

**REPORT BY**  
**THE BUSINESS EXPERTS**  
**AND LAW FORUM**  
**(BELF)**

**November 2008**

## FOREWORD

The Scottish Government has set out a central purpose of increasing sustainable economic growth. In its economic strategy<sup>1</sup>, it identifies a supportive business environment as one of the strategic priorities which will help to achieve that purpose, saying that:

‘The challenge for government is to create the best possible environment for competitive businesses, entrepreneurship and innovation to flourish.’

The strategy goes on to affirm that:

‘Effective and modern legal and criminal justice systems, underpinning a safer and stronger Scotland, provide an essential sound basis for conducting business and securing growth.’

One of the key sectors identified in the economic strategy is financial and business services, with the government committed to building a critical mass of activity, and helping to create the right environment for its competitiveness and growth.

Scotland’s legal system and profession matters to our country’s economic goals because:

- the profession in itself contributes around £1bn a year to Scotland’s economy;
- high quality legal services are a key factor in a supportive business environment, particularly in encouraging firms to maintain head office functions in Scotland;
- being able to resolve disputes as effectively as possible is an important contributory factor to success in many areas of business.

Over the last few years, much has been done to make our legal system more efficient and effective, including the development of Commercial Courts. The current Civil Courts Review, led by Lord Gill, will identify further opportunities to improve access to justice, and early resolution of disputes.

However, in the past there has been a tendency to see the needs of the justice system and the needs of business as separate. No sustained attention has been paid, for example, to the fact that many businesses, including major Scottish businesses, often choose to resolve disputes in England rather than Scotland.

That is why the Justice Secretary established the Business Experts and Law Forum with a remit to see what could be done to enable and encourage businesses, so far as appropriate: to choose Scotland as the seat of their business and legal activities; to look to Scottish lawyers for their advice; and to look to the Scottish courts as their dispute resolution forum of choice.

---

<sup>1</sup> The Government Economic Strategy – published 13 November 2007 – ISBN 978-0-7559-5548

The role of the Forum was not to undertake research or present detailed proposals for reform, but to identify the opportunities and areas of focus that will allow Government and the legal profession to work together to ensure that Scotland's legal profession continues to thrive and, even more importantly, to ensure that the legal system can help business, and therefore Scotland as a whole, to flourish.

The meetings of the Forum took place before the recent turmoil in the financial markets, and the likely consequence of an economic downturn. These events will have profound effects on Scottish business and on legal services. Law firms have already been affected by the slowdown in the property market, and other forms of legal business are likely to be adversely affected. Nonetheless, the basic message of this report remains valid – that Scotland's legal system has much to offer business, but that more can be done by the profession, the Government and the courts to maximise the contribution of the legal system to Scotland's economic wellbeing.

- 1. SCOTLAND AS A CENTRE FOR DISPUTE RESOLUTION..... 5
  - 1.1 Encouraging business to use the Scottish courts and legal system. .... 5
  - 1.2 Why business chooses English rather than Scots Law ..... 5
  - 1.3 Conclusions ..... 7
  - 1.4 Recommendations ..... 8
- 2. THE COMMERCIAL COURT OF THE COURT OF SESSION ..... 10
  - 2.1 How the Commercial Court Operates..... 10
  - 2.2 Recommendations ..... 10
- 3. ALTERNATIVE DISPUTE RESOLUTION ..... 12
  - 3.1 Development of ADR..... 12
  - 3.2 Recommendations ..... 13
- 4. GROWING THE LEGAL MARKET ..... 14
  - 4.1 The development of niche markets ..... 14
  - 4.2 Commoditised legal services ..... 15
  - 4.3 Recommendation ..... 15
  - 4.4 Intellectual property law ..... 15
  - 4.5 Recommendations ..... 16
  - 4.6 Employment law ..... 16
  - 4.7 Recommendations ..... 17
  - 4.8 Technological leap-frogging ..... 17
  - 4.9 Recommendation ..... 17
  - 4.10 Understanding the profile of the business legal market..... 17
  - 4.11 Recommendation ..... 18
- 5. SELLING SCOTLAND’S LEGAL SYSTEM AND PROFESSION..... 19
  - 5.1 Improving the perceptions of the legal market ..... 19
  - 5.2 Recommendations ..... 19
- 6. CONCLUSION ..... 21

