



THE LAW SOCIETY
of SCOTLAND
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Regulation Paper

The Solicitors (Scotland) Act 1980 **The case for change**

The Law Society of Scotland

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Introduction

1. As a statutory professional membership body pursuing legal excellence, the Law Society of Scotland supports the needs and requirements of the Scottish solicitor profession in delivering legal services to Scottish, UK and global businesses and consumers.
2. With the overarching objective of delivering and leading legal excellence, we strive to excel to be a world-class professional body, understanding and serving the needs of our members and the public. We work to assure that the public can be confident in Scotland's solicitor profession by setting and upholding standards to ensure the provision of excellent legal and customer services delivered by our members.
3. We have a statutory duty to work in the public interest,¹ a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, stakeholders and our membership.
4. This paper is intended to inform Scottish Government, and other stakeholders, of the current legislative framework for Scottish solicitors, primarily the Solicitors (Scotland) Act 1980, and the impact that changes in the Scottish legal services market have had on the workability of this.
5. We hope that this paper will stimulate and promote engagement and discussion in considering the possible introduction of a new effective legislative framework which will allow for the proactive and effective regulation of the legal services market with a central focus on consumer protection.

¹ Section 1 Solicitors (Scotland) Act 1980

The case for change

6. Over recent years the Scottish legal market has changed dramatically. The changes in how legal services are delivered, the emergence of cross border firms, the growth of new areas of business, the increasing internationalisation of legal services, the changing demands of clients and advances in technology have all impacted on the Scottish legal profession businesses and consumers and dramatically affected the way in which legal services are delivered in the 21st century. The planned devolution of further powers to the Scottish Parliament will bring additional opportunities, possible challenges and further changes in the law which will affect the public, Scottish solicitors and the wider legal profession.
7. The regulation of the legal services market is an essential component which contributes to the proper functioning of the justice system, the economy and society in general. Central to any legislative framework is consumer protection, which is supported by three main principles which a regulatory framework must encompass, these being:
 - i. controlling entry into the profession: setting qualification requirements and standards and administering authorisation to practise,
 - ii. the conduct of the profession; setting the rules of professional conduct and monitoring these, and
 - iii. complaints; ensuring there is an accessible and effective complaints process and system.
8. The present legal framework surrounding the Scottish legal profession is, in effect, a patchwork of legislation. The underpinning and central piece of regulatory legislation, the Solicitors (Scotland) Act 1980 (the 1980 Act), is in itself a consolidation Act, bringing together legislation dating back to 1949, and amended in 1958, 1965 and 1976. Since 1980, there have been further significant changes to the Act in 1990, 2003, 2007 and 2010.
9. Changes in the law and to the legal services market have resulted in difficulties in the interpretation of the legislative framework, and the 1980 Act is being continually tested. The legal, economic and social landscape has significantly evolved since the 1980 Act was introduced and Scottish solicitors numbered

4810, with the majority of the profession undertaking similar legal work within a narrow legal sector. However, the Act is now being interpreted to reflect legal services in the 21st century, where there are now 11,308 practising Scottish solicitors, one third being employed in-house.

10. Scottish solicitors are also working in a much greater and diverse legal sector, where larger firms have materialised over recent years to exploit the opportunities that the international and globalised legal services market provides. Although there is a greater prominence of large commercial and international firms, the smaller private and general law practices still continue to operate, many of which serve rural communities. These smaller private practices are key in providing an important, and much needed, legal service to members of the community who may have difficulties in accessing legal services otherwise.
11. Although the 1980 Act can be interpreted in many instances to reflect the original policy intent, there are many other instances where compliant interpretation is strained because the policy intent did not anticipate or allow for 21st century legal services and the change in social, consumer and business needs and demands. Although many of the provisions of the 1980 Act continue to work well, the law needs to be modernised to support and facilitate the evolution of new business structures and advancements in technology which threaten to undermine the interests and protection of the Scottish and UK consumer and test the provision of the Act further.
12. The 1980 Act consists of sixty seven sections, accompanied by six schedules. To date, of those, we have identified approximately fifty sections which we believe need to be addressed to ensure more effective and focused consumer protection, safeguards, clarity and workability.
13. The scale of the changes needed to ensure the Act would be workable, effective and 'future proof' would, we believe, justify a new enabling Act being introduced with the flexibility to move with the times and adapt quickly to changes in the market, advancements in technology and the demands of consumers, without future need for additional primary legislation.

14. The start of November 2015 saw the beginning of our new five year strategy.²

Our purpose is to lead legal excellence – this reflects our leadership role and our pursuit of excellence, taking us beyond simply being a successful and respected professional body, while recognising that our current members operate in and outside of Scotland. The strategy will see us change our ‘traditional’ approach and pick up our pace of modernisation. In order for us to meet our purpose, we have five strategic goals, which we shall be reporting on annually for the next five years. If delivered these five strategic goals would allow us to meet our purpose and mission.

15. Over the next five years we will;

ASSURE our members’ clients and employers by setting and upholding standards that ensure excellent legal and customer service

SERVE our members through a detailed understanding of their needs, providing tools and services which they can use every day

EXCEL by operating as a world-class professional body.

INFLUENCE the creation of a fairer and more just society by being an international centre in law and justice thought leadership

GROW our membership and income by being a vibrant, influential and inclusive organisation

16. In summary, the current legal services market requires a modern, transparent, responsive and agile professional body to ensure that the Scottish solicitor profession, alongside others such as paralegals, can continue to deliver a competing world class service to Scottish and UK businesses and consumers. A recent poll indicated that 90% of the Scottish public are satisfied with the services provided by their solicitor and 82% would recommend their solicitor to others³.

