

**REGULATORY SCHEME FOR LICENSED SERVICE PROVIDERS
CONSULTATION AND RESPONSES
(Last updated 26 April 2010)**

Introduction

This paper summarises the responses to consultation together with questions asked at the 6 Road shows and further questions raised in response to feedback after the Road Shows.

The consultation paper on the regulatory scheme for Licensed Legal Services Providers was published on 12 February 2010 and comments were initially invited by 16 April 2010 giving members of the profession two months to respond. This was further extended by one week to 23 April to allow for any further feedback after the referendum and the SGM. The consultation paper asked 14 questions on specific areas of the possible regulatory scheme for LPs. Distribution was via the Society's e-bulletin and website. Further promotion was also given via The Journal.

In total 27 responses were received by email and letter. Most of these were from individual members with five responses on behalf of organisations. There were six responses which were identical although from individual members. Some of the responses received did not deal specifically with the issues raised in the consultation paper but expressed views on the concept of ABSs.

In addition the Society held six Road Shows in Aberdeen, Dumfries, Dundee, Edinburgh, Glasgow and Inverness which were attended by nearly 700 members. The attendees were from nearly 400 organisations and 340 practice firms (representing about 25% of practice firms in Scotland). Some 70 questions were raised at these Roadshows. There were also nearly 50 comments/questions raised in feedback from these meetings.

To allow an audit trail the responses have been identified in this document as:

Consx.	Consultation Response number x
ABx	Aberdeen Question x
DFx	Dumfries Question x
DNx	Dundee Question x
EDx	Edinburgh x
GSx	Glasgow Question x
INx	Inverness Question x
FBx	Feedback reference x

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1. New business models

1.1. Extract from consultation paper

Possible models

The Bill will allow alternative business structures to supply legal services in Scotland. Existing firms do not have to adopt the new permissible structures.

A summary of new possible business models is set out below

New Model A – Partnership plus

Entities looking to make no change to services they are currently providing.

Entities are not looking for outside investors with all investment being internal and limited to current and past principals and employees. They might want to give the practice manager or other professionals the status of partner/member. This would allow creation of Employee Share Ownership Trusts for example.

The entity could be a limited company, partnership or LLP.

New Model B – Multidisciplinary practice (MDP)

A one-stop shop comprising “managers” from legal and other professions providing legal and other services to clients. The entity could be a limited company, partnership or LLP.

The LP would be a joint practice of lawyers and non-lawyers who would share the fees received for the delivery of legal and non-legal services to clients. This could be, for example, a practice with accountants and surveyors.

Under the current MDP Practice Rules solicitors can not form a legal relationship with a person or body who is not a solicitor to jointly offer professional services as a MDP. This means that non-lawyers cannot have a stake in ownership of the firm but does not preclude them from being remunerated with a share of the profits

New Model C – Outside Capital

It will be permissible for up to 100% outside capital.

Private equity investment

Representatives of a private equity house might become members of the LP incorporated practice and the private equity company may hold shares in the LP. The regulator would have to carry out appropriate due diligence and monitoring on the investor.

Listed firms

The LP firm might be floated on AIM/stock market—subject to stock market/corporate governance rules and the regulator being able to pre approve the transfer of shares.

Other entities

These might include franchise operations.

In all cases the regulator would have to carry out appropriate due diligence and monitoring of the investor.

New Model D – Not for profit organisations

Not for profit organisations providing legal services but who charge a fee e.g. charities

(At present these organisations can't charge a fee)

New Model E - In-house team

In-house teams expanding into the market (e.g. local authorities). Currently these can not offer services to the public. Could set up licensed entity and sell or provide services to public or associated entity. This would be subject to any other regulations e.g. under the Local Authorities (Goods & Services) Act.

Outside investors

S 49 of the Bill proposes how an approved regulator should satisfy itself as to the fitness of an outside investor in a LP.

There may have to be pre-emption rights on share transfers to allow the Society to approve such transfers. This thinking accords with the Solicitors Regulatory Authority in England

Consultation Paper

We asked the following questions

1. *Are there any other business models you can envisage?*
3. *Should the Society not seek to regulate any of the models listed (accepting that other bodies may choose to do so)?*
8. *Are there any types of non-solicitor investors that you would consider to be inappropriate?*
9. *What tests should be applied to ensure investors are fit and proper?*

1.2. Responses

Question 1

Do you envisage any other business models that LPs might adopt?

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 - 9	Limited Partnerships could suit passive investors as "limited partners" with the solicitors being "general partners".
Cons 10	-
Cons 11	Not interested
Cons 12	I think at this stage it is difficult to envisage additional models . I think there is a need to watch how matters develop south of the border as from discussions with the SRA to date there are suggestions of sham ABS but that is more about how you check those owning the business than the model itself
Cons 13	<p>No. But the posing of this as the first question appears to preclude a response that none of the proposed "business models" are acceptable, or that one or more might be acceptable while others are not.</p> <p>The only new "business model" which I regard as acceptable is that which allows a firm of solicitors to assume a minority of persons from other professional disciplines as partners, provided such persons fully accept the ethics and rules applicable to solicitors, if necessary in priority to any such applicable in respect of their original professional discipline.</p> <p>Anything else risks dilution of the pre-eminence of the interests of the client</p>
Cons 14	Yes – but that is not to say that they are desirable
Cons 15	No
Cons 16	No

Source	Response/comment/issue
Cons 17	<p data-bbox="443 286 496 315">No.</p> <p data-bbox="443 336 1359 434">Although the question does not relate specifically to the issue, there is no other opportunity in the consultation response to comment on the proposed models. I will do so here.</p> <p data-bbox="443 454 1359 719">The 2008 paper voted on at the AGM in that year was approved on the basis that the detail of regulation and enforceability would be established and where that was not possible in respect of any model, such a model would not be introduced. This consultation provides no regulatory model in respect of any of the suggestions and therefore the position has not moved on so far as the detail is concerned since May 2008. the paper merely re-states the possible models and takes the matter no further forward.</p> <p data-bbox="443 739 1359 1070">Model A is a model which might be acceptable if there was a limit on the number (or proportion) of solicitors to non-solicitors within such an entity. This model is virtually available at present in any event through an employee bonus scheme, which can in effect reward relevant employees for performance and provide them with the incentive of a share of the profits. The ownership, control and responsibilities of the firm, however remain with solicitors. As stated, it could be acceptable for a limited number of employees to be a partner/member in the capacity of manager etc, but that would be subject to the same provisos as with MDPs. (Model B)</p> <p data-bbox="443 1090 1359 1256">Model B has been the subject of detailed consideration over many years, dating back to the late 1980's and no solution has been found to the regulatory conundrum. Which disciplinary body has jurisdiction over the members/partners or the entity and how is regulation enforced? The paper does not answer this.</p> <p data-bbox="443 1276 1359 1608">Model C must be accompanied by details of the proposed regulatory structure under which they would operate. A 'fit & proper' test for owners is proposed in respect of all investors. The resources required to undertake such a task would be excessive. What financial structure will ensure total recovery of the cost of these checks and what timescale will be required? A de minimis provision is proposed. That is fallacious it cannot be beyond the realms of possibility that a 'gang' or group of criminals or undesirables could collaborate in becoming 'minority' shareholders separately while collectively maintaining a controlling interest.</p> <p data-bbox="443 1628 1359 1720">Model D might be an acceptable provision subject to specific regulations being devised to cover this situation. This would not entail the full provisions for ABS.</p>

Source	Response/comment/issue
	<p>Model E. What is the evidential basis for such a proposition? In house counsel currently do not provide legal services to the public and are consequently exempt from contribution to the Guarantee Fund and do not require PI cover. For such solicitors to be able to compete with the general profession on such a basis would be inequitable. For local authorities to fund such contributions would result in taxpayers funding the protective facilities which are paid for by solicitors in practice. Where would the level playing field be here?</p> <p>The Society seems to have lost the concept of in-house counsel. It is often claimed that almost 30% of the profession are in this category. That is mis-guided. It may be that almost 30% of the profession are employed by government, local authorities or corporations, but that does not mean that they are in-house counsel. For example, while the Society may have employees who hold practising certificates, they are not in-house counsel. They are merely employees who are solicitors. In-house counsel provide legal advice to the employing organisation and are said to have responsibility only to one client. In many jurisdictions they are prohibited from being members of a Bar Association.</p>
Cons 18	Is there any reason that a model could comprise of a partnership but where one of partners is actually a trust or a ltd company? Or indeed a limited company where a shareholder was a blind trust, trust or indeed another limited company which ltd companies it has ltd co or trusts as shareholders. If so how do you propose to identify who the beneficial owners of a share of LPs are and whether they are fit and proper.
Cons 19	No
Cons 20	We believe the models described in the Consultation Paper encompass all of the possibilities at this stage. As the Consultation Paper notes, the Bill does not currently permit partnership between solicitors and advocates in a Legal Disciplinary Practice model. We believe this approach is misguided and that the Society should press for the introduction of an amendment to the Bill at stage 2 or stage 3 of the parliamentary process

Source	Response/comment/issue
Cons 21	<p>In terms of the Bill, a licensed legal services provider (LP) is a business entity which, through the designated and other persons within it, (a) provides (or offers to provide) legal services (i) to the general public or otherwise, and (ii) for a fee, gain or reward, and (b) does so under a licence issued by an approved regulator. There is no restriction in the Bill to the type of business entity which might seek to provide legal services nor in the type of business model that an LP might adopt. A particular business model might be broadly categorised under one of the listed headings, or it may be a hybrid of several (e.g. external owners with/without a direct interest in the legal services provided). New business models involving complex ownership structures/ intermediate holding companies could emerge and their very complexity could make such entities extremely difficult to regulate.</p>
Cons 22	<p>No. However, we should assume there may be hybrids which combine models. For example an MDP may include external capital to help launch the venture or to help buy out individuals or work disciplines that do not fit the new strategy for the LP. Indeed, it is possible to see one or more different models operating within the overall framework of a controlling LP, having regard to different business drivers and needs.</p>
Cons 23	<p>I was not clear from the Consultation Document or the Bill whether an LP must be a Scottish registered vehicle (where that vehicle is a legal person with a registered office). I mention this because there are all sorts of possible vehicles that could be used that haven't been considered: offshore unit trusts; a UK unit trust; an ordinary express Scottish trust on the Standard Oil model; a Delaware LLC; an offshore limited partnership; foreign political party; home political party; religious groups. Regulation of such entities would be difficult, perhaps impossible. That's why some of these vehicles are so popular in the corporate finance world.</p>
Cons 24	<p>From the outset Brodies' Board has considered ABS to be ill advised. External ownership of a legal practice raises serious questions about the long-term independence of the profession in Scotland and the special properties such independence brings to the client-adviser relationship. We have argued throughout that for a relatively small and distinctive jurisdiction, the rule of law and, therefore, Scottish based businesses, institutions and individuals would not be well served by deregulation to the extent proposed in England.</p> <p>However, to answer the question, we do not consider that, at present, there are other business models that are likely to be adopted. On the basis that LPs may go ahead we are perplexed as to why a business that is owned by both solicitors and advocates will remain prohibited –there appears to be no logic to this exception.</p>

Source	Response/comment/issue
Cons 25	We have not spent time envisaging other business models so to that extent the answer is NO. Legislation should define the business models which are permissible. It is not clear that Holyrood is competent to do so as the creation and regulation of business models is a reserved area in terms of the Scotland Act.
Cons 26	No
Cons 27	No but I do have concerns about the new Model C and the element of external ownership and how this could be fully and effectively regulated with the test of fit and proper as proposed. I think in the other models solicitors should retain a majority interest. In other words a firm with more accountants than solicitors should not be able to call itself a LP.
DF 4	Why would anyone want to buy into a law firm?
FB 9	Germany has been mentioned as another country who have ABS. How has it worked there? Are there other countries who have tried it?
FB 20	I feel you didn't really cover possible models for an ABS
FB 38	How would a limited liability company (LTD not LLP) fit as an alternative business structure for a solicitor firm under the new proposals?
FB 48	I think it would have been good to have been given some examples of ABS from other jurisdictions

Question 3

Are there any models listed that the Society should not seek to regulate (accepting that other bodies may choose to do so)?

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 - 9	Where there is a legal component consisting of Solicitors admitted in Scotland the Society should seek to be the regulator.
Cons 10	-
Cons 11	Not interested
Cons 12	<p>I believe this is a difficult question because there is an assumption that Scottish Ministers will allow an approved regulator to dictate who they will regulate.</p> <p>If the Society were allowed to choose then I think for a raft of reasons, in particular for me reputational risk that we should only seek to regulate ABS where the ownership is 50% or more with solicitors</p>
Cons 13	I repeat from 1 above: "The only new "business model" which I regard as acceptable is that which allows a firm of solicitors to assume a minority of persons from other professional disciplines as partners, provided such persons fully accept the ethics and rules applicable to solicitors, if necessary in priority to any such applicable in respect of their original professional discipline."
Cons 14	There should be only one regulator for all models, irrespective as to whether that is the Society or someone else
Cons 15	-
Cons 16	No. I think there should only be one regulator of solicitors and organisations employing Solicitors, and this should be the Society. In the case of an MDP, there may be a requirement for regulation by other bodies also (e.g. if in partnership with a CA, the organisation may have to be regulated both by the Society and ICAS).
Cons 17	See responses to questions 1 and 2
Cons 18	<p>Society should not regulate any entity where shares are not owned by defined natural persons (however how will society know whether shares are being held as a nominee or not)</p> <p>Law soc with all respect does not have the funds will or probably personnel to take on and regulate a large commercial concern who will employ external solicitors to argue their case , delay regulation, argue rule interpretation and ultimately use political pressure to do what they deem to be in the consumer interest</p>
Cons 19	No

Source	Response/comment/issue
Cons 20	<p>No. If the Society is to be a Regulator, it should regulate all forms of Licensed Legal Service Providers in addition to regulation of traditionally structured solicitor practices. We very much welcome the Society's view expressed in this section of the Consultation Paper that there should be a level playing field for the regulation of Licensed Legal Service Providers and traditionally structured solicitor practices, and we return to this point below.</p> <p>A further issue arises in this context from the relatively small number of activities formally reserved to solicitors. The potential exists for a clear gap in the regulation of those who operate reserved and unreserved legal activities. Already many traditional model firms deliver reserved and unreserved legal activities, provided by solicitors who are required to abide by the professional rules of the Society in whatever they do. The only practical solution in our view seems to be to ensure a level playing field of regulation of a Licensed Legal Service Provider if it is carrying out reserved/unreserved/both reserved and unreserved legal activities.</p>
Cons 21	<p>Yes. The Law Society of Scotland should seek to regulate only solicitors as individuals and those entities, not being LPs, which are wholly owned <u>only</u> by solicitors.</p>
Cons 22	<p>For the reasons stated above the Society should only seek to regulate LP's where the underlying business is primarily the provision of solicitor services.</p> <p>The Society should, however, consider carefully whether it would be a suitable regulator for solicitor businesses which are not, or are not exclusively, Scottish. English regional firms may prefer to be regulated other than by the SRA and this is an opportunity the Society should consider, whether under Scottish or English/Welsh legislation.</p>
Cons 23	<p>I confess that it is at this point that the whole discussion of "regulation" begins to break down. I suspect the model is hopelessly out of date. All the indicators from the respected commentators and writers in the <i>Financial Times</i> for the week beginning 19th April 2010 are that financial regulators may increasingly resort to the general principles of the common law, in particular, fiduciary duties, to "regulate" market participants. Attempts to formulate detailed regulatory rules, it has become clear, are doomed to fail. I simply do not understand how any body, other than the Law Society of Scotland, would have the expertise to regulate the provision of legal services to the public in Scotland. Indeed, certain parts of the Bill (see for example s 39) assume that there will be a solicitors' profession under the 1980 Act; which selfsame Act creates the Law Society of Scotland as a statutory body corporate with statutory functions. I do not see where the amendments are in the Bill that would change that position.</p>

Source	Response/comment/issue
Cons 24	No, if it is going to regulate LPs it should regulate all models.
Cons 25	B,C, D and E The Council of the Law Society has no statutory power or authority to regulate anyone other than solicitors. They have no funds with which to do so.
Cons 26	I believe that the Society should not regulate a structure where solicitors are not in a majority by way of ownership. The Society should also not be regulating a structure that is partly owned by a Public Limited Company.
Cons 27	As I say Model C could create significant difficulties and in respect of MDP's should only regulate when solicitors are in majority ownership positions. This could of course be part of the regulatory framework as I understand it.
DN 5	Is there a realistic chance that the Bill might be changed in line with the SLAS motion?
DF 1	Does the Society consider that it should regulate 100% non solicitor owned ABSs
DF 2	Who else might come forward as potential regulator?
IN 10	What would happen if the Society chose not regulate certain LPs
IN 11	Could the Society regulate RBS or Tesco's?

