



Law Society
of Scotland

Regulation of Legal Services (Scotland) Bill

Equalities, Human Rights & Civil Justice Committee –
call for evidence response



27 July 2023

General comments

As the professional body of over 13,000 Scottish solicitors, the Law Society of Scotland knows the regulation of legal services must change and modernise.

Scotland should be proud of its legal sector. It helps to provide justice to thousands of people each year. It assists individuals during some of the most important times of their lives, such as buying a home or setting up a business. It helps resolve complex family disputes, manage the complicated processes that can flow from the death of a loved one, and provides important advice and defence to those accused of a crime. Members of the legal profession act as trusted advisors to businesses, facilitating commercial business transactions with global companies. As a whole, the profession also accounts for tens of thousands of well-paid, highly skilled jobs, and contributes over £1 billion to the Scottish economy each year.

The legal sector is constantly changing. Today's legal services market is a diverse one, from small high street practices through to major international law firms. A quarter of the Scottish legal profession now works in-house, whether in the public or private sector. The range of services required by civic Scotland and offered by legal professionals has never been wider, with technology transforming the way in which many of those services are provided.

This is why we welcome the introduction of the Regulation of Legal Services (Scotland) Bill¹. It is an important opportunity to introduce major and long overdue regulatory changes in the public interest, for the benefit of consumers and those working within the sector.

The Bill marks the culmination of eight years of campaigning by the Law Society to secure reforms to existing legislation, much of which is now over 40 years old. Indeed, the lengthy process that has led to the Bill's introduction started, not because of a scandal or market failure, but because the Law Society itself went to the Scottish Government and argued for change; change that would modernise regulation and be in the public interest.

Our preference was always for a new single Act, that brought together the currently fragmented and often confusing pieces of different existing legislation. We also called for a permissive and enabling framework of primary legislation that would be flexible enough to respond to future changes in the legal services market, for example by allowing future amendment through secondary legislation.

We believe the Scottish Government's decision to bring forward a Bill which simply amends previous legislation from as long ago as 1980 is a missed opportunity to simplify and improve the law overall. However, we respect the decision of Scottish Ministers to now proceed in this way. Our desire is to ensure the final Bill

¹ <https://www.parliament.scot/bills-and-laws/bills/regulation-of-legal-services-scotland-bill/introduced#topOfNav>

learns the lessons from the many issues arising within the current legislation and allows the Law Society to respond properly to the challenges in today's legal services market.

To that end, we welcome many of the Bill's reforms, not least because we requested them. New proposals for entity regulation and restrictions around who can and cannot call themselves a lawyer are important and positive improvements to the law which will give additional protections to consumers of legal services. There are also some process improvements which should help speed up elements of our work to take robust regulatory action when we need to.

However, many of the suggestions we made to the Scottish Government for system improvements remain absent from the Bill, particularly around complaints handling. We understand this was due to a lack of time before the legislation had to be lodged, something we hope can be addressed as the Bill progresses through its parliamentary stages.

Regrettably, some parts of the current Bill are contradictory and confusing in nature or create unintended consequences. These could add bureaucracy, unnecessarily increase the costs which will need to be met by consumers, stymie innovation and reduce inward investment. It is important these issues be addressed.

Of greatest concern to us, as we will detail in this submission, is the desire of the Scottish Government to be granted extensive and exceptional new powers of intervention over how legal professionals are regulated. These powers, which we have not been able to identify in any other western democracy, risk seriously undermining the rule of the law and the independence of Scotland's legal sector from the state. A key component of a free and democratic society is the role that an independent legal profession plays in challenging government and protecting citizens from the excessive use of power by the state. We hope the committee will ultimately conclude these sections should be removed from the Bill altogether.

In this submission, we first answer the important questions the Equalities, Human Rights and Civil Justice Committee (the EHCJ committee) set out in its call for evidence². We have also provided a section-by-section analysis, which covers our views across the various parts of the Bill in greater detail. We hope both are useful.

We very much look forward to engaging with members of the EHCJ committee as it considers the Bill. We are of course happy to answer any follow up questions and provide any additional background information that would be useful. We wish the EHCJ committee well as it considers this important piece of legislation.

² Regulation of Legal Services (Scotland) Bill – Call for written Evidence See: <https://yourviews.parliament.scot/ehcj/regulation-of-legal-services-bill/>

Questions

1. What are your views on:

a) the principal recommendation of the Robertson Review that an independent regulator should be created to regulate legal professionals?

We disagreed fundamentally with the model Esther Robertson presented in her 2018 report³ and believe the Scottish Government was right to reject it. In her report, Ms Robertson 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.’*⁴

These were important observations, backed up by evidence. Independent polling showed that over 84% of the public have trust in the Scottish solicitor profession. This rises to 93% of those who had used a solicitor in the past five years.⁵ These are higher levels of trust than seen in other parts of the United Kingdom.⁶

Complaints against solicitors are running at similar levels to a decade ago, despite the profession being 21% larger. Despite the global recession of 2008 and the economic impact of COVID-19, solicitor numbers are now at record levels.⁷

Given all this, there was never any convincing rationale within the Robertson report to support a wholesale dismantling of existing regulatory structures which have served Scotland well for decades. There were also substantial risks with the alternative model Ms Robertson suggested which were simply not addressed in her report:

A. The risk of increased costs

In her report, Ms 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.’*⁸

It was a fundamental flaw of the Robertson report that it failed to provide any detail on how such an aim could be achieved with the model proposed. Indeed, the report was devoid of any financial analysis or impact

³ Fit for the Future: [Report of the Independent Review of Legal Services Regulation in Scotland](#)

⁴ Ibid at page 30.

⁵ 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://savanta.com/knowledge-centre/poll/law-society-of-scotland-solicitors-polling/>

⁶ Legal Services Board – ‘Public trust in the legal professions’ research 2018 – 45% trust. See: <https://legalservicesboard.org.uk/research/market-intelligence-old/consumer-behaviour/public-trust-in-legal-prof>

⁷ 2013 10750 practising solicitors – 2023 13103 practising solicitors

⁸ Fit for Future report at page 47

assessment. This is important because any additional costs would ultimately be met by consumers paying more for their legal services.

We believe the Robertson model would have unquestionably introduced substantial new costs through the creation of an additional body. New set-up, transitional and ongoing operating costs, including staffing, office accommodation, utilities and other overhead costs would all have been required for little, if any, benefit.

Such a model would inevitably have also resulted in solicitors and non-solicitors, most of whom volunteer their time and expertise as part of the existing regulatory framework without recompense, being paid as part of a new public body.

B. The risk of undermining the rule of law

A key principle of the rule of law is the independence of the legal profession from the state. Solicitors are often responsible for challenging the excessive use of government power or defending their clients against prosecution from the state.

This is why it is so important for legal professionals, from judges to individual lawyers, to act freely from government interference. It is 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 for example, is an unacceptable breach of these longstanding and commonly held principles.

The model put forward by Esther Robertson would have seen the members of a new legal regulator being appointed directly by politicians, a serious erosion of the independence of the profession. In her 2018 report, Ms Robertson acknowledged that no other jurisdiction in the world had adopted the system she proposed.⁹ We believe there is good reason for this given the serious constitutional implications which would have arisen.

The then President of the International Bar Association (IBA), Sternford Moyo, wrote to the Scottish Government during its 2021 consultation. Mr Moyo, himself a lawyer in Zimbabwe, described the Robertson model as “*a serious and potentially dangerous step away from the principle of the independence of the legal profession*”.¹⁰

He went on, “*It [the Robertson model] 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.... Such changes would,*

⁹ Fit for the Future Report at page 31.

¹⁰ Correspondence to the Minister for Community Safety dated 8 Nov 2021.

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.”

b) the Scottish Government’s decision to “build on the existing framework” rather than follow that principal recommendation?

Whilst we have some significant concerns over certain aspects of the Bill introduced, we agree with the Scottish Government’s core position that it is best to make improvements within the current system rather than create new, expensive public bodies.

One of the major shortcomings of the Robertson report was its failure to recognise that the problems in regulation come not from existing structures, but because of a lack of flexibility within the regulatory system.

Rigid, often out-of-date, processes mean it can take longer to reach regulatory decisions than should be the case. Our limited powers from existing legislation mean we are not always able to step in when we would like to protect consumers and the wider public interest.

The debate that flowed from the Robertson report between 2017 and 2021 provided the opportunity to discuss and explore the legal services regulatory landscape and how the existing regulatory framework could be improved, from the perspective of both the legal profession and consumers. Although there was divisive debate regarding the regulatory model, primarily who should regulate, the decision by the Scottish Government to build on the existing framework has, in many ways, allowed this debate to positively move on to focus on enhancing regulation.

The Scottish Government’s approach also allows reforms to be introduced more quickly. It was clear that establishing a wholly new regulatory body would have taken considerable time and brought substantial additional costs. However, whilst the changes proposed would still in our view result in additional costs, the decision to reform from within the current system mean improvements can be made faster for the benefit of all involved.

c) whether there is a risk that the proposals could raise concerns about a potential conflict of interests?

We challenge the assertion that a conflict of interest exists in having a professional body led approach to regulation.

Like other professional bodies in Scotland and around the world, 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 work, underpinned by the strong regulatory objectives set out in legislation¹¹, ensures the profession works according to high ethical standards and delivers excellent legal services. Solicitors themselves have a strong personal and professional interest in ensuring their profession is trusted and respected, that bad practice is rooted out and that appropriate 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. Further afield, law societies and bar associations around the world have a role 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.

As required by existing legislation, our regulatory function is clearly separated from our professional support work. The Society's regulatory functions are administered by the Regulatory Committee which already works independently of the Law Society of Scotland Council.¹²

The Regulatory Committee is made up of 50% lay members and 50% solicitors and must, by law, be chaired by a lay member.¹³ This 50/50 split is mirrored in all the regulatory sub-committees which take individual decisions. This means every single regulatory decision is taken or overseen by a committee, combining knowledgeable solicitors as well as public interest lay members, who work in partnership to deliver effective regulation of the profession. This system will be made even more independent, transparent, and accountable by the provisions in the Bill, changes we support.

There are other bodies within the current legal regulatory landscape, including:

- **The Scottish Legal Complaints Commission (SLCC)**, which has a board made up of solicitors and lay members and acts as the gateway for all legal complaints. It also has other important oversight powers.
- **The Scottish Solicitors' Discipline Tribunal (SSDT)**, again made up of solicitors and lay members, hears the most serious cases of professional misconduct and has the power to strike off a solicitor from the roll.

¹¹ See Section 1 Legal Services (Scotland) Act 2010.

¹² See Section 3B Solicitors (Scotland) Act 1980.

¹³ Ibid at section 3C.

