



Ash Denham MSP  
Minister for Community Safety  
Scottish Government  
St Andrew's House  
Regent Road  
Edinburgh  
EH1 3DG

Our Ref: KL/AA/RB  
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Dear Minister,

### **Review of the regulation of legal services**

On 24 October 2018, Esther Robertson published her report on the regulation of legal services.

We welcome the opportunity that now flows from the Robertson report to make improvements to the regulatory framework. The Law Society has long championed the need to modernise the current patchwork of regulation, much of which is almost 40 years old and increasingly ineffective in addressing the issues in today's modern and diverse legal sector. It was why we approached the Scottish Government proactively in 2015 to argue that reform be made a priority. It was this approach which ultimately led to the Robertson review.

During our meeting on 4 December 2018, I explained my intention to write and set out the Law Society's initial thinking on Ms Robertson's report. We agree with the majority of her recommendations and welcome her call for more flexible legislation to ensure the regulatory structure can keep pace with a rapidly changing market in legal services. Reforms around entity and cross border regulation were central to the Law Society's submission to the review. We were pleased Ms Robertson endorsed these suggestions.

However, as I explained during our meeting, we do not agree with her central recommendation to create a new single regulator for the whole of the Scottish legal profession. We believe there is no robust evidence to justify this proposal and are concerned such a reform risks increasing costs for consumers and weakening professional standards.

We believe there are alternative approaches which we would encourage the Scottish Government to consider, reforms which would improve the regulatory system, enhance consumer protection and importantly, protect the competitiveness and economic vibrancy of the Scottish legal services market.



## The need for reform

In advance of the 2016 election, the Law Society approached all political parties, asking for reform to be a priority in this term of the Scottish Parliament. We did so to build on the profound success we have seen in Scotland's legal services market and to address the obvious need for modernisation.

There are currently a record number of almost 12,000 Scottish solicitors practising inside and outside Scotland. They work across a range of sectors including private practice, the public sector and in influential in-house roles in some of Scotland's largest companies. It is also a highly competitive sector, with nearly 1,200 private law firms, overall employment of 24,000 people and an annual economic contribution of more than £1.5 billion.

As important as the size and economic contribution, is the respect which Scotland's legal profession and the badge of Scottish solicitor attracts. Independent research carried out recently by Comres shows that nine in ten solicitor clients are satisfied with the service they received. Trust in the solicitor profession as a whole stands at 81%, notably higher than similar research showing only 48% trust in the legal profession in England and Wales.

The Scottish legal profession and its professional standards and ethics are also highly respected around the world and often looked to by other developing jurisdictions. A critical cornerstone of the profession is its independence from the state, a key principle within the rule of law for any advanced democracy.

This hard won success was recognised by Ms Robertson in her report where she said, *"Scotland is home to a well-educated, well respected legal profession with a high degree of public trust of which I believe we can be rightly proud."* We agree with that assessment.

However, we know that to stand still is to fall behind. We must continue to strive to do better for consumers. This is why we believe there is a compelling case for reform, to further promote access to justice, to enhance the protection available to consumers and to strengthen the economic contribution of the sector.

To that end, there is much in Ms Robertson's report we welcome and with which we agree. We are delighted that many of the recommendations we made to her during the review have received her endorsement. For example, we support her proposed move towards entity regulation and the opportunity to create a regulatory system more relevant and more applicable to modern legal practice. We welcome her recommendation to introduce restrictions on the use of the title 'lawyer' to help avoid confusion and better protect consumers. We also support her call for new powers to allow cross border regulation, a change which could position Scotland as a more attractive jurisdiction for legal firms to be based within.

We believe these reforms and others which we are now proposing to the Scottish Government can enhance Scotland's growing legal services market. In particular, our suggested reforms to the complaints handling system offer a real opportunity to address



some of the core issues which have created most concern, both amongst the public and the profession.