## 1. SCOTLAND AS A CENTRE FOR DISPUTE RESOLUTION

### 1.1 Encouraging business to use the Scottish courts and legal system.

1.1.1 For the majority of businesses, legal disputes are an expensive and time-consuming distraction from their main business objectives. When turning to a court for adjudication of those disputes, businesses generally want that court to deliver a service that is:

- quick and efficient;
- predictable (so far as possible) both in terms of outcome and costs;
- provided by judges with relevant skills and experience; and
- comprehensible and accessible.

1.1.2 Businesses with a choice over jurisdiction will be deterred from using a civil justice system if that system is perceived to be performing less well in some or all of these objectives than other jurisdictions.

### 1.2 Why business chooses English rather than Scots Law

1.2.1 The reasons why businesses may choose English rather than Scots law in contracts, and litigate in the English rather than Scottish courts, may include:

- Harmonisation: Paradoxically increasing harmonisation of Scots and English Law (driven, in part, by EU harmonisation) makes it more difficult to “sell” Scots Law where there is a choice between the systems.
- Size: Because England is a significantly larger jurisdiction than Scotland, its lawyers and judiciary will often have greater breadth of experience, born of scale, in specific areas of law.
- Global recognition: A legacy of the British Empire is that English law has been successfully exported and embedded across the world, giving it unique global recognition.
- Geographical/ logistical barriers: Parties may be reluctant to commit to a case being heard “up North” with the perceived inconvenience of logistical issues such as travel and lack of familiarity.

- Delays: Perceived delays (whether actual or not) in obtaining dates for debates and proofs and in receiving judgments were identified by businesses as a particular concern and an area in which Scotland compares unfavourably to some other jurisdictions.<sup>2</sup>
- Specialisation: Although many commercial disputes are now heard by specialist Commercial Court judges and sheriffs, other disputes involving businesses will still be heard by judges and sheriffs who may have little or no expertise in the legal fields involved, at least in the first instance.
- Case management: The level of case management applied to commercial cases may vary between courts, but the effective use of case management has been identified by businesses as a key factor in ensuring that cases are driven forward to an outcome efficiently and with reasonable speed.
- Language: The procedural terms used by the Scottish courts are distinctive and historic, but arguably alienate those unfamiliar with Scots law. They may hinder the creation of an impression among businesses (both local and international) of the Scottish courts as modern, accessible and user-friendly. The fact that Scotland is an English language jurisdiction should give it a competitive advantage over many other international jurisdictions as a dispute resolution forum; retaining archaic procedural terminology could limit this potential advantage.
- Costs: The levels of cost recovery available in Scotland are in many cases lower than those available in England, creating a financial disincentive to litigating in Scotland.
- Mediation: Although mediation is available in Scotland, it is still not as regularly utilised in commercial disputes as in other jurisdictions (eg England) and receives only *ad hoc* judicial support.
- Arbitration: Many commercial contracts contain provision for arbitration, but except in construction disputes, comparatively little commercial arbitration takes place in Scotland.

---

<sup>2</sup> In the Commercial Court of the Court of Session (in contrast with the Ordinary Roll in the Outer House) the time taken to bring a case to debate or proof is, we understand, generally quite short and probably compares favourably with (for example) London. It is normally possible to avoid long continuations if a case runs beyond its anticipated duration. However, problems do arise with long cases clogging up the system by blocking out dates for quick hearings on other matters. Lack of judicial resource appears to be the main contributing factor. There are also concerns regarding the delay sometimes experienced between a Commercial Court decision and the hearing before (and decision of) the Inner House, if there is an appeal.

## 1.3 Conclusions

1.3.1 In summary, the combination of scale, harmonisation, and global recognition makes it difficult for Scottish lawyers to persuade clients to choose Scots Law over English Law. That said, of the factors listed above, only the first four might be said to be beyond our control – there is much that Scotland can do.

