

Wider choice and better protection

A consultation paper on the regulation of legal services in Scotland

Response from the Office of Fair Trading

April 2009

OFT1076

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The Office of Fair Trading (OFT) welcomes the opportunity to respond to the Scottish Government's consultation paper on the regulation of legal services in Scotland. We acknowledge the significant progress that is being made to introduce Alternative Business Structures. Our Response details the full range of reforms we believe are necessary to establish an effective regulatory framework and a competitive legal profession in Scotland. We note that not all of the issues in our recommendations below are currently proposed in the way we suggest. It may be that the Scottish Government is currently minded to defer some of these issues.

However, the OFT considers that the best way to contribute positively to the current considerations is by keeping in view the full range of issues where we consider reform is required.

Our key recommendations are that:

- The Legal Professions Bill and its regulatory objectives should apply not only to ABSs but to traditional forms of practice and to all legal professionals including Advocates.
- Both the Law Society of Scotland and the Faculty of Advocates should separate their regulatory functions from their representational functions with a lay majority voting on regulatory and non membership issues.
- Scottish Ministers should exercise their oversight function with the assistance of a consumer advisory panel.
- The Faculty of Advocates blanket restrictions on members forming partnerships and joining Alternative Business Structures should be lifted.
- The Scottish Government should consider a review of the QC appointments process.

Our mission is to make markets work well for consumers. Markets work well for consumers and contribute to the health of the wider economy when they are efficient and productive. The OFT has a UK wide competition programme dedicated to the professions since 2000. The aim of the programme is to ensure

that competition is not unnecessarily restricted as a result of the behaviour of professional service providers or their regulatory bodies. This benefits efficient and innovative service providers, who compete on both a domestic and international level, and ultimately benefits consumers.

We therefore welcome the Scottish Government's proposals for the Legal Professions Bill. This will have the effect of reforming the regulatory framework for legal services and removing restrictions on the types of business models under which legal professionals, except members of the Faculty of Advocates, can offer such services. It will provide a new opportunity but will not impose change on those practitioners who choose to retain their existing structures.

The OFT was a member of the Research Working Group on the Legal Services Market in Scotland. The Group's Final report, published its findings in May 2006,¹ identified a number of restrictions on competition in the Scottish legal services market, which both the OFT and the Scottish Consumer Council, now part of Consumer Focus Scotland, agreed should be removed. These included the restrictions on Alternative Business Structures (ABSs). The OFT's concerns were further set out in our response to the Which? Super-complaint in 2007² and in discussions at the Legal Professions Bill Reference Group meetings.³

We wholly support the Scottish Government objectives that the reforms should be 'to achieve improved access for all to high quality legal services, within a competitive market, which is appropriately regulated to ensure public protection and maintain quality.'

We welcome the proposals made by the Scottish Government to modernise the governance of the Law Society of Scotland and codify the regulatory arrangements of the Faculty of Advocates. OFT's longheld view is that it should be a pre-condition of the continuing regulatory involvement of the professional

¹ www.scotland.gov.uk/Publications/2006/04/12093822/0.

² www.of.gov.uk/shared_of/super-complaints/oft946.pdf.

³ www.scotland.gov.uk/Topics/Justice/legal/profession-reform-1-1/Reference-Group/Minutes.

bodies that they separate their regulatory and representative functions to ensure that regulation is in the consumer and public interest. We believe that further thought should also be given as to how this can best be achieved for the Faculty of Advocates.

1. Do you agree that alternative business structures (ABS) should be permitted for the provision of legal services by solicitors in Scotland?

Yes.

The OFT favours the removal of restrictions in professional rules and in statute which limit the business models that may be adopted. We support the introduction of Alternative Business Structures (ABSs) which will allow legal service providers to adapt their businesses to the most efficient model that meets their customers' needs, allowing the market to work better for consumers.

ABSs are likely, in the OFT's view, to produce consumer benefits, such as more choice, higher quality services and lower costs. Their introduction in Scotland is likely to contribute positively to competition in the supply of legal services throughout Scotland and thereby benefit the Scottish economy and the public as a whole.

