



**THE LAW SOCIETY  
of SCOTLAND**  
[www.lawscot.org.uk](http://www.lawscot.org.uk)

**The Public Interest:**

**Delivering Scottish Legal Services**

**A consultation on legal business models for the  
21<sup>st</sup> Century**

**Consultation Analysis**

**February 2008**

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## **Executive Summary**

### **Introduction and Purpose of Consultation**

The Council of the Law Society of Scotland is committed to contributing to the reform and modernisation of Scotland's legal services market and justice system to meet the needs of all who use them. In focusing on the markets and legal services, it is important to keep the size and nature of the systems in proportion and to acknowledge the pace of change which is unfolding within the legal profession in Scotland. The purpose of this consultation was to allow the Council to be informed about the views of the profession and more widely as to which of the various options represents the best way forward.

The consultation was published on 31 October 2007 and comments were invited by the 31 January 2008, giving members of the profession and other interested stakeholders 3 months to respond.

The consultation was distributed via the Society's ebulletin and website with a wider stakeholder group receiving email correspondence. Further promotion was given through the Journal and the media. Various prompts were used during the period of consultation to encourage responses.

### **Profile of Respondents**

In total, 92 responses were received by email and letter. The majority were from legal firms of varying sizes with the remainder coming from a range of legal and non-legal organisations.

### **Responses to Questions**

The consultation document asked 21 questions which focused on 4 specific alternative business structures and the issues that surround them, either separately or collectively. Of the 92 responses received, 59 addressed either all or some of the questions directly and 33 were in the form of free text. Where these responses addressed themes raised by any of the questions, their comments have been included in the analysis.

### **Common Themes**

A number of common themes were identified and this summary report presents a broad outline of the responses (although it cannot reflect the detailed range of suggestions). The findings are presented qualitatively, reflecting the nature of most of the data.

Overall, there was support for some change from the status quo however the majority of respondents noted that any change would need to take into account the following:

- That any new structures are regulated effectively
- That the independence of the solicitors' profession is protected

- That core values are upheld
- That access to justice is not negatively affected
- That appropriate consumer safeguards are in place

### **Other key messages**

The consultation gave further key messages in relation to the following issues:

- **Guarantee Fund and Master Policy**

There was an overall consensus that if alternative business structures were introduced into the legal services market, the Guarantee Fund and the Master Policy would not be able to survive in their present form.

- **Resolution of Regulatory Conflict**

There was an overall consensus that it would be necessary to devise an appropriate and rigorous regulatory framework before any changes are implemented.

- **Non-solicitor Partners/External Shareholders**

#### *Fitness to Own Test*

There was an overall consensus that there should be a “fitness to own” test for non-solicitor partners and external shareholders, although many respondents commented that it would be difficult to formulate.

#### *Levies*

There was an overall consensus that some kind of charge should be levied at external shareholders. The main reason cited was to meet increased regulation costs.

### **Conclusion**

It is safe to say that the consultation responses do not represent a consensus view, or point to any one conclusive course of action. Rather, the focus seems to be on making sure that the quality of legal services provision and the integrity of the solicitor’s profession is maintained regardless of the course of action taken. It must be pointed out that while a wide range of suggestions were made about how this could be achieved, other responses indicated that these fundamental principles cannot be upheld if alternative business structures are to be permitted.

## Methodology

The Society's consultation, *The Public Interest: Delivering Scottish Legal Services – A consultation on Alternative Business Structures* was launched in October 2007 and closed at the end of January 2008 allowing three months for those who wished to respond.

The consultation was distributed via the Society's ebulletin and website with a wider stakeholder group receiving email correspondence. Further promotion was given through the Journal and the media. Various prompts were used during the period of consultation to encourage responses.

The consultation paper gave a background to the ABS debate and included what the Society considered to be the fundamental principles, namely access to justice, the core principles and regulation. This was followed by a description of four alternative models and a broad outline of the arguments for and against in each case.