- **The Lord President of the Court of Session and Lord Justice General** also brings independent oversight of our regulatory work including approving solicitor practice rules.

Taken with the Law Society's own processes and substantial involvement of lay persons in decision making, there is a strong system of checks and balances to ensure the public interest sits at the very heart of the regulatory system.

2. What are your views on the current regulatory landscape for legal services in terms of complexity or simplicity?

The current structure of professional body led regulation provides a relatively simple and proportionate system of regulation for the Scottish jurisdiction. As highlighted in our answer to 1, the professional body model used for regulating solicitors is similar to that used for accountants, architects, surveyors and teachers.

As part of our regulation, we set a robust route to qualification and clear standards of conduct to which all Scottish solicitors must adhere. There is a distinct and defined route by which a consumer can raise a complaint via the SLCC. Other important public protections are also in place, including the Guarantee Fund (Client Protection Fund)¹⁴ which protects consumers who have lost money because of the dishonesty of a solicitor, and the Master Policy¹⁵ which provides profession-wide professional indemnity for cases of solicitor negligence. Overall, the system works well.

However, the core legislation covering the regulation of legal services is now over 40 years old. It was legislation of its time. Few people in 1980 could have foreseen the significant changes which would materialise in terms of the expectations of consumers and the way legal services are delivered in 2023.

This is why we went to the Scottish Government in 2015 to push modern legislation for a modern legal sector.¹⁶ Put simply, the current framework is no longer fit for the kind of diverse and increasingly international legal profession we see in Scotland today. This is why we have advocated so hard for change over the last eight years.

As covered in more detail in our answer to question 6, the complaints system in particular is slow, complex, cumbersome and desperately needs reform. Many of the problems come from the overly rigid and prescriptive primary legislation currently in place. This sets lengthy processes which the Law Society and other bodies must follow without any room for flexibility.

¹⁴ See: Law Society of Scotland Client Protection Fund at: <https://www.lawscot.org.uk/for-the-public/client-protection/client-protection-fund/>

¹⁵ See Law Society of Scotland Master Policy at: <https://www.lawscot.org.uk/members/regulation-and-compliance/master-policy/>

¹⁶ Law Society of Scotland 'The Case For change' see: <https://www.lawscot.org.uk/media/10152/the-solicitors-scotland-act-1980-the-case-for-change-regulation-pa.pdf>

Given the complaints system is one of the parts of the regulatory framework on which consumers rely most when things go wrong, the Bill must be a vehicle for making the changes necessary to make that system simpler, quicker and smoother.

3. What are your views on the proposed division of regulators into two categories and the requirements which these regulators will have to comply with, as set out in Part 1 of the Bill?

We do not believe the Scottish Government has yet made a persuasive or compelling case for creating different categories of regulator.

The separation of regulators into different categories was not a recommendation from the Robertson report. Similarly, the Scottish Government did not raise this as an option when it consulted formally on reforming legal services regulation in 2021.

The explanatory notes that accompany the Bill provide little in the way of supporting evidence or justification for introducing this new level of complexity into the regulatory framework. It is unclear as to what additional benefit would come from having different regulator categories.

Those notes say that *“Category 1 regulators are intended to be those with a significant membership or whose members provide largely consumer-facing services. Category 2 regulators are intended to be those whose membership is more specialist in nature in terms of the legal work undertaken and whose membership is comparably smaller in number.”*¹⁷

However, both organisations listed as being automatic Category 2 regulators include members who offer legal services directly to consumers. Many Category 2 regulated individuals will also be involved in highly controversial or sensitive cases, such as murder or rape trials, or work in complex and high value civil cases. Just because the total number of such legal professionals may be comparatively small, it does not necessarily mean the regulatory requirements should be different.

There are also some practical implications. For example, the Bill introduces new requirements to improve the transparency, accountability and independence of Category 1 regulators such as the Law Society of Scotland. We welcome these improvements. However, these duties will not necessarily apply to Category 2 regulators. If the Scottish Government and parliament believe these enhanced requirements are positive, we remain unclear as to why such changes would not also be of benefit with respect to Category 2 regulators.

If the requirements for different categories or regulators become virtually the same, then there is a question over whether categorisation is even required.

¹⁷ Regulation of Legal Services (Scotland) Bill Explanatory Notes at page 7. See: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/regulation-of-legal-services-scotland-bill/introduced/explanatory-notes-accessible.pdf>

4. Section 19 of the Bill gives Ministers the power to review the performance of regulators' regulatory functions. Section 20 sets out measures open to the Scottish Ministers. What are your views on these sections?

Sections 19 and 20 of the Bill introduce sweeping levels of ministerial intervention into the regulation of the legal profession. We have never before seen such an attempt at political control over the legal sector in Scotland.

A fundamental tenet of the rule of law is the independence of the legal profession from the state. The International Bar Association describes the independence of the profession as “*a bastion of a free and democratic society*”. They say, “*lawyers must be able to carry out their duties in a free and secure environment, where they are able to ensure access to justice and provide their clients with intelligent, impartial and objective advice.*”¹⁸

This matters because of the critical and unique role which solicitors play in our society, challenging government on behalf of clients and protecting citizens from the excessive use of power by the state.

These sections of the Bill would allow unprecedented levels of political control and interference over many of those who work to hold the politically powerful to account. It could see the Scottish Government intervene directly on the rules and structures that decide who can and cannot be a solicitor, decide the professional requirements placed upon solicitors, and decide the way in which legal firms operate. This is deeply alarming.

Since the Bill was published, we have asked the Scottish Government repeatedly to provide a justification for seeking such powers. We have asked specifically for instances where, over the last 10 years, the Scottish Government had identified a regulatory failure that would have resulted in it using the new powers proposed. In response, the Scottish Government has said our questions are ‘hypothetical’ and that the provisions are merely intended to act as a safeguard. These are not reassuring or convincing answers.

While the EHCJ committee has asked specifically about Sections 19 and 20, there are other sections which cause concern.

Section 41 of the Bill gives Scottish Ministers, for the first time, a direct role in approving rules on the way existing law firms operate and the conduct and practice of solicitors. This is political intervention in the regulation of Scottish solicitors and contrasts sharply with the existing and long-standing practice whereby it is for the Lord President to approve solicitor practice rules.

¹⁸ The Independence of the Legal Profession: [A report by the IBAs Presidential Task Force on the Independence of the Legal Profession](#) at page 10.

Section 49 would also allow the Scottish Government to appoint itself as a direct authorisation body or regulator of legal businesses. It opens the prospect, one never before suggested, that the state could regulate law firms directly.

We believe it is dangerous and wrong to undermine the independence of the legal profession in this way. Not only will it weaken the Scottish legal sector in what is an increasingly internationally competitive market, it will also damage the global reputation of Scotland and its justice sector.

There is a real risk that autocratic regimes in other parts of the world could use Scotland as an excuse to justify similar controls on the lawyers in their own countries. This is why the Bill has caused such deep concern within the International Bar Association and the Commonwealth Lawyers' Association, which recently launched an international declaration on the independence of legal professions.¹⁹

In addition, in what is now a global marketplace for legal services, such provisions will make Scotland a less attractive legal jurisdiction in which to do business, both for multi-national law firms and for clients looking to invest in Scotland. Clients often have a choice of which law, which jurisdiction and which dispute forum to choose when doing business in the UK. The risk of direct state intervention and even the perception of political control over the Scottish legal profession could see clients choosing to go elsewhere. It may also result in the larger multinational firms moving their operations to other parts of the UK.

Given the serious issues raised, we believe Sections 19 and 20, elements of Sections 41 and 49, and Schedule 2 should be removed from the Bill.

5. What is your understanding of the experiences of other jurisdictions, for example England and Wales, where independent regulators have been introduced to regulate legal services?

We would urge a degree of caution when comparing the Scottish jurisdiction with that in England and Wales, not least because of the difference in size.

In England and Wales, there are close to 200,000 legal professionals, with 18 separate bodies involved in the regulation landscape. In Scotland, there are just under 14,000 legal professionals (solicitors, advocates, and commercial attorneys), with just three regulators.

The complexity and cost of the kind of model used in England and Wales would clearly be disproportionate to the size of the Scottish legal profession. This was a view shared by the then SNP Cabinet Secretary for Justice Kenny MacAskill in his speech to the legal profession in September 2007, when he stated that

¹⁹ See: <https://www.lawscof.org.uk/news-and-events/legal-news/society-signs-goa-declaration-on-independent-profession/>

following the England and Wales model was not appropriate for Scotland.²⁰ We agreed with the former Cabinet Secretary then and continue to do so.

The Robertson report also recognised that the Scottish legal profession and jurisdiction are much smaller than others,²¹ and therefore the adoption of a model designed for a much larger legal profession was not a suitable one.

When looking at the regulation of solicitors specifically, it should be noted that the Solicitors Regulation Authority (SRA), the regulatory body for solicitors in England and Wales, is formally a part of the Law Society of England and Wales but is operationally independent. While there are some differences, this is a similar set up to our own Regulatory Committee which, by law, exercises the statutory regulatory functions of the Law Society independently of the Council of the Society.

The SRA Board is made up of 10 members, four solicitors and six lay members, and is chaired by a lay person.²² Similarly, the Law Society of Scotland Regulatory Committee is currently made up of 10 members; five lay and five solicitors, and is chaired by a lay member.

Importantly, the SRA acts completely independently of the UK Government. Ministers in England and Wales do not possess the kind of intervention or control powers which the Scottish Government is seeking to introduce in Scotland through this Bill.

Finally, we are concerned at a suggestion from this question that there is a lack of independence within the current Scottish system. This is not the case.

As we set out in our answer to question 1(c), the Regulatory Committee of the Law Society is 50% lay members and 50% solicitor, with a lay convener. By law, it must exercise regulatory functions independently from the Council of the Law Society and has done so for over a decade. This is supplemented by the work of the SLCC and Scottish Solicitors Discipline Tribunal (SSDT), all of which work and take regulatory decisions separately from the Law Society. These systems, taken as a whole, ensure a strong set of checks and balances.

²⁰ Speech by the Cabinet Secretary of Justice – Law Society Annual Conference September 2007.

²¹ Fit For Future Report at page 31.

²² Solicitors Regulation Authority Board. See: <https://www.sra.org.uk/sra/how-we-work/our-board/board-members/>

6. What are the main deficiencies in the current complaints system, and do you believe the proposals in the Bill are sufficient to address these issues?

There is near universal acceptance that the system for dealing with legal complaints is not working as well as it should. The current legislative requirements have created a system which is too slow, too rigid, too complex and increasingly expensive to operate. There is a need for an urgent overhaul, for the benefit of all who rely on there being a fair and efficient processes for handling and resolving complaints.

There are many provisions in the Bill which we welcome and have come about because of years of positive collaborative work between the Law Society, the SLCC and the Scottish Government.

