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Convener
Equalities, Human Rights and Civil Justice Committee
Scottish Parliament

By email only to: EHRCJ.committee@parliament.scot

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Dear Convener,

Regulation of Legal Services (Scotland) Bill

I am writing in relation to some of the evidence your Committee heard earlier this week. I'm grateful that the Committee had indicated that it was interested to continue to hear from stakeholders as the discussion developed.

I wanted to provide some context to the sub-set of data on appeals of SLCC decisions to the Inner House of the Court of Session which Lady Dorrian and Lord Ericht chose to share with the Committee. We have some concerns the data presented may not give the Committee a full picture of the workload and cost of appeals for the SLCC, and the impact on parties.

I have also provided some further information on our views on the proposals for the replacement of the current appeal mechanism with a review process with decisions made by panels of the SLCC's independent commissioners.

The SLCC makes around 800 appealable decisions every year. There will inevitably be cases where people feel it necessary to question or challenge a decision, where an error has been made or where new information comes to light. We absolutely agree that there should be a mechanism to consider and address those issues when they arise. The question is what the most appropriate mechanism is to achieve that. We think there are practical, pragmatic and proportionality considerations to take account of here, and I'll come onto those issues below.

A complete dataset on appeals

Firstly, I want to provide a fuller picture of the nature of appeals to the Court of Session to aid the Committee's understanding of the wider context. We have not

seen the statistics Lady Dorrian presented, so I am aware that we may be using slightly different recording methods or time periods when looking at the same data. However, I hope the information below helps to put those figures in context.

Since the beginning of 2020, 41 appeals regarding SLCC decisions were initiated to the Inner House of the Court of Session (30 from complainers, 11 from practitioners).

I appreciate this is different to the figure cited by Lady Dorrian which were, as Lord Ericht stated, restricted to "case[s] which went to a hearing". This is because the first stage of that appeal process is a decision on whether the court will grant 'leave to appeal'.

It is important to emphasise that the process involved in the determination of applications for leave to appeal is much more involved than a mere 'sift'. For the SLCC, this process is often at least as onerous, in terms of both time and cost, as defending the subsequent appeals in the minority of cases in which leave to appeal is granted. In applications for leave to appeal, the parties' positions on the merits require to be set out in detail in written pleadings and notes of argument. In most cases, the competing arguments are then the subject of oral submissions at a substantive hearing before a single procedural judge and may be the subject of a written judgment.

Responding to an application for leave to appeal generally requires a detailed examination of the SLCC's files by its external legal advisers and counsel in order that they may advise upon and articulate the SLCC's position.

As Parliament would expect, we seek to exercise careful control over our legal spend in all our activities. The charges of our external solicitors are the subject of a competitive public procurement exercise, and we generally insist on fixed or capped charges from our solicitors and counsel for all external legal advice, including in the context of appeals.

The cost to the SLCC of defending an application for leave to appeal is broadly similar to the costs involved in then dealing with the appeals themselves in the minority of cases in which leave to appeal is granted. Moreover, in a significant proportion of the applications for leave to appeal in which the SLCC is successful in opposing the granting of leave, we are unable to recover those costs from the applicant.

I would also stress that these figures take no account of the significant internal cost within the SLCC for the resource we require to devote to the preparation and instruction of appeal cases, which are described more fully below.

In 20 of the 41 applications for leave to appeal made since 2020, the court refused leave to appeal, leaving the SLCC as the successful party.

A further 3 cases were withdrawn and in 6 cases leave is still being considered. That leaves 12 cases (5 from complainers, 7 from practitioners) where leave to appeal was granted and which could proceed to a full appeal hearing (of which 1 is still live and 1 was not lodged).

These cases were omitted from the evidence provided, but if the Committee has concerns as to the difference in the datasets it is being provided, I'm sure Lady Dorrian and Lord Ericht, or the Scottish Courts and Tribunal Service, could confirm these figures as giving a true picture as to the volume of appeals initiated.

