



Law Society
of Scotland

Regulation Paper

The Case for Change: Revisited

January 2018



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Introduction

1. As the professional membership body for Scottish solicitors, the Law Society of Scotland has a statutory duty¹ to act in the public interest. We know a successful Scottish legal profession is built on the reputation of those delivering legal services alongside the confidence and trust which consumers have in that profession. Solicitors and other providers of legal services are often assisting highly vulnerable clients or people facing great distress and difficulty in their lives. That is why it is so important to maintain a proportionate and effective system of regulation.
2. The Law Society has a near 70-year track record of setting high standards for Scottish solicitors and proactively ensuring those standards are met through a robust route to qualification, continuing professional development and specialist accreditation. By doing this, we know the Scottish solicitor qualification is recognised and respected around the world. Equally, we know the vital importance of maintaining a system of public protections and consumer redress for whenever our standards are breached or when clients do not get the service they deserve.
3. It was because of our commitment to the public interest that we argued for a review of the regulation of legal services in 2015. We were delighted when the Scottish Government established the independent review. We recognise this important opportunity to deliver a regulatory system that is fit for purpose, addresses the challenges of modern legal practice and works more effectively for those who depend on it, solicitors and consumers.
4. In December 2015, we submitted our paper, *The Case for Change*, to the Scottish Government.² The purpose of the paper was to inform the 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. We set out our desire for the introduction of a new effective and permissible legislative framework which will allow for the proactive and effective regulation of the legal services market and legal profession with a central focus on consumer protection. In our reasoning, we briefly touched upon some of the many reasons why we believe the current framework is outdated, in drastic need of modernisation and no longer fit for purpose.

¹ See section 1 Solicitors (Scotland) Act 1980

² <https://www.lawscot.org.uk/media/10152/the-solicitors-scotland-act-1980-the-case-for-change-regulation-pa.pdf>

We believe that the legal services review offers a real opportunity to develop a consensus on what reforms are required and how they can be effectively delivered. Since April 2017, we have assisted the review by providing information relating to the solicitor profession in Scotland and on our role in the regulation and professional support of that profession.

5. This paper is intended to expand on some of the themes touched upon in our 2015 paper, developing our case for the modernisation of legal services regulation in Scotland. As with our previous paper, we hope that this paper will stimulate and promote engagement and discussion and will be of assistance to all stakeholders currently looking at, and involved in, the review of the Scottish legal services market.

Executive summary and recommendations

6. The independent review of legal services in Scotland presents a critical opportunity to build a consensus around a new regulatory framework that is fit for purpose, protects consumer interests, supports a thriving legal profession and properly addresses the rapidly changing way in which legal services are provided.
7. We believe the benefits of effective and proportionate regulation are considerable. Through setting a robust route to qualification, fit and proper testing and strict rules of conduct, we can ensure those providing legal services to clients, often in difficult and stressful circumstances, deliver a high standard of service. Effective regulation also ensures there is proper consumer redress, appropriate compensation and measures to enforce professional discipline for those few instances when things go wrong.
8. **A new flexible and permissible regulatory framework:** The present legal framework surrounding the Scottish legal profession is a patchwork of inconsistent and increasingly outdated legislation. The changes made over the last 40 years have created a jigsaw framework that is no longer working as effectively as it could, either for the profession or for consumers. We have identified 50 sections of the 1980 Solicitors (Scotland) Act which are problematic and not fit for purpose. Widespread concerns with the complaints process demonstrate inherent problems with the 2007 Legal Profession and Legal Aid (Scotland) Act. The most recent piece of legislation, the Legal Services (Scotland) Act 2010 is effectively unworkable, delaying the introduction of alternative business structures and the intended increased competition in legal services as a result. We do not believe these problems can be properly addressed through amendments to current legislation. This is why we recommend:

A. The repeal of the Solicitors (Scotland) Act 1980 and those parts of the Legal Profession and Legal Aid (Scotland) Act 2007 which relate to the regulation of legal services, and the introduction of new enabling and permissible legislation for the regulation of legal services in Scotland and the Scottish solicitor profession, with the flexibility to move with the times and which allows for proactive regulation to ensure consumer protections remain robust.

B. Amending those sections of the Legal Services (Scotland) Act 2010 which relate to the regulation of legal services and the Scottish solicitor profession to address the difficulties in interpretation and application.

9. **Multi-national practice:** More and more legal services are being provided by firms operating both in Scotland, and also in England and Wales and other jurisdictions. However, the current legislation does not adequately empower us to regulate legal businesses in respect of their operations beyond

Scotland. This means Scottish businesses have to submit to dual regulation, even if only operating within the UK. This increases compliance costs for the business and reduces competitiveness (and transparency) for consumers. We believe there is a strong economic case for Scotland and the Law Society being given the permissible power to seek to become a regulator of legal services beyond Scotland. Providing a single regulatory model for cross-border firms could, over time, position Scotland as a more attractive jurisdiction in which to locate and base a firm's operations. This is why we recommend:

C. A new regulatory framework allowing for the flexibility for the Society to seek approval from the Legal Services Board to be an authorised regulator for those multi-national practices operating in Scotland.

10. **Technology and AI:** Technological evolution and the advancement of artificial intelligence (AI)-driven decision-making systems is becoming a significant and rapidly emerging business model within the legal sector outside the UK. These developments will come to the UK sooner rather than later. However, there are regulatory challenges, ensuring the interests of justice and professional principles are maintained as the automation of legal services through AI increases. That is why we recommend:

D. That any new regulatory framework makes provision for the regulation of legal services provided remotely by artificial intelligence.

11. **A single professional body:** Since 2008, Scotland has had a system of co-regulation of legal services involving the Law Society, the Faculty of Advocates, the Scottish Legal Complaints Commission, the Scottish Solicitors' Discipline Tribunal and others. Although we advocate a modern and flexible regulatory framework, we believe there are essential aspects of the 1980 Act which do work and must be maintained. This includes the fundamental principle of a professional body regulating and providing support for Scottish solicitors independently from government. It is a model which has been consistently acknowledged as the preferred and suitable model for Scotland by both the Scottish Government and Scottish Parliament. It is also a model seen in other professions, including accountancy and teaching, and in other legal jurisdictions around the world. That is why we recommend:

E. Retaining an independent professional body for the regulation and professional support of the Scottish solicitor profession.

F. Retain a separate and independent discipline tribunal for decisions in serious cases of professional misconduct.

12. **The unregulated sector:** The legal sector has evolved significantly in recent years, with new types of innovative business structures emerging. The current regulatory framework has failed to keep up with the current landscape and the widespread delivery of legal services through an increasing unregulated sector. Consumers purchasing services through this sector are seriously exposed if the advice or legal service turns out to be incorrect or if something goes wrong. We believe the unregulated provision of legal services poses a significant risk to consumer protection and confidence. That is why we recommend:

G. That all legal service providers providing services direct to the consumer be regulated, strengthening consumer protections and enhancing consumer confidence in the Scottish legal sector.

13. **Use of the title lawyer:** The term 'solicitor' is a protected title in Scotland and the rest of the UK. It is a criminal offence for any person to pretend, wilfully and falsely, to be a solicitor. There are, however, no such restrictions around the use of the term 'lawyer'. As a result, any person, regardless of qualification, experience or regulation, can legitimately refer to themselves as a 'lawyer'. Even a person with a serious criminal conviction can use this title. Our own research has shown overwhelming public support for restrictions on who can call themselves or advertise themselves as a lawyer. That is why we recommend:

H. That the term 'lawyer' be a protected term, in the same way as solicitor, and only those able to demonstrate recognised legal qualifications, and who are regulated, are permitted to use the term.

14. **Entity regulation:** This is a method of regulating firms or businesses and is increasingly in line with the consumer's perception of legal services regulation. Clients and members of the public often presume and expect that the business providers they are seeking legal services from are regulated, which is not necessarily the case.
15. The current legal framework for the regulation of the legal profession in Scotland places the emphasis on regulating the individual solicitor. The current powers of the Society to regulate entities are mainly restricted to financial inspections and the requirement for firms to have professional indemnity in place. The introduction of the Fourth Money Laundering Directive in June 2017 means all firms will be regulated at entity level to the extent of complying with money laundering legislation.

However, we believe there is the potential for consumer protection to be enhanced through greater entity regulation. That is why we recommend:

I. That primary legislation provides the permissible powers for the Law Society of Scotland to extend entity regulation to those firms wholly owned by solicitors.

16. **A complaints system that works for consumers and the profession:** Both the Law Society and the Scottish Legal Complaints Commission (SLCC) have called for the current legal complaints process to be radically changed. We know the current system is slow, bureaucratic and expensive. It is why we advocate a new process based on our learning from other jurisdictions, whereby:

- The SLCC would continue to handle service complaints and the Society will continue to handle conduct complaints, as is currently the process.
- The single gateway function would be abolished, with either body able to receive complaints, and pass on complaints where appropriate. This arrangement works successfully in England and Wales between the Legal Ombudsman service and the Solicitors Regulation Authority.
- Where the complaint relates to a conduct matter, the complaint will be taken forward in the name of the Law Society. Where the Law Society identifies possible misconduct, it would be able to move to a formal investigation without first seeking approval from the SLCC.
- Hybrid complaints, which existed before the recent decision by the Court of Session³, are reinstated. This would mean compensation could be awarded for the service aspect of complaints, which would be dealt with by the SLCC in its consumer redress role, leaving the Society to carry out its regulatory role in relation to professional discipline.
- Compensation would not be awarded for 'pure' conduct complaints. In reality, most conduct complaints relate to rule breaches which would not generally impact on clients.
- The creation of an independent ombuds who would oversee the SLCC, the Society and Faculty of Advocates. The right to go to the ombuds would arise at various stages of the process, removing the costly need to involve the Court of Session.

³ See Anderson Strathern vs. SLCC (CSIH 71XA16/15) & Law Society of Scotland vs Scottish Legal Complaints Commission [2017] CSIH 36

This is why we recommend:

J. That a new system for dealing with complaints about legal services and solicitors is introduced, recognising the paramount aim to protect consumers whilst allowing the Society to continue to deal with the professional discipline of its members, and adopting relevant processes to make the system speedy, effective and efficient whilst recognising the differences between consumer redress and professional discipline.

17. **Opening up the Law Society:** We want to be an inclusive professional membership body, supporting the needs and requirements of, not just Scottish solicitors but others 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 others, such as paralegals, legal executives, and legal technologists. We are committed to growing our membership and providing a value proposition for those non-solicitors working in the legal sector. 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. That is why we recommend:

K. That primary legislation provides for the permissible power for the Law Society of Scotland to open up membership to non-solicitors.

Benefits of consumers using a regulated Scottish solicitor

18. It is important that consumers are made aware of the range of legal services providers currently operating in the Scottish legal services market and further understand that the level and standard of service they receive is likely to reflect the professional standing of the service provider. At the very least, consumers need to be better informed of the choices available and the risks faced when instructing a non-solicitor legal service provider.
19. We believe that whenever possible consumers use a regulated Scottish solicitor for their legal matters. There are many reasons why consumers should use a regulated Scottish solicitor and many benefits of doing so, as we detail below.
20. **Legally educated and qualified.** Scottish solicitors possess legal qualifications to demonstrate they have been educated to a very high standard in the application of the law and legal practice and rigorously tested in their knowledge. After the formal legal education stage, they will have undergone two years' training under the supervision of an experienced practising solicitor. During the course of their solicitor career, they are required to undergo annual continuing professional development (CPD) to ensure their knowledge remains up to date.
21. **Fit and proper.** Scottish solicitors must possess a practising certificate from the Law Society of Scotland before they can practise and use the title 'solicitor'. The application process for a practising certificate is stringent and robust, with the requirement that the applicant is a 'fit and proper' person to practise within the solicitor profession to ensure the consumer can have confidence in the trustworthiness of those we regulate.
22. **Rules of conduct.** Scottish solicitors are bound by strict rules of conduct to ensure, for example, there are no conflicts of interests with, or between, clients. Also, a client's information must remain strictly confidential – and is protected by legal privilege. Solicitors' firms are also bound by the accounts rules, which relate to the holding of client monies.
23. **Complaints.** If something were to go wrong then there is a defined complaints pathway through the Scottish Legal Complaints Commission (SLCC) to seek redress. If the complaint relates to the service a solicitor has provided then this will be investigated by the SLCC. If the matter is a conduct complaint, this will be referred to the Society. Where a conduct complaint is upheld, there can be heavy sanctions imposed on the solicitor. For serious matters, they can be struck off the roll of

solicitors, and may no longer practise in the solicitor profession. (Complaints are discussed further below.)

24. **Client Protection Fund.** Scottish solicitors are covered by the Client Protection Fund (defined as the Guarantee Fund in the Solicitors (Scotland) Act 1980). This protects clients who have lost money because of the dishonesty of a solicitor or a member of their staff. (See below.)
25. **Master Policy.** All solicitors working in private practice are required to have professional indemnity insurance in place, with most covered by the Society's Master Policy. This is the compulsory professional indemnity insurance arrangement that covers any valid claim against a solicitor for an act of negligence which has occurred in the course of his or her work, even if the solicitor is no longer in practice. (See below.)

Client Protection Fund (the Guarantee Fund)

26. The Scottish Solicitors' Guarantee Fund, now operating as the Client Protection Fund (CPF), was set up by the Legal Aid and Solicitors (Scotland) Act 1949, and is now governed by section 43 of the 1980 Act. Its purpose is to 'make grants in order to compensate persons who suffer a pecuniary loss by reason of dishonesty' on the part of a solicitor, an employee of a solicitor, a registered foreign lawyer or a conveyancing/executory practitioner or employee. The primary objective of the CPF is to prevent hardship amongst those who have suffered loss due to any dishonest actions performed by a solicitor.
27. The provision and maintenance of the CPF is a requirement of the 1980 Act and it is financed by annual contributions from the partners and directors of all Scottish practice units as well as (with some exceptions) Registered European Lawyers (RELs) and Registered Foreign Lawyers (RFLs). As legal service providers in the unregulated legal sector are not 'practice units', they do not contribute towards the CPF. However, the CPF will still provide awards to all those clients who suffer a loss through the actions of a solicitor employed by the legal service provider even if the solicitor has since died or had his or her name struck off from the roll of solicitors or been suspended.
28. The CPF is a discretionary fund and there are rules and criteria for an application and for making an award. It is also a fund of last resort and, in most cases, will only compensate those who have tried all other options to recover their losses. The fund is administered and overseen by a sub-committee of our Regulatory Committee, which is made up both of experienced Scottish solicitors and public interest lay members from outside the legal profession. That committee considers claims to ensure

they meet the conditions for a grant, and verifies the amount of loss. CPF guidelines are available on the Law Society's website.⁴ The amount of an individual grant from the CPF may not exceed £1.25 million. The operation of the CPF is overseen by the SLCC in accordance with the 2007 Act.⁵

29. In reality, the CPF would only be called upon where the solicitor holds client monies. Therefore, this would normally exclude in-house solicitors and those in the unregulated sector as they do not hold client funds.