17. The poll demonstrates a strong public confidence in the Scottish solicitor profession. To ensure this is maintained and built upon, it is important that the solicitor profession has the ability to meet the shifting expectations and demands of their clients within a modern flexible framework which can meet the

² <http://www.lawscot.org.uk/media/572056/Strategy-2015.pdf>

³ [http://www.lawscot.org.uk/news/2014/12/research-shows-high-level-of-trust-in-solicitors-\(1\)/](http://www.lawscot.org.uk/news/2014/12/research-shows-high-level-of-trust-in-solicitors-(1)/)

unprecedented, and unforeseen, changes we have seen over recent years and those ahead of us in the future.

18. We strongly believe that the time has come for a new future proof legislative framework and for practical, empowering reforms to modernise the regulatory system allowing for effective and proactive regulation of the legal services sector. Together with the Society's five year strategy, this will ensure that the Scottish solicitor profession continues to be best placed to deliver legal services in which Scottish and UK businesses and consumers can continue to have strong confidence in.

Protecting what works within the current framework

19. Although there may be a number of weaknesses in the current legislative framework under the 1980 Act, the fundamental principles of a professional body regulating and representing Scottish solicitors and independent of government has stood the test of time. Basic principles such as the independence of the legal profession, we believe, are fundamental and essential to ensure we meet our statutory obligations, as is the independent gateway for complaints and investigation of service complaints, which promotes transparency and gives aggrieved clients a clear path of redress.

Independent solicitor profession

20. *'Lawyer independence is a public right that protects the rule of law. It is not a lawyer's right – rather, it is a fundamental right that the public has to be able to obtain legal advice from a lawyer whose duty is to the client, not to any other person.....It guarantees that a client can be confident that his or her lawyer provides legal assistance without fear of interference or sanction by the government or other interests'*⁴

21. The Scottish solicitor profession and the Society are independent, but accountable, and the legislation under which we regulate the solicitor profession allows us to operate as such. We are under a statutory obligation to promote an independent, strong, varied and effective legal profession.⁵

22. We believe that the solicitor profession, regulated independently of government is vital to underpin the rule of law. It is of paramount importance that the public are able to place trust in the competence and integrity of the solicitor profession and that can only be ensured through independent regulation. At this time of great challenges to the legal profession, changes to the legal services market and to the changing makeup of the legal sector it has never been more important that the profession remains strong and independent.

⁴ Law Society of British Columbia ; <https://www.lawsociety.bc.ca/page.cfm?cid=2199>

⁵ Section 1(d) Legal Services (Scotland) Act 2010

Single professional body

23. By virtue of the 1980 Act⁶, the Society both regulates and represents the solicitor profession in Scotland. This is a dual role we have addressed successfully for over sixty years and is one which is supported by our membership.⁷ We believe this dual role is essential in ensuring that Scottish solicitors deliver the highest of practical and ethical standards and is central to becoming and remaining a world class professional body.

24. Maintaining regulation, representation and professional support within one organisation ensures that we can be an effective professional body for Scotland's 11,308 solicitors. To ensure we maintain practical distinction of our regulatory and representative roles, and at the same time operate as a unified professional body, the membership of the Society's Council and Regulatory committee and Sub-committees are comprised of both solicitors and members of the public, as too are a number of our non-regulatory committees in keeping with other world-class professional bodies.

25. Maintaining the dual role under a single piece of legislation helps to ensure that a fair balance is struck between those roles, allowing for a rapid response where issues are identified and a proactive approach to anticipate developments. Most importantly, the consumer can instruct solicitors in the knowledge those solicitors:

- have high standards of legal education and training,
- have expertise, provided in many instances in the context of a 'one-stop' service,
- maintain statutory indemnity and compensation fund arrangements,
- are subject to the Scottish Legal Complaints Commission (see below) which offers the independent investigation and adjudication of service complaints, and
- are subject to regulation and discipline by a strong and independent professional body.

⁶ Section 1 Solicitors (Scotland) Act 1980

⁷ http://www.lawscot.org.uk/media/466116/Members-Survey_2014.pdf

Independent complaints

26. In 2006 we welcomed the proposals and policy intent in creating an independent body to act as a single gateway for all complaints against legal professionals and to deal with service complaints⁸ and the introduction of the Legal Profession and Legal Aid (Scotland) Act 2007 (the 2007 Act) created the Scottish Legal Complaints Commission (SLCC). The SLCC is a complaints body which operates independently of the legal profession and Scottish Government, with oversight powers of complaints. The Society retained the responsibility for managing and investigating complaints relating to the conduct of a Scottish solicitor, with the SLCC having oversight powers to audit the systems and processes which the Society use. Decisions relating to conduct complaints are made by the Society's Professional Conduct sub-committees (which consists of 50% of solicitors and 50% lay persons) in order to maintain a balanced view and ensure independence from the solicitor profession and the Society's Council.

27. We regularly engage with the SLCC, discussing shared matters of concern and ideas for improving the complaints process to the benefit of complainants and the legal profession. We have been in discussions with the SLCC and other stakeholders with regards the various challenges which the 2007 Act and the 2010 Act raises in relation to the Scottish Legal Complaints Commission (Modification of Duties and Powers) Regulations 2014. These discussions are ongoing and we are hopeful these will lead to improvements to the complaint handling process.

28. We also believe that the current processes for handling complaints must be improved to provide the flexibility to react swiftly to urgent matters, which, taking the circumstances into account, pose a significant risk to the consumer. We need an agile responsive complaints process to better enhance consumer protection.