Given the complexity of the ABS debate and the nature of responses to this type of consultation, the value lay more with the range of views articulated than the number of responses.

We received 92 responses by email and letter and having recorded and checked them for duplication, we then carried out an open-ended analysis.

The analysis goes through each question and outlines the key issues per question.

It is worth noting that some responses came from representative organisations which may be considered to have more significance than other respondents. However, given the qualitative nature of the responses we did not consider it appropriate or necessary to assign specific differential weights.

## Breakdown of respondents

There were 92 responses in total. The majority were from legal firms with the remainder coming from a range of legal and non-legal organisations.

| <u>Legal firms</u>                              | <b>Number</b> | <b>%</b>   |
|---|---------------|------------|
| 1 – 5 partners                                  | 26            | 28         |
| 6 – 15 partners                                 | 12            | 13         |
| 16 – 29 partners                                | 11            | 12         |
| 30 + partners                                   | 22            | 24         |
| <b>Subtotal</b>                                 | <b>71</b>     | <b>77</b>  |
| <u>Others - Legal</u>                           |               |            |
| Faculties/Bar Associations                      | 7             | 8          |
| Scottish Legal Aid Board                        | 1             | 1          |
| Scottish Solicitors Disciplinary Tribunal       | 1             | 1          |
| Law Society of England & Wales                  | 1             | 1          |
| Legal Complaints Service                        | 1             | 1          |
| <b>Subtotal</b>                                 | <b>11</b>     | <b>12</b>  |
| <u>Others – Non-legal</u>                       |               |            |
| Individual Businesses                           | 4             | 4          |
| Institute of Chartered Accountants in Scotland  | 1             | 1          |
| Office of Fair Trading                          | 1             | 1          |
| Office of the Immigration Services Commissioner | 1             | 1          |
| Scottish Consumer Council                       | 1             | 1          |
| Shelter   | 1             | 1          |
| Which   | 1             | 1          |
| <b>Subtotal</b>                                 | <b>10</b>     | <b>11</b>  |
| <b>TOTAL</b>                                    | <b>92</b>     | <b>100</b> |

## Consultation Analysis

### General Comments

Of the 92 responses received, 33 were in the form of “free responses”, in that they did not directly address the questions in the consultation paper. Where they discussed some of the points that were raised by the questions, their responses have been incorporated into the analysis however additional comments have been summarised below:

#### For change

- The profession should lead the way on change and not have change thrust upon it
- Outside investment would help to engage a higher calibre of non-solicitor professional
- It would help smaller firms in sharing cost and experience. Larger firms should be permitted to compete on an equal playing field
- Disappointed that the Society does not support the creation of a Legal Services Board

#### Against change

- Generally not in favour from client service perspective and threat to core values. If they are to proceed, public protections must be paramount
- Outside investment would result in loss of Scottish control and diversity of business. Arguments for external investment are false or exaggerated
- There seems no need for the ability to create structures that may be permitted elsewhere in the UK to be copied slavishly in Scotland. Improved competition and consumer service can be achieved by other means
- ABSs are out of step with Europe
- Public interest is being distorted by consumer interest
- Risk of big player new entrants cross subsidising to secure market share (anti-competitive).

#### General Comments

- Consideration of the functions of SSDT should be given at every step of the way. Its powers should not be transferred elsewhere
- If the Society has to choose between representing the interests of big firms and the interests of smaller firms, it should opt for the latter
- There should be an association of small firms, which could pool resources and provide clients with a comprehensive wide-reaching service
- Whatever course of action the public interest must be protected and high standards set (including Money Laundering Regulations 2007) for those who wish to offer legal services. Suitable training must be maintained for those entering the profession.