Master Policy

30. The Master Policy is the compulsory professional indemnity insurance arrangement which covers most Scottish solicitors working in private practice. This was made compulsory in 1978. The provisions relating to the Master Policy are set out within section 44 of the Solicitors (Scotland) Act 1980 and Rule B7 of the Law Society's practice rules 2011, which place an obligation on every Scottish practice to contribute to the Master Policy annual premium.
31. The Master Policy covers any valid claim against a solicitor for an act of negligence which has occurred in the course of his or her work, even if the solicitor is no longer in practice (referred to as run-off cover), no longer solvent or cannot be traced at the time the claim is made. It is one of the most important areas of consumer protection put in place and required by the Law Society. The insurance provides cover of up to £2 million for any one claim.
32. The Law Society makes arrangements each year for the Master Policy. However, individual claims are handled by the Master Policy insurers and not the Society. Each practice is obliged to contribute to the premium in order to be covered. The individual premium paid by each practice is determined by the lead insurer's rates and rating factor rules. These rules are made and set by Royal Sun Alliance (RSA). The Law Society does not set these rules nor is it allowed to under the Financial Conduct Authority regulatory regime. The Master Policy is a commercial insurance arrangement. The principal factors considered by RSA in allocating the global premium amongst practices are: the practice fee income; number of partners/directors; ratio of partners/directors to total staff; type of business conducted; and, any claims made in the last five years. The global premium for the current insurance year, 2016/17, paid by all Scottish solicitor practices, was £18.16 million.

⁴ <https://www.lawscot.org.uk/for-the-public/client-protection/client-protection-fund/>

⁵ Section 39(a) Legal Profession and Legal Aid (Scotland) Act 2007

33. All claims are handled by the lead insurers, RSA, unless it has a conflict of interest, in which case one of the co-insurers will then manage the claim. The RSA has a claim-handling team as well as a panel of solicitors to handle complex claims. There is a claim-handling philosophy agreed each year between RSA, the brokers and the Law Society. All claims are intimated direct to the brokers. The Society has no involvement in claims handling at all. The Law Society provides guidance online for any person wishing to make a claim.⁶ The 2007 Act makes provision for the SLCC to oversee the operation of the Master Policy.⁷

⁶ <https://www.lawscot.org.uk/members/business-support/professional-indemnity-insurance/>

⁷ Section 39(b) Legal Profession and Legal Aid (Scotland) Act 2007

Permissible regulatory framework

34. The present legal framework surrounding the Scottish legal profession is a patchwork of inconsistent and increasingly outdated legislation. The underpinning and central piece of regulatory legislation, the Solicitors (Scotland) Act 1980, is in itself a consolidation Act, bringing together legislation dating back to 1949, and amended in 1958, 1965 and 1976.
35. Since 1980, there have been further significant changes to the 1980 Act brought in by:
- Solicitors (Scotland) Act 1988
 - Law Reform (Miscellaneous Provisions) (Scotland) Act 1990
 - Proceeds of Crime Act 2002
 - Council of the Law Society of Scotland Act 2003
 - Legal Profession and Legal Aid (Scotland) Act 2007
 - Legal Services (Scotland) Act 2010

These changes have created a jigsaw regulatory framework for the Scottish solicitors' profession.

36. Changes in the law and to the legal services market have resulted in difficulties in the interpretation of the legislative framework and this is being continually pushed and tested to its extreme boundaries. The prescriptive nature of the current legislation is effectively constraining regulation, which undermines consumer confidence and is detrimental to consumer interests and protections.
37. The legal, economic and social landscape has significantly evolved since the 1980 Act was introduced, when Scottish solicitors numbered fewer than 5,000 and the majority of the profession carried out similar legal work within a narrow Scottish legal sector. However, the outdated Act is now being interpreted to reflect modern legal services, where there are now more than 11,000 practising Scottish solicitors, and other providers of legal services who are unregulated in any way. The 1980 Act did not, and could not, envisage the changes in social, consumer and business needs, expectations and demands of consumers and small business as well as the way legal services are now delivered beyond the high street and extending to delivery by new innovative methods, such as the internet and the increase in the unregulated legal services sector.

Challenges with the 1980 Act

38. We have identified 50 sections⁸ within the 1980 Act which are problematic⁹ and outdated. Widespread concerns with the complaints process also demonstrate inherent problems with the 2007 Act, and the 2010 Act is effectively unintelligible and unworkable.
39. Constraints within the 1980 Act are resulting in potential risks to the consumer, with the Society being restricted by the provisions within the legislation from taking steps to address identified consumer and regulatory issues. In the rapidly and constantly changing nature of the legal services market, it is imperative that we, as a regulator of the Scottish solicitor profession, have the flexibility to respond quickly and effectively to changes. The existing prescriptive 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 Scottish Legal Complaints Commission, currently enjoy through a legislative framework approach underpinned by regulations.
40. The existing framework restricts the pace at which we can change and develop rules, regulations and processes which could enhance delivery of our services to members and the consumer. Changes to the law regulating Scottish solicitors require, in most cases, primary legislation. This limits the Society's responsiveness to changing circumstances. The effect of this is that the Society is forced to react more slowly to risks that have been identified and is less agile as a regulator of the Scottish solicitor profession.
41. 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 delivery of legal services and the development of new and materialising risks.
42. We do not believe these problems can be properly addressed through amendments to current legislation. The scale of the changes needed to all the existing legislation to provide a workable and effective framework justifies a new, single piece of enabling and permissible legislation. Any new, prescriptive legislation, or yet further amendments to existing legislation, i.e. the 1980 Act, will result (again) in a framework which will quickly be outdated and problematic and, in some

⁸ The Solicitor (Scotland) Act comprises of 67 sections

⁹ Details of these sections can be found in the appendix to this paper

instances, may be unworkable. What is required is the flexibility for making changes through subordinate, secondary legislation providing the agility we need to proactively regulate the solicitors' profession in Scotland.

43. Without the adoption of a permissible framework approach to regulation, unforeseen developments in the legal sector will continue to push and exploit regulatory gaps to the detriment of consumer protections and interests. As Sherriff Principal Taylor noted in relation to the regulation of legal services: *'Perhaps it is better for the regulator to be ahead of the game and anticipate what might be, or probably is, just round the corner...'*¹⁰
44. **Recommendation:** The repeal of the Solicitors (Scotland) Act 1980 and those parts of the Legal Profession and Legal Aid (Scotland) Act 2007 which relate to the regulation of legal services, and the introduction of new enabling and permissible legislation for the regulation of legal services in Scotland and the Scottish solicitor profession, with the flexibility to move with the times and which allows for proactive regulation to ensure consumer protections remain robust.

Legal Services (Scotland) Act 2010

45. In Scotland, the Legal Services (Scotland) Act 2010 permits licensed legal services providers (LPs). This allows solicitors to provide legal services via a range of different business models (providing there is a minimum of 51% qualifying investor ownership), such as allowing non-solicitor partners and solicitors working in partnership with other professionals. To date, there are no LPs as there is no approved and authorised regulator in Scotland and the infrastructure required, eg complaints processes etc., has not yet been put in place. In early 2017, the Society was approved as a regulator in relation to LPs pursuant to the provisions of the 2010 Act. However, the Society remains unauthorised.
46. The provisions of the 2010 Act raise a number of problems. There are significant interpretation issues and difficulties caused by the Act's interaction with other legislation which results in inconsistencies. We are in discussions with the Scottish Government regarding these. However, we believe that the best way of addressing the numerous issues would be to significantly amend those parts of the 2010 Act which relate to the regulation of legal services and the Scottish solicitor profession. Below we have set out just two examples of the many problems faced.

¹⁰ Review of Expenses and Funding of Civil Litigation in Scotland – Taylor Review 2014 – Chapter 13

47. Scope of regulation. Under the 2010 Act, approved regulators may only regulate the provision of legal services (as defined in the 2010 Act) by their LPs. This means that the services which are regulated by the Society when carried out by a firm of solicitors and the services that may be regulated by an approved regulator when carried out by an LP are not co-extensive. This creates a number of risks:
- **Differences in consumer protection** – consumers will have the benefit of more consumer protection measures if they use a firm of solicitors for certain types of work than they would benefit from if they used an LP to do the same work – this may not be readily appreciated by consumers.
 - **Unregulated work** – some work, which is regulated if carried out by a firm of solicitors, will be unregulated if carried out by an LP – this may have an adverse impact on client protection and may not be readily appreciated by consumers.
 - **Multiple regulators** – conversely, some work (which the general law requires to be regulated by an appropriate regulator), which may be regulated by the Society if carried out by a firm of solicitors, will not be capable of regulation by the approved regulator if carried out by an LP, obliging the LP to submit to alternate regulation for that work – which may cause additional expense or an increase in the regulatory burden for the LP, putting it at a commercial disadvantage when compared to a firm of solicitors. This is also likely to cause considerable consumer confusion.
48. Response to breach of the regulatory scheme. There is an inconsistency in the provisions of the 2010 Act in respect of suspension or revocation of a licence. The Act does not require that prior representations be allowed where a licence is to be suspended or revoked (see section 14, 2010 Act). There are a number of other instances within the Act that require the suspension or revocation of a licence. Again, there is no requirement for prior representation. However, the provisions of S18(2) appear to require that prior representations be permitted before the approved regulator takes measures in response to breach (which measures would logically include suspension or revocation of licence). Therefore, there is an inconsistency in requirements.
49. The result is that the steps that an approved regulator must take prior to taking certain measures are not clear, which could prejudice both the approved regulator's ability to take necessary action promptly to protect clients and consumers and also the regulator's ability to comply with the requirements of the 2010 Act. This is exacerbated by the uncertainty surrounding how the 2010 Act interfaces with the 2007 Act.

50. **Recommendation:** Amend those sections of the Legal Services (Scotland) Act 2010 which relate to the regulation of legal services and the Scottish solicitor profession to address the difficulties in interpretation and application.

Multi-national practices

51. More and more legal services are being provided by firms operating both in Scotland, and also in the rest of the UK and other jurisdictions. Over the last ten years, particularly through a series of acquisition and mergers, we have moved towards fewer, larger legal firms operating cross border. These include: Pinsent Masons (which combined with Scottish firm McGrigors in 2012); CMS Cameron McKenna Nabarro Olswang (which combined with Dundas & Wilson in 2014); and Dentons, which announced a merger with Maclay, Murray & Spens in the summer of 2017. These new firms have continued to invest heavily in the Scottish market, in many cases increasing their numbers of Scottish practising certificate holding solicitors. Other Scottish-based firms also have operations in other parts of the UK and further afield.
52. The current legislation does not adequately empower the Society to seek to regulate legal businesses in respect of their operations beyond Scotland. This means that businesses have to submit to dual regulation, even if only operating within the UK. This unnecessarily increases compliance costs for the business and reduces competitiveness.
53. We believe there is a strong economic case for the Law Society being given the permissible power to seek to become a regulator of legal services beyond Scotland. Providing a single regulatory model for cross-border firms could, over time, position Scotland as a more attractive jurisdiction in which to locate and base a firm's operations.
54. **Recommendation:** A new regulatory framework allowing for the flexibility for the Society to seek approval from the Legal Services Board to be an authorised regulator for those multi-national practices operating in Scotland.

Artificial intelligence and robot legal services

55. Technological evolution and the advancement of artificial intelligence (AI)-driven decision-making systems is becoming a significant and rapidly emerging business model within the legal sector and there is a general agreement that legal services is one of the sectors that stands to benefit from

developments in AI. Recent research suggests that, out of the biggest 100 law firms in the UK, 40% are using AI systems, with 30% currently piloting systems.¹¹

56. AI decision-making systems use predictive coding systems to analyse input data, many of these are self-learning. Some are used by firms to complete work on behalf of clients, for example, carrying out due diligence by checking digital uploaded documents, others provide basic advice and predictions relating to litigation direct to consumers via the internet. Such innovative AI systems can bring benefits. Legal services provided by AI, for instance, could promote the interests of consumers and access to justice, automating regular and routine enquiries, providing assistance outside normal working hours, supporting decision making by analysing previous case law, analysing disclosure documents in complex cases, helping to break down language barriers through translation services, or providing better accessibility to people with disabilities.
57. However, there are regulatory challenges, for instance, around: ensuring the interests of justice and professional principles are maintained as the automation of legal services through AI increases; what protections people have around automated advice and decision making; how client confidentiality may operate; how professional ethics can be ensured; and, how the consumer can maintain confidence in legal services. This is a question which is currently before the UK Parliament's Select Committee on Artificial Intelligence¹², which recently heard evidence of the challenges facing the legal sector.¹³
58. Although many of these systems will be provided by regulated law firms, there is currently nothing to prevent a business from another jurisdiction outside of the UK developing an AI system and delivering this in the UK; not only will the business be unregulated, but there are also serious data protection issues.
59. **Recommendation:** That any new regulatory framework makes provision for the regulation of legal services provided remotely by artificial intelligence.

¹¹ The Times October 5 2017 'Top firms play it smart with AI'

¹² Select Committee on Artificial Intelligence see: <http://www.parliament.uk/ai-committee>

¹³ Select Committee on Artificial Intelligence: oral evidence: Artificial Intelligence Tuesday 17 October 2017

An independent professional body, regulating and supporting the Scottish solicitor profession

60. Over the years, it has been suggested that the Scottish solicitor profession is self-regulating. Since the system was overhauled in 2008 with the setting up of the Scottish Legal Complaints Commission (SLCC), we have a clear system of co-regulation in Scotland, set out in legislation, with different organisations undertaking different roles and functions within that system.
61. The SLCC receives all complaints about legal professionals and decides which should be admitted for investigation. The SLCC also performs an oversight role of the Society in relation to conduct complaints.¹⁴ There is a separate and independent Scottish Solicitors' Discipline Tribunal (SSDT) to make decisions in serious cases of wrongdoing.
62. In many practice areas there is also co-regulation involving other professional bodies working in different sectors, such as investment business and consumer credit (Financial Conduct Authority), insolvency (Insolvency Practitioners Association), legal aid (Scottish Legal Aid Board) and immigration advice and representation (Office of the Immigration Services Commissioner). Co-regulation provides for the knowledge and expertise of all parties to be used more effectively. The Court of Session also has a role to play in regulation, for example, appeals under the Admission as Solicitors (Scotland) Regulations 2001.¹⁵
63. Although we are advocating a new, modern, flexible regulatory framework, with the repeal of the 1980 Act, there are essential aspects of the 1980 Act which do work well and **must** be maintained in any future permissible legislation.
64. The fundamental principles of a professional body regulating and supporting Scottish solicitors independently from government are vital components in ensuring that Scottish solicitors deliver legal services to the consumer at the highest of practical and ethical standards. We believe that a conjoined approach lies at the heart of the profession and that separating the functions would be harmful to the delivery of that ideal, to the detriment of the consumer.
65. Over the years, there have been views expressed relating to the dual role of the Society as both a regulator and representative body of the Scottish solicitor profession. Questions have been asked

¹⁴ In addition to those oversight powers referred to earlier within this paper

¹⁵ See Regulation 40 Admissions as Solicitors (Scotland) Regulations 2001

about the potential conflict that this may raise between representing the consumer interest and that of the profession, with suggestions forwarded that the Society cannot always represent both interests fairly.

