



Law Society  
of Scotland

# Consultation response

Scottish Government consultation:

Legal Services Regulation Reform in Scotland

December 2021



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## Introduction

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As the professional body for over 12,600 Scottish solicitors, we know the way that legal services are regulated needs to change.

We hold this view as strongly today as when we first approached the Scottish Government in December 2015<sup>1</sup> calling for a major overhaul of the legislative framework underpinning legal regulation. Indeed, it was this proactive initiative by the Law Society of Scotland, not a scandal or market failure, that led to Scottish ministers establishing the review which was ultimately undertaken by Esther Roberton.

Six years on from us presenting our first case for change and three years on from the publication of the Report of the Independent Review of Legal Services in Scotland<sup>2</sup> (Roberton report) we believe the need for reform is greater than ever. The core legislation covering the regulation of legal services (the Solicitors (Scotland) Act 1980) is over 40 years old and was legislation of its time. When it was enacted, the significant changes that would materialise in the way legal services are now delivered and the expectations of consumers in the legal services market could not be foreseen. Almost half of all current practising Scottish solicitors were not even born when the bulk of the legislation was passed by the UK Parliament. This framework is too rigid and simply not fit for the kind of modern and diverse legal profession we see in Scotland today.

The challenge for us in working to such prescriptive legislation gets greater each year. The current legislative patchwork is complex, stifling and, in some cases, contradictory. It does not properly account for the increasing use of technology in the delivery of legal services. It leaves gaps in regulation which place consumers at risk. It also creates a legal complaints system which, all stakeholders agree, is slow, cumbersome, and expensive, causing frustration for consumers and solicitors alike.

### This situation is not sustainable

Yet, in delivering much-needed change, the Scottish Government must also protect and cherish what works within the current legal services market. Scotland is home to more qualified solicitors than ever before, increasing by over 1,000 in the last five years.<sup>3</sup> With over 1,000 firms in cities, towns and villages across the country, it is a highly competitive market, providing tens of thousands of well-paid jobs and contributing over

<sup>1</sup> Law Society of Scotland 'Case for Change' paper 2015 (published March 2016). See: <https://www.lawscot.org.uk/media/10152/the-solicitors-scotland-act-1980-the-case-for-change-regulation-pa.pdf>

<sup>2</sup> Report of the Independent Review of Legal Services Regulation in Scotland 'Fit for the Future' See: <https://www.gov.scot/publications/review-of-legal-services-independent-report/>

<sup>3</sup> The number of practising solicitors November 2016: 11,584 – November 2021: 12,630

£1.5 billion to the Scottish economy each year. Contrary to the unevidenced statement in the consultation suggesting Scotland is losing its share of the UK and global legal services market, we believe Scotland has punched above its weight and continues to do so.

At its heart is a solicitor profession which serves people, whether individual consumers, businesses, and third-party organisations such as charities. It helps many of the most disadvantaged in our society, often at the most difficult times of their lives. It supports business owners, from small companies through to large international corporate entities. It is a sector which is increasingly international in its outlook, as solicitors work across the globe and choose to retain their Scottish qualification as a badge of excellence, representing and reflecting the distinctive and respected identity of the Scottish legal system and profession. None of this can or should be taken for granted.

Great care is therefore needed to avoid changes which undermine the strengths of the current system. Unnecessary new regulatory costs risk raising prices for consumers and could weaken the competitiveness of Scotland's law firms. Political involvement in the regulation of legal services would erode core principles around the rule of law and the independence of the profession, principles which Scotland has championed and defended for decades.

For over 70 years,<sup>4</sup> the Law Society of Scotland has regulated the solicitor profession: effectively, proportionately and independently from the state. Through the work of our solicitor and lay members, we have set and enforced strong professional standards. We have delivered a robust route to qualifying as a solicitor and prosecuted cases of misconduct before the independent discipline tribunal. We have also administered critical public protections, such as the Client Protection Fund, and the delivery of sector-wide professional indemnity insurance. As a professional body, we are proud of the role we have played in protecting the public and ensuring the badge of Scottish solicitor is one that individuals respect and have confidence in.

The challenge now is to protect what works and to focus on making the changes which the legal sector needs, and the public interest demands. The problems we see today do not come from structures or from who regulates; they come from the unnecessarily complex processes and outdated procedures which are hard-wired into primary legislation and so must, by law, be followed.

<sup>4</sup> The Law Society of Scotland was given a statutory footing under the Legal Aid and Solicitor Scotland Act 1949

It is why we strongly welcome the publication of the Scottish Government's consultation, *Legal Services Regulation Reform in Scotland*.<sup>5</sup> This takes a significant step towards much-needed and long-overdue legislative reform, to bring about a regulatory regime which is centred on modern consumer protections and equally supports the Scottish legal sector to thrive as a globally recognised and respected profession.

In this response, we set out the major areas of reform which we believe the Scottish Government should prioritise. We believe there is an important opportunity to build a consensus around this positive agenda and agree a package of changes which can be taken quickly and easily through the Scottish Parliament. In doing so, we can deliver a vastly improved system of regulation, one that meets the needs of consumers and one which is fit for the modern legal sector.

Before responding to the specific questions set out by the Scottish Government in its consultation, there are several important issues and themes we believe the government should consider:

- the core problem needing addressed
- the strength of the current co-regulation model
- the benefits of a professional body led approach to regulation
- the risk of unnecessary and increased costs
- the danger of undermining the rule of law
- the challenge of COVID-19
- an improved regulatory and complaints model (Option 3+)

We hope this will help Scottish ministers decide on their next steps. We look forward to continuing our engagement with the Scottish Government, and our other partners in the legal sector, in advancing these issues in the months ahead.

<sup>5</sup> Legal Services Regulation Reform in Scotland, see: <https://www.gov.scot/publications/legal-services-regulation-reform-scotland-consultation/>

## The core problem needing addressed

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In her 2018 report, Esther Roberton said: *'Scotland is home to a well-educated, well-respected legal profession with a high degree of public trust, of which I believe we can be very proud.'* She went on to say: *'There is little evidence of significant wrongdoing in the current system.'*<sup>6</sup>

These were important observations from Esther Roberton, which are backed up by evidence. Recent independent polling has shown that over 84% of the public have trust in the Scottish solicitor profession, and this rises to 93% of those who have used a solicitor in the past five years,<sup>7</sup> far higher than the levels seen in other parts of the United Kingdom.<sup>8</sup> Complaints numbers are at similar levels to a decade ago, despite the profession being 17% larger.<sup>9</sup> Indeed, despite the global recession of 2008 and the economic impact of COVID-19, solicitor numbers are now at record levels.<sup>10</sup>

However, the way legal services in Scotland are regulated needs to change. Since the 1980 Act was enacted, the Scottish legal services market has transformed dramatically. Changes in how legal services are delivered and diversification of the law, the emergence of cross-border firms, the growth of new areas of business, the increasing internationalisation of the legal services market, changing demands of clients, advances in technology: all have impacted on the Scottish legal profession, businesses and consumers.

This has never been more evident than since the emergence of COVID-19. The pandemic required the Scottish legal sector to adapt rapidly, embracing technology and adopting innovative business practices to support consumers and the commercial sector. This ensured the continued delivery of legal services throughout one of the most difficult and challenging periods in history.

However, the pandemic, and the response of the legal profession to it, has underlined the need for a permissive legislative approach to regulation. The regulatory framework must be flexible enough to address unforeseen and novel situations and ensure all users of legal services are robustly protected.

<sup>6</sup> Report of the Independent Review of Legal Services Regulation in Scotland 'Fit for the Future' at page 30

<sup>7</sup> Savanta ComRes interviewed 1,000 Scottish adults online between 26 October and 10 November 2021. Data were weighted to be representative of key demographics including age, gender and region. Savanta ComRes are members of the British Polling Council and abides by its rules. See: <https://comresglobal.com/polls/law-society-of-scotland-solicitors-polling/>

<sup>8</sup> Legal Services Consumer Panel. See: Legal Services Consumer Panel [https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2021/07/LSCP\\_Consumer\\_Tracker\\_2021\\_v1.0-Copy.xlsx](https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2021/07/LSCP_Consumer_Tracker_2021_v1.0-Copy.xlsx) at Percentage Tab, line 1372

<sup>9</sup> 2011: 10755 – 2021: 12630 – increase of 17%

<sup>10</sup> as at 25 Nov 21 there are 12630 Scottish Solicitors holding practicing certificates

Yet, when we need flexible and responsive regulation, we have 40-year-old legislation which is rigid and cumbersome. These are not issues relating to regulatory bodies themselves, they are issues relating to the powers given to those bodies and the complicated processes they are forced to follow. In too many ways, the current legislation places a straitjacket on the Law Society of Scotland and means we cannot act when we would want or intervene as quickly as we would like.

Over the last six years, we have presented to government the crucial need for new permissive legislation to underpin the regulatory regime, **not** a change to the current strong and effective regulatory structures. We believe that with new flexible, agile legislation, the Law Society and our co-regulation partners can deliver substantial improvements for the benefit of consumers and the legal sector.

## The strength of the current co-regulation model

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Over the years, some have argued for a fundamentally new approach to legal services because they see the current system as amounting to 'self-regulation'. This is a fundamentally flawed argument.

For decades, Scotland has had a structure of co-regulation when it comes to legal services, with different organisations undertaking different roles within that structure. Given the size of the Scottish jurisdiction, this model has served the country well and been consistently acknowledged as the preferred and most suitable system by both the Scottish Government and Scottish Parliament.<sup>11</sup>

This system of co-regulation means:

- An independent complaint-handling body in the form of the Scottish Legal Complaints Commission (SLCC), which receives all complaints about legal professionals and decides which should be admitted for investigation. It directly investigates service complaints, awards consumer compensation and has oversight of the Law Society of Scotland in its handling of conduct complaints.
- A separate and independent Scottish Solicitors' Discipline Tribunal (SSDT) that makes decisions in serious cases of solicitor wrongdoing. It has extensive powers to censure, fine, suspend or remove a solicitor's right to practise and is overseen by the Lord President. The SSDT can also hear appeals against Law Society of Scotland conduct decisions.

<sup>11</sup> 11<sup>th</sup> Report Scottish Parliament 2002 <http://archive.scottish.parliament.uk/business/committees/historic/justice1/reports-02/j1r02-11-vol01-01.htm>

- The existence of the Office for Professional Body Anti-Money Laundering Supervision (OPBAS), an independent body established by the UK Government, and which oversees the Law Society's role as a regulator on anti-money laundering.
- The presence of other bodies for particular aspects of legal services, such as investment business and consumer credit (Financial Conduct Authority), insolvency (Insolvency Practitioners Association), legal aid (Scottish Legal Aid Board) and immigration advice and representation (Office of the Immigration Services Commissioner).
- The Court of Session plays a central role in hearing appeals in admissions to the solicitor profession and in relation to complaints, with the Lord President approving all changes to the solicitor practice rules. This recognises the primary role of solicitors as officers of the court and their overriding duty to the rule of law and the administration of justice.
- The Competition and Markets Authority (CMA) which work to promote competition for the benefit of consumers across all sectors, including legal.

Taken together, this strong system of checks and balances serves the legal services market well.

## **The benefits of a professional body led approach to regulation**

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Like other professional bodies in Scotland and around the world with a duty to uphold and protect the public interest, the Law Society of Scotland has a dual role in robustly regulating its profession and providing services and support to allow that profession to thrive.

Our role as a single professional body helps ensure an effective, balanced and responsive approach to regulation. Our work, underpinned by the regulatory objectives set out in legislation, ensures high ethical standards as well as excellent legal services. Members have a strong personal and professional interest in ensuring their profession is trusted and respected, that bad practice is rooted out and that proper action is taken when someone falls below the standards expected. Far from there being a conflict of interest in a single professional body approach, there is a coincidence of interest.

This is why the professional body model is used by so many other professions at home and the world over. Here in Scotland, we have the Institute of Chartered Accountants of Scotland, the Royal Incorporation of



Architects in Scotland, the Royal Institution of Chartered Surveyors, and the General Teaching Council for Scotland. There is a clear recognition that professional bodies offer robust regulation and are cost effective.

Further afield, law societies and bar associations around the world have a role to play in regulation and professional support of their respective legal professions. These include the law societies of Ireland and Northern Ireland, law societies and bar associations in the provinces of Canada and states of Australia, as well as bar associations in many US states. They provide a cost effective, practical, and co-ordinated professional approach which works in the interests of the consumer, and are academically recognised as having significant advantages, which include:

- a relationship of mutual trust between regulator and regulated
- expertise and insight, allowing for more efficient innovation
- swifter amendment of regulatory standards
- lower monitoring and enforcement costs
- lower costs to the public purse<sup>12</sup>

Our regulatory function is clearly separated from our professional support work. The Society's regulatory work is overseen by the Regulatory Committee<sup>13</sup> in accordance with the provisions of the Solicitors (Scotland) Act 1980.<sup>14</sup> This committee works independently of the Law Society of Scotland Council and, along with all its sub-committees, is made up 50/50 of volunteers – solicitor and lay members. This means every single regulatory decision at the Law Society is taken or overseen by a committee of knowledgeable solicitors as well as public interest lay members, who work in partnership to deliver effective regulation of the profession.

This contribution from our network of lay members cannot be overstated. They help ensure we meet our important statutory duties towards the public interest and allow for the interests and protections of the consumer to sit at the very heart of our regulatory regime.

The strength of that regulatory work at the Law Society of Scotland is shown by:

<sup>12</sup> (Ogus 1995; Morgan & Yeung 2007)

<sup>13</sup> For further information on the Regulatory Committee, see: <https://www.lawscot.org.uk/about-us/who-we-are/our-committees/regulatory-committee/>

<sup>14</sup> See section 3B Solicitors (Scotland) Act 1980; as inserted by Legal Services Scotland Act 2010, section 133

- A clear and recognised route to qualifying as a solicitor and a strong rules-based set of professional standards for solicitors to follow.
- Our highly trained financial compliance and anti-money laundering teams ensure compliance with our strict accounts rules and the UK anti-money laundering regime.
- The 124 conduct complaints which the Law Society initiated in the public interest between 2016 and 2020. Almost a third of all disciplinary cases taken before the Scottish Solicitors' Discipline Tribunal arose not from consumer complaints, but because of the proactive work of the Law Society.

The outcomes from this work are clear. Public polling consistently shows that over 93% of the Scottish public have trust and confidence in the solicitor profession,<sup>15</sup> higher levels than seen in other parts of the UK. Consumer complaints are at the same level as a decade ago, despite a record number of solicitors and legal transactions being carried out. Claims made to the Society's Client Protection Fund have reduced significantly over recent years and claims on the Master Policy for professional indemnity insurance are at historic lows. None of this should be taken for granted.

## The risk of unnecessary and increased costs

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In her 2018 report, Esther Robertson said: 'I am clear that the global cost of the new regulatory system should not be more than the cost of the current system.'<sup>16</sup> Whilst we agreed with this statement, we believe a fundamental and critical flaw of the Robertson report was the failure to provide any detail on how such an aim could be achieved with the model proposed.

We note that in its consultation paper and against the first two model options, the Scottish Government also states it is the 'intention' that the cost to the legal profession be no more than the current regulatory framework. Again, we are not aware of any detailed cost analysis or detailed financial modelling to show how this could be achieved with either a new public regulator or an additional market regulator.

It is obvious, and indeed inevitable, that increased costs would arise from Options 1 and 2 in the consultation paper. New set-up, transitional and ongoing operating costs for a new public body or additional market regulator on staffing, office accommodation, utilities and other overhead costs would all be required.

<sup>15</sup> 93% of those who have used a solicitor in the past 5 years. Savanta ComRes interviewed 1,000 Scottish adults online between 26 October and 10 November 2021. Data were weighted to be representative of key demographics including age, gender and region. See: <https://comresglobal.com/polls/law-society-of-scotland-solicitors-polling/>

<sup>16</sup> Report of the Independent Review of Legal Services Regulation in Scotland 'Fit for the Future' page 47

Potentially, over 100 people who currently volunteer within the Law Society to take or oversee regulatory decisions without remuneration would need to be compensated in a way that is consistent with other public bodies.

On costs, the Scottish Government needs only to look at the experience from the last time a new body was established for legal services regulation.

The legislation establishing the Scottish Legal Complaints Commission (SLCC) was accompanied by a financial memorandum.<sup>17</sup> This estimated that the SLCC would be financed by an annual levy on the legal profession of approximately £1.2 million a year. Yet, over the last decade, the SLCC's levy on Scottish solicitors has increased by 50% to almost £4 million. This is despite that body handling the same numbers of complaints as 10 years ago.

The issue of increased cost is a particular risk for the Scottish legal jurisdiction given its size and the relatively small group upon which the costs of a regulatory system must be borne. Layering in new and unnecessary costs risks undermining Scottish firms in what is now a UK wide legal services market. Similarly, new costs for in-house lawyers, and particularly those in the public sector, risk driving legal advice out of the regulated professional sector altogether as individuals or employers refuse to continue paying for more expensive practising certificates.

There is an impact on consumers too as costs are borne ultimately by those buying legal services via increased fees. Our own consumer research has shown how the cost of legal services, or the perception of cost, can act as the single biggest barrier to someone getting the legal services they need.<sup>18</sup> This is why great care is needed as increased prices will always disproportionately impact on individuals with lower incomes or those from more disadvantaged groups.

<sup>17</sup> Legal Profession and Legal Aid (Scotland) Bill [ Revised Financial Memorandum] SP Bill 56A. See: [https://archive2021.parliament.scot/S2\\_Bills/Legal%20Profession%20and%20Legal%20Aid%20\(Scotland\)%20Bill/b56s2-stage2-fm-rev.pdf](https://archive2021.parliament.scot/S2_Bills/Legal%20Profession%20and%20Legal%20Aid%20(Scotland)%20Bill/b56s2-stage2-fm-rev.pdf)

<sup>18</sup> See: <https://www.lawscot.org.uk/news-and-events/law-society-news/publicpolling2021/>

## The danger of undermining the rule of law

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Scotland has been a long and proud defender of the rule of law, and this is recognised and reflected within the regulatory objectives.<sup>19</sup> Others around the globe have looked to Scotland in admiration of our justice system and sought to learn from what we do in delivering legal excellence.

