



Law Society  
of Scotland

## Appendix 2

The Robertson recommendations

December 2018



Recommendation Theme Establishment and Accountability	Law Society of Scotland response
<p><b>1 There should be a single independent regulator for all providers of legal services in Scotland, independent of those whom it regulates and of Government, responsible for the whole system of regulation including entry, standards, monitoring, complaints and redress which covers individuals, entities and activities. The independent regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland.</b></p>	<p>For the reasons set out in our covering paper, we do not believe this recommendation should be pursued by the Scottish Government. We believe this proposal would increase costs for consumers and ultimately lead to a diminution in professional standards with the legal profession.</p> <p>We do not believe Ms Robertson's report presents sufficient evidence to justify such a radical change and that other alternative reforms could more effectively address the problems we see in the current regulatory system.</p>
<p><b>2 The Legal Character of and governance arrangement for the new body should be set out in primary legislation.</b></p>	<p>We agree that the broad framework of the structure of regulation should be set out in primary legislation. The Law Society benefits from having clarity in its status, role and responsibilities through such legislation (currently the Solicitors (Scotland) Act 1980). We agree any new regulatory legislation should provide similar clarity.</p> <p>We believe such legislation should, in as far as possible, be permissive and flexible. Leaving more of the detail of regulatory processes to secondary legislation would more easily allow for updates to be made in light of wider changes in the legal services market.</p>
<p><b>3 The definition of legal services, the regulatory objectives and the professional principles should be set out in primary legislation</b></p>	<p>We agree there should be a clear and encompassing definition of 'legal services.' The current definition and regulatory objectives are contained the Legal Services (Scotland) Act 2010.</p> <p>We have previously raised the issue of a lack of a clear definition of legal services in our submissions to the Scottish Government and the Legal Services Review. We agree that any new legislation provides</p>

	<p>an important opportunity to address this.</p>
<p><b>4 There should be a new regulatory framework that is principle based, sustainable and flexible. It should embed the Better Regulation Principles, with the public and consumer interest at its heart.</b></p>	<p>We agree that the interests of consumers and the wider public must sit at the heart of the regulatory system and the statutory framework which underpins this.</p> <p>In our submissions to the review, we argued for a more flexible regulatory framework and so support a more permissive statutory context. We also agree that this presents a useful opportunity to build on the regulatory objectives provided in the 2010 Act and enshrine the Better Regulation Principles within the system.</p>
<p><b>5 The Board of the regulator should have a non-legal Chair and a non-legal majority to provide consumer and public confidence</b></p>	<p>We agree that the head of the regulatory system should come from a non-legal background. The chair of the Law Society's Regulatory Committee must, by law, be a lay member. The Regulatory Committee has a membership, which, under the current provisions of the 1980 Act, must be at least 50% lay membership (section 3C). As the convener is a lay person, this effectively creates a majority lay membership.</p> <p>We have proposed reforming the Scottish Legal Complaints Commission (SLCC) into a Scottish Legal Ombudsman Service (SLOS). We agree that the chair of this body / chief ombudsman should come from a non-legal background and that the governing board of that body should be majority non-legal.</p>
<p><b>6 The Scottish Parliamentary Corporate Body should appoint the non-legal chair through a public appointments process. As is the standard practice, having been appointed the chair may only be removed by a two thirds majority of Parliament therefore preventing any undue influence from Government.</b></p>	<p>Currently the non-legal (lay) chair of the Regulatory Committee is chosen by all committee members, solicitor and non-solicitor. This was introduced by the 2010 Act, has worked well, and is fair and proportionate. The chair may be removed by a two thirds majority of the Council</p> <p>In terms of our proposed SLOS, we believe the chair should be appointed by Scottish Ministers following</p>