Scottish Solicitors Discipline Tribunal (SSDT)

⁸ Stage 1 Report on the Legal Profession and Legal Aid (Scotland) Bill

29. The SSdT is independent of the Scottish solicitor profession and the Scottish Government, which ensures impartial decision making on complaints of professional misconduct. The provisions of the 1980 Act provide the Society's Council with the power to make rules as to professional practice, conduct and discipline⁹ and the Council has the power to refer a complaint of misconduct to the SSdT, whose powers can also be found in the 1980 Act.¹⁰ We believe that, in the determination of complaints, there is room for improvements to the current process to enhance efficiency and transparency.

⁹ Section 34 Solicitors (Scotland) Act 1980

¹⁰ Section 53 Solicitors (Scotland) Act 1980

The Solicitors (Scotland) Act 1980

30. As referred to above, the Solicitors (Scotland) Act 1980 underpins and is central to the regulation of the solicitors' profession in Scotland. It is a consolidation Act, which brought together a number of pieces of legislation dating back to 1949. The 1980 Act itself has been subject to amendments introduced by various pieces of legislation in 1990, 2003, 2007 and 2010.

31. Below, we have provided a brief overview of the six parts which the 1980 Act is comprised of and have included some examples to demonstrate existing and emerging weaknesses which we have identified.

Part I: Organisation

32. Part I establishes and sets out the role and objectives of the Law Society of Scotland and sets out the remit of the Society's Council including the power to delegate its functions to committees, sub-committees and the Society's Executive.

33. The provisions allow for the Council to delegate its regulatory functions. However, a number of the provisions are contradictory and ambiguous, requiring wide interpretation to ensure workability.

Part II: The rights to practise as a solicitor

34. Part II of the 1980 Act sets out the requirements to practise as a solicitor in Scotland. The provisions require that a solicitor must have, in force; a practising certificate issued by the Society and is on the Roll of Solicitors as maintained by the Society. Part II expands on this further, setting out training and education requirements, rights of solicitors, restrictions on practising certificates and offences relating to unqualified persons acting as solicitors. Many of the current provisions of Part II are out of touch with modern legal practice, contain ambiguities and do not allow for effective sanctions for breaches. To set out a few brief examples:

- i. The Society Council may suspend a solicitor's practising certificate on the occurrence of one of a number of instances which relates to fitness to practice¹¹. However, these events do not include where a solicitor is subject to disqualification as a company director or subject to a debt repayment programme, both of which may raise concerns as to fitness. Also, there are currently no powers to suspend a solicitor's practising certificate where that solicitor has failed to pay the levy to the SLCC or has failed to pay compensation to clients awarded under the 2007 Act and ordered to do so by the SLCC.
- ii. Where an unqualified person holds themselves out to be a solicitor or notary public, he or she commits a criminal offence. However, there may be insufficient evidence for a successful prosecution to be brought. The Society may apply for an interdict, however this may take time. It would be beneficial to the protection of consumers for additional civil powers to be available to the Society to prevent persons holding themselves out as solicitors, such as the power to issue 'stop notices'
- iii. The legal areas which are reserved to solicitors¹² are very narrow and open to interpretation. Crucially the giving of legal advice in important consumer areas, such as employment, contracts, pensions, criminal litigation is not reserved under the 1980 Act.
- iv. The Society, as an innovative regulatory body, has moved to issuing practising certificates electronically. However the wording in the provision of the 1980 Act prevents post-dated practising certificates being issued, which is incompatible with electronic delivery of the certificates.
- v. Many of the provisions¹³ contained within Part II contains terminology inconsistent with later legislation, in particular the 2007 and 2010 Acts. This causes uncertainty and confusion and can make regulatory enforcement problematic.

¹¹ Section 18 Solicitors (Scotland) Act 1980

¹² Section 32 Solicitors (Scotland) Act 1980

¹³ There are approximately 10 sections within part II with inconsistent terminology.

Part III: Professional practice, conduct and discipline of solicitors

35. Part III sets out the powers of the Council in relation to the making of rules for the regulation of solicitors, including the keeping of client accounts and powers where a solicitor fails to adhere to these. Part III also provides powers to the Council relating to unsatisfactory professional conduct, powers of investigation and the provision of the Guarantee Fund.
36. There are a number of provisions in Part III which are inconsistent with regulatory rules and regulations, in addition many of the powers provided to Council are unduly restrictive and impede on the effective regulation of the solicitor profession. For example:
- i. Provisions require the submission of an accounts certificate to demonstrate compliance with the Account Rules. However, the Account Rules allow solicitors to self-certify and it's not necessary to obtain an accountant's certificate.
 - ii. Where a solicitor has his or her practising certificate suspended or removed for a failure to adhere to the Accounts Rules, there is no requirement to rectify the breach before the practising certificate is reinstated.
 - iii. A number of provisions, which relate to the suspension / removal of a practising certificate, are inconsistent with one another. Some provide for the right to appeal, others do not.
 - iv. The Council is provided with the power to apply for appointment of the Judicial Factor following an investigation of a firm. However, there is no power to apply for appointment following concerns uncovered during a routine inspection by the Society.
 - v. A number of provisions, with the policy intent of protecting client funds, allow the Council to freeze firm's accounts where a sole practitioner is struck off or becomes ill. However, there is no power to allow Council to actually deal with the client accounts. This is also inconsistent with other provisions of Part III.

- vi. The Council has no power to prevent a solicitor who has had his or her practising certificate suspended being employed by a legal firm in an alternative role (i.e. legal adviser), and still directly advising and representing clients

Part IV: Complaints and disciplinary proceedings

37. Part IV sets out the powers of the SSDT and the powers the Council has to make a complaint to the SSDT and the provision of the appeal process relating to its decisions. The powers given to the SSDT and the Council often lack consistency and are ambiguous. For example:

- i. Where the SLCC refers an Incorporated Practice to the Council for a conduct issue, the Council does not have the power to refer that Incorporated Practice to the SSDT.
- ii. A number of other provisions give the SSDT the power to refer Incorporated Practices back to Council, but the Council is not provided with comparative powers to deal with Incorporated Practices.
- iii. Where conduct falls short of that required for misconduct, the SSDT does not have the powers to make a finding of unsatisfactory professional conduct.
- iv. The SSDT cannot delegate any of its functions to a sub-tribunal, convener or vice convener, which may be required for procedural matters.
- v. The powers of the SSDT do not include powers to order that the solicitor in question undergo further education or training in identified areas before applying for a practising certificate.
- vi. There are no rights of appeal given to the Council against the findings of the SSDT of unprofessional conduct.