1.3.2 The Forum considered whether, as a general principle, Scots law should be aligned with English law, both in terms of substance and language, unless there is good reason to be different. There is an argument that this policy of alignment, combined with a communications strategy, could mitigate the negative perceptions of Scotland as a difficult place in which to do legal business. The counter-argument was that it was important that Scots Law should develop in a way which was right for Scotland, rather than be overly influenced by another jurisdiction which has its own limitations and defects.

1.3.3 This issue may be something for the Scottish Law Commission to consider, alongside other possible ways to make Scots law clearer and more accessible to potential users, such as codification.

1.3.4 However, in terms of opportunity, the more important issue is “choice of jurisdiction”. Whilst a contract may not be governed by Scots law, there may be opportunities to persuade parties that they should, nonetheless, bring their disputes to Scotland for resolution. There are examples of Scottish arbitrators being used as neutral arbitrators in disputes between international parties.

1.3.5 We see potential for Scotland’s dispute resolution system to be developed and marketed as a just, integrated and efficient neutral system that runs like clockwork – the **“Switzerland of dispute resolution”**. However, this would require significant change to both the culture and procedures of the courts. We set out in our recommendations below suggestions as to the priorities for change.

## 1.4 Recommendations

1.4.1 The Scottish Government should develop a **coherent strategy to present Scotland as a centre of excellence for the full spectrum of dispute resolution processes**. The Unique Selling Proposition (USP) of the strategy will be that each type of dispute resolution is represented, providing users with access to a quality service across the spectrum of dispute resolution processes.

1.4.2 The Scottish Government and Scottish Court Service should consider **widening the pool of temporary judicial resource** available, thus freeing up court time and truncating litigation timescales<sup>3</sup>.

1.4.3 The Lord President should consider mirroring or **expanding the “Commercial Court” model** at Court of Session and Sheriff Court level to include additional specialism of relevance to business e.g. construction law and intellectual property. This could enable Scotland to develop its reputation in those specialist legal markets while providing an enhanced dispute resolution service to businesses in Scotland<sup>4</sup>.

---

<sup>3</sup> One of the problems in the Commercial Court in the Court of Session is that of late settlements – the Court diary is filled and a case then settles too late for the time thereby released to be used for other cases. One solution is to double book cases e.g. fix work for three or more Judges when only two regular Commercial Judges are available, in the confident expectation (or hope) that one or more of the cases may settle. This is done to some extent, but the concern is always: what happens if none of the cases settle?

The availability of a pool of temporary judicial back-up – whether “ticketed” Outer House Judges or temporary Judges – would make this more manageable, leading to wider use of double booking and a resulting benefit to court users in terms of their being given earlier dates for hearings etc.

As to the use of temporary Judges with the requisite experience, it may be that there is some reluctance amongst Advocates to accept appointments as temporary Judges out of concern that it might (wrongly) send out a signal that they are winding down their practice.

One option that could be explored which would avoid this problem, would be to mirror the “Assistant Recorder” process in England and invite all newly appointed QCs (and possibly existing QCs) to apply for appointment as temporary Judges/Sheriffs. They might be expected to be available to sit, if required, for up to a certain number of weeks a year. From the resulting larger pool of resources, the Commercial Courts, whether Court of Session or Sheriff Court, could find a person of the requisite experience to sit as a temporary Judge/Sheriff on a one-off basis for such longer periods as were necessary to meet the particular resource problem.

<sup>4</sup> At present in the Court of Session intellectual property cases are heard by nominated specialist intellectual property judges, and the applicable Rules of Court provide for a form of case management (though less intensively “hands on” than that applicable to commercial cases). Construction cases are dealt with within the Commercial Court. Construction cases tend to be long and complex. Because of that they can impose a heavy resource demand and have a disruptive effect on the work of the Commercial Court, but they often raise issues of law which are appropriate for resolution within the Commercial Court.

1.4.4 The Lord President and Rules Councils should undertake a full **review of costs recovery rules** including comparative analysis with other jurisdictions. This should include consideration of all areas of fee recovery and the possibility of using a "summary assessment of costs" as a means of achieving interim payments.