## **1. DO YOU THINK THE LEGAL SERVICES MARKET WOULD BENEFIT FROM A MOVE TOWARDS A LDP MODEL?**

While the majority of respondents who addressed this question said that they did think the legal services market would benefit from a move towards the LDP model, a third of those respondents said so on a conditional basis. Of those who unconditionally thought that the market would benefit from the move, a small number gave reasons, namely:

- Skill transfer and greater sustainability
- Advantage to firms with significant court practice
- Convenient for clients

Of those who conditionally accepted the move to the LDP model, the following conditions were given:

- As long as consumer safeguards are in place
- As long as a sufficient number remain within the faculty to provide an independent bar
- Protocols and memorandum of understandings would be required
- In favour of working with advocates as long as Master Policy and Guarantee Fund are safeguarded
- As long as core values are upheld

Another view taken was that while the legal services market should permit LDPs, this should only be as a step along the way to more radical change.

Of those respondents who did not commit to a positive or negative answer, the following points were raised:

- Consumer benefits need to be weighed against need and costs of regulation and effect on access to justice
- No fundamental issues of ethics raised

Approximately a quarter of those who responded to this question said that they did not think the market would benefit from a move to the LDP model. The reasons given were:

- Undermines Independent Referral Bar
- Solicitor-advocates provide the necessary choice
- could cause imbalance in profession



## **2. Is there any justification for requiring clients to have to instruct a firm of solicitors if they wish to instruct an advocate for a matter in the Court of Session or the High Court?**

Approximately half of the overall responses did not address this question. Of those that did, a third thought that there was justification for requiring clients to have to instruct a firm of solicitors in order to instruct an advocate. The reasons given included:

- It would create a conflict between acting in the clients' best interests and as an officer of court
- Solicitors involvement helps advocate focus/ensures proper formulation of issues
- [not requiring] It would lead to the demise of the bar
- There are few instances where there is a need to instruct an advocate directly
- It may cost more but there are better safeguards

While approximately two thirds of those who did respond to the question said there was no justification, no specific reasons were actually given.

## **3. Is consumer choice already adequately provided for by the choice between an advocate and a solicitor advocate?**

Only slightly over half of the responses addressed this question. Of those that did, opinion was evenly divided over whether or not consumer choice was adequately provided for by the choice between advocates and solicitor-advocates. One respondent thought that while consumers are adequately served by the existing system, LDPs would enhance it further. Other responses indicated that consumer choice is only provided for in the High Court and Court of Session but not in respect of legally-aided cases in the Sheriff Court. Another response indicated that solicitor-advocates only undertake criminal law work.

#### **4. DO YOU THINK THE LEGAL SERVICES MARKET WOULD BENEFIT FROM A MOVE TOWARDS A MDP MODEL?**

Just under half of the respondents who addressed this question indicated that they thought the legal services market would benefit from a move towards the MDP model. Again, as with question 1, approximately a quarter of those positive responses were made conditionally.

For those who supported the idea without reservation, the following reasons were given:

- It is necessary to compete with non-regulated providers and promote the solicitor brand
- It would help rural practices and increase access to services
- Freedom of choice is paramount
- To match England & Wales
- It would reward specialisms

One respondent noted that the MDP model is 'a real opportunity which the profession should grasp'.

Of those who conditionally supported the move, the majority were of the view that it should only take place once a suitable regulatory structure has been devised and suitably rigorous regulation could be guaranteed.

Comments included:

- Provided all members of "structure" are bound by same rules, no problem however this will be difficult to achieve in practice
- MDPs are inevitable. This is fine, as long as they are controlled by a recognised professional body
- MDPs hold some attraction but all partners would have to be subject to same rules, regulations and ethics, otherwise impossible to regulate

Other concerns were:

- As long as standards are maintained but it risks the independence of professions
- Costs should be noted
- Not convinced of long-term benefit to the consumer but can see the attraction to the firm
- Multi-disciplinary/jurisdictional matrix could increase consumer risk
- Consumer benefits need to be weighed against need and costs of regulation and effect on access to and administration of justice

One respondent suggested that the ICAS model should be followed and firms should have regulated non-members in the first instance, as ICAS already operates.