In particular, we recognise and support most of the reforms which should help the SLCC deal with the eligibility stage of complaints more quickly. This should help ensure that serious cases of alleged solicitor misconduct are referred to us faster for investigation and, if necessary, prosecution.

However, we do not agree with the removal of the existing eligibility test of “frivolous, vexatious and totally without merit” from legislation.

We recognise that the language used for that eligibility test could be improved. That is why we and the SLCC previously asked Scottish Government to adjust the phrase to be “frivolous, vexatious and without merit”.²³

There are established legal precedents defining those words and most regulators have a similar eligibility test in place. We recognise that the Bill allows the new Scottish Legal Services Commission (the Commission) to set its own eligibility criteria for complaints by creating eligibility rules. It is possible that the Commission could include some form of eligibility test similar to the existing test of “frivolous, vexatious and totally without merit”. However, there is no guarantee of this.

Given the importance of flushing out complaints which are frivolous, vexatious or without merit at the initial eligibility stage so they do not flow through the complaints system, clogging it up and unnecessarily consuming resource, we believe the statutory eligibility test of “frivolous, vexatious and without merit” should be retained in primary legislation, with removal of the current word ‘totally’.

Separate to this, we welcome the new provision (Section 67 and 68) which ends the current bureaucratic and time-consuming process whereby we, when we identify possible misconduct through our own investigations, must submit a complaint to the SLCC only for that complaint to be referred back to us for investigation.

²³ Section 2 Legal Profession and Legal Aid (Scotland) Act 2007

Instead, we would have the power to progress immediately to investigation, taking time out of the process and allowing us to move more swiftly to a decision and any appropriate regulatory action.

We also support Section 52 which reintroduces hybrid complaints as a category involving both conduct and service. Hybrid complaints had been an established and long-standing feature of the complaints system but ceased following a significant court case. This ensures overlapping elements of poor service and any departure from professional standards of conduct are fully addressed by investigations undertaken respectively by the SLCC and the relevant professional body.

However, we believe there is scope for this legislation to go further. Indeed, the Bill omits many of the suggestions we put forward to the Scottish Government for complaints reform.

For example, we have sought new powers which would allow us to dispose of conduct cases early if all parties agree. Similar powers exist for the Solicitors Regulation Authority in England and Wales and other professional regulators in Scotland and have proven a useful and effective tool. 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.

We have also suggested we should have powers to issue letters of advice and warning. This would allow us to respond to minor regulatory breaches which are not sufficiently serious to require regulatory action.

We believe these powers would help us reach the same robust regulatory decisions and outcomes, but to do so more quickly for the benefit of all involved. This would, in turn, free up time and resource to focus on the more challenging and more serious misconduct cases, again helping us to deal with and conclude these cases more swiftly. It also could, over time, deliver some financial savings.

Separate from early disposal powers, we have also sought to significantly widen our currently limited powers to suspend a solicitor on an interim basis when possible serious wrongdoing is uncovered or alleged or to restrict a solicitor's practising certificate to afford greater public protection. We believe these additional powers are important to provide us with more flexibility to step in and protect the public when it is right to do so.

We also asked for increased powers to publish our Professional Conduct Sub-committee decisions (subject to GDPR) which would create more transparency in relation to our regulatory decisions and provide helpful information for practitioners and the public.

In addition, we asked for changes to the powers of the SSDT to help make the complaints system more efficient and effective. These suggestions included giving the SSDT the power to order a solicitor to undertake education or training and for the SSDT to be able to make a finding of Unsatisfactory Professional Conduct in

relation to complaints it heard but didn't consider amounted to Professional Misconduct, rather than passing such complaints back to us for determination.

We understand from the Scottish Government that the decision to leave these and some other reforms out of the Bill arose because of timing issues rather than because of any objection to the proposals. Given this, we hope these additional reforms can be inserted during the parliamentary process.

7. What do you consider the impact of the Bill's proposed rules on alternative business structures might be:

a) generally?

b) in relation to consumers of legal services?

It is difficult to determine what impact the provisions in the Bill will have on licensed legal service providers or consumers, particularly given the scheme for regulating licensed legal service providers is not yet up and running.

The Bill as proposed would reduce the 51% majority ownership by solicitor and/or other regulated professionals to 10%. We agree that the current 51% requirement may present a barrier to becoming a licensed legal services provider (LP), particularly for smaller firms. While we did not suggest a specific figure, we did encourage the Scottish Government to consider reducing the ownership percentage. Enabling the provision of legal services through licensed legal service providers will benefit consumers as it is likely to bring additional innovation into the legal services market and therefore reducing barriers to entry should help to attract more licensed legal service providers to the sector.

Looking at the Bill and accompanying documents, it is not clear to us the basis on which the figure of 10% was chosen and we look forward to hearing more from the Scottish Government as to its rationale for this. Reducing to this low level inevitably raises a question over whether a minimum percentage ownership by solicitors and other regulated professionals is even required.

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 LPs take-up in Scotland. For example, there is no opportunity for a Scottish LP to list on a stock exchange, unlike the position in England and Wales and other countries around the world. Similarly, the regulatory requirements for an LP are more onerous than for traditional solicitor practice with, depending on the type of work undertaken, a requirement to be regulated by other regulators in some circumstances as well as the Law Society (for example, the Financial Conduct Authority).

8. What are your views on the provision of:

a) “Entity regulation” (as set out in Part 2 of the Bill)?

We strongly support the introduction of entity regulation. This has been a key ask of the Law Society for many years, including in our response to the Robertson review call for evidence and the Scottish Government’s consultation.

From the perspective of consumers, their contract for procuring legal services is most often with a law firm or business entity. However, the bulk of the current legal framework places the emphasis on regulating the individual solicitor.

Entity regulation, which is emerging as the preferred model across global jurisdictions, expands regulation beyond the individual within a firm to cover all employees collectively. This recognises that many of the decisions are not taken by one individual solicitor and often increasingly by individuals who are not currently regulated, for example, paralegals.

The Law Society has some limited powers over entities, such as our programme of proactive financial inspections and the requirement for firms to have professional indemnity insurance. There has been a limited extension of entity regulation in recent years, for example, the introduction of incorporated practices and the recent regulation at entity level of all firms on anti-money laundering compliance.

It should be stressed 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 is necessary.

While we welcome the broad thrust of the Bill’s provisions on entity regulation, we have some concerns over elements of the detail which is over-prescriptive and potentially counterproductive. Much of this has been caused by the decision to duplicate provisions from the Legal Services (Scotland) Act 2010, legislation which has been found to have a number of practical flaws.

Specifically, we do not believe it appropriate for Scottish Ministers to have a direct role in approving the practice rules applying through entity regulation or to directly authorise and regulate entities, as the Bill currently proposes. The Bill also suggests an annual entity licence renewal that we believe is unnecessary, bureaucratic and cumbersome. Equally, we are concerned the provisions do not take proper account of ‘Registered Foreign Lawyers’ which are relevant to allow the large cross-border firms to be able to operate in Scotland. We believe these details will need addressing at Stage 2.

b) title regulation for the term "lawyer" (section 82)?

We strongly welcome this provision in the Bill. This responds to a long-standing call from the Law Society that there should be strict controls over who can and cannot call themselves a 'lawyer'.

It remains a matter of deep concern to us that anyone, including those without any legal education, qualification or accreditation, can legitimately call themselves a 'lawyer' and offer legal services for profit on this basis.

We believe the current unrestricted use of the title 'lawyer' 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.

This is reflected in recent public polling, which demonstrates that 86% of respondents believe there should be restrictions on who can call themselves, or advertise as, a lawyer.²⁴

Although we recognise that some individuals who call themselves lawyers may have some qualifications and legal training, many may not. 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 defined complaint or redress process. Nor will the consumer benefit from the protection offered by the Guarantee fund (Client Protection Fund). This all potentially leaves the consumer exposed in the event something goes wrong.

Most worrying for us as a public interest regulator, are individual instances where we have successfully prosecuted a solicitor for misconduct and had that individual struck off from the roll of solicitors, only for that same person to re-appear, operating from the same premises and offering the same legal services. The only difference has been that they describe themselves as a lawyer rather than a solicitor.

This is clearly unacceptable and why we welcome the provisions set out in Section 82 of the Bill.

However, we question whether this section is potentially weaker because an offence would only be committed if a person uses the title of lawyer "with intent to deceive". This subjective term risks creating an unhelpful loophole in the legislation and could still allow an unqualified person to continue to offer legal services and call

²⁴ 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://savanta.com/knowledge-centre/poll/law-society-of-scotland-solicitors-polling/>

themselves a lawyer so long as they are not intending to deceive. We believe this still risks placing consumers at risk.

Our preference would be for this to be amended to a term of acting “wilfully and falsely” as a lawyer. This would bring consistency with the long-standing offence of pretending to be a solicitor which has been covered effectively for many years under Section 31 of the Solicitors (Scotland) Act 1980.

c) Do you have any further comments on the Bill and any positive or negative impacts of it?

We have set out a section-by-section analysis of the Bill as an appendix to this response and hope this assists the EHCJ committee. We do however want to highlight some significant issues with the current Bill which we hope the EHCJ committee will find time to consider in detail.

- **Powers of the Scottish Legal Services Commission to direct regulators**

Much of the focus on the Bill has rightly been on issues which arise from Scottish Ministers intervening directly in the regulation of legal services. However, the proposed significant expansion of the powers of the SLCC created under Section 51 also raises serious questions.

The current SLCC has important existing powers of oversight. For example, it deals with any complaints made about the Law Society’s handling of a solicitor conduct complaint. It also monitors the effectiveness and can make recommendations relating to complaints handling, the Client Protection Fund and professional indemnity insurance arrangements.

The Bill would give the Commission (renamed the Scottish Legal Services Commission) new powers which go well beyond issuing recommendations and would allow it to set minimum standards.

We interpret the provisions as creating very broad powers. Under Section 69, the Commission would have the power to set certain minimum standards directly for practitioners. Section 71 includes a provision which requires practitioners to comply with those minimum standards. Together, those provisions, in effect, give the Commission the power to make practice rules by a back door and without any checks and balances such as the requirement for approval from the Lord President. Such powers would represent a major and serious departure from the current arrangement where the SLCC has the power to make recommendations but where it is for the Law Society, with the relevant understanding and experience of regulation, to make a decision.

There are worrying practical implications from this. The SLCC has occasionally in the past issued reports and recommendations which we believe would have had serious and negative consequences for consumers. In such circumstances, we set out our reasoning as to why we would not accept such recommendations. For

example, the SLCC currently holds limited oversight powers in relation to the Master Policy²⁵. The Master Policy provides a valuable protection for consumers of legal services and is unique to Scotland. In the other UK legal jurisdictions, law firms must purchase professional indemnity insurance themselves on the open insurance market. Recently, the SLCC made recommendations in relation to changing the Master Policy terms which were not in line with the practices of the professional indemnity insurance market.