	the public appointments process.
<b>7</b>	<p><b>The Chair should appoint an equal number of both professional and non-legal members of the board by an independent public appointments process with and independent assessor external to the regulator</b></p> <p>Our current recruitment process for both lay and solicitor members of the Regulatory Committee is an open, transparent and fair application process where vacancies are publicly advertised. We shall be reviewing the process to determine if there are opportunities for greater openness's and wider publication.</p>
<b>8</b>	<p><b>The Chair and Board members should be non-executives with experience of corporate governance who are appointed under public appointment best practice principles with a maximum time on the board of 8 years.</b></p> <p>We agree that members of an overarching committee or board should be non-executives. The Law Society's current Regulatory Committee is comprised of experienced and respected solicitors and non-solicitors. No member of the executive sits on the Committee.</p> <p>We agree that term limits should be attached to membership. Members of the Regulatory Committee currently serve a maximum of six years. We consider this term limit to be more appropriate than the eight years proposed.</p> <p>We believe similar term limits should exist for members of the Board of our proposed SLOS.</p>
<b>9</b>	<p><b>The Chief Executive of the regulator should be appointed by and accountable to the Board.</b></p> <p>The chief executive of the Law Society is currently accountable to both the Society's Council and the Regulatory Committee.</p> <p>We agree that the chief executive of our proposed SLOS should be accountable to that organisation's Board.</p>

<p>Recommendation</p> <p>Theme Role and Functions of the Regulator</p>	<p>Law Society of Scotland position</p>
<p><b>10. The new regulator and the system should be financed by a levy on practitioners and entities. The cost of the new regulatory arrangements should be no greater than the current model and should ensure proportionality</b></p>	<p>The Law Society of Scotland is funded by the legal profession and presents a highly cost-effective model which is mirrored in other professions. We do not agree with the assumption that the proposed new independent regulator would be cost neutral and believe substantial new costs are likely to emerge from such a change.</p> <p>We believe the base funding of our proposed Ombudsman Service should come from the legal profession although we believe there should be oversight and accountability for major financial decisions.</p>
<p><b>11. The regulator should be required to work in partnership with the legal profession to ensure sustainable and vibrant legal profession</b></p>	<p>We agree with this recommendation. One of the benefits of the current model is that this sense of partnership is built into the system. This works not only for the legal profession but for other sectors such as accountancy, surveying and teaching.</p> <p>We believe that one of the drawbacks that may arise from the creation of a new single regulator is the potential fragmentation of the voice of the legal profession, which could make this kind of partnership more difficult.</p>
<p><b>12. The regulator should be required to ensure it embeds a consumer voice in the organisation</b></p>	<p>We agree with the central importance of ensuring consumer voices and the public interests are embedded in the regulatory system.</p> <p>The lay members on the Law Society Council and Regulatory Committee exist to ensure the public interest sits at the very heart of our decision making.</p> <p>We believe that this principle has the potential to be enhanced further by appointing a specific representative from the consumer sector onto the Regulatory Committee and the Council. We note that the Scottish Government is proposing to</p>

establish Consumer Scotland and we look forward to working with that body and would consider having a place for someone from that body once established.

**13. The regulator should be required to develop new systems rules and processes in particular with consumer bodies and those it regulates**

We agree with the recommendation. We did this in 2009 when establishing the standards of conduct and service standards. We have welcomed the Scottish Government's proposal to establish an independent consumer body in the form of Consumer Scotland.

One of the benefits we envisage is that Consumer Scotland will provide sectoral regulators, such as the Law Society, with a central point of contact to discuss consumer matters such as proposed initiatives and consumer focused projects which will help to ensure that the consumer perspective is fully and carefully considered before further development.

**14. The Regulator should be required to lay an annual report before the Scottish Parliament including details on progress performance and budgets and should be able to be called to account to answer question in Parliament.**

We agree with this recommendation. As a statutory body, the Law Society is already subject to scrutiny by the Scottish Parliament. We already publish an annual plan, annual report and financial statement and would be open to formalising this in terms of laying before parliament.