Lifting these restrictions will not compel legal providers to change. The current business models will still be available. With legal professionals free to choose the model that best meets their business needs, they will be able to innovate and remain competitive in a market which continues to develop in a changing world. Safeguards in the public interest will continue to be required for any of the business models available.

2. Are there any of the three business structures described in paragraphs 2.21 to 2.30 which should not be permitted?

No.

We fully support the three business structures described in paragraphs 2.21 to 2.30: an ABS allowing non-lawyer ownership, an ABS involving external ownership, and multi-disciplinary practices (MDPs).

The OFT considers that the removal of restrictions on non-lawyer ownership and permitting external ownership will enhance opportunities for capital to enter from outside the profession. This will encourage and facilitate innovation in the provision of services typically provided by solicitors such as litigation, advocacy, executry work and conveyancing. By opening up a variety of new and more convenient methods of providing legal services, consumer choice will be enhanced. Such change is also likely to encourage a wider range of career structures and working patterns for some solicitors.

In its report *Competition in Professions* in 2001,⁴ the OFT noted that restrictions on MDPs might both inhibit new entry and prevent the exploitation of possible economies of scale and scope. It remains the OFT view that the opportunities to provide, for example, combinations of High Street professional services under one roof, should unlock potential cost efficiencies and enhance customer choice and convenience at that level of the market. There are real concerns about access to legal and other professional services particularly among rural consumers in Scotland, and it seems likely that their interests will be best served by supporting improved and more efficient service delivery taking advantage of communication technology and other practical support as appropriate.

We agree with the Scottish Government that safeguards would be required to ensure that only fit and proper persons were able to exercise influence or control over a legal practice and that such practices were properly regulated. We welcome the proposals for the 'fit to own' test proposed in the consultation.

3. Are there any of the three business structures which should be permitted but which you feel would require additional safeguards?

No.

The OFT recognises that any changes must take account of the consumer and public interest and that, where necessary, suitable safeguards must be put in place. We feel that these should be developed by the appropriate Approved Regulator together with the oversight body.

⁴ www.offt.gov.uk/advice_and_resources/publications/reports/professional_bodies/oft328.

4. Should there be any change to the present arrangements for regulating licensed conveyancers and executry practitioners, or those with rights of audience, as described in paragraphs 2.5 to 2.9?

Not currently, but this should be kept under review.

We are aware that licensed conveyancers and executry practitioners are currently regulated by the Law Society of Scotland (LSS), with whose members these professionals compete. We suggest that in the review of the LSS's governance arrangements the scope for actual and potential conflicts be addressed and a separate independent committee established. If the number of these professionals were to increase significantly it might be necessary to consider developing a separate Approved Regulator, based on this independent committee.

5. Should the areas of business reserved to legal professionals as described in paragraph 3.3 remain as now?

Currently yes.

The OFT supported the commencement of sections 25-29 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 which sets out arrangements by which rights to conduct litigation and rights of audience can be granted to bodies other than solicitors and advocates. This provision allows approved bodies to be granted rights of litigation and advocacy in specified legal areas thus opening up the current restriction to solicitors and advocates in those areas.

The OFT is not aware of currently contemplated challenges to existing reservations whether this is to expand or reduce their scope. But we believe that Reservation can only be justified when it secures protection for consumers and is proportionate to that end. This may for example be by ensuring minimum standards of service that would not be secured through other means, such as Consumer Enforcement Regulations, Consumer Codes and / or consumer education.

Any proposed extension to the current reserved areas would require a detailed cost benefit analysis. A careful balance needs to be found between providing consumers with the same protection irrespective of provider and potentially increasing costs for currently unregulated providers which might force them to exit the market altogether.

The current set of reservations should be reconsidered from time to time to ensure that they provide the consumer benefits originally intended.

6. Do you support the proposals that the Bill should focus on the regulation of legal professionals and businesses where legal professionals are involved in the provision of legal services to third parties?

Currently yes – based on the current evidence set out in paragraph 3.8.

7. Do you agree that (subject to the issues discussed in chapters 7 and 8) the arrangements for regulation of solicitors and advocates in the traditional forms of practice should remain as they are now?

No.

OFT considers that there should be one set of provisions that apply to the current existing partnership structures and providers of alternative business structures. We would therefore welcome clarification from the Scottish Government about how the LSS will be required to apply the same regulatory standards to all solicitors and legal professionals, irrespective of the structure within which they work. The provisions set out in the Legal Services Act 2007 offer a precedent for this development.