Had the proposed direction power been available to the SLCC, then we potentially could have been forced to progress changes which would not have been agreed by the insurance market, potentially resulting in no Master Policy being available because no insurer would underwrite it, which would not be in the public interest. This would have damaged the interests of both consumers and the profession. That cannot be right.

We also question why such a new power is required. Current legal requirements mean the Regulatory Committee, with its 50% lay membership and lay convener, must and does exercise the regulatory functions of the Law Society without undue influence from the Council. The Bill strengthens further the Regulatory Committee's role and increases its independence from the Council.

Given this, we fail to understand why such new standard setting powers from the Commission are needed. It is also unclear as to what, if any, power the Law Society would have to challenge directions from the Commission, no matter how unreasonable those directions were.

We believe it would be more appropriate for the new Commission to retain the existing power to make recommendations. Then, if any recommendation is not accepted, there should be a new statutory obligation on the regulator to provide reasons. The Commission would then have the power to make a referral to the Lord President as the ultimate head of the justice system and oversight body. We believe this would be a more appropriate process and that this be considered further at Stage 2.

- **Oversight of the Scottish Legal Services Commission**

We have concern over the renaming of the SLCC to the Scottish Legal Services Commission (SLSC) and the possible confusion amongst the public who may think the Commission itself is some provider of legal services. We are also concerned at the lack of oversight of the body, today and in future.

²⁵ The Master Policy is the compulsory professional indemnity insurance arrangement which covers all Scottish solicitors working in private practice. The Society arranges the Master Policy. Claims are handled by the Master Policy insurers. The insurance provides cover of up to £2 million for any one claim.

The SLCC/SLSC plays a critical role in the regulatory system. Under the Bill, those powers are widened and strengthened. However, we believe the lack of oversight of the work and performance of the Commission is a concern

It remains unclear as to what, if any, checks and balances exist or what recourse would be available if the Commission was either acting unreasonably or, worse still, failing in its own regulatory responsibilities other than standard processes of judicial review. The current Bill could leave open a new situation where the Commission could set minimum standards for regulators which the Commission itself does not or is not required to meet. The Bill also fails to address previous issues where the Commission agreed substantial increases in its budget, including above inflation increases in levies, without any kind of external approval.

We believe this deficiency in accountability for such an important and influential body needs to be addressed.

We also have significant concerns over Section 58, which would have the effect of removing a complainer or solicitor's right to appeal a service complaint decision to any external body.

As things stand, the right of appeal is to the Court of Session. We agree this can present a daunting and expensive route, particularly for complainers. This is why we advocated previously changing this to an appeal to the Sheriff Court.

However, the Bill goes substantially further than this by introducing a requirement on the Commission to have an internal 'review committee' to consider appeals. The decisions of this committee would be final.

We consider this to be a significant weakening in consumer protection, removing an important **external** appeal process and replacing it with one decided by the Commission internally. Given the need to build in appropriate checks and balances, we believe the removal of an independent appeal process to be a retrograde step and one likely to harm consumers. We would argue in favour of our original suggestion of allowing appeals to the Sheriff Court.

- **Definition of legal services**

Section 6 of the Bill would define, for the first time, the meaning of 'legal services' for existing regulated solicitors and law firms.

We have already highlighted to the Scottish Government our concern that this list may be too restrictive. For example, estate agency work and incidental financial business would not, in our view, be covered as a defined legal service. This is despite these being long-established solicitor services and covered by our existing regulatory reach.

The consequence of this part of the Bill may be that firms would need to be regulated for such activities by another body, for example the Financial Conduct Authority. This would bring unnecessary and added bureaucracy and cost for existing law firms. Again, any new costs will ultimately need to be met by consumers.

- **Legal privilege**

Section 60 seeks to define legal privilege. However, this is narrower than the common law definition in that it only includes litigation privilege and not legal advice privilege. This means legal advice given for purposes other than litigation may not be privileged and could be disclosable in a third-party complaint.

This undermines a person's fundamental right to have privileged communication with a solicitor for the purpose of seeking legal advice. We suggest that trying to create a statutory definition of legal privilege could have unintended future consequences and, if there is to be a statutory definition in Scotland, it will need to be revised and extended. We hope this can be considered further at Stage 2.

- **Special Rule changes**

The Law Society's current processes for granting waivers from practice rules has worked well for many years and is overseen by a dedicated committee involving lay members and experienced solicitors. There are sometimes good reasons to agree to waive an individual solicitor from a practice rule in a specific case.

For example, we have conflict of interest rules which carefully prescribe the circumstances in which it may be permissible for solicitors to act for both seller and purchaser in the sale or purchase of property. However, we can and have waived the rules in certain cases so as to permit solicitors to act in other circumstances which could not easily have been anticipated, but which present no real risk of a conflict emerging, for example where an individual in a family company is buying a property from that company and where it makes sense for a single solicitor to act for both.

Our existing waiver powers would also allow us to set up a regulatory or legal tech "sandbox"²⁶ if and when required. We have not had a circumstance yet that required such a sandbox, but our existing waiver powers are fit for this purpose.

Sections 21 - 24 of the Bill relates to waivers or 'special rule changes'. However, as currently drafted, the provisions are unworkable for dealing with waivers quickly, creating new processes involving the Competition

²⁶ A 'sandbox' is a tool that allows a business to explore and experiment with new and innovative processes and services whilst remaining under regulatory supervision.

and Markets Authority, the office of the Lord President and Scottish Ministers. These processes could stymie the existing effective and efficient waiver system, cost more and be of real detriment to consumers.

- **Freedom of Information**

Many parts of the Bill increase the transparency of the regulation of legal services and build in strong reporting mechanisms which we welcome. Indeed, we would like to see the Bill go further, with the Law Society given additional powers in relation to publishing regulatory decisions.

However, we disagree with making the work of legal regulators subject to Freedom of Information (FOI) as set out in Schedule 3. Although there are some regulators outside of the legal sector which are subject to FOI, no other UK legal regulator involved in making disciplinary and regulatory decisions is currently subject to FOI.

Given the Law Society takes such decisions, we would be constrained by GDPR and Section 52 of the 2007 Act in relation to the information we could disclose under FOI.

However, FOI would be expensive, cumbersome, and disproportionate given these transparency and publication measures. The additional cost of administering FOI would also need to be borne by the profession and ultimately passed on to consumers.

- **The Law Society Regulatory Committee**

The Bill proposes welcome new measures to strengthen the independence of the Law Society's Regulatory Committee. This includes making the committee responsible for its own membership, rather than members being appointed by the Law Society Council.

The Regulatory Committee has benefited enormously from being 50% lay member and 50% solicitor member, and with a lay convener. This ensures a blend of perspectives, including those representing the public interest as well as those with experience from within the solicitor profession.

Section 74 of the Bill proposes amending the composition of the Board of the SLCC to make it 50/50. We welcome this. However, the Bill has no requirement on the Regulatory Committee to also have a 50/50 composition. Indeed, as things stand, the Bill could allow for a 100% lay committee without any solicitor input or involvement whatsoever. This would clearly go against a professional body led model of regulation and differ starkly with the new Commission and the Scottish Solicitors' Discipline Tribunal.

We believe the Bill should be amended in Section 10 to ensure a 50/50 composition on the Regulatory Committee.

- **Law centres, citizen's advice bodies and charities**

Section 81 of the Bill proposes that third sector providers, such as law centres, citizens advice bodies and charities, should be allowed to undertake reserved legal services but without having the kind of public protections which apply to solicitors, such as the Client Protection Fund, professional indemnity cover and the defined complaints process.

We recognise and support the ongoing effort to provide access to justice to all who require it. This is why we have argued so strongly in favour of major improvements to Scotland's system of criminal, civil and children's legal aid, to ensure those from disadvantaged or deprived backgrounds can get quality legal advice when they need it.

However, by their very nature, the individuals using law centres and charities can be highly vulnerable. To that end, we would have deep concerns at diluting important consumer protections which are available to other more wealthy or privileged individuals who instruct solicitors direct.

We have previously suggested to the Scottish Government that the Legal Services (Scotland) Act 2010 (the 2010 Act) Act be amended to remove the current restriction which prevents a third sector organisation from establishing as a licensed legal service provider. This would provide these important advice centres with greater freedom to offer legal advice and legal services but would, importantly, ensure they would still be regulated properly with the necessary consumer protections in place. The current drafting of the Bill does not achieve this objective.

APPENDIX - Section Analysis

Introduction

We have carefully considered the detail of the Bill, as introduced, and we have observations and comments on many sections. These are in addition to those comments and concerns we raise earlier in this response.

Section Comments

Section 2 – Regulatory objectives.

This section sets out the objectives of regulating legal services which are relevant to regulators who must ensure they exercise their regulatory functions in a way that meets the objectives.

Largely, these reflect the existing regulatory objectives set out in the 2010 Act²⁷. However, there are some additions. Section 2(1) (iv) provides that one of the Regulatory Objectives is to promote ‘*effective communication between regulators, legal services providers and bodies that represent the interest of consumer*’. It is ambiguous as to what will be considered ‘effective’, which is a subjective test and could lead to challenges. If effectiveness is to be measured in any meaningful way, then it will require - and will be dependent on - correlated requirements applying to all stakeholders and regulators.

Section 3 - Application of the regulatory objectives.

This section places a duty on ‘regulatory authorities’ to exercise their regulatory functions in a manner which reflects the regulatory objectives and takes into account several consumer principles.

We note that section 3 removes the wording included under sections 77 and 119 of the 2010 Act which state a regulator must act in a way which is compatible with the regulatory objectives ‘so far as practicable’ and ‘with a view to meeting...[objectives]’.

We are not sure why the obligations in section 3 of the Bill have changed to drop this sensible wording.

One general concern in this section is the adoption of the principles under section 3(2). These are derived from the SLCC Consumer Panel’s principles, ‘...*published to help those involved in regulation - and legal professionals - to think about the consumer interest in a structured way...*’²⁸

These are currently for guidance only, and we are concerned the Bill is seeking to transpose guidance into statutory form, with little recognition given as to the practicalities of delivering these. Whilst we welcome, and are supportive of, the intent behind the principles, we do not believe that they should be prescribed in legislation – especially given that they could, from time to time, be amended.

²⁷ Section 1 Legal Services (Scotland) Act 2010

²⁸ See SLCC Consumer Panel at: <https://www.scottishlegalcomplaints.org.uk/about-us/consumer-panel/consumer-principles/>

It also appears the intention is that regard must be had to the consumer principles at all times. However, as the wording is taken directly from the SLCC's Consumer Panel's principles, it fails to recognise that many users of legal services are not 'consumers' in the normal meaning of the word, but businesses or corporate users of legal services. In addition, the Bill does not recognise that there may be a tension between what a particular 'consumer' or other buyer of legal services may want and general principles like wider public interest or the interests of justice.