Part V: Notaries public

38. Part V provides that only those admitted as Scottish solicitors may be enrolled as a notary public in Scotland and provides that if a solicitor is struck off the roll, his

or her name will be removed from the register of notary publics. Part V also provides for the right of solicitors and Incorporated Practices to enter into multi-national practices with Registered Foreign Lawyers.

39. In relation to multi-national practices, there is inconsistency between the provisions in relation to the Council's powers and the rights of Registered Foreign Lawyers.

Part VI: Miscellaneous and general

40. Part VI contains provisions relating to solicitor's fees paid by clients for legal services provided, charges for expenses, penalties for committing any offence within the Act and provision relating to the advisory and supervisory functions of the Competition and Markets Authority. Part VI contains sections 61-76, none of which we believe raise concerns at this time.

Schedules 1 - 6

41. The main provisions of the 1980 Act are supplemented and supported by six schedules. Within the schedules there are provisions relating to the Society's constitution and proceedings, the Roll of Solicitors and the Council's powers in relation to the Roll. There are also powers concerning the Guarantee Fund and the constitution, procedure and powers of the SSDT. There are a number of issues within the provisions contained within the schedules, for example:

- i. The Society is an authorised body for licensing and monitoring of incidental financial business. This requires allocation of resources. However, the Society does not have the power to charge fees to recover costs associated with this or other statutory functions.
- ii. The Council has the power to investigate a firm where concerns are raised, however if a solicitor delays or refuses to deliver documents necessary as part of the investigation, the Council needs to apply to the Courts to compel production. This is time consuming and prevents the Council from acting swiftly to protect consumers in any investigation.

- iii. The Council is required to 'write' to a solicitor to enquire if he or she wishes to remain on the Roll. Although it is not prevented, there is no express provision allowing for electronic communications, such as e-mail. However a 'paper' copy still has to be sent, which is both costly and time consuming.
- iv. Schedule 3 includes provisions relating to the Scottish Solicitors Guarantee Fund. The provisions are restrictive and provide limited powers in administering the fund itself.

42. As can be noted from the examples set out, there are significant gaps within the current outdated legislative framework, which we believe need addressing to ensure coherence, flexibility and more effective and consistent regulation, which would ultimately enhance consumer protection.

Protecting the Scottish and UK consumer in an ever changing market

43. As the law continues to evolve, the introduction of legal reforms and with the rapidly changing nature of the legal services market, it is paramount that consumers can be confident and assured that the representation and advice they are receiving comes from a qualified person, competent to provide a reliable legal service which is properly regulated, and that they are protected with a clear path to prompt and accessible redress.

44. Unfortunately, the provisions of the 1980 Act and the regulatory framework intended to afford Scottish and UK consumers with full and adequate protection and assurance, have failed to keep up with, and do not reflect, the current legal landscape, the market and the way those legal services are delivered.

Unregulated legal sector

45. *'Buying legal advice is to some extent a lottery for consumers who are understandably confused about whether the people providing it are up to standard'*¹⁴ Elizabeth France, Chair of the Office for Legal Complaints (England and Wales). Although Elizabeth France was referring to the unregulated legal sector in England and Wales, the same observation could be said to apply to Scotland.

46. We have seen a significant increase in the number of business structures providing legal services to businesses and consumers in Scotland, and the rest of the UK, over recent years, and have heard concerns from our members and the public in regards to these. Many of those businesses use the term 'legal' or 'law' in their business title to give credibility. This promotes the misconception that the business is a regulated law firm. Gaps within the 1980 Act¹⁵ mean that the business is not required to be regulated to provide advice and services in relation to unreserved areas. The provisions of the Act relating to regulated firms are ambiguous and businesses are finding effective ways of circumventing the

¹⁴ http://www.legalombudsman.org.uk/downloads/documents/press_releases/0813-Unregulated-legal-advice.pdf

¹⁵ In particular the provision of section 26, 31, 32 are ambiguous and inconsistent and allow businesses to set up providing legal services and employing solicitors without the need for regulation or indemnity insurance.

legislation. Although, to the best of our knowledge, no recent research exists on the prominence of unregulated legal services in Scotland, in England and Wales, 20-30% of legal services are provided by the unregulated legal sector.

47. The 'unregulated legal sector' is not defined within legislation. It is a default term referring to those legal service providers who provide advice and representation on any area of law which is not reserved to solicitors or other regulated legal professionals, such as copyright attorneys, licenced conveyancers, and who are therefore not part of the regulated sector. As is clearly implicit in its name, there are no regulators in the unregulated sector. Consumers purchasing legal services in the unregulated sector leave themselves seriously exposed if the advice turns out to be incorrect or something goes wrong.
48. A firm or solicitor regulated by the Society offers all consumers the benefit of protection through the Society's Guarantee Fund and Indemnity Policy. An unregulated business cannot offer consumers the same level of protection which may leave the consumer exposed to increased financial hardship, compounded legal problems and associated stress levels.
49. The 1980 Act states those limited areas of legal work which are reserved to solicitors, and will therefore be regulated.¹⁶ This includes the preparation of writs relating to court actions or to moveable or heritable estate. However the provision of legal advice in many areas of law does not fall within reserved legal work. We believe, and are concerned, that the majority of consumers may not realise that only a small proportion of legal services must be undertaken by a qualified and regulated solicitor. Many other 'legal' matters such as will writing, employment law, divorce, consumer matters, personal injury, family law and immigration can be handled by unregulated firms and by persons who may be unqualified to provide that advice. We are already seeing an increase in prominence of diverse business models within the Scottish legal sector. Although Alternative Business Structures (ABS) have been permitted for some time, the limited nature of the Legal Services (Scotland) Act 2010 means that no

¹⁶ Section 32 Solicitor (Scotland) Act 1980

businesses have taken advantage of this development as there are currently no ABS regulators in Scotland (further discussion below on ABS).