### **A new single regulatory body**

We believe Ms Robertson's recommendation to abolish existing structures and establish a wholly new regulatory body is misguided. In establishing the review, the Scottish Government set a clear aim to "*ensure a proportionate approach to regulation that supports growth in the legal services sector*". Rather than meeting this aim, we believe Ms Robertson's recommendation risks undermining it.

At an early stage in her review, Ms Robertson asked an important question - "*why regulate and what mischief are we trying to prevent?*" She went on to say "*the issue is not one of mischief; there is no significant evidence to suggest there is lots of mischief going on.*"

Ms Robertson provided a similar conclusion in her report where she said "*there is little evidence of wrongdoing in the current model.*" As such, we do not believe Ms Robertson has provided the kind of robust or convincing evidence that would be expected or required to justify her proposal to set up a new regulatory body, which would involve significant upheaval, uncertainty, and increased cost for consumers.

The Law Society has an important statutory duty to work in the public interest. It is a responsibility entrusted to us by parliament and one we take extremely seriously.

We are passionate about maintaining and improving professional standards, ensuring the clients of solicitors are protected whenever things go wrong. Indeed, the 60 non-solicitors from other sectors and civic Scotland who sit on our committees and take regulatory decisions, ensure the public interest sits right at the heart of this organisation.

It is this commitment to standards and the public interest which has delivered:

- An internationally recognised route to qualification, with mandatory continuous professional development requirements
- A compulsory system of professional indemnity insurance to cover negligence when mistakes are made
- More than 250 proactive financial inspections each year to ensure client money is accounted for and properly managed
- A strong anti-money laundering regime viewed as an example for others to follow
- Rigorous work to identify and tackle issues of misconduct, with half of all cases before the independent discipline tribunal arising from the proactive work of the Law Society rather than from a client complaint
- The Client Protection Fund, which ensures clients are protected in the event of a Scottish solicitor's dishonesty, without using a single penny of taxpayers' money.



All of this work is overseen by the regulatory committee which was established by the Scottish Parliament in 2010 and sits independently of the Council of the Law Society.

Ms Robertson has proposed removing all such regulatory powers and responsibilities from the Law Society and giving them to a new, untested and inevitably inexperienced regulator. Given the prime importance of protecting the public, we believe such a change presents a material and unnecessary risk to the interests of consumers.

In addition, the proposal raises serious concerns in terms of support for the rule of law and the independence of the legal profession. Implementing such a change could damage our global reputation. The leaders of some of Scotland's largest law firms, who are involved in international transactions, have indicated to us that this is troubling them. Given that the first of the Better Regulation Taskforce's five principles of better regulation is proportionality, we believe great care is needed to avoid the significant and unintended consequences which could arise from this kind of reform.

Indeed, following a review, the government of the Republic of Ireland specifically rejected a regulatory model similar to that which Ms Robertson has proposed. The Irish Government agreed that the Law Society of Ireland should continue as a professional body and have a central role in the regulation of solicitors in its country. Concerns around the rule of law and independence of the profession were major drivers for this decision.

These risks are compounded by the inevitable costs which would arise from the creation of a new body. In her report, Ms Robertson suggests her proposal would be cost neutral. However, she provides no evidence to support such an assertion. We believe all available evidence runs contrary to her assessment.

For example, the Legal Profession (Scotland) Act 2007 establishing the Scottish Legal Complaints Commission (SLCC) was accompanied by a financial memorandum. This estimated that the SLCC could be financed by an annual levy on the legal profession of approximately £1.2 million per year. The most recent SLCC annual report for 2017/18 shows the levy raised almost £3.1 million. Over the last three years, the SLCC's levy on Scottish solicitors has increased by 24.5%. These costs are, of course, borne ultimately by consumers via increased fees.

This compares to a highly cost effective model provided by the Law Society. We benefit enormously from the volunteerism of hundreds of solicitors and non-solicitors who give their time, knowledge and expertise without remuneration to ensure sound regulatory decisions are taken.

Transferring these responsibilities to a politically appointed statutory body would build in additional costs. This is in addition to the new staffing, utilities and other overhead costs which would need to be funded by a new body.