Section 3(2)(a) provides that the regulatory authority must take into account the consumer accessibility to '*...a range of legal services that are affordable...*' How is '*affordable*' to be determined? Is the suggestion that the regulator will influence pricing in some way? We would argue that it is not compliant with competition law for a regulator to set or influence the costs charged by service providers. This is a matter for providers to determine themselves.

Section 3(2)(b) requires the regulatory authority to take into account that the consumer '*should receive sufficient information about the consumer's rights and services ...available*'. Is it the intention that regulators provide 'legal advice' on consumer rights? If so, this is outside the scope of regulation and is not a role for the regulator.

Section 3(5) sets out those bodies considered to be 'regulatory authorities'. Those listed all perform a regulatory role. However, the Scottish Solicitors Discipline Tribunal (SSDT), which plays a significant part in the regulatory regime, is absent from the list. We believe this may be an inadvertent oversight and clarification from the Scottish Government would be welcomed.

Section 5 - Power to amend the regulatory objectives and professional principles.

This section confers powers on Scottish Ministers to amend the regulatory objectives and professional principles.

As with the other proposed ministerial directions, we are seriously concerned with this proposal. This will provide Scottish Ministers with direct control over the ethical and practice behaviour of Scottish solicitors. This may, for example, allow Ministers to introduce restrictions on acting in any matters challenging the Scottish Government.

We also note that, although there are requirements to consult various bodies before making regulations, there is no requirement for the consent of the Lord President to any amendments to the regulatory objectives or professional principles. As we have highlighted throughout our response, ministerial interference in the regulation of the legal sector is a direct threat to the constitutional principle of the rule of law and independence of the legal profession.

Section 6 – Meaning of “legal services” and “legal services provider”.

This section sets out the definition of legal services.

We note that sub-sections (1) through (3) of the proposed definition mirror the definition of legal services set out in section 3 of the Legal Services (Scotland) Act 2010,²⁹ which is applicable to licensed providers of legal services. This definition could unintentionally restrict the scope of the Law Society's regulation to a narrow field of defined legal services.

It will not, for example, include the regulation of estate agency work, incidental financial business, or immigration services. Regulation of these ancillary services are all captured under the existing regulatory powers of the Society under the 1980 Act, but the definition as currently provided under section 6 does not include these as legal services. The consequence could be that the Law Society, as a category 1 regulator under the Bill, is no longer able to regulate these additional ancillary services. In such a scenario, legal firms would need to be regulated separately for delivering such ancillary services by another regulator, for example the Financial Conduct Authority. This would bring unnecessary and additional bureaucracy and cost for existing legal practices. We look forward to finding out more in relation to the intention behind the definition of legal services and discussing possible amendments at a later stage.

Chapter 2 - Regulators

Section 7 – Meaning of regulatory functions.

Some of the regulatory functions set out, for example S7(a) '*..setting standards for admission ...etc*' are only applicable to regulators and not wider regulatory authorities, for example, the Commission. It would be helpful if the Bill sets out what functions are attached to only a regulatory authority or the regulator and which are shared. This would provide clarity and certainty.

Section 7 also omits administering the Guarantee Fund (Client Protection Fund) from those functions considered regulatory. This is a crucial consumer protection tool and is currently a defined regulatory function under the Solicitors (Scotland) Act 1980³⁰. It is unclear why this is now omitted from section 7 of the Bill, and we believe this may have been an inadvertent oversight on the part of the Scottish Government. We strongly believe it is crucial this be set out as a regulatory function, as it currently is under the 1980 Act.

Section 9 – Exercise of regulatory functions

This section ensures that the regulatory functions of a Category 1 regulator are exercised independently through a regulatory committee, as the Law Society does currently. The section then proceeds to strengthen the independence of the Regulatory Committee and we agree with that principle. We would like to see an additional provision providing that any future amendments to the remit of the Regulatory Committee are to be agreed jointly between the committee and the governing body of the regulator. This would further strengthen the independence of the Regulatory Committee.

²⁹ Section 3 Legal Services (Scotland) Act 2010

³⁰ Section 3F Solicitors (Scotland) Act 1980.

Section 10 – Regulatory Committee: composition and membership.

Reflecting the 1980 Act³¹, section 10(5) requires that the Regulatory Committee must have ‘at least 50%’ lay persons within its membership.

Currently the Law Society’s Council has oversight of the committee’s membership and is required to approve appointments to the Regulatory Committee. We agree that it is an important strengthening of the independence of the Regulatory Committee that the Council should play no future role in appointing members to the committee.

However, the Bill proposes no minimum requirement for solicitor members on the committee. This could result in a future Regulatory Committee appointing no solicitor members at all to the committee. Given the Society remains a membership body for Scottish solicitors, retaining solicitor representation on the Regulatory Committee is important. We suggest it would be more appropriate to require the composition of the committee within the Bill at 50% non-solicitor and 50% solicitor membership. Crystallising members of the committee in this way is also in keeping with the provisions of section 74 of the Bill relating to membership of the Commission.

Section 10 ((d) prohibits any person convicted of an ‘*offence involving dishonesty*’ from membership. However, there are numerous other offences, many of which can be serious, that do not fall under the definition of ‘dishonesty’ and which may make it inappropriate for an individual to be a member of the Regulatory Committee. We suggest that the discretion should be given to the Regulatory Committee to determine if a proven offence is of such nature and seriousness as to restrict appointment to its membership.

Section 12 – Regulatory Committee: convener, sub-committees, and minutes.

This section provides the powers to regulatory sub-committees to co-opt members. However, the Bill is silent on the power of the Regulatory Committee to co-opt to its *own* membership. We believe this may be an unintentional oversight, as it effectively gives the sub-committees greater flexibility and powers than those of its oversight and parent committee.

Currently both the Regulatory Committee and its sub-committees may co-opt members for a period of up to 12 months. Co-option is necessary for several reasons - to ensure committee membership, and decisions, are quorate and to support the work of the committee where a particular skill set, or knowledge is required.

Section 13 – Annual reports of Category 1 regulators.

This section places a duty on the Regulatory Committee of a Category 1 regulator to provide annual reports. We endorse the principle of reporting on the work of a regulator. However, we have several concerns and observations to make in respect of this section.

³¹ Section 3C Solicitors (Scotland) Act 1980.

Section 13(2)(e) requires the regulator or its regulatory committee, to set out how decisions have been reached and criteria used to determine claims made on professional indemnity insurance. The regulator will not be in a position to provide this data as it is the insurance providers, and not the regulator, which determine claims and set the criteria for paying claims. The regulator plays no role in these decisions and may not have access to the information. Insurance companies generally do not disclose the detail of the decisions they make or the criteria used for those decisions and therefore the Master Policy insurers may be reluctant to provide that information for the regulator's annual report.

Section 13(2)(f) may require disclosure of disciplinary proceedings. Such information will need to be considered with reference to Section 52 of the 2007 Act. It is not clear to us whether Section 13 of the Bill would override the 2007 Act.

Section 13(4) requires the regulator to consult on its reports. We question why this is necessary and note that it adds potentially lengthy bureaucracy for no stated purpose. Also, it is not clear on exactly what is to be consulted upon.

Section 13(6) places a duty on Scottish Ministers to lay the annual report before the Scottish Parliament. We suggest it would be more appropriate that the report is laid directly by regulators to alleviate any perception of possible political influence and remove the potential risk of any undue delay in the Scottish Parliament having sight of the report.

Section 13(7) defines the reporting year as the 12 months from 1 April, ending the 31 March. This may not be practical for regulators and the information required will often be determined by reference to the regulators 'operating year' - i.e. financial/accounting information. Reporting across two different operating years creates challenges, especially in relation to annual accounts. Our own operating year is 1 November – 31 October annually. We suggest that it should be for the regulator to determine its own respective 'reporting year' and this should not be set out in primary legislation.

More generally, we note that the reporting requirements for Category 2 regulators are much more light touch. As we have highlighted above, we suggest that there is a need for consistency across regulators.

Section 14 – Compensation funds.

This section relates to compensation fund for clients who suffer financial loss as a result of dishonesty by a legal service provider. The Law Society currently operates the Guarantee Fund (Client Protection Fund), which serves the same purpose as that proposed.

We are supportive of much of the policy intent of this section. However, section 14(6) requires regulators to consult the independent advisory panel of the Commission before making or amending any rules regarding the operation of the 'compensation fund'. We believe this may dilute the Regulatory Committee's powers in relation to the operation of the fund. We also do not think it is necessary given the increased extent of the Regulatory Committee's independence. In addition, the current provisions of the 1980 Act that relate to the Guarantee Fund work well and, to the best of our knowledge, there have been no issues or concerns

regarding how the fund is administered from an operational perspective and the section has the effect of creating unnecessary complexity.

Section 15 – Exercise of regulatory functions.

We note this section, which sets out the requirements for Category 2 regulators, is significantly less prescriptive than what is required for Category 1 regulators. We refer to our earlier comments regarding categorisation and the lack of compelling evidence to justify a two-tiered approach of regulators.

Section 16 – Annual reports of Category 2 regulators.

As highlighted previously, we note these are much more light touch than reporting requirements of Category 1 regulators.

Section 17 – Register of regulated legal services providers.

We are supportive of the general intent of this section which, in effect, mirrors the purpose of the Roll of Solicitors which we currently maintain under the provision of the 1980 Act³². It also reflects similar provisions contained within the 2010 Act.³³ The register therefore is an extension of this, and we welcome the proposal to make this available electronically. We do, however, have some observations and questions to raise.

Section 17(2) requires the register to record information pertaining to the individual. However, it omits much information that would be useful to consumers. For example, status in relation to being a notary public (not all solicitors are authorised to perform notary services), solicitor advocate with extended rights of audience, and those registered to do criminal legal aid etc.

It is not clear how 17(3) would operate at a practical level. Is this an attempt to mimic the Roll where a solicitor's details and records are maintained and their name remains on this Roll, but they do not practice? This could be confusing to consumers.

We also note that the information to be accessible via the register is narrower than that applying to licensed providers under section 83 of the 2010 Act - notably there is no requirement to publish details of disciplinary actions.

Section 18 – Professional indemnity insurance.

This relates to the requirement to have in place rules regarding professional indemnity insurance. Section (6) sets out the definitions of 'authorised insurer' and 'professional liability'. These differ from those in the 1980 Act and further amendments will need to be made for consistency.