A key principle of the rule of law is the independence of the legal profession from the state. Solicitors often have to challenge the power of government. This is why it is so important for legal professionals, from judges to individual lawyers, to act freely from government interference as an essential guarantee for the promotion and protection of human rights. To have the state involved in deciding who can become a lawyer or removing the right to practise would be an unacceptable breach of these longstanding and commonly held principles.

Yet the first option in the consultation would see the members of a new legal regulator being appointed by politicians, a serious erosion of the independence of the profession. In her 2018 report, Esther Robertson acknowledged that no other jurisdiction in the world had adopted the system she proposed. We believe there is good reason for this given the serious constitutional issues it creates.

We are aware that the President of the International Bar Association (IBA), Sternford Moyo, has written to the Scottish Government about some of the models put forward in this consultation. In particular, we note his words on behalf of the IBA;

*'We believe this [Option 1] is a serious and potentially dangerous step away from the principle of the independence of the legal profession. It risks government appointees making the arrangements for who can and cannot become a lawyer, determining the requirements which are set down on the legal profession and, perhaps most seriously, controlling the process to remove a lawyer's right to practise. These are steps which should remain within the remit of the profession.'*

*'Such changes would, at a stroke, call into question the independence of your legal profession. Not only does this undermine the rule of law, it risks damaging the reputation of the Scottish jurisdiction across the globe.'*<sup>20</sup>

<sup>19</sup> Section 1(a) Legal Services (Scotland) Act 2010.

<sup>20</sup> Correspondence to the Minister for Community Safety dated 8 Nov 2021.

We believe this is a serious intervention from Mr Moyo who, as a practising lawyer in Zimbabwe, has a particular understanding of these issues. It shows why the Scottish Government must take care to avoid action which undermines the rule of law at home and Scotland's standing abroad, especially when such little evidence exists to justify the sweeping changes which would create these very challenges.

It is important to have effective oversight and accountability of those tasked with regulating legal services. We believe such oversight is best provided by the rigorous supervision of the Lord President as the independent head of the judiciary. This mirrors the best practice seen in other jurisdictions and avoids the issue, perceived or otherwise, of political interference.

## The challenge of COVID-19

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When Esther Roberton published her 2018 report, few could have predicted or foreseen the COVID-19 pandemic, or how it would impact our economy and transform the way so many live their lives.

Like many sectors, the immediate impact of COVID-19, including the public health restrictions on the legal profession, was abrupt and severe. Upto 90% of law firms faced a reduced turnover, driven by an overnight halt to the property market, fewer commercial transactions, and a drastic slowdown in court business.

A regulatory objective set out in the legislation passed by the Scottish Parliament in 2010 means we must act in a way which promotes access to justice and an independent, strong, varied and effective legal profession.

<sup>21</sup> It was why, as a professional body, we recognised the vital importance to act quickly and support the profession to weather the crisis. It meant we came forward with a £2.2 million package of direct support,<sup>22</sup> unprecedented in the history of the Law Society, and an act which saved many law firms tens of thousands of pounds.

Not only did this help to support businesses and jobs in the sector, but it also helped ensure a continuation of legal services for consumers and those most in need. Our approach contrasted starkly with the Scottish Legal Complaints Commission which, at the height of crisis, actually chose to increase its fees and charge more when solicitors could least afford it.

<sup>21</sup> Section 1 Legal Services (Scotland) Act 2010

<sup>22</sup> For further information, see: <https://www.lawscot.org.uk/news-and-events/law-society-news/multi-million-pound-package-of-financial-support-for-scottish-solicitors/See>

While the economic position has improved markedly from the early stages of the pandemic, the legal sector recovery remains fragile. This is why great care is needed to ensure any reforms to regulation serve rather than undermine that recovery. It is also why this, of all times, is not the time to impose increased costs and bureaucracy, or to introduce uncertainty and inexperience in the regulation of legal services.

## **An improved regulatory and complaints model (Option 3+)**

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The Scottish Government has presented three broad options for progressing regulatory reform: the first, which sets out the Robertson model of a new state appointed regulator; the second, of an additional market regulator; and a third, which retains existing regulatory structures.

It remains unclear to us what problems would be solved by Option 1 and a new politically appointed regulator. We believe the Robertson report failed to set out a convincing argument for the changes proposed or the ‘non-mischief’ being addressed. Similarly, it is difficult to see what would be positively achieved or delivered differently in terms of outcomes from Option 2 and layering in an additional market regulator.

Both options would: introduce substantial new costs; adopt untried, untested and bureaucratic new bodies; and, risk a level of political interference in the legal profession unseen in advanced democracies. All for little, if any, benefit.

We regret that Option 3 has been presented in the consultation paper in a way that some have interpreted it as amounting to the status quo. In reality, we believe this option offers the best and most effective way of delivering the change needed. Indeed, by moving beyond unnecessary and potentially divisive arguments on regulatory structures, there is the chance to develop a consensus on reform and allow for substantial reform to be taken quickly through this term of the Scottish Parliament.

This is why we support Option 3 but would like to strongly enhance this model to address the real problems and real concerns within the current regulatory regime. This includes:

- A radical overhaul of the complaints system, widely seen as failing consumers and the profession, by moving to a system which is quick, agile and treats all parties fairly. The Scottish Government should transform the Scottish Legal Complaints Commission into a proper Scottish Legal Ombudsman Service which could concentrate more effectively on dealing with consumer complaints thoroughly and swiftly. This would, in turn, allow the Law Society to continue its strong track record of protecting the public interest by addressing issues of professional misconduct and prosecuting for prosecuting disciplinary breaches.. This is the kind of system which already exists and works well in England and Wales and was recently adopted in Northern Ireland.

- Changes to the way our already independent Regulatory Committee is populated and making it more accountable for its work.
- An important move towards entity regulation, which would create a regulatory system more relevant and more applicable to modern legal practice and provide the Law Society with a broader range of powers to take action when we need to. This could also be used to address the need for more robust regulation around the use of artificial intelligence and other technology in the delivery of legal services.
- Action to tackle the unregulated legal services market, which puts consumers at risk, an issue which the consultation paper regrettably fails to discuss or adequately recognise. This is disappointing as this current review presents possibly the only opportunity to address problems and risks associated from unregulated legal services.
- New powers to allow cross-border regulation, a change which can position Scotland as a more attractive jurisdiction in which legal firms can be based and offer the chance to grow inward investment and jobs.

We have set out in detail our proposed complaints model within Appendix 1 to this response paper. We also refer to and comment further on this where appropriate to the questions raised within the consultation.

## Specific comments and responses

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### Part 1: Strategic change, vision and key aspects of the regulatory model

**Q1 From the options listed, how important do you think each of the following principles and objectives are for any future regulatory model for legal services in Scotland?**

- protecting and promoting the public interest, including the interests of users of legal services
- supporting the constitutional principle of the rule of law
- promoting independent legal professions and maintaining adherence to the professional principles
- improving access to justice, including choice, accessibility, affordability and understanding of services by service users
- embedding a modern culture of prevention, quality assurance and compliance
- working collaboratively with consumer, legal professional bodies, and representatives of legal service providers as appropriate
- embedding the better regulation principles throughout its areas of responsibility (additionally; agility, independence, prevention, improvement, consideration of cost, and efficiency)
- promoting innovation, diversity, and competition in the provision of legal services

The constitutional principle of the rule of law is a cornerstone of democracy and is crucial in underpinning the Scottish legal system. All the objectives and principles set out above are necessary and very important to support the rule of law and are each inter-dependant on the others. To diminish the standing of any of these to 'not important' or even to 'should be removed' would not support a flexible, robust, proportionate and consumer-focused regulatory regime

**Q2 From the options listed, how important do you think each of the following are in supporting the framework of any future regulatory model?**

- enable access to justice, including choice and diversity
- uphold the rule of law and the proper administration of justice
- offer accountability in protecting the public and consumer interest
- offer accountability to those regulated by the framework
- secure the confidence and trust of the public



- **enable future growth of legal services**

As with our response to Q1, upholding the rule of law and the proper administration of justice is crucial to any regulatory regime and we believe that each of the above are equally necessary to underpin a modern regulatory framework. However, both Option 1 and Option 2 risk diluting many of these objectives, and we discuss this further in response to Q4 below.

**Q3 From the options listed, how important do you think each of the following criteria is in a regulatory framework?**

- **support and promote sustainable legal services, which benefit consumers**
- **agile**
- **risk based**
- **efficient**
- **outcomes based**
- **a proactive focus on continuous improvement and prevention of failures (which lead to complaints)**
- **proportionality**
- **an increased focus on independence and accountability**

Each regulatory principle or objective listed above is equally important and all should be reflected in any regulatory framework which has the consumer interest at its core and seeks to support a flourishing legal sector. We note that the final principle refers to 'increased focus on independence'. However, both Option 1 and Option 2 threaten the independence of the legal profession, by each creating a body appointed and overseen by the Scottish Government and Scottish Parliament.

We also highlight that some of the listed objectives can only be realised by moving away from the existing prescriptive and constraining legislation. For example, it is challenging under the current legislation to regulate in a way which is agile, risk based, and outcomes focused. These regulatory outcomes could be introduced through new, permissive legislation which allows a greater degree of flexibility to legal service regulators to regulate in a way which meets the expectation of both the legal sector and consumers. Creating a framework which enables these outcomes does not require radical change to the current regulatory structure.

## Part 2: Regulatory models and landscape

### The potential regulatory models

**Q4** The primary recommendation of the Robertson report was: *'There should be a single regulator for all providers of legal services in Scotland. It should be independent of both government and those it regulates. It should be responsible for the whole system of regulation, including entry, standards and monitoring, complaints, and redress. Regulation should cover individuals, entities and activities and the single regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland.'* To what extent do you agree or disagree with this recommendation?

**We strongly disagree.** We believe the recommendation to abolish existing structures and establish a wholly new singular regulatory body is not the right way to fix the current challenges in the regulatory system.

We do agree that the regulators should be:

- independent of government
- responsible for the full life cycle of regulation
- cover individuals, entities and activities
- have suitable accountability

All of this is more achievable through the existing regulatory model or Option 3 set out in this paper.

The overarching remit of the Independent Review of Legal Services was to 'ensure a proportionate approach to regulation that supports growth in the legal services market'.<sup>23</sup> Rather than meeting this aim, the Robertson model risks undermining it. It risks introducing a radical regulatory structure which is costly, undermines the rule of law and damages the international reputation of the Scottish legal sector to address a problem which is non-existent.

### Cost of a new regulator

In Appendix 2 of this response, we outline our concerns about cost in greater detail, focusing on start-up costs of a new regulator, transitional costs and long-term operating costs.

<sup>23</sup>Report of the Independent Review of Legal Services Regulation in Scotland 'Fit for the Future' at page 10 (Remit)

We explain the cost challenges arising from:

- winding up the existing Law Society
- property costs
- employee and senior leadership costs
- IT and system costs
- costs of resourcing the work currently undertaken by volunteer committee members
- pension costs
- costs relating to the Client Protection Fund

We strongly urge the Scottish Government to carry out full cost and impact assessments for any proposed change to the regulatory model.

#### The independence of the legal profession and the rule of law

This proposed model raises fundamental and significant concerns regarding the rule of law and the independence of the legal profession. Implementing such a change to the regulatory structure, which would significantly dilute these and would inevitably damage the global reputation of the Scottish legal sector. The independence of the legal profession, from the state, is a principle universally recognised as underpinning public interest, promoting and protecting human rights and is central to safeguarding the rule of law, ensuring that legal professionals can serve the public unfettered from the interference, actual and perceived, from the state and political influence. It is of paramount importance that consumers can place trust in the competence and integrity of the solicitor profession and that can only be ensured through regulation independent of government. The importance of the rule of law and the independence of the legal profession is reflected within the regulatory objectives which places a duty on both the Society and Scottish ministers to ensure the constitutional principle of the rule of law is supported and the independence of the legal profession promoted.<sup>24</sup>

The Robertson report correctly acknowledges that no other jurisdiction in the world has adopted the regulatory model put forward within this recommendation. We believe there is good reason for this, as the model proposed would create the risks other jurisdictions have already identified and rejected. For example, following a recent review, the government of the Republic of Ireland specifically rejected a

<sup>24</sup> Section(s) 1 and 4 Legal Services (Scotland) Act 2010

regulatory model like that which is recommended because of concerns about the rule of law and independence of the legal profession from government. The Irish Government agreed that the Law Society of Ireland should continue as a professional body and have a central role in the regulation of solicitors in its country.

During the parliamentary passage of the Legal Services (Scotland) Act 2010, the independence of the legal profession was widely discussed, and recognition was given to the importance of this principle in a democratic society committed to the rule of law. This was a view shared by the Scottish Government, which said that ‘all of us, regardless of party, support a strong and independent Scottish legal profession’.<sup>25</sup>

#### International reputation

The Robertson model threatens a strong and independent Scottish legal profession which, in turn, damages the international reputation and credibility of the Scottish legal profession. If the rest of the world questions the independence of the Scottish legal profession, it will damage Scotland plc, making it a less attractive jurisdiction in which to do business. The Scottish legal profession is worth around £1.5 billion to the Scottish economy and now, more than ever, is not the time to threaten that economic contribution.

#### Status of professional bodies

The Robertson model proposes that professional bodies, after the creation of a new super-regulator, would no longer have regulatory roles but would work with the new independent regulator as professional membership organisations. The Society is currently under a statutory duty and is committed to work in the public interest.<sup>26</sup> We regularly engage with the Scottish Government and other stakeholders in promoting the development of policy and legislation to the benefit of the public and society more widely. This work is carried out by highly skilled staff and volunteers.

However, it is unlikely that this crucial work would continue through voluntary membership bodies with funding challenges. The majority of the Law Society’s income is raised through the practising certificate fee and other regulatory levies. Without those income streams, the remaining commercial income

<sup>25</sup> Fergus Ewing - Minister for Community Safety and Legal Affairs – stage one report Legal Services (Scotland) Bill 2010

<sup>26</sup> Section 1 Solicitors (Scotland) Act 1980 & section 1 Legal Services (Scotland) Act 2010

raised through, for instance, training and CPD events would be insufficient to support the strong policy work currently carried out by the Law Society.

In addition to diminishing the strength and quality of the professional bodies, the Robertson model would lead to a disjointed representative landscape. Already, there are various representative voices for solicitors, including the bar associations, local solicitor faculties, WS Society, Society of Solicitors in the Supreme Courts of Scotland, Scottish Law Agents Society and others. If the Law Society as we know it ceased to exist, it would become one of many smaller voices, which would make liaison between a new super-regulator and the professional bodies more complicated and more expensive.

#### One-size-fits-all regulation

Solicitors, advocates and commercial attorneys each perform a different and equally important function within the legal services sector and, as such, each is bound by different rules and requirements embedded through provisions stretching across many statutes. Collating all branches of the legal profession under the umbrella of one single super-regulator would be expensive, challenging to manage in a proportionate way and require significant and experienced resource.

#### **Q5 Of the three regulatory models described above, which one would you prefer to see implemented?**

Our preference would be a model that reflects Option 3 and incorporates our proposed complaints model as set out in Part 4 of this paper and within Appendix 1.

We believe that the Option 3 model, with the adoption of our proposed complaints model, is the only credible option which strikes the correct balance between working in the consumers' best interests, promoting a strong legal sector, and providing a proportionate and appropriate complaints redress route. We are supportive of all the proposed functions attached with this option, the majority of which align with the current functions and responsibilities resting with the Society and other organisations within the current co-regulation structure.

Option 3 allows for evolution and iterative improvement of the current regulatory framework. It would also allow for a more agile, responsive, and transparent regulatory regime, which would strengthen the focus on consumer protections and support the legal profession.

This option would:

- provide powers for regulators to apply to regulate legal services providers in other jurisdictions
- introduce powers to regulate at entity level, therefore affording greater protection to consumers
- provide greater flexibility through permissive legislation, which will introduce the powers for a more proactive regulatory regime encompassing the better regulation principles of proportionality, targeted, transparency, accountability, consistency
- improve transparency and accountability around regulators, in particular the Regulatory Committee

Option 3 is the only option which provides the opportunity to make significant change quickly and at the least cost. As referred to elsewhere in this response, both Options 1 and 2 will attach significant and unknown cost and will take many years to embed, bringing significant uncertainty to both the legal profession and consumers during any transition period and preventing much-needed reform to *how* regulation is carried out while time, money and effort are instead spent on *who* regulates.

Option 3 also brings the following benefits:

- Embedding a consumer voice

We are strongly supportive of the principle of providing a voice to the consumer within the regulatory sphere and we fully recognise that effective consumer engagement is a crucial part of the regulatory process, bringing many significant benefits.

As referred to previously within this response, the Society benefits already from both non-solicitor and solicitor volunteers, across its regulatory committee and governance structure, who ensure that our regulatory work remains focused on the consumer interest. Building further on our commitment to place the consumer at the heart of our regulatory work, the Regulatory Committee of the Society, in its current two-year strategic objectives,<sup>27</sup> sets out a commitment to establish a Consumer Panel to provide greater voice to the consumer and to help further inform our regulatory work and development.

- Role of the Lord President and the Court of Session

<sup>27</sup> Law Society of Scotland Regulatory Committee: <https://www.lawscot.org.uk/about-us/strategy-reports-plans/regulatory-committee-strategic-objectives-2021-2022/>

The Lord President and the Court of Session play a crucial and independent role in the current regulatory model and support good governance by providing checks and balances on the current regulatory regime, which should be continued. We have worked closely with the Lord President's office for many years and look forward to this continuing. We comment further on the role of the Lord President and the Court of Session in response to Q13-17 below.

- Establishing a whistleblowing procedure

We are supportive of the proposal to introduce a whistleblowing process and agreed with the associated recommendation within the Robertson report. We have recently introduced a similar procedure and policy in relation to our anti-money laundering supervisory role. Under this model, we would intend taking work forward to build upon our experience of doing this to introduce a whistleblowing process for our wider regulatory work.

- Regulation of claim management companies

We note that Option 3 places an obligation on the regulator to consider and make recommendations regarding the ability to regulate claim management companies. Although we are not in a position currently to make comment on our ability or desire to regulate claim management companies, we would be happy to establish a working group to consider this more closely and in detail.

**Q6 Of the three regulatory models described above, please rank them in the order you would most like to see implemented.**

**Option 3 (Increased transparency and accountability)**

This is the only model we are strongly supportive of, with the addition of our proposed complaints model and for the reasons we have set out in response to Q5 above.