66. We fundamentally reject this argument. The Law Society has a statutory duty to work in the public interest.¹⁶ We deliver this through our work to promote a strong, varied and effective solicitor profession working in the interests of the consumer and protecting and promoting the rule of law. The conjoined approach of regulation and professional support ensures that we have the necessary ability and tools to discharge this important consumer function.
67. The Society's dual role of regulation and professional support has been successfully carried out for almost 70 years.¹⁷ It is one that has been acknowledged as the most suitable model for Scotland by the Scottish Government and Scottish Parliament.
68. In its report on the Inquiry into the Regulation of the Legal Profession^{18 19}, the Scottish Parliament's Justice Committee concluded that the best option for Scotland was to retain self-regulation for the Scottish solicitor profession.
69. During the course of the inquiry, the Scottish Government (formally Scottish Executive) stated: *'The view is that any conflict is more apparent than actual and that, in practice, the duality that is imposed on the role of the Society enhances that role and allows the consumer to benefit from a different and wider approach by the Society.'*²⁰
70. At the core of the Scottish solicitor profession is the aspiration to provide the best possible service to the consumer, while recognising that it has a responsibility to act in the consumer interest in all that it does. The regulation of the profession is the means by which the profession ensures these aspirations are met by allowing regulatory measures to be directed to those areas that are identified as an actual or apparent risk to the consumer. The dual role helps us to act swiftly in identifying those risks and taking the necessary action, reducing consumer risk exposure.

¹⁶ Section 1 Solicitors (Scotland) Act 1980

¹⁷ As set out within the Legal Aid and Solicitors (Scotland) Act 1949

¹⁸ 11th Report 2002 <http://archive.scottish.parliament.uk/business/committees/historic/justice1/reports-02/j1r02-11-vol01-01.htm>

¹⁹ The Inquiry was focused on complaints, but considered the dual role of the Society in detail as an inherent part of looking at complaints

²⁰ Scottish Executive, oral evidence column 3003

71. First and foremost, we set high professional standards which all solicitors must meet, including a robust route to qualification along with practice rules and guidance that are regularly reviewed. Our highly trained financial compliance team inspects around 370 law firms each year to ensure compliance with our strict accounts rules. In 2016/17, and as a result of these inspections, we raised 23 complaints of our own to the SLCC. Additionally, we intervene quickly in firms when things go wrong, ensuring clients know who to contact, where their files are and offering the assurances they need. Even when clients choose to no longer pursue an initial complaint against their solicitor, we will raise our own complaint if it is in the public interest and in order to maintain standards. In total, we raise around 30 complaints a year against solicitors to the SLCC.
72. By setting, maintaining and vigorously enforcing standards, we strive to ensure that consumer interests remain the central focus of our regulatory work and that consumer confidence in the Scottish solicitor sector remains high. A poll of Scottish consumers in 2014 indicated that 90% of those surveyed were satisfied with the services provided by their solicitor and 82% would recommend their solicitor to others.²¹ That poll also demonstrated high levels of trust in the legal profession as a whole.
73. A members' body which regulates and provides professional support to its members ensures high, practical and ethical standards, as well as excellent services and, supporting its members as a profession, it promotes greater commitment, pride and loyalty within the legal profession. Members have a strong personal and professional interest in ensuring that the profession is appropriately regulated through the Law Society of Scotland.
74. Most professional bodies worthy of that title regulate and support their members, which is why it is the model used by professional bodies the world over. Here in Scotland, we have the Institute of Chartered Accountants of Scotland (ICAS), the Royal Incorporation of Architects in Scotland and the Royal Institution of Chartered Surveyors. The teaching profession in Scotland recently moved from separate bodies into the single professional body that is the General Teaching Council for Scotland. There is clear recognition across a number of professions that having a single professional body is the right approach, particularly given the geographical size of Scotland.

²¹ Scottish Public Attitudes & Opinion Monitor, Ipsos MORI, October 2014

75. Further afield, law societies and bar associations around the world have dual responsibility for regulation and professional support. These include the Law Society of Ireland, law societies in the provinces of Canada and states of Australia as well as bar associations in US states such as California, Florida and Texas. It provides a cost-effective, practical, and co-ordinated professional approach which works in the interests of the consumer.

Regulatory Committee

76. To ensure we maintain a practical distinction between our two roles, our regulatory function is clearly separated and works independently of our professional support work. That regulatory activity is overseen by the Regulatory Committee in accordance with the provisions of the Solicitor (Scotland) Act 1980. This is an independent committee. The committee was established in 2011 to ensure and demonstrate a clear independent regulatory role in response to concerns raised during the parliamentary passage of the 2010 Act. This was considered to be the most suitable and proportionate approach, taking into account the size of the Scottish solicitor profession.
77. The Law Society Council is not permitted to unduly interfere with the work of the Regulatory Committee, nor with the work of its sub-committees, which are responsible for taking specific regulatory decisions. This is all clearly set out in legislation.²²
78. To strengthen that independence, the convener of the Regulatory Committee is chosen by the committee and must be a lay member.²³ Our current Convener, Carole Ford, comes from the teaching profession, bringing both an expertise in standards setting and enforcement and also a clear commitment to the consumer interest. The committee has an equal number of solicitor and non-solicitor members – another element set out in legislation.²⁴

Independent solicitor profession

79. The independence of the legal profession and the regulation of that profession independently of government are vital in underpinning the rule of law. It is of paramount importance that consumers are able to place trust in the competence and integrity of the solicitor profession and that can only be ensured through independent regulation. The Scottish solicitor profession and the Law Society of

²² Solicitor (Scotland) Act 1980 section 3B

²³ Ibid section 3C(d)

²⁴ Ibid section 3 C(b)

Scotland are both independent of government, but accountable, and the legislation under which we regulate the solicitor profession allows us to operate as such.

80. At this time of great challenges to the legal profession, changes to the legal services market and to the changing make-up of the legal sector, it has never been more important that the profession remains strong and independent. The existence of an independent regulator is crucial for the Scottish solicitor profession; it serves as a guarantee of due process for the consumer. Independent and self-regulating professional bodies are better equipped to understand and appreciate the complex challenges and issues faced by their colleagues on a daily basis and the demands and expectations of legal consumers.
81. Independent regulation offers a strong governing structure and leadership, promotes the welfare of Scottish solicitors and ensures access to the solicitor profession for those who are suitably qualified. As the International Bar Association recently noted: *'Self-regulation...safeguards the consumer's right to an independent legal profession and ensures that government control, whether direct or indirect, is eliminated or minimised to the greatest extent possible...'*²⁵
82. During the parliamentary passage of the Legal Services (Scotland) Act 2010, the independence of the legal profession was widely discussed and recognition was given to the importance of this principle in a democratic society committed to the rule of law.
83. This was a view shared by the Scottish Government, which said that *'all of us, regardless of party, support a strong and independent Scottish legal profession'*.²⁶ Other professionals within the legal profession also recognise the possible dilution of standards should independence and self-regulation of the legal profession be threatened, with the Faculty of Advocates saying that *'if self-regulation were removed, the power and moral authority of the leaders of the profession to insist on good standards of ethical and professional conduct would be diminished'*.²⁷
84. Periodically, it has been suggested that an independent (from the legal profession) 'super regulator' be created, similar to the Legal Service Board.²⁸ However, it has been consistently recognised that this is not a suitable model for Scotland given the smaller size of jurisdiction and legal profession.²⁹ In

²⁵ IBA Presidential Task Force - Report on the Independence of the Legal Profession: September 2016

²⁶ Fergus Ewing - Minister for Community Safety and Legal Affairs – stage one report Legal Services (Scotland) Bill 2010

²⁷ Faculty of Advocates oral evidence session – Inquiry into the Regulation of the Legal Profession

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2016&mode=html>

²⁸ England and Wales Legal Services Act 2007

²⁹ Number of solicitors England and Wales 142,515 (SRA statistics 2017). Scotland 11, 500

addition, it has also been recognised that the creation of such a body would be unnecessarily expensive³⁰ and bureaucratic. This was a view shared by the then Cabinet Secretary for Justice in his speech to the legal profession in September 2007 when he stated that following the England and Wales model was not appropriate for Scotland.³¹

85. Similarly, we strongly support the principle of there being an independent disciplinary tribunal which is separate to professional bodies and takes decisions in the most serious of cases against Scottish solicitors. The SSDT has built up substantial expertise and, by involving both experienced solicitors and lay members, acts in the public interest at all times. We believe the current arrangements, whereby the Law Society acts as the prosecutor before the SSDT in cases of professional misconduct, work effectively.
86. **Recommendation:** To retain an independent professional body for the regulation and professional support of the Scottish solicitor profession.
87. **Recommendation:** To retain a separate and independent discipline tribunal for decisions in serious cases of professional misconduct.

³⁰ Stage 1 Report on the Legal Services (Scotland) Bill 4th Report Session 3

³¹ Speech by the Cabinet Secretary of Justice – Law Society Annual Conference September 2007

Unregulated legal services

88. The legal services sector has evolved significantly in recent years, with new types of innovative business structures emerging to deliver services and meet the modern needs of the consumer. Consumer expectations and the evolving legal sector were unforeseen when the Solicitor (Scotland) Act 1980 was enacted. The provisions of the 1980 Act that intended to afford Scottish and UK consumers with full and adequate protections and assurance have failed to keep up with the current legal landscape and the widespread delivery of legal services through the unregulated legal sector.
89. The 'unregulated legal sector' is not defined within legislation. It is a default term referring to those legal service providers who provide advice and representation on any area of law which is not covered by specific legal services regulation. As is clearly implicit in its name, there are no regulators in the unregulated sector. Consumers purchasing legal services in the unregulated sector leave themselves seriously exposed if the advice or legal service turns out to be incorrect or something goes wrong. In addition, they do not receive any of the benefits of instructing a regulated Scottish solicitor, as referred to earlier in this paper.
90. Under the provisions of the 1980 Act, the legal work that can only be undertaken by a Scottish solicitor is extremely small. Section 32 of the 1980 Act restricts this to only the preparation of writs relating to court proceedings, the submission of writs relating to heritable or moveable estate and the preparation of papers to found or oppose an application for a grant of confirmation.
91. We 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, are provided by Scottish solicitors but can also be handled by unregulated firms and by persons who may be unqualified and inexperienced to provide that advice.
92. We do recognise that, in some areas of law, legal advice and services may be provided by 'regulated' professionals (other than solicitors), for example, an accountant may provide tax law advice³² and patent and trademark attorneys are regulated in the provision of intellectual property services.³³ But the majority of legal services, which are most commonly provided direct to the consumer, remain unregulated in any way.

³² Regulated by the Institute of Chartered Accountants Scotland (ICAS)

³³ Regulated by the Chartered Institute of Patent Attorneys (CIPA)

93. We believe that the unregulated provision of legal services poses a significant risk to consumer protection and confidence. For example, there is no statutory requirement in the unregulated sector for professional indemnity insurance should something go wrong. By contrast, a legal service provider regulated by the Law Society of Scotland offers the benefit of both the statutory Client Protection Fund³⁴ and professional indemnity insurance requirements, including the Master Policy. Those consumers receiving services from other regulated professionals, such as accountants, will have the protections afforded and required by the relevant regulator.
94. Should the consumer have any issue with the service they have received from an unregulated provider or if something manifests which, in the view of the consumer, raises concerns about the conduct of the provider, then there is unlikely to be any route of complaint. An unregulated provider **may** have a complaints process, but they are not obliged or required to do so. A regulated provider will provide the consumer with a course of redress, either through the regulating professional body or, in the case of a solicitor or regulated law firm, through the Scottish Legal Complaints Commission (SLCC) under the provisions of the Legal Profession and Legal Aid (Scotland) Act 2007.
95. We are not aware of any recent research which details the scale of the unregulated sector in Scotland. However, in its recent report into the unregulated legal sector in England and Wales³⁵, the Legal Services Board found that in some 'unreserved' legal areas, the unregulated service providers accounted for a significant market share, for example, as much as 13% in family matters, 11% in property and planning and 9% in wills and probate.
96. There are many reasons why a consumer may choose to engage a non-regulated service provider. There may be geographical reasons, for example, no regulated professionals operate within close proximity. Therefore, the consumer has little choice other than to approach an unregulated provider. Alternatively, the choice may be determined by cost. In this scenario, the consumer may not appreciate the saving in cost is at the sacrifice of consumer protections and, potentially, the quality and service provided. We suggest that regulating all legal service providers will ensure that, regardless of geographical and cost factors, all consumers will benefit from, at least, minimum protections and can be confident that the provider is committed to standards of service which can be expected of the legal profession and sector.

³⁴ Formally the Guarantee fund – see appendix for further details on the nature of the fund

³⁵ <https://research.legalservicesboard.org.uk/wp-content/media/Economic-insight-in-depth-unregulated-research.pdf>

97. As the legal market continues to evolve, it is paramount that consumers engaging a legal service provider can be confident that they are afforded the protections expected of the legal sector and have confidence in the quality and reliability of the legal service provided.