Question 8

Are there any types of non-solicitor investors that you would consider to be inappropriate?

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 - 9	Provided that the "fitness" of outside investors is strictly controlled and tested there should be no prohibited Investors. Where there is any reasonable doubt about there being an adverse impact upon any regulatory, compliance or ethical matter the issue of "fitness" should be closely monitored.
Cons 10	-
Cons 11	Not interested
Cons 12	<p>This has the potential to be problematic and highlights the issue which follows in question 9 about "fit and proper". It also links back to the earlier question about what the Law Society might be prepared to regulate because that could impact on this.</p> <p>The whole point of this legislation is to open up the market and I believe a regulatory scheme will not be approved if it seeks to narrowly define those who might be accepted as owners – again in terms of possible other ABS regulators Scottish Minister will have to apply some sort of level playing field.</p>
Cons 13	<p>If "investors" means owner or controller the types I consider inappropriate are the non-solicitor types, with the possible exception of minority non solicitor but professional partners or members of solicitors' practices.</p> <p>If anyone thinks that a non-solicitor "investor" will accept the pre-eminence of the interests of the client he, or she, is living in a cloud cuckoo land where I may expect to find politicians devoted to the interests of their constituents and the good of the country...</p>
Cons 14	Of course. Too stupid a question to answer
Cons 15	Yes [No details given]
Cons 16	Yes [No details given]
Cons 17	All

Source	Response/comment/issue
Cons 18	<p>Clearly there are an obvious list of criminals etc but less obvious are those who seek to dominate the Scottish legal services market and ultimately reduce consumer choice. How are they to be identified until too late? See for example stage coach and first bus in the transport market and their reported success in dominating those markets in certain geographical areas.</p> <p>Can we provide that any fee which is demonstrably uneconomic is a breach of a new rule designed to prevent commercial dominance in an area e.g. free conveyancing in exchange for buying life insurance, taking a particular mortgage product etc. how about extra Tesco/Nectar /Airniles whatever pts if they do the conveyancing. Such schemes only available to large commercial providers</p>
Cons 19	<p>Companies who have Directors who have been previously disqualified under the Companies Acts.</p> <p>Anyone who has been convicted of a crime of dishonesty.</p>
Cons 20	<p>We do not consider that any broad category of potential investor (such as, for example, banks or retailers) should be considered inappropriate per se. Instead, we favour the approach taken by section 50 of the Bill.</p> <p>Accordingly, we believe that where individuals or particular entities have transgressed in a specified manner, or are unable to demonstrate fitness, as the case may be, they should be precluded from investment.</p> <p>We agree with each of the examples provided in the Bill in this respect, such that any of the following would render a non-solicitor investor as inappropriate to invest: a poor financial position; a previous breach of a licence to provide legal services; insolvency; a disqualification order under the Company Directors Disqualification Act 1986; a conviction for dishonesty; and a conviction for another serious criminal offence.</p>
Cons 21	<p>I consider any form of external ownership/control of a law firm to be incompatible with the need to preserve the independence of the profession.</p>

Source	Response/comment/issue
Cons 22	<p data-bbox="443 286 1361 353">Yes, any fitness to own test must mean that not all owners are appropriate.</p> <p data-bbox="443 367 1361 501">We agree the sort of tests anticipated by the Bill. We feel however there needs to be more clarity around ownership via corporate or other investment vehicles as the existing provisions appear to relate in most cases to individuals rather than entities.</p> <p data-bbox="443 515 1361 582">We also feel that the fitness to own test should not exclusively relate to type of person or entity.</p> <p data-bbox="443 595 1361 766">We would like to see an approach which takes into account whether an investor is passive or active and which looks at the particular rights which are held by that investor. Undue influence is more likely to be exerted by an active investor which has significant rights of veto or other controls over the operation of the LP entity.</p> <p data-bbox="443 779 1361 913">We also consider that the level of concentration of ownership is relevant. High concentrations of ownership can potentially challenge 'good governance' and potentially could put undue pressure upon a practitioner which a more diffuse ownership structure would not.</p> <p data-bbox="443 927 1361 1137">Consequently we do not consider the fitness to own test should in all cases be a 'yes/no' test but should also influence the level of regulatory scrutiny and LP enshrined safeguards. Where there are, for example, active 'non-professional' owners or high concentrations of ownership (and that whether or not professional) higher levels of safeguards and scrutiny may be appropriate.</p> <p data-bbox="443 1151 1361 1285">We believe the fitness to own test is at the heart of and hopefully the solution to much of the current disquiet about the regulator's ability to ensure our professional values are protected and that in all cases LP's should comply with and enforce these.</p> <p data-bbox="443 1299 1361 1599">We note that Section 52 of the Bill allows for the Scottish Ministers to make regulations which impose requirements to which licensed providers are subject. We see some merit in allowing a bedding-in period before allowing 'outside investors' to have, as a class of owner, a controlling interest. We would not object to regulations from the outset which require external investors to be in the minority. This would allow Scottish Ministers discretion by regulation to review their policies having had the opportunity to test the effectiveness of new regulatory models.</p> <p data-bbox="443 1612 1361 1854">However, for the reasons specified in Answer 2 above, this limitation on control only looks, to us at least, realistically plausible if it refers to 'non-professional' interests. Given a surveyor wishing to sell 'solicitor services' would need to use this legislation even if that represented only 1% of their business then we assume there would be a policy objection to any requirement that this can only happen if solicitors have majority control of that entity.</p> <p data-bbox="443 1868 1361 2002">Consequently we feel any regulations which impose limits on majority control would most likely be based upon a requirement for majority 'professional' control, in the sense of accredited professionals practising in that business.</p>

Source	Response/comment/issue
Cons 22 Cont'd	This may involve expanding the concept of 'designated person' (see Section 47) to include, in the case of the MDP model, other recognised professionals practising in the business. If so the regulations could be worded to prohibit majority control of 'outside investors' allowing, for example, practising chartered accountants to have majority control (given they would be 'designated persons').
Cons 23	No juristic persons, or natural persons who invest in a representative capacity, would be appropriate. It is simply not possible to apply a "fit and proper" person test to a juristic person. Again, this point was never properly thought through. Presumably the Money Laundering Regulations tests on "beneficial ownership" would have to be applied to any juristic person investing. And it seems to me that wherever a natural beneficial owner is found, that person must be subject to the fit and proper persons test.
Cons 24	We are opposed to external ownership in the hands of those not involved in the day to day business of a legal practice.
Cons 25	All non-solicitor investors would be inappropriate
Cons 26	I do not believe that there is any adequate test that can be constructed to ensure that investors are "fit and proper". The recent financial crises with various institutions amply demonstrate this in my view. Investors may not set out to be in any way unprofessional but it is a simply fact of life, as we have seen recently, that many institutions who would almost certainly be considered "fit and proper" can act in ways that are incompatible with the principles of a solicitors' firm. In addition, I do not believe that there is any test in the world that can weed out those who would seek to use a legal firm to assist them in criminal activities.
Cons 27	Yes. See my answer earlier. I have reservations about Model C. However non solicitor owners who are working in the business should be members of other recognised professional bodies which group could be set down within the regulatory framework.
ED 2	Law is not a commodity and is a buffer between state and public. Concern to this buffer by external ownership
ED 4	Will there be predatory pricing of large investor funded LPs?
FB 42	How can foreign ownership of a Scottish ABS be regulated?

Question 9*What tests should be applied to ensure investors are fit and proper?*

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 - 9	There must be equivalent obligations as Indicated by the Society. "Fit and Proper" or similar tests have been in place in other sectors (Banking and Financial Services) for several decades and a robust model must be enforced by the regulator if we are to open up the profession to outside interests or control.
Cons 10	-
Cons 11	Not interested
Cons 12	<p>The Bill already sets out a broad framework which requires to be built on and there has to be read across to the Society's own fit and proper person test for solicitors which must be the very minimum standard for owners.</p> <p>There will be a need to have enhanced disclosure I believe for individual owners and there are issues around identity checking – the SRA have had challenges in accurately checking the identity of registered foreign lawyers and some sort of equivalent to money laundering checks will be necessary.</p> <p>Where the owners may be institutional that becomes a much more difficult issue and I have a real concern that we might not have the capacity to satisfy ourselves in that situation – I have heard it said that if an investor is listed on the Stock Exchange or AIM that that might be a sufficient badge of good standing but I would be keen to know more about how, for example the FSA might look at this type of issue.</p>
Cons 13	As I do not accept the propriety of any "investor" other than a solicitor or another professional assumed into a solicitors' practice I see no need to invent tests for outsiders.
Cons 14	Objective and reasonable ones, with a bias to excluding people rather than including non solicitors
Cons 15	-
Cons 16	Usual negative tests: insolvency, disqualification as director etc.
Cons 17	Determination of such a question is not appropriate in the context of this consultation.

Source	Response/comment/issue
Cons 18	<p>I suspect that no such test actually exists which is robust enough to catch any determined investor. Also given we already have allowed folk into the profession with criminal records (in some cases for fairly serious crime) it must be difficult to refuse others. Also we allow folk in who have been bankrupt. How can we infer that its ok to have previous conviction including jail term as long as have a law degree and we accept your explanation and claim that have renounced a life of crime and then seek to refuse others to invest in legal practices simply because by straight comparison they have not got a law degree. Illogical to assume those who qualify in law are law abiding whilst those that have no such degree may not be.</p> <p>The FSA I think struggles with the fit and proper test and they have much more facilities available to them to check this than law soc ever would. If an investor has a fiscal fine for assault is that sufficient. If they have received community service for a theft or a fine for shoplifting? Is that sufficient? Yet we will have solicitors who have convictions for shoplifting when young.</p> <p>Can we accurately determine the source of funds for the investment? Is there to be a minimum investment? In theory the level of financial investment can be zero. How do you apply a fit to invest term on a zero investment?</p>
Cons 19	<p>It is submitted that a similar test to the one used in the FSA model, and the one presently used by the Law Society, should be considered.</p>
Cons 20	<p>We have already answered this question, to a large extent, in response to question 8 above.</p> <p>We would add here that the FSA's "fit and proper" requirements are worthy of more detailed assessment and may well provide assistance in drafting the "fit and proper" test for external owners". If an external owner is already regulated, for example by the FSA, this needs to be taken into account so as not to put unnecessary obstacles in the way of reputable companies/individuals.</p> <p>Further, we believe that management competence, whilst not a conclusive matter for or against fitness, is a factor worth including in the list of considerations when measuring fitness. A non-lawyer who has excellent management competence could improve their fitness mark/assessment when applying to become a partner/shareholder in a Licensed Legal Service Provider.</p> <p>We also consider that it would be helpful for the ultimate beneficial owner of a Licensed Legal Service Providers to be declared; the information is no secret because it will be disclosed in the financial statements of the Licensed Legal Service Provider. Apart from dealing with the group perspective of applicants, such information may also help to flush out nominee holdings.</p>

Source	Response/comment/issue
Cons 20 cont	A different question is whether the ultimate beneficial owner of the holder of a material interest in a Licensed Legal Service Provider should also be disclosed. We believe that the identity of an ultimate beneficial owner of a Provider and of those holding material interests in a Provider should be readily available for the public in much the same way as law firms have to make available the names of their partners/members. This information might be of great importance to potential clients of the Licensed Legal Service Provider or those having other dealings with it
Cons 21	The Justice Committee in its Stage 1 Report on the Bill acknowledged that there was <u>no</u> test which could provide a guaranteed protection against undesirable third party investment. Allowing <u>any</u> form of external ownership opens up real risks that some third party investors will turn out to be not “fit and proper”.
Cons 22	See response to Question 8
Cons 23	The same as are presently applied to solicitors. Again, the test can only be sensibly applied to natural persons.
Cons 24	If there has to be a test then the FSA’s proposed new Fit and Proper Test for Approved Persons is a good starting point. It should extend to senior management who are not solicitors and those in “controlled function” roles. All of this is lacking in the Bill.
Cons 25	The tests required to become and a remain a solicitor
Cons 26	I do not believe that there is any adequate test that can be constructed to ensure that investors are “fit and proper”. The recent financial crises with various institutions amply demonstrate this in my view. Investors may not set out to be in any way unprofessional but it is a simply fact of life, as we have seen recently, that many institutions who would almost certainly be considered “fit and proper” can act in ways that are incompatible with the principles of a solicitors’ firm. In addition, I do not believe that there is any test in the world that can weed out those who would seek to use a legal firm to assist them in criminal activities.
Cons 27	I find this question very difficult in the abstract. In the same way that solicitors are only admitted after a period of study and practical experience of legal practice there should be a requirement to ascertain motive. If investment is only about making money and that would seem to be so I am not sure if that sits very easily with the other responsibilities and duties placed on a solicitor in their field of work. I think that if we were required to regulate such investors the same standards required of solicitors being admitted should have to apply to investors. It has often been said that there should be a level playing field and I don’t think it should be any different in this respect either.