50. In some instances businesses are employing solicitors to provide advice to clients directly, but the firms themselves remain unregulated. This is due to their business model, promoting, advertising and holding themselves out as 'consultants' i.e. employment law consultants, and employing solicitors as in-house lawyers who, in reality, advise and represent the business' clients directly. Although the legal adviser may be a solicitor, as the firm itself is unregulated, then the consumer will not have the benefit of protection from the Society's Guarantee Fund or Indemnity Policy.

51. There is a very strong case, from a consumer protection perspective, for the regulation of the legal services market to be rationalised so that all those offering and providing any legal advice or services are regulated. This would ensure that all consumers enjoy and have the benefit of consistent and assured protection, as is currently afforded to all those seeking advice and representation from a regulated firm.

Guarantee Fund

52. The solicitor's Guarantee Fund has been in existence for over 60 years. Expressly for the protection of consumers, it is enshrined in section 43 of the 1980 Act. The fund is resourced entirely by the Scottish solicitor profession, with no contribution from taxpayers or the public purse. The Fund makes awards to consumers who have suffered a monetary loss through an act of dishonesty by a Scottish solicitor regulated by the Society. The maximum claim value is limited to £1.25 million.

53. The provisions of the 1980 Act are restrictive as to the powers to make an award to consumers who have suffered a monetary loss. Although there are powers to allow the Society Council to make a grant, there are no powers to make loans to the Judicial Factor so that urgent matters can be settled in the short term. It is paramount that consumers, who may have lost money through no fault of their own, are not further burdened by unnecessary delays.

54. There is also currently no limit on the number on claims that can be made by a single claimant on the same solicitor. This poses the potential risk of the fund being exhausted by an institutional or corporate claimant, for example a lender, to the possible detriment of other claimants, such as the individual consumer. Likewise there is currently no value limit on claims against one solicitor by multiple claimants; again this poses the risk of exhausting the Guarantee Fund.
55. To ensure that the Guarantee Fund continues to be fit for purpose and reflective of the policy intent behind its creation, it will be necessary to fully review the current provisions of the 1980 Act to ensure that the fund continues to operate in the public's interest and protect consumers.
56. In early 2015, in his review relating to consumer protection in conveyancing, Sheriff Principal Edward Bowen recommended that the: '*... manner of operation of the Guarantee Fund should be examined with a view to providing more discretionary powers to those charged with its operation.*'¹⁷
57. We recently consulted with our membership on changes to the Guarantee Fund. We are currently analysing the results to the consultation exercise and we intend publishing these in due course.

Practising certificates

58. For a Scottish solicitor to practise, he or she must hold a current practising certificate.¹⁸ Where a sole practitioner is 'struck off' or has his or her practising certificate suspended, the power to deal with that solicitor's clients' accounts vests in the Society Council.¹⁹ The practising certificate demonstrates that the solicitor is of good standing, has the necessary indemnity insurance and is fully qualified and competent to practise.
59. However, there are a number of provisions throughout the 1980 Act which dilute the reflected intent of the practising certificate. For example, there are limited powers to remove the practising certificate of a solicitor where an event has

¹⁷ <http://www.lawscot.org.uk/media/439009/Law-Society-report-Consumer-Protections-in-Conveyancing-Cases.pdf>

¹⁸ Section 4 Solicitors (Scotland) Act 1980

¹⁹ Section 45 Solicitors (Scotland) Act 1980

occurred which may call into question his or her fitness to practise, for example where a practising solicitor has been sentenced to imprisonment for an offence, other than dishonesty, the Council may only suspend that solicitor if the term of imprisonment is 12 months or more. Therefore the situation may arise of a solicitor being sentenced for an offence other than dishonesty for less than 12 months and he or she may continue to hold a practising certificate.

60. In addition, there are instances where all partners in a firm may have their practising certificates suspended or withdrawn. In those instances, the 1980 Act does not provide the Society with the power to deal with the firm's client accounts.

61. The powers contained within the 1980 Act require to be extended to provide greater discretion to the Council to restrict, suspend or revoke a solicitor's practising certificate in certain circumstances, enhancing consumer protection.

Taxation

62. Taxation is the independent review of fees charged by a solicitor to the client to determine if those fees are fair and not overly excessive. Currently there is no primary legislation allowing for the right to have excessive fees subject to determination by taxation. Where an application is submitted for taxation, this can only be conducted by the Auditor of the Court of Session. As well as being very time consuming, this can prove prohibitively expensive. If the submitted fee account is determined to be fair and not excessive, then the applicant is liable for all costs incurred. This may act as a deterrent for consumers in applying for taxation. We would suggest that a simpler, quicker and more accessible system would provide a more efficient process for consumers to have disputed costs considered and determined.

Regulation that is relevant to the modern legal profession

Cross-border, Alternative Business Structures and international firms

63. With the changes in the economic and social landscape and cross border developments, between Scotland and England and Wales, there is now a complex and fragmented landscape of cross-border legal services. In England and Wales, some 500 businesses have been licenced as Alternative Business Structures (ABS)²⁰ to provide legal services. Many of these are now active in Scotland.