We believe our proposed Ombudsman should also be subject to this level of scrutiny.

**15. The regulator should be empowered to seek approval as regulator in other jurisdictions**

We agree with this recommendation. This reflects our submissions to the Scottish Government and legal services review. We believe there is a strong economic case for Scotland and the Law Society being given the permissive power to seek to become a regulator of legal services beyond Scotland.

Providing a single regulatory model for cross border firms could, over time, position Scotland as a more attractive jurisdiction in which to locate and base a firm's operations. We believe that this would bring economic benefits for Scotland and the Scottish legal sector.

<p>Recommendation Theme: Entry Standards and Monitoring</p>	<p>Law Society of Scotland position</p>
<p><b>16. The Regulator will hold a register of those it regulates. Any lawyer, solicitor, solicitor advocate, advocate, commercial attorney who wishes to provide legal services must be admitted to the register.</b></p>	<p>We agree that all those who provide legal services should be registered with, and admitted by, their respective regulator.</p> <p>The Law Society of Scotland already maintains a register in accordance with the Solicitor (Scotland) Act 1980. This is a publicly accessible register of all Scottish solicitors entitled to practice. Any regulator of Licensed Legal Services Providers under the Legal Services (Scotland) Act 2010 will also be required to do this.</p>
<p><b>17. The regulator should have oversight of education and training and work in partnership with all of the legal professional bodies to keep these areas under review</b></p>	<p>We agree with the recommendation. The Law Society currently determines the route to qualification for Scottish solicitors.</p> <p>The Law Society sets the standards to be met by universities providing the LLB degree and the Diploma in Professional Legal Practice and the standards to be met during the traineeship, in collaboration with providers and the profession. Universities are subject to a rigorous initial accreditation process; universities' internal validation process panels include a member of the Law Society's Education and Training Sub-Committee; and all providers are required to submit a reflective annual report, including an action plan for the future, which is scrutinised by the Education and Training Sub-Committee.</p> <p>A review of the accreditation standards and of the required outcomes for the three-stage training process (LLB, Diploma, traineeship) is currently being carried out.</p> <p>We believe it is wrong to assume that with the creation of a new single regulator, strong</p>

	<p>professional bodies would continue. Thus, other important education work, such as Street Law, the Lawscot Foundation and other work to improve equality and diversity could be at risk.</p>
<p><b>18. The regulator should quality assure the membership bodies in accrediting CPD schemes</b></p>	<p>We agree with the importance of ensuring there is high quality continuous professional development (CPD) available to the legal profession. The Law Society currently has a robust set of requirements in terms of annual CPD. This stands in contrast to reforms being seen in other parts of the UK where CPD rules are being removed. We also provide a broad range of exceptionally high-quality content which is widely respected and valued.</p>
<p><b>19. The regulator should work with the professional bodies to simplify existing codes of conduct and service standards including making them more consumer friendly comparable and proportionate</b></p>	<p>The Society's 'Standards of Conduct' sits within the Law Society of Scotland Practice Rules 2011.</p> <p>We plan to review the Standards of Conduct to ensure they are more consumer friendly and focused. This would also apply to the service standards which are in place as guidance.</p>
<p><b>20. The term lawyer should be protected in the same way as solicitor where only those able to demonstrate recognised legal qualifications and who are regulated are permitted to provide legal services.</b></p>	<p>We strongly agree with this recommendation, which reflects our own submissions to Ms Robertson's review. This is an issue which we first raised in January 2017, where consumer protections are being undermined by persons referring to themselves as 'lawyers' without possessing formal qualifications or there being any determination of legal knowledge.</p>