The OFT believes, as set out in answers 28, 33 and 34, that the Faculty of Advocates (FOA) and its members should similarly be subject to the regulatory arrangements set up under the new regime.

We see no reason in principle why solicitors and advocates in current models and in ABS forms of practice should not be regulated by other suitable regulators should such bodies wish to develop, subject to approval by the Oversight body , and take on these roles.

8. Do you think that provisions to allow applications for confirmation rights, as described in paragraphs 3.10 to 3.13 should be included in the Bill?

Yes.

The OFT favours provisions that will expand the choice of executry providers thus increasing competition for these services. These might be similar to sections 54 and 55 of the Courts and Legal Services Act 1990 in England and Wales which allow banks, building societies and members of bodies approved by the Secretary of State to provide probate services for a fee.

9. Do you agree that there should be a statement of regulatory objectives for providing legal services in ABS as proposed in paragraph 4.8?

Yes.

We welcome this proposal and in particular the commitment to protecting and promoting the public and consumer interest, and promoting competition.

10. Do you agree that regulatory objectives should be supplemented by considerations which should guide the actions of regulators, as proposed in paragraphs 4.9 and 4.10?

Yes.

11. Do you agree that there should be a statement of professional principles for those providing legal services in ABS as proposed in paragraph 4.11?

Yes

12. Are there any amendments which should be made to the Government's proposed listings at paragraphs 4.8, 4.10 and 4.11?

Yes. We see merit in inclusion of additional objectives which will underline the following ambitions:

- to ensure access to justice, maintain a healthy supply base for publicly funded work and continued support for pro bono initiatives.
- to ensure that the regulator maintains the professional obligation on lawyers to set out for their clients their rights and consequences of different obligations.

In the Legal Services Act in England and Wales these are described as objectives:

- of encouraging an independent, strong, diverse and effective legal profession.
- and increasing public understanding of the citizen's legal rights and duties.

13. Do you agree that it should be possible for regulators to grant conditions of licence or to refuse a licence to operate an ABS where there is demonstrable evidence of a risk to access to justice (as proposed at paragraph 4.27)?

In principle Yes.

Although we suggest that such decisions should arise in very rare and exceptional circumstances, and should be made following consultation with a consumer advisory panel (see answer 19 below). The strong default option should be not to reject a licence due to any risk of decreasing access. Refusing licences or imposing restrictions will, by their nature, restrict supply which tends to increase prices and decrease availability for consumers. This is highly likely to cause access to justice problems in the longer term for those consumers ineligible for public funding.

14. Do you have any other suggestions as to how the regulatory objective of promoting access to justice can best be achieved?

No.

15. Do you agree that ABS should be regulated at the entity level, with individual professionals regulated by their own professional bodies, as set out in paragraphs 5.1 and 5.2?

Yes.

16. Do you agree with our proposals for defining the ABS in paragraph 5.6?

Yes, although we assume you mean paragraph 5.5.

17. Do you agree with our proposals for dealing with regulatory conflict in paragraphs 5.10 to 5.12?

Yes.

18. Do you have any views on how the legal professional privilege should be protected in an ABS with reference to paragraphs 5.13 to 5.15?

We suggest it may be dealt with satisfactorily as under the Legal Services Act 2007.

19. Do you have any views in the setting up of some form of advisory panel to advise Ministers on applications as described in paragraph 5.21?

Yes.

The OFT favours the setting up of an advisory panel. In the absence of a new independent public body we believe an advisory panel would greatly assist Scottish Ministers in the exercise of their oversight role. We envisage its role will be to represent the interests of consumers and to provide advice to Ministers (similar to the role of the Consumer Advisory Panel established under the Legal Services Act 2007 sections 8- 11).⁵

We would suggest that the Panel is comprised solely of lay members from a diverse background, though including some with a clear consumer interest.

20. Do you agree that Ministers, with the agreement of the Lord President, should authorise ABS regulators as proposed in paragraph 5.1?

No.

OFT's strong preference has been for the oversight function to be performed by a new independent public body, such as the Legal Services Board. However in the absence of such a body, oversight of the Approved regulators should be exercised by Ministers together with an advisory panel, subject to competition scrutiny by the OFT.