Source	Response/comment/issue
AB 11	Need to consider how to deal with a corporate investor
FB 42	If floating on the Stock Exchange is an option, how could the regulator in Scotland prevent the purchase of shares on the LSE by "undesirable" persons following flotation?

2. The Solicitor profession and role of the Society

2.1. Extract from consultation paper

The Society as a regulator of LPs

The Society wants to be the regulator of choice where entities may be able to "regulator shop" on the basis of price/efficiency of supervision. It should be stressed that existing firms do not have to adopt any of the new permissible structures.

In accordance with the policy paper, the Society intends to apply to become an Approved Regulator. At this stage it is not clear whether other bodies will apply to be regulators although some interest has been shown by ICAS.

Ethics etc

LPs will have to comply with six professional principles that persons providing legal services should:

- (a) support the proper administration of justice,
- (b) act with independence and integrity,
- (c) act in the best interests of their clients,
- (d) maintain good standards of work,
- (e) where—
 - (i) exercising before any court a right of audience, or
 - (ii) conducting litigation in relation to proceedings in any court,comply with such duties as are normally owed to the court by such persons,
- (f) meet their obligations under any relevant professional rules.

Concerns have been expressed around professional privilege. These are addressed by s 60 of the Bill, which provides that communications made to or by an LP or designated persons within it (acting in the provision of legal services) are privileged from disclosure in the same way as if the person had at all material times been a solicitor acting for the client.

Use of brand "Solicitors"

S90 (3) of the Bill removes the offense for an LP to call itself "Solicitors" by amending S31 of the 1980 Solicitors (Scotland) Act.

The Society's current thinking is that it would prefer only entities regulated by the Society to be able to use the description "Solicitors". This may be restricted to current practice models and LPs where a significant majority of the ownership is in the hands of solicitors. (This would be similar to restrictions made on the use of "Chartered Accountants"). The Society is investigating what options are available to protect the brand of "Solicitors" including suggesting amendments to the Bill.

Consultation Paper

We asked the following questions

- 2. *Do you agree that the Society should apply to be a Regulator and if not the Society who else would you expect to apply?*

7. *Are you satisfied that the Bill adequately deals with issues relating to standards and ethics required of LPs?*
13. *Do you agree with this proposal on the use of the term "Solicitors"? Do you have any other comments on possible restrictions on the use of the term "Solicitors"?*

2.2. Responses

2. *Do you agree that the Society should apply to be a Regulator and if not the Society who else would you expect to apply?*

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 - 9	Where there is a legal component consisting of Solicitors admitted in Scotland the Society should seek to be the regulator.
Cons 10	-
Cons 11	Not interested
Cons 12	I believe this is a difficult question because there is an assumption that Scottish Ministers will allow an approved regulator to dictate who they will regulate. If the Society were allowed to choose then I think for a raft of reasons, in particular for me reputational risk that we should only seek to regulate ABS where the ownership is 50% or more with solicitors
Cons 13	I repeat from 1 above: "The only new "business model" which I regard as acceptable is that which allows a firm of solicitors to assume a minority of persons from other professional disciplines as partners, provided such persons fully accept the ethics and rules applicable to solicitors, if necessary in priority to any such applicable in respect of their original professional discipline."
Cons 14	There should be only one regulator for all models, irrespective as to whether that is the Society or someone else
Cons 15	-
Cons 16	No. I think there should only be one regulator of solicitors and organisations employing Solicitors, and this should be the Society. In the case of an MDP, there may be a requirement for regulation by other bodies also (eg if in partnership with a CA, the organisation may have to be regulated both by the Society and ICAS).
Cons 17	No. The Society should remain as regulator of the solicitor's profession and leave the regulation of any other provider of legal services (including whatever models the government may create) to whoever the government considers should do so. The essential difference would be that other such entities would not be or include solicitors.

Source	Response/comment/issue
Cons 18	<p>Yes the Society should apply to regulate LPs which are majority solicitor owned but have the right to refuse to accept entities who are too complex to regulate i.e. as above.</p> <p>I'd also expect ICAS and the SRA (England) to apply.</p>
Cons 19	<p>Yes. It is anticipated that Regulators for other recognised professional bodies may also wish to apply to be a Regulator.</p>
Cons 20	<p>As a matter of principle, we do not believe that any organisation should be both Regulator and Representative Body. As we explained in our response to the Scottish Government Consultation "Wider Choice and Better Protection", we favour an approach similar to that in England & Wales where separate bodies now exist to deal with the representation and regulatory roles of the Society. In considering reform of the profession, nothing is more important than ensuring that the correct regulatory structure is achieved. We believe it is essential to separate regulation and representation; only by this approach will regulation be, and be seen to be, fully independent.</p> <p>Achieving the correct approach to regulation is undoubtedly a complex subject and we would recommend the approach adopted in England & Wales. In considering the position in England & Wales prior to the separation of roles there, the Legal Services Board stated in its draft Business Plan (at paragraph 20): "Any regulatory regime must put the interests of consumers first. The previous system of self-regulation, which saw the representational professional bodies governing all aspects of their members' professional education, development, and standards, was strongly criticised from both within and outside the profession. A Government report published in July 2003 concluded that the framework in place at the time was "outdated, inflexible, over complex and insufficiently accountable or transparent". In particular, critics focused on the confusing 'regulatory maze' that prevented consumers from understanding who was responsible for ensuring appropriate standards within the legal profession. There was a strong perception that there was too close a connection between representational and regulatory functions within the professional bodies, which led to a lack of faith in independent and public interest regulation."</p> <p>We believe this accurately summarises the position though we wish to stress our view that the Law Society of Scotland fulfils its functions well at present; the issue is one of customer perception and confidence rather than that the current regime fails consumers.</p> <p>In summary, our view is that public confidence can be maintained only by separation of roles. We recognise that the Society does not share that view but as this is our position, we therefore do not agree that the Society should apply to be a Regulator while it also retains its position as Representative Body.</p>

Source	Response/comment/issue
Cons 20 (cont'd)	To ensure as level a playing field as possible, we would suggest that if the Society continued to be a regulator, it should delegate the regulatory duties to a subsidiary body, analogous to the Solicitors' Regulation Authority in England & Wales, so ensuring that there is demonstrable separation between the regulatory and representative roles.
Cons 21	No. I agree that the Law Society of Scotland should continue to regulate the solicitors' profession in Scotland as it has done since its inception. It is suggested that, without amending legislation, it would be <i>ultra vires</i> the Society's function as expressed in the 1980 Act to seek to be a Regulator of an LP. Even if it were permissible for the Society to become a Regulator, then as a member of the Society, I would not consider it desirable that the Society should also seek to regulate my direct competitors (in the form of LPs).
Cons 22	<p>Question 1.</p> <p>Yes.</p> <p>Question 2.</p> <p>If the Society does not apply there will be a material void which will require policy intervention by the Government. We imagine the Complaints Commission could be used as a suitable regulatory vehicle and the Solicitors Regulatory Authority should be asked to apply, assuming its constitution allows it.</p> <p>The terms of the Bill are such that any entity (not exclusively owned by Scottish solicitors) which wishes to sell Scottish 'solicitor' services to the public requires to be licensed as a LP under this Bill. Consequently other professions who wish to take advantage of the ability to provide Scottish 'solicitor' services would need to use this legislation even if that were a very small proportion of their overall business.</p> <p>It would seem sensible for the likes of ICAS to regulate LP's which were primarily accountancy based so we expect other professional bodies to apply if their profession wish to take advantage of providing Scottish 'solicitor' services.</p> <p>Businesses will likely favour the regulator most aligned to the type of services they provide so in the case of MDPs the natural selection will likely be influenced by whether the business is primarily, for example, a surveying business or primarily a legal business.</p> <p>Primarily solicitor businesses would look for a 'legal' regulator and this is why there would be a void if the Society did not apply which would need to be filled.</p>

Source	Response/comment/issue
Cons 23	<p>I cannot think of any other body – even including the highly respected ICAS – that has the necessary expertise to apply.</p> <p>In my view, only the Society can thus be a regulator. It may be, however, that, in becoming the Regulator, the representative role would be better performed by, for example, the extensive network of local and national societies that already exist (RFPG, SLAS, Glasgow Bar Association etc).</p>
Cons 24	<p>We would prefer to see the Society have regulation of all solicitors in Scotland. However, we are concerned about proposals that LPs be given access to the existing Guarantee Fund and that such organisations can be called “Solicitors” provided a majority of owners are solicitors.</p> <p>If we were starting from scratch with the legal profession in Scotland then we would not be in favour of a single body which carries out both regulatory and representation functions. However, Scotland is a small jurisdiction and the costs of having a new regulatory entrant do not outweigh the perceived benefits.</p> <p>We will be interested in seeing who does apply to be a regulator. We think the minimal costings provided by the Scottish Government are inadequate and that the costs of the new regulatory regime are likely to be off putting for others.</p>
Cons 25	<p>Only if the Council of the Law Society raises its own funds to do so. It is not an approved use of the funds entrusted to the Law Society Council by or on behalf of individual solicitors. SRA may apply.</p>
Cons 26	<p>I would have preferred that the Society regulates only solicitors and that those firms that wish to be Alternate Business Structures should effectively no longer be able to call themselves solicitors. In view of the recent referendum, however, I accept that the Society would regulate various structures.</p>
Cons 27	<p>I would regard it as essential that the Society act as regulator. In relation to legal services short of creating a new one which should be avoided in my view there are no others in such an ideal position.</p>
DN 5	<p>Is there a realistic chance that the Bill might be changed in line with the SLAS motion?</p>
DF 1	<p>Does the Society consider that it should regulate 100% non solicitor owned ABSs</p>
DF 2	<p>Who else might come forward as potential regulator?</p>
IN 10	<p>What would happen if the Society chose not regulate certain LPs</p>
IN 11	<p>Could the Society regulate RBS or Tesco's?</p>

Question 7

Are you satisfied that the Bill adequately deals with issues relating to standards and ethics required of LPs?

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 - 9	Yes
Cons 10	-
Cons 11	Not interested
Cons 12	<p>In a broad sense, yes but the challenge will come in MDPs where there may be competing rules and standards between different professionals.</p> <p>Any regulatory scheme clearly will have to include an ability to deal with rule conflict and whilst much has been said about Memoranda of Understanding, there could eventually be a multiplicity of these, serving little purpose.</p> <p>I have a slightly novel view on this.</p> <p>The Bill is about the provision of legal services. On that basis if there is a conflict of rules between for example the Law Society and another professional body, it is the Society's rules, specifically designed for the legal services market that should prevail.</p>
Cons 13	Anyone qualified to practice as a solicitor should adhere to the highest standards and ethics of that profession regardless of any attempt to define standards statutorily so the issue is irrelevant.
Cons 14	No
Cons 15	The Bill should not proceed in its current form. [No further details given]-
Cons 16	No. If there is more than one regulator, there will be more than one set of regulations, more than one set of standards, etc. Confusing for Solicitors, who may have to comply with Society rules while there employer is working to different regulations. Surely impossible for the public to understand. This can only work if there is only one regulator!

Source	Response/comment/issue
Cons 17	<p>The Bill deals with the generality of these issues. A mere statement of the issues does not clarify how they are to be enforced and how compliance can be effectively monitored.</p> <p>In relation to professional privilege, section 60 of the Bill may be open to abuse in extending privilege to areas of practice which currently would not benefit from it and where it would be inappropriate for it to apply.</p> <p>For example, it would be possible for a claim to be made that information provided to or advice given by an accountant or other non-solicitor member of the entity was to or by ‘... a designated person acting under the supervision of a solicitor..’ in a context which would not currently allow the application of privilege, thereby extending the scope of professional privilege. On the basis that the privilege attaches to the client, questionable situations may well arise as in the Enron and suchlike cases which resulted in the need for the Sarbannes Oxley legislation in USA. Any abuse of professional privilege may well undermine the effectiveness and value of the concept, which will then be lost to the solicitors’ profession. The circumstances of each case would be a matter for judicial determination, but this will only serve to complicate unnecessarily any litigation where such an issue arises.</p>
Cons 18	Yes. Not convinced in practice though that this will work particularly given recent case law in Europe re independence of solicitors employed in house
Cons 19	Not wholly. It is submitted that further provision could be considered for providing information about complaints, made to the LP, within the APR as well as including details of any disciplinary action taken, or proposed, against staff with compliance responsibilities in the LP.
Cons 20	Yes. The protection of legal professional privilege is very important and will need to be as strongly adhered to by lawyers working within a Licensed Legal Services Provider as in the traditional model. We believe that section 60 of the Bill, by providing that privilege applies to the communications of a Provider where legal services are being provided, adequately deals with the matter
Cons 21	No. For example, a requirement to ‘maintain good standards of work’ is meaningless in a regulatory environment.
Cons 22	Yes

Source	Response/comment/issue
Cons 23	<p>Absolutely not. I have rarely encountered such a badly formulated Bill, both in the quality of the drafting and, secondly and more importantly, in the underlying ideology. Let me consider first the drafting. Take s 2(d): persons providing legal services should do “good” work. I find it almost impossible to believe anyone with even a modicum of legal training could have drafted such a provision. It is gimcrack. What is the standard of “good”? Who is to judge”? What is “good” is about as easy to define as the meaning of life. How can a judge even know what is “good” conveyancing or chamber practice? It is unlikely he will ever have done either of these. It is a radical departure from the existing common law which requires – of all professionals, not just lawyers – that there is established (one) a usual and normal practice; (two) that the professional has not adopted that practice; and (three) that the professional adopted a course which is one which no professional person of ordinary skill would have taken if he had been acting with ordinary care.</p> <p>Second is the philosophy. The public is to move from having one point of contact and one regulator – the Society – to having multiple points of contact, perhaps applying different standards, to different types of legal services professionals, only some of whom will be solicitors. I do not see how that is in the interests of the citizen. It is like going into the worst and cheapest hospital in the world and saying, “this is the cheapest level on which medical services can be provided; let us ensure that everyone has access to such terrible hospitals, rather than the standards presently required in the NHS. The market will decide who is entitled to what.” This is exactly the perverse philosophy that is to be applied to the legal system by the Bill</p>
Cons 24	<p>No.</p> <p>Every solicitor in Scotland is obliged to comply with the Code of Conduct and Standards. Solicitors also have to comply with a myriad of other rules and standards.</p> <p>The Bill has six professional principles. The difference is obvious. Is it the case that this is to be left to the discretion of schemes set by approved regulators? We do not consider that to be fair nor does it create a level playing field which we would be assured would happen.</p> <p>Can we also question whether rules prohibiting “traditional firms” sharing fees etc are going to remain in existence after the introduction of ABS. As a matter of logic they should cease to have effect.</p>
Cons 25	No
Cons 26	No comment

Source	Response/comment/issue
Cons 27	No. I think on the face of the Bill there is not enough on this and it appears as if it is being left to the creation of regulatory frameworks to set this out in greater detail.
DN 3	What should an employed solicitor in an LP do if asked to do something unethical?
DF 3	Will the Society continue to regulate solicitors wherever they work?
GS 1	What position is a solicitor in an LP he was asked by his employer to do something he thought was unethical
GS 6	What about confidentiality and professional privilege?
IN 8	What position is a solicitor in an LP he was asked by his employer to do something he thought was unethical
FB 4	What is the difference between working in an ABS and currently working In-House? Surely the ABS will have some sort of Mission Statement or Constitution which outlines its purpose with associated Standing Orders etc.