³² Section 7 Solicitors (Scotland) Act 1980

³³ Section 83 Legal Services (Scotland) Act 2010

Sections 21 to section 24

These sections relate to practice rules and provide regulators with the powers to ‘waive’ the application of practice rules in defined circumstances. We have outlined some concerns in principle with these provisions in our response to question 8(c) of the call for evidence and wish to add more detail here.

We are unclear as to why these new provisions have been added to the Bill and have various concerns about the provisions as drafted. The powers which these provisions are seeking to provide for already exist under the 1980 Act and the ability to waive most of the existing practice rules³⁴ is in force and works well.

We have policies and guidance³⁵ in relation to how and when we use our waiver powers and we are not aware of any challenge or issue with how the process currently works. Our existing waiver system would allow us to create and operate a regulatory or legal tech sandbox for solicitors and solicitor-owned practice units if and when necessary. Therefore, we have not requested any changes to our current powers under the 1980 Act.

However, we do seek the power to grant waivers in relation to licensed providers under the 2010 Act.³⁶ We anticipate a waiver regime for licensed providers operating in the same way as it does currently for solicitor-owned practice units. The ability to waive certain requirements in certain circumstances (often subject to conditions which can be tailored to fit) is invaluable in allowing an effective, proportionate and appropriate regulatory response to circumstances, events or developments which could not have been anticipated when the relevant rule was made. Waivers can support innovation, reduce regulatory conflict or overlap and avoid disproportionate regulatory burdens adversely affecting competition or increasing costs (or reducing choice) for consumers.

The provisions of sections 21-24 would be counterproductive and frustrate the efficient operation of the current waiver system. Most waivers we grant are urgent and subsist forever (though only in relation to the specific transaction where they are transactional). It would not be possible to grant waivers in a timely manner if we had to consult external stakeholders in advance. In most cases, it would not work if waivers were time limited as the rule must either apply to the situation or transaction or not. In addition, waiver decisions often refer to personal information of the applicant, commercially confidential information about the operation of a practice or client confidential information. This would make it, at best, difficult to publish waiver decisions and, at worst, consume significant time and resource to redact the decisions before publication.

Furthermore, section 12(3)(a) states that we may not disapply or modify a rule that regulates conduct or discipline but, as a conduct regulator, all of our rules are conduct rules. Section 12(3)(b) states that we may not disapply or modify a rule that regulates the handling of complaints, but no such rules exist. Our complaints policies and processes are governed through statute and not rules.

³⁴ With the exception being the rules in B1 (Standards of Conduct), B8.4.2 (Appearance in a Superior Court), Section C Rule 2 (Incidental Financial Business) and C4.1 and C4.2 (re acquiring Rights of Audience).

³⁵ Waivers Policy and Guidance see: <https://www.lawsco.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b2/advice-and-information/b2-2-applying-for-waiver/>

³⁶ Amendments would be required to section 12 of the 2010 Act in order for us to grant waivers from the Regulatory Scheme under that Act.

The powers in section 22 to amend or revoke waivers could prejudice anything done in good faith by an authorised legal business while a waiver was in place. Such revocation or amendment could also be contrary to established rules of law such as fair notice.

We would urge deleting the proposed sections 21 – 24 and instead amending s12 of the 2010 Act as previously requested.

Chapter 3 - New regulators of legal services and sections 25-37.

This chapter and associated sections provide powers to allow further organisations to seek to be accredited as a legal services regulator.

Whilst we are supportive of the policy intent of these provisions, this is on the basis that it must expressly exclude the creation of a further regulator for the Scottish solicitor profession. The creation of a further regulator of Scottish solicitors would be detrimental to both the interests of consumers and the profession by potentially applying inconsistent regulation, differing standards and rules and leading to complexities in the regulatory structure.

It could potentially allow and promote a sector 'split' in relation the Scottish solicitor profession. It would also bring confusion to both the consumer and the Scottish solicitor profession and would be disproportionate given the limited size of that profession.

Part 2 - Regulation of legal businesses.

This part introduces 'entity regulation' across the Scottish legal sector. As we highlight in our response to question 8 of the committee's call for evidence, we are supportive of these proposals and have advocated for them for several years.

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. 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 and meeting the expectations of the consumer, bringing consistency, with all entities having to meet the same high standards.

Although we are supportive of the policy, there are aspects of the Bill's provisions that raise concern and, as drafted, may be problematic from an operational and regulatory perspective.

Much of the drafting of this part is drawn from the provisions set out in the 2010 Act, and in some instances amend the 2010 Act itself. The 2010 Act is niche in that it applies to the unique business structure of licensed legal services providers (LPs). This effectively provides the framework for the regulation of, and what is generally termed as, alternative business structures - business that are jointly owned by solicitors and other professionals, for example accountants.

Part 2 of the Bill, as currently drafted, replicates many provisions of the 2010 Act. Attempting to apply these to the regulation of authorised legal businesses (ALBs) without recognising that the regulation of 100% wholly owned solicitor firms (ALBs) and those partly owned by solicitors and other professionals (LPs) are completely distinct, with each requiring a completely different regulatory approach and regime. We strongly advised against using the approach of adopting the provisions of the 2010 Act in the consideration and drafting of entity regulation provisions, believing such an approach would create a complex and disproportionate regulatory regime based on that attached to LPs and on legislation previously described as ‘unwieldy’.

There are many sections that, as drafted, are inconsistent with existing legislation and will require extensive amendments. We intend to provide suggested amendments for Stage 2 of the Bill’s parliamentary passage and would welcome the opportunity to discuss these in more detail with the Committee.

Section 39 – Requirement for legal businesses to be authorised to provide legal services.

This section defines a legal business as being wholly owned by either (a) solicitors OR (b) qualifying individuals, but not a mixture.

Subsection (8) makes it clear that a solicitor cannot be a ‘qualifying individual’ and explanatory note 107 says there are no qualifying individuals at present. The consequence of this drafting is that Registered Foreign Lawyers would be excluded from ownership of firms of solicitors and incorporated practices, which is currently allowed under the 1980 Act.

This in turn would mean that no multi-national practices in Scotland could be authorised by the Law Society to deliver legal services in Scotland. Almost all of the big Scottish law firms are multi-national practices. We assume that the policy intent is to require all businesses which provide legal services to the public for a fee to be authorised, and not to bar multi-national practices from practising in Scotland. If those are the policy objectives, then extensive amendments will be required to section 39.

Section 41 – Rules for authorised legal businesses.

This section requires regulators to make rules for authorising and regulating ALBs.

Section 41(2)(c) provides a wide discretionary power to Scottish Ministers to make regulations on ‘*such other regulatory matters*’ as they may wish, and we make the same observations regarding ministerial interference as we refer to earlier in this response. In addition, the exercise of this power requires no consultation with, for example, the Lord President or regulator and therefore lacks transparency.

Section 41 (4) requires prior approval of Scottish Ministers for rule changes. Again, we have significant concerns regarding the involvement of Ministers in the regulatory regime and do not believe this is appropriate. Notwithstanding this, we question why prior approval is necessary, as there is no such requirement for practice rules for individual solicitors. If there is a need for prior approval, then we believe this should rest with the Lord President and it should be for the regulator to consult with ‘*such other person or body they consider appropriate*’.

Section 41 (5) requires regulators, '*in preparing (or amending) its ALB rules*', to consult with at least six separate stakeholders. We believe this is totally disproportionate and would require a time and resource-heavy process that will result in significant delay should an amendment be required urgently to address a highlighted risk. It could potentially result in an extensive consultation exercise for even the smallest change.

The current process for introducing / amending Rules requires consultation with the membership and the concurrence of the Lord President (Section 34 Solicitors (Scotland) Act 1980). We believe this process continues to be the most appropriate and we are not aware of there being any issues or concerns raised regarding this. Notwithstanding the need to consult with an extensive number of consultees, if this is to be the case, then it should only be for new and 'material' amendments. 'Material' will need to be clearly defined to provide certainty.

Section 41(6), especially read together with explanatory note 114, compounds the issues in relation to the definition of "legal services" at section 6. Section 41(6) suggest that additional regulations would be required to give authority to the rules of a regulator to deal with the provision of ancillary non-legal services (e.g. estate agency, accountancy or tax advice). Under the 1980 Act, we already have the authority to regulate these ancillary services and therefore we wonder whether this is an unintended consequence of section 41(6). We look forward to understanding the intention behind sections 6 and 41(6) and may seek to amend these sections at a later stage.

Section 42 – Authorisation rules.

This section sets out what the regulator must cover when making its authorisation rules in relation to entity regulation. Much of this section introduces requirements that, in our view, are not necessary.

Section 42 (1)(b) refers to the attachment of 'conditions' to authorisation. However, this appears to only allow conditions at the initial point of authorisation. This alone is not appropriate or sufficient. Powers should be provided for conditions to be attached to the ALB at any point of the authorisation period, not just at the outset. This may be the policy intent, however, for clarity this needs to be expressly included. This would be consistent with similar condition attachment powers for licensed providers.

Section 42(1)(c)(i) provides that rules are to be made regarding the renewal of a legal business authorisation. Annual renewal of authorisation is not necessary and to introduce such a requirement would create additional cost associated with administration and resource on the part of the regulator, cost which ultimately would be passed on to the consumer. This would be a further administrative burden for the profession. It is also inconsistent with the requirements in relation to licenced providers under the 2010 Act and in relation to incorporated practices under the 1980 Act. However, the regulator should retain the power to charge an annual fee.

Section 42(1)(c)(ii) provides that the rules set out the circumstances where authorisation may be withdrawn. It is uncertain if this includes voluntary surrender of authorisation on the part of the ALB. Clarification on this from the Scottish Government would be welcome. However, we suggest in any case that this should be

expressly included to ensure clarity and provide an avenue should an ALB, for one reason or another, wish to cease as an ALB – effectively surrendering its authorisation.

Section 42(1)(d) and (3)(d) provides that the rules must set out the basis of how fees are to be determined. We do not believe that it is appropriate to set this ‘criteria’ out in rules - this should be a matter for the regulator to determine. The factors to be taken into account will be varied and to ‘hard wire’ these into rules will constrain the regulator from considering any new emerging factors or applying any kind of discretion.

Section 43 – Appeals in relation to authorisation decisions.

We are supportive of many parts of this section. However, we do have some concerns.

Section 43(3)(a)(ii) refers to refusal of an application for renewal. However, as highlighted above, we do not believe that annual renewal is necessary. Removing the need for annual renewal would negate the need for this provision. We also make the same observations regarding the attachment of conditions -(43(3)(b)- as we do in relation to section 42.

Section 44 – Practice Rules.

This section sets out what the practice rules should cover in relation to the regulation of ALBs.

Section 44(1)(c) specifies ‘*accounting and auditing*’. The current account rules, as set out in the 1980 Act³⁷, relate to the operation of client accounts and the monies held within those accounts. However, it is not clear if (1)(c) is also narrowly defined or if the intention is for much wider application that will require rules regarding obligations that are already and separately legislated for.