64. In Scotland, the Legal Services (Scotland) Act 2010 provides for ABS, which allows solicitors to provide legal services via a range of different business models; such as allowing non-solicitor partners, working in partnership with other professionals (multi-disciplinary practices (MDPs)), and external ownership. Currently there are no approved regulators in Scotland to licence Scottish ABSs, as required under the 2010 Act. We have been in discussions with the Scottish Government in relation to the 2010 Act, and the desire of the Society to be an ABS regulator. We have highlighted those parts of the Act which we believe need further consideration and what will work best for consumers.

65. There are also an increasing number of international law firms, whose offices spread across the UK and beyond, and we now have 32 global law firms operating in Scotland. Over recent years there have been a number of high level mergers between Scottish and English law firms.²¹ Under the current regulatory framework, the Society is restricted from regulating Scottish solicitors and firms outside of Scotland.

66. The continuing growth in globalisation presents many opportunities for the Scottish legal sector, particularly in those sectors where the profession is world renowned as leaders, such as oil and gas.

²⁰ Approximately 500 ABS providers have been licenced in England and Wales under the Legal Services Act 2007.

²¹ Such as Dundas and Wilson with CMS and Simpson & Marwick with Clyde & Co.

67. We believe that the regulatory framework should allow for the flexibility for the Society to regulate cross-border firms, not just Scottish firms, but all firms operating across the UK, supporting those firms to expand into developing markets globally.

Entity regulation

68. We believe that to enhance consumer protection there needs to be better targeted regulation of entities than that currently provided in the 1980 Act.

69. Under the current legal framework for the regulation of the legal profession in Scotland, the emphasis is on regulating the individual solicitor. The current powers to regulate entities, under the 1980 Act, are mainly restricted to financial inspections and the requirement for firms to have professional indemnity in place. Over the years there have been a number of amendments which have introduced further limited powers which, for example, allow for rules on professional practice and conduct and discipline to be made in relation to Incorporated Practices and Limited Liability Partnerships.

70. Whilst there has been a limited degree in the extension of regulation to these business models in recent years, the traditional model of partnership firms remains, to a large extent, unregulated as an entity. This could be best described as a patchwork of regulation, resulting in a structural weakness in the regulatory framework.

71. The policy intent of regulating individual solicitors was, in 1980, appropriate for that time and was based on the traditional model for the delivery of traditional high street legal services. However, with the development of different business models, the increased number of solicitors working in-house, the creation of larger law firms through mergers, the increased internationalisation of legal services, the changes in the expectations and demands of consumers and the way legal services can now be delivered through the use of technology, we believe that a regulatory framework based on the regulation of both individual lawyers and entities (hybrid regulation) would be a better fit for modern legal services and would provide greater safeguards for the Scottish consumer. Entity

regulation is emerging as the preferred model across the world as jurisdictions recognise and adapt to the changes in legal services.²²

72. The Society recently consulted with members and stakeholders on entity regulation.²³ We are currently analysing the results and we will be publishing these in due course. However, in their response to the consultation, the Council of Mortgage Lenders commented that '*We believe that an extension of regulation to both entities and individuals would be a natural progression and would be in keeping with what has happened in other jurisdictions and other professions*'.²⁴ The principle and consideration of entity regulation is also one supported by, in their response to the consultation, the SLCC which recognises that entity regulation could deliver benefits to the consumer.²⁵

73. We believe that entity regulation, the principle of which is supported by the Society's Council, would bring many advantages over the current system of regulation. For example, it would:

- i. allow for more appropriate and effective targeting of sanctions against the entity where it may be difficult to identify an individual solicitor,
- ii. afford better protection to the consumer, as in the majority of instances the client contracts with the entity and not the individual advising solicitor. Also in many instances the legal work is completed by support staff, such as paralegals,
- iii. bring increased certainty for business. With the changing nature of business structures, it is becoming increasingly difficult for entities to navigate the current regulatory framework. Entity regulation will bring transparency and certainty,
- iv. provide a level playing field with all entities having to meet the same high standards.

²² Legal Services Act 2007 provides the SRA with powers for entity regulation in England and Wales.

²³ <http://www.lawscot.org.uk/media/555161/Regulation-consultation-Entity-2015.pdf>

²⁴ <http://www.cml.org.uk/documents/response-to-regulation-in-21st-century-entity-regulation-second/>

²⁵ <http://www.scottishlegalcomplaints.org.uk/resources/consultation-responses/law-society-of-scotland-consultation-on-entity-regulation-and-charging.aspx>

- v. encourage the systemisation of ethical conduct and appropriate management systems. Entities could be encouraged to develop management, supervision and quality control systems and
- vi. provide greater opportunities to the Society to promote and support continuing professional development, new career pathways into the legal profession and to promote equal opportunities and diversity by understanding and identifying the needs of members.

An inclusive professional body, open to non-solicitor members

74. We want to be an inclusive professional membership body supporting the needs and requirements of, not just Scottish solicitors but, all solicitors and non-solicitors working within the Scottish legal sector. It is our view that the Society should become a Scottish legal community, opening up the services and support which we currently offer to our Scottish solicitor and Registered Foreign Lawyer members. Our five year strategy, as referred to in the introduction, includes a commitment to grow our membership and provide a value proposition for those non-solicitors working in the legal sector.

Registered Paralegal Scheme

75. There are ways and means at present for the Society to expand its services and support to non-members. In 2011 the Society established the Registered Paralegal Scheme, a voluntary scheme which Paralegals may join, subject to certain minimum requirements. The Registered Paralegal Scheme provides a defined professional status and a career path for paralegals which recognises the important role they play in the Scottish legal sector. Membership of the Scheme requires that the paralegal has undergone certain training requirements, has demonstrated minimum competency standards (verified by a supervising solicitor) and commits to ten hours of continued professional development training each year. Those who are members of the Registered Paralegal Scheme are also subject to professional conduct requirements and a complaints process. The scheme has been successful and there are currently 373 paralegals registered.