⁵ www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_2#pt2-pb3-l1g8.

We suggest that the scrutiny role of the OFT should be similar to its role under the Legal Services Act 2007 to ensure a degree of symmetry of advice in both jurisdictions. The LSA 2007 defines five areas where the OFT has been given a specific role.

- A. Section 57 gives the OFT the power to investigate if it perceives the behaviour of any approved regulator to be anti-competitive and to publish any report it may prepare.
- B. Schedule 10 commits the LSB to seeking advice from the OFT on application from regulators to become ABS licensing authorities.
- C. Advising on the recognition of new approved regulators in Schedule 4.
- D. Advising on additions, amendments and subtractions from the list of reserved activities in the terms set out under section 24 and 26 , with the procedure defined in Schedule 6, and
- E. Making representations on any proposals for the LSB itself to become an approved regulator defined in section 66

This Bill should provide a mechanism (such as in A) whereby OFT would be consulted on competition issues by Scottish Ministers, and OFT would be able to bring competition issues to the attention of Scottish Ministers who would have an obligation to respond to such competition issues raised.

For authorisation of ABSs the decision making process will need to be transparent and in accordance with clear criteria. We also consider that it is necessary that any professional interest should not be seen or thought to impinge on the decision making in any way. Regulatory independence of the oversight body is crucial to the credibility of the legislation with consumers and the general public. Widespread confidence in this new independent regulation is in the interest of the profession and the legal service market as a whole.

We have concerns that requiring the Lord President's agreement would be seen to introduce a professional interest, given his position as a judicial officer and a member of the profession. OFT therefore concludes that there should not be a

formal link between the Lord President and Scottish Ministers in their role as overseer.

21. Do you agree that the Bill should set out the criteria for authorisation of ABS regulators, and that these criteria should relate to organisational capacity, independence and an appropriate regulatory scheme (as proposed in paragraph 5.16)?

Yes.

In our view the Bill should not prescribe an exhaustive set of requirements. This will allow for flexibility to supplement criteria without the need for further legislation. We welcome the Scottish Government's proposals that these criteria include a requirement for the regulatory function to be separate from the representational functions with a substantial degree of lay involvement.

22. Do you agree that there should be a 'fit to own' test specified by the ABS regulator which should apply to anyone owning, or acting as a principal in, an ABS as proposed in paragraph 6.5?

Yes.

23. Do you agree with the details of the test as proposed in paragraph 6.5?

Yes.

24. Do you agree that the proposals provide sufficient safeguards to ensure that professional principles are not compromised in ABS which are externally owned?

Yes.

We recognise that there are potential risks in external ownership but we believe that the proposals provide both sufficient and proportionate safeguards to any actual risks. There will be opportunity to review the safeguards once these types of ABS are up and running.

25. Do you have any views on the proposals for a Head of Legal Services and Head of Practice, or alternatively a Practice Committee for ensuring ethical and practical standards in ABS owned by non-legal owners?

Yes.

The OFT is in favour of a requirement for ABSs to appoint a Head of Legal Services and Legal Practice. We recognise that Practice Committees could be an alternative but we would require further details as to how this would operate. We would have concerns if the potential size and operational cost of such committees hindered effective decision making and deterred potential ABS providers unnecessarily. The approach adopted should be proportionate to the size and structure of the alternative business structure.

26. Should changes be made to the Society's governance arrangements, for example in relation to the size of the Council, frequency of meetings and decision making powers?

Yes.

The OFT believes that substantial changes are required to be made to the LSS's governance arrangement so that the Council can become an effective decision making body.

- Its overall size should be reduced.
- The governance arrangements need to be revised to separate the representative and regulatory functions. The current governance reflects the interests of a membership body, rather than those of a regulator in the public interest (discussed at question 28 below).
- There should be to be a majority non-lawyer membership on the Council of the Society (discussed at question 27 below).
- The changes should be approved by Scottish Ministers, taking advice from an advisory panel as described in answer 19 above.