1.4.5 The Lord President should establish a working party to **review the procedural terminology of the Scottish civil courts** and consider whether adoption of "simple English" terminology might provide the courts with a more accessible, user-friendly image to present to local and international users. As one small example, some businesses questioned the use of the term 'taxation' to refer to the assessment of fees.

1.4.6 The Scottish Government, the Lord President and Judicial Appointments Board should review whether greater **specialisation could be encouraged in the appointment and deployment of sheriffs and in the Court of Session.**

1.4.7 The Scottish Government should commission a **detailed study to identify, from comparison with other jurisdictions of a broadly similar size and nature (such as Norway), other ways in which Scottish Civil Court procedures might be made more attractive to business.**

## 2. THE COMMERCIAL COURT OF THE COURT OF SESSION

### 2.1 How the Commercial Court Operates

2.1.1 As the forum designed to hear Scotland's major commercial disputes, the Commercial Court has brought many benefits for litigants. In recent years, there have been uncertainties and concerns over the application of the pre-action protocol and concerns about delays. However, action has already been taken to reduce delays both in fixing hearings and in producing judgements. Concerns about the protocol have also been alleviated to a large extent. Recent figures show that the case-load within the Commercial Court is picking up. This suggests that the court is again attracting work from within the business community in Scotland, though more needs to be done if it is to attract commercial work from outside that community.

2.1.2 The principles and procedures upon which the Court was established remain sound and it remains a potential flagship in attracting businesses to use Scotland's civil court system. The Forum concluded, however, that a number of steps could be taken to enhance the service that the Court offers to businesses.

2.1.3 We suggest below some ways in which this might be achieved. The Forum was not able to conduct a detailed review of the operation of the Court and its rules, but the key principle is that, while retaining its judicial authority, the Court should operate in the way that successful businesses operate – flexibly and responding to the needs of those who use the service.

2.1.4 The issues discussed in Chapter 1 are also relevant, since Commercial Courts are dependent on efficient operation of the whole system. For example, it is important that cases are not only dealt with quickly in the Commercial Court itself, but that any appeals and reclaiming motions arising from the Court are dealt with speedily.

### 2.2 Recommendations

2.2.1 The Commercial Court should consider the development of **pilot schemes for new initiatives designed to speed-up/improve case management** e.g. to identify cases where parties could be informally encouraged to consider ADR. If these proved successful, they could then be referred to the Rules Council for possible wider application.

2.2.2 Commercial Court judges should continue to explore how, within existing cost constraints, **technology might be better utilised to achieve efficiency savings and to free up court time**. Measures already taken in the Glasgow Sheriff Court Commercial Court illustrate

some possibilities, including greater use of email, electronic document submission and use of conference calls for routine procedural hearings<sup>5</sup>.

2.2.3 The Faculty of Advocates should **review its Code of Conduct to identify ways of increasing user-friendliness and client focus**. One example of this could be relaxing the current rules that constrain Counsel from speaking to witnesses in advance of proof, thus removing a perceived “distance” between Counsel and client and creating greater accessibility.

2.2.4 To address any continuing misconceptions over the effect of the pre-action protocol and to enable the court to respond flexibly to issues as they arise, the **Commercial Court should issue informal practice statements** from time to time about issues of practice in the court.

---

<sup>5</sup> The Forum is aware of the concerns of the Inner House in the case of Jackson v Hughes Dowdall (8<sup>th</sup> July 2008) reporting possible ECHR issues with some of these procedures, but would hope nonetheless that pragmatic solutions can be found to resolve any such concerns.

### **3. ALTERNATIVE DISPUTE RESOLUTION**

#### **3.1 Development of ADR**

3.1.1 The Arbitration (Scotland) Bill, if passed by Parliament, will reform and consolidate the currently outdated and incomplete Scots law of arbitration. By putting the vast majority of the general Scots law of arbitration into a single statute, in future anyone in Scotland, or anyone seeking to do business in Scotland, will be able to find in one place the principles governing the law of arbitration in Scotland in language which can be readily understood.