76. Paralegals have an important and central role within the legal profession. Where a consumer is receiving a legal service from a member of the Registered Paralegal Scheme, they can be assured that he or she is a dedicated professional, competent and trained to the highest of standards and subject to a strict code of practice. The Registered Paralegal Scheme helps to raise standards to the advantage of the consumer offering greater consumer protection in the unlikely event that something should go wrong.

77. We believe that full membership of the Society is a quality mark of professionalism; therefore we would like to open up membership of the Society to welcome other groups who work within the legal sector. We further believe that the Registered Paralegal Scheme demonstrates that the Society can continue to represent and regulate Scottish solicitors whilst also offering other groups structured guidance and support as well as regulating and representation.

Affiliate, associate and student membership

78. The groups which we believe may benefit from such membership may include, legal advisers, researches, legal executives, legal analysts, law librarians, legal secretaries and legal academics. We believe that by opening up different categories of membership to non-solicitors we can maintain and increase the standards in the legal sector by providing training, professional guidance, support, and career development opportunities.

79. We believe that non-solicitors will be attracted to affiliated membership because of the commitment it demonstrates to high professional standards which will set them apart from others and the benefit of the range of services which he or she will be offered by the Society. As well as bringing tangible benefits to non-solicitor members, this will provide consumers with the assurance that they are dealing with a legal professional who is trained, and committed to, delivering the highest standard of legal service. In addition we would also like to introduce student membership to help, guide and support all those students at the outset who are studying for a career in the legal profession and also legal academics and retired solicitors.

80. We are currently considering the different categories of membership which we could offer and which would best suit the needs of prospective non-solicitor members. In addition to student membership, these may include affiliated and associate memberships.

81. To allow us to develop other membership options and to open our doors to other professionals within the legal sector, we would require a new regulatory framework to allow for this. The 1980 Act only covers Scottish solicitor

membership and Registered Foreign Lawyers. In setting up the Registered Paralegal Scheme, the Society was required to secure the intellectual property rights to the title 'Registered Paralegal'. Without express provisions allowing for non-solicitor members, we would be required to create separate IP rights for all the different level of memberships we are considering.

82. We believe that by opening up and developing membership options we can further develop and maintain quality standards in the delivery of legal services, providing consumers with enhanced assurance and protection.

A proactive, effective and responsive professional body

83. In the rapidly and constantly changing nature of the legal services market it is imperative that we, as a regulator of the solicitor profession, have the flexibility to respond quickly and effectively to changes. Being able to proactively adapt at a quick pace is important in any consumer risk based profession, particularly one which can have serious consequences for consumers. The ability to respond swiftly is necessary to ensure that consumers are protected from the changes in the deliverance of legal services and the development of new risks. The existing regulatory framework does not allow the Society to react rapidly; it does not provide administrative flexibility, which other organisations, for example the Scottish Legal Aid Board and the SLCC currently enjoy through a legislative framework approach underpinned by regulations.

Efficiency & technology

84. None of the provisions within the 1980 Act take into account the development of technology and the advancement of electronic communications. For example, the 1980 Act provides that the Society Council should maintain a register of solicitors and provide access to that for inspection purposes. However, there is no express power to provide an electronic copy, which would be more easily accessible to those wishing to inspect.²⁶ The 1980 Act contains a number of similar examples which require information in writing and hard copy of records to be maintained.

85. In this age of rapid technological advancement and increased communications and delivery of legal services over the internet, it's important that we, as a regulator, have the powers to engage with the profession, stakeholders and consumers in the most appropriate, convenient and speedy manner. From a transparency perspective, public records, for example the Roll of Solicitors, need to be accessible to all those who wish to inspect it, regardless of global location. It is also vitally important that we have the ability to support the profession in the growth of on-line services, which helps to ensure all consumers, regardless of their location, have access to a reliable and regulated legal service provider.

²⁶ If requested, the Register must be provided for examination, and can only be examined on the Society's premises.

Society 'Smartcards'

86. We have recently introduced Smartcards to take advantage of technological advances. The Society's Smartcard stores the member's information on a microchip. All solicitors holding a practising certificate issued by the Society will hold a Smartcard. We began rolling out Smartcards to all our members, who are entitled to practise, in September 2014. The rollout is expected to be completed in 2016.

87. The Smartcard provides a number of benefits and functions, it provides:-

- i. A new photographic ID for practising solicitors – allowing secure access to courts and prisons and helping reassure the public they are consulting a trusted adviser.
- ii. An electronic ID - allowing real-time confirmation of credentials, which will evolve across a range of new and planned services throughout the justice system in Scotland and Europe, as the Smartcard is also Council of Bars and Law Societies of Europe (CCBE) compliant.
- iii. A secure digital signature - allowing practising solicitors to sign documents and contracts entirely electronically and to receive signatures from others knowing they come from a trusted professional system. The Smartcard will provide Scottish solicitors with a qualified secure digital signature, the EU digital signature with the highest form of security and 'self-proving' in Scotland.
- iv. Smartcards support the Scottish Government's digital strategy initiative and the amendments to the Requirements of Writing (Scotland) Act 1995 and recently introduced Legal Writings (Counterparts and Delivery) (Scotland) Act 2015, allow for the electronic exchange of contracts with digital signatures.