**Option 2 (Market regulator)**

We believe Option 2 is neither necessary nor desirable. Many of the concerns we have raised in relation to Option 1 (see our response to Q3) are also applicable to Option 2. We also note that this regulatory model is similar to that which has been adopted in England and Wales. In that regard, we would suggest that the Scottish Government may find it helpful and informative, from a comparative perspective, to examine and consider the experience within this jurisdiction, the challenges that have arisen and the extent to which this regulatory model has or has not achieved its objective.

We also have several observations which suggest that this model has not been sufficiently considered.

- As we highlight above, this model seeks to introduce, by another name, a model akin to that which exists in England and Wales in terms of the Legal Services Act 2007<sup>28</sup> and replicate, in effect, the role of the Legal Services Board (LSB).<sup>29</sup> It suggests a model developed in England and Wales for the regulation of close to 200,000 legal professionals,<sup>30</sup> with 18 separate bodies involved in the regulation landscape,<sup>31</sup> for the regulation of around 13,000 legal professionals (solicitors, advocates and commercial attorneys) in Scotland, with just three regulators.
- Rather than simplifying the regulatory model, this introduces a further layer of regulation, complexity, bureaucracy, cost, and uncertainty which is completely disproportionate to the size of the Scottish legal profession. This was a view shared by the then Cabinet Secretary for Justice, Kenny MacAskill, in his speech to the legal profession in September 2007, when he stated that following the England and Wales (LSB) model was not appropriate for Scotland.<sup>32</sup> The Robertson report also recognises that the Scottish legal profession and jurisdiction are much smaller than others, and therefore the adoption of a model designed for a much larger legal profession is not a suitable one for the Scottish legal sector.
- The role of the proposed market regulator has not been made out within the consultation, and contradictory functions appear within the consultation. For example, the proposed functions include 'set minimum entry, education, and training standards'.<sup>33</sup> However, the consultation further states exactly the same functions will rest with the 'authorised regulator'.<sup>34</sup> This suggests that the functions of the market regulator have not been considered extensively enough to make this a realistic option upon which to comment.
- One of the functions of the market regulator is to make recommendations. The consultation contains very little detail in relation to making recommendations. It is not clear as to whom these recommendations will be made. Will there be any enforcement powers to ensure recommendations are taken forward and would there be a duty on Scottish ministers to do so.

<sup>28</sup>See <https://www.legislation.gov.uk/ukpga/2007/29/contents>

<sup>29</sup>For more information see Legal Services Board, Home: <https://legalservicesboard.org.uk/>

<sup>30</sup>Market Research Report- Legal Services Board 2019. See: <https://legalservicesboard.org.uk/about-us/who-we-are#question-13>

<sup>31</sup> See Legal Services Board approved regulators; <https://legalservicesboard.org.uk/wp-content/uploads/2021/07/LSB-regulators-and-oversight-map-infographic.pdf>

<sup>32</sup> Speech by the Cabinet Secretary of Justice – Law Society Annual Conference September 2007

<sup>33</sup>Legal Services Regulation Reform in Scotland: Consultation 2021. See page 42

<sup>34</sup> see *ibid* at page 43



Also, it is not clear what the relationship would be with the newly formed Consumer Scotland would be, which itself will have the power to make recommendations, or with the Competition and Markets Authority, and it appears that there may be a crossover of responsibilities among those bodies.

- The suggestion is made that the market regulator will be responsible for commissioning research. However, how will this research be funded? Research is costly and if this is to be funded by the profession, then this will divert significant funds from the main regulatory function. It should be clear to the consultation audience if the research is to be member-funded or funded through an alternative source. If this model is to be taken forward, then government funding would need to be considered for research work as the legal profession should not be burdened with unquantified costs of this nature.
- The costs associated with general funding of a new market regulator or oversight body must be correctly identified and accurately calculated, and the consultation again fails to set this out. The assumption is made, as with Option 1, that the regulatory cost to the profession will be no more than the current cost. However, we cannot understand how this will be the case when it is proposed to introduce another regulator into the framework. In effect, this will mean that the profession will pay regulatory fees/levies to the market regulator, the authorised regulator, and the Scottish Legal Complaints Commission (SLCC). This contrasts with the current model where fees (or levies) are paid to only the latter two. Therefore, we can only presume that either the overall cost to the legal profession will increase, or the fees/levies paid to the authorised regulator/SLCC will be reduced, which itself would impact on the regulatory and consumer functions of those bodies. If the proposal is to introduce a levy on the authorised regulators to fund the market regulator (replicating the funding model of the LSB), then fees to the regulated population would be increased accordingly and would not remain as currently is. We comment further on our concerns relating to cost in Appendix 2 of this response.
- The proposal<sup>35</sup> is that the market regulator would determine and specify the 'remit' of the Regulatory Committee. However, the consultation document later states that 'Under model Options 2 and 3, the existing remit of Regulatory Committees would remain'<sup>36</sup> Given the

<sup>35</sup> Legal Services Regulation Reform in Scotland: Consultation 2021. See page 43

<sup>36</sup> Ibid at page 56

significant importance of ensuring a remit reflecting the public interest, we would welcome clarification on this possible inconsistency. The current remit of the Society's Regulatory Committee is determined by the Society's Council, and reflects, the 'regulatory functions' as set out within the 1980 Act.<sup>37</sup>

#### Additional comments

More generally, we are pleased to note that the consultation appears to be committed, regardless of the model carried forward, to the introduction of powers to permit the respective regulator to seek approval to regulate in other jurisdictions outside of Scotland.<sup>38</sup> This would significantly support the Scottish legal sector to increase its market share, raise its profile and promote competition in the wider UK legal market.

There are an increasing number of multi-national law firms, whose offices spread across the UK and beyond, and we now have 47 operating in Scotland. However, the current legislation does not allow us to regulate legal businesses in respect of their operations beyond Scotland. This means Scottish businesses must submit to dual regulation, even if only operating within the UK. This increases compliance costs for the business and reduces competitiveness (and transparency) for consumers. We believe there is a strong economic case for giving Scottish legal service regulators the permissive power to seek to become a regulator of legal services beyond Scotland. Providing a single regulatory model for cross-border firms could, over time, position Scotland as a more attractive jurisdiction in which to headquarter a firm's operations, thus strengthening the Scottish economy.

**Q7 Please rank in importance the aspects of regulation you would most like to see handled by professional regulatory bodies, through independent regulatory committees.**

- **education and entry**
- **oversight of standards and conduct**
- **complaints and redress**

All of these elements carry equal importance in the overall regulatory regime and therefore it would not be appropriate to list them in preference order. As with the current model, we believe that any regulatory

<sup>37</sup> Section 3F Solicitors (Scotland) Act 1980

<sup>38</sup> Legal Services Regulation Reform in Scotland: Consultation 2021. See page 45 (Role of regulator)

committee should have responsibility for all aspects of regulation, and none should be removed from the functions of the regulator.

In relation to education and entry, we believe that a professional body regulator is best placed to determine the requirements for both, being in a position to be able to identify emerging trends within the legal sector and introducing changes to reflect these. This ensures that legal education and entry requirements can evolve to continue to maintain the necessary high standards. The quality of legal education is reflected in recent independent public polling, which shows that 91% of all respondents agree that Scottish solicitors are educated and trained to a very high standard.<sup>39</sup>

Over recent years, we have taken innovative steps to reflect the needs of the legal sector in terms of legal education and training. We have accredited new delivery formats of LLB courses (the clinical LLB at Strathclyde University, and the online LLB at Robert Gordon University (RGU)) and the Dip LP (online Dip LP at RGU). We encourage other legal education providers to think innovatively about their provision and our annual reporting process for accredited providers seeks to drive best practice.

We have chosen to innovate ourselves. Since the publication of the Robertson report, we have introduced new admission regulations, the Admission as a Solicitor (Scotland) Regulations 2019, which:

- moved the earliest point of admission and gaining a restricted practising certificate from 12 months of a training contract having been completed to three months of a training contract having been completed – in particular, this has enabled traineeships at criminal defence firms as trainees can appear in court earlier
- standardised the way in which lawyers from outwith the EU can requalify into Scotland – this has led to a significant growth in numbers of applicants from non-UK and non-EU jurisdictions since the introduction of the new regulations
- created a position of a training manager in each firm, which gives power to named individuals to make certain decisions rather than requiring the Society to do so (e.g. shortening training contracts within parameters and seconding trainees to other entities)
- modernised the language around the regulations

<sup>39</sup>Savanta ComRes interviewed 1,000 Scottish adults online between 26 October and 10 November 2021. Data were weighted to be representative of key demographics including age, gender, and region. See: <https://comresglobal.com/polls/law-society-of-scotland-solicitors-polling/>

In relation to complaints and redress, we believe that the current responsibilities, whereby the regulator investigates complaints relating to conduct, should remain with some improvements and we discuss this in more detail in response to Part 4 and within our proposed alternative regulatory complaints model set out in Appendix 1.

**Q8 Of the three models described above, please rank in importance the aspects of regulation you would most like to see handled by a body independent of, and external to, the professional regulatory bodies, and of government.**

See our response to Q7 above.

**Q9 Under the Robertson model, to what extent do you agree or disagree that the professional bodies should have a statutory footing?**

**We strongly agree.** We believe that those organisations with a regulatory function and who currently have a statutory footing should continue to do so, including professional bodies and the Lord President. This ensures credibility in delivering their respective core remit and responsibilities, provide certainty as to role and purpose and bring transparency.

Although we agree that the relevant organisations should continue to have a statutory footing set out within primary legislation, the functions of those bodies should be set out within subordinate legislation, providing flexibility to amend both pro and reactively when necessary.

If professional bodies, having had their regulatory functions removed, were not to have a statutory footing, then it would be difficult to envisage how membership of those bodies could be any more than voluntary. This would result in a drop in income which would impact on delivery of the remaining functions.

**Q10 Which of the following methods do you think the final regulatory model should utilise to embed a consumer voice?**

- **seeking input from Consumer Scotland**
- **through a consumer panel**
- **a requirement for consumer expertise within regulatory committees**
- **a combination (please specify)**

We are supportive of a combined approach of all three of the above. As referred to previously (see response to Q5), the Regulatory Committee of the Society has recently committed to establishing a Consumer Panel to provide greater voice to the consumer and to help further inform our regulatory work and development. It is anticipated that this panel will bring significant and valued input that will ensure consumers remain at the heart of regulatory decisions and will help to proactively identify, and at an early stage, issues that may impede and be determinative to consumers. We also anticipate and recognise that consumer insight will be part of the relevant criteria and skills specification for committee recruitment going forward.

At an early stage of development of the proposal to establish Consumer Scotland, and on several occasions more recently, we have welcomed the creation of this new consumer representative body, which we look forward to working with collaboratively in our current co-regulation framework.

**Q11 To what extent do you agree or disagree that Consumer Scotland should be given the power to make a super-complaint in respect of the regulation of legal services in Scotland?**

**We mostly agree.** However, it is not clear as to the extent of the proposed power and what mischief it is intended to address. We would welcome clarification of this.

For example, would this relate to competition concerns? If so, the Competition and Markets Authority already holds the vires to bring a 'super-complaint' in this regard. Or is it suggested that the power be given to Consumer Scotland to make a super-complaint about an individual regulator, or all regulators collectively, regarding the performance of regulatory functions? If it is the latter, then it would be helpful and necessary to clarify what is meant by 'in respect of the regulation of legal services' as this is currently very wide and ambiguous.

In addition, we believe Consumer Scotland will have a general power to make a super-complaint in any case, and therefore we are uncertain why it would be necessary to expressly state the power in relation to the regulation of legal services. We also highlight that super-complaints can currently be made by a

number of bodies under the Enterprise Act 2002,<sup>40</sup> including Which? - the Consumers Association and the Scottish Association of Citizens Advice Bureaux.

**Q12 To what extent do you agree or disagree that a baseline survey of legal services consumers in Scotland should be undertaken?**

We believe that it is crucially important in developing a new framework for legal services that the views and interests of those who use these services are sought and considered. Therefore, in principle, we strongly agree. However, the consultation is silent as to the objective of the suggested 'baseline' survey and to what extent this will be used to shape the regulatory regime. We would welcome clarification on this.

**The Role of the Lord President and the Court of Session**

**Q13 To what extent do you agree or disagree with the Robertson report, that the legislative approach should make clear the role of the Lord President and the Court of Session in the regulatory framework?**

**We strongly agree.** Both the Robertson report, and the current consultation give little recognition and acknowledgement of the significant role the Lord President and Court of Session play in relation to regulation of the legal sector and how the role of both is crucial from a constitutional context in protecting the rule of law and the independence of the courts and legal profession

The extensive, important and constitutional role the Lord President undertakes, both consultative and consenting, is clearly embedded within the current regulatory framework and within the existing primary legislation. Likewise, the Court of Session also has an important role to play within the framework.

We would expect the roles of both the Lord President and the Court of Session to continue within any new regulatory framework and for the roles to be clearly set out within primary legislation as is currently the case. We would be strongly opposed to any proposals which sought to remove the role of the Lord President and (or) the Court of Session from the regulatory framework.

<sup>40</sup> Amendment of the Enterprise Act 2002 (Bodies Designated to make Super-complaints) Order 2004. See <https://www.legislation.gov.uk/uksi/2009/2079/article/2/made>

**Q14 To what extent do you agree or disagree that the role of the Lord President and Court of Session in the regulatory framework in Scotland is important in safeguarding the independence of the legal profession?**

**We strongly agree.** The respective roles of the Lord President and Court of Session are essential in protecting the independence of the legal profession. When we discuss independence in this context, it relates to the independence of the legal profession from the executive (i.e. the Scottish Government) and the Scottish Parliament. A democratic society is underpinned by the doctrine of separation of powers, which includes a separate and independent judiciary. This is enshrined in Scotland by virtue of the Judiciary and Courts (Scotland) Act 2008.<sup>41</sup> which places an obligation on the Scottish Government and Scottish Parliament to uphold the independence of the judiciary.

The recognised objective of this constitutional doctrine is to ensure that there is no monopolisation of powers by any one branch of the state and there can be no interference with the judiciary in the administration of justice and upholding the law. The Lord President, as the head of the Scottish judiciary, plays a crucial role in overseeing and protecting the independence of the judiciary, and this flows through to the legal profession.

Scottish solicitors, as with all regulated legal professions within Scotland, are officers of the court, and therefore under a duty to support the independence of the judiciary by ensuring that they treat all persons equally regardless of the circumstances of the matter and are free from external interference or influence. To ensure that solicitors act independently, and accordingly as officers of the court, they are subject to rules and conduct requirements which ensure they always remain impartial, regardless of the matter.

The Lord President plays a significant consultative and consent role in relation to these rules and the Lord President's functions<sup>42</sup> (set out briefly within Additional comments) provide safeguards that protect the independence of the Scottish solicitor profession, the Scottish judiciary and ultimately the rights of the citizens. The independence of the legal profession and the judiciary are intrinsically linked and are inseparable and any risk to one, poses a risk to the other.

<sup>41</sup>Judiciary and Courts (Scotland) Act 2008. See: <https://www.legislation.gov.uk/asp/2008/6/contents>

<sup>42</sup> Set out in the Solicitors (Scotland) Act 1980, the Legal Profession and Legal Aid (Scotland) Act 2007 and the Legal Services (Scotland) Act 2010

In bringing forward proposals for alternative business structures, which transpired into the Legal Services (Scotland) Act 2010 (providing for licensed legal services providers), the Scottish Government recognised the potential risk that such business structures would bring to the independence of the legal profession. To mitigate this risk, a significant role was conferred on the Lord President within the 2010 Act, with both consultative and consent functions which were purposely targeted at protecting that independence. Having previously recognised the importance of the Lord President's role regarding independence of the legal profession, it appears inconsistent to now suggest this is not necessary without any basis of evidence.

**Q15 Should the Lord President and Court of Session have a 'consultative' role, or 'consent' role with regard to the following potential changes to the operation of any new regulatory framework?**

- **changes to professional rules, practice rules, conduct and discipline**
- **changes in relation to complaints practice and procedures**
- **new entrants to the market seeking to conduct litigation and exercise right of audience**

We believe that both the Lord President and the Court of Session should continue to have both consultative and consent functions consistent with those currently held.

However, we also believe that there are some limited instances where the concurrence of the Lord President may not be necessary, and which relate to training requirements. For example, the education and training requirements are set out within the Admission as Solicitor (Scotland) Regulations 2019 by pursuance of the 1980 Act. We accredit universities to ensure that the legal education delivered to undergraduate students remains consistent and meets required standards and objectives.

As it currently stands, if we wish to change the regulations for training, for example to recognise changes in the Scottish legal services landscape, or a shift in social attitudes, or to make it easier for those who may be from disadvantaged backgrounds to enter the profession, then the 1980 Act requires that changes may only be made with the concurrence of the Lord President.

The process, which we are required to follow for the Lord President's concurrence, can be lengthy, even for the most minor changes. We believe that removing the need for approval for some of the minor



changes to the regulations would allow us the flexibility to make changes reflective of the evolving legal services market, to ensure that training remains relevant whilst maintaining high standards.<sup>43</sup>

**Q16 To what extent do you agree or disagree that the Lord President should have a role in any new regulatory framework in arbitrating any disagreements between independent regulatory committees and the professional regulatory bodies?**

**We strongly agree.** The Lord President currently has an independent role in resolving any disputes that may arise between the Society's Regulatory Committee and Council. This is provided for within the 1980 Act.<sup>44</sup> The Society's Council fully recognises, respects, and supports the Regulatory Committee's independence and responsibility in all matters concerning the Society's regulation functions and therefore it has not been necessary to request that the Lord President arbitrates to resolve any regulatory disputes.

However, recognising that there needs to be a process should a regulatory dispute arise, we believe that, as the Lord President is independent of both the Regulatory Committee and the Council, then the current process, and the role of the Lord President within this, remains the most appropriate one.

**Q17 To what extent do you agree or disagree that the Lord President should have a role in the process of appointment of any new 'legal members' to relevant positions, such as regulatory committees, in any new regulatory framework?**

We note that this question is ambiguous. It refers to the Lord President having a 'role in the process' but fails to expand on what that role would be; would this be consultative or one of consent of appointment? For example, would it mirror the Lord President's current function in relation to legal appointments to the Scottish Solicitors' Discipline Tribunal (SSDT), where appointments are made by the Lord President on the recommendation of the Society's Council?