3.1.2 To complement the new Bill, the Forum considered whether additional steps could be taken which would enhance the uptake of arbitration in Scotland generally. It was agreed that although most arbitration in Scotland takes place between those actually doing business in Scotland, Scotland should also be aiming to market itself internationally as a forum for arbitration that can offer high quality arbiters, facilities and legal support. There is in fact no need for the arbiter to be Scottish. For example, it would be quite feasible for a non-Scottish arbiter to sit in Scotland and hear arguments presented by both Scottish, English and/or other counsel (this happens routinely in the International Chamber of Commerce (ICC) arbitrations in England and other countries, where the arbiters and lawyers are often drawn from different jurisdictions).

3.1.3 It was agreed that lessons should be learned from England, which has a leading reputation as a world centre for arbitration and which boasts many QCs with specialist expertise in particular practice areas practising as arbitrators.

3.1.4 Mediation, while not a universal panacea, is also a key dispute resolution option for businesses and should form an essential part of any modern civil justice system. Although some disputes will always require judicial determination through litigation or arbitration, a great many commercial disputes currently proceeding through the courts could be resolved by mediation, saving businesses considerable time, expense and uncertainty and freeing up court time for cases that truly require full judicial analysis.

3.1.5 Although mediation is widely available in Scotland, it has not yet been fully incorporated into the Scottish civil justice system as an option for routine consideration in every dispute. In this respect Scotland is not on an equal footing with other jurisdictions, including England and the United States. Reasons for this may include residual suspicion or scepticism amongst lawyers, general lack of awareness amongst businesses and inconsistency of endorsement (formal or informal) from the judiciary.

## 3.2 Recommendations

3.2.1 Scottish courts should be encouraged **formally to acknowledge the role that mediation can play in resolving disputes**, to incorporate consideration of it as an option into standard case management processes and to routinely recommend it to litigants in cases that may appear to the court to be suitable for it. (The stage at which it is recommended by the court should be decided by the court having regard to the particular circumstances of each case.)

3.2.2 The Scottish Government should, in collaboration with business interests and ADR communities, develop **firm proposals for a Dispute Resolution Centre in Scotland**, offering facilities for users of arbitration and other forms of ADR, including mediation.

3.2.3 The Scottish Government should reiterate publicly its **support for mediation as a dispute resolution option for businesses and develop a proactive communications strategy to promote its wider use** by the business community.

3.2.4 The Faculty of Advocates should consider ways in which **advocates with particular expertise could be encouraged to practise as arbiters** – perhaps by forming training links with relevant colleagues in England.

3.2.5 To increase the marketability and visibility of Scots lawyers in the arbitration arena, the Faculty of Advocates and Law Society of Scotland should consider adopting a programme of **certifying their members as “appropriate to act as arbiters”** through having requisite experience and knowledge in a particular field.

## 4. GROWING THE LEGAL MARKET

### 4.1 The development of niche markets

4.1.1 The issue of how we compete effectively with England applies equally to non-contentious legal work as it does to litigation. There are areas where Scots law has advantages over English law, and the Scottish government should prioritise reforms to civil law which can develop those advantages, but the quicker win is likely to come from encouraging greater use of Scots lawyers, rather than Scots law.

4.1.2 In doing this, we need to accept that Scotland may not be able (subject to some exceptions) to offer the same degree of specialisation which can be offered by some of the English bar and in the ‘magic circle’ solicitors firms. The competitive advantages we have include:

- we can offer a more rounded, more personal service – because our commercial lawyers do not specialise to the same degree as the large English firms, the teams can be smaller and more flexible
- we are used to operating in multi-jurisdiction environments – i.e. we know more about English law than the English know about Scots law
- in a relatively small country we can work very closely with other professionals such as corporate financiers, accountants, surveyors etc which offers similar benefits to multi disciplinary practices
- we can carry out major commercial work more cheaply than our English competitors

4.1.3 The ‘pitch’ for the Scottish profession is, in short, that we are like England (we have the closeness to England to understand and use English law) but not England (we can be quicker, less bureaucratic and give better value for money).