Question 13

Do you agree with this proposal on the use of the term “Solicitors”? Do you have any other comments on possible restrictions on the use of the term “Solicitors”?

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 – 9	We agree with the Society’s proposals.
Cons 10	-
Cons 11	Not interested
Cons 12	The solicitor brand is a key marketing tool and one that should be protected for members of the profession and traditional firms. I am in favour of what is suggested in the paper as a reasonable solution and protection for the brand.
Cons 13	Only solicitors should be allowed to use the word. Those who include non-solicitors should be required to add a qualifying term to disclose that they are not solely solicitors. If this cannot be achieved then the “traditional” solicitor should be granted the exclusive right to the expression “Independent Solicitor”
Cons 14	No – I have little confidence in the Society to formulate sensible rules and regulations
Cons 15	-
Cons 16	Yes- should only be when a majority are solicitors.
Cons 17	Such a restriction as proposed would be acceptable but only for firms wholly owned by solicitors. The Society should not support or agree to the extension of professional privilege.
Cons 18	Only someone who is a solicitor should be able to use that. Therefore a firm with 100% solicitor ownership should be allowed to call themselves solicitors. Everyone else should be a legal practice unit. The public can work out difference for they if they are in the slightest interested
Cons 19	No. It is unclear why the present offence should be removed and an offence of calling yourself an LP, when you are not, should be substituted. Firms calling themselves “Solicitors Firms”, where they are majority owned/run by solicitors could give customers the perception that they will always be advised by a solicitor. This could leave them open to allegations of misrepresentation.

Source	Response/comment/issue
Cons 20	<p>We have no objection to the proposal that use of the term “Solicitors” should be restricted to current practice models and alternative business structures where a majority of the ownership is in the hands of solicitors. However, it will be important to ensure both a level playing field for the different types of providers of legal services, and to ensure that no confusion arises among the public.</p> <p>We believe it should be possible to find a form of wording which addresses these issues and appropriately describes alternative business structures where there is not majority ownership in the hands of solicitors.</p>
Cons 21	<p>No. The use of the term “Solicitors” should be restricted to current practice models and S90 (3) of the Legal Services Bill should be resisted. It should be transparent to all if one is dealing with a solicitor or a firm of solicitors subject to and regulated by the rules of the Law Society of Scotland or with a licensed legal services provider.</p>
Cons 22	<p>We anticipate businesses will naturally brand themselves with the profession whose services they primarily provide. Would an organisation which has 70% of its fees coming from surveying services wish to brand itself as ‘solicitors’? But it may wish to use, for example, a joint brand such as ‘Surveyors and Solicitors’ and this seems to be unobjectionable.</p> <p>If an external investor wishes to invest in a solicitors business it would be self-defeating not to be able to brand it as a ‘solicitors’ business just because the solicitors are all employees. This seems to us to be contrary to the intentions of the legislation.</p> <p>An organisation which has embedded solicitors selling services to the public is providing ‘solicitor services’ and so should be free to brand itself in any way it chooses provided that is not misleading.</p>
Cons 23	<p>There are possible remedies with the Company Names Adjudicator under the Companies Act 2006 to the extent that the LP using the term is a UK company, LLP or LP but does not have the requisite number of solicitors in its practice.</p> <p>I strongly incline to the view that only LPs in which more than 75% of the capital is owned by solicitors with valid practicing certificates should be able to call itself “solicitors”, or any derivation thereof.</p>

Source	Response/comment/issue
Cons 24	<p>We are concerned that the Society thinks it is acceptable for LPs to call themselves “solicitors” even if that is only to apply to cases where solicitors are the majority owners. This will only create confusion in the minds of the public about who is providing the services and the regulation they are subject to.</p> <p>The UK Government when looking at accountants felt strongly that the term “chartered accountant” should continue to be restricted to appropriately qualified members of one of the professional accounting bodies. The UK Government believes that this is rightly regarded as providing a good basis on which the public may make an informed judgment between individuals who hold a qualification from a professional body.</p> <p>The Law Society needs to protect the brand of “solicitor” if ABSs are going to be permitted. Any dilution of that brand will result in what the Society has told us will not happen –i.e. the disappearance of qualified solicitors.</p>
Cons 25	For 'significant' read 'not less than 80%' of ownership in hands of solicitors'.
Cons 26	No comment
Cons 27	A LP should only be permitted to call itself solicitors when there are a majority of solicitor owners. I think this is essential and part of the role of the Society in its representative role is to protect the brand of solicitor.
DF 10	Need to work on branding concept of "Solicitors"

3. Client and consumer protections

3.1. Extract from consultation paper

Accounts Rules and Guarantee Fund

The Guarantee Fund is provided for in the Solicitors Act (Scotland) 1980 which gives Council the responsibility to maintain this fund.

The current Accounts Rules and the Guarantee Fund exist to engender public confidence in the profession and redress loss in the event of client funds being dishonestly used where is no other remedy. In the event of any client funds being improperly taken, the first call is the solicitor's practice followed by their personal assets. The Guarantee Fund only steps in when there are no other funds available..

The current draft of the Bill does not specifically put an equivalent obligation on Regulators to provide for a fund of last resort. The Society has raised this issue with the Scottish Government and is awaiting further comment.

The Society's view is that for public protection there should be an equivalent requirement for LPs or for those who choose to practice through the medium of an LP. This will be included in the Society's proposed regulatory scheme.

LPs will be required to comply with equivalent rules to the Accounts Rules and hence the risks are perceived to be similar to those existing now. The Society therefore proposes, in principle, that LPs will be required to be covered by the existing Guarantee Fund.

There will be a number of practical and legislative issues to be resolved. These include basis of contributions for LPs, and the application of equivalent unlimited indemnities as in effect provided by existing principals.

PI and the Master Policy

At present all Scottish firms are required to have minimum PI cover through the Master Policy. The compulsory cover is £2m. Some firms also buy "top up" cover. At present the Master Policy broadly covers all activities customarily undertaken by Scottish solicitors. Marsh currently act as the broker to the Policy and together with the insurers calculates premiums based on a number of factors including the number of principals of each entity, the claims records, a historic analysis of work undertaken at entity and other rating factors.

The Bill requires that LPs have at least equivalent cover as that offered by the Master Policy.

The Society is proposing that that LPs regulated by the Society would be required to use to existing Master Policy to provide PI cover. However there would be restrictions on the activities that could be covered by the Policy. These would be limited to legal services as defined in the Act plus additional "permitted services/activities" that fit into the current scope of cover at being "all manner of business carried or transacted which is customarily (but not exclusively) carried on or transacted by solicitors in Scotland".

The Society will need to develop a means of assessing alternative provisions of cover (for example Local Authorities are self insuring for some of their activities).

It should be noted that if the pool of firms in the Master Policy were to reduce then it may be that the Master Policy is no longer viable although the risk

could be reduced depending on the claims records of firms no longer covered.

Consultation Paper

We asked the following questions

10. *Do you agree with the proposals with respect to the Guarantee Fund and do you have any additional comments?*
11. *Are there any issues to be raised in connection with the proposals on PI/Master Policy?*

3.2. Responses

Question 10

Do you agree with the proposals regarding the Guarantee Fund and do you have any additional comments?

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 -9	Equivalence may lead to "capping" the liability to contribute to the G'tee fund so as not to distort between traditional and LP models.
Cons 10	-
Cons 11	The Guarantee Fund should be scrapped as part of the move toward open competition. The Fund was created as a sop to Government to allow solicitors to enjoy the benefits of protection against external competition. It is an anomaly in the modern world. Fergus Ewing has confirmed that Government will review this if solicitors make a case for its abolition. Why is the Law Society not doing anything about this? You are our representative body – get lobbying, bring in the votes and take the case to Government
Cons 12	<p>The Stage One Report makes clear that there will have to be an equivalent of the Guarantee Fund. The question is how that is achieved.</p> <p>I can understand that Government will not want to pump prime a similar fund but the current funds in the Scottish Solicitors Guarantee Fund have been paid by solicitors to deal with solicitor dishonesty and I just do not accept the argument that the fund can simply be opened up – I think that could lead to a legal challenge</p> <p>Ring fencing the current fund is only a partial answer because what would happen if there was an early claim on the new fund. How do the insurers view all this in terms of one of the key back up elements – stop loss cover ? I ask that because we are moving here potentially from insuring the dishonesty of solicitors to the question of dishonesty of a wider range of owners.</p> <p>I understand the argument that because of the nature of ABS, the risk to a Guarantee Fund or Compensation Fund may be less but my concern remains the possible detriment to the arrangement which will require to stay in place for traditional practice.</p>
Cons 13	If other people are to be allowed to practise without contributing to the guarantee fund I would consider I was being discriminated against and would withhold my contribution.
Cons 14	No – I have little confidence in the Society to formulate sensible rules and regulations

Source	Response/comment/issue
Cons 15	No. [No further details given]
Cons 16	Wholeheartedly. The guarantee fund has served the profession (in terms of retaining high standards and our reputation) and the public well. As I say, it is so much simpler if there is just one regulator.
Cons 17	There is no doubt that an equivalent fund to the Guarantee fund should be established. The current scheme cannot be allowed to apply to such entities as the reserves built up are for the 'benefit' of those who have contributed on the basis for which they have been – i.e. solicitors.
Cons 18	Logic dictates that the average investor should be of no more risk to the Guarantee fund than currently exists. However the Guarantee fund is unlimited and as a first step to protect the members it needs to be limited both in terms of claim and annually. Until now with maybe one or 2 exceptions the Guarantee fund has been very lucky that no solicitor has come up with a sophisticated enough scheme to disappear with millions of pounds of client's cash. As things already stand if someone was prepared to do so they could. The concern though must be that (just as many criminals believe that credit card fraud is victimless) that someone sees the Guarantee Fund in same light and pressurises a solicitor in their employ to set it up and take the fall. Now hits could potentially happen at meantime and as far as I know has not. However increasing drug abuse in our Society and a more general awareness of the fund by criminals could lead to problems. Look for example to the fund manager Nick Leeson who brought down his employer by fraudulent share transactions. Who benefited there? Look at examples of fraud from other industry where millions were transferred (case some yrs ago involving from memory 2 people both employed in an oil co) they were caught and jailed but monies never recovered. Albeit illogical to restrict Guarantee fund to only solicitor majority owned firm s I suspect that this will be need to be done and at same time restrict very clearly the scope of work covered , the limit per claim and indeed an overall limit.(how one operates that though is yet another problem).
Cons 19	Yes. It is imperative, if a level playing field is to be maintained, that customers have the ultimate redress/protection afforded by the Guarantee Fund and that a comparable system, to the Law Society model is introduced in this regard.

Source	Response/comment/issue
Cons 20	<p>We agree that a Licensed Legal Services Provider should be subject to the same requirements to contribute to the Guarantee Fund as a traditionally structured solicitor practice. We believe the Society should continue to press the Scottish Government to have the Bill amended in this respect. The requirement should be achieved via the combined responsibilities placed on the HOLP and HOFA and by the licensing provisions that regulate a Licensed Legal Services Provider.</p> <p>As in other areas, the Regulator should aim for a level playing field when drawing up regulations in relation to Guarantee Fund arrangements. To be more specific, we believe that a Licensed Legal Services Provider should be required to contribute to the same Fund as already exists without introducing the complexity of new funds peculiar to Licensed Legal Services Providers only.</p> <p>We would add at this stage, though, that while we fully support the need for protection of the public, we do not believe that unlimited liability across the profession is consistent with the modern world. In many ways, the position is analogous to the position of firms prior to the introduction of LLP legislation. The introduction of LLPs reflects modern attitudes towards capping of otherwise unlimited liability and we believe this approach should also be applied to the Guarantee Fund.</p> <p>We also believe that if the design of the Licensed Legal Services Provider model achieves the intention of entities with improved capital adequacy rather than current traditional models (where there is no capital adequacy requirement) the possibility of customers of Licensed Legal Services Providers needing to seek the protection of the Guarantee Fund should be remote; as the Society notes in section 4.1 of the Consultation Paper, the first call where funds have been improperly taken is and would continue to be on the assets of the provider of legal services.</p>
Cons 21	<p>Agreed that if LPs are brought into existence, then they should be required to have an equivalent fund of last resort similar to the Guarantee Fund but not that LPs should be covered under the existing Guarantee Fund</p>
Cons 22	<p>It is essential that the liability to contribute is limited. Currently there is no level playing field with other jurisdictions or other professions.</p>
Cons 23	<p>If the Society is to become a regulator of Scottish solicitors, it can maintain the Guarantee Fund. But that fund should cover only acts of solicitors with a valid practicing certificate.</p> <p>If the rationale for the Bill is consumer protection then it seems to me that all other regulators must require their LPs to contribute to a guarantee fund on the same terms, mutatis mutandis, as the Guarantee Fund presently maintained by the Society.</p>

Source	Response/comment/issue
Cons 24	<p>No.</p> <p>Your proposal that they be covered by the existing Guarantee Fund is wholly inappropriate.</p> <p>All LPs should be required to contribute to a fund of last resort but that should not be the Guarantee Fund. We have no idea at the present time what the risk profile of such entities is going to be like and it is unfair to impose their risk profile on those who choose not to convert to being an LP.</p>
Cons 25	<p>Yes. It is difficult to see how the guarantee fund can be shared with non-solicitors.</p>
Cons 26	<p>I am strongly against the proposals in connection with the Guarantee Fund. The suggestion that those other than solicitors would be required to contribute to the Guarantee Fund and therefore for their potential claims to be met from the fund is entirely unacceptable in my view. It has been made clear by the profession throughout this negotiation that the Guarantee Fund simply could not continue in its present form if Alternate Business Structures are permitted. The Society must either renegotiate the terms of the Guarantee Fund or consider some alternative provision. I would prefer that there is some separate compensation arrangement in place than that the Guarantee Fund should be opened up to all-comers. I do not believe that the Society has any mandate from the profession to even consider allowing ABSs to be part of the Guarantee Fund.</p>
Cons 27	<p>I agree with the Society's position in this respect. Generally I have to say that decisions on capping the guarantee fund need to be taken and the introduction of LP's could be the right time to do this.</p>
AB 6	<p>Not happy about the balance on the Fund being used by non solicitors</p>
DF 8	<p>What is view of an LP which has one solicitor supervising 100 staff and then using the G'tee Fund?</p>
DN 9	<p>How can the Society be satisfied that the requirement that a G'tee fund equivalent will be required from all LPs will be back in the Bill?</p>
GS 3	<p>What about the Guarantee Fund?</p>
GS 4	<p>Should the Guarantee Fund still be unlimited?</p>
IN 5	<p>A question was asked with regard to other regulators not having to have a G'tee Fund</p>
FB 18	<p>They are mainly concerned with the possibility that solicitors will be left at a disadvantage if there is not a level playing field regarding regulation. The Guarantee Fund obligation is the prime example.</p>

Question 11*Do you have any comments about the proposals on PI/Master Policy?*

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 -9	Equivalence is again the issue. LPs must have (either through the Master Policy or through the insurance market) the same minimum levels of cover with the facility to "top up" to suit each LP's requirements. Self-insurance should be restricted to Central or Local Government.
Cons 10	-
Cons 11	Not interested
Cons 12	<p>MY understanding is that it is currently thought the Master Policy can be extended – at least to LPs that might be registered by the Society. What I am not clear about is how the profession might view this in circumstances where the global premium might be affected in some way by non solicitor owners acting dishonestly – the fidelity cover element.</p> <p>However the problem it seems to me around this might be different to that identified. The cover given by the Master Policy at the moment is very wide. The definition of legal services in the bill is narrower. That may not be a problem just now but if there is a run on the Master Policy and the insurers narrow their definition of what it covers to what is in the Bill would that not disadvantage the traditional profession?</p>
Cons 13	I suspect that the Master Policy is such a good deal that the proposed "investors" will be clamouring to join.
Cons 14	No – I have little confidence in the Society to formulate sensible rules and regulations
Cons 15	-
Cons 16	Again, we are a small country, and we may not have a Master Policy if the number of Solicitors insuring through it falls too low. It should be a requirement for all LPs just as it is for other Solicitors at present.