<b>Recommendation</b> <b>Theme: Entity regulation</b>	<b>Law Society of Scotland position</b>
<p><b>21. The regulator should licence all entities providing legal services to the public and corporate entities subject to a fitness to be an entity test that the regulator should determine including protections such as professional indemnity insurance. All legal professionals' licences through the regulator would also have to be licenced through an entity. This would not include Advocates and in-house professionals.</b></p>	<p>We agree that legal services should be regulated at entity level, as well as individual level.</p> <p>This mirrors the recommendations put forward by the Law Society in our submissions to the Scottish Government and the Legal Services Review. A move towards entity regulation would require legislative change but would be more appropriate for today's legal services market.</p>
<p><b>22. The model for entity regulation should be enabling flexible and should apply to any organisation which employs at least one legal professional</b></p>	<p>We agree with the recommendation. Legislation with the flexibility to move with the times would allow for proactive regulation to ensure consumer protections remain robust and would allow for a rapid response to emerging risks. This reflects the terms of the 2010 Act for Licensed Legal Services Providers.</p>
<p><b>23. The regulator should introduce proportionate arrangements including fees for licencing different types of entities and including not for profit organisations</b></p>	<p>We agree with the recommendation. We believe that it is appropriate that licencing fees for entities and 'not for profit organisations' should be applied proportionately.</p> <p>This would mirror the approach to the licensing of Licensed Legal Services Providers under the provisions of the Legal Services (Scotland) Act 2010.</p>
<p><b>24. The Scottish Gov and the regulator should review the standards and accreditation process for Scottish National Standards for Information and Advice Providers in order to establish if those providers covered by these standards should be regulated and to ensure that regulation is proportionate.</b></p>	<p>The Law Society does not currently review the standards and accreditation process for Scottish National Standards. However, we agree that there may be merit in exploring this recommendation further.</p>

<p><b>25. The regulator should require all licensed entities have a legal compliance director who is regulated legal professional and a director of finance and compliance. They may have to be the same person where it is unavoidable e.g. sole trader. Those responsible for financial compliance need not be legal professionals.</b></p>	<p>We agree with this recommendation. This mirrors, to an extent, the provisions for Licensed Legal Services Providers under the Legal Services (Scotland) Act 2010.</p>
<p><b>26. The regulator should take on the role of AML regulator in Scotland as we as the role of incidental financial business regime under financial services legislation.</b></p>	<p>The Society was recently approved by the UK Government as an AML supervisor for Scottish Law Firms. This reflects the confidence which exists in our track record of financial inspections and anti-money laundering work.</p> <p>The current legislation is reserved to the UK Parliament. Therefore, any change to the current AML supervisory requirements fall outside the legislative competency of the Scottish Parliament.</p>
<p><b>27. The new regulator of legal services should review whether the financial conduct authority regulation of claims management companies in Scotland is working or whether there are gaps or discrepancies around the Scottish circumstances that need to be more carefully considered.</b></p>	<p>We agree with this recommendation and the Law Society is willing and well placed to undertake such a review.</p>

<p><b>Recommendation</b> Theme: Regulation of Activities</p>		<p><b>Law Society of Scotland response</b></p>
<p><b>28 There should be no substantial change at this stage to bring more activities within the scope of those activities reserved to solicitors or to remove activities i.e. will writing should not be reserved. Entities licensed by the regulator should be able to undertake confirmation as an activity.</b></p>	<p>We agree with the recommendation. We do not consider it is necessary at this time to review those powers reserved to Scottish solicitors. However, we believe that the Society, as regulator to the solicitor profession, should have the power to propose any changes to those areas currently reserved.</p>	

Such a power would allow any changes to be made as identified to enhance consumer protection and interests. Final decisions would be for parliament.

**29 It should be for the regulator to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated**

We agree with the recommendation. See above at recommendation 28.

**30 The new regulator should work with the office of the immigration services commissioner to ensure that individuals legal professional immigration practitioners i.e. solicitors and non-legal professional immigration practitioners codes of conduct align. Complaints and legal professionals and non-legal professionals would sit with the appropriate regulator. Best practice sharing between the bodies should take place.**

We believe there is an important opportunity for a conjoined approach by other stakeholders and co-regulators in this area. The Society already works with the OISC on a regular basis to ensure the proper regulation of immigration and asylum matters including the standards to be expected of those providing those services.