4.1.4 That message needs to be worked up more fully into a coherent marketing strategy for Scottish legal services.

4.1.5 That said, there are specific niche areas where Scotland may have particular potential for development.

## 4.2 Commoditised legal services

4.2.1 One of the major changes in the legal services market over the next few years is likely to be the further development of commoditised legal services – using technology and business re-engineering to deliver high volume legal processes (such as re-mortgaging and debt recovery) more efficiently and on a large scale. Lower property and salary costs than some other parts of the UK, combined with a skilled workforce and a concentration of legal skills, make Scotland a potential beneficiary of this shift, if the opportunity is grasped.

4.2.2 A key enabler is likely to be the development of alternative business structures (ABS) in the legal services market, allowing access to external investment. The UK government has already legislated to allow ABS, but full implementation of the legislation is still some way off. The Scottish Government has announced legislation in its current Programme which will allow ABS in Scotland. If Scotland acts quickly, it can keep pace with and even overtake England in developing a framework for ABS in the delivery of services by solicitors, which maintains our current, cost effective regulatory environment. That cost effective regulatory environment is in itself an important factor in maintaining the attractiveness of Scotland as a base for legal business.

## 4.3 Recommendation

4.3.1 The Government should ensure that the **forthcoming legislation on the regulation of legal services provides a flexible and proportionate regulatory regime** which will allow the Scottish legal profession compete internationally, and should aim for implementation at least in step, and preferably ahead, of the implementation in England and Wales of the Legal Services Act 2007.

## 4.4 Intellectual property law

4.4.1 Development of this area of the law could bring with it synergies if the Scottish Government is intending to focus on areas such as sustainable energy sources, biotechnology, and microelectronics – and, indeed, any other area of fast technological development. Businesses looking to develop in these areas need to be confident that:

- there are laws in place to protect their work;
- the legal skills are in place to advise and, if need be, rule on the application of those laws;
- the legal infrastructure is in place to administer the rights provided by the laws (eg skilled solicitors, Patent agents); and
- the jurisprudence favours the innovative development of legal principles to support ground-breaking concepts in technology.

## 4.5 Recommendations

4.5.1 The Government should conduct a **study into the legal needs of the industries which rely on the support of intellectual property law** - to understand better what those needs are, and how they might best be met.

4.5.2 The Joint Standing Committee on Legal Education should encourage the **enhancement of intellectual property law expertise at Scottish universities** (e.g. combined law and technology qualifications) – for the purpose of:

- encouraging a new generation of lawyers specialising in this area; and
- promoting innovation in intellectual property law to keep abreast of – and anticipate – the fast pace of change in the industries that rely on that area of the law.

4.5.3 Identify areas where legal administration could facilitate business in the protection of their intellectual property e.g. registration.

## 4.6 Employment law

4.6.1 Employment law can have a significant impact on the attractiveness of a jurisdiction to business. Employment law is currently reserved to the UK Government, and in some respects is derived from EU legislation, although the approach to implementing EU Directives may differ in different jurisdictions.

4.6.2 A sub-group discussed the possibility that employment law be devolved to the Scottish Government. This possibility is one which goes beyond the immediate focus of BELF, but could allow a distinctive approach to be developed, which might be attractive to business, including inward investors.

4.6.3 Less radically, there may be ways to improve the operation of employment law in Scotland, to make employment disputes less of a drain on business, and indeed employees. The current reform to UK Tribunals, and the need to consider a Scottish response (as discussed in the recent report by the Scottish Consumer Council<sup>6</sup>) presents an opportunity to consider the benefits of a distinctively Scottish approach.

---

<sup>6</sup> Options for the Future Administration and Supervision of Tribunals In Scotland: A report by the administrative justice steering group, chaired by the Rt. Hon Lord Philip

## 4.7 Recommendations

4.7.1 The Tribunal Service should **invest in Employment Tribunal infrastructure and training** to expedite the resolution of employment disputes.

4.7.2 The Government should consider a **greater role for mediation (and other forms of dispute resolution) in employment dispute resolution**. This might address the perception that the relationship between employer and employee is too frequently escalated into a legalistic, polarised process which discourages mutually constructive dialogue.