Source	Response/comment/issue
Cons 17	<p>Whatever the proposals are, do the Master Policy Insurers agree and will they permit such an extension of it?</p> <p>I consider it to be inappropriate for the consultation to contain a veiled threat that the policy may not be viable if the proposals are not accepted. If that is the case then it follows that it is the proposals overall that are jeopardising the existence of the master policy.</p> <p>It should be for such entities to obtain equivalent PI protection separately from the master policy.</p> <p>The current master policy covers all work which can reasonably be expected to be undertaken by Scottish solicitors. In effect, it almost follows that anything which is undertaken by a Scottish solicitor within reason is covered. To my knowledge, a question did arise in relation to football agency which was being undertaken by a solicitor. That was rejected on the 'reasonable' test. However if ABS are admitted to cover under the master policy, how much further and how many more restrictions will need to be placed on the scope of the policy? How much resource will be required to determine what activities of an ABS are covered under the master policy and at what stage would that be done? If it were to be decided after the event, then the blanket cover afforded under the master policy would be subject to possible restriction.</p>
Cons 18	<p>Really up to the PII providers to issue a statement on their position. Once this is known further comment may follow.</p>
Cons 19	<p>Yes. It is imperative, if a level playing field is to be maintained, that customers have the ultimate redress/protection afforded by the Guarantee Fund and that a comparable system, to the Law Society model is introduced in this regard.</p>

Source	Response/comment/issue
Cons 20	<p>Our response to this question should be noted in the context that, as a fully integrated firm across the UK, we do not in fact subscribe to the master policy as our PI cover is provided through the Solicitors' Regulation Authority.</p> <p>We agree that the starting principle should be that the clients of Licensed Legal Services Providers receive the same level of protection as clients of traditionally structured solicitor practices.</p> <p>In broad terms, the approach should be the same as currently applies. Many law firms already carry out a mixture of work that is reserved and unreserved. As law firms and individuals they are subject to regulation even though the unreserved activities can be carried out by competing and unregulated non-lawyer commercial organisations. It is hard to see why the level of PII should be any different because a law firm is operating as a Licensed Legal Services Provider and carrying out the same activities as before, reserved or unreserved. However, if a Licensed Legal Services Provider intends to carry out entirely new unreserved legal activities or non legal activities that could pose higher consumer risk it should be required to make that clear under the terms of its license. If necessary, the Regulator should be able to prescribe a higher level of PII to reflect additional risk to the consumer if the existing level is thought to be inadequate.</p> <p>While these comments are not necessarily inconsistent with the continuation of a Master Policy, we would add that we no longer consider the Master Policy arrangements to be appropriate, whether in relation to Licensed Legal Services Provider or otherwise. In England & Wales, the advantage of departure from the old SIF merger policy was that firms could be charged PII premiums according to their nature of work and level of risk, allowing for differentiation. One size did not and does not fit all in this area. That is true now and will remain true following the introduction of Licensed Legal Services Providers.</p> <p>While we recognise that one of the rating factors under the Master Policy is the claims record of the practice, we believe this does not go far enough and that the time has come to depart from the Master Policy.</p>
Cons 21	Agreed that if LPs are brought into existence, then they should be required to have at least equivalent PI cover to that offered by the Master Policy but not that LPs are to be covered under the Master Policy.
Cons 22	No
Cons 23	'No. I would guess, however, that LPs with high numbers of unqualified staff might find it very difficult to obtain insurance. As for LPs who are regulated by the Society, if the Master Policy ceases to be viable, that is yet another protection lost to the consumer.'

Source	Response/comment/issue
Cons 24	While it is essential that LPs are required to maintain insurance at minimum levels we consider it inappropriate to open up the master policy to them for the same reasons we give in relation to the Guarantee Fund.
Cons 25	This legislation, if it proceeds to be enacted, will have the effect of abolishing the master policy, along with an independent legal profession.
Cons 26	No comment
Cons 27	I agree that LPs should be required to utilise the Master Policy
AB 10	Will there need to be scoping or definition of "activities customarily carried out by Scottish solicitor"?
DF 9	Is the Master Policy continuing?

4. Other aspects of LP Regulatory Scheme

4.1. Extract from consultation paper

General

The draft regulatory scheme for LPs will be made of several components:

- Licensing rules – these will cover detailed aspects of the licensing process and are being developed.
- Practice rules - The practice rules will be based on, where possible, the Society's existing Rules and Regulations together with specific requirements included in the Bill. Examples of specific requirements are:
 - The Bill requires two new responsible roles within a LP. These are Head of Practice or a Practice Committee and Head of Legal Services.
 - An Annual Performance Report.
 - The requirements of Professional Indemnity
 - How to make and handle complaints about a LP
- Specific requirements such as how to reconcile differing sets of regulatory rules.

No changes for solicitors as individuals are envisaged as a result of the Bill. As you are aware, following three consultation exercises, the Society is in the process of implementing changes to the education and training framework. The Society will continue to set rules and regulations for entry to the profession and Continuing Professional Development.

New Roles

The Head of Legal Services has to be a solicitor but the Head of Practice /member of Practice Committee does not necessarily have to be. Their duties are set out in the Bill.

Annual Performance Report ("APR")

An APR will be required from LPs.

We have started to look at the possible contents of Annual Performance Report and some of these are set out below:

- Confirmation of compliance with LP Practice Rules and Regulations.
- Confirmation on whether the LP holds client money or not.
- Details of staffing – managers/principals/staff, structure and supervision.
- Details of outside investors.
- Data on compliance – Head of Legal Services, Head of Practice, Cash room partner, MLRO, Client Complaints Partner etc.
- Details of legal services turnover – most recent and forecast/budgeted.
- Details of capital adequacy/summary of balance sheets.
- Any issues with other regulators subject to any inter-regulator protocols.

“Shadow” Accounts Rules and Accounts Certificates would apply but it might be possible to wrap certain aspects into the APR or vice versa.

The APR would be required as part of the Practising Certificate renewal cycle and would be required by the end of August each year.

Funding of the Society

Fees are levied on members in respect of Practising Certificates, membership and/or retainer. There are also charges levied in respect of traineeships, admission to the roll, and registration as LLPs etc. In addition there are a number of broadly self funded activities such as The Journal, other publications and training/special interest events.

For LPs the Society would continue to levy fees on individual members. It would also look to recover from LPs any additional costs for the initial licensing of an LP, changes to practices during the year and annual compliance costs.

Costs incurred by the Society in becoming an approved LP regulator would be part of the basis for such LP fees.

The fees for LPs would be set out in the regulatory scheme and would be subject to review as part of the approval process of the Society as a regulator.

The level of fees for LPs might depend on the number of possible LPs.

Other issues

The Society has made some proposed amendments to the Bill to ensure for example that it will be able to levy fees on LPs.

The Society is investigating whether it will be able to offer the benefits of the Incidental Financial Business registration to LPs

It is the Society's objective to carry out its regulatory function in respect of LPs and solicitor practices (current practice model) in as an efficient and effective way as possible. The Society will continue to review the existing Rules, Regulations and Guidelines to ensure that regulation meets these objectives. Any proposed changes to the Rules and Regulations will be proposed in the normal way.

Consultation Paper

We asked the following question

4. *Do you have any comments on the development of the regulatory scheme for LPs?*
5. *Do you have any comments on the roles or appointment of Head of Practice/Practice Committee and Head of Legal Services?*
- 6 *Do you have questions/comments on the proposals about the Annual Performance Report? We asked the following question*
12. *Do you agree with the proposal on fees and do you have any other comments?*
14. *Do you have any other comments on the Bill, the introduction of LPs or the Regulatory Scheme?*

4.2. Responses

Question 4

Do you have any comments on the development of the regulatory scheme for LPs?

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 - 9	There must be a level playing field in terms of equivalent regulation, compliance, accounts rules, PI Cover and complaints handling, CPD etc.
Cons 10	-
Cons 11	Not interested
Cons 12	<p>I believe the key facet of the regime should be where possible to replicate what we have for the current profession. We should do that because what we have is respected and works I believe reasonably well.</p> <p>The challenge is that the Act will require an LP regulator to do certain different things – perhaps best highlighted by the Annual Report and assessment. That needs to be thought through very carefully because if there is to be a level playing field it is likely that Government may well invite an explanation as to how that measure might be introduced to the traditional business model – the performance review clearly goes beyond the current Accounts certificate regime</p>
Cons 13	The existing regulatory scheme for Scottish solicitors is sufficient and may be extended to cover minority non-solicitor partners or members in solicitors' practices.
Cons 14	No
Cons 15	-
Cons 16	We are not a populous country. We should have one regulatory regime and one regulator. This will ensure a level playing field, and prevent the costs of regulation spiralling out of control.

Source	Response/comment/issue
Cons 17	<p>It is impossible to comment effectively on the regulatory scheme provided which is at too high a level. The Society has considered methods of regulating non-solicitors within the context of law firms for over 20 years and has always concluded that whilst MDPs and ABS may be beneficial from the profession's point of view, the interests of the public would be detrimentally affected as it was not considered possible to devise a satisfactory regulatory scheme which would be capable of effective implementation. The current proposals make no change to that situation apart from having insufficient regard to the public interest.</p> <p>The proposals in the paper go no further than the generality of a structure which, I suggest, cannot be made operational in such a way as to be effective.</p> <p>This paper merely states the obvious and provides no answers.</p>
Cons 18	<p>This must be no less onerous than currently apply to current model for solicitors practices. By same token this is not to be taken as a reason to impose more regulation on the traditional solicitors firm e.g. KPIs, annual returns of complaints dealt with , claims settled etc.</p> <p>Extra regulation inevitably results in increased overhead which in time increases the costs for consumers or makes small firms (which are the most common Scottish model) uneconomic.</p> <p>However those who wish to provide a legal service in a non traditional manner may well be prepared to accept regulation over and above what the traditional solicitor has to face as a price of their being allowed to do business.</p> <p>Look at example of the conveyancing practitioners who are now inspected by Society but have different regulation from solicitors re e.g. client monies, but can also pay referral fees. There is precedent for different regulations to apply to different models.</p>
Cons 19	<p>Yes. If there is to be a level playing field then it would be expected that the Regulatory regime, governed by the Law Society, should be comparable to the present regime by which they regulate solicitors in Scotland.</p>

Source	Response/comment/issue
Cons 20	<p>Yes. We agree with the approach set out in section 3 of the Consultation Paper. We would add that we believe that regulators of the legal profession should behave in a manner that is proportionate, fair and reasonable, coupled with a clear understanding of the commercial drivers likely to influence practitioners as they face up to the most significant challenges and changes in the legal services market for generations.</p> <p>If regulators are to carry out their responsibilities in a flexible, professional and pragmatic manner, they should acquire a good understanding of the real issues facing the individuals, firms, and 'entities' subject to regulation. Indeed, the priority approach of legal regulators should be to convey to those whom it regulates that its principal aim is to assist them to 'get it right' in a manner that will encourage them to take advantage of the opportunities offered by the Bill rather than being restrained from development of their businesses by over-regulation that inhibits the provision of legal services to consumers.</p>
Cons 21	<p>In 2004, the Society reported to the Scottish Executive's Research Working Group that the difficulties of regulating LPs would be 'insurmountable' particularly with regard to potential conflict between the commercial interests of the owners and the professional duty of solicitors working in the firm to serve the interests of the client. Nothing has occurred in the intervening years to suggest that these difficulties can be overcome. The development of a regulatory scheme based on 'adherence to principles' might be considered out-of-touch with FSA requirements. The CML has recently called upon the Solicitors Regulation Authority in England & Wales to adopt a tighter and more intrusive style of regulation than the principle-based approach, and has threatened to scale down existing panels if lenders cannot regain confidence in the effective regulation of the legal profession. The Law Society of Scotland should be championing the effective regulation of Scottish Solicitors and should not seek to develop new and largely untested regulatory schemes.</p>

Source	Response/comment/issue
Cons 22	<p>As a generalisation the Bill is permissive and requires a regulator applicant to demonstrate how it will meet regulatory policy at the point of application. We support this approach as it provides flexibility and allows regulatory 'best practice' to evolve.</p> <p>However, it also means that the primary legislation is quite skeletal and it is difficult now to get a picture of the 'look and feel' of the ultimate solution and so what levels of cost and processes a LP may have to incur.</p> <p>We support keeping it simple. At its heart the Bill does not and should not directly affect how Scottish solicitors are regulated as individuals (i.e. through practicing certificates).</p> <p>Consequently the regime is about requiring at an entity level that the LP ensures that it is organised and managed in a way which supports the ability and requirement of its solicitors to conform to their individual commitments, codes of conduct, ethics etc. An LP should be obliged to ensure that the solicitor services it provides comply in all respects with the commitments of an individual Scottish solicitor. It is therefore an additional systemic commitment at an organisational level that individuals will conform to existing and evolving 'solicitor' commitments.</p>
Cons 23	<p>See above. [Response to Q3] The proposals are those of another time (Blairite Britain prior to the collapse of Lehman Bros).</p>
Cons 24	<p>We think it would have been much better for the detail of the regulatory scheme to have been fleshed out and detailed prior to the Bill reaching the stage it has.</p> <p>At the moment, it appears the Law Society is still in the very early stages of considering what a regulatory regime should look like and beyond setting out some basic principles the Scottish Government does not seem too interested in the end product, at this stage. Asking Parliament, against that background, to make decisions that will have far reaching consequences for the provision of legal services in Scotland is somewhat irrational.</p> <p>An opportunity will be lost in our view to go far in sorting several important issues regarding the provision of legal services in Scotland:</p> <ul style="list-style-type: none"> ▪ access to justice in the areas of law that lawyers cannot provide on an economic basis; ▪ enabling those who are not sophisticated and frequent users of lawyers to become better informed consumers.