Various legislative provisions relating to company law already sets out the obligations of firms to meet accounting and auditing requirements. It is not the role of the legal regulator to determine rules of how business should meet those requirements or how business should have regards to other company and insolvency law requirements.

Section 44 (1)(e) & (f) relate to rules regarding complaints. In relation to individual solicitor regulation, the corresponding requirements are set out in legislation and not the current practice rules. The process for how complaints are handled should be, in our view, set out in primary legislation, as they currently are in the 2007 Act. This provision has been lifted from the 2010 Act, and the issues this causes have been previously highlighted to the Scottish Government. We are concerned that those issues will be compounded by inclusion in rules relating to ALBs

Section 44(2)(ii) requires that the practice rules must require ALBs to have regard to the regulatory objectives. This is not appropriate - it is for the regulator to have regards to the regulatory objectives, not ALBs. An ALB should have regard to the professional principles instead.

³⁷ Section 34 Solicitors (Scotland) Act 1980

Section 44(2)(v) requires rules regarding professional indemnity. Professional indemnity will provide redress for consumers for losses arising from the negligence of a firm. However, the provision omits similar rule requirements for the Guarantee Fund (Client Protection Fund). This fund is separate and provides a route of redress for losses incurred due to acts of dishonesty.

Section 45 – Financial sanctions.

This section provides powers to introduce financial sanctions that may be imposed on ALBs. We are supportive of the policy intent of this section.

Section 45(3) provides that the paid financial penalty is payable to Scottish Ministers and reflects the current position in relation to financial sanctions imposed by the Scottish Solicitors Discipline Tribunal (SSDT). However, unlike the provision relation to individual solicitors, it is to be the regulator who collects the financial penalty on behalf of Ministers. The regulator will incur costs in meeting this requirement.

Therefore, powers should be given to recover costs incurred in collecting the financial penalty, as this will require additional resource on the part of the regulator. In addition, regulators should be given the power to abandon pursuit of the penalty where this is proving futile. This would restrict costs incurred, otherwise those costs may exceed the amount of the penalty pursued.

Section 46 – Reconciling different rules.

This provision has been lifted from the 2010 Act in relation to licensed providers where such provision is necessary, as the licensed provider may be regulated by two or more regulators – for example the Law Society of Scotland and the Institute of Chartered Accountants Scotland.³⁸

However, it may not be necessary for ALBs, as these business structures will be 100% solicitor-owned, therefore will be subject only to one regulator. Provided we get clarity that we can continue to regulate ancillary services such as estate agency and incidental financial business, the issue of reconciling different regulatory rules will not arise for ALBs and this section, in our view, is not necessary. We are uncertain of what ‘regulatory conflicts’ the Scottish Government foresee arising in relation to ALBs.

Sub-section 2(c) makes reference to legal or ‘*other services*’. Again, we are uncertain as to what these other services may relate to, and it would be helpful if the Scottish Government could share an example so that we may further consider.

Section 47 – Monitoring of performance of authorised legal businesses.

This section places a duty on regulators to monitor the performance of ALBs. We are supportive of the policy intent of this, which provides for a more proactive approach to regulation, with powers to review/investigate performance of a legal business.

³⁸ See section 13 Legal Services (Scotland) Act 2010



However, we believe that our powers to monitor and proactively investigate performance and compliance should be extended to include our entire regulated population, in other words similar (but not necessarily identical) provisions should be made in relation to in-house solicitors and solicitors employed by the Crown Office. The ongoing Post Office/Horizon enquiry is an example of where it might be relevant for us to proactively investigate and require information from in-house or Crown Office solicitors and the Bill as drafted would not allow us to do so.

Section 48 – Law Society of Scotland.

This section sets out the time frame by which the Law Society of Scotland must prepare the ALB rules, being three years from the point that Part 2 (relating to entity regulation), comes into force.

This is unduly prescriptive and fails to recognise the significant work that must be undertaken before we would be in a position to accept applications from business seeking to be authorised. Much of the development of the ALB scheme is reliant on external factors, for example consulting with numerous stakeholders, factors that we are not able to influence. We believe there should be a degree of flexibility in this time frame to allow variation and to be extended, if necessary, but with such variation or extension being subject to the agreement of the Lord President.

Section 49 – Powers of the Scottish Ministers to intervene.

This section gives Scottish Ministers powers to intervene directly in the authorisation and regulation of legal businesses. As we have set out earlier in this response, we have serious concerns regarding such extensive powers.

This section would allow Scottish Ministers to create what would, in effect, be a government appointed regulator, with subsection (2) providing further concerning powers for Scottish Ministers to amend, or if so wished, totally disregard all provision set out in part 2. We suggest that this may also extend to disregarding the regulatory objectives.

Finally, there are provisions which we had requested which are missing from the Bill in relation to entity regulation. These included the power to “passport” existing legal practices into the new regime without requiring full applications from existing practices, provisions that would fix existing issues with our powers to intervene in or appoint a judicial factor over an incorporated practice, and deemed transfers of ALBs which are partnerships when there are changes in the partners in order to comply with Scottish partnership law. We will propose amendments to the Bill to effect these changes at a later stage and are happy to discuss further with the Committee.

Part 3: Complaints

The focus of part 3 is on legal complaints. Some of the most important elements of any regulatory system are the processes available for consumer complaints and professional discipline. However, the current legal complaints process and framework is slow, complex and expensive. It is simply not meeting the needs or expectations of consumers or the legal profession. For many years, we have advocated for a complaints

process which is timely, agile, and proportionate, one which is not prescriptive or constraining and adopts principles of transparency, accountability, proportionality and consistency, where complaints will be handled sensitively.

We therefore further welcome provisions within the Bill which seek to improve the complaints journey. However, we believe the Bill could be improved and, in some cases, go further than proposed.

One general concern is that the Bill is very much framed to provide the Commission with enabling powers and flexibility to develop its own processes, procedures and criteria regarding its own complaint handling at an operational level. However, we are disappointed that the Bill fails to confer such enabling powers on the regulator, including ourselves. Instead, it imposes increased oversight on the regulator, retaining much of the prescriptive processes and requirements in primary legislation. This approach will be detrimental to the complaints journey for complainers and legal practitioners. It will create a two-tier process approach, whereby the Commission will be empowered with developing and introducing an agile approach that greatly improves efficiency, whereas the regulator will be hampered by prescriptive processes, unable to benefit from efficiency improvement.

As we have highlighted earlier, we are also disappointed that the provisions of the Bill do not reflect many of the proposals we have suggested to the Scottish Government for modernising our powers in relation to conduct complaints - proposals and powers that we believe will bring a significant improvement to the complaints process and benefit all. We seek powers that would allow consensual early disposal of complaints and increased powers to suspend or add conditions to a solicitor's practising certificate when it is in the public interest to do so. We will propose amendments to the Bill in relation to these matters at a later stage and would be happy to discuss further with the Committee.

Section 51 – Change of name to the Scottish Legal Services Commission.

This section changes the name of the Scottish Legal Complaints Commission to the Scottish Legal Services Commission.

We do not agree with this change, which we believe will cause confusion to the consumer and is potentially very misleading. The proposed name suggests that the Commission has a role in the delivery of legal services to consumers. It risks being seen as an advice body, and one that is able to even offer legal services directly when that is absolutely not the case. We believe the current name should be retained.

Section 54 – Commission process relating to complaints.

As highlighted earlier, this section is a further example whereby greater flexibility is being conferred on the Commission to steer its own processes, and providing discretion to several procedural aspects that are currently mandatory, for example section 58(8).

In addition, section 54(7) repeals that part of the 2007 Act that requires the Commission to provide notice in writing of its determination of the complaint to the complainer and practitioner, setting out the reasons for the determination. In our view, this may impact on the principle of fair process.

Section 55 – Regulatory complaints against authorised legal businesses

This section sets out the regulatory complaints process for ALBs. This section inserts into the 2007 Act provisions that require us to investigate and report on regulatory complaints in the same way we currently do for conduct complaints under the 2007 Act. This only increases our regulatory burden without making the system more proportionate. It provides no mechanism for discontinuing an investigation. As with conduct complaints, we hope to gain additional powers to dispose of appropriate cases more proportionately and will propose amendments at stage 2.

Section 63 – Handling complaints.

This section extends handling complaints to include new ALB complaints and, as with many others, provides the Commission with greater flexibility in its operational processes.

Currently the Commission is required to provide reasons for its decisions, in relation to handling complaints, to the complainer, practitioner and regulator. However, section 63(2) repeals this requirement. As previously highlighted, removing requirements to provide reasoning raises concerns regarding fair process and transparency, it will leave both complainer and practitioners in the dark as to why, and on what basis, decisions have been reached. This is not reflective of an open complaints process focused on delivering fair outcomes.

We are very concerned and opposed to the power conferred on the Commission to issue 'directions' to the regulators (section 63(3)). This is totally disproportionate and unnecessary and will not be conducive to a collaborative regulatory regime. As an alternative we believe that it would be more appropriate for the Commission to make recommendations to the regulator, and if the regulator disagrees, having provided reasons, then the Commission retain the right to refer to the matter to the Lord President to determine the final outcome.

A recommendation system, with the power for the Lord President to enforce if appropriate, would encourage greater collaboration between the Commission and the regulator.

Section 64 – Annual general levy and complaints levy.

Section 64(4) amends Section 29 of the 2007 Act. This section concerns the amount payable for the levies.

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 imposed changes to its levy, including at times substantial above inflation increases, without any oversight. Under the provisions of the 2007 Act,³⁹ 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

³⁹ Section 29 Legal Profession and Legal Aid (Scotland) Act 2007.

are aware of the tension the SLCC's budget causes with the legal profession and have previously highlighted our concerns about the budget and the impact this has on the profession. In our response to the Scottish Government consultation exercise in 2021⁴⁰ we highlighted that 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 and such provision should be made within the Bill.

Section 64(4) (e) introduces an additional requirement on the regulator to assist the Commission with enquiries relating to size and income of each ALB. This is financial data that we, as a regulator, do not collate and it will require additional resource and thus increased cost. Many businesses may be reluctant to share their income, as this will likely be considered as commercially confidential information.

Section 65 – Unregulated providers of legal services: voluntary register, annual contributions and complaints contributions.

This section provides powers for the Scottish Legal Services Commission to introduce a register for unregulated providers, those business providing non-reserved legal services. Although we have advocated for many years for the regulation of the unregulated legal services sector, we have concerns with the proposal for a voluntary register.

If the policy intent behind section 65 is to extend regulation to currently unregulated providers of legal services, then we would suggest that amendments to section 65 are required. The Commission has the *discretion* to introduce the register, but it is not required to do so.