**Recommendation**  
Theme: Quality Improvement

**Law Society of Scotland response**

**31 The regulator should work with the Scottish Government to consider how data should be shared to ensure consumers are protected from harm and enable the regulator to adopt a risk-based approach to intervene where systematic issues are identified. The regulator should work with professional bodies to establish a process to assist those professionals identified by this process to improve their standards.**

We agree with this recommendation. The Law Society has enjoyed a long and positive relationship with the Scottish Government on issues relating to the legal profession, legal services market and consumer protection.

Similarly, there is an important role for parliament to consider these issues on an ongoing basis.

Recommendation Theme: Complaints		Law Society of Scotland response
32	<b>The legislation should require the regulator to develop a complaints handling process for those it regulates. This process should be based on well-established consumer principles and provide appropriate and speedy resolution for all parties. This should include the option of early dispute resolution learning from the SLCC positive experience of mediation services.</b>	We agree that the current complaints system is no longer fit for purpose. It is slow, complicated and cumbersome. In our attached paper, we have presented a set of suggested reforms which seeks to build a simpler and more effective system. We look forward to the opportunity of discussing this further with Scottish Ministers.
33	<b>There should be a single gateway for complaints and a single investigation where conduct concerns can be directed at any stage through a separate process and to a single disciplinary tribunal where appropriate.</b>	As above at 32
34	<b>The Regulator should be required to develop appropriate sanctions and establish rules for proportionate compensation</b>	As above at 32
35	<b>The Regulator should be required to develop a simple process of appeals which are only available at the end of the complaints process</b>	As above at 32

Recommendation Theme: Tribunal		Law Society of Scotland position
36	<b>The regulator should establish an independent tribunal dealing with conduct cases referred by the regulator. This should cover all legal professional individuals and entities providing legal services.</b>	We agree with the recommendation. As we set out in appendix 1, we believe that the Office of the Lord President should oversee the Disciplinary Tribunal.

Recommendation Theme: Whistleblowing	Law Society of Scotland position
<p><b>37 The regulator should be required to develop a formal whistleblowing procedure</b></p>	<p>We agree with this recommendation. We are currently developing a ‘whistleblowing’ procedure in relation to anti-money laundering and raising concerns in relation to other matters. We anticipate that the work will be complete and the ‘whistleblowing’ line will be live by February 2019. 2019.</p>

Recommendation Theme: Economy	Law Society of Scotland response
<p><b>38 The Scottish Government should require the CMA to revisit the report it undertook on the legal services sector in England and Wales in 2016 and the test the relevance of its findings for the Scottish Legal Services Sector.</b></p>	<p>Although the recent CMA investigation was centred on the market in England and Wales, the Law Society engaged with the CMA throughout as we believed there would be some useful learning points.</p> <p>We reflected carefully on the CMA final report, in particular in relation to price transparency, and we are currently moving forward with work in this area and proposing to introduce guidance for the profession in 2019.</p>
<p><b>39 The Scottish Government should commission or facilitate a baseline study to identify the current quantum of the sectors contribution to the economy and to identify those niches in the global market where we might target our efforts</b></p>	<p>We agree with the benefits this could bring to all stakeholders within the legal sector. The Law Society initiated an economic impact assessment of the legal sector some years ago.</p> <p>We plan to work with Scottish Development International, Scottish Legal International and other partners to significantly update this work and provide a thorough analysis of economic output and growth opportunities.</p>



**40 The Scottish Government should work with the sector to bring all the key players together to develop and implement a strategy to maximise the potential for growth and the contribution that it would make to our economy**

We agree with the recommendation and would welcome the opportunity to engage with the Scottish Government in developing this further.