88. The Society intends to treat the Smartcard as evidence of entitlement to practise and essentially replace the practising certificate with the Smartcard. Sections 13 to 24 of the 1980 Act envisage a regime in which the practising certificate is a hard copy in paper form. In terms of section 13 "*The Council may make rules with*

respect to the issue of practising certificates" and accordingly may make rules making the Smartcard a practising certificate but it would be helpful to modernise the sections however so that they referred to register of those entitled to practise (rather than a register of applications) and moved away from the implied paper-based system.

89. For the Society to move forward with the Smartcard initiative, and take full advantage of the technological, commercial and international benefits, the regulatory framework, for clarity and certainty, needs to expressly make provision for an e-practising certificate (in its current iteration Smartcards but avoiding limiting the methodology to specifically Smartcards which may themselves be overtaken by new technologies).

Charging for services

90. The power of the Council is limited in relation to charging. Schedule 1 provides that the Council has the power to impose fees to cover expenses. This is administered as the 'practising certificate fee'. Other provisions within the 1980 Act also allow for limited fees to be charged. For example, section 37 allows the Society to charge a fee for administering the accounts regime. However there are no powers which allow the Council to charge fees for other services provided which may be incidental but necessary. For example, the Society is under a statutory duty to licence and monitor those undertaking incidental financial business. However, there are no powers to allow costs to be recovered in performance of that statutory duty and the Society is not permitted to charge fees to those firms licenced by the Society to undertake incidental financial business.
91. Increased powers to charge would allow a more equitable approach to be taken in relation to the charging structure. For example, if the entity was to be charged, the fee could reflect the turnover and size of the business. It would also allow for increased resources to be applied, and for costs to be recovered, in the performance of regulatory functions and duties. In addition, the 'practising certificate fee' is levied in advance and although this is based on the planned budget, there is no guarantee that the fees will match the eventual budget.

Governance

92. The existing framework restricts freedom of movements to develop and improve the law, rules, regulations and processes which could enhance delivery of our services to members and the public. Changes to the law regulating Scottish solicitors require, in most cases, primary legislation. This limits the Society's responsiveness to changing circumstances. What is required is the flexibility for making changes through subordinate, secondary legislation providing the agility we need. Many of our processes, rules and regulations require the approval of our members and the Lord President. The effect of this is that the Society reacts more slowly to risks that have been identified and is less agile as a regulator of the solicitor profession. For example, the 1980 Act provides that the Council must obtain the approval of the Lord President in making regulations for training as a solicitor.²⁷ Also the Council may not make any rule relating to professional practice, conduct and discipline without the Lord President's approval.²⁸

93. Currently the Society is required to seek the Lord President's approval for all changes, however small and procedural. For example consequential changes, updating practice rules to reflect amended statutory provisions.

94. The necessity of seeking approval, for even the most minor changes, may prevent the Society from responding quickly and effectively to threats which may undermine the regulatory aspects of the legislative framework and impact on consumer protection. We believe that removing the need for approval for some of the more process and procedural related matters and minor consequential changes will allow for a more responsive approach being taken to rules, regulation and practise ensuring that they can evolve at the same pace as the profession.

²⁷ Section 5 Solicitors (Scotland) Act 1980

²⁸ Section 34(3) Solicitors (Scotland) Act 1980

Contribution of legal services to the Scottish economy

95. The Scottish legal services market contributes significantly to the economy of Scotland. In Scotland there is approximately 1,200 legal firms' directly providing employment to some 24,000 people. The Scottish Annual Business Statistics show that the legal sector contributed £1.4 billion to the Scottish economy with the trend rising over the previous six years, from £1.2 billion in 2008.²⁹ In addition the Scottish legal profession is a vital part of the framework which helps other services to grow and businesses to develop. In particular those services which are necessary to the infrastructure of a strong successful economy, such as the financial services and banking sector and those sectors which Scotland is particularly strong in, such as oil and gas. As already stated, the changing face of legal services has seen the growth in multi-national firms taking advantage of the globalisation of legal services.

96. It is vitally important that the legislative framework can be adapted to keep up with the continued economic growth of the legal market and that business and consumers can be assured that an increase in the quantity of legal services will not dilute the quality of them. The Scottish legal profession must continue to play an influential and prominent place in the global legal services market.

Conclusion

97. We believe and suggest that the most appropriate way to ensure a responsive, agile and transparent legislative framework would be through enabling legislation, a parent Act, providing the flexibility through subordinate legislation to react quickly to future changes in the legal market place and which could be amended swiftly to ensure continued and strengthened consumer protection.

98. We believe that legislative improvements should comprise of:

- i. general reforms to the existing structure of the 1980 Act and related legislation;
- ii. an extension of the scope of regulation to cover entities;

²⁹ <http://www.gov.scot/Resource/0048/00484162.pdf>

- iii. changes to the scope of the services to be regulated;
- iv. powers to make fees and charges relating to regulation;
- v. provisions and powers to deal with structural changes designed to put firms' activities outside regulation
- vi. provisions to allow for the advancement in technology
- vii. the scope to increase membership through the regulation of other professions within the legal sector.
- viii. changes to ensure consistency and clarity across the 1980 Act and other related legislation, and
- ix. changes to allow for the streamlining of processes and regulatory activities.

99. We believe that together, this package of regulatory improvements, focused on protections which are essential to consumers, will provide a framework which will allow for a strong, well regulated Scottish legal sector, which is able to adapt quickly to changes in the market and consumer demands. We believe it will support growth and innovation in legal services, and it will support and help the Society move forward with our five year strategy.

100. We are confident that a modernisation of the legislative framework will attract wide support across the political spectrum in Scotland, including support from key stakeholders and consumer groups, with whom we shall be engaging in due course.

101. A review of the legislative framework would provide a significant opportunity for all those organisations within the Scottish legal sector and the Scottish Government to come together in a strategic discussion of modernisation and reform focused on strengthening the interests and protections of Scottish and UK businesses and consumers.