27. Do you agree that there should be significant non-lawyer membership on the Council of the Society?

Yes. The OFT believes that a lay majority is required, at least in any vote which relates to non representational issues. We believe that lay members are more likely to be objective in their decision making, rather than those who have practiced in the particular profession, and are qualified in suitable and diverse areas such that they can better assist the LSS with following the objectives of

the Bill. Lay membership will also enhance the public perception that the LSS is fulfilling its public interest role.

Thought should also be given to the appointment process to ensure that it is seen by both the public and the profession of producing demonstrably qualified and genuinely independent members from a variety of backgrounds best suited to considering the consumer and public interest.

28. Should the representation and regulatory roles of the Society be split as proposed by the Office of Fair Trading?

Yes. The OFT strongly advocates such a split.

Under current arrangements the LSS is engaged in functions that are both representative and regulatory. We believe that both the LSS and the FOA should have regulatory responsibility only where they can demonstrate that this will not conflict with their representational responsibilities. Consumers and the public at large are unlikely to trust any regulatory framework, unless and until, they are satisfied that it is separate and independent from representative self-interest.

The regulatory function, if it is to be properly exercised, must serve the wider public interest. Aspects of the public interest objectives such as justice, independence, competition and innovation sometimes may conflict and a balance is needed. There are, in our view, several instances of the tension between members' interests and the wider public interest leading to rules that may not best serve the public interest. This may be because they unnecessarily restrict lawyers from adapting their services to meet the needs of clients, for example the 'mixed doubles' rule, or because, in some other regard, they do not strike an appropriate balance between the objectives. The LSS's previous difficulties in addressing the challenge of ABSs could be cited as a recent example of this inherent conflict.

Similarly, the representational function of the profession may be less effective where the professional body wishes to act as lobbyist on behalf of members' interests but is constrained in doing so by a duty to reflect other wider interests. Both functions are likely to be more effectively exercised when separated. There is clear support for this. The published responses to the Scottish Government's

consultation on these issues showed a very large majority (84 per cent) in favour of a requirement to split regulatory and representation functions.⁶

OFT therefore considers that it should be a pre-condition of the continuing regulatory involvement of the LSS (and also of the FOA) that they separate their regulatory and representative functions and do so to the satisfaction of the oversight body. We consider both reforms to be critical to ensuring that regulation is in the public interest.

Securing the independence of the regulatory arm acting with demonstrable independence from representational interests would be best achieved by a completely separate regulatory body. This is the model now in dentistry and in medicine with the British Medical Association and the British Dental Association representing members and the General Medical Council and General Dental Council regulating those professions. However we appreciate that the formation of a new body may not immediately be feasible but it should be a long term objective.

Any internal separation undertaken in place of completely new structures should set out clear and robust arrangements to minimise the risk or reality of prejudice or other undue interference from those in post for representative purposes. Just as justice must not just be done but seen to be done regulatory independence must be visible and perceived as independent by consumers and the public.

We suggest that the exact nature and form of the split should be agreed by the Oversight Body.

29. Should the Guarantee Fund or an equivalent provision be required for ABS?

We understand that most claims under the Guarantee Fund relate to acts of dishonesty by sole practitioners. The OFT would prefer that this Fund apply to ABSs so that consumers have the same protection irrespective of provider and we see no reason why it should not be capable of doing so. However any

⁶ *Reforming complaints handling, Building Consumer confidence*, Analysis of written consultation responses (available at www.scotland.gov.uk/resource/doc/77843/0018721.pdf).

changes to be made to its operation should not act a barrier or deterrent to the creation of ABSs.

30. Should the liability under the Guarantee Fund be capped, either for individual claims or the overall liability?

We favour a Scheme which protects the public but at the same time does not act a barrier or deterrent to the creation of ABSs. To the extent that unlimited liability creates a future deterrent to innovation in the models for legal professional service we would support capping of any liability. This should be commensurate with the turnover or projected turnover of the firm.

31. Are there any particular provisions which are required in relation to professional indemnity insurance for ABS, beyond what is set out at paragraph 7.35?

We support the Scottish Government's proposal that it should be a licensing condition for ABSs to take out appropriate professional indemnity insurance (PII) and the cover provided to be equivalent to the Master Policy. We also welcome the fact that ABSs will be able to choose their providers of PII.