Source	Response/comment/issue
Cons 24 cont'd	<p>There is nothing in the Bill or the proposed regulatory framework that seeks to address these fundamental issues (which would properly address the Which? complaint) nor does the Bill seriously consider clients' interests (as opposed to the interests of certain law firms).</p> <p>Instead we have been left with a Bill that is being pushed through because the debate has been dominated by a view that Scottish firms with English offices will somehow suffer in the race to raise external capital - dressed up as "modernising". That seems to us to ignore the client perspective. MDPs controlled by non-lawyers have, in the legal context, been tested and found wanting, and clients, both domestic and overseas investors, who are used to independent lawyers must be certain of robust legal solutions - and lawyers who deal with lawyers across the world with the same perspective. Legal services have always been available on the high street throughout Scotland and it is very hard to see how mass consolidation, should that be one unforeseen consequence, would maintain that position.</p>
Cons 25	<p>It would lead to a regulatory mess, increasing costs and reducing productivity for all but the largest UK firms which are already regulated by SRA, and who have stated to Parliament their preference to choose to have one regulator for all UK activities. The Law Society Council by its own actions and policy may implode as the large providers will choose to be regulated by SRA and the smaller firms may cease to exist. The Crown Office do not need practising certificates and the ILG are also exempt from the reserved areas. The Council is not at present attempting to regulate Which? or the Co-op in their provision of legal services in Scotland.</p>
Cons 26	<p>No real comment – except that I believe that regulation of these new entities will be extremely difficult to manage.</p> <p>On a practical note, the Society should have a staged approach to the regulation of these entities. MDPs should be regulated first and only after that is working well should external ownership be brought in.</p>
Cons 27	<p>Any proposed structures should be consulted on. Careful consideration as to what are required of non solicitor owners within a MDP model in respect of standards etc. e.g. they should be a member of another recognised professional body.</p>
ED 7	<p>Will the first time the scheme is tested be when it fails like the FSA?</p>
DF 5	<p>Do we see the need for extra regulation of LPs over "traditional firms" to ensure they can't supply legal work "on the cheap".?</p>
DF 6	<p>How do we ensure level playing fields for all the regulators? There might be "hundreds"</p>
DN 2A	<p>Will approved regulators apply the same rules as for existing firms to LPs</p>

Source	Response/comment/issue
DN 2B	Are we just increasing the opportunity for regulation?
GS 11	Should the LS slacken its own standards
GS 13	I'm concerned that we would see the culture of the FSA come into the legal profession in Scotland – will this act mean that we adopt the FSA regulatory model?
IN 2	What would happen if members reject the proposed Regulatory Scheme
IN 7	Would LPs try to employ cheaper staff?
FB 3	Can the high street firms be assured that new service providers will be subject to the same level of burden of regulation both in terms of cost and administration and severity of penalties as we are? If not, why not?
FB 10	Regulators in competition with our Law Society... they are just going to crib all the Society's Regulations (from the Society Website). I presume that the Society does not need the OK from the Scottish Ministers to continue as Regulator. Who in the Scottish Ministers would know better than the Law Society how to regulate LP's? Has the Society considered that it has material of value in it's Regulations? I asked a question "Why is there not a Schedule to the Act setting forth the Regulations?"... I meant a model set of regulations. OK, it would end up something like the Companies Acts, I agree. But why, oh why should the Law Society not get the benefit from all the thought, experience and work over the years put into their regulatory structures... all such as no doubt will be the yardstick for the acceptance by the Scottish Ministers in any event of another Regulator's framework? Is there copyright?
FB 31	Solicitors are heavily regulated in relation to standards, practice, advertising etc. Unless all other licensed providers are equally regulated then the 'playing field' will not be level
FB 40	What is the extent of the reach of the Law Society as a regulator? Could this potentially include businesses with a majority of non-lawyer employees and/or non-lawyer ownership? What other regulators could operate in this space?
FB 42	What is to prevent a firm of Solicitors in a small town in Scotland forming an ABS with the only firm of Surveyors in that town so as to obtain an unfair market advantage over any other Solicitors in that town?
FB 44	More of a comment than a question but the issue of regulation remains a concern - the banking sector was supposed to be regulated and look what happened there.

Question 5

Do you have any comments on the roles or appointment of Head of Practice/Practice Committee and/or Head of Legal Services?

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 - 9	There would need to be equivalent roles to ensure that client money, complaints and anti-money laundering controls were in place.
Cons 10	-
Cons 11	Not interested
Cons 12	<p>These should be minimal additional requirements to those in the Act and I personally wonder if in terms of the individual CPD requirement we should look at some requirement to demonstrate continuing commitment to learning about management and keeping up to date with rules and ethics – I am not talking about full revalidation but there should not be an assumption that having been found fit to be a Head of Practice that there is an assumption that the person is fit in all time coming – perhaps that could be tested in some way in the performance assessment every three years.</p> <p>So far as Head of Practice is concerned, I think that this is more difficult because the person does not have to be a solicitor (in many instances may not be) and therefore the consideration needs to be around what qualifications you would need to fulfil this role understanding the incumbent duties. I believe there is an underlying suggestion at least that the person has some sort of professional qualification.</p> <p>I think there is also a need when looking at these two roles to consider where the traditional roles of Client Relations Partner and Designated Cash Room Partner might fit in. I would suggest that the role of Money Laundering Reporting Officer probably falls as part of the Head of Practice Role and would need to be specified.</p>
Cons 13	The Society has already created too many Pooh-Baas within existing practices. There is a danger of diffusing the responsibility which each individual solicitor has, and should feel, in respect of proper practice. As a sole practitioner I have long ceased to be amused by being addressed in my multiple roles as if I were some form of chameleon.
Cons 14	No
Cons 15	-

Source	Response/comment/issue
Cons 16	<p>I understand it is envisaged individual Solicitors will still be regulated by the Society. The Head of Practice/Committee must be also, or they may be working to a different regulatory regime. This would create a conflict between the regulations the individual must follow and those to be followed by the organisation.</p>
Cons 17	<p>The creation of a Head of Service per se does not provide sufficient detail as to how he/she will be able to function in the face of competing or conflicting priorities between the interests of the clients and the non-solicitor owners or shareholders. At present, if a solicitor comes under such pressure from his/her partners/colleagues, they are jointly and severally answerable to LSS regulation and are required to comply with such codes and standards as set out. Ultimately the sanction is that they can lose their practising certificate and consequently their livelihood. Shareholders will only lose their ability to invest in ABS, which is unlikely to be their livelihood.</p> <p>Would the joint and several liability of all solicitors within the entity be maintained? This is not clear from the consultation paper. What ultimate sanction can be visited upon a non-solicitor under the proposals?</p>
Cons 18	<p>I suggest that they have to be solicitors of at least 3 yrs unrestricted practicing certificates (just as you have to have to be a sole trader at present). There is a concern though that with LPs that the head will be a sacrificial lamb should anything go wrong with the LP promising to perform better under the new LP. See football club managers as an example of entities sacking the head coach to re assure their market. Likewise look to example from transport industry where the CPC holder may no be the owner but takes the fall if there is an issue whilst the owner carries on as before with a new CPC holder. How many times will the owner be allowed to replace the head before there is deemed to be a systemic failure in the LP requiring it to close down. If that LP is a large organisation will in fact that ever happen.</p>

Source	Response/comment/issue
Cons 19	<p>Yes. It is accepted that it is appropriate to set up comparable rules, and accountabilities, relating to cash room practices, client relationships, and money laundering and that the roles of the Head of Practice/Practice Committee and/or Head of Legal Services should be extended to meet these duties. However, the Law Society may wish to consider whether these duties should be applicable, mainly or partly, to the Head of Legal Services taking into account whether, in so doing, that post may have more onerous accountabilities than the comparable Law Society model.</p> <p>It is also suggested that further criteria be adopted for the Head of Legal Services including the following-</p> <ol style="list-style-type: none"> 1. That they should hold an unrestricted practice certificate. 2. That they should have been fully qualified for a certain specified minimum period. For example, 5 years. 3. That they should have undertaken some Practice Management training as accredited by the Law Society. 4. That they should not have been the subject of any disciplinary action, or penalty, imposed by the Law Society Disciplinary Tribunal. <p>If these criteria are adopted it should ensure that the Head of Legal Services is a suitably experienced, trained, and fit and proper person for that post.</p>
Cons 20	<p>We agree with the approach taken in sections 38 – 40 of the Bill. The most important point in relation to these roles is that the individuals have the appropriate accountability and responsibility.</p> <p>The roles of the Head of Practice and Head of Legal Services will clearly be crucial in ensuring that accountability for practice standards, regulatory matters and financial requirements are firmly placed on the shoulders of suitable individuals who may be more focused on risk than their equivalents responsible for similar tasks in the traditional model firm. We would refer to the Australian example of the stock exchange listed law firm where the positive approach of the regulator together with the requirements of Australian company law and stock exchange regulations combine to ensure protection for the consumer that is as good as, if not better than, the traditional model law firm.</p> <p>Finally, we would add that we believe the licensing regime which governs Licensed Legal Service Providers must be applied consistently, ensuring a level playing field by adopting the same standards as apply to traditionally structured solicitor practices.</p>

Source	Response/comment/issue
Cons 21	I question whether a Head of Legal Practice/Practice Committee and/or Head of Legal Services (whether or not a solicitor) can truly offer an independent view if he/she/they are controlled or influenced by a non-lawyer external investor.
Cons 22	No
Cons 23	<p>I would like to see a high threshold for the appointment of the Head of Legal Services, such as the formulation used for judicial appointments: 10years experience as a principal in private practice, for instance.</p> <p>Any Head of Practice who is not a solicitor or advocate should be required to take an oath or affirmation before a Sheriff or before an independent (i.e. unrelated) Notary Public appointed for that purpose by the Council of the Law Society of Scotland, or other regulator, that the Head of Practice undertakes to uphold (a), (b) and (c) of the Professional Principles set out in s 2 of the Bill. Since all witnesses in court are required to do this to bring home to them the seriousness of their task, I do not think that it is too much to ask a non-lawyer Head of a Legal Practice to do the same.</p>
Cons 24	<p>Every individual solicitor under the Code of Conduct is responsible for acting in the client's best interest, not acting in a conflict situation and complying with ethical and professional standards. Each Principal in a law firm is responsible for compliance with the Accounts Rules etc. The consequences of non-compliance to an individual solicitor can be the loss of the right to practise as a solicitor. The proposals dilute this protection for the consumer and the public by a significant degree on the basis that one individual or a small group of individuals alone may be held responsible for failures in an organisation. The equivalent of a board of directors in an ABS should also be held to account with appropriate sanction in relation to its business as well as in relation to the individuals responsible.</p> <p>To leave such important matters to two individuals is a retrograde step in regulatory terms and one that will create regulatory risk rather than manage it.</p>
Cons 25	This is not the question posed as 5 in the body of the text. The answer is NO
Cons 26	No comment
Cons 27	Must be a solicitor with a required number of years post qualifying experience e.g. 3 years

Question 6*Do you have any comments on the proposals about the Annual Performance Report?*

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 - 9	APRs would be both essential and useful. Given the need for equivalence it seems likely that the same regime would have to be extended to traditional non LP entities.
Cons 10	-
Cons 11	Not interested
Cons 12	<p>If we believe that there is to be a level playing field, than I think this issue is fraught with challenges because in reality form traditional business we collect very little information.</p> <p>The list in the consultation document is interesting and valuable but can I suggest that the best way of looking at this is to consider what as a regulator we need :-</p> <ul style="list-style-type: none"> • Declaration about compliance with Practice Rules • Declaration confirming compliance with accounts rules • Data on owners and those who fill key posts <p>The issue that then arises is what would add value to the role of a regulator and clearly the obvious information relates to the financial state of the business.</p> <p>The challenge is that we do not currently ask for that information and I think in terms of the level playing field argument there is a clear issue around what we would do in the future for traditional practices</p> <p>We also need to be clear in terms of whether the data we collect is for information or potential action</p>
Cons 13	This is yet another piece of box ticking bureaucracy to which “regulators” seem addicted. No, it is neither necessary nor desirable.
Cons 14	No
Cons 15	-
Cons 16	Why not restructure the requirements? The existing rules (eg accounts rules and certificates, report of who is Cashroom Partner, MLRO, etc) to apply, just as they do to all Solicitors firms at present, and specify additional rules to apply to LPs only (such as details of outside investors).

Source	Response/comment/issue
Cons 17	<p>The exact nature and purpose of the APR is not clear. What specific benefits are to be gained from such a report? If it is of benefit in the context of ABS, why does such a system not operate currently?</p>
Cons 18	<p>Yes this should be imposed on LPs but not on the traditional solicitor practices. There does not need to be a level playing field. There is not one at moment between solicitors and conveyancing practitioners (2 firms in Scotland)</p> <p>An APR for many smaller firms would be unnecessarily expensive in terms of resources required to complete the information. Also who is going to check all these to see that they are accurate or will firms be allowed to self certify. One wonders how accurate many of the accounts rules certificates currently submitted by firms are particularly when inspections can be 3 yrs apart and the submitting parties know that.</p>
Cons 19	<p>Yes. It is submitted that there should be clearer rules, or a clearer explanation, within the legislation, in relation to the applicable penalties if a LP fails to submit an APR by the specified deadline or within such other period as is appropriate in the circumstances. The Legislation should also provide flexibility about the deadline for submission of the APR giving the LPs the opportunity to apply for an extension of same if certain criteria are met e.g. the illness, absence, or termination of the Head of Legal Services/Head of Practice.</p> <p>It is also submitted that standard financial criteria is applied in relation to the provision of forecasted, or budgeted, turnover so that consistency is maintained across the Regulated LPs.</p>
Cons 20	<p>Yes. We believe the Annual Performance Report is an excellent idea. The importance of compliance with the Practice Rules and Regulations and issues such as capital adequacy and proper forecasting of turnover cannot be overstated. However, we would recommend that the provisions which have been described at page 6 of the Consultation Paper are extended to all providers of legal services, including traditionally structured solicitor practices. The proposed content of the Annual Performance Report described in section 3.2.2 of the Consultation Paper includes a number of requirements which are basic to the successful management of any organisation, whether a Licensed Legal Service Provider or not.</p> <p>In addition to protecting the consumer interest by ensuring that all providers of legal services (and not merely Licensed Legal Service Providers) are subject to rigorous regulatory requirements, particularly in the areas of solvency and sustainability, such a move would ensure a level playing field between the various different business models.</p> <p>The aim should be to ensure that an ABS (whatever its lawyer/non lawyer balance) is neither more tightly nor more loosely regulated than the other models that are part of the competition for legal services.</p>

Source	Response/comment/issue
Cons 21	No
Cons 22	No
Cons 23	No
Cons 24	No
Cons 25	It should be not less than the standard currently demanded of law firms.
Cons 26	No comment
Cons 27	I see this as a development of the existing accounts certificate expanded out. As regulator the Society would be entitled to inspect firms and the APR could be used to identify issues which may give cause for inspections.