In the absence of further information or clarity, we are presuming that the proposal relates to consent of appointment. Currently, members of the Society's Regulatory Committee, both solicitor and non-

<sup>43</sup> For example, we are aware of some small anomalies within the 2019 Regulations, but the extent of the process to rectify these is disproportionate to their effect. for example, see Schedule 2 2019 Reg

<sup>44</sup>Section 3D Solicitors (Scotland) Act 1980

solicitor, are appointed by the Society's Council on the recommendation of its Nominations Committee after a thorough and transparent recruitment process.

We have been open regarding our willingness to consider an independent appointment process akin to the public appointments process for non-legal members of the Regulatory Committee.

In relation to appointments of legal members, we would be supportive of appointments also being made independently. However, we believe that it is important for the Society's Council to retain a role within the process to make recommendations for the appointment of legal members. Retaining the Council's involvement would help to ensure that the profession's confidence is continued in the new regulatory framework.

#### Additional comments

The role of the Lord President is threaded throughout the regulatory framework, across a multitude of legislative provisions, relating to all branches of the Scottish legal profession. These are too extensive to set out in detail within this response; we do however provide, below, a very brief overview of some of those relating to the Scottish solicitor profession, which demonstrates how crucial the Lord President's role is.

The 1980 Act provides that the Lord President:

- must agree the making of regulations for the practical training of solicitors, their attendance at a course of legal education and the passing of exams (s.5)
- has a right of approval in relation to rules concerning rights of audience in the Court of Session and High Court of Justiciary etc, including rules as to the conduct of persons who have obtained such rights (s.25A(8) read with s.34(3))
- may request that a solicitor advocate be suspended from exercising their extended rights of audience where a complaint has been made alleging professional misconduct by that solicitor advocate
- must approve solicitors' conduct and practice rules and accounts rules
- has a concurrence role on rules in relation to the making, hearing, and determining of complaints made to the SSDT, certain appeals, inquiries, and certain appeals under sections 20, 20ZB and 20ZE of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, and generally as to the procedure of the SSDT
- appoints solicitor members to the SSDT on the recommendation of the Council, and non-solicitor members after consultation with Scottish ministers (schedule 4 para 1A(a)&(b))

- may terminate the appointment of any member of the SSDT and fill the vacancy in accordance with the Act (schedule 4 para 3)

The 2010 Act also contains many similar provisions, as does the 2007 Act. These collated together demonstrate the extent of the role of the Lord President within the current regulatory framework and the need for the Lord President's role to remain within this.

### **Regulatory committees**

**Q18 To what extent do you agree or disagree that regulatory committees, as described above, should be incorporated into any future regulatory framework?**

**We strongly agree** that a regulatory committee should be embedded within the regulatory and statutory framework as is currently the case with the Society's Regulatory Committee under the provision of the 1980 Act.<sup>45</sup>

**Q19 To what extent do you agree or disagree that regulators should be required by statute to ensure that regulatory committees are suitably resourced, with a certain quota of persons being exclusively ring-fenced for dealing with regulation?**

**We disagree.** Although all regulatory functions should be suitably resourced, ring-fencing that resource serves no discernible purpose and may increase the cost of regulation. It is unclear to us what problem or mischief would be solved by ring-fencing resource. This proposal also raises several important questions for consideration:

- is this limited to the Regulatory Committee secretariat (committee secretary/clerk) or is this wider and intended to extend to all staff working in the regulation teams and directorate?
- would this also require separate, ring-fenced IT, HR, finance, or administrative staff solely for the benefit of the Regulatory Committee?
- how would this work in relation to senior leadership such as the role of executive director of regulation, where wider Society involvement is required and necessary in fulfilment of the role, or the role of chief executive officer, where responsibility rests for the leadership of the

<sup>45</sup> Section 3 Solicitors (Scotland) Act 1980: as inserted by Legal Services (Scotland) Act 2010 section 133

Society as a single professional body and whose role cannot be split separately between regulation and professional support?

The suggestion to ring-fence persons does not reflect the reality that many colleagues perform work-related functions that cut across both the regulation and support roles of the Society (for example, IT and HR colleagues). If staff were to be ring-fenced, this may require additional resource and associated cost. Ring-fencing resource would also reduce the benefits and holistic approach of professional body regulation. By reducing contact between regulatory and other staff, sector expertise and insight would be lost and mutual trust between regulator and regulated eroded.

The allocation of resource is an operational matter for the regulator to consider and should not be set out within primary legislation. This would ensure that the necessary resource continues to be available at any given time. In addition, prescriptive ring-fencing resource provisions would be contrary to the intended spirit of the proposed new regulatory approach, which is flexible and permissive legislation, allowing a more proactive and proportionate approach to regulation.

**Q20 To what extent do you agree or disagree that regulatory functions of regulatory committees should be subject to freedom of information legislation or requests?**

**We strongly disagree.** The Society is not defined as a 'Scottish public authority'<sup>46</sup> in terms of the Freedom of Information (Scotland) Act 2002 and therefore we are not subject to its provisions requiring disclosure of information. However, we regularly receive data subject access requests and, supporting the principle of transparency, we voluntarily provide the data requested when appropriate to do so and in compliance with the current safeguards set out within the relevant data protection legislation.

We do not agree with the proposal that the Regulatory Committee, nor any of its sub-committees, should be subject to freedom of information (FOI) legislation or requests. Much of the work of the Regulatory Committee and its sub-committees would be subject to exemption as sharing this information would prejudice, prevent or seriously impair the committee from fulfilling its public interest role. Therefore, the reality is that very little could be provided in any case on request and the costs

<sup>46</sup> Schedule 1 Freedom of Information (Scotland) Act 2002

and resource that would be required to process these requests would be disproportionate. The Solicitors Regulation Authority (England & Wales) is not subject to FOI for these same reasons.

#### Additional comments

The Regulatory Committee has been in existence for over a decade; we firmly believe that the Regulatory Committee in its current form works well. Recognising the need to deliver continued improvement, there are several ongoing strategic initiatives under way, including the formation of a Consumer Panel to provide guidance on matters that may have a consumer dimension, giving greater recognition to the better regulation principles throughout our regulatory work and promoting the work of the Regulatory Committee and its sub-committees more transparently.

- Appointments

We agree with introducing an independent appointment process akin to the public appointments process for non-legal members of the Regulatory Committee, as suggested within the consultation document and potentially involving the Lord President, or another independent third party, for legal members. (See our comments in response to Q17 above.)

- Reporting/accountability

We agree that there are benefits in being more transparent in relation to the work of the Regulatory Committee. In this regard, we would be open to consider the laying of annual reports for information before the Scottish Parliament. Although we already publish our annual financial reports, which include our regulatory budget and costings,<sup>47</sup> we would also be open to consider including this for information within the proposed report.

In addition, we are considering publishing minutes and papers of the meetings of the Regulatory Committee.

- Regulatory budget

As with our views in relation to dedicated ring-fenced resource (see Q19), we believe that the regulatory budget should be determined at an operational level which ensures that all relevant factors can be duly and carefully considered and any unforeseen budgetary concerns can be addressed speedily should

<sup>47</sup> see: <https://www.lawscot.org.uk/about-us/strategy-reports-plans/annual-reports/annual-report-2020/>

they arise. To ensure the regulatory functions are appropriately resourced, there is continuous and collaborative dialogue between the Regulatory Committee, the Society's Board and executive.

However, we recognise that there may be some benefits in the Regulatory Committee having a greater degree of involvement in financial and budgetary considerations in relation to the regulatory functions. In that regard we are already considering ways for the Regulatory Committee's role to be expanded in the budget setting process.

- Regulatory Committee remit

We note the proposal in relation to Option 3 is for the remit of the Regulatory Committee to be approved by the Scottish Parliament.<sup>48</sup> As we have previously highlighted, the Society's Regulatory Committee remit is determined by the Society's Council and reflects the 'regulatory functions' as set out within the 1980 Act.<sup>49</sup> We would be concerned if the regulatory remit were to be removed from primary legislation and the powers to determine the Committee's remit were given to the Scottish parliament. This proposal raises similar concerns regarding independence for the legal profession as those we have highlighted in relation to Option 1 and further concerns that providing the power to the Scottish Parliament to determine the remit gives potential for the remit to be subject to political influence.

In addition, this proposal also raises similar concerns regarding independence for the legal profession as those we have highlighted in relation to Option 1 and further concerns that providing the power to the Scottish parliament to determine the remit gives potential for the remit to be subject to political influence.

- Governance

We note the suggestion that a memorandum of understanding govern the approach to interaction between the Regulatory Committee, its sub-committees and the Society's wider representative and public interest work. We ourselves made this suggestion as a more appropriate alternative to separating resource allocation, which would be problematic and unrealistic from an operational perspective. Introducing a MoU would recognise that it is often not clear cut as to what is regulation and what is not and there are many aspects of our support/representative work that require

<sup>48</sup> At page 46

<sup>49</sup> Section 3F Solicitors (Scotland) Act 1980

consideration from a regulatory perspective, and vice versa, in particular, our policy and law reform work which we carry out in the public interest.

### **Fitness to practise**

**Q21 To what extent do you agree or disagree that the following aspects of ‘fitness to practise’ requirements or regulations are appropriate and working well in Scotland?**

- **content of the criteria**
- **frequency of career points where the criteria must be satisfied**
- **transparency and fairness in decision making**

We strongly believe that the current criteria for all of the above is appropriate and works well. It is also important to highlight that the Admission as Solicitor (Scotland) Regulations 2011, as referenced within the consultation paper and in relation to this question<sup>50</sup> have been amended and superseded by the Admission as Solicitor (Scotland) Regulations 2019,<sup>51</sup> which introduced several changes, some of which we have highlighted earlier in this paper in response to Q7.

**Q22 Are there any changes you would make to each aspect as set out in the previous question?**

There are none we wish to make.

**Q23 To what extent do you agree or disagree that there should be a test to ensure that non-lawyer owners and managers of legal entities are fit and proper persons?**

**We strongly agree.** This mirrors the requirements relating to non-solicitor investors within a licensed legal services provider under the Legal Services (Scotland) Act 2010.<sup>52</sup>

### **Legal tech**

**Q24 To what extent do you agree or disagree that legal tech should be included within the definition of legal services?**

<sup>50</sup>Legal Services Regulation Reform in Scotland: Consultation 2021 page 59

<sup>51</sup> See: <https://www.lawscot.org.uk/media/368407/admission-as-solicitor-scotland-regulations-2019-amendment-3-feb-2020-clean.pdf>

<sup>52</sup> See section 62 Legal Services (Scotland) Act 2010 – Fitness for Involvement

**We mostly agree.** The consultation attempts to oversimplify what is a complicated area. ‘Legal tech’ is a tool for delivery of legal services and not a legal service itself. Therefore, it would be difficult to include a general provision in legislation to regulate legal tech. However, in relation to the services delivered, we believe that the provision of any reserved legal services delivered through the platform of legal tech should be included within the definition of legal services. Technological evolution and the advancement of artificial intelligence (AI)-driven decision-making systems is becoming a significant and rapidly emerging business model within the legal sector and there is a general agreement that legal services are one of the sectors that stands to benefit from developments in AI.

**Q25 To what extent do you agree or disagree that those who facilitate and provide legal tech legal services should be included within the regulatory framework if they are not so already? If so, how might this operate if the source is outside our jurisdiction?**

**We mostly disagree.** If a legal tech service is currently outside of the regulatory framework, then it is so because it is not offering reserved legal services. The provision of any reserved legal services delivered through the platform of legal tech should be included within the definition of legal services. Whether or not it is based outside of Scotland should mirror the current approach to regulating other business units outside of Scotland.

**Q26 To what extent do you agree or disagree that not including legal tech may narrow the scope of regulation, and reduce protection of consumers?**

**We disagree.** Regulated legal professionals are currently required to ensure that the legal tech they use is compliant and competent. The regulators need to pay close attention to what is being provided and ensure that guidance for the use and procurement of certain legal tech, where there is an identified risk to the consumer, is competent. By putting the emphasis on the profession, which is trained to understand the practice and ethics of legal services, you ensure that consumers’/clients’ needs are placed at the heart of decision making. Our regulation regime needs to be agile and legal tech should not be a side issue – it must be at the heart of regulatory decision making. Introducing entity regulation would also be an effective and proportionate way to regulate the use of legal tech in the delivery of legal services.

**Q27 To what extent do you agree or disagree that the inclusion of legal tech in a regulatory framework assists in the strength, sustainability, and flexibility of regulation of legal services?**



**We strongly agree.** However, this must be proportionate and take into account our answers above.

**Q28 To what extent do you agree or disagree that the Scottish regulatory framework should allow for the use of regulatory sandboxes to promote innovation?**

**We strongly agree.** The current regulatory framework already allows the Society to use a sandbox and offer waivers from our practice rules on application from a legal tech provider or legal firm seeking to use legal tech in delivering services. The use of sandboxes is most commonly seen in financial services but is increasingly being used in legal services. The Society is a founding member of Lawtech UK's Regulatory Response Unit, where we would be alerted at an early stage if a sandbox-style arrangement was needed so we could look at what waivers may be within our power to grant. There has so far been no call for this but, should there be one, we would work within the current rules to facilitate this as best we could. However, we would welcome additional, permissive regulatory powers which would enable legal tech innovation in the delivery of legal services.

**Client Protection Fund (Guarantee Fund)**

**Q29 To what extent do you agree or disagree that the Client Protection Fund works well?**

**We strongly agree.** The Client Protection (formally Guarantee) Fund (CPF), established in 1949,<sup>53</sup> is a level of consumer protection of which we are immensely proud and has, over the past 10 years alone, paid around £6 million to help 480 consumers of legal services who might otherwise have faced undue hardship through the rare but serious dishonest actions of a solicitor. It is a fund which is financed entirely by annual contributions made by partners and directors of all Scottish practice units as well as (with some exceptions) registered European lawyers (REL) and registered foreign lawyers (RFL). It receives no funding through government revenue and is funded by the Scottish solicitor profession alone.

Its purpose is to 'make grants (up to a maximum of £1.25 million) to compensate consumers who suffer a pecuniary loss by reason of dishonesty' on the part of a solicitor, an employee of a solicitor, a registered foreign lawyer or a conveyancing/executory practitioner or employee. It is a significant consumer protection for consumers of legal services in Scotland, and together with the Society's Master Policy provides a safety net of protection unequalled within UK legal services.

<sup>53</sup> Established under Legal Aid and Solicitors (Scotland) Act 1949

The fund is administered and overseen by a sub-committee of our Regulatory Committee, which is made up both of experienced Scottish solicitors and consumer interest lay members from outside the legal profession. The operation of the CPF is overseen by the Scottish Legal Complaints Commission in accordance with the 2007 Act.<sup>54</sup>

**Q30 What, if any, changes should be made to the fund?**

As we have stated in previous submissions to the Scottish Government,<sup>55</sup> the current provisions of the 1980 Act are restrictive as to the powers to make an award to consumers who have suffered a monetary loss. Although there are powers to allow the Society's Council to make a grant to a claimant, there are no powers to allow the Council to make loans to the Judicial Factor so that urgent matters, which pose a risk to clients, can be settled in the short term. It is paramount that consumers, who may have lost money through no fault of their own, are not further burdened by unnecessary delays.

There is currently no limit on the number of claims that can be made by a single claimant on the same solicitor. This poses the potential risk of the fund being exhausted by an institutional or corporate claimant, for example a lender, to the possible detriment of other claimants, such as the individual consumer.

Likewise, there is currently no value limit on claims against one solicitor by multiple claimants; again, this poses the risk of exhausting the fund. To ensure that the CPF continues to be fit for purpose and reflective of the policy intent behind its creation, any new permissive legislative framework must provide greater flexibility in its operation.

Additional comments

The CPF operates alongside the Society's Master Policy, to provide a safety net in which the consumer of legal services can have the confidence that, in the unlikely event they suffer loss through dishonesty or the negligent actions of a solicitor, they will have a signposted route of redress.

<sup>54</sup> Section 39 Legal Profession and Legal Aid (Scotland) Act 2007

<sup>55</sup> Law Society of Scotland 'Case for Change' 2015. See: <https://www.lawscot.org.uk/research-and-policy/legal-services-review/>

The Master Policy is the compulsory professional indemnity insurance arrangement which covers most Scottish solicitors working in private practice. This was made compulsory in 1978. The provisions relating to the Master Policy are set out within section 44 of the Solicitors (Scotland) Act 1980 and Rule B7 of the Law Society's practice rules 2011, which place an obligation on every Scottish practice to contribute to the Master Policy annual premium. The SLCC oversees the operation of the Master Policy under the 2007 Act.

The Master Policy covers any valid claim against a solicitor for an act of negligence which has occurred in the course of his or her work, even if the solicitor is no longer in practice (referred to as run-off cover), no longer solvent or cannot be traced at the time the claim is made. It is one of the most important areas of consumer protection put in place and required by the Law Society. The insurance provides cover of up to £2 million for any one claim.

The Society makes arrangements each year for the Master Policy. However, individual claims are handled by the Master Policy insurers and not by the Society. The individual premium paid by each practice is determined by Royal Sun Alliance (RSA), the lead insurer's, with reference to the rates and rating factor rules. . The Law Society does not set these rules, nor is it allowed to under the Financial Conduct Authority regulatory regime. The Master Policy is a commercial insurance arrangement. The principal factors considered by RSA in allocating the global premium amongst practices are the practice fee income; number of partners/directors; ratio of partners/directors to total staff; type of business conducted; and any claims made in the last five years.

### **Part 3: Legal services providers and structures**

#### **Entry, standards and monitoring**

**Q31 To what extent do you agree or disagree that any future regulatory model should incorporate a greater emphasis on quality assurance, prevention, and continuous improvement than the current model provides?**

**We strongly agree.** There is a need to ensure that legal professionals remain knowledgeable and up to date with developments in their respective practice area and, in that respect, there is a need for high-quality continuous professional development and a continuous programme focused on quality assurance and improvement. However, the consultation raises this question without any consideration

or explanation of what the current quality assurance framework is. Although the Robertson report<sup>56</sup> recommended that the (Option 1) regulator ‘quality assures programmes whether delivered by professional bodies or others’,<sup>57</sup> it did not highlight any problems with the current quality assurance framework, nor does it expand on how this proposed change will improve on it.