32. Do you agree that the Faculty should not be required to allow its members to form partnerships or participate in ABS, provided that those wishing to do so can easily become solicitor advocates?

The FOA has stated concerns that lifting the current restrictions on its members to adapt their businesses as they wish would weaken the independent bar and reduce choice. It fears that advocates forming partnerships or joining ABSs would not be subject to the 'cab rank' rule. The FOA places great importance on the 'cab rank' rule and claims that it upholds access to justice and maintains the independence of the bar. It has concluded that members of the FOA should continue to be prohibited from participating in partnerships or ABSs.

The OFT does not agree with the FOA's analysis, and does not believe that arrangements requiring advocates to transfer to the solicitor-advocate branch are satisfactory. The OFT has identified the prohibition on advocates forming

partnerships with other Advocates or with other professionals as amongst the most restrictive of competition.⁷

The OFT questions whether the 'cab rank' rule does in fact ensure the right of representation as claimed since advocates may already decline a brief on the grounds of work load and have some scope therefore to balance their workload and types of cases. We query the suggestion that removal of the existing rule would cause some clients to be significantly hampered in securing Counsel of the appropriate skill and experience.

Were concentration to lead, or threaten to lead, to limitations on access to justice, the OFT's competition powers could be deployed to avert distortion of the market. But the incentive of Advocates to provide for potential clients would be most likely to resolve any such issue in the natural course of supply matching demand.

The OFT takes the view that prohibiting partnerships, between lawyers from the same or different branches of the profession, restricts the lawyers' choice of adapting their business structures to best suit their clients' needs. It prevents them from taking advantages of efficiencies that other organisational forms provide, the benefits of which could be passed onto consumers. Allowing partnerships between advocates and others has the potential to increase the availability of advocates, by attracting practitioners to new areas of practice, and would pave the way for young barristers to gain varied legal experience.

⁷ OFT Report in Professions, March 2001 paragraph 50.

Consultation on the future regulatory framework for legal services in England and Wales Paragraph 3.2, OFT 722, June 2004.

Report by the Research Working Group on the Legal Services Market in Scotland, 2006, paragraphs 8.8- 8.11, 8.23,8.24 and 8.42.

OFT Response to Which? Super-complaint: Restrictions on business structures and direct access in the Scottish legal profession, July 2007, OFT 946, Chapters 3 and 4.

The other benefits of ABSs would apply for advocate partners and their clients. These have been set out extensively elsewhere and include:

- sharing of costs
- spreading of risks
- economies of scope through offering of a broad range of legal services, and
- innovations and efficiencies.

The proposal that advocates should have to transfer to the solicitor advocate branch in order to participate in ABSs does not alleviate the competition concerns of the OFT. Current arrangements for transfer lack transparency and appear to incur costs of time and loss of perceived status. There does not appear to be reciprocity for advocates who have become solicitor-advocates to rejoin the advocate branch.

The status of solicitor-advocates as a relatively new branch of the profession is still being developed. Given the historical dominance of FOA members in advocacy in the Higher Courts, there are questions about whether transfer from this prestigious branch, losing a badge which appears to carry weight both with clients and with the courts, imposes a significant professional cost to practitioners. One such cost may be, as described to the OFT, the perception that a solicitor-advocate is less likely to earn the QC title than an advocate. (A fuller consideration of this point follows at the close of this answer.)

There is also a potential impact on the market for ABS services, if ABSs are prevented from offering a full range of legal services, including those of members of the FOA.

In the context of the current consideration of arrangements for the legal profession, the OFT has revisited the discussions of the Research Working Group on the Legal Services Market in Scotland and the proposal that the award

of QC status should be examined further, as recorded by the Group's report.⁸ As noted above the arrangements are of relevance to the question of comparability of status between solicitor-advocates and advocates as well as in the wider context of consumer information. We believe there is a need to consider how this title is awarded, whether it is in the interests of consumers and whether it distorts competition.⁹

In general, the OFT considers for the QC appointments process to function effectively:

- appointments should be made on an objective basis
- the appointment process should be fair and transparent and performed by a selection panel composed of professional and lay interests
- entry should be subject only to candidates meeting a standard without influence of any kind of quota, and
- awards should be revalidated from time to time, and be capable of being withdrawn.