Of those respondents who did not commit to a positive or negative answer, the following points were raised:

- Can see advantages and disadvantages
- Needs further research in terms of ethical issues and client protection
- Risk of conflict of interest; there should be more research

More than a quarter of those who responded to this question said that they **did not** think the market would benefit from a move to the MDP model. The reasons given were:

- It is not clear what the demands for change are/change for change sake is pointless
- Risks to independence, rural practices and client protection
- There would be commercial pressures
- The core values would be threatened
- They are of no ultimate benefit to clients

One response stated that despite being of no real benefit to the legal services market, MDPs should be allowed nonetheless. Another respondent took a similar view, noting that while he did not think that the legal services market would benefit from permitting MDPs, nonetheless he felt that it was worth considering to see if there is a demand for such a service.

##### **5. Would the advent of MDPs be an adequate response to the demands for change from the profession and from other stakeholders?**

More than half of the respondents did not address this question. Of those who did, a small majority did not think that MDPs would be an adequate response to demands for change. Reason for this was divided between those who accepted that there was a demand for change and those who did not, or at least questioned where it was coming from.

Comments included:

- Additional flexibility would be required in order to compete globally
- Do not see any evidence of demand
- Big business is behind move for change
- From within the profession, demands must only be coming from larger firms
- Not from profession, maybe from others

Overall, responses to this question were negative in tone. Comments from those who either said that it might or would address the demand for change included:

- It will please some and not go far enough for others
- If it also satisfies the consumer lobby
- Only if external ownership were excluded
- Hopefully
- Needs further research in terms of ethical issues and client protection
- For now
- MDPs are a necessary response
- They are a step in the right direction

**6. What effect, if any, would allowing non-solicitor partners have on the core values of the solicitors' profession?**

Approximately half of the responses received addressed this question. Of that number opinion was quite evenly divided that allowing non-solicitor partners would have either a negative effect or no effect on the core values of the solicitors' profession.

As with questions 1 and 4 above, a large number of responses that indicated that would be no effect on the core values came with conditions attached. These mainly concerned regulation but other points were also made. Comments included:

- [There would be no effect], subject to effective consumer protection regulation
- Perceived risks could be controlled by regulation
- [There would be no effect], if MDPs are regulated by the Society and non-solicitor partners are in a minority (max 25%)
- [There would be no effect], if you impose a fitness to own test

Some respondents suggested that provided the non-solicitors are professionals, there should not be a problem as they will most likely adhere to similar rules and principles.

Another respondent made the point that senior non-legal staff members already exist therefore compliance is a key business requirement regardless.

Of those who felt that the core values would be negatively affected, the majority echoed the point in their response, rather than specify what those effects might be, or what would cause them. Comments included the following:

- It would obscure and ultimately obliterate them
- They would be seriously affected
- There would be serious conflict of interest issues
- It will lower standards
- There would be a profit emphasis
- There would be a dilution of identity and standards

Although this could potentially be subsumed into the 'No Effect' category, a number of respondents gave their views on the steps that should be taken to ensure that the core values are protected rather than answer the question directly. Suggestions included:

- Apart from very basic standards relating to the core values, standards of professional practice should be agreed by each firm in relation to each client rather than by the Society
- All owners of legal firms must comply with core values
- Firms would be obliged to ensure compliance; non-solicitors would need to appreciate ethical codes
- A condition of being granted a licence should be that the entity takes responsibility for ensuring staff compliance

In addition, two respondents suggested that changes to the core values are happening already and are "a sign of the times":

- Changes affecting core values can already be seen due to new business practices
- Risk management/containment should now be the main focus

## **7. What would the impact if any be on the Guarantee Fund and/or the Master Policy?**

Of the responses received, the overall consensus was that the Guarantee Fund and the Master Policy would not be able to survive in their present form. Responses can be divided into several categories, namely:

**Expression of negative impact:** (sample comments: problematic, adverse, catastrophic, horrendous, unsustainable)

**Those who thought the Guarantee Fund and Master Policy should be retained:** (sample comments: not in consumer's interest for Master Policy or Guarantee Fund to be lost; Clients may lose Guarantee Fund; should continue in limited form; Master Policy is vital to solicitors brand; Guarantee Fund/Master Policy must apply but changes will be necessary)

**Those who thought that their retention was unjustified:** (sample comments: Retention unjustified - each firm should provide fidelity insurance; There would be no case for Guarantee Fund; The guarantee fund and the master policy should be abolished; Guarantee Fund outdated; Needs to be changed whether or not ABSs introduced; Guarantee Fund should be terminated; Guarantee fund should be reviewed anyway; Both should be replaced; Master Policy should be abolished.)

Of those who thought that the Guarantee Fund should be retained, a number of respondents felt that non-solicitor professionals should be obliged to

contribute. A number of respondents also expressed the view that the Guarantee Fund should be capped if it is to continue. As for the Master Policy, some respondents suggested that it would be able to adjust to suit the changes while others questioned whether an insurance company would be willing to underwrite a firm where the integrity of a number of principals cannot be guaranteed.

A couple of responses expressed the concern that the effect on the Guarantee Fund and Master Policy could cause particular difficulties for sole practitioners.

## **8. What would the effect of the creation of MDPs be on access to justice?**

Of the respondents who addressed this issue, opinion was quite evenly split on whether MDPs would create a positive effect, a negative effect or no effect at all on access to justice.

A marginally higher number thought that MDPs would have a negative effect. Comments included:

- It would be severely prejudicial
- It would be negatively affected in rural areas
- Consumer choice will be restricted rather than increased
- Reduction in range of legal services
- [There would be a] concentration in towns and lucrative areas of law

Of those who thought that MDPs would increase or improve access to justice, their reasons included:

- It would improve access to justice by making services more viable
- It would be beneficial as there would be greater expertise
- it would improve it as costs would be reduced due to shared facilities and overheads
- It would help rural practices and increase access to services

A number of respondents did not say whether they thought there would be an effect, or said that they did not know. Comments included:

- The Scottish Government should undertake more research
- Needs further research in terms of ethical issues and client protection
- It may improve [it] but can only find out once in place
- It is a concern but ultimately access to justice is a government issue. The government needs to implement a decent legal aid system

## **9. How would conflict between different regulatory codes be resolved?**

Of the responses received, the overall consensus was that it would be necessary to resolve regulatory issues before implementing change. While it was recognised that these issues would be difficult to overcome, a number of respondents had very clear views on how it might be achieved, including:

- The Society should retain overall control of regulation
- Regulatory provisions could be agreed by virtue of Memoranda of Understanding
- A unified code of conduct should be created
- There should be a central regulatory forum
- The regulator with the most rigorous standards should prevail
- The regulator of the majority of professionals within the business should have control
- There should be a Committee of professionals bodies to resolve conflicts
- Through consultation between the regulatory bodies

Of those who suggested that regulatory provisions could be agreed by virtue of Memoranda of Understanding, one respondent in particular outlined quite a clear suggestion on this basis:

“it would be preferable for one regulator – preferably the Society – to regulate all principals in practice or providing legal services throughout Scotland. If the non solicitor partner or principal is otherwise regulated by his or her own organisation then provided this is not seriously at variance with the code of conduct expected of solicitors then some arrangement would require to be made between the two regulatory codes to ensure that the appropriate code was followed in the service provided.”