There is currently an extensive programme focused on quality assurance, prevention, and continuous improvement and we set this out in the additional comments below.

**Q32 To what extent do you agree or disagree that the rules within the regulatory framework should be simplified with the aim of making them more proportionate and consumer friendly?**

**We strongly agree.** As with our views regarding the need for permissive and enabling legislation, we also believe that any secondary legislation, regulations, and rules should be simplified. This would permit a flexible, proportionate and risk-based approach to be taken to regulation, which would be adaptable to changing priorities and needs.

**Q33 Which of the following methods do you think regulatory model should incorporate to provide quality assurance and continuous improvement?**

- **peer review**
- **a system of self-assessment for all legal professionals**
- **both, neither or another**

The current quality assurance framework already encompasses elements of both of the above. See our additional comments below.

Additional comments

We note that the consultation document, reflecting the Robertson report, refers to a small number of jurisdictions when providing examples of differing approaches to monitoring. However, it does not explain the extent of that which is currently in place to monitor standards in Scotland.

The Robertson report notes that professional bodies would ‘have a key role in developing and delivering continuous professional development’. It notes that the role of the regulator will be to quality assure

<sup>56</sup> <https://www2.gov.scot/Resource/0054/00542583.pdf>

<sup>57</sup> Report of the Independent Review of Legal Services Regulation in Scotland ‘Fit for the Future’ Page 36

programmes whether delivered by the professional bodies or others. Again, no real analysis is given of the current quality assurance framework in relation to education and training nor any concern raised as to how the current system works. The only example of quality assurance given is the advocates' Quality Assessment. Robertson found no issue with the advocates' scheme yet recommends that there needs to be a new level of overarching quality assurance – which would only add to the cost of legal services without any justification.

Given the report does not cover solicitors' continuing professional development (CPD) and other quality assurance structures, it may be useful to explain them here.

- All Scottish solicitors must undertake a minimum of 20 hours of CPD a year. 15 hours must be verifiable. One hour must be related to a series of risk-management topics highlighted by the Society annually and five hours' self-study. We discuss CPD further below.
- All new partners in private practice must undertake a day-long mandatory practice management course (plus pre-reading).
- Solicitor advocates (around 350 in total) who have passed assessments and been granted rights of audience in the higher courts are required to undertake 10 hours of CPD relating to advocacy a year.
- Accredited family mediators are required to undertake no less than 15 hours of CPD a year and this must comprise (a) a minimum of six hours mediation training (b) five hours of family law training, of which two hours require to be on financial provisions. They also must undertake (c) one peer review in co-mediation a year (d) one assessment of competence by an approved assessor in each three-year period of accreditation. Family mediators require to renew their accreditation every three years (see below). They also must adhere to a code of conduct. There are around 75 accredited family mediators across Scotland.<sup>58</sup> The oversight regulation for this scheme is the Lord President of the Court of Session.

Legal aid solicitors undergo cyclical peer review by specially trained reviewers. There are different quality assurance schemes for children's, criminal and civil legal aid practitioners. Around 500 solicitors are on more than one type of legal aid register and are peer reviewed for each. Repeated failures of peer review may lead to removal from the relevant legal aid registers. The three quality assurance schemes are based around continuing improvement over cycles of

<sup>58</sup> Our regulation of accredited family mediators is authorised – and reassessed – by the Lord President every three years

reaccreditation across the sector and tied to the ability of individuals and/or their firms to undertake legal aid work. There are also specific CPD requirements for those registered to undertake legal aid.

Solicitor firms with a frequency or severity of Master Policy claims, or where their loss ratio is high, are subject to a practice improvement plan supported by the Master Policy brokers (Lockton). The practice improvement programme is a risk-management programme targeting firms with an audit and improvement plan funded by the risk-management bursary. The aim of the exercise is to raise standards across the profession and to reduce risk at an individual firm level and, in due course, the cost and impact of claims to the firm and to the Master Policy.

We do not authorise or accredit CPD providers, or individual courses). Our position is to allow members to choose CPD which is relevant to their development needs and, to a large extent, let the market decide on CPD quality. This has led to a rich network of CPD providers across Scotland, which would likely not exist if there were an accreditation structure which, we believe, would add complexity and cost to the process, which would be passed on to the consumer and client for no obvious educational benefit. Many other regulators (such as the Institute of Chartered Accountants of Scotland and the Solicitors Regulation Authority) have moved away from accreditation of providers of CPD and it is not immediately clear why the recommendation goes against this general trend.

We would also note that the Competition and Markets Authority's (CMA) *Legal Services in Scotland* report,<sup>59</sup> similarly did not focus on competence or fitness to practise. Indeed, the CMA's only mention of competence was quoting Professor Stephen Mayson's observation that 'professions tend to raise standards of competence and quality above those necessary to protect consumers'.<sup>60</sup>

### **Definition of legal services and reserved activities**

#### **Q34 To what extent do you agree or disagree that there should be a definition of legal services?**

**We strongly agree.** In our previous submissions to the Scottish Government,<sup>61</sup> we have raised our concerns regarding the lack of clear definition of legal services and the need for an unambiguous and

<sup>59</sup> CMA Report: Legal Services in Scotland Research report:  
[https://assets.publishing.service.gov.uk/media/5e78cc9b86650c296f6eda63/SLS\\_report\\_final\\_version\\_PDF\\_---.pdf](https://assets.publishing.service.gov.uk/media/5e78cc9b86650c296f6eda63/SLS_report_final_version_PDF_---.pdf)

<sup>60</sup> Ibid at para 5.79

<sup>61</sup> Law Society of Scotland: 'Case for Change' Jan 2016 & 'Case for Change Revisited' Jan 2018. See <https://www.lawsocot.org.uk/research-and-policy/legal-services-review/>

encompassing definition. Currently, the only definition is set out within the Legal Services (Scotland) Act 2010.<sup>62</sup> It should be noted that this definition applies only to licensed legal services providers; it does not apply to the wider legal sector.

The Solicitors (Scotland) Act 1980 sets out the legal work that can be undertaken only by a Scottish solicitor. This is extremely narrow. Section 32 of the 1980 Act restricts this to only the preparation of writs relating to court proceedings, the submission of writs relating to heritable or movable estate and applications for a grant of confirmation in favour of executors. Beyond that, all other work can be carried out by an unregulated person, which raises consumer protection concerns and which we comment on further below.

**Q35 To what extent do you agree or disagree that the definition of legal services should be set out in primary legislation?**

**We strongly agree.** It is crucial that this definition be set out within legislation, which will provide certainty and clarity to both the profession and consumers. Setting out the definition within primary legislation would assist in the regulation of the currently unregulated legal services market by making it a requirement that any person providing services as defined within the legislation would be required to be regulated (see our additional comments below regarding the unregulated sector).

**Q36 To what extent do you agree or disagree that there should be no substantial change at this stage to bring more activities within the scope of those activities ‘reserved’ to solicitors or to remove activities?**

**We strongly agree.** We do not consider that it is necessary at this time to review, reduce or increase the activities currently reserved to Scottish solicitors under the provisions of the 1980 Act.<sup>63</sup>

**Q37 To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated?**

<sup>62</sup> Section 3 Legal Services (Scotland) Act 2010

<sup>63</sup> See section 32 Solicitors (Scotland) Act 1980

**We strongly agree.** We believe the regulator should have the permissive power, set out in primary legislation, to propose to the Scottish Government any changes to those activities currently reserved. The regulator would be best placed to recognise and identify any concerning and emerging trends and to recommend any necessary changes that would address these for the purposes of consumer protection.

#### Additional comments

We note that the consultation document discusses 'unreserved' activities but appears to conflate this with 'unregulated'. For clarification, unreserved relates to those legal activities that may be delivered by a person other than a solicitor. 'Unregulated' relates to the regulatory status of those delivering legal services. This distinction is crucial. At this time, we are not in favour of increasing those activities reserved to solicitors, or other members of the legal professions.

However, and we have stated this on many occasions previously, we are strongly in favour of introducing regulation for all providers of legal services to ensure greater consumer protection. We are disappointed to note that the consultation does not appear to directly address the issue of unregulated service providers, nor the risks associated with the delivery of legal services by unregulated providers.

The 'unregulated legal sector' is not defined within legislation. It is a default term referring to those legal service providers who provide advice and representation on any area of law which is not covered by specific legal services regulation (reserved activities). As is clearly implicit in its name, there are no regulators in the unregulated sector. Consumers purchasing legal services in the unregulated sector leave themselves seriously exposed if the advice or legal service turns out to be incorrect or something goes wrong.

We are concerned that many consumers may not realise that only a small proportion of legal services must be undertaken by a qualified and regulated solicitor. Many other 'legal' matters, such as will writing, employment law, divorce, consumer matters, personal injury, and family law, are provided by Scottish solicitors but can also be handled by unregulated firms and by persons who may be unqualified and inexperienced to provide those services.

We do recognise and accept that, in some areas of law, legal advice and services may be provided by other 'regulated' professionals (other than solicitors), for example, an accountant may provide tax law



advice<sup>64</sup> and patent and trademark attorneys may provide intellectual property services.<sup>65</sup> But other legal services may be provided direct to consumers by unregulated providers.

We believe that the unregulated provision of legal services poses a significant risk to consumer protection and confidence. For example, there is no statutory requirement in the unregulated sector for professional indemnity insurance to provide compensation should something go wrong. By contrast, a legal service provider regulated by the Law Society of Scotland offers the benefit of both the Master Policy and top-up professional indemnity insurance requirements<sup>66</sup> and the statutory Client Protection Fund.<sup>67</sup> Those consumers receiving services from other regulated professionals, such as accountants, will have the protections afforded and required by their relevant regulator.

Should the consumer have any issue with the service they have received from an unregulated provider, or if something manifests which raises concerns about the conduct of the provider, then there is unlikely to be any route of complaint. An unregulated provider may have a complaints process, but they are not obliged or required to do so. A regulated provider will provide the consumer with a course of redress, either through the regulating professional body or, in the case of a solicitor or regulated law firm, through the Scottish Legal Complaints Commission under the provisions of the 2007 Act.

There are many reasons why a consumer may choose to engage an unregulated service provider. There may be geographical reasons, for example, no regulated professionals operate within proximity. Therefore, the consumer has little choice other than to approach an unregulated provider. Alternatively, the choice may be determined by cost. In this scenario, the consumer may not appreciate the saving in cost is at the sacrifice of consumer protections and, potentially, the quality of service provided.

We suggest that regulating all legal service providers will ensure that, regardless of geographical and cost factors, all consumers will benefit from, at least, minimum protections and can be confident that the provider is committed to standards of service rightly expected of the legal profession.

<sup>64</sup> Regulated by the Institute of Chartered Accounts Scotland (ICAS)

<sup>65</sup> Regulated by the Chartered Institute of Patent Attorneys (CIPA)

<sup>66</sup> For information on the Society's Master Policy see: <https://www.lawscot.org.uk/members/regulation-and-compliance/professional-indemnity-insurance/>

<sup>67</sup> Formally the Guarantee fund – for information on the Fund see: <https://www.lawscot.org.uk/for-the-public/client-protection/client-protection-fund/>

## Titles

### Q38 To what extent do you agree or disagree that there should be a change such that the title 'lawyer' would be given the same protections around it as the title 'solicitor'?

**We strongly agree.** The use of the term 'lawyer' should be afforded the same level of protection as that currently given to the term of 'solicitor' under the Solicitors (Scotland) Act 1980.<sup>68</sup> The term 'lawyer' is generic and defined as 'someone whose job is to give advice to people about the law'.<sup>69</sup> As the consultation paper correctly recognises, any person without suitable formal qualification in law, who has not undergone any determination of legal knowledge, or determination of fitness to provide legal services, can currently, and legitimately, refer and promote themselves as a 'lawyer' for the purposes of gain, and to the possible detriment of the consumer. The consistent expectation of the consumer is that anyone who refers to themselves as a 'lawyer' should be suitably qualified and regulated to do so. This is reflected in recent public polling, which demonstrates that 86% of respondents believe that there should be restrictions on who can call themselves, or advertise as, a lawyer.<sup>70</sup>

As we have stated on many occasions,<sup>71</sup> we find this increasingly concerning and it unquestionably poses a significant risk to consumers, many of whom, understandably, do not differentiate between a 'solicitor' and a 'lawyer' and are therefore potentially being misled. The consumer's perception is that a 'lawyer' is a solicitor, or other legal professional, who is appropriately qualified and regulated, and therefore adheres to strong moral, ethical and legal standards.

Although we recognise that some lawyers may have qualifications, knowledge, and adequate legal services, many may not and, crucially, they may not be regulated or be subject to any kind of code of practice. They are therefore unlikely to offer consumer protections such as professional indemnity insurance cover or any complaint or redress process, potentially leaving the consumer exposed should something go wrong. Nor will the consumer benefit from the protection offered by the Client Protection Fund.

<sup>68</sup> See section 26 Solicitors (Scotland) Act 1980

<sup>69</sup> Cambridge dictionary. See: <https://dictionary.cambridge.org/us/dictionary/english/lawyer>

<sup>70</sup> Savanta ComRes interviewed 1,000 Scottish adults online between 26 October and 10 November 2021. Data were weighted to be representative of key demographics including age, gender and region. See: <https://comresglobal.com/polls/law-society-of-scotland-solicitors-polling/>

<sup>71</sup> See Law Society of Scotland: 'Case for Change' Jan 2016 & 'Case for Change Revisited' Jan 2018. See <https://www.lawsocot.org.uk/research-and-policy/legal-services-review/>

As highlighted in the consultation paper, only an individual who is entered on the roll of solicitors may refer to themselves as a 'solicitor'. This ensures that only those who have been determined as fit and proper to practise and hold the appropriate qualifications can use the title of solicitor and only those who hold a current practising certificate can legally practise as a solicitor. The practising certificate demonstrates that the solicitor holds the necessary insurance and is subject to a robust regulatory regime.<sup>72</sup>

It is crucial, for the protection of the consumer, that similar requirements are embedded for those wishing to use the title 'lawyer'. This would promote consumer confidence, and reflect their expectations that the 'lawyer':

- has undergone a programme of legal education and is suitably qualified
- has been assessed as to their fitness and properness to provide legal services
- is regulated to a high standard and adheres to the appropriate codes of ethics or rules
- is subject to continuing professional development requirements
- has the necessary consumer protections in place, such as insurance and an accessible complaints and redress pathway

**Q39 To what extent do you agree or disagree that the title 'advocate' should have the same protections around it as the title 'solicitor'?**

It would not be appropriate for us to answer this question in detail. However, we do agree that the public should be clear on the difference between those highly regulated individuals using the term (such as those regulated by the Faculty of Advocates or solicitor advocates regulated by the Society) and others who may not be regulated.

**Q40 To what extent do you agree or disagree that the legislation should allow for the protection of other titles in relation to legal services as appropriate?**

**We strongly agree.** Any legislation regarding protection of title should be enabling, and not prescriptive. This would allow a proportionate and reactive approach to be taken to the protection of other titles being used in the provision of legal services directly to consumers and would address the

<sup>72</sup> See sections 13 to 19 Solicitors (Scotland) Act 1980

risk of non-regulated providers using increasingly imaginative professional titles to circumvent any legislative prohibitions in place and resultant consumer protections.

**Q41 To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which titles to protect?**

**We strongly agree.** The regulator would be best placed to recognise the emergence of any use of title which may mislead the consumer as to the provider's professional, and regulatory, status.

**Business structures**

**Q42 To what extent do you agree or disagree that the 51% majority stake rule for licenced legal services providers should be removed?**

We strongly agree that consideration should be given to reducing the 51% majority. The requirement for a 51% majority may present a barrier to becoming a licensed legal services provider (LP), particularly for smaller firms, but there are also many other challenges that have been identified with the application of the Legal Services (Scotland) Act 2010 beyond this ownership requirement which may limit alternative business structures (ABS) take-up in Scotland. For example, there is no apparent reason for the legislative prohibition on non-profit organisations applying for LP status.<sup>73</sup>

The Law Society has been approved as a regulator of LPs and, at the time of writing, we are awaiting the necessary authorisation from the Scottish Government. We are now at such an advanced stage of being able to introduce alternative business structures that we believe it would be sensible to delay any amendments until such a time as an evaluation can be made of how the legislation operates in practice and the extent to which this encourages – or discourages – new entrants into the legal services sector. The 2010 Act provides the power to Scottish ministers to vary the 51% majority stake through secondary legislation<sup>74</sup> and therefore modification should be considered should it prove to be a barrier to becoming an LP.

**Entity regulation**

**Q43 To what extent do you agree or disagree that entity regulation should be introduced?**

<sup>73</sup> See section 47(1)(a)(ii) of the Legal Services (Scotland) Act 2010

<sup>74</sup> See section 147(1) Legal Services (Scotland) Act 2010

**We strongly agree.** This reflects our previous recommendations,<sup>75</sup> and our response to the Robertson report.<sup>76</sup> Clients and members of the public often presume and expect that their legal services providers are regulated, which is not necessarily the case. From the perspective of the client, their contract is with the legal service provider and the client places expectations on that entity.

The current legal framework for the regulation of the legal profession in Scotland places the emphasis on regulating the individual solicitor. The current powers of the Society to regulate entities, under the 1980 Act, are mainly restricted to the obligation to undergo financial inspections and the requirement for firms to have professional indemnity in place. There has been a limited extension of entity regulation in recent years, for example, with the introduction of incorporated practices in 1987, licensed legal services providers in 2010, and, most recently, the regulation at entity level of all firms to the extent of complying with money laundering legislation.

Entity regulation, which is emerging as the preferred model across global jurisdictions, expands regulation beyond the individual solicitor within a firm to cover all employees collectively, recognising that many of the decisions are not taken by an individual solicitor and often increasingly by individuals who are not currently regulated, for example, paralegals. Entity regulation also recognises the increasing diversity and innovation in legal practice in terms of individuals providing legal services, legal technology and new business models. These in turn are being driven by technology, globalisation, and increased interest in the multi-disciplinary provision of legal services.