Indeed, this is one of the many reasons why the professional body model of regulation was endorsed by the Scottish Government in its last review in 2009. It is also why the model is replicated across other sectors, including accountancy with ICAS, surveying with RICS



Scotland and the teaching profession with GTC Scotland. This approach is also mirrored in other jurisdictions such as Ireland, Australia, Canada and many states in America.

The issue of regulatory costs is important as it is the consumers of legal services, whether individuals, businesses or organisations who will ultimately bear these costs. Additional cost is not only bad for consumers, it risks undermining the international competitiveness of Scottish solicitors and legal firms and potentially erodes further the individual's access to advice and ultimately justice.

Ms Robertson acknowledges that no other jurisdiction in the world has adopted the system she proposes. We believe there is good reason for this as her preferred model would create the risks other jurisdictions have identified and led them to reject the system she advocates.

### **An alternative approach**

Rather than pursuing this recommendation, we believe there are alternative reforms which could strengthen the regulatory system and command broader support.

In our submissions to Ms Robertson's review, we explained how the problems in regulation today arise because of the unnecessarily cumbersome processes and procedures which we and our co-regulators must follow. Many of these are written on the face of primary legislation. This is where we would encourage the Scottish Government to focus, particularly in the area of complaints handling.

We agree with the SLCC that the current complaints system is slow, complex and expensive. It is simply not meeting the needs of consumers – who demand transparency and speedy resolutions to complaints – or the legal profession. It can take the SLCC six months or more to even admit a complaint for investigation after it is received. When the Law Society identifies suspected wrongdoing, it has to submit a complaint to the SLCC which is then referred back to us for investigation. This kind of administrative bureaucracy benefits no-one.

We have attached a proposed set of reforms to the complaints system which we believe would create a simpler and more effective model. At its heart is a desire to see complaints being dealt with more quickly. This model recognises the important distinction between consumer complaints – involving service and possible compensation – and complaints relating to conduct and ethics, which are the natural preserve of an experienced professional body.

Our proposals would transform the SLCC into a Scottish Legal Ombudsman Service which could concentrate properly on dealing with consumer complaints thoroughly but swiftly. That ombudsman could give the necessary focus to consumer redress and issues of compensation. This would in turn allow the Law Society to continue its strong track record of addressing issues of professional misconduct and prosecuting for discipline. This kind of system is similar to that which exists and works well in England and Wales and was recently adopted in Northern Ireland



We think both areas of work could be subject to rigorous oversight by the office of the Lord President as the independent head of the legal profession. Again, this mirrors some of the best practice seen in other jurisdictions and avoids the issue, perceived or otherwise, of political oversight.

These longer term changes to the complaints system can be delivered in addition to the shorter term reforms possible through secondary legislation. We continue to work closely with the SLCC on these and are confident about its ability to improve complaints handling in the short term. Given the likely timescales around wider reforms, we believe this work must remain a priority.

Given the clear majority of submissions made to the Robertson review centred on the issues of complaints, we believe this is the area worthy of most focus and attention. Devoting time and resource to overhaul other elements of the regulatory system, areas which work well currently and have attracted little or no adverse comment, risks diverting all of us from driving forward critical improvements elsewhere.

In addition to our suggested complaints model, we have provided some initial thoughts on Ms Robertson's wider set of recommendations. As we have said, we are enthusiastic about many of these suggested reforms and think there is a significant opportunity to incorporate these into the current system. Equally, there are other areas which require changes to primary legislation and where consensus already exists. It is important to keep these at the forefront of our thinking.

We now look forward to hearing more from the Scottish Government in terms of its response to the Robertson review. Whilst we realise the report's recommendations have provoked strong and varied views, we nevertheless believe there is a powerful and positive opportunity to build a consensus around reform. These can ensure the Scottish legal sector remains one of our country's proudest economic and social success stories.

Yours sincerely,

Alison Attack  
President