Some respondents suggested that existing models or provisions could be followed, such as:

- The ICAS RNM Regulated Non-Member model (where the regulator of the entity is the majority professional body)
- The Multi-National Partnership model
- The EU Services Directive on convergence of regulators

## **10. DO YOU THINK THE LEGAL SERVICES MARKET WOULD BENEFIT FROM A MOVE TOWARDS A SHAREHOLDING MODEL?**

Over a quarter of respondents did not answer this question. Of those that did, a small majority did not think the legal services market would benefit from a move towards a shareholding model. Comments included:

- There is no consumer benefit. It may hold some small benefits in relation to governance, investment and succession
- Surrender of independence more of a threat than an advantage.
- Alleged benefits not proved. Private benefit over public good
- Risks introducing undesirable elements.
- Will only benefit some large firms financially
- Big business will cherry pick
- Consumer safeguards such as the Guarantee Fund, Master Policy and the Code of Conduct will be threatened
- Impossible to regulate
- Outside investment in legal firms is a bad idea as for it to be meaningful, external investors would want control, which would be undesirable and not in the public interest

Of those who thought that the legal services market would benefit from a move towards a shareholding model, the following reasons were given:

- It would lead to efficiencies
- It would have a positive influence on governance and business acumen
- It would lower prices to clients by spreading risk
- It would increase competition

One respondent indicated that in his view the move was inevitable therefore resistance would not serve the Society members well.

As with questions 1 and 4 above, of those who indicated that the legal services market could benefit from such a move, many said so on a conditional basis. These conditions included:

- Only if shares are held by those with Practising Certificates
- control would have to remain with solicitors subject to regulation by the Society
- The idea of outside investment in legal firms has merit provided that they are subject to appropriate regulation
- Change should not undermine core values
- A fitness to own test would be necessary but difficult to achieve

A small number of respondents did not commit to a positive or negative answer. Their comments included:

- Consumer perception of independence and quality may be compromised
- It would benefit a small number of large firms
- External capital model should be put on hold until MDPs prove themselves. Further consultation would be required
- If genuine control is retained by those bound by core principles then fine but if the driving force is introduction of capital this may be at odds with protecting clients' best interests



- It would need very tight regulation – there would be a threat from money launderers

**11. How would it be possible to ensure that control of a solicitors' practice with non-solicitor shareholders could remain with the solicitor directors?**

While some respondents indicated that they thought it would be difficult to ensure that control of a solicitors' practice remains with solicitor directors, the majority of respondents had very clear views on how it might be achieved, including:

- By way of regulatory control
- By ensuring that solicitors own the majority of shares
- By legislation, either to prohibit shareholders influencing solicitors or to exempt directors of such practices from the statutory duty of directors ("to promote the success of the company" – section 172 of the Companies Act 2006)
- By contract
- By constitutional documents
- By appointing a Head of Legal Practice

**12. Should any limit be imposed on the proportion of shares which could be owned by any single external shareholder?**

Of those who responded to this question, the majority thought that a limit should be imposed.

A couple of respondents suggested that while it was a good idea in theory, in practice, either it might not be viable, it will not be competitively sustainable or shareholders are unlikely to invest in a business that they could not control.

Of those who thought that solicitors should own a majority of shares, the following non-solicitor shareholding limits were suggested: 10%, 15%, 25% and 49%.

Other respondents suggested that solicitors should retain voting control or there should be a fitness to own test, either above a certain threshold or instead of imposing a limit.

**13. Should any minimum proportion of shares still require to be owned by solicitors or registered foreign lawyers?**

Further to question 12, it logically follows that the majority of people who responded to this question thought that a minimum of shares would still require to be owned by solicitors or registered foreign lawyers.

A small number of respondents reiterated the point that while it might be a good idea in theory for solicitors to be the majority shareholders, in practice it is not viable, because no one would want to invest in a business that they could not control.

Of those who were of the view that solicitors should own a majority of shares, the following percentages of shares were suggested: 50% (which would help with the initial opening of the market), 75%.

Other respondents suggested that while there should be no minimum portion of shares allotted to solicitors, they should retain voting control or there should be a fitness to own test, either above a certain threshold or instead of imposing a limit.

One respondent took the view that Registered Foreign Lawyers should be excluded from consideration of this point.