The focus of entity regulation is centred on the public interest and protection of the consumer and would bring forward many recognised benefits, including:

- affording better protection to the consumer as, usually, the client contracts with the entity and not the individual advising solicitor
- meeting the expectations of the consumer, who may already believe the legal service provider is regulated
- bringing consistency, with all entities having to meet the same high standards
- supporting adherence to professional principles and protecting consumers whilst encouraging innovation and competition in the legal services market

<sup>75</sup> Law Society of Scotland 'Case for Change' January 2018

<sup>76</sup> Law Society of Scotland – Response to the Independent Review of Legal Services Regulation December 2018. See: <https://www.lawsocot.org.uk/research-and-policy/legal-services-review/>

- providing the opportunity for a greater collation of data, which would enable the regulator and the legal profession to identify and address deficiencies early, taking the necessary preventative action

However, we must emphasise that entity regulation should not in any way replace or dilute the regulation of the individual. To ensure the strongest of consumer protections, a ‘hybrid’ approach would be necessary. Regulating entities as well as individual solicitors through a hybrid approach would provide more efficient and effective regulation – both from the consumer and the solicitor perspective, by providing proportionate and appropriately targeted regulation. It is meant to simplify and improve the regulatory process from the perspective of the individual solicitor and to strengthen consumer protections.

To ensure a coherent approach to hybrid regulation, it would therefore be appropriate that regulation rests with a single body. If there were to be separate regulators for entities and individual solicitors, this would create additional levels of complexity in the regulation framework and confusion amongst consumers.

**Q44 To what extent do you agree or disagree that all entities providing legal services to the public and corporate entities should be subject to a ‘fitness to be an entity’ test?**

**We strongly agree.** This would ensure that each entity satisfies the necessary conditions to be able to provide legal services, bringing consistency and avoiding any disparity and associated issues that may arise by having differing regulatory requirements. This in turn would provide consumer confidence. We suggest that this would sit as part of the process whereby the entity would be licensed to provide legal services.

**Q45 To what extent do you agree or disagree that, as all lawyers providing legal services will be regulated – entity regulation should engage only those organisations who employ lawyers where those organisations are providing legal services for a profit – with the exclusion that when that legal service is in the context of an organisation whose main purpose is not to provide a legal service (for example banking) then regulation would remain at the level of an individual lawyer only and no entity regulation would apply?**

**We mostly agree.** Entity regulation is not necessary for, nor should it apply to, advocates or to those working in-house in a legal services capacity, and who therefore do not provide those services directly

to consumers or to third-party organisations. It is crucial, however, that this sector of the legal profession remains regulated at an individual level.

We do believe that all organisations providing legal services directly to consumers should be regulated at entity level and be licensed to provide those services, including non-profit providers. This would provide a harmonious level of entity regulation which would further promote consumer confidence and ensure consistent quality and standards are applied.

Those consumers who access non-profit legal services are often the most vulnerable and it is therefore crucial that they are afforded the same level of protection, and can expect the same level of service and standards, as those able to access for-profit providers. However, we do recognise the limited resource of many non-profit providers and the significant need to provide access to justice for all and the important role these providers play in that. We therefore believe that, in bringing forward proposals for the licensing of entities, a proportionate approach is taken to any licensing fee to be introduced and applicable to non-profit providers. More flexible, permissive regulation would also allow proportionate regulation of non-profit legal services providers.

As recommended in the Robertson report, we believe that entity regulation should apply to any organisation which employs at least one individual providing legal services externally. However, given the evolving nature of legal service and the business structures under which they are delivered, it is crucial that legislative provisions are enabling and provide flexibility to ensure that any new emerging business structures, which seek to provide legal services, are captured and are not able to circumvent regulation in any way and to the detriment of consumers.

### **Economic contribution of legal services**

**Q46 To what extent do you agree or disagree that the Scottish Government should commission or facilitate a baseline study to identify the current quantum of the sector's contribution to the economy and to identify those niches in the global market where we might target our efforts?**

**We strongly agree.** Such research would bring significant benefits to the Scottish legal sector and would help to further promote the international standing of Scotland as a major legal hub. In this regard, and as we have stated previously on several occasions, we would very much welcome the opportunity to work collaboratively with the Scottish Government and other stakeholders in the legal sector in taking this forward at the earliest opportunity.

We also refer to our additional comments in relation to Q6 above, welcoming the clear indication to provide regulators with the power to seek authorisation to regulate outside of the Scottish jurisdiction. This will promote competition and further raise the profile of the Scottish legal sector.

#### **Part 4: Complaints and Redress**

##### **Q47 To what extent do you agree or disagree that there should be a single gateway for all legal complaints?**

**We mostly agree.** A single gateway for consumer complaints has an intuitive appeal as it allows for clear signposting for complainers and their advisors. It also allows for initial assessment and allocation of complaints to take place according to a single set of criteria.

However, we are of the view the gateway does not operate as originally intended. The intention was to avoid confusion for the consumer and to avoid delays caused by complaints passing between different organisations.

Many of the concerns regarding the complaints process relate to the length of time it takes to admit a complaint for investigation after it has been received by the Scottish Legal Complaints Commission (SLCC) and do not reflect the expectations of the consumer or the legal professions. It can take the SLCC up to 3 months or more to even admit a complaint for investigation after it is received.

In the past 5 years 33% of the most serious cases, that engage issues of public protection and public confidence, have been pursued under our own initiative. These cases firstly had to be looped through the gateway before we could investigate the conduct concern we had identified. This administrative bureaucracy only adds to delays in our ability to take action and exposes the public to a greater degree of risk.

Additionally, there are complaints where the complainer withdraws their complaint during our conduct investigation. As a responsible regulator, we may continue to take the concern forward in our own name if we consider that there remains a risk to the public. In these cases, we need to pause our investigation, re-submit the complaint the SLCC and wait for the complaint to be remitted back to us. This is despite the fact that the concern has already passed through the gateway when the complainer originally made the complaint.



A further problem exists in that the court has held that the 2007 Act does not allow the SLCC to make a complaint to itself.<sup>77</sup> Accordingly, if the SLCC received information that disclosed a conduct concern about a solicitor but did not receive a formal complaint, it would not be able to sift the case and pass to the relevant body for investigation. In this scenario the SLCC could pass information about the concern to us. As above, we may decide to make a complaint in our own name. We would still require to formally make a complaint to the SLCC, so they can pass it through the gateway in order to pass back to us to investigate.

These illustrative examples highlight that the single gateway currently operates in a counterintuitive way that causes delay and may lead to confusion. It may be that a modified version of the current system would be more efficient. For instance, a single gateway for consumers to make complaints but also allowing us, and the other professional bodies, to take conduct complaints forward under our own initiative. This would ensure consumers would be clear about where to take a complaint and professional bodies would not face delays in taking regulatory action in relation to conduct matters. An example of such a modified system may be found in New South Wales, Australia. The different bodies would need to apply the same eligibility tests for conduct complaints and the threshold principles of eligibility could be included in legislation. The underlying mechanics of eligibility tests, responsibility and referrals between the different regulatory bodies could be addressed through Memoranda of Understanding as is the case in England & Wales. These proposed changes would result in a more efficient system which retains clarity for the consumer but eliminates some of the nonsensical and time consuming looping between the SLCC and the professional body regulators.

All of that said, we are not aware of any research that identifies the presence or absence of a single gateway as a critical factor for complainants. We would suggest the Scottish Government may find it helpful and informative, from a comparative perspective, to examine and consider the experience in a neighbouring jurisdiction. In England and Wales, the single gateway was removed in 2010. Service user research since has not identified any issue around its absence. What seems to count for complainants is a high quality and efficient process (Legal Ombudsman 2014).

<sup>77</sup> Cannon v SLCC [2020] CSOH 23 [p21]

**Q48** Dependant on the regulatory model take forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, where a complaint is generated by an external complainer such as a client, or non-client?

**We strongly agree.** Professional regulatory bodies should maintain a role in conduct complaints. Scottish solicitors have a strong personal and professional interest in ensuring that conduct complaints are appropriately handled and dealt with through a robust complaints system, not only to protect the rights and interests of the consumer but also the reputation of the solicitor profession. Maintaining the reputation of the profession is an important part of ensuring that the public has confidence in the legal services and access to justice.

As we have outlined in this response, we consider that removing professional regulatory bodies from conduct complaints would lead to:

- a loss of expertise
- undermining of the rule of law and independence of the profession
- increased cost for the consumer

As referred to previously within this response, the Robertson report notes that ‘there is little evidence of significant wrongdoing in the current model’ and identifies the ‘pitfalls’ in the current ‘detailed, prescriptive’ legislation which limits ‘flexibility and agility’.

In this context, it would be a disproportionate and risk-filled step to remove professional regulatory bodies from the process, particularly when improved outcomes can be achieved by modernising the legislation that underpins the regulatory process.

**Q49** Dependant on the regulatory model take forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, with regard to the investigation and prosecution of regulatory compliance issues?

**We strongly agree** that the professional regulatory bodies should maintain this role.

In addition to our answer to Q48 above, we would again highlight that approximately 33% of the cases we have prosecuted at the Scottish Solicitors' Discipline Tribunal over the past five years were commenced under our own initiative. Our inspection regime, anti-money laundering and financial compliance work helps us identify and take forward these concerns and form an important role in protecting the public.

**Q50 From the complaint issues below please give a preference between the options a) an independent body or b) a professional regulatory body; who you think should investigate each of the following:**

- **Service**
- **Unsatisfactory conduct**
- **Professional misconduct**

Our preference would be:

- service – a) an independent body
- unsatisfactory conduct – b) a professional regulatory body
- professional misconduct – b) a professional regulatory body

For reasons outlined in this response, we are of the view the professional regulatory bodies are best placed to deal with concerns about unsatisfactory conduct and professional misconduct.

We are of the view service complaints should remain with a separate body. This recognises the difference between consumer redress complaints and conduct complaints, which engage issues of public protection and public confidence in the profession.

In addition, we strongly agree with the proposed reintroduction of hybrid service and conduct issues of complaint, set out in the recent Scottish Government consultation on amendments to the complaints system.

The complaints process prior to 2016 was a practical continuation of the process formerly operated by the Law Society in complaints investigation between 1989 and the implementation of the Legal Profession and Legal Aid (Scotland) Act 2007. During this time, complaints, and individual aspects or issues within those complaints, were categorised as involving allegations of poor service by a solicitor or their firm on the one hand, but also improper or inappropriate conduct on the part of the individual solicitor on the other.

Throughout that period, until the decision in *Anderson Strathern v Scottish Legal Complaints Commission*<sup>78</sup>, the competency of such an approach was neither questioned nor criticised by the profession or the courts. In our view, it is an unintended consequence of the drafting of the 2007 Act that the binary separation of service and conduct complaints which had not previously existed, and which had not been lobbied for, was created.

We believe the proposal in the Scottish Government's consultation on amendments to the complaints system will have a clear benefit to users of legal services who raise complaints. Introducing hybrid issue complaints will ensure that overlapping elements of poor service and departure from professional standards of conduct are each fully addressed by investigations undertaken respectively by the Scottish Legal Complaints Commission and the relevant professional body.

We would refer you to our additional comments on this point in our response to the Scottish Government's consultation on amendments to the complaints system.<sup>79</sup>

**Q51 To what extent do you agree or disagree that there should be a level of redress for all legal complaints, regardless of regulated activity?**

**We agree** there should be a level of redress for all legal complaints. Although the conduct complaints process is one which runs, primarily, in the public interest rather than the interest of any individual complaint, we recognise the importance of complainers being compensated for loss, inconvenience and distress caused by the poor conduct of solicitors.

**Q52 To what extent do you agree or disagree that there should be a single Discipline Tribunal for legal professionals, incorporated into the Scottish Courts and Tribunals Service?**

**We strongly disagree.** In general terms, part of the appeal of an alternative dispute resolution is that it takes cases away from the court system. Adding an additional area of responsibility to the Scottish Courts and Tribunals Service could have a detrimental impact on the administration of justice,

<sup>78</sup> *Anderson Strathern v Scottish Legal Complaints Commission* [2016] CSIH 71

<sup>79</sup> Law Society of Scotland Response: Scottish Government consultation: Amendments to Legal Complaints. See: [https://www.lawscot.org.uk/media/370546/consultation-amendments-to-legal-complaints-law-society-of-scotland-response\\_-002.pdf](https://www.lawscot.org.uk/media/370546/consultation-amendments-to-legal-complaints-law-society-of-scotland-response_-002.pdf)

particularly as the service continues to work hard to return to pre-pandemic operating levels. It would also add cost to the public purse if the existing tribunal were incorporated into the Scottish Courts and Tribunals Service.

We understand the intuitive appeal of a single disciplinary tribunal for all legal professionals. However, we do not consider the size of our jurisdiction would justify such a step. Although the Robertson report commented on a ‘cluttered’ regulatory landscape, in recommending that a single tribunal should be established, it was noted that only the Law Society and Faculty of Advocates have a disciplinary tribunal. We regulate over 12,600 solicitors. Of the 352 cases we concluded in 2019/20 we referred 46 (13%) for prosecution before the tribunal<sup>80</sup>. This represents less than 0.4% of the solicitors currently on the Roll. The Faculty of Advocates regulate approximately 500 Advocates. An even smaller percentage of Advocates find themselves before the Faculty of Advocate’s disciplinary tribunal. Therefore, it does not appear necessary to go to the upheaval of abolishing both disciplinary tribunals and creating a single disciplinary tribunal for the numbers involved.

Additionally, the SSDT and the Disciplinary Tribunal of the Faculty of Advocates have built up a specialist expertise in deciding what is needed to protect the public and maintain public confidence in their respective areas. If a single disciplinary tribunal were created for all legal professionals, there is a risk this expertise would be lost or diluted.

We are supportive of an independent, arm’s length, tribunal dealing with conduct cases. This is a useful and common element of a system of professional regulation. The SSDT currently provides this in relation to solicitors.

**Q53 To what extent do you agree or disagree that any future legal complaints model should incorporate the requirement for the complaints budget to require the approval of the Scottish Parliament ?**

**We disagree.** We believe that there is a lack of oversight and accountability in relation to the Scottish Legal Complaints Commission (SLCC) budget but we do not agree that the budget should be approved by the Scottish Parliament.

<sup>80</sup> See; <https://www.lawscof.org.uk/about-us/strategy-reports-plans/annual-reports/annual-report-2020/assure/>.

Currently, the SLCC is funded by the legal profession through an annual levy applied individually to all legal professionals (with a small number of exceptions). Since its formation in 2008, the SLCC has increased the levy applied each year by a rate beyond inflation with no opportunity presented to challenge and question such excessive increases.

Under the provisions of the Legal Services (Scotland) Act 2007,<sup>81</sup> the SLCC is only required to consult with 'relevant professional organisations' (regulators) each January and to lay the finalised budget before the Scottish Parliament by the end of April. There is no opportunity for scrutiny of the budget, either by the Scottish Parliament or by those who fund the SLCC. We are aware of the tension the SLCC's budget causes with the legal profession and have previously highlighted our concerns about the SLCC's budget and the impact this has on the profession. It is crucial that the budgeting process is fully transparent and the SLCC is required to demonstrate evidence of its spending of the revenue which is generated through application of the annual levy. The opportunity should be given to challenge this if necessary and just.

However, we believe that scrutiny and approval of the SLCC complaints budget should be independent of the parliament and the executive to demonstrate full transparency that would have the confidence of the regulated population and consumers alike. We suggest that there may be potential for the Lord President, as the independent head of the judiciary and courts services, to play a role in this or, alternatively, another independent third party.

In relation to approving the budget of those complaints determined as 'conduct' and therefore resting within the responsibility of the professional body regulator, we have expressed our concerns that the proposal of a single regulator, dealing with conduct concerns and accountable to the Scottish Parliament, raises serious concerns in relation to the rule of law, independence of the legal profession and our global reputation.

Those concerns would be exacerbated if the Scottish Parliament had approval over the funding of the body that considers conduct matters. As noted in the consultation document: *'The regulator should be*

<sup>81</sup> Section 29 Legal Profession and Legal Aid (Scotland) Act 2007

*able to undertake its duties without seeking permission from, or the approval of, the Government*<sup>82</sup>. Under this proposal, the state, via the Scottish Parliament, would have an ability to directly influence the activity of the regulator through approval of its budget.

We also highlight that our annual budget is already subject to scrutiny and approval. It is determined to reflect and ensure that we can continue to meet our statutory obligations and perform our regulatory functions. The Society's budget is mostly funded by our membership, through the annual practising certificate fee. The membership is invited to approve the proposed fee and is provided with the opportunity to raise questions and challenge this if they wish or have any concerns. This presents a fully transparent and engaging budgeting process which involves those providing the funding. In addition, our accounts are published annually.

**Q54 From the options listed how important do you think each of the following principles and objectives are for any future regulatory model?**

**Model Option 1 (Robertson report recommendation)**

- **Uphold the rule of law and the proper administration of justice.**

**Very important.** As we have stated in our response to Qs1 and 2 and expanded on in our response to Q4, upholding the rule of law is crucial in any regulatory model. Our main issue with the Robertson model is that **it will not** uphold the rule of law or support the proper administration of justice. This model brings with it serious concerns about the rule of law and independence of the profession, which work in unison to underpin the proper administration of justice, and it threatens to dilute each of those significantly to the detriment of both the consumer and the legal profession alike.

- **Provide access to justice.**

**Very important.** We are concerned that the Robertson model (and the market regulator model) would lead to increased costs, which will be passed to the consumer, restricting access to justice. Consumer research has shown that cost is a factor which consumers consider.

<sup>82</sup> Legal Services Regulation Reform in Scotland page 5, see: [https://www.gov.scot/publications/legal-services-regulation-reform-scotland-consultation/ ref to consultation page 5](https://www.gov.scot/publications/legal-services-regulation-reform-scotland-consultation/ref%20to%20consultation/page%205)

Therefore, any increase in costs may deter consumer accessing legal services. We have set out our concerns relating to costs associated with this model in response to Q4 and within Appendix 2.

- **Operate for the public interests (offer accountability in protecting the public and consumer interest).**

**Very important.** We are concerned that the Robertson model would damage trust and confidence as it raises concerns about the rule of law and the independence of the legal profession.