Question 12*Do you agree with the proposal on fees and do you have any other comments?*

Source	Response/comment/issue
Cons 1	-
Cons 2	-
Cons 3	-
Cons 4 - 9	Individual fees should continue and LPs should bear their own particular costs for initial licensing and regulation over and above the equivalent costs for non LP entities.
Cons 10	-
Cons 11	Not interested
Cons 12	<p>As a matter of principle the activities of the Society as an ABS regulator must be funded by ABS. There can be no suggestion of nay subsidy form PC fees.</p> <p>IN my view that will present a significant challenge in the early days where there may be few ABS and I think it presents an internal challenge for the Society in ensuring the time spent on ABS regulatory activities and the associated costs are in some way identified separately.</p> <p>Whilst there may be issues around the current legislation in terms of the Society's ability to look at charging entity fees to the traditional profession, one change that has to be effected and is relevant is the removal of the cost of the Financial Compliance regime from the Guarantee Fund subscription into the ordinary subscription.</p> <p>This is logical because the Guarantee Fund is about paying compensation and not supporting a regime designed to ensure compliance with the rules</p>
Cons 13	No comment
Cons 14	No – I have little confidence in the Society to formulate sensible rules and regulations
Cons 15	-
Cons 16	Yes, though I repeat my view that the Society should be the Regulator of all LPs as well as all individual Solicitors.
Cons 17	Any and all costs of establishing any regulatory scheme and the administration must be recovered in full from LPs at all stages. The Society should not incur any expenditure. However the Society should not be involved in the regulation of ABS and should concentrate on the profession as it stands to ensure that it is best placed to meet the competition from other providers.

Source	Response/comment/issue
Cons 18	Yes
Cons 19	<p>Whilst the general principal is understood, and accepted, the overriding concern, in connection with fees, is whether there will be a high ratio of Regulators in comparison to the number of LPs. If so, then the level of fees may be unduly onerous. If so then the overriding purpose of the legislation, namely access to justice, may be affected because potential LPs are discouraged by the cost of Regulation.</p>
Cons 20	<p>Again our starting position is that the same rules and levies should apply to Licensed Legal Services Providers as apply to traditionally structured solicitor practices.</p> <p>We accept that a Licensed Legal Services Provider should be required to make payment of application fees as part of the initial process of becoming licensed. However, we do not accept that the costs of the Society becoming an approved regulator of Licensed Legal Services Providers should be borne only by Licensed Legal Services Providers in the future. If the Society is to regulate both</p> <p>traditional practices and new forms of providers of legal services, it should seek to do so evenly without allocating costs so directly between the different forms of entity. To look at matters another way, should a traditionally structured solicitor practice fail in the future (perhaps because of the absence of a capital adequacy requirement if that is not introduced), we would not anticipate that the associated costs would be borne only by traditionally structured practices. The approach in all circumstances, including in the levying of fees, should be that all providers of legal services are treated equally.</p>
Cons 21	<p>The set-up and ongoing costs of any approved LP regulator should be met by those entities which would seek to be regulated. Over the years of its existence, the Law Society of Scotland has built up a tremendous institutional memory and resource in terms of its regulatory function. This has been brought about largely by the voluntary goodwill of members. The Law Society should not squander this resource by seeking to regulate non-solicitors.</p>
Cons 22	<p>Yes in principle. We reserve our position as we have no feel yet for the likely scale and whether the set up costs will be prohibitive.</p> <p>We support an incremental approach to the introduction and regulation of LPs. It should be as aligned as possible with the regulation of individual practitioners. This will help ensure a level playing field but also by allowing the regulation to be 'more of the same' it should allow additional costs, if any, to build incrementally.</p>
Cons 23	No comment
Cons 24	All costs arising from being a regulated LP should be borne by an LP

Source	Response/comment/issue
Cons 25	The solicitors' profession should not be expected to fund the cost of this project, nor to subsidise the costs of developing or maintaining the regulation of non-solicitors.
Cons 26	The assessment of fees for one of these new entities will, I think be difficult to manage. The Society will have to be scrupulously careful that all of the costs of regulating these new structures will be met by the structures themselves and not by the profession in any form.
Cons 27	I agree
AB1	Concern raised about the fee basis of the ABS regulator
GS 10	If LS is not approved as a regulator, does it have a plan for a different fee structure? (for individuals and for entities?)
FB 3	Can the high street firms be assured that new service providers will be subject to the same level of burden of regulation both in terms of cost and administration and severity of penalties as we are? If not, why not?
FB 42	Should only one ABS be formed in Scotland, would that ABS have to meet all of the regulatory costs? What are the projected annual regulatory costs?
FB 43	The regulatory framework and the additional resource and costs this will entail.

Question 14

Do you have any other comments on the Bill, the introduction of LPs or the Regulatory Scheme?

In addition to responses to the amount question, there were a number of general issues raised and for the sake of completeness these have been included here

Source	Response/comment/issue
Cons 1	Generally unhappy
Cons 2	Generally unhappy
Cons 3	Generally unhappy
Cons 4 - 9	Depending on the responses from the profession and the attitude of Government it may be necessary to step back from a "big bang" approach to LPs and to consider a more stepped and transitional regime with either restrictions on the level of "control" which passes to non-solicitors under the proposed changes. The profession might be happier with majority ownership always being vested in solicitors and/or with the non-solicitor owners being restricted to other "professionals" who are actively engaged in the business of the LP.
Cons 10	Generally unhappy
Cons 11	The Bill is weakly drafted and is versed entirely in favour of the "consumer" instead of the interests of justice. It is the product of a Government focussed on the voter rather than on the intrinsic values of a robust and independent legal system. It is the beginning of the end for the integrity of the Scottish legal profession, and the Law Society hasn't seen it coming
Cons 12	<p>I think there is a need for understanding that the first attempt at the scheme will be just that and that it will evolve over time.</p> <p>I remain concerned at differences there might be between the regulation of current firms and LPs and I personally believe that sooner rather than later we should move to the same model for traditional firms – it is not more regulation – it should be seen as better, more effective and proportionate regulation.</p>

Source	Response/comment/issue
Cons 13	<p>The arrival of the Bill is a consequence of the profession's craven response to the exertions of consumerists who are devoted to an ideology which does not recognise professional standards and the pre-eminence of the interests of the client. The consumer lobby is not able to make a proper assessment of these matters because they do not perceive the nature of the professional relationship between solicitor and client. The word "consumer" itself betrays this failure.</p> <p>All that follows is merely rolling further down the path of destruction of the requisite professional ethos and is to be deplored.</p> <p>I do not wish to support a Law Society which has prostituted itself to become a mere regulator of any service which deals in areas related to the practice of law which is prepared to pay the fees.</p> <p>How does such a Society propose to maintain any position of representing the solicitor profession's interests when it is providing a regulatory service to those dedicated to competing against solicitors?</p>
Cons 14	<p>My main concern is to get over the strongly held view that the Society should no longer have any representative role whatsoever and should become the sole and pure regulator and nothing else</p>
Cons 15	<p>The Society has overstretched itself here</p>
Cons 16	<p>We must only have one regulator to ensure a level playing field, to keep costs under control, and to stop the whole regime becoming over complex for a country with less than 6 million people. The government will regulate the regulator(s)- why not have 2 governments to do this? Why not an infinite number? Or is that anarchy?!</p>

Source	Response/comment/issue
Cons 17	<p>After SCESB was established in 1990 by the government to open the legal services market to licensed practitioners, the Society cooperated in the formulation of a regulatory structure. Ultimately the fate of the Board was that in view of the lack of consumer demand for licensed practitioners, the regulation was passed to the Society. There is no reason why the same approach to ASB should not be taken. This would result in an additional source of legal service providers for the consumer, the success or failure of which would depend on the competition which would emerge between solicitors as an established profession and other providers of legal services.</p> <p>If the government wishes to introduce an additional 'profession' for the provision of legal services, that is a matter for the government. The aims, objectives and responsibilities of the Society are in relation to the solicitors' profession. There is and always has been a benefit to the solicitor brand in Scotland and it behoves the Society to maintain that brand and not to allow it to be diluted by the introduction of external influences through ownership or part ownership.</p> <p>The fact is that for at least the past 10 years, a sizeable proportion of the work done by many firms of solicitors does not require a practising certificate. Why have such firms maintained the full complement of practising certificates? Why have they not hived off the non-legal services and operated them separately while retaining ownership and responsibility? This is because they value the brand of solicitor as it exists, but that comes at a cost.</p> <p>It is to their benefit for them to remain as they are and to seek to cause the Society to devalue that brand while retaining the impression that it will be unaffected.</p> <p>They wish to obtain all the benefits as established over the last 60 years by the Society and the attendant standards.</p> <p>If the purpose of the legislation is to open up the market then why should the government allow the Society to be a regulator of other forms of legal service provider? If the Society were to be the only regulator, the market would not be opened up.</p> <p>The Society currently enjoys a head start on any other regulator and resources should be directed at enhancing the profession and capitalising on its position.</p> <p>As was seen in 1990 with the establishment of SCESB, in the last analysis, there was in fact no demand for the services provided. Why should the position be different now?</p> <p>I accept that this approach may result in a diminution of the number of practising solicitors if those firms who wish to operate in England feel that they cannot operate in Scotland, but the scale of the Society can be adjusted accordingly. The Law Society of Northern Ireland manages to regulate and make necessary provision for its profession which is considerably smaller than 10500.</p>

Source	Response/comment/issue
Cons 18	<p>As I understand it there is a proposal to allow firms /LPs to share commissions, accept referral fees etc. This should continue to be resisted. As I see this the big commercial concerns such as banks , insurance co's , supermarkets etc will most likely enter the legal services market by front ending the provision of service but actually subcontracting the work to others on a full indemnity basis (just like they sell TVs). They will then take a referral fee from a legal services factory who will then provide the service for a smaller and smaller fee until they go bust and the next new man on the block steps forward to try his more efficient processing hand.(its what they do with farmers!) See the reports on Tesco re entry to estate agency market in England! Look at the Virgin Group . Is it not now a private company? I seem to recall that some of their business methods have come in for criticism. M &S likewise (regarded as v good by consumer but ask their suppliers about margin squeeze)</p> <p>By preventing the sharing of fees that will mean the commercial providers either have to have their own fully funded service with full regulatory compliance or not take part .</p>
Cons 19	No
Cons 20	Not at this stage
Cons 21	<p>In 2004, the Society could see no circumstances in which the ownership and control of law firms by non-lawyers could be permitted without surrendering the prime objectives of maintaining the independence of the legal profession and public protection. The Legal Services Bill neither brings about nor follows any change in circumstances. Rather, the recent collapse of the financial services/banking industries serves as a salutary reminder that the regulatory regime should be restrictive rather than permissive.</p>
Cons 22	No

Source	Response/comment/issue
Cons 23	<p>I think the Bill:</p> <ul style="list-style-type: none"> (a) is wholly misconceived, being, as it is, based on a Blairite philosophy that “shareholder value” is the be-all and end-all and that certain people (lawyers and bankers) are entitled to exceptions from general legal principles applicable to everyone else; (b) will remove many of the protections for the consumer that the present consumer has which are unrivalled throughout the world; (c) will lead to an increase in unnecessary and ineffectual red tape; (d) will make it increasingly difficult for citizens, particularly outwith the central belt and Aberdeen to obtain affordable legal advice from a suitably trained professional; (e) depending on the detail of the final form, the Bill could make large companies more difficult to sue; (f) leaves Scotland one of the few jurisdictions in Europe that will not comply with Art 2 of the CCBE Charter of Core Principles of the European Legal Profession and Code of Conduct for European lawyers on independence; (g) will damage the reputation of Scots law, the Scottish legal system and Scots lawyers in Europe and beyond; (h) will undermine the rule of law, despite the terms of s 2; (i) Is not actually attractive to outside investors (who, as I understand the Bill, must be natural persons); and, as a result, (j) is unlikely to lead to any real changes, rendering the entire process a scandalous waste of time, money and effort on the part of all concerned which should have been focussed on representing those at the margins of society who need professional legal advice but cannot afford it. <p>All of my comments provided above are provided subject to the points I make in this final paragraph. The comments I have provided, however, assume that the Scottish Government moves the Bill in the face of my comments in this final paragraph. I consider my other responses to be the types of running repairs that will be necessary for a profession and a legal system which the Bill proposes to hole below the waterline.</p>

Source	Response/comment/issue
Cons 24	<p>We are repeating here our main objections to the Bill as set out in our response to the Scottish Government.</p> <p>We support the general proposition that there needs to be a balance between the interests of consumers and the interests of the legal profession. This applies to any market for the provision of services. If the balance is in favour of the legal profession to the detriment of consumers then there does indeed need to be change. We accept the need for regulation (and indeed change where appropriate) to ensure quality and standards and the need for sufficient competition in the market place for legal services. As a business we, like many law firms, are constantly changing to meet the needs of our clients and remain competitive. However, we question proposals which may come at significant cost and, we believe, may cause confusion for consumers of legal services.</p> <p>We have several objections to the proposals relating to ABS:</p> <ul style="list-style-type: none"> ▪ the risks that ABS pose to the continuation of an independent legal profession in Scotland; ▪ accepting that there are issues of concern (surrounding access and informed consumers) in relation to the provision of legal services in Scotland, these will not be solved by the introduction of ABS; ▪ the absence of any empirical data to support the suppositions that ABS will result in increased competition and greater choice for the consumer at a cheaper price; <p>the lack of any cost/benefit analysis in relation to the introduction of a new tiered regulatory system and proper exploration of other methods of promoting the consumer's interest which do not carry as much risk as the introduction of ABS.</p> <p>The proposals set out in the Consultation Paper proceed on the basis that the introduction of ABS for law firms is the appropriate tool for ensuring a balancing of interests between the consumer and the legal profession and achieving greater competition. This conclusion has been reached, in our view, in the absence of any empirical data/evidence that demonstrates that ABS will achieve what is heralded for them in terms of cheaper legal services for consumers and better access to growth funding for legal services providers. It is not a foregone conclusion that ABS will improve competition or provide cheaper services. We believe that some form of impact assessment and testing of assumptions does require to be undertaken to properly assess the competition and pricing impact of ABS.</p>