## 4.8 Technological leap-frogging

4.8.1 A theme throughout the Forum's discussions was the logistical problems (actual and perceived) associated with Scotland's remote geography – both for attracting legal business into Scotland, and for administering existing business. Existing technologies such as video-conferencing can help but, to date, have often been unsatisfactory substitutes for face to face communication. However, it is likely that technology over the next few years will create substantially new ways of doing business – whether through new communication channels such as instant messaging, or completely new business environments, such as Second Life. Scotland's universities are world leaders in aspects of new technology, and potential synergies should be explored.

## 4.9 Recommendation

4.9.1 The Scottish Government and Scottish Court Service should work with Scottish universities and other bodies that are developing this sort of pioneering technology and harness their knowledge and skills to assessing how that **technology might be adapted, in a cost effective way, to overcome some of the logistical issues arising for the delivery and administration of justice in Scotland**.

## 4.10 Understanding the profile of the business legal market

4.10.1 When considering what “business-focused” looks like for the Scottish courts, there was consensus on the importance of speed, transparency, certainty, and plain English. Beyond that, however, a greater understanding of the “market” and its needs is required. In turn, to know who are the constituents of the “market”, more data is required on, for example:

- what sorts of businesses use the courts most (e.g. large corporate, SMEs, partnerships, sole traders) - broken down to show use by volume and value; and
- what sort of litigation those businesses engage in (e.g. debt recovery; contractual disputes; employment; intellectual property) - broken down by volume and value.

4.10.2 At present, there is very little data on the business users of the courts. To gain a complete picture, it is important to know who does **not** use the courts, and how and where they go about resolving their disputes (essentially an analysis of the courts' competitors whether in Scotland or abroad).

#### 4.11 Recommendation

4.11.1 The Scottish Government should carry out **research into the business users of the courts**, and the profile of the sorts of litigation they engage in – whether as pursuers or defenders; and the other forms of dispute resolution businesses use.

## 5. SELLING SCOTLAND'S LEGAL SYSTEM AND PROFESSION

### 5.1 Improving the perceptions of the legal market

5.1.1 Currently, the overall promotion of the legal profession may not be as outward facing as some other professional services, such as accountancy or financial services. This should be addressed in relation to distinct customer, and potential customer, bases of:

- businesses already operating in Scotland, with the need to encourage them to undertake their legal work in Scotland, and
- businesses that may be considering whether to locate in Scotland, or to use Scottish legal services.

5.1.2 Historically, the Law Society and the Faculty of Advocates have maintained strong links with legal professionals abroad, including organisations such as the International Bar Association, but it is less evident that there has been any sustained push in recent years to market the profession, either at home or abroad. The running has been made by legal firms marketing themselves. While it is understandable that businesses will wish to commit resource to their own marketing in those areas of direct relevance to their own business, this represents a lost opportunity to market the Scottish legal profession and legal system.

5.1.3 In summary, there is a need to actively market Scottish legal services as part of a full range of professional services. Such services are an intrinsic part of the economic infrastructure that supports a successful enterprising Scotland, and should be incorporated in the marketing of Scotland and Scottish business.

5.1.4 The leadership in this should come from the profession itself, working alongside the Scottish Government, and key agencies such as Scottish Enterprise, Scottish Development International, Scottish Financial Enterprise and the Department for Business, Enterprise and Regulatory Reform.

### 5.2 Recommendations

5.2.1 The legal profession, working with the Scottish Government, should develop a **proactive communications strategy which promotes Scottish legal, and other professional services** such as banking, financial services, accountancy, etc, as part of a highly qualified and expert economic infrastructure, which actively assists businesses<sup>7</sup>.

---

<sup>7</sup> In a relatively small country the professions work closely together and, therefore, there is in effect a 'one-stop-shop'.

5.2.2 The communications strategy needs to be:

- coordinated across the professions;
- supported and promoted by the Scottish and UK Governments and their ministers; and
- actively supported by other Scottish agencies such as Scottish Enterprise and the SCDI.