Claims management companies (CMCs)

98. CMCs are not currently regulated in Scotland, unlike England and Wales where these business structures are regulated by the Claims Management Regulation Unit, which is part of the Ministry of Justice. As we understand, regulation responsibility will switch to the Financial Conduct Authority under the Financial Guidance and Claims Bill [HL].³⁶
99. We have said on a number of occasions that we believe all those providing legal services to the consumer should be regulated, which would include CMCs, a view which we expressly stated in our response to the *Wider choice and better protection* consultation in 2009³⁷ and more recently before the Justice Committee in the oral evidence session³⁸ relating to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.
100. We also agree with the suggestions made by Sheriff Principal Taylor in his report³⁹ that it is ‘...*right and proper that there should be a level playing field with solicitors who are highly regulated. Responsible claims management companies have told us that they would welcome regulation as it provides them, as well as members of the public, with some protection from the arrival on the scene of rogue elements...*’ We further agree with his recommendation that CMCs be regulated in Scotland.⁴⁰
101. In the appendix, for further information, we detail the most common types of business structures within the unregulated sector and further information on the financial safeguards afforded by a service provider regulated by the Law Society of Scotland.

³⁶ Clause 20 Financial Guidance and Claims Bill [HL]

³⁷ <http://www.gov.scot/Resource/Doc/1097/0076097.pdf>

³⁸ Oral evidence session: 28th Meeting, 2017 (Session 5) Tuesday 26 September 2017

³⁹ Review of Expenses and Funding of Civil Litigation in Scotland – Taylor Review 2014

⁴⁰ Ibid at Chapter 13 para 18

102. We want to be clear that we are not suggesting that the Society should become a regulator of the currently unregulated market. What we are suggesting is that there must be some form of regulation for this sector. Regardless of who takes on the role of regulator, the important factor is that there is regulation.
103. This would ensure that all consumers have access to a regulated service provider, providing the benefit of consistent and assured protection, as is currently afforded to all those seeking advice and representation from a regulated legal service provider.

Recommendation: That all legal service providers providing services direct to the consumer be regulated, strengthening consumer protections and enhancing consumer confidence in the Scottish legal sector.

Use of the term ‘lawyer’

104. The term ‘lawyer’ is generic and defined as ‘*someone whose job is to give advice to people about the law...*’⁴¹ It is not a ‘protected’ title. As a result, **any person**, regardless of qualification, experience or regulation, can legitimately refer to themselves as a ‘lawyer’. The consumer often does not appreciate that there is a significant difference between a solicitor and a lawyer – all solicitors are lawyers, but not all lawyers are solicitors.
105. Within the Scottish (and UK) legal services sector, there are individuals and businesses using the term and referring to themselves as lawyers, which we believe may be potentially misleading consumers. In 2016, we conducted research (carried out by Ipsos MORI) which demonstrated that 63% of consumers did not recognise the difference between a solicitor and a lawyer.⁴² The consumer’s perception is that a ‘lawyer’ is a solicitor, or other legal professional, who is appropriately qualified and regulated, and therefore reputable.
106. The term ‘solicitor’ is a protected title in Scotland and the rest of the UK. Section 31 of the 1980 Act⁴³ makes it a criminal offence for any person, which includes corporate bodies, to pretend, wilfully and falsely, to be a solicitor or notary public. If a business or person wishes to hold themselves out as a solicitor or notary public, they are required to have the relevant qualifications to do so. This has the

⁴¹ Cambridge dictionary online : <https://dictionary.cambridge.org/us/dictionary/english/lawyer>

⁴² See research results in appendix 3

⁴³ See appendix 3

effect of reserving the terms 'solicitor' and 'notary public' to those who are qualified to use such terms. This ensures that the consumer can have confidence and trust in the provider of the legal service in the knowledge that the provider has completed many years of law study, gained the necessary qualifications, undertaken two years' 'training on the job', complies with a particular code of ethics and rules and is regulated to provide legal services. The consumer also has the benefit of the protections that exist for acts of negligence or dishonesty.

107. Some lawyers may have the same qualifications, intelligence and experience as solicitors, but many may not and, fundamentally, it is important to note, they may not be regulated and therefore they are unlikely to offer consumer protections. As with the 'unregulated sector', there may not be any complaint or redress process available, potentially leaving the consumer exposed should something go wrong.
108. One important point of concern is that the consumer is unlikely to recognise that a 'lawyer' is not required to adhere to any code of ethics or rules, therefore there is no protection afforded for client confidentiality or legal privilege. The rules, as applied to regulated solicitors, prevent the disclosure or sharing of any client information without the express authority of the client (with certain limited exceptions⁴⁴). This is to protect the rights and interests of the client and to reassure the client that everything discussed remains confidential between the client and solicitor. This facilitates full information sharing from the client, allowing the solicitor to provide full and appropriate advice. Also, an unregulated lawyer is unlikely to be bound by rules relating to conflicts of interest – for example, advising two separate clients on the same or related matter.
109. A further point of concern is that any person who has been struck off as a solicitor, therefore in effect deemed unfit to practise law, can continue to provide a legal service to the consumer as a 'lawyer'. We are aware of at least one former solicitor who, having been struck off by the Scottish Solicitors' Discipline Tribunal for professional misconduct, is providing legal services direct to consumers, unregulated in any way and operating a claims management business.
110. It is also possible for a person convicted of **any** criminal offence to refer to themselves as a lawyer and provide legal services to the consumer. This raises serious consumer protection concerns, as the person may have been convicted for violent offences – which also raises personal safety concerns – financial crime-related offences or otherwise. This is not hypothetical. We are often

⁴⁴ For example - Some statutes, most notably the Proceeds of Crime Act 2002, require solicitors and others to inform the appropriate authorities

contacted by persons who have been convicted of offences and wish to undertake a career in law. Although we, as regulator to the Scottish solicitor profession, carry out checks to ensure a person wishing to become a solicitor is a fit and proper person to work within the profession, we have no powers, and nor does anybody else, to prevent a person becoming a 'lawyer' providing legal services for payment.

111. We acknowledge that part of the problem is consumer awareness to recognise that, for specialist legal advice, or for certain legal activities, which the consumer is paying for, they need the protection of someone who is regulated, insured and qualified. From the consumer perspective, if someone calls themselves a 'lawyer' rather than advocate or solicitor, this should cause alarm bells to ring and the consumer should be asking questions as to status and qualifications of the person concerned.

Consumer research

112. We recently commissioned research into the consumer's understanding and perception of which legal services can only be carried out by solicitors and the use of the title 'lawyer'. The results and analysis by ComRes are concerning and provide a robust evidence base supporting our recommendations relating to protecting the term 'lawyer' and also the unregulated sector.⁴⁵
113. There appears to be a lack of clarity on which services can only be provided by a solicitor. A relatively high proportion of Scottish adults mistakenly believed that only a solicitor can give legal advice to help with a divorce or child custody case (58%). Almost one-third did not believe that a solicitor must draft the legal document that transfers ownership of a house (only 69% believed that you need a solicitor).
114. The majority of consumers believed that only a solicitor should transfer ownership of a house, represent someone in court, give legal advice in a divorce or child custody case and provide advice in a police station to someone suspected of having committed a crime. Fewer people believed that only a solicitor should help someone draft a will and give employment law advice (44% and 35%).

⁴⁵ Methodology: The Law Society of Scotland commissioned ComRes to undertake independent research on a series of questions into the provision of legal services and the role of solicitors. ComRes interviewed 1,000 Scottish adults online between 16 and 25 October 2017. ComRes analysed the results and data were weighted to be representative of all Scottish adults aged 18 or over by age, gender and region. Full data tables are available at www.comresglobal.com

115. Almost nine out of ten Scottish adults believed that there should be restrictions on who can call themselves or advertise themselves as a lawyer (87%), with 66% strongly agreeing with this statement. This is a clear indication that the consumer believes that the use of the term 'lawyer' should be protected and restricted. The terms solicitor and lawyer appear to be interchangeable in the minds of the consumer.
116. **Recommendation:** That the term 'lawyer' be a protected term, in the same way as solicitor, and only those able to demonstrate recognised legal qualifications, and who are regulated, are permitted to use the term.

Entity regulation

117. Entity regulation is a method of regulating firms or businesses which provide legal services direct to the consumer. It expands regulation beyond the individual solicitor within a firm to cover all employees collectively, recognising that many of the decisions are not taken by the individual solicitor but often by individuals who are not currently regulated. Regulating entities places a focus on wider consumer protection and confidence. It is not intended to dilute individual regulation and responsibility, but to enhance the current regulation framework.
118. In our earlier paper, we suggested that there needs to be better targeted regulation of entities than that currently provided in the Solicitor (Scotland) Act 1980. The current legal framework for the regulation of the legal profession in Scotland places the emphasis on regulating the individual solicitor. The current powers of the Society to regulate entities, under the 1980 Act, are mainly restricted to financial inspections and the requirement for firms to have professional indemnity in place. There has been a limited extension of regulation to these business models in recent years, for example, with the introduction of incorporated practices in 1987 and licensed legal services providers (LPs) in 2010, but the traditional model of partnership firms remains, to a large extent, unregulated as an entity. We would like the permissible power to extend entity regulation to all those law firms which are wholly owned by solicitors.
119. In April 2016, we invited stakeholders to our roundtable regulation event.⁴⁶ The consensus was that any move towards entity regulation is a positive step and would be welcomed. The Scottish Legal Complaints Commission, in their response to our public consultation,⁴⁷ recognised that entity regulation could deliver benefits to the consumer. The Council of Mortgage Lenders also expressed the opinion 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 professions.
120. There has been a shift towards entity regulation in a number of jurisdictions. In England and Wales, entity regulation was introduced through the Legal Services Act 2007 and therefore those of our members in multi-national practices in England and Wales are already subject to entity regulation. In Australia, the conduct of law-practice entities has been regulated for over a decade and is now

⁴⁶ This included representatives from the SLCC, SLAB, SSDL, CMA, Scottish Government, CAS, Faculty of Advocates

⁴⁷ Consultation details <https://www.lawsco.org.uk/media/2094/entity-regulation-consultation-paper.pdf>
https://www.scottishlegalcomplaints.org.uk/media/56695/slcc_response_to_law_society_of_scotland_entity_regulation_and_charging_consultation.pdf

covered by the Legal Profession Uniform Law. The Nova Scotia Barristers Society is in the advanced stages of introducing an entity regulation framework, as is the Law Society of British Columbia. All jurisdictions which have introduced or are considering introducing entity regulation recognise the benefits entity regulation brings. These, for example, include:

- Affording better protection to the consumer as, in the majority of instances, the client contracts with the entity and not the individual advising solicitor
- Meeting the expectations of the consumer, who may already believe the legal service provider is regulated
- Bringing consistency, with all entities having to meet the same high standards
- Supporting adherence to professional principles and protecting consumers whilst encouraging innovation and competition in the legal services market
- Providing the opportunity for a greater collation of data, which would enable the regulator and the legal profession to identify and address deficiencies early, taking the necessary preventative action

121. As referred to above, entity regulation already occurs in parts across the regulated legal services sector in Scotland. For example, following the introduction of the Solicitors (Incorporated Practices) Practice Rules 1987, we now regulate those businesses which have formed as a company and have been recognised by the Society's Council as an incorporated practice. The Legal Services (Scotland) Act 2010 introduced LPs, which will be regulated at entity level, and the introduction of the Fourth Money Laundering Directive in June 2017 means that all firms will be regulated at entity level to the extent of complying with money laundering legislation. All legal practices are regulated to the extent of the accounts rules and subject to annual inspections.

122. The regulation of entities is in line with the consumer's perception of legal services regulation. Clients and members of the public often presume and expect that those providers they are seeking legal services from are regulated, which is not necessarily the case. From the perspective of the client, their contract is with the legal service provider and the client places expectations on that firm. Providing the Society with the permissible power to extend entity regulation to all law firms wholly owned by solicitors will greatly enhance consumer protections and introduce minimum standards which all consumers could expect to receive when seeking and receiving legal services. That, in turn, will also have the effect of promoting and strengthening consumer confidence in the Scottish legal sector.

123. In the appendix to this paper, we have set out further views and discussion points relating to entity regulation and provided examples to highlight the extent to which entity regulation could strengthen consumer protection and confidence.
124. **Recommendation:** That primary legislation provides the permissible powers for the Law Society of Scotland to extend entity regulation to those firms wholly owned by solicitors.

Complaints

Introduction

125. Some of the most important elements of any regulatory system are the processes available for consumer complaints and professional discipline. It is critical that consumers can have confidence that they will have proper recourse for those comparatively few occasions in which something serious goes wrong or where they do not receive the service they deserve. Equally, it is important for professional bodies themselves to investigate cases of alleged misconduct within the profession and to be able to do so in a timely and effective manner.
126. The system of complaints against Scottish solicitors changed dramatically following the passage of the 2007 Act, which established the Scottish Legal Complaints Commission (SLCC). Now, ten years on, both the Law Society and the SLCC agree that the current legal complaints process needs to be radically changed. We know the current system is slow, bureaucratic and expensive. It is why we advocate a new process based on what we have learned from other jurisdictions.
127. Currently, we are responsible for the handling of complaints which relate to matters of conduct, with the SLCC responsible for matters relating to service. The SLCC, as the gateway for all legal complaints, determines if the complaint constitutes a conduct complaint or a service complaint or both.⁴⁸ Those complaints determined as conduct complaints are forwarded to the Law Society. Following investigation by our dedicated and experienced complaints investigators, all conduct complaints are considered by our Professional Conduct Sub-Committee.
128. The sub-committee will determine the complaint based on the evidence. It can decide that the complaint warrants no further action, amounts to unsatisfactory professional conduct or is potentially professional misconduct, which should be referred to the Scottish Solicitors' Discipline Tribunal (SSDT). The sub-committee is made up of 50% lay members (non-solicitor) and 50% solicitor members. All members are volunteers who willingly commit their own time, experience and knowledge to ensure that complaints receive due and focused consideration and determination.

⁴⁸ Section 2(1A)(a) Legal Profession and Legal Aid (Scotland) Act 2007

129. There are a number of aspects of the present legal complaints process which serve as either bottlenecks in the process, or barriers to effective and equitable investigation of complaints. The complaints process has been the subject of many discussions since the introduction of the 2007 Act and has been subject to much criticism. Recently, we submitted a written response to the Scottish Parliament's Public Petitions Committee relating to a call on the Scottish Parliament to urge the 'Scottish Government to review the operation of the Scottish Legal Complaints Commission with a view to making the process of legal complaints more transparent and independent'.⁴⁹
130. Whilst we believe some improvements can be made to the current process through secondary legislation, we remain of the view that more fundamental reforms through primary legislation are now required.