Likewise, the unregulated legal services provider is under no obligation to sign up to the register. Given that there will be a cost attached to becoming registered and the provider will be subject to the complaints requirements and procedure in section 62 if they do register, it is unlikely there will be any kind of meaningful uptake. The section as drafted creates an illusion of a degree of regulation over the unregulated sector.

In relation to cost, we also note with some concern that the Commission is to have the discretion to waive a fee or 'annual contribution' for being registered. If it does so, then who will bear the cost of this register and the additional administrative burden of the Commission of not only maintaining the register, but administering the additional complaints that may be generated relating to those businesses which are registered on the register? We are concerned that the Commission will impose increased levy fees on the regulated profession to subsidise the cost of the register for the unregulated sector and associated complaints – and this we would strongly oppose.

If the proposal in section 65 is to be carried forward, and if it is to have any effect of bringing an element of regulation to the unregulated sector, then it should not be discretionary. The Commission should be required to introduce the register, all those unregulated businesses providing unreserved legal services to the public

⁴⁰ Legal Services Regulation Reform in Scotland, Law Society of Scotland response. See: <https://www.lawsco.org.uk/media/372054/legal-services-review-consultation-law-society-of-scotland-response.pdf>

should be required to join, and the Commission required to cover its costs of administrating the register from a levy on the unregulated sector only - not via an increased or additional levy on the current regulated sector.

Section 70 – Compensation funds: setting of minimum standards by the Commission.

This section provides powers to the Commission to set minimum standards relating to the operation and effectiveness of the Guarantee Fund (Client Protection Fund).

Section 70(2) proposes that minimum standards be set within guidance to be issued by the Commission. This is not appropriate. As we have highlighted in relation to section 69, it is not appropriate to set out what are considered as requirements (i.e. mandatory) in guidance (discretionary). Any conflation of the two raises the potential for uncertainty.

We are also concerned that this will confer the Commission with powers to interfere at an operational level where it does not have the experience or knowledge to understand how the Guarantee Fund (Client Protection Fund) is administered.

Section 71 – Enforcement of minimum standards.

This section provides the ‘enforcement’ mechanism relating to the setting of minimum standards.

We are seriously concerned at the extent of powers to be conferred on the Commission by this section (as well as those throughout other part 3 sections) without there being any notable checks or balances in place to ensure that these are used appropriately, reasonably and proportionally.

We do not see the evidence or policy reasoning for the provisions of section 71, and we are strongly opposed to this. It proposes an approach which is not conducive to a collaborative and mutually respectful working relationship and risks raising tension and conflict between regulators and the Commission.

Section 71(4) provides for a route to arbitration should there be a disagreement between the regulator and the Commission. However, sections 71(4) and 71(5) indicate that arbitration must be by agreement from both parties. This inevitably raises the question of what would happen if the Commission refused to agree?

If the Commission refused to agree to arbitration, then section 71(6) would come into play, giving the Commission powers to issue a ‘direction’ to the regulator with potential recourse to the courts should the regulator fail to take the direction forward. Section 71, read holistically, therefore provides the Commission unfettered powers to bring forward *any* minimum standards it wishes, with no real right for the regulator to challenge the standards (as the Commission must agree to arbitration) and to issue direction should the regulator, for what may be a very good reason, be unable or refuse to comply with a direction.

Section 71(2) – introducing section 40B (enforcement of minimum standards in relation to practitioners) also raises equally concerning proposals. This provides the Commission with powers to directly set minimum standards and issue ‘directions’ to those providing legal services. In our view this effectively provides the Commission powers to introduce - without any kind of oversight, checks or balances or consultation with

stakeholders - rules governing the legal profession. We believe that this is not appropriate and interferes with the regulator's role. It may lead to inconsistent and conflicting regulation and cause confusion to both consumer and the legal profession.

Section 74 – Commission membership.

This section sets out proposed changes to the membership structure of the Commission's Board. We note that the proposed amendments to membership numbers do not correspond with referenced paragraphs of schedule 1 of the 2007 Act. However, we note the Keeling schedule provides clarity that the intention is to create an equal balance of legal and non-legal members to the board.

Section 74(3)(a) increases the maximum term limits a member of the Commission may serve from 10 years (two x five-year terms) to 16 years (two x eight-year terms). We do not agree with this excessive term of service which does not reflect the Nolan Principles of good governance. No reason has been given as to why such an increase is necessary.

Section 75 – Role of the independent advisory panel.

This section sets out the proposed role of the new 'Independent Advisory Panel'. In reality, this is a retitled SLCC Consumer Panel.

We are concerned with the proposal set out in section 75(2)(b)(e) to confer powers on the panel to make recommendations to the regulator. The reality of this is that this would result in Scottish Ministers, the Commission AND the panel *ALL* having recommendation or direction powers over regulators – this is disproportionate, particularly given the increased independence of the Regulatory Committee as proposed within the Bill.

In our view it would also result in even further complexities to the regulatory framework as conflicting recommendations could be made by different entities. We would also respectfully suggest that, as the panel will be comprised of consumer representatives / non-legal members, then it is unlikely that the panel will have the knowledge and insight of the working of the legal sector and the internal operation of the regulator to make informed recommendations.

It would be more appropriate for the panel to refer any concerns or issues it may have in relation to regulators, to the Commission in the first instance. The Commission could thereafter consider and decide to make recommendations to regulators if it is considered necessary and appropriate to do so.

In addition, if the panel is to have powers to make recommendations, it is not set out as to what will be the extent of the onus and expectations placed on regulators to implement those recommendations.

Although it appears that the panel is to have some superficial oversight of the Commission, this is minimal, and we also note that the panel is not to have powers to issue 'directions' to the Commission and may make recommendations only. This contrasts with the Commission's new proposed powers as contained in sections 70 and 71, to make 'directions' targeted at regulators.

Section 76 – Commission reports.

This section sets out the reporting requirements of the Commission. We note that this is much less prescriptive than the requirements to be imposed on regulators regarding reporting and as set out in section 13. There is no clear reason provided as to why there is a disparity between what the Commission and the regulator is to report on.

We also highlight that, unlike regulators, the Commission is not required to consult with any legal sector stakeholders - this is another example of the disparity between the checks and balances applicable to the regulator and those of the Commission.

Part 4 – Miscellaneous

Section 83 – Offence of pretending to be a regulated legal services provider.

This section makes it an offence for a business to pretend to be a regulated legal services provider. We have similar concerns to this section and the need to demonstrate the ‘intent to deceive’ as we do in relation to section 82.

Part 5 - General

Section 88 – Individual culpability for offending by an organisation.

This section provides for the prosecution of specified individuals who are ‘responsible officials’ of an organisation which has committed an offence involving the consent of the official. Although supportive of the policy intent, this will only apply to those offences committed under the 2023 Bill, it will not include offences committed in terms of the 1980 Act.

In addition, there is some inconsistency in terminology. We propose that this section be extended to include offences under the 1980 Act.

Schedule 1 – The Law Society of Scotland

Part 1 paragraph 6 relates to the Guarantee Fund⁴¹

We have previously suggested that the name of the fund be changed to better reflect its aim and purpose. The current name does not reflect the aim of the fund and suggests that it in some way ‘guarantees’ to pay out to consumers who have suffered loss, when this is not the case. Each matter is determined on its own merit, and none are ‘guaranteed’. We believe that the name should be amended to the Client Protection Fund, to better reflect its function. This would also reflect the operational name of the Fund which has been used for many years.

⁴¹ For further information on the Guarantee Fund see: <https://www.lawscof.org.uk/for-the-public/client-protection/client-protection-fund/>

Paragraph 6(6) inserts a new section 43A into the 1980 Act. This provides Scottish Ministers with powers to make regulations in relation to the Fund. This has the potential for significant change to be made which may adversely impact on the operation of the Fund, for example, amending the criteria for the grants. This may have financial consequences on the Fund or amend the contributions required from the regulated population, which would increase costs to consumers. There is also no requirement for the Lord President's consent in relation to any changes brought in through regulations.

Paragraph 1(4) of Schedule 3 of the 1980 Act sets a maximum limit of £250,000 for any grant from the Guarantee Fund (Client Protection Fund). We have previously asked for this to be removed, but this has not been carried forward into the Bill. The £250,000 value was set many years ago, and reflects, for example, typical property values at that time to arrive at an overall prudent value of the Fund at that time. The figure is crystallised and therefore has not taken into account inflation and increases in property values and values of typical estates. It is insufficient to cover the likely losses claimants may suffer as a result of the acts of dishonesty on the part of solicitors against typical house purchase and estate values.

What we have previously suggested to the Scottish Government is that no crystallised figure should be set out in legislation. To do so would result in the Guarantee Fund (Client Protection Fund) facing the same challenges within a very short period of time.

Paragraph 13 makes amendments to section 34 of the 1980 Act regarding rules for professional practice, conduct and discipline. Para 13(2) has the effect of requiring the Society to comply with section 41 of the Bill when bringing forward any practice rules in relation to the regulation of the solicitor profession. Section 41 states that the Society may not prepare or amend rules without first consulting with the Commission and those other organisations as set out in section 41. We are uncertain if this is the policy intent and would welcome clarification. If this is the intention, we would be strongly opposed. The regulator is best placed to determine the rules by which to deliver its regulatory functions and objectives. The combined effect of the amendments to section 34 of the 1980 Act and section 41 of the Bill would also lead to oversight duplication, as we would still be required to consult and, separately, seek approval from the Lord President.

In addition, the proposed amendments to s 34 of the 1980 Act may require additional consideration depending on the intent behind the definition of legal services in section 6 and the requirements in relation to ALB rules under section 41.

We also highlight that (2) makes reference to '*including incorporated practices*' However, this is only referenced in some sections of the Bill, and not in others where we would expect to see it. This causes uncertainty where not included. If the intended position is that any reference to 'authorised legal businesses' will always include incorporated practices, then it is better not to confuse the issue by specifying sometimes but not always.

Schedule 2 - Further provision about measures open to the Scottish Ministers

This schedule relates to, and is inserted by, **section 20** and sets out further detailed provisions relating to powers of Scottish Ministers, including the powers to direct. As highlighted earlier in this response, we are

strongly opposed to powers conferred by sections 19 and 20 of the Bill, and this includes all those provisions set out in schedule 2.

Schedule 3 – Minor and consequential modifications of enactments

Additional consequential changes to existing legislation.

Finally, we would like to take this opportunity to highlight that there are many consequential technical changes to existing legislation which will need to be considered further at a future stage.

For example, in some instances the term “solicitor” in the 1980 Act has been amended to “ALB” where it is not appropriate to do so and in others, the conversion has not been made where it should be. We will provide a more detailed analysis of these changes at a future stage.

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