- **Have a high degree of public confidence and trust, embedding a modern culture of prevention, continuous quality improvement, quality assurance and compliance. Promote improvements, use information and evidence gathered to identify sector-wide issues.**

It is **very important** that the public and the profession have trust and confidence in the regulator. The Robertson model risks undermining this confidence.

- **Work collaboratively with consumer and legal professional bodies as appropriate.**

**Very important.** We believe that it is important that all organisations within the Scottish co-regulation structure work collaboratively, both together and with consumer bodies. However, we are concerned that the Robertson model would lead to a diminished and disjointed professional body landscape, making it challenging to liaise meaningfully with legal professional and consumer bodies.

- **Encourage companies to act on complaints data. Publish guidance, and provide training to help firms and the sector improve complaint handling. Provide support for 1st tier complaints management (be able to provide guidance on handling).**

**Very important.** All of these proposals are part of a well-functioning complaints system and are things which the Law Society already does. The importance of the suggested functions in the question are not only applicable to the Robertson model and should be considered as part of the complaints process in any of the proposed regulatory models.



- **Embed the better regulation and consumer principles throughout its areas of responsibility.**

**Very important.** However, again, these are not restricted to only the Robertson model and could be taken forward in any new regulatory framework. It is also worth noting that the Society's Regulatory Committee recently published its two-year sub-strategy with objectives centred on the better regulation principles.

- **Accessible, remove barriers to people seeking the redress they are entitled to. There should be a single gateway and investigation for complaints. 3rd party complaints would be allowed.**

**Important.** As detailed above in our answer to Q47, we believe that compensation should be available for all legal complaints and that the single gateway should remain for consumer complaints subject to modification to allow professional bodies to deal with conduct matters directly.

We recognise that 3rd party complaints are an important part of a modern, accessible regulatory regime. However, there is a tension in that 3rd party complaints are sometimes used vexatiously in highly charged emotional situations. For example, in contentious executries, family proceedings or civil litigation, parties sometimes use third party complaints to thwart the relevant judicial proceedings or as a backdoor appeal system after a judicial decision has been made.

This was not the intention of the third-party complaints system. Rather than removing third party complaints, it may be appropriate to limit the parameters of whom and in what circumstances these may be brought, perhaps through guidance. Alternatively, adopting more permissive legislation would assist the regulator to resolve vexatious complaints early.

**Effective, able to resolve consumer complaints and have adequate enforcement powers to hold providers to account when things go wrong.**

**Very important**

- **Transparent, publish a range of information including decision criteria, complaints data and outcomes of cases. Be able to advise on trends and issues emerging from 1s tier complaints.**

**Very important**

- **Have an increased focus on independence and accountability. Provide an impartial service to both consumers and providers. Accountable, to a competent authority or a regulator.**  
**Undertake periodic reviews on the effectiveness of ADR schemes and publish the results.**

**Very important.** We consider it is of critical importance that the regulator is independent from the state and encourages a strong independent legal profession in order to maintain the rule of law, as we have discussed several times within this response and in relation to Q4.

We consider it less important that a regulator is independent from the profession it serves. There are many examples of effective co-regulation. As noted in the consultation document and referred to previously, we already operate an independent statutory Regulatory Committee comprised of at least 50% non-solicitor members. We consider this works well in providing the public reassurance about the independence of the process.

- **Enable early consensual resolution, which would include mediation as a key process should be built upon.**

**Very important.** Early consensual resolution would ensure a more proportionate system. Mediation is an important process for service complaints but not important for conduct complaints. This is because a conduct complaint involves matters of professional discipline which encompass issues of public protection and the wider public interest. We consider that these types of complaint should not be open to informal or commercial resolution.

- **Provide prompt resolution, proportionate to the complexity of the complaint.**

**Very important.** Again, this would be relevant regardless of the regulatory model taken forward and is not limited to the Robertson model. Our complaints model (set out in Appendix 1) would support the delivery of each of these.

- **The levy for entities should be on a financial turnover basis.**

We believe that it would be appropriate for the levy, and the method for determining this, to be left to the discretion of the relevant regulator. In relation to the Scottish solicitor profession, the Law Society would be best positioned to consider all the relevant factors so as to determine the most appropriate basis of calculating the levy, whether this is based on financial turnover or an alternative method, and thereafter the levy to be applied. There are many factors to consider in determining the correct basis for any levy, and it is too simplistic to base this on financial turnover alone, for example, the application of possible thresholds could recognise that some entities will be in a stronger financial position than others. Relatively small changes in fees can have big consequences, even affecting the financial viability of smaller high street businesses, which find it more difficult to absorb new costs, so it is important that legal service regulators have the flexibility to determine the basis of calculation and amount.

Providing these powers to regulators allows for swift regulatory fee changes to be made to reflect emerging challenges. By way of example, and as highlighted earlier in this response, the Law Society, on the emergence of the COVID-19 pandemic, was proactively able to reduce the regulatory fees and provide a financial support package to the solicitor profession. It is important that any provisions relating to entity levies provide similar flexibility.

- **Appeals process simplified whilst adhering to ECHR. No appeal from the Complaints Ombudsman, but the ability to appeal to the Court of Session in relation to misconduct.**

**Very important.** The appeals process should be simplified in a way which remains compliant with the European Convention on Human Rights (ECHR). The question recognises that there is a distinction to be made between service and conduct issues when it comes to appeals.

In relation to service complaints where consumer issues are addressed, we agree there should be no appeal from the Complaints Ombudsmen. Allowing an appeal to a court at the end of an alternative dispute resolution scheme undermines the purpose of such a scheme. Regulatory ombudsmen or dispute resolution schemes typically have a final decision that is binding, subject

to judicial review. That is accepted and ECHR compliant. The current system of appeals to the court for service issues is costly, time consuming and undermines the purpose of having a customer friendly non-court dispute resolution in the first place.

In relation to conduct complaints, which are complaints dealing with professional discipline, a full appeal right is required to satisfy the requirements of ECHR.

- **There should be no appeal in terms of the amount of compensation awarded, similar to other professions.**

**Very important.**

#### **Model Options 2 and 3**

- **There should be a Memorandum of Understanding between the complaints body and the professional bodies on cross-referring cases.**

**Very important.** This would resolve the problems we have identified above with the current single gateway.

- **The presence of conduct issues should not delay, complicate the process, or disadvantage the outcome of service complaints for consumers.**

**Very important.** We consider that our proposed model, underpinned with more permissive legislation, would allow service and conduct complaints to progress in a simplified way without delay and disadvantage to the complainer. This approach mirrors the process in England and Wales where different bodies are responsible for service and conduct complaints.

#### **Additional comment**

While we do not agree with the Robertson report's central recommendation, we have commented on each of the principles and objectives identified under Model Option 1 in responding to this question. Although these principles and options are not re-listed under model Options 2 and 3, we are of the view the principles and objectives remain relevant to those models also.

## Appendix 1 Proposed complaints model

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The Robertson report was published in October 2018. At that time and in its written response to the report contents, the Society proposed an alternative complaints model which we believe will create a simpler and more effective model. At its heart is a desire to see complaints being dealt with more quickly and in a way that is proportionate, managing expectations better. This model recognises the important distinction between consumer complaints involving and complaints relating to conduct and ethics, which are the natural preserve of an experienced professional body. Before finalising any new complaints model, additional research and impact assessments on more detailed proposals would need to be undertaken and our proposals below should be considered against that backdrop.

Our proposals would transform the Scottish Legal Complaints Commission (SLCC) into a Scottish Legal Ombudsman Service which could concentrate properly on dealing with consumer complaints thoroughly but swiftly. This would in turn allow the Society to continue its strong track record of protecting the public interest through addressing issues of professional misconduct and prosecuting for discipline.

Given most submissions made to the Robertson review centred on the issues of complaints, we believe this is the area worthy of most focus and attention. Devoting time and resource to unnecessarily overhaul other elements of the regulatory system, which both Options 1 and 2 propose, risks diverting all of us from driving forward critical improvements elsewhere and where needed.

### Proposed model

Our proposed model contains elements of the successful model in England and Wales between the Legal Ombudsman Service (LeO) and the Solicitors Regulation Authority (SRA). In our view, the Option 3 model, suitably modified, would best serve the public and the profession. We believe a model that incorporates elements of the model operated in England and Wales between the LeO and the SRA would work well in Scotland.

- The SLCC is replaced with SLOS. This body would focus on handling complaints from consumers and ensure a speedy resolution or, if a formal determination is needed, appropriate redress. In line with the recommendations of the Robertson report, we suggest the chair of SLOS be subject to the public appointment process and be required to lay an annual report before the Scottish Parliament. The office of the Lord President would oversee SLOS (see below).
- SLOS would handle service complaints, with the Society (or respective co-regulators, such as the Faculty of Advocates) handling conduct complaints. This recognises the differences between consumer

redress complaints and conduct concerns, which engage issues of public protection and public confidence in the profession.

- The single gateway for consumer complaints would be retained and SLOS would act as the gateway. However, the Law Society would be able to proceed to investigate conduct concerns without first seeking approval from the SLOS (as we currently must do with the SLCC). This would ultimately allow us to take action quicker, minimising risks to the public. In addition, as with the SRA and LeO, there would be a Memorandum of Understanding between the Law Society and SLOS to address the mechanics of eligibility of conduct complaints and cross-referral of service issues. (For more information on the issues caused by the single gateway, see our answer to Question 47).
- There would be a speedier process to decide which complaints are investigated, replacing the current cumbersome set of statutory 'eligibility' tests which a complaint must pass through. The different bodies would need to apply the same eligibility tests for conduct complaints. The principles to be applied in accepting a conduct complaint for investigation could be included in the legislation. The underlying mechanics of the eligibility tests, responsibility and referrals between the different bodies could be dealt with through Memoranda of Understanding, as is the case in England and Wales. This would allow the different bodies to develop a more flexible and proportionate approach, similar to the approach the SRA adopt in their enforcement strategy.<sup>83</sup>
- Hybrid complaints would be reintroduced as set out in our response to Q50.
- There would be powers to award compensation in relation to both service complaints and conduct complaints.
- The SLOS would have the power to award compensation in relation to service complaints where an aspect of consumer redress is required.
- Given the limited size of the Scottish jurisdiction, we are of the view the Office of the Lord President (LP) should adopt an oversight role over both the SLOS and the professional bodies within the legal sector. This would be similar to the role which the LP currently has in overseeing the Scottish Solicitors'

<sup>83</sup> Solicitor Regulatory Authority: enforcement strategy see: <https://www.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy/>

Discipline Tribunal (SSDT). In addition to oversight, we suggest that the LP would be responsible for receiving and investigating handling complaints about SLOS or the professional bodies. This reflects the important role of the Lord President as the independent head of the Scottish legal profession and is a system which works well elsewhere.

- The appeals process would be simplified, while remaining compliant with the European Convention on Human Rights. In keeping with other regulatory ombudsmen and alternative dispute resolution schemes, service complaint decisions would be binding on regulated professionals, subject to judicial review. Appeals of conduct complaint decisions would be heard by the Court of Session.
- We support the principle of there being an independent disciplinary tribunal which is separate to the professional bodies and takes decisions in the most serious of cases against Scottish solicitors. This tribunal would sit outside the Scottish Courts and Tribunals Service. We believe the current arrangements where we act as prosecutor before the SSDT in cases of professional misconduct works effectively. This is evidenced by the number of cases which we bring before the SSDT under our own initiative. Over the past five years, 33% of the complaints we have prosecuted at the SSDT arose from complaints we initiated.

We have briefly outlined and summarised our proposed model above. However, we have given careful consideration as to the detailed steps which would be undertaken in any new process, including appeal routes. We would welcome the opportunity to discuss this further with the Scottish Government and interested stakeholders as part of this consultation exercise and would encourage undertaking additional research and impact assessments in the future before implementing the final agreed model.

### Further proposals

In the current system there is a low threshold for investigating complaints. Once complaints pass the investigatory threshold, they must then pass through a rigid statutory process which results in a written report being produced addressing the facts of the matter and the proposed action to be taken.

At the end of the process, most cases (72%) result in no action being taken<sup>84</sup>. In that regard, we are similar to other professional regulators. For example, prior to introducing an improved triage process in 2015 (provisional enquiries), the General Medical Council (GMC) took no action in 83% of the cases it investigated<sup>85</sup>. Even now, with the added benefit of an improved triage process, the GMC takes no action in 57% of the cases it investigates<sup>86</sup>. Where we differ from other professional regulators is that we have fewer tools at our disposal to proportionately deal with cases and ensure we are focusing our resources on the most serious cases that will likely lead to regulatory action being taken.

As noted earlier in this response, there must be more permissive legislation underpinning this model. This is the approach the Scottish Parliament has adopted with professional regulators in other devolved areas, and it has worked well. For example, the modern legislation underpinning the General Teaching Council for Scotland<sup>87</sup> (GTCS) and the Scottish Social Services Council<sup>88</sup> (SSSC) serves as a stark contrast to the patchwork quilt of complex legislation underpinning legal regulation.

Over the past 10 years, these two regulators have introduced various innovations including changing to fitness to practise models of regulation, developing thresholds for investigating cases and implementing consensual disposal for cases. It should be noted that the GTCS, like us, is a regulating professional body. This underlines our key point: the current problems are not caused by the model of regulation or who is regulating – they are caused by overly prescriptive process set out in law.

Removing much of the detail of the complaints handling regime from primary legislation and making the legislation much more permissive would allow us to improve various parts of the complaints handling process outlined above. For example:

At eligibility stage we could:

- Alongside SLOS, develop a strategy similar to the approach set out in the SRA's Enforcement Strategy. This would be more refined than the current statutory tests of eligibility and focus on matters such as the seriousness of the issue, insight and remediation, intent and harm.

<sup>84</sup> Of the 347 cases concluded by the Professional Conduct Committee in 2019-20, 250 were rejected: <https://www.lawscot.org.uk/about-us/strategy-reports-plans/annual-reports/annual-report-2020/assure/>.

<sup>85</sup> [https://www.gmc-uk.org/-/media/documents/06---outcome-of-the-first-phase-of-the-provisional-enquiry-pilot\\_pdf-80653718.pdf](https://www.gmc-uk.org/-/media/documents/06---outcome-of-the-first-phase-of-the-provisional-enquiry-pilot_pdf-80653718.pdf) [p2].

<sup>86</sup> 641 of 1,117 concerns that met the investigation threshold were concluded with no action: <https://www.gmc-uk.org/-/media/gmc-site-images/about/how-we-work/annual-report-2020/downloads/gmc-annual-report-and-accounts-2020.pdf?la=en&hash=79C4BCD77BBFBF08DF5FB004D870DC219A5571AC> [p14]

<sup>87</sup> [The Public Services Reform \(General Teaching Council for Scotland\) Order 2011](#) esp. Articles 5, 6, 7, 8, 15 and 18.

<sup>88</sup> [The Regulation of Care \(Scotland\) Act 2001](#) esp. Sections 43, 46, 49.



- Develop an Early Resolution process. As mentioned above, the GMC operates a provisional enquiry process. This involves obtaining one or two discrete and easily obtainable pieces of information which are critical to deciding whether a case should be investigated.<sup>89</sup> As noted above, this has reduced the percentage of cases that proceed to investigation and result in no action being taken. In 2018/19 the SRA introduced an early resolution process. This involved talking further with the person who raised a concern, the firm or solicitors involved and relevant third parties. This allowed the SRA to obtain and verify information which often provided the opportunity to resolve the matter at an early stage. This approach led to a 37% decrease in the number of concerns requiring a full investigation.<sup>90</sup>

These processes would ensure more complaints are resolved promptly when a detailed investigation is not required and ensure resources are properly focused on concerns that pose the most risk to public protection and confidence.

At determination stage we could:

- Issue letters which contain advice and a warning. This would allow us to respond to minor regulatory breaches which are not sufficiently serious to require regulatory action. This is a method the SRA utilise in England and Wales.
- Develop a process for consensual disposal. A consensual disposal process would allow us to protect consumers and the public interest swiftly, efficiently and at a proportionate cost by reducing the need for full evidential hearings in uncontentious cases. Where appropriate, we would agree an outcome based on an agreed set of facts. The agreement would be placed before the independent Sub Committee of the Regulatory Committee and, in cases of serious professional misconduct, the independent SSDT. They would consider the agreed outcome and decide whether to accept it, revise it or decide that a full evidential hearing is required. In 2019/20, 38% of cases (42 of 112) concluded at the Solicitors' Discipline Tribunal of England and Wales were concluded by way of consensual disposal<sup>91</sup>.

<sup>89</sup> <https://www.gmc-uk.org/-/media/documents/dc13029-guidance-for-decision-makers-on-provisional-enquiries----part-a-purpose-and-overarc-83986839.pdf> [para 2]

<sup>90</sup> Solicitors Regulation Authority '[Upholding Professional Standards 2019/20](#)', page 17

<sup>91</sup> Solicitors Regulation Authority '[Upholding Professional Standards 2019/20](#)', p25

As noted in the consultation document, we have an independent Regulatory Committee who are responsible for discharging our regulatory functions (page 28). The membership of this Committee, and its Sub Committees, is comprised of 50% non-solicitors. This ensures complaints handling decisions and any significant changes to the complaints handling process undergo detailed scrutiny including scrutiny by consumers of legal services.

We are of the view that Option 3, with the changes outlined above and permissive legislation, would allow us to improve how concerns are dealt with. In a similar model, the SRA concludes many cases within three months and most cases within 12 months<sup>92</sup>. We are confident that combining our expertise in handling conduct concerns with modern, flexible legislation would allow us to perform at comparable levels.

<sup>92</sup> <https://www.sra.org.uk/consumers/problems/report-solicitor/investigating-concerns/>.

## Appendix 2: Costs associated with the proposed options

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### Key issues with Option 1 (Roberton model)

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#### Summary

The consultation document and the Roberton report suggest that the cost to the profession of the proposed model under Option 1 would be ‘no more than the current system’. This was an assumption based on no evidence. We have several key financial issues and concerns with the Option 1 model and would strongly disagree with this assumption. These issues can be summarised as falling into the three categories below, which we thereafter expand on in more detail.