Eligibility

131. The gateway eligibility process is one of the primary bottlenecks in the investigation of complaints, and occurs at a stage which can colour service users' perception of the entire process – at the first point of contact.
132. The Legal Profession and Legal Aid (Scotland) Act 2007 is prescriptive in respect that it sets out in detail a complex preliminary procedure which complaints require to traverse before they are even admitted as eligible to the investigative process.⁵⁰ In turn, the SLCC is obliged to assess whether a complaint is premature; whether it is time expired; and, whether it is frivolous, vexatious or totally without merit. If the complaint fails any of these tests, the SLCC is obliged to reject it (subject to a very limited discretion to waive the prematurity and time bar provisions, which is exercised sparingly).
133. As the SLCC's decisions in respect of each of these discrete points are set out in the statute, they are all appealable.⁵¹ It follows that, taken to its extreme, it would be possible for a single complaint to be rejected as premature, reinstated on appeal, rejected as time barred, reinstated again on appeal, then rejected as frivolous, vexatious or totally without merit, and then once more reinstated on appeal. There could therefore conceivably be three separate decisions by the SLCC to reject a

⁴⁹ Petition PE01660 <http://www.parliament.scot/ResearchBriefingsAndFactsheets/Petitions%20briefings%20S5/PB17-1660.pdf>

⁵⁰ The Legal Profession and Legal Aid (Scotland) Act 2007 Sections 2 - 20

⁵¹ Ibid - Section 21 of the 2007 Act

complaint, and three Court of Session actions to overturn those decisions in order for a complaint to be even admitted to probation in the investigative process.

134. A consequence of the statutory nature of each of the SLCC's preliminary decisions, and the existence of the right of appeal against them, is the requirement for the SLCC to apply very substantial resource to the preliminary stages of the process. In terms of the actual investigation of the complaints, objectively that resource adds little value, and could be applied more productively to the actual investigation process. Removal of detailed process requirement from the statute would permit, we suggest, the SLCC to operate a more streamlined, efficient and flexible sifting function, which still rejected complaints which were genuinely premature, time barred, frivolous, vexatious or totally without merit, but did so subject to a right of review by an independent ombudsperson (see Oversight below) rather than recourse to the court at each stage.

Oversight

135. The SLCC is not subject to any oversight except that of Scottish ministers, and even then it is obliged only to present its budget and activity to them periodically⁵² – the ministers have no locus to interfere with its budget or operation.

136. As indicated above, we consider the existing appeals process to be cumbersome and de facto exclusionary because the majority of the SLCC's service users are unable to invoke the protection of the courts as it is prohibitively expensive to do so.

137. To incorporate the Society's vision of a fairer appeals process, we would like to see a more robust, independent scrutiny of the SLCC, particularly (in the context of complaint handling, rather than necessarily budget and operations) by the creation of a post of ombudsperson. The ombudsperson would have the role of arbiter in matters concerning eligibility or categorisation decisions, and would also have the power to review the safety of the SLCC's determinations of service complaints (which are also currently appealable only to the Court of Session). The ombudsperson would also have responsibility for investigating and determining handling complaints made against any of the recognised professional bodies or the SLCC itself.

⁵² 2007 Act section 29. The budget must be laid no later than 30 April each year

Appeals

138. As noted above, the SLCC's decisions at each stage of the preliminary process may be appealed to the Court of Session. The same is true of the SLCC's decisions in respect of categorisation of complaints as either service complaints or conduct complaints, and of the SLCC's determinations of the merits of service complaints. The effect of the appeals being competent only to the Court of Session is that, in reality, almost all service users are obviated from seeking leave to appeal because of the expense implications, which act essentially as a barrier to justice. Even where appeals are taken, the Court of Session process is slow and complex, meaning that invariably several months will pass before an appeal will be heard and decided. Meantime, the complaint remains unresolved.
139. We would like to see a simplification of the appeals process, whereby appeals against the decisions of the SLCC were made to an independent ombudsperson, whose decision would be final. That would provide a quicker, more efficient, and substantially less costly method (for all parties, including the SLCC) of resolving technical questions regarding the exercise of the SLCC's judgment and its decision making.

Compensation in respect of professional conduct or unsatisfactory professional conduct

140. Whilst we can understand that the legislature would wish to provide complainers in legal sector complaints with a mechanism to recover actual losses they have incurred, or to compensate stress and inconvenience they have suffered, as a result of a solicitor's conduct, it is our view that the professional conduct of solicitors is primarily a professional disciplinary matter which should be driven by the interests of the consumer and of maintaining standards within the profession. The provision for awarding compensation to a complainer in such circumstances can often distort that driver.
141. For example, if a conduct complaint is made against a solicitor who has already been struck off the roll, and in respect of whom a non-restoration order has been made by the SSDT, we are nonetheless placed under some pressure to pursue a further prosecution purely because the right of a complainer (who may or may not, at his or her discretion, elect to lodge a claim for compensation) to benefit from a compensation order would be extinguished by the Society failing to do so. In those circumstances, on the basis that there is no issue of consumer protection at stake (the solicitor already having been subject to the ultimate disciplinary sanction by being permanently excluded from the profession), the further prosecution of a complaint, with concomitant imposition on the resources of the Society and the SSDT, may be argued not to be in the consumer interest, or in the interests of maintaining standards within the profession.

142. We take the view that the range of sanctions available to the SSDT in respect of complaints for professional misconduct, and the sanctions available to the Society in respect of conduct complaints upheld as unsatisfactory professional conduct, ought to be purely disciplinary in nature; and the power to award compensation to a complainer in either case should be repealed.

Hybrid complaints

143. We would advocate express provision being made for single issues of complaint to be categorised competently as either service complaints, conduct complaints, or a hybrid of both. This would replicate the situation which had worked in practice before the 2016 Court of Session judgment which ruled single issue hybrid complaints as unlawful. Such provision would enable the SLCC to consider the consumer interest in the context of service complaints, and enable the recognised professional bodies to scrutinise disciplinary infractions arising from the same circumstances, without the requirement for one or the other to be extinguished at the outset by an either/or categorisation decision.

144. The concept that there can be no intersection between service complaints and conduct complaints is an artificial one introduced by the Legal Profession and Legal Aid (Scotland) Act 2007, and it is the Society's position that hybrid complaints should be reintroduced as a comprehensive means of addressing all aspects of complaints.

145. The potential impact on consumers of repealing the ability to award compensation for unsatisfactory professional conduct or professional misconduct would thereby also be negated, as they would retain the right to compensation in any corresponding service complaint.

Suggested new process

146. Over recent months, we have been reviewing the current process model with the objective of identifying potential changes to simplify the system, which has been overly complicated by the terms of the Legal Profession and Legal Aid (Scotland) Act 2007. We have recently written, jointly with the SLCC, to the chair of the review group suggesting interim improvements to the eligibility stage which we believe will significantly improve and speed up the process and which can be introduced through secondary legislation. A copy of this letter can be found in appendix 5.

147. A recent research visit to the Legal Ombudsman service in Birmingham confirmed that a model very similar to that which the Society used to employ prior to the 2007 Act is working successfully and this has helped to inform our proposed changes for new service and conduct complaint models.
148. This is why we are advocating a new system based on a number of grounded principles and which reflects what we have set out above:
- The SLCC would continue to handle service complaints with the Society handling conduct complaints, as is currently the process. This recognises the differences between consumer redress complaints and those relating to conduct and professional discipline.
 - The **single gateway function**, which the SLCC currently performs, would be abolished. We propose that complaints can be received by either body. Each body would have a responsibility to work closely together and pass on complaints where appropriate. This arrangement works successfully in England and Wales between the Legal Ombudsman and the Solicitors Regulation Authority. We believe a similar system could work well here in Scotland.
 - Where the complaint relates to a conduct matter, the **complaint will be taken forward in the name of the Law Society of Scotland**. The complainer will be kept fully informed as the complaint progresses. Where the Law Society identifies possible misconduct, it would be able to move to a formal investigation without first seeking approval from the SLCC.
 - **Compensation will not be awarded for ‘pure’ conduct complaints**. In reality, most ‘pure’ conduct complaints relate to breaches of the accounts rules, which would not generally impact on clients and it is these that the principle is aimed at. By definition, other conduct complaints will have an element of service, and are therefore hybrid, which compensation can continue to be awarded for (see below).
 - **Hybrid complaints, as they existed before the 2016 Court of Session judgment, are reinstated**. This would mean that compensation could be awarded for the service aspect of complaints issues, which would be dealt with by the SLCC in its consumer redress role, leaving the Society to carry out its regulatory role. If there is no compensation for conduct, this will remove the double jeopardy element as the Society is only looking at the complaint from a regulatory perspective. Concurrent investigations could proceed as neither body requires to take into account any compensation which has already been awarded. This will speed up the complaint process.

- The **creation of an independent ombuds** who would oversee the SLCC and the Society. The right to go to the ombuds would arise at various stages of the process, removing the costly need to involve the Court of Session. It is suggested that the Lord President may be the appropriate body for this role, although this has not been discussed with the LP as yet.

149. We have given careful consideration to the detailed steps which would be undertaken in any new process, including appeal routes. We would be happy to discuss this with the review group.

150. **Recommendation:** That a new system for dealing with complaints about legal services and solicitors is introduced, recognising the paramount aim to protect consumers whilst allowing the Society to continue to deal with the professional discipline of its members, and adopting relevant processes to make the system speedy, effective and efficient whilst recognising the differences between consumer redress and professional discipline.

An inclusive professional body, open to non-solicitor members

151. 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. We are committed to growing our membership and providing a value proposition for those non-solicitors working in the legal sector.
152. In 2011, we established the Registered Paralegal Scheme, a voluntary scheme which paralegals may join, subject to certain minimum entrance requirements and opting into certain standards (ie a code of conduct, a continuing professional development regime, and a complaints process). 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. The Society owns the intellectual property behind the title and grants it to paralegals. 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 CPD training each year. Some work was undertaken earlier this year to update and refresh the scheme and it was renamed the Accredited Paralegal Scheme. The scheme has been successful and there are currently over 400 paralegals registered.
153. Paralegals have an important and central role within the legal profession. Where a consumer is receiving a legal service from a member of the Accredited 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 Accredited 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.
154. In 2016, we also established a student associate scheme. All Scots law LLB and Diploma in Professional Legal Practice students, and recent graduates of those courses, are eligible to apply to join as a student associate. The scheme is free to join and provides help and guidance to students at the outset and while they are studying for a career in the legal profession. There are currently more than 1,600 student associate members.
155. 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 Accredited 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 regulation and representation.

156. Other groups which we believe may benefit from such membership include legal advisers, researchers, legal executives, legal analysts, legal technologists, law librarians, legal secretaries and legal academics.
157. 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 also due to 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.
158. 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. 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' (now Accredited 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.
159. 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.
160. **Recommendation:** That primary legislation provides for the permissible power for the Law Society of Scotland to open up membership to non-solicitors.

Conclusion

161. We believe our suggested reforms present an appropriate way to ensure a responsive, agile and transparent legislative framework, working in the interests of the consumer. That is best delivered through enabling legislation, a parent Act, providing the flexibility through subordinate legislation to react quickly to future changes in the legal marketplace, allowing for the development and enhancing of professional standards and strengthening of consumer protections. We further believe that a permissible Act which reflects the recommendations as set out within this paper will significantly strengthen consumer protections and confidence.
162. We hope this submission is helpful to the independent review and would be happy to discuss any of the issues raised. We look forward to engaging further as the review completes its work this year and to assist further in any way we can.

Appendix 1: Challenges within the 1980 Act

163. As previously referred to in this paper, the Solicitors (Scotland) Act 1980 underpins and is central to the regulation of the solicitors' profession in Scotland. Changes in the legal sector landscape and often ambiguous, prescriptive and even conflicting legislation has resulted in difficulties in interpreting the legislative framework to meet the objectives which were originally intended – the regulation of the Scottish solicitor profession and the protection of the consumer. The prescriptive nature of the 1980 Act prevents proactive regulation, which we believe can only be achieved by a more permissible framework.
164. Below, we have set out, by way of examples, some of the issues raised by the current framework.
165. **Part I of the 1980 Act** 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.
166. The provisions allow for the Council to delegate its regulatory functions and, in this respect, all regulatory matters are delegated to the Society's Regulatory Committee. However, a number of the provisions are contradictory and ambiguous, requiring wide interpretation to ensure workability. For example:
- i. A solicitor may have his or her practising certificate suspended on the occurrence of one of a number of instances which relate to fitness to practice⁵³. 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 Scottish Legal Complaints Commission (SLCC) or has failed to pay compensation awarded to clients 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

⁵³ Section 18 Solicitors (Scotland) Act 1980

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 solicitors⁵⁴ are very narrow and open to interpretation. Crucially, the giving of legal advice in important consumer areas, such as employment, contracts, pensions and 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 provisions⁵⁵ contained within part II contain terminology inconsistent with later legislation, in particular, the 2007 and 2010 Acts. This causes uncertainty and confusion and can make regulatory enforcement problematic.

167. There are a number of provisions in **Part III (Professional practice, conduct and discipline of solicitors)** which are inconsistent with regulatory rules and regulations. In addition, many of the powers provided to the 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 accounts rules. However, the accounts 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.

⁵⁴ Section 32 Solicitors (Scotland) Act 1980

⁵⁵ There are approximately 10 sections within part II with inconsistent terminology

- v. A number of provisions, with the policy intent of protecting client funds, allow the Council to freeze a firm's accounts where a sole practitioner is struck off or becomes ill. However, there is no power to allow the 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.

168. **Part IV (Complaints and disciplinary proceedings)** sets out the powers of the Scottish Solicitors' Discipline Tribunal (SSDT) and the 102 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 the 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 undergoes 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.

169. **Schedules to the 1980 Act.** 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 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 email. However a 'paper' copy still has to be sent, which is both costly and time consuming.
- iv. Schedule 3 includes provisions relating to the Guarantee Fund. The provisions are restrictive and provide limited powers in administering the fund itself.

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

171. The 1980 Act consists of 67 sections, accompanied by six schedules. To date, of those, we have identified approximately 50 sections which we believe need to be addressed to ensure more effective and focused consumer protection, safeguards, clarity and workability.

The Solicitors (Scotland) Act 1980 – identified weaknesses

Note: The wording of the section below has been lifted from the 1980 Act, however, reference to the ‘Council’ is to be read as the ‘Regulatory Committee’ in those matters which relate to regulation. This is because the Council’s regulatory functions are fully delegated to the Regulatory Committee and the Council is not permitted to unduly interfere in the Regulatory Committee’s performance of those functions.