5.2.3 Scottish lawyers and other professionals should be included in UK trade missions, and in initiatives such as Global Financial Services Week and International Chamber of Commerce presentations

## 6. CONCLUSION

6.1.1 Scotland's legal system and profession has a proud and ancient history; it also contains many highly skilled practitioners and modern businesses. Our legal profession will never be as big as England's, and in some areas it is likely that England will remain pre-eminent as a destination of choice for business. But there is much that can be done to improve the competitiveness of Scotland's legal system – in how it does its business and how it markets itself.

6.1.2 The critical success factors will be:

- a real and shared commitment from Government, the courts and the legal profession to make this a priority as part of the wider development of Scotland's economic future; and
- a willingness to experiment, to learn from mistakes, and to see Scotland's illustrious legal history as an inspiration, not as a barrier to change.

**ANNEX A – (BELF) MEMBERSHIP AND HOW IT OPERATED**

<b>Ministerial sponsor</b>	<b>Status</b>	<b>Organisation</b>
Cabinet Secretary for Justice	Sponsor	Scottish Government
<b>Membership</b>		
Paul Cackette (until April 08), then Colin McKay	Lead Officer/Chair	Scottish Government, Constitution, Law and Courts Directorate
Carol Paton	Member	The Royal Bank of Scotland Group
Richard Keen QC	Member	Dean of the Faculty of Advocates
Michael Clancy OBE	Member	The Law Society of Scotland
Karina McTeague	Member	The Committee of Scottish Clearing Banks (CSCB)
Charlotte Barbour	Member	Institute of Chartered Accountants Scotland (ICAS)
Andrew Wilkinson	Member	Norwich Union
Robert Crawford	Member	Glasgow Caledonian University
Professor Russel Griggs OBE	Member	CBI
Patrick Andrews	Member	Shepherd and Wedderburn LLP
Kay McCorquodale	Observer	Legal Adviser to Civil Courts Review
<b>Participants in BELF discussions</b>		
Lord Glennie	Sub-Group Invitee	Judiciary
Sheriff Principal Taylor	Sub-Group Invitee	Judiciary
Scottish Legal Profession	Sub-Group Invitees: Rod McKenzie Mark Higgins Ken Ross Robert Fife Joyce Cullen Maggie Moodie Douglas Connell	Various representatives from Scottish Legal Firms: Harper Macleod Irwin Mitchell Paul & Williamson Anderson Strathern Brodies LLP Morton Fraser LLP Turcan Connell
<b>BELF support</b>		
Marion McCormack	Facilitator & Project Manager	Scottish Government, Justice and Communities Directorate
Conor Swaine	SG Secretariat	Scottish Government, Justice and Communities Directorate

## ANNEX B - METHODOLOGY

1. BELF met for the first time on 4 February 2008, when the Cabinet Secretary for Justice outlined his vision for the group. The group met in plenary on a further 3 occasions, with the final meeting on 25 June 2008.
2. In addition to plenary meetings:
  - BELF met in two sub-groups which considered respectively the areas of Civil Procedures reform, and Specialism and Perception; and
  - two meetings were held in Glasgow and Edinburgh with representatives of commercial law firms.
3. The aim of BELF was to act as a short-life group which would draw on the experience and knowledge of its members and those who contributed to meetings to identify issues and possibilities which could be taken forward by the Scottish Government, courts and legal profession.

#### 4. **Scope**

It was agreed that the work-streams would focus on how:

- Scottish businesses might be encouraged to continue to use the Scottish civil court system for the resolution of their disputes in preference to courts in other jurisdictions;
- Scotland might increase its attraction as a jurisdiction to which international businesses could turn for dispute resolution services
- the Scottish legal profession and legal system could develop niche areas of legal business through which to:
  - gain a competitive advantage; and
  - enhance the attraction of Scotland as a place in which to do business, for local business and inward investment
- the Scottish courts could become more business-focused
- the perception of the Scottish legal system could be positively broadened and promoted both within and beyond Scotland

It was also agreed that the Forum's scope should include not just the Scottish civil court system in its pure sense but also other forms of dispute resolution that might be used by businesses, including arbitration and mediation.

Although the focus would be on areas in which improvements could be made for business users of the Scottish civil courts, it was hoped that many of the recommendations might also lead to general improvements for non-business users.