1. **Start-up costs.** The creation of a new regulator will invariably incur start-up costs. These costs will include corporate set-up and branding, employee recruitment and training, IT, systems, process development, data migration and property (search, fitout, and furnish).
2. **Transition costs.** As with any creation of a new regulator, there will inevitably be a period of transition between the existing bodies and the new regulator. We believe that there is a risk that this period could be several months or potentially years, during which time the profession could incur duplicate operating costs. In addition, in transferring its regulatory activities to the new regulator, the Society has several material financial risks which could add significant cost to its members under this model. These costs include, corporate restructuring, onerous lease costs, employee restructuring, material pension liabilities, and data migration.
3. **Operating costs.** We believe that the Society members and the profession would incur material additional annual operating costs under the new regulator model. In particular, the new regulator will require new IT systems and operational support functions (such as HR, finance, administrative support, etc), which we believe would largely replicate those used by the Society in the future.

#### Issue 1: Law Society of Scotland legislative status

Currently, the Society is a legal entity incorporated by statute as enacted in the Solicitors (Scotland) Act 1980, with its authority, power and remit defined by that same legislation (as amended by relevant subsequent legislation).

Option 1 in the consultation document sets out that the current regulators, including the Society, would no longer have regulatory roles. Instead, they would be invited to work with the new independent regulator as

professional membership organisations. The consultation also states that the professional bodies would be membership organisations representing the interests of their members. They would have a statutory footing in line with sections 1 and 2 of the Legal Services (Scotland) Act 2010; however, these would be described as professional objectives rather than regulatory objectives.

In this regard, the consultation document makes limited reference to the underlying legislative status of the Society, and whether the Society would continue to exist as its current legal entity (albeit with no regulatory activities) under an amended version of its current empowering legislation, or whether the current Society legal entity would be dissolved and replaced with a newly constituted entity which was either:

1. a legal entity constituted under new legislation; or
2. a new professional services entity founded by members and not constituted under legislation.

This issue is of paramount importance to both the Society and our members as it underpins the financial assumptions in relation to the consultation document. If the current legal entity were to continue under Option 1, then in simple terms this could mean that the Society would continue in its current form (albeit with no regulatory powers or activities) and all the current liabilities and obligations of the Society, and the rights and obligations of our members, could remain with the same legal entity. Society members could continue to retain access to their existing assets and reserves, as well maintaining their existing obligations and liabilities. It is worth pointing out that even in this scenario, should the Society's functions change, then this could well lead to a duplication of costs to members of the profession.

However, if the current legal entity were dissolved and a new entity constituted for the Society (whether by statute or otherwise) this could trigger a significant amount of key financial risks for Society members, and the profession, many of which are dealt with in more detail in this paper, but in summary:

- The Society has carried forward reserves built up out of member contributions over the years. Should the existing legal entity be dissolved, it is unclear what would happen to these reserves, and a significant amount of further analysis and work would need to be undertaken to clarify the rights and obligations of members in relation to the existing reserves.
- The Society has around 140 employees, and associated liabilities, who would all need to be managed if their employer was dissolved. There could be significant potential financial liabilities to Society members should a number of these employees need to be made redundant because of the creation of the new regulator.
- The Society is a non-active member of the Society Staff Retirement Benefits Scheme, which is currently in deficit on a continued funding basis. If the Society ceased to exist, then the full pension fund deficit

amount would be immediately payable under the relevant pensions legislation unless a suitable alternative solution were found to the satisfaction of the pension trustees.

The impact of the above could well mean that the Society, and its members, because of the creation of the new regulator, are faced with material liabilities to settle, and it is not clear if there would be sufficient reserves in the Society to meet these obligations. It is unclear how any deficit would be settled, although it is possible that the liability would rest with members which, in turn, they would potentially pass on to their customers.

### **Issue 2: New regulator start-up costs**

Option 1 proposes the creation of a new 'independent' single regulator for all legal services in Scotland. Therefore, there could well be significant start-up costs incurred to set up the new regulator across multiple departments, including costs for property, office fitout, leadership team, new employees (including recruitment and training), IT and systems, branding etc. It is not clear to what extent these set-up costs have been included in the working assumptions underpinning Option 1.

Property: The new regulator will require new office accommodation to house its new team. We believe that it is likely that this would all be within one single office and that the new regulator will need to source the property (thereby incurring agency costs), as well as incur costs to fit out and furnish the new offices.

Leadership team: Whilst the consultation envisages a similar leadership structure to that already in place at the Society, we would suggest that a new leadership structure designed for the purposes and remit of the new regulator would need to be put in place. Whatever this new structure looks like, we believe that it is likely that the new regulator will incur a material cost to both recruit and train the new team, which will be an incremental cost to the profession, over and above the ongoing leadership costs at the Society, which will likely remain.

New employees: The new regulator will require a full team of employees in order to perform its duties. We believe that a proportion of these employees will transfer over from the Scottish Legal Complaints Commission (SLCC). However, it is not clear from the consultation document as to the recruitment plans for the remainder of the employees. We acknowledge that some existing employees of the Society who wholly perform regulatory tasks may well be able to transfer over to the new regulator; however, we believe that there will still be many regulatory roles that will need to be fulfilled by external recruitment. In addition, the new regulator will require an operational support team (HR, finance, IT, administrative support) which will also likely need to be externally recruited. Therefore, we believe that the new regulator will require additional employees over and above those already employed at the Society and the other existing regulatory bodies (at least for the operational support

functions such as HR, finance, IT, and administrative support), which will incur a cost to both recruit and train, and which will be an incremental cost to be borne by Society members and the profession.

IT and systems: The new regulator will likely require new IT systems and supporting infrastructure and applications to perform its required tasks. The Society and the SLCC currently have systems to perform their existing regulatory roles; however, we believe that it is unlikely that both the Society and SLCC systems could be fully transitioned to the new regulator, and whether their legacy systems could ever be fully integrated. Therefore, the new regulator may well be required to invest significant capital (and/or ongoing licence costs) into new IT systems in order to be operational, all of which would have significant incremental costs to Society members and the profession.

Furthermore, by the very nature of its remit, the new regulator will likely require a significant amount of data to be transferred from the existing regulatory bodies onto its new systems. The transfer of data will need to be managed in compliance with all laws (including General Data Protection Regulations) and we believe that it will need a full project plan and focus from dedicated transitional teams on both sides in order to be completed successfully. We believe that this project would be very time consuming and could have a material cost for all parties involved, which will likely be passed onto the profession.

Branding: The new regulator will require its own unique branding, website, communication function and other outward-facing collateral in order to function. These items will all need to be developed before the new regulator is able to start its operations, which could have a material cost for all parties involved, which will likely be passed onto the profession.

### **Issue 3: Transition costs**

We believe that there will inevitably be a period of transition between the existing bodies and the new regulator as the various tasks and responsibilities are passed on from the existing regulatory bodies. In addition, we believe that there is unlikely to be a single cut off date of all regulatory activities from the incumbent regulators to the new regulator, and therefore there is a risk that there will be a transition period of at least several months or potentially years whereby both organisations will incur duplicate costs as they run largely in parallel.

In addition, it is unclear how existing cases and issues being managed by the existing regulatory bodies will be transferred to the new regulator, or indeed whether such cases will be run down by the existing regulatory bodies. There could also be a run-off period for existing matters to be cleared up by the existing regulatory bodies before they are transferred to the new regulator, all of which would add material cost and time into the transition process.

We believe that there are two elements of transition costs which are likely to be incurred by the Society and/or the profession in the transfer of any regulatory powers from the Society to the new regulator. The first element of transitional costs are those costs incurred by the Society (and its members) in transitioning services to the new regulator, and in any potential rightsizing of the Society following this transition. These costs include the following:

- **Advisory costs:** Including legal, financial and tax advice to the Society on its future corporate structure and operations.
- **Pension costs:** It is unclear what will happen to the Society's pension liability, and whether some (or any of it) would be transferred to the new regulator, and whether any of the liability would be left with the Society. In addition, the process to manage the transition of any pension scheme to a new employer is invariably a costly and complex job as the pension fund trustees are duty bound to follow due process in relation to their obligations to the fund members and The Pensions Regulator. In this case, care would need to be taken to determine which of the deferred members' liabilities, if any, were to be transferred to the new regulator and, of those, how the scheme assets and liabilities associated with each transferring member were to be calculated. Finally, should the Society be wound up with a remaining liability under the pension scheme, this could trigger material financial costs to the Society and its members.
- **Employee costs:** The Society currently employs around 140 employees. It is unclear in the consultation document what is likely to happen to these employees under Option 1. The consultation makes no reference to the treatment of the Society employees who currently deal solely with matters which would transfer to the new regulator ('regulatory employees'), nor those employees who either do no regulatory work ('non-regulatory employees') or whose role involves only partial regulatory work – for example, those employees in operational support functions such as finance, HR, IT, administration etc ('shared employees'). It is not clear if or how any employees would transfer to the new regulator from the Society but, in any such transfer process, there could be an expensive employee TUPE consultation exercise. Furthermore, for those employees who do not TUPE transfer to the new regulator, there is the risk that the Society will have to make many of them redundant as their roles could no longer exist at the Society. In that case, we believe that the Society could have an expensive redundancy process to undertake to right size its employees and employment costs.

- **Property costs:** The Society currently leases A-grade office space at Atria One in Morrison Street, Edinburgh, and has a long-term lease commitment for a significant number of years. Given that a portion of the Society's activity would be transferring to the new regulator, this property could be too large for the Society's future activities. The Society will be required to pay for the larger building until the expiry of its lease, when it will be able to move to more suitable accommodation. This onerous lease cost could be borne by the Society members for many years to come.
- **IT costs:** We believe that the new regulator will require a significant amount of data to be transferred from the existing regulatory bodies onto its new systems. The transfer of data will need to be managed in compliance with all laws (including GDPR) and could need a full project plan and focus from dedicated transitional teams on both sides in order to be completed successfully. We believe that this project could be time consuming with a material cost for all parties involved.

The second element of transitional costs are those potential parallel operating costs for a transitional period where the Society (and the other existing regulatory bodies) and the new regulator will be operating in parallel for a period of time as the various regulatory tasks and roles are transferred to the new regulator. During this period, it is possible that the Society will continue to incur costs consistent with its current cost levels, whilst the new regulator would also be incurring ongoing operational costs as it worked in parallel with the existing regulatory bodies. These parallel operational costs would likely be incremental costs to be borne by the profession for the length of time of any transitional period.

#### **Issue 4: Law Society of Scotland pension scheme**

The Society is a non-active member of the Society Staff Retirement Benefits Scheme, which is currently in deficit on a continued funding basis. The Society has agreed a payment plan with the pension fund trustees to pay down the balance of the current deficit over a 10-year period. It is unclear what will happen to this pension liability, and whether some (or any of it) would be transferred to the new regulator, and whether any of the liability would be left with the Society.

In addition, should the Society be wound up with a remaining liability under the pension scheme, this could trigger material costs to the Society under the applicable pensions legislation. In addition, the process to manage the transition of any defined benefit pension scheme to a new employer sponsor is invariably a costly and complex task as the pension fund trustees are duty bound to follow due process in relation to their obligations to the fund members and The Pensions Regulator.

#### **Issue 5: Law Society of Scotland member rights and obligations**



Membership of the Society currently provides a range of rights and obligations to members. It is unclear if and how these will continue within the consultation documents, and what the rights and obligations of members are as regards the Society if it were to be dissolved.

In addition, the Society has a level of reserves built up over many years which provide surety to members over the continuing solvency of the Society, along with providing a long-term steady level of income to the Society. It is unclear what would happen to these reserves under any scenario, and a significant amount of further analysis and work would need to be undertaken to clarify the rights and obligations of members in relation to the existing reserves.

#### **Issue 6: Treatment of the Scottish Solicitors' Guarantee Fund**

The Guarantee Fund is currently administered by the Society under statute, with a clearly defined scope and purpose. Option 1 would require administration of the fund to transfer to the new regulator. This would result in a (small) transfer of administrative income from the Society, but more importantly, the fund has a level of reserves and investments built up over many years from the annual contributions of Society member solicitors, which are then held as a fund of last resort for a specific statutory purpose. It is assumed that the fund legislation will be untouched by the change to a new regulator (aside from those relating to administration of the fund), and that the fund will not be expanded to cover losses from other acts, or losses from non-member solicitors. However, it is not clear that this will be the case, and it would appear to be plausible that the future fund remit could be expanded to include a wider group of parties than currently covered, and a wider group of wrongful behaviours. In either case, the position and rights attached to the existing reserves and funds of the fund, built up over many years from contributions from Society members, is not clear.

#### **Issue 7: Liabilities and obligations of the Law Society of Scotland**

The Society currently has several short-term and long-term liabilities and commitments which are relative to its current needs and operational footprint. As a result of the transfer of the regulatory employees/functions to a new regulator, and also an increase in the prevalence of homeworking due to the COVID-19 pandemic, the Society could well be left with a material value of liabilities and commitments which are no longer relevant to it, and which will need to be managed down over time as the commitments come to their pre-agreed termination dates. These include property costs (dealt with elsewhere in this paper) and operational support cost liabilities.

In addition, the Society currently performs a dual regulatory and member representation role, and in doing so the Society team includes a set of operational support functions (HR, finance, administration, IT etc) which will be required in any organisation. In this regard, the Society will need to retain its existing operational support functions and systems in order to perform its reduced role under the Option 1 model. However, the new

regulator will also need to recruit and train a new operational support function team to perform its duties. Therefore, under Option 1, both the Society and the new regulator would require operational support teams, which would result in a significant duplication of cost.

#### **Issue 8: Law Society of Scotland volunteer costs**

The current Society overhead cost does not include the remuneration and administration cost of approximately 100 voluntary committee members who are actively involved in regulatory work on behalf of the Society. These individuals are happy to perform this work on a voluntary basis for the Society as they see it as part of their professional undertaking and membership obligations of the Society. We believe that many of these individuals would require to be remunerated for their services to a new regulator. In this regard, this would be a significant cost if many committee members had to be remunerated for one or two days' work a month at rates which they would expect to earn given their experience, expertise and skill set. In addition, significant operational support costs relating to recruitment, governance, finance, IT, and administrative support will be required to manage these committees and committee members.

#### **Issue 9: Collection of annual membership levies**

Currently, the Society sets the annual fees for its membership, which covers both regulatory and representational work. The Society then collects the combined fees, thereby ensuring operational and cost efficiencies at the lowest overall cost to members, and the annual review allows us to consider current challenges faced by the profession and determine a fee which is proportionate. We believe that a separate billing and fee-setting process will inevitably lead to increased costs to members.

This demonstrates clearly that the extent of additional cost to the Society, profession, the Scottish taxpayer and ultimately the users of legal services would be significant under this model.

### **key issues with Option 2 (Market regulator)**

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#### **Issue 1: Cost of the new regulator**

The market regulator model provides for the creation of a new market regulator to provide an oversight role of the existing regulatory bodies. Again, unsupported by any evidence, it is suggested that this model would cost the profession 'no more than the current system'.

We believe that the creation and operational costs of a new market regulator, in whatever form this new body takes, will undoubtedly generate costs which will need to be passed onto the profession and ultimately onto the users of legal services. Many of these mirror the costs associated with Option1, for example:

- Property

The market regulator will require new office accommodation to house its new team; there will be associated costs in locating and securing this accommodation and outfitting.

- Leadership team

A leadership team will be required to oversee operations. The recruitment, appointment and training of this team will attract significant cost and the remuneration package will also need to ensure it attracts candidates of the right calibre.

- New employees

The market regulator will require a full new team of employees in order to perform its duties. This again will have significant cost attached for recruitment and training. As well as those employees whose responsibility will be to ensure the market regulator fulfils its remit, the market regulator will require additional employees in supporting roles such as HR, finance, IT, and administrative support.

- IT and systems

The market regulator will likely require new IT systems and supporting infrastructure and applications in order to perform its required tasks and be required to invest significant capital (and/or ongoing licence costs) into new IT systems in order to be operational, all of which would have significant incremental costs.

- Branding

The market regulator will require its own unique branding, website, communication function and other outward facing collateral in order to function.

## **Issue 2: Cost of the new statutory regulatory committee**

The market regulator model broadly assumes that the Society would remain in its current form and would continue to perform its current role across both regulatory and representation matters. In addition to its existing role, the Society would also be required to 'host' a new independent statutory regulatory committee accountable to the market regulator, which would be required to lay reports to the market regulator.

It is not clear in the consultation documentation what the scope of 'hosting' the new statutory regulatory committee would entail, and it is also not clear on the quality and depth of the reports that the new committee would need to lay to the market regulator. In this regard, we believe that it would not be possible to create and house a new committee at no cost, and that there could be considerable cost in the generation of the new

reports required by this committee to the market regulator. The cost of the committee and the generation and production of the new reports will be passed onto the profession (as is stated in the consultation documents) and we believe that these costs would likely be incremental to the costs already borne by the profession under the current regulatory structure.

Therefore, we cannot agree with the assumption in the consultation documentation that this proposal would cost 'no more than the current system'.

### **Issue 3: Additional layer of regulation**

The market regulator model introduces an additional body into the regulation structure. This will need to be funded, therefore it is clearly unrealistic to suggest that this would be cost neutral. The current regulators of legal services would retain their current responsibilities and, for their respective regulatory functions to remain as robust and consumer focused as they currently are, it is crucial that an appropriate level of funding remains to resource their regulatory activity. Therefore, to fund an additional body within the regulatory structure would require a significant increase to regulatory fees paid by the profession. We again highlight that it is the consumer, the user of legal services, who ultimately will pay any increase in the regulatory fees.

## **key issues with Option 3 (Enhanced accountability and transparency)**

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### **Issue 1: Cost of the new statutory regulatory committee**

The enhanced accountability and transparency model provides for the creation of a new statutory regulatory committee to provide an oversight role of the existing regulatory bodies. Again, it is suggested that this model would cost the profession 'no more than the current system'.

We believe that the creation and operational costs of a new regulatory committee, in whatever form this new body takes, will generate costs which will need to be passed onto the profession, whether they be set-up costs, employee costs, committee costs, IT and systems, meeting costs etc. These costs would likely be incremental to the costs already borne by the profession under the current regulatory structure, and therefore we cannot agree with the assumption in the consultation documentation that this proposal would cost 'no more than the current system'.

In this regard, it is worth pointing out that whilst we believe that the Option 3 model would incur the incremental costs to the profession stated above, we believe that the level of these incremental costs would be lower in quantum than the incremental costs incurred under the Option 1 and Option 2 models, both of which would incur higher costs due to their added complexity and the scale of the required change.



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UP VERSION