Section	Provisions of section	Weakness
3A 3B 3F	<p>Discharge of functions of Council of the Law Society:</p> <p>Section 3 provides the power to the Council to arrange for its regulatory functions to be exercised on its behalf by the Regulatory Committee. 3B provides the Regulatory Committee with the powers to exercise those functions delegated.</p>	The current wording of section 3A,B is ambiguous, open to interpretation and raises a number of inconsistencies in providing powers.
3C(1)(d) 3C(2)	<p>Particular rules applying: (to Regulatory Committee)</p> <p>(1)(d) provides that the Regulatory Committee is to appoint a lay member as convener. (1)(e) provides that if the convener is not present, then another lay member ‘is to chair the meeting’. (2) provides that any sub-committee is subject to the rules of the Regulatory Committee, except (2)(a) that any meeting of a sub-committee of the Regulatory Committee need not be chaired by one of its lay members.</p>	Provisions inconsistent with the practicalities.
5	<p>Training regulations:</p> <p>Provides that the Council, with the concurrence of the Lord President, may make regulations for training requirements, for admission as a solicitor.</p>	All regulations to be introduced by the Council relating to training, passing of examinations, courses of legal education etc must be agreed by the Lord President. This can take considerable time and cause delays in the introduction of new proposed

		education and training requirements.
7	<p>Keeping the roll:</p> <p>Places a statutory duty on the Council to maintain and administer a roll of solicitors, which any person may inspect without fee.</p>	The Council no longer considers it appropriate for a hard copy (paper) register, which may only be examined on Society premises. An electronic copy will be easier to maintain and can be accessed/examined electronically, i.e. via the internet.
8	<p>Entry to the roll:</p> <p>Requires a solicitor to inform the Council, in writing, of any change of details.</p>	There are no sanctions for a failure to notify of changes.
12	<p>Removal of name on request:</p> <p>Provides that on application by a registered European lawyer to the Council to remove his name, the Council should remove the name of that solicitor.</p>	The terminology is inconsistent between registered European lawyer and solicitor.
12A	<p>Keeping the register: (the Register of European Lawyers)</p> <p>This places a statutory duty on the Council to maintain and administer a Register of European Lawyers, which any person may inspect without fee.</p>	The provision does not expressly allow for an electronic copy of the register to be maintained or electronic examination, as with section 7 above.
13(3)	<p>Applications for practising certificates:</p> <p>Provides that the making of a false statement in an application for a practising certificate may be treated as professional misconduct.</p>	<p>The term 'may' gives rise to discretion.</p> <p>The term professional misconduct is also inconsistent with wording of similar effect contained in other sections of 1980 Act.</p>
15	<p>Discretion of Council in special cases:</p> <p>Section 15 relates to practising certificates, and allows the Council to issue a practising certificate (PC) to a solicitor in special</p>	The list of 'special cases' does not include where the solicitor owes money to the Scottish Legal Complaints Commission under S27-28 2007 Act (levy fee) or has

	cases, as set out in S2(a)-(j).	not paid in full compensation awarded under S42ZA 2007 Act (Council directing solicitor to pay compensation to complainer).
15(2)(c)	<p>Discretion of Council in special cases:</p> <p>Under the provision of (2)(c), where a period of 12 months has elapsed since the solicitor held an unrestricted practising certificate, the Council will issue a 'restricted' practising certificate.</p>	There have been instances of solicitors applying for a practising certificate at the eleventh month period, only paying the reduced pro-rata fee. This allows the solicitor to obtain a full unrestricted practising certificate when they return to practise.
17	<p>Date and expiry of practising certificate:</p> <p>Provides that a practising certificate issued in November must state the date of 1 November, and each practising certificate expires on 31 October. A practising certificate issued outside of November shall state the date on which it is issued.</p>	<p>The Society has moved to online practising certificate renewal. The wording of section 17 may be interpreted to prevent the Society from issuing post-dated certificates during the month of October.</p> <p>S17 does not take into account Smartcards and the abolition of paper-based practising certificates to be introduced in the near future.</p>
18	<p>Suspension of practising certificate:</p> <p>Provides that a solicitor's practising certificate shall be suspended upon intimation to the Council of the occurrence of an event as expressly stated S181(a)-(e).</p>	The events as expressly stated do not include where a solicitor is subject to disqualification under the Company Director Disqualification Act 1986 or is subject to a debt repayment programme under the Debt Arrangement and Attachment (Scotland) Act 2002. Both these events may raise questions of fitness to practise.
20	<p>Council's duty to supply lists of solicitors holding practising certificates:</p> <p>Requires the Council to provide practising certificate lists to a number of expressly</p>	There is no provision to allow the circulation of the practising certificate list to the Scottish Legal Aid Board. However, S20 may be

	<p>stated organisations annually. Also provides for the Council to advise those same organisations of changes to the list.</p>	<p>interpreted as not restricting circulation to any other organisation.</p>
23A	<p>Professional misconduct for registered European lawyer to practise without a registration certificate:</p> <p>(3) refers to a false statement being treated as professional misconduct.</p>	<p>The term professional misconduct is inconsistent with wording of similar effect contained in other sections of the Act.</p>
23B	<p>Professional misconduct for registered European lawyer to practise without a registration certificate:</p> <p>23B refers to a false statement, by a foreign lawyer, being treated as professional misconduct.</p>	<p>The term professional misconduct is inconsistent with wording of similar effect contained in other sections of the Act.</p>
24C(2)	<p>Discretion of Council in special cases: (European lawyers)</p> <p>Requires applicants to provide the Council with six weeks' notice before applying for a renewal of registration certificate.</p>	<p>Wording used in S24C(2) is inconsistent with 2007 Act.</p>
24F	<p>Suspension of registration certificate:</p> <p>Provides that a European lawyer shall have their registration certificate suspended upon intimation to the Council of the occurrence of an event as expressly stated S24F(1)(a)-(e).</p>	<p>As above with section 18, the events as expressly stated do not include where a solicitor is subject to disqualification under the Company Director Disqualification Act 1986 or is subject to a debt repayment programme under the Debt Arrangement and Attachment (Scotland) Act 2002. Both these events may raise questions of fitness to practise.</p>
24A(3)	<p>Applications for registration certificates:</p> <p>(3) Provides that the making of a false statement in an application for a registration certificate may be treated as professional</p>	<p>The term 'may' gives rise to discretion. Also, the term professional misconduct is inconsistent with wording of</p>

	misconduct.	similar effect contained in other sections of the Act.
24G(4)	<p>Further provisions relating to suspension of registration certificates:</p> <p>Provides that a suspension for practice arising by virtue of S24F(1A) expires if the grounds for it no longer apply (24F(1A) relates to conviction of offence involving dishonesty etc), where the registration certificate has been suspended (under 24F(1)).</p>	The wording 'grounds no longer apply' is ambiguous and open to interpretation.
25	<p>Rights of audience in the Court of Session etc:</p> <p>Provides for the extension of rights of audience in civil matters where the Council is satisfied that the applicant has met the requirements as set out in (2)(a)-(c).</p>	S25 fails to take into account that the UK Supreme Court has limited criminal jurisdiction in Scottish cases - devolution issues and Scottish solicitor advocates may appear. Section 25 does not cover the UK Supreme Court.
25A	<p>Rights of audience in the Court of Session etc:</p> <p>Provides for the extension of rights of audience in civil matters where the Council is satisfied that the applicant has met the requirements as set out in (2)(a)-(c).</p>	(2)(a) requires that the applicant has completed a course in evidence, but there is not a requirement for understanding or learning to be demonstrated, for example, through an exam etc.
25A(1)	<p>Rights of audience in the Court of Session, the High Court and the UK Supreme Court:</p> <p>Provides that any solicitor seeking rights of audience shall have those rights, providing he has satisfied the Council as to the requirements and subject to regulations 6 & 11 of the European Communities (Lawyers Practice)(Scotland) Regs 2000.</p>	Reg 11 of the European Communities (Lawyers Practice)(Scotland) Regs 2000 relates to registered European lawyers, and provides they shall not have rights of audience in the UK Supreme Court unless they have completed training. However, S25 does not apply to registered European lawyers, and S25 is not referred to in the regulations as one where the

		Council may make rules regarding training. Therefore, the legislation and the regulations are contradictory to one another.
25A(9)-(12)	<p>Rights of audience in the Court of Session etc:</p> <p>Requires the Council to submit rules, which have previously been approved by the Lord President, to the Secretary of State for approval.</p>	May be unnecessary oversight, duplication of approval.
26	<p>Offence for solicitors to act as agents for unqualified persons:</p> <p>Provides that it shall be an offence for a solicitor act as an agent for an unqualified person or unregulated firm or to allow his/her name to be used in any actions or prepare any writ, which will lead to profit for the unqualified person.</p>	Ambiguous in its wording and open to interpretation. In particular, it has been interpreted by some legal service providers to allow businesses to provide legal services and to operate (unregulated), employing a solicitor with a PC.
30	<p>Liability for fees of other solicitors:</p> <p>Provides that where a solicitor or Incorporated practice is authorised by a client to employ another solicitor, he shall be liable for the employed solicitor's fees.</p>	The provision does not distinguish between 'agency' and employment.
31	<p>Offence for unqualified persons to pretend to be a solicitor or notary public:</p> <p>Provides that it shall be an offence for a person or corporate body to hold themselves out as a solicitor, notary public or incorporated practice.</p>	The provision does not provide powers for the Council to prevent unqualified persons to pretend to be a solicitor or notary public, where there is insufficient evidence to bring a criminal prosecution – no powers to seek prevention through courts.
32	<p>Offence for unqualified person to prepare certain documents:</p> <p>Provides that it shall be an offence for unqualified persons to undertake work in</p>	Limited areas of legal work are reserved. Businesses are opening to offer services in unreserved areas and are unregulated, which may undermine consumer

	specific reserved areas, which includes any writ relating to heritable or moveable property etc.	protection.
34(1A)	<p>Rules as to professional practice, conduct and discipline:</p> <p>Provides the Council with the powers to make rules for regulating matters of professional conduct for solicitors and incorporated practices. 34(1A)(iii) allows practice rules to provide for the period for which any recognition granted will remain in force.</p>	Under the provision, the recognition granted lasts for an indefinite length of time and it is not clear who has the power to revoke. Also, wording is ambiguous as to the Council's powers to revoke a certificate of recognition for incorporated practices. This may also impact on section 45.
37	<p>Accounts certificates:</p> <p>Requires solicitors/incorporated practices to deliver a certificate from an accountant demonstrating compliance with the accounts rules.</p>	The provision is inconsistent with the accounts rules. The accounts rules, at B6/15, allow for solicitors to self-certify the certificate; it is not necessary to submit a certificate certified by an accountant.
39A	<p>Powers where excessive fees charged etc:</p> <p>Provides powers to the Council to withdraw a practising certificate where excessive fees have been charged and must restore the practising certificate if the accounts are submitted for taxation and the client refunded relevant amount. S39A (8) provides for right of appeal to the decision to remove a practising certificate.</p>	S39A(8) provides for the right of appeal for a decision to remove a practising certificate. However, no appeal provision exists to appeal decision <i>not</i> to restore.
41	<p>Appointment of Judicial Factor:</p> <p>Provides the Council with the power to apply for appointment of the Judicial Factor following investigation.</p>	Expressly refers to 'investigation' - this should also include the power to act after concerns raised in routine inspection.
42(2)	<p>Distribution of sums in client bank account:</p>	In urgent cases, an interim Judicial Factor may be appointed

	(2)(c) provides the power to distribute the credit in the client account proportionately amongst the clients on the occurrence of an event, including: (c) the appointment of Judicial Factor.	by the court. However, the provision does not include the power for the interim Judicial Factor to act.
42ZA	<p>Unsatisfactory professional conduct: Council's powers:</p> <p>This sets out the duties and powers of the Council where a conduct complaint suggesting unsatisfactory professional conduct is remitted from the SSDT.</p>	Wording suggests that the Council must pre-determine if the complaint is unsatisfactory professional conduct before investigating complaint.
43	<p>Guarantee Fund:</p> <p>Provides for the establishment of the Guarantee Fund and vests the powers in the Society and the Council for the management and control of the fund. Schedule 3 sets out requirements for the Guarantee Fund and gives the Council power to make rules regarding procedures.</p>	<p>The title of the fund does not accurately reflect its purpose. Since November 2015, the account has been trading as the Client Protection Fund, although it will still be referred to as the Guarantee Fund as this is how it is referred to under the 1980 Act.</p> <p>There are a number of other weaknesses in relation to the Guarantee Fund. For example, there are no provisions to prevent a claimant submitting multiple claims, and no restriction on the total value of claims against any one solicitor etc.</p>
45(4)	<p>Safeguarding interests of clients of solicitor struck off or suspended:</p> <p>Provides that if the 'struck off' solicitor is a sole practitioner then the right to deal with the client account shall vest in the Society.</p>	The provisions may not cover the situation where all practising partners may be struck off or have their practising certificates removed. Under the provisions, there are no powers to give the Society the right to deal with the client account.
46(3A)	<p>Safeguarding interests of clients in certain other cases:</p>	The process is cumbersome. The requirement to apply to the court

	Provides the Council with the powers to take control of solicitors' files, accounts etc where those solicitors cease to practise. (3A) provides that the Council must apply to court to stop the operating of the client account where a sole solicitor dies.	causes delays and is expensive.
46(2)	<p>Safeguarding interests of clients in certain other cases:</p> <p>S46(2) provides that where a sole practitioner ceases to practise for any reason, other than having been struck off, then the provisions shall apply to allow the Society to deal with client files. In accordance with S46(3A), the Council, with the consent of the court, may freeze the client account.</p>	The provision provides that the Society may only freeze the account. There is no power to deal with the account in any other way, as there is with the client account under S46(1)-(where a solicitor becomes ill).
47	<p>Restriction on employing a solicitor struck off or suspended:</p> <p>Prevents a solicitor, without permission of the Council, from employing or remunerating any person whom they are aware has been disqualified as practising as a solicitor.</p> <p>A solicitor can have their PC suspended under a number of provisions within the Act, see sections 9, 15, 18, 40.</p>	A solicitor who has had his or her practising certificate suspended may be employed in another legal capacity, i.e. legal adviser, if they do not apply for a practising certificate renewal. If they do not apply for a renewal, then the practising certificate cannot be suspended and therefore they can be employed.
51A	<p>Complaint to SSDT:</p> <p>Provides that a complaint will include complaints made in respect of conveyancing and executory services.</p>	If the complaint relates to the conduct of an incorporated practice, the SLCC will refer to the Society. However, the Society does not have the power to refer an incorporated practice to the SSDT for conduct matters, only individual solicitors.
51(2)	<p>Complaint to SSDT:</p> <p>(2) provides that certain persons may report</p>	The list of persons contained in (3) and who may make a complaint under (2) does not include the

	an incorporated practice to the SSDT for suspected professional misconduct.	Council - this may be interpreted as preventing the Council from making a complaint regarding an incorporated practice.
52	Procedure on complaints to SSDT: Section 52 and schedule 4 set out the constitution, powers and procedure for the SSDT.	Schedule 4 does not provide the power for the SSDT to delegate any of its functions. The SSDT rules do allow such delegation. Often, functions are delegated to a 'sub' tribunal, convener or vice convener.
53(3A)	Powers of SSDT: Provides the power for the SSDT to exercise powers on former solicitors and incorporated practices.	The provision refers to 'incorporated practices', and gives powers to the SSDT to deal with these. However, the Council does not have the powers to refer incorporated practices to the SSDT (see 51A above).
53(2)	Powers of SSDT: Provides the SSDT with powers to be exercised in a finding of professional misconduct.	S53(2) does not include the power to order that the solicitor undertakes education or training in the particular area where the misconduct may have occurred, e.g. client accounts.
53ZA	Remission of complaint by SSDT to Council: Places a duty on the SSDT to remit a complaint to the Council if not satisfied there has been professional misconduct but considers there may be a case of unsatisfactory professional conduct.	Requires the case to be re-heard by the Society - this is time consuming and unnecessarily lengthens the time taken to conclude the matter.
53(7A)	Powers of SSDT: Sub-section (7A) refers to investment business certificate and provides definition.	Definition out of date and superseded.
54	Appeals from decisions of SSDT:	Neither S54, nor Schedule 4, expressly refers to the making of