Source	Response/comment/issue
<p>Cons 24 Cont'd</p>	<p>Evidence already submitted to the Justice 1 Committee makes it clear that markets can become inefficient as a result of structural reasons. It is often suggested that legal markets suffer from structural inefficiencies because consumers do not have the knowledge to make sound judgements about the quality of services and price (and the relationship between both) being provided by various suppliers. We consider the issue of the “informed consumer” (together with access to justice) to be the main problem with the provision of legal services in Scotland (and not the purported inability to raise external capital or innovate). It is not a problem that will be solved by the introduction of ABS or an increase in the number of legal service providers. We believe that better regulation (particularly in the area of transparent information provision) can tackle this issue better than reform of business structures.</p> <p>It is not the case, as assumed by the Which? Report and the OFT, that regulations governing business structures automatically impede competition. The EU in its February 2004 Report on Competition in Professional Services simply stated that distortion of competition might be an outcome of restrictions; not that one necessarily follows the other. The EU, however, does permit restrictions where they pursue a clearly articulated and legitimate public interest objective. Our contention is that restrictions on ABS do pursue such an objective; the independence of the legal profession in Scotland which underpins the rule of law in Scotland and the consequent confidence in investors in our economy.</p> <p>The OFT considered it unnecessary to conduct a market study of the legal services sector in Scotland. The Report by the Research Working Group on the Legal Services Market in Scotland found relatively high levels of competition in commercial law, financial services/tax advice and residential property conveyancing (and this has probably now increased further given the current economic climate). Markets with relatively low levels of competition included the market for executry work, family law, welfare/debt/housing law and consumer law.</p> <p>The reason for the relatively low levels of competition in these areas, we contend, is not the result of restrictions on business structures nor will it be cured by the introduction of ABS. Poor provision of legal services in these areas flows from issues of affordability for consumers who require these services, the consequent difficulties in running a business where there is a large differential between cost and value to the consumer and, in some cases, inherent difficulties surrounding location of consumers. This should be of real concern to all in Scotland. Legal services will only be of benefit to the consumers in these particular consumer groups if they are both affordable and provided locally. There is a very large assumption in the proposals that ABS will enter the market bringing with them more efficient systems which will automatically mean cheaper pricing and access for all with sufficient consumer protection.</p>

Source	Response/comment/issue
<p>Cons 24 Cont'd</p>	<p>However, there is insufficient evidence to support assumptions that (a) ABS are more economically efficient suppliers of legal services and (b) their introduction will result in an outcome of better informed consumers of legal services who can buy services more cheaply, when and where they are needed. We feel strongly that different solutions must be found to these problems if they are to be properly addressed for the benefit of consumers in Scotland.</p> <p>The Scottish Government's Economic Strategy sets ambitious targets for increasing sustainable economic growth. It must be the case that the providers of legal services continue to contribute to economic growth and to continue to be (as a group) a significant employer in Scotland. However, the legal services sector does need to be regulated to ensure that economic and social benefits apply to all in the Scottish economy and not just the lawyers within it. We believe that better regulation of the legal profession in Scotland will help lawyers in Scotland contribute more to the economic success of Scotland, will provide greater consumer protection and choice, improve access to justice and legal services and, importantly, help create better informed consumers. We believe that pursuing a strategy of better regulation is more likely to achieve these objectives than the introduction of ABS which carries significant risk to the continued independence of the legal profession in Scotland.</p> <p>Better regulation can:</p> <ul style="list-style-type: none"> ▪ bring real improvements to standards and quality and improve confidence in the legal sector. Something akin to independent oversight of the regulation of solicitors could address many of the issues raised by the OFT and the Consultation Paper. For example, subject to appropriate costing analysis, consideration might be given to a model that is akin to the Professional Oversight Board for auditors, actuaries and accountants; ▪ create better informed consumers. We believe it is accepted that sophisticated and repeat users of legal services are not the consumer group that causes the OFT most concern. It is the consumer who has infrequent need of legal services who often finds the process unsatisfactory. We are supportive of a regulatory system that has greater teeth in relation to the upholding of standards and the provision of information to consumers about costs of legal services. This should be done pro-actively and not in response to complaints. It is not lack of choice, we believe, that prejudices the consumer but a lack of knowledge about procurement of legal services and the process. Greater powers might be given to the Auditor of Court (or some other body) in resolving fee disputes and levels of payment for inadequate service. Regulation can look at how to create more informed consumers rather than simply creating a confusing plethora of options for the consumer.

Source	Response/comment/issue
<p>Cons 24 Cont'd</p>	<ul style="list-style-type: none"> ▪ allow solicitors to access capital. There are several models of external funding that do not involve controlling or direct economic interests. Painful and highly costly lessons learned in other sectors (such as the change in the delivery of investment banking services) do need to be considered carefully. Restrictions on referral fees could also be looked at so that legal services can be provided more simply in certain legal markets. Relaxation of rules could mean solicitors could join with sophisticated purchasers of legal services such as banks to provide legal services to specific consumer groups (without the need for either entity to change structurally) without the risks associated with external controlling influences. . ▪ encourage local high street services. A relaxation of some restrictions could allow solicitors to share “office” costs. For example, a solicitor could enter into joint employment arrangements, tenancy arrangements and mitigate other “practice” costs without the need to alter its business structure while at the same time retaining control over the delivery of legal services. <p>Such approaches we believe can address the problems posed by the OFT and not adversely impact upon the public interest requirement of maintaining the rule of law in Scotland and economic and personal freedom in society.</p> <p>Underpinning the rule of law is the independence of the legal profession. It is our contention that ABS will, in the long term, seriously undermine the continued independence of the legal profession in Scotland which is not, we believe, in the public interest.</p> <p>The obligations of lawyers to interests other than their own and those of their clients is, of course, most obviously seen in the court context; but those obligations to the wider interests of the public and justice, more generally, are also vital in almost all areas in which Scottish lawyers work. Lawyers owe and fulfil duties to the law, the wider public interest and other professionals.</p> <p>External ownership of organisations that can call themselves “lawyers” or similar seems likely to bring about a dilution of objectivity currently applied to conflicts to the detriment of the legal advice that should properly be provided to consumers of legal services of all types. Consumers need a market of providers of legal services who will be able to stand up for their interests free from the influence of others (including the influence of business imperatives, employers and politicians). We believe conflicts between ethical duties and commercial interests in law firms currently are resolved in favour of compliance with ethical duties because the owners of the business are bound by the same ethical code (which is sanction based) as the solicitors working for them. That will not necessarily be the case with owners of an ABS (the owners of which may be bound by no ethical code and/or may have no concept of the obligations to legal principles) and under the current proposals such owners will not be regulated as individuals (regulation being at the level of the ABS).</p>

Source	Response/comment/issue
<p>Cons 24 Cont'd</p>	<p>The following is stated by the Financial Reporting Council in relation to its approach to regulation:</p> <p>“We are very clear that no system of regulation can ever eliminate the possibility of corporate reporting or governance failures; we believe that it is impossible to achieve zero failure and any attempt to do so would destroy wealth rather than facilitate its creation.”</p> <p>It is our view that safeguards for the independence of the legal profession in Scotland (being necessary for the rule of law) have to result in zero failure and that leaving the maintenance of that independence to a Head of Legal Services or a Practice Committee in an ABS is a risk not outweighed by the “perceived” rewards that have been assumed.</p> <p>As we have said, access to justice for those who cannot afford it needs to be addressed but what we also need in Scotland is for lawyers based and employed in Scotland to be serving the legal needs of large scale companies and organisations operating in Scotland. The Scottish Government quite rightly said that we need a Scottish solution. That solution needs to benefit the Scottish economy. The proposals mean that in the future we will have three tiers of legal service providers. We anticipate that the lower end of the market will become volume driven at the expense of quality and control and influence over many of the larger firms currently operating at the top end of the market in Scotland will, by a process of external acquisition, inevitably migrate South. What is left in the middle is not going to be the modern developed legal sector everyone wishes. If the Scottish Government considers it important to have high quality lawyers based and operating in Scotland who are able to service the needs of the world class companies and organisations who operate in Scotland it needs to reconsider the likely outcomes of ABS and the consequences for our economy and our standing in the sophisticated legal jurisdictions around the world.</p> <p>Finally, on this question we wonder whether the promotion of ABS is the right strategy to adopt at a time when we have yet to appreciate fully the lessons to be learnt from the tumultuous experiences of the financial services sector? The outcomes of the current reviews of regulation and governance within that sector will have implications for the legal sector too. To the extent that the move to ABS represents some degree of deregulation, the timing looks particularly inappropriate given the apparent effects of some deregulatory measures for the financial services industry. To proceed with major changes to an important sector of the Scottish economy (one which touches all others), in such circumstances, is not a strategy that makes particular sense to us nor does it appear to be in the consumer’s interest.</p>
<p>Cons 25</p>	<p>The mandatory role of the OFT is wholly inappropriate and undemocratic.</p>

Source	Response/comment/issue
Cons 26	I remain concerned about privilege and how this will apply to any non solicitor owners of a LP. I am also deeply troubled by the fact that there is still no detail by way of possible regulation of these new entities.
Cons 27	I think the Society should be extremely cautious in how it now deals with the Bill especially as half the membership have serious concerns about what effects it may have on the profession and how the public may ultimately be affected by the impact of LP's in the delivery of legal services. However if the Bill is enacted then I think the Society should apply to be a regulator and ensure in creating a new regulatory framework that the solicitors' brand is properly protected.
AB 13	Issue raised re S90 of Bill
AB 14	Are we happy that we will leave the profession in good shape for next generation?
DF 11	What are benefits for customers of LPs?
DF 12	Do we see large or small firms benefits from the Bill?
DF 13	Is here a conflict for the Society between regulation and representation
DN 1A	How can the Bill widen access to justice?
DN 8	Feeling that we can't turn back the clock and must manage the process as well as we can
ED 1	What are the advantages of ABS for small firms?
ED 3	How can we continue to develop first class professionals in the new environment?
ED 6	Is this the end of the road for the lower end of the profession?
GS 2	There are going to be a lot of new, unregulated people providing legal services – this puts solicitors who are heavily regulated at a disadvantage.
GS 5	Is Society lobbying on public interest?
GS 7	Where is the definition of legal services in the Bill
GS 8	There's a very aggressive will writing company that operates where I practice (Ayrshire). How will the legislation deal with that?
GS 9	My fear, despite the assurances that solicitors in charge will continue to be regulated by LS, is that we will see a repeat of what's happening with will writers and touting. Why is the law society so sanguine about employees that will not have the same standards that we have to operate to?
GS 12	Why is there no schedule to this bill to set regulatory provisions?
GS14	There's a question about the SLCC and standards set by other regulatory bodies – am not sure what the question is, but Philip's response is that the bill as drafted makes no difference to inadequate

	professional service and there would be no difference between solicitors and LPs – that same standards would apply.
GS 16	How can you reassure me about the position of Scots law and Scottish solicitors if this bill goes through?
IN 4	A question was asked re the timing of the Bill

Source	Response/comment/issue
IN 6	Would it be possible to regulator shop
FB General	A number of respondents felt that they couldn't make specific comments until the legislation had move on or the Society was able to present a fuller version of its thoughts.
FB2	I can't possibly have unanswered questions. We are in new territory here. This is a stupid question.
FB5	How will the rules of the LSS scheme as potential regulator be designed? Who will have input to the creation of those rules?
FB6	Can't say until legislation is in place
FB 7	Still unclear where all this leaves the profession and the Law Soc in the long run. Financial institutions have shown their collective ability to get things wrong to hitherto unknown proportions. Do we really want to entrust legal services to them?
FB 8	How can chamber practices compete with large entities which can cross-sell and loss-lead on traditional areas of practice?
FB11	What cocoon do Law Society officials live in?
FB12	I feel that the there is a strong possibility of multiple regulatory authorities with Legal Service Provider able to pick and choose who to be regulated by and don't believe that the supporters of the Bill have really thought through the consequences. What can be done to avoid consumer confusion now rather than after the subsequent Act becomes law?
FB13	How solicitors and licensed providers are to be regulated and whether there will be a level playing field
FB 19	Why does the Law Society think this Act will be for the benefit of the profession and why they have failed to address that?
FB 26	Is there any restriction on the maximum size of ABS's? Is there a risk of large monopolies distorting the market (e.g. we already all dance to the CML tune), the result being less, rather than more choice of legal services?
FB 27	I remain to be convinced that it will improve consumer access and provide value for money. I also think that the outcome will put severe pressure on small firms.
FB 29	I remain concerned with two matters: Firstly the ability of the Law Society to continue to represent the interests of the public and the profession (there has always been a conflict of interest); Second I am not convinced that the Society represents all parts of the profession (particularly having regard to the President's remarks).

Source	Response/comment/issue
FB 30	<p>How is the Society to bring together the profession after this</p> <p>Why did the Society not carry out a proper survey of the profession's views prior to the 2008 AGM. It was clear at the AGM that the Council wished to push this through aided by proxies. It is difficult to see what the benefit will be for the general public who want a solicitor in the high street who is independent</p>
FB 37	<p>When law firms are all so different why is a "one size fits all" solution being imposed to the clear and unarguable benefit to large city firms and to the dismay and concern of the smaller firms acting for the Mr and Mrs Smiths of the world?</p>
FB 39	<p>The reasons for the Bill were unsubstantiated. I accept the constraints of the forum BUT the only recurring theme amongst the main speakers was the handful of firms who would be disadvantaged if ABS didn't take place. For example, what is the substantiation for saying that the LSB is required to increase access to justice yet not a single reason was given for advancing this position. Also, someone raised predatory pricing, this is a logical result and the Society should have no qualms about this and there is no reason why competition law should be raised, lower cost to consumers for legal services is in the public and consumer's interest - which is one of the reasons given for ABS.</p>
FB 41	<p>Comment rather than question. I think it is naive to think of this as a change like scale fees or advertising. While the changes are, as we were often told, permissive rather than prescriptive, they will erode what ordinary solicitors can still do at a profit. It is, I am afraid, a "one size fits all" solution which will financially benefit a few very large firms, but will seriously and probably fatally damage many others. The public will have less choice. That said, I accept that none of us has the right to earn a living. We must adapt if we are to survive, but we will not, I think, be surviving in a form that will give many of us much satisfaction, financially or professionally. Incidentally, does the Government really think that experience of their regulation of the sort of bodies likely to become involved gives anyone any confidence it can be done effectively. When it goes wrong this time, though, it will be the accessible rump of the "profession" that picks up the bill rather than the taxpayer or the shareholder.</p>