We note that the appointment process is still performed by a senior judge and selection is at his discretion, in light of views sought from other senior judges and senior members of professional bodies. This does not appear to meet the criteria the OFT has sought and we would propose that the Scottish Government should take this opportunity to review and develop the process.

33. Do you believe that the regulatory framework of the Faculty should be organised into a code set out in law?

Yes.

⁸ Report by the *Research Working Group on the Legal Services Market in Scotland*, Scottish Executive, May 2006, at paragraph 11.13.

⁹ Paragraph 11.16.

We believe that codification of the FOA's regulatory framework is a move in the right direction provided that the changes in answer 34 below are made.

34. Do you believe that the regulatory framework of the Faculty described in paragraphs 8.1 to 8.10 should be changed in any respect?

Yes.

As detailed in answer 28 above, we consider that the FOA should have regulatory responsibility only where it can demonstrate that this will not conflict with its representational responsibilities. Consumers and the public at large are unlikely to trust any regulatory framework unless and until they are satisfied that it is separate and independent from representative self-interest.

The OFT's view is that the FOA should also be regulated by the oversight body and that its representational and regulatory function split. If the Scottish Government is not currently persuaded to require such amendment, or to require alteration of the FOA's prohibition of members joining ABSs, we propose that the legislative framework now being introduced should provide for the possibility of future alteration of the FOA's governance structure without further recourse to primary legislation.

35. Do you consider that regulation of claims management companies operating in Scotland is necessary?

Currently No, but to be kept under review.

Given the potential impact on competition of the extension of regulation into new markets, in general the OFT takes the view that regulation should be restricted to situations in which a rigorous process of market analysis has clearly identified both a clear market failure and that the proposed system of regulation will adequately address that failure without unduly distorting competition and adding cost to the consumer. These situations are more likely to occur in certain types of markets than others, in particular markets for distress products where high standards are the preliminary concern, rather than markets for consumption goods where innovation and freedom of choice may be most relevant.

36. If you think that regulation is necessary, which option do you favour?

Regulation through a non-departmental public body.

Regulation by Scottish Ministers with licensing and administration contracted out to trading standards department or similar body.

We would favour an approach in Scotland similar to the one used in England and Wales.

37. Are you aware of any issues in Scotland with 'no win, no fee' arrangements where the cost to the client was greater than the award?

38. Are you aware of any poor practices by claims management companies in Scotland, for example:

- questionable advertising, and/or
- practices such as cold calling, market stalls, or approaching people in hospital in Scotland, and/or
- inappropriate pressure to settle a claim?

The OFT has a role in the regulation of CMCs which specifically deal with claims relating to the unenforceability of consumer credit agreements (UCCA). This derives from the requirement for such businesses, in certain circumstances, to hold an appropriate OFT consumer credit licence. Businesses which offer debt counselling or debt adjusting services when reviewing or advising on the enforceability of consumer credit agreements are required to be licensed under the Consumer Credit Act.

We have dealt with cases where CMC's have made misleading claims about what they can provide, misleading advertising and charging high upfront fees.

The OFT and the Ministry of Justice (MoJ) recently (February 2009) issued a press notice to raise awareness amongst business, consumers and advice organisations about enforcement action taken including:

- warnings issued to CMC's about the misleading statements or omissions by businesses who claim that they are able to easily write off consumer credit agreements such as outstanding loans and credit card debts and obtain compensation
- guidance issued to business highlighting the types of statements appearing in adverts and promotional material that could mislead consumers, and
- warnings to businesses who provide advice on the payments of debts or how to reschedule debts when advising on the enforceability of consumer credit agreements that they may also need to be licensed under the Consumer Credit Act 1974. Trading without an appropriate licence is a criminal offence. Unlicensed trading is punishable by a fine, imprisonment or both.

A copy of the February 2009 press notice can be accessed from:

www.justice.gov.uk/news/newsrelease170209a.htm. This action followed a 'Consumer Alert' published jointly by MoJ and the OFT in August 2008 urging consumers to seek independent advice before accepting the services of businesses claiming that they can arrange for outstanding liabilities under loan, credit card and other consumer credit agreements to be written off. A copy of the August 2008 alert is available from:

www.of.gov.uk/news/press/2008/consumeralert