	Provides that a solicitor may appeal against the decision of the SSDT within 21 days.	further determinations, for example, compensation payable etc. The determination of compensation may be considered after the appeal has been lodged. Also S54 does not provide the right to appeal interim decisions.
54A (S53 2007 Act)	Appeals from decisions of SSDT: Provides the right to a complainer to appeal a decision of the SSDT.	No right given to the Society's Council to appeal decision of the SSDT.
54B	Appeals from decisions of SSDT: The right to appeal to the SSDT against Council decision not to restore name of solicitor to roll/register.	No right of appeal to the Court of Session for decisions of the SSDT to uphold Council's decision not to restore. Inconsistent with other provision of Act. May have been repealed in error by 2007 Act.
55(2)	Powers of the court: Sub-section (2) provides that 'subject to subsection (3) a decision of the court...shall be final'.	Cross-reference missing, should also include 3A.
60A(4B)	Registered foreign lawyers: Provides that a registered foreign lawyer may apply to the Council for his or her name to be removed from the register and the Council shall grant if satisfied adequate arrangements have been made in respect to the business.	12C(2)(b) provides same powers but with additional condition that 'it is otherwise appropriate to do so'. This is an inconsistency in provision.
60A(4F)	Registered foreign lawyers: (4F) provides that the applicant may appeal to the courts within three months of the Council's decision not to register the applicant.	The provision provides a right to appeal against refusal to register, but not the right to appeal for refusal to restore under 4C.
65(1)	Interpretation section:	Will require review and updating to

	Provides for definitions of key terms used throughout the Act.	reflect all amendments.
Schedule 1	Constitution and proceedings: Revenue: Provides the powers to the Council to raise revenue through application of membership fees etc.	The current provisions restrict the Council from raising revenue for services provided in the course of carrying out its statutory functions.
Schedule 2	Powers of the Council and ancillary provisions: Para 1(b) provides that the Council may send a 'letter' enquiring if the solicitor wishes to remain on roll.	Raises interpretation issues - does this also include emails. for example?
Schedule 2 Para1(b)	Powers of the Council and ancillary provisions: Section 1(b) provides that the Council writes to a solicitor, giving him or her six months to confirm if he or she wishes for his or her name to remain on the roll.	The obligation to give six months' notice applies where a solicitor fails to pay his or her practising certificate fee. Some solicitors will then wait until they receive the six-month notice and pay in month five. The solicitor will then be charged the pro rata rate. Also, the solicitor is effectively practising without a practising certificate for six months.
Powers to charge fees	Currently, the Society has no powers to charge fees or recover costs for administering incidental financial business.	The Society is under a statutory duty to administer but not entitled to recover costs.
Schedule 3 Part 1	Guarantee Fund - contributions by solicitors: (4) provides that no annual contribution will be required as long as the amount of the Client Protection Fund (Guarantee Fund) does not fall below £250,000.	The Council has power to set membership fees and to vary the amount to be held in the Guarantee Fund - (4) expressly states £250,000. In reality, the limit expressed serves no purpose.
Schedule 3 Part 1	Guarantee Fund: Grants: Provides the Council with the power to make a grant out of the Client Protection	No power to provide loans to Judicial Factor - would help to access funds to settle urgent

P4	Fund (Guarantee Fund).	matters in short term.
Start up	<p>Powers to prevent start up:</p> <p>There are no regulatory powers to prevent solicitors setting up a solicitor firm.</p>	<p>Currently, a solicitor can cease operating a firm, leaving client files, accounts, business debts etc and immediately start operating a new separate firm, with no connection to the previous firm and no obligation on the solicitor to attend to the previous firm's business.</p>
Taxation	<p>Taxation is the independent review of fees charged by a solicitor to the client. It arises when the fee is disputed and is conducted by the auditor of the Court of Session.</p>	<p>Currently, there is no primary legislation process requirement for taxation. When taxation does occur, it can only be conducted by the clerk /auditor to the Court of Session. This causes significant delays as there are limited resources to undertake the taxation process.</p>

Appendix 2: The unregulated sector

172. Common businesses within the unregulated legal sector can take a number of forms and structures, the most common of which is an unregulated business providing ‘unreserved’ legal services and:

- Employing a solicitor holding a practising certificate (PC)
- Employing a solicitor not holding a PC
- Does not employ a solicitor and provides unreserved legal services through ‘legal advisers’

Employing a solicitor holding a PC

173. Although a solicitor holding a PC is authorised to provide reserved legal services, as provided in section 32 of the 1980 Act, section 26 of the Act prohibits a solicitor holding a PC from conducting reserved activities on behalf of an unqualified person for profit. An unqualified person can be defined as a business which is not a firm of solicitors or an incorporated practice – therefore not regulated by the Society.

174. There are currently a number of businesses in Scotland that offer legal services, in particular, in the area of employment law, and employ solicitors holding a PC. However, they may also offer other services, including everything from will writing, legal services relating to social welfare and housing, to advice on media law, commercial contracts and tax.

175. Although they may not be strictly acting in contravention of sections 32/26, they are often skirting very close to the edge in circumventing the legislation, through liberal interpretation of the statutory provisions. We have no information on whether these service providers hold client money. If they did, this may contravene section 33 (unqualified persons not entitled to fees) and section 35 (accounts rules). For example, employment advice service providers ensure that any monies received from the client (lodging fees etc) are made out to a third-party recipient, settlement being made direct to the client.

176. In relation to client money, Rule B6.1.1 of the practice rules 2011⁵⁶ defines ‘client money’ as any money (not belonging to him) received by a regulated person, whether as a regulated person or as a trustee in the course of his practice. This includes the receipt of third-party cheques and payments as

⁵⁶ The Law Society of Scotland Practice Rules 2011

being 'client money'. The rules provide that all client money received must be paid into a client bank account without delay, and properly held and accounted for within the records of the practice, and the client bank account.

177. However, there some exceptions to this. These include third-party cheques and payments received from, or to be passed onto, third parties, where the practice unit is effectively acting as a 'post-box'. In such a situation, there is no requirement for the practice to pay such funds into a client bank account, but they must record the third-party cheques and payments through the books and records. Although the practice unit does not need to pay third-party cheques, cash and funds into a client bank account, they still need to record the receipt, and onward payment, of these funds through their records, and this would still be considered 'handling client funds'.
178. Examples of this would be insurance or accident claims and settlement payments awarded by employment tribunals as referred to previously. Therefore, money received by the solicitor, whether or not paid into a 'client account' and regardless of payments being made payable to a third party, may be 'client money' and, as such, may potentially breach the Society's accounts rules.
179. The employed solicitor holding a valid PC is subject to individual regulation by the Society, which affords a level of protection. Practising solicitors, as individuals, are covered by the Society's Client Protection Fund. However, as the business is not regulated, the consumer does not have the benefit of the protection afforded by Society oversight, including inspections and the assurance of sufficient indemnity insurance as offered by the Society's Master Policy etc.
180. If any issues arise in relation to the individual solicitor, the client may complain to the Scottish Legal Complaints Commission (SLCC). However, if the complaint is wider or the actions which gave rise to the complaint cannot be attributed to any individual then the SLCC does not have the powers to be able to consider the complaint.
181. In relation to the position in England and Wales, any person wishing to practise as a solicitor must practise through a firm authorised by one of the legal regulators whenever providing services to the consumer, including non-reserved legal services. However, the Solicitors Regulation Authority (SRA) recently consulted on proposals to lift this restriction and permit the provision of non-reserved services by a solicitor employed by a non-regulated business.

Employing a solicitor not holding a practising certificate

182. In this particular scenario, the solicitor will be registered on the roll, but they do not hold a valid PC. As a solicitor registered on the roll, they may refer to themselves as a solicitor, but in accordance with section 23 of the 1980 Act, they cannot hold themselves out as a practising solicitor. Many simply refer to themselves as legal advisers or 'lawyers' and they are permitted to provide none of the reserved areas of legal service.
183. As the solicitor does not hold a PC, they are only subject to limited practice rules and the Society's standards of conduct. However, as a solicitor they will be covered by the Society's Client Protection Fund for acts of dishonesty, although they do not contribute to this in any way. As the solicitor does not hold a PC, they will not be acting as a qualified person in terms of the 2007 Act, therefore they cannot be made the subject of a complaint to the SLCC.

Does not employ a solicitor and provides unreserved legal services through 'legal advisers'

184. Where a business provides non-reserved legal services and these are provided by 'advisers' who are not solicitors, then the Society has no powers. Providing that the service provider does not conduct the type of work as set out in section 32 of the 1980 Act, they are not breaching any statutory restriction and, to the extent of the legal services provided, the consumer will be exposed to significant risk from a protections perspective. There will be no protection through the Client Protection Fund. As the business is not regulated and the service has not been provided by a solicitor, the client cannot make a complaint to the SLCC. The business may have professional indemnity insurance but the level of this may be insufficient.

Appendix 3: Entity regulation

185. We believe that to enhance consumer protection there needs to be better targeted regulation of entities than that currently provided in the regulatory framework.
186. 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 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 solicitors and entities (hybrid regulation) would be a better fit for modern legal services and would provide greater safeguards for the Scottish consumer.
187. Over the years, there have been a number of amendments which have introduced further limited powers to regulate certain categories of entities. However, if entities are to be regulated to the extent considered in this paper, then the permissible power to fully regulate all entities will need to be provided within new primary legislation.

What is entity regulation?

188. Entity regulation and entity-based regulation are terms used interchangeably to describe a process or system which regulates firms that deliver professional services, such as law firms. Entity regulation, from the perspective of legal services, moves away from the individual solicitor being the centre of the regulation framework, expanding this to cover all individuals within the law firm, including both qualified and non-qualified staff. It recognises that some issues and problems may go beyond the responsibility of the individual solicitor and better sit within the responsibility of the firm.
189. The focus of entity regulation is centred on the consumer interest and protection of the consumer. In part, it is a response to the increasing diversity and innovation in legal practice in terms of individuals, entities and business models. These, in turn, are being driven by technology, globalisation and increased interest in the multi-disciplinary provision of legal services. There has been a collective acknowledgement in a number of UK and international jurisdictions of just how antiquated and ineffective the existing individual regulatory system is. There has also been recognition that the

model of the regulation of individual solicitors is an anachronism that goes back to when legal services were, for the most part, delivered by one or two-person firms.

190. Entity regulation recognises the evolution in the way legal services are delivered, how the marketplace and the structure of firms has changed significantly from traditional models and how many professional decisions – once made by individual solicitors or partners – are increasingly determined by law firm policies, procedures and firm decision-making processes, which can substantially influence the behaviour of individual solicitors. Many law firms now delegate decision-making powers to non-solicitor employees.
191. From the perspective of a regulator, entity regulation provides the opportunity for a greater collation of data, which would enable the regulator and the legal profession to identify and address deficiencies early, taking the necessary preventative action.
192. Entity regulation can, and often does, run in parallel to individual regulation, effectively providing a 'belt and braces' approach. Regulating entities as well as individual solicitors through a hybrid approach aims to provide more efficient and effective regulation – both from the consumer and the solicitor perspective. It is meant to simplify and improve the regulatory process from the perspective of the individual solicitor, not to create additional regulatory burden. In the instance where there has been a breach of the rules by an individual solicitor, then they would be subject to disciplinary proceedings. If it could not be established or proved which solicitor was responsible, then the hybrid system would allow for action to be taken against the firm. Entity regulation does not dilute the regulation of the individual solicitor; the two run alongside and complement each other.
193. By encouraging the delivery of legal services in new ways, entity regulation recognises that clients need a regulatory system that does not just impose sanctions, but also provides remedies and gives the clients, as well as the solicitors, a broader array of choices when seeking to receive or provide legal or law-related services.
194. The regulation of entities will also be in line with the consumer's perception of legal services regulation. Clients and members of the public often presume and expect that those they are seeking legal services from are regulated, which is not necessarily the case. From the perspective of the client, their contract is with the law firm/legal service provider and the client places expectations on that firm.

The current extent of entity regulation

195. The Law Society of Scotland already regulates entities to an extent, in addition to individual regulation, and this will progressively increase with the introduction of the Fourth Money Laundering Directive⁵⁷ in the summer of 2017.
196. **Traditional law firms**, or 'legal practices' are regulated by the Society as an entity to the extent of the accounts rules and are subject at entity level to annual inspections in addition to the requirements of the Society's Master Policy. However, as a practice unit, all principals and employed solicitors are also regulated on an individual level. Service complaints made against firms by clients are also dealt with by the Scottish Legal Complaints Commission (SLCC) at entity level.
197. **Incorporated practices** have been permitted since the coming into force of the Solicitors (Incorporated Practices) Practice Rules 1987. Until relatively recently, there were very few incorporated practices, however, this has increased in recent years to 417 (split LLP – 326 and limited company – 91). An incorporated practice takes the form of a company (limited or unlimited) or a limited liability partnership (LLP) which has been recognised by the Society's Council in accordance with section 34 of the Solicitors (Scotland) Act 1980. The Law Society's practice rules 2011, specifically Rule D5, apply to incorporated practices as well as all those rules within section A and section B. Over the years, there have been a number of amendments which have introduced further powers to regulate at entity level which, for example, allow for rules on professional practice, conduct and discipline to be made in relation to incorporated practices and limited liability partnerships.
198. **Licensed legal services providers (LPs)**, as permitted by the Legal Services (Scotland) Act 2010, allow 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. The Society has recently been approved as a regulator for LPs and is currently developing criteria to meet the requirements of the 2010 Act. LPs will be licensed, charged and regulated at entity level. The solicitors within the LP will also be regulated at individual level.