#### **14. What, if any, requirements should there be for non-solicitors to satisfy by way of “fitness to own”?**

There was an overall consensus that there should be a “fitness to own” test.

Some respondents pointed out that in reality it would be very difficult to formulate. Of those who took that view, the following points were raised:

- Limiting shares held by non-solicitors is a better option
- Independent vetting may be beyond the Society - clarity in regulation needed
- There will be appeals, there will be more cost. It will be very difficult to police

Of those respondents who thought there should be a fitness to own test, the following ideas were suggested:

- Non-solicitors should satisfy the same requirements as solicitors upon entering the profession;
- Tests similar to those imposed by the FSA, e.g. the “fitness and propriety” test for controllers (those who own or control more than 10% of voting rights or capital)
- Public disclosure and the same test as for directors of limited liability companies
- Two-fold test: membership of recognised and accepted profession; thereafter same as for solicitors;
- minimum: no criminal record
- honesty, integrity, reputation, competence, capability and financial soundness;
- No criminals. No known associate of criminals. No barred directors.

- Follow Solicitors' Regulatory Authority proposals

**15. What, if any, charge should be levied by the Society on external shareholders and should that be a one-off or annual charge?**

Of those who responded to this question, a clear majority felt that some form of charge should be levied on external shareholders. A number of respondents linked the levy to the cost of the enhanced regulation that would be required. The following suggestions were also made:

- They should pay the equivalent of the practising certificate fee and the Commission levy;
- There should be an annual charge like FSA (but on a 3yr basis to minimise paperwork)
- There should be an annual charge in line with Registered Foreign Lawyers
- Charge should be linked to annual turnover
- There should be a mandatory payment to the guarantee fund;
- One-off fitness test levy

Of those who did not think a charge should be levied, or were not sure, the following points were raised:

- They should not be levied if they have no involvement in the running of the firm
- It would be impractical to levy/difficult to enforce
- The proposal is anti-competitive

**16. DO YOU THINK THE LEGAL SERVICES MARKET WOULD BENEFIT FROM A MOVE TOWARDS A NON-LAWYER OWNERSHIP AND CONTROL MODEL?**

The majority of responses did not support a move towards the non-lawyer ownership and control model. Arguments against the move included:

- It would result in monopolies, price fixing and reduced access to justice
- There are too many ethical risks
- The only incentive is profit
- Too difficult to control/regulate
- The benefit to large firms does not outweigh risks to small firms and public
- May give rise to significant conflict of interest issues
- Risk to 'freedom from undue influence'
- External ownership of firms of "lawyers" seems likely to bring about irreconcilable conflicts

A small number of respondents who did not support the move nonetheless thought that it was an inevitability.

Of those that did support the move, generally speaking the approval was unconditional and few comments were made. One respondent noted that “such a move may provide additional innovation in the legal services market and would certainly increase competition”. Another respondent highlighted the need to be on the same footing as England and Wales. A small number of respondents conditionally supported the move, as long as the model was subject to appropriate consumer protection and regulation.

A small number of respondents did not answer yes or no. One respondent suggested that further consultation would be required.

### **17. How do we ensure that the Solicitors’ Code of Conduct takes priority over the interests of shareholders?**

While the clear majority of respondents thought that it would be difficult to ensure this, nonetheless there were many suggestions as to how it might be done:

- Robust regulation through the Society and primacy for the Society as regulator
- By way of regulatory control (with strict rules and disciplinary action)
- By making solicitors directly responsible for the acts of the shareholders in the form of penalties
- By making compliance with the code a statutory requirement
- By creating a legislative prohibition on shareholders influencing solicitors
- Via contracts or constitutional documents

Of those who simply expressed the view that it would be difficult or even impossible to overcome, the following comments were made:

- Shareholders would have to adhere to the code of conduct but that would require extra regulation which in turn would result in greater costs and more bureaucracy
- Opening up the market will result in a reduction of standards
- Difficult for code to take priority over shareholders
- External ownership conflicts with independence
- By appointing a Head of Legal Practice, or Regulation and Compliance Officer (who would be a solicitor)

**18. Would the abolition of the reserved areas provide the competition demanded by consumers while retaining the integrity of the solicitor profession?**

While few respondents said that they thought it would provide competition without threatening the integrity of the solicitor profession, some conceded that it might be a possibility. The following reasons were given:

- It is difficult to justify the reserved areas
- If there is a level playing field in regulation the reserved areas can be opened up
- abolition of the reserved areas should take place as long as "lawyers" are clearly identified as non-solicitors and accept the core values either through their regulator or the Society
- It is not relevant to ABS issue but open to the idea
- If the standards set for non solicitors were as high as they are for solicitors

Of those who did not think that integrity could be maintained if the reserved areas were abolished, few reasons were given to explain their view. The following comments were made:

- Handling client funds and altering the public register is the crux of the matter
- It would undermine legal service to public
- End of reserved areas would mean the end of the solicitor badge

Again, a number of respondents fundamentally questioned the existence of a demand for competition from consumers.

**19. Should legal professional privilege be available to the customers of practices where the owners and operators of the firm are not solicitors?**

Overall, the consensus was that legal professional privilege should remain solely with the solicitor therefore in the case of firms that have non-solicitor owners and operators, the majority of respondents were of the view that as long as the *service provider* is a solicitor then legal professional privilege should apply.

Other respondents were willing to go further, suggesting that it should be available where service providers and those owning or controlling the firm are all regulated/bound by the same code of conduct.

One respondent highlighted the risk that non-solicitors might breach the privilege and another suggested that it might be appropriate in civil cases only and not criminal cases.

## **20. What, if any, requirements should be in place to protect solicitors' independence?**

The consensus was that independence was of utmost importance and should be protected at all cost. One respondent noted: "The Society must give full consideration and weight to the necessary independence of lawyers if they are to fulfil their proper role in a modern Scotland".

Of those who responded to this question, their suggestions can be divided into several categories, namely:

**Everyone with an interest should be bound by core values:** (sample comments: they would be bound by the core values of the profession; those holding any interest in a law firm should be bound by core values but in reality it will be difficult to enforce; observance of core values; Precedence of the Society Code of Conduct; shareholders should give an undertaking of compliance)

**Solicitors should retain overall control:** (sample comments: provision to retain overall control of business; majority solicitor ownership; Majority ownership and control by solicitors)

**Clear rules should be set out:** (sample comments: rules or requirements which prevent undue influence; Rules; Statutory and other guarantees needed; Clear distinction between what solicitors and non-solicitors can do; Duty of disclosure for non solicitors)

**Regulation by the Society:** (sample comments: regulation by the Society is sufficient; by strong and independent representation by the Society; Regulation to remain with Law Society; Regulation by the Society and protection for employees against employer; The Society must continue to represent the interests of solicitors)

**Regulation (general):** (sample comments: should be left to the regulating authority to figure out; Clear values and regulation; Individual and entity regulation; Proper supervision).

## **21. What advantages or disadvantages do you see in a gradual or stepped introduction of alternative business structures?**

Of those who responded to this question, a small majority thought that it would be an advantage to introduced alternative business structures gradually. The following reasons were given:

- To establish interest and identify problems
- To allow time for Gill Review Team to report fully
- Less risk to the dilution of the core values

- A gradual introduction would permit development of regulatory framework
- Avoid big bang - normal adjustment
- Gradual introduction preferred to set regulatory regime at correct level and to ensure public protection
- Regulatory unification will take time

Of those who thought that there would be no advantage to a gradual introduction, the following reasons were given:

- Disadvantage if already introduced in England & Wales
- It would prolong uncertainty
- An incremental introduction will be seen as self protection; No advantage in gradual change
- Real risks of further delay
- Go for big bang!