⁵⁷ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2015_141_R_0003&from=ES

199. The **Fourth Money Laundering Directive (4MLD)**, came into force in June 2017, will require that the Society regulates *all* firms for anti-money laundering (AML) purposes at an entity level. The directive aims to give effect to anti-money laundering standards which have been agreed at an inter-governmental level. The 4MLD will be passed into domestic legislation notwithstanding the UK's decision to exit the European Union.
200. The obligations imposed on our members under 4MLD will increase marginally to include the obligation for each practice to assess and record the risk of money laundering to which their business is subject. From an AML supervisory (regulation) perspective, the duties placed on the Society will be greatly increased. Among other things, the Society will be obliged to develop an AML risk assessment regime across the supervised entity population; apply and administer new supervisory sanctions and penalties; approve beneficial owners, officers, or managers of a practice.
201. As will be noted from the above, the Society currently regulates entities, but the approach and level of regulation varies. Entity regulation and charging will help to provide consistency, certainty and clarity across all business models providing legal services.

Advantages of entity regulation

202. We believe that entity regulation, the principle of which was agreed to by the Society's Council in October 2014, and re-affirmed in June 2017, would bring many advantages over the current system of regulation. For example, it would:
- Allow for more appropriate and effective targeting of sanctions against the entity where it may be difficult to identify an individual solicitor
 - Afford better protection to the consumer as, in the majority of instances, the client contracts with the entity and not the individual advising solicitor – in many instances, the legal work is completed by support staff, such as paralegals
 - 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
 - Bring transparency and certainty
 - Provide a level playing field, with all entities having to meet the same high standards
 - Support adherence to the professional principles and protect consumers whilst encouraging innovation and competition in the legal services market

- Allow the Society to offer a system of regulation to a broader range of entities or individuals who wish to supply legal services as a member of the regulated community, with the enhanced consumer protection that would entail
- Provide the opportunity for a greater collation of data, which would enable the regulator and the legal profession to identify and address deficiencies early, taking the necessary preventative action
- Promote the development of a stronger proactive relationship between the regulator and the firm
- Promote and improve ethical best practice, promoting and strengthening compliance with regulatory objectives, professional principles and rules by both qualified and unqualified staff
- Recognise the evolving changes in business structures
- Enhance consumer confidence and introduce recognised service standards

203. All jurisdictions which have adopted the entity regulation approach have seen significant reductions in legal service and conduct complaints. For example, following the introduction of entity regulation in New South Wales, there has been a reduction of two-thirds in client complaints. Since the introduction of entity regulation in England and Wales, the Legal Ombudsperson of England and Wales has reported a 22% reduction in complaints against law firms.⁵⁸

Case studies

204. Regulating at entity level, as well as individual level, will help the Society, as the regulator of Scottish solicitors, to identify and address, for example, the following problems, which draw on elements of real life cases.⁵⁹

205. **Example 1:** John Watts is one of ten solicitors employed in the litigation department of Greens solicitors. The respondent client contacts the department to check on his case and the imminent court dates. The client speaks to John Watts, who is the only available solicitor at that time. John Watts checks the file and notices that some work has not yet been completed, although the court date has been fixed. He deliberately advises the client that the date has been moved, intending to apply for a postponement, but he fails to apply for the postponement. As a result, the client misses the court date and the case is found in the complainer's favour. Costs are awarded. The client cannot

⁵⁸ Both New South Wales and England and Wales have introduced outcomes-focused approach to regulation

⁵⁹ Identifiable details (names etc) changed for obvious reasons

recall the name of the solicitor he spoke with. John Watts does not wish to 'own up', fearful for his own position.

206. Misleading the client gives rise to a potential conduct issue and is subject to possible disciplinary proceedings. However, the individual solicitor cannot readily be identified without a timely and costly investigation. Currently, when this type of scenario occurs, the SLCC will apply a 'scatter-gun' approach. As it may not be possible to identify which solicitor is responsible, it is necessary to proceed with complaints against some of the solicitors in the firm – those within the litigation department, for example. Where the individual solicitor cannot be identified, entity regulation would allow a conduct complaint to be raised against the firm and appropriate sanctions imposed if appropriate.
207. **Example 2:** Bridget Smith is a non-registered paralegal working at Williams solicitors. As a non-registered paralegal, she is not regulated as an individual in any way. Bridget is on a night out with friends; after a few drinks, she talks about a particular client's case to a close friend, aware that the friend only lives a few doors away from the client. The client finds out about this and complains to the firm, which apologises. The client then submits a complaint to the SLCC on the basis of breach of confidentiality. The SLCC refers the case to the Society as a conduct matter. As Bridget is a non-solicitor, she is not regulated. The Society considers a case of failure to supervise staff but, as the breach was in Bridget's own time, this is unlikely to be viable. No action is therefore taken.
208. As entity regulation applies at firm level, the entity is responsible for the actions of all staff, regardless of whether they are regulated or not. In the above scenario, entity regulation will allow for a complaint of a breach of confidentiality to be made against the firm for the actions of Bridget.
209. **Example 3:** Kiley solicitors, an incorporated practice (in the meaning of S34 of the 1980 Act), has a history of providing poor service to clients, failing to return telephone calls, not responding to correspondence and failing to update clients on developments etc. Eventually, one of the firm's clients makes a complaint to the SLCC. The SLCC takes this forward as a client complaint and the complainer is awarded £5,000. However, Kiley solicitors go into liquidation. The complainer is not a preferred creditor; therefore the assets of the firm are exhausted and the complainer does not receive the award. The following month, the former principals of Kiley solicitors open up a new solicitor practice unrestricted in any way.

210. Before opening another practice, an entity regulation scheme would require an application for licence. Taking previous matters into account, the Society's Council may refuse to grant the application for licence, or grant a licence subject to conditions which may attach to service.

Comparative jurisdictions

211. There has been a shift towards entity regulation in a number of jurisdictions. This has been in response to the recognition of increasing diversity and innovation in legal practice in terms of individuals, entities and business models and driven by technology, globalisation and increased multi-disciplinary business structures. Jurisdictions which have introduced entity regulation for the legal profession include England and Wales and New South Wales. There are others which are at advanced stages of consulting and considering the introduction, such as Nova Scotia, British Columbia, Ontario, Alberta and Saskatchewan.

212. The common approach taken in the regulation of entities is in reference to primary legislative regulatory objectives and supporting principles, underpinned by rules. However, it must be emphasised that many of those have moved to an outcomes-focused approach. To support the objectives and principles, all have introduced, or are considering introducing, a proactive-based management system which helps the entity to proactively manage and monitor compliance with the principles and rules.

England and Wales

213. In England and Wales, entity regulation was introduced through the Legal Services Act 2007. Section 1 of that Act sets out eight 'regulatory objectives' that provide the basis for the regulation of the legal profession. The Solicitors Regulation Authority (SRA) is responsible for regulating entities engaged in reserved areas of legal services. Entities are expected to meet ten principles,⁶⁰ set out by the SRA, which support the objectives. Each regulated entity is required to have a proactive management system in place. Entity regulation was also introduced in England and Wales for barristers in March 2015.⁶¹

⁶⁰ <https://www.sra.org.uk/consumers/sra-regulate/sra-regulate.page#principles>

⁶¹ See Bar Standards Board, <https://www.barstandardsboard.org.uk/regulatory-requirements/entities,-including-alternative-business-structures/about-bsb-entities/>

New South Wales – Australia

214. In Australia, the conduct of law-practice entities has been regulated for over a decade and is now covered by the Legal Profession Uniform Law,⁶² which provides for entities to be co-regulated by the Law Society of New South Wales and the Office of the Legal Services Commissioner (OLSC). The Law Society of NSW is responsible for registering law firms as entities and the OLSC is responsible for regulating their conduct. Primary legislative objectives are supported by principles. Entities are also required to implement and maintain ‘appropriate management systems’ to meet ten management objectives.

Nova Scotia – Canada

215. The Nova Scotia Barristers Society is in the advanced stages of introducing an entity regulation framework, again centred on regulatory objectives,⁶³ and is currently consulting with members on the development of the ‘Management System for Ethical Legal Practice’.⁶⁴

British Columbia – Canada

216. The Law Society of British Columbia is currently working on the introduction of entity regulation, which forms part of its strategic plan⁶⁵, and has recently published an interim report with a number of recommendations to take this forward.⁶⁶ The Law Society of BC is considering a proactive outcomes model based on objective and compliance-based principles, which again requires the entity to introduce a proactive management system, recognising that ‘...*firm regulation is a means of improving the quality and effectiveness of the provision and regulation of legal services...*’ The interim report, published in October 2016, recommends eight ‘professional infrastructure elements’ (principles) that collate to the core professional and ethical duties expected of firms, which, although designed to be flexible and adaptable for each firm separately, are sufficiently robust to set out clear standards of a firm’s conduct. These elements include confidentiality, client relations, conflicts of interest, financial management and others which are familiar to the legal profession and recognised as appropriate to ensure client protection and robust management.

⁶² Legal Profession Uniform Law: <http://www.liv.asn.au/For-Lawyers/Regulation/Legal-Profession-Uniform-Laws>

⁶³ http://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/lsr_frameworkforthefuture.pdf

⁶⁴ <http://nsbs.org/management-systems-ethical-legal-practice-mselp>

⁶⁵ https://www.lawsociety.bc.ca/docs/about/StrategicPlan_2015-17.pdf

⁶⁶ <https://www.lawsociety.bc.ca/docs/consumerations/reports/LawFirmRegulation-2016.pdf>

Appendix 4: Letter to the chair of the Legal Services Review

Esther Robertson

11 January 2018

Chair of the Independent Review of the Regulation of Legal Services

c/o. Scottish Government, Justice Directorate

St Andrews House

Regent Road

EDINBURGH, EH1 3DG

Dear Esther

INTERIM IMPROVEMENTS TO LEGAL REGULATION AND COMPLAINTS ACHIEVABLE THROUGH REGULATIONS

The Law Society of Scotland and the SLCC are both fully committed to the independent review of the regulation of legal services and the need for longer term changes around many areas; both organisations have welcomed the review.

The Society have indicated that you kindly made the suggestion when you met with the Law Society that should we jointly be able to identify interim adjustments to the system of regulation, which could assist with efficiency and effectiveness in the short term, then you may be willing to raise these with the Minister in advance of your final report, in the knowledge that, change which can only be implemented through primary legislation, will take time.

The SLCC and the Society have responded to that challenge and jointly identified the potential for improvements within the current system, which would only require change by regulation, using s41 of the 2007 Act, and then through changes to the SLCC 'rules'. These could be delivered more quickly than fuller legislative change, and might assist in the interim to achieve some measures of a more efficient and proportionate mechanism for the handling of complaints. This is of potential benefit to the public and to the sector.

Before fully committing resources to the detailed legal advice, scoping, planning and drafting, and public consultation on rules changes which would be required, the SLCC and Society wish to ascertain whether

you might be willing to support such an approach. We would be happy to work up a detailed proposal if these suggestions find favour.

The main issues being considered are at the 'eligibility' stage, which both organisations agree is most in need of reform:

1. **Reducing the number of steps:** A presumption that a case will progress to full investigation – the removal of the requirement to provide reasoning for cases proceeding to investigation.
2. **Removing disproportionate appeal rights:** Appeal only available to complaints sifted out at eligibility and finally determined by a Determination Committee (not simply when cases move to being investigated).
3. **Creating proportionate options to manage individual complaints:** SLCC flexibility to apply the current tests in the most proportionate order.
4. **Allowing complaints without merit to be closed earlier:** the removal of 'totally' from Frivolous, Vexatious, Totally Without, Merit ('totally' being too high a bar, not seen in other legislation).

To achieve this, revision of the Act would be required, or deletion of sections from the Act that would instead be incorporated into the SLCC Rules. These rules would need consulted on, including a formal role for the Lord President.

A key factor will be timescales – if swift progress can be made then there is a realistic prospect of improvements being delivered in the short term, if the changes take too long, bringing them closer to the implementation of the longer term reform, then two sets of changes in quick succession may have disproportionate cost and uncertainty.

The Society and the SLCC have agreed to work jointly on legal advice and all communications on this issue (profession, public, government, etc.) to ensure that throughout discussion leading to regulations being laid, and during consultation on rules, there will be consensus between the organisations in support of them and the necessary changes.



Neil Stevenson
Chief Executive
Scottish Legal Complaints Commission



Lorna Jack
Chief Executive
The Law Society of Scotland

Appendix 5: Summary of recommendations

- A. The repeal of the Solicitors (Scotland) Act 1980 and those parts of the Legal Profession and Legal Aid (Scotland) Act 2007 which relate to the regulation of legal services and for the introduction of new enabling and permissible legislation for the regulation of legal services in Scotland and the Scottish solicitor profession, with the flexibility to move with the times and which allows for proactive regulation to ensure consumer protections remain robust.
- B. Amending those sections of the Legal Services (Scotland) Act 2010 which relate to the regulation of legal services and the Scottish solicitor profession to address the difficulties in interpretation and application.
- C. A new regulatory framework allowing for the flexibility for the Society to seek approval from the Legal Services Board to be an authorised regulator for those multi-national practices operating in Scotland.
- D. That any new regulatory framework makes provision for the regulation of legal services provided remotely by artificial intelligence.
- E. Retaining an independent professional body for the regulation and professional support of the Scottish solicitor profession.
- F. Retaining a separate and independent discipline tribunal for decisions in serious cases of professional misconduct.
- G. That all legal service providers providing services direct to the consumer be regulated, strengthening consumer protections and enhancing consumer confidence in the Scottish legal sector.
- H. That the term 'lawyer' be a protected term, in the same way as solicitor, and only those able to demonstrate recognised legal qualifications, and who are regulated, are permitted to use the term.
- I. That primary legislation provides the permissible powers for the Law Society of Scotland to extend entity regulation to those firms wholly owned by solicitors.

- J. That a new system for dealing with complaints about legal services and solicitors is introduced, recognising the paramount aim to protect consumers whilst allowing the Society to continue to deal with the professional discipline of its members, and adopting relevant processes to make the system speedy, effective and efficient whilst recognising the differences between consumer redress and professional discipline.

- K. That primary legislation provides for the permissible power for the Law Society of Scotland to open up membership to non-solicitors.

For further information, please contact:
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