Next, we accept that, of the 10 appeals that were granted leave to be heard and have now concluded, none were 'won' by the SLCC, with our figures showing 7 disposed of by agreement (a joint minute between the appellant and the SLCC) and 3 upheld against the SLCC. Given the number of appealable decisions we make annually, and the number of appeals brought, we are satisfied that this represents a very small number of cases where the court has had cause to consider quashing an SLCC decision. Those 10 cases represent less than a quarter of the appeals presented to the Court of Session but, as I have sought to explain, comprise only part of the overall financial burden for the SLCC associated with the current appeals mechanism.

Appeal outcomes

As you might expect, the cases in which leave to appeal is granted vary considerably, but I wanted to provide an example of the issues which the court has upheld against the SLCC in this period.

This appeal decision from April 2022 related to an appeal by a firm of solicitors against a decision by the SLCC to uphold part of a complaint of inadequate professional services against the firm. The basis on which the appeal was found against the SLCC (which can be found at paragraph 43) relates to the wording of a letter to the firm advising that the complainer had not accepted the recommendations of the SLCC's investigation report not to uphold any of the issues of complaint, and that therefore the case would, as our process requires, proceed to be determined by a Determination Committee, which could arrive at a different view on the evidence presented.

In that letter, we asked the firm to provide "any new information which you have not yet provided" to inform the Committee's deliberations. The court's view was that this did not comply with the requirement in our rules to write "to the parties to the

complaint for the purpose of giving those parties the opportunity to make representations on its findings and recommendations". The decision states:

> *"The court concludes that this procedure was not complied with. The option to provide "further information" or "any new information which you have not yet provided" was not the equivalent of an opportunity to make representations on the Commission's findings and recommendations as set out in its investigation report. This was a significant procedural impropriety."*

On that basis, the court quashed the SLCC's decision to partly uphold that issue of complaint. In light of the court's decision, the case was sent back to the SLCC for a differently constituted Determination Committee to consider the decision.

We respect the court's jurisdiction and opinion and acted swiftly to comply with its decision. However, as we stated at the time, we aim to ensure our communications to complaint parties are clear and in plain English. Wherever possible we avoid using legal terminology, where evidence suggests that might not be understood by the general public.

This links to the point I made in my oral evidence about how the complaints process has becomes very legalistic compared to the normal ombudsman model which is focused on providing a fast, efficient and accessible alternative to court. We know many members of the public don't understand 'making representations', but this ruling pushes us to using this terminology in communications with all parties. This causes accessibility issues compared to the use of plain English. We also know from our customer feedback that 'speaking like lawyers' often make people feel we are on the side of lawyers.

I'd also noted the power imbalance in this situation. Each firm must, under relevant regulation, has a Client Relations Partner who is responsible for understanding the complaints process and responding to complaints. Aside from any language used in our letters they would be expected to be fully versed in the complaints rules to meet the professional obligations the Law Society of Scotland sets. In making decisions about the language we use in our letters we are taking into account the needs of a legally qualified professional with a regulatory requirement to understand the rules and their duties in relation to complaints, and a potentially vulnerable members of the public. Our key concern must be what language may help them engage.

A review process is necessary, and the SLCC fully supports this

None of this takes away from the fact that a review process is required. Within the current system, once we've made a decision, we cannot change it, even if we become aware that there is an error or if new information comes to light. The only

mechanism available to change that decision is if a party appeals the decision to the Inner House of the Court of Session. The number of cases where appeals are lodged is small in comparison to the number of decisions we make annually. The number of those applications granted leave to appeal is even smaller. While the court has decided in some cases to overturn our decisions, and we accept those decisions, we do not agree that this means that the current appeal route is the best mechanism.

In addition, for many currently appealable issues, no mechanism to appeal directly to the Court of Session was in the arrangements prior to 2007. It is not that a longstanding arrangement is being challenged here, but that a late-stage amendment to our founding legislation in 2007 brought in a new process which has come at a significant cost not envisaged when that amendment was passed.

That is not to argue for no mechanism, but a mechanism better suited to the context. While the decisions we make on service complaints can involve significant sums of redress in some cases, the vast majority of our determination decisions will either make no financial award or a relatively small award (our median award is £500).

This is not to diminish the importance of these decisions to the consumer who has raised concerns or the firm who may be directed to provide redress. However, the equivalent process for complaints about the service provided by a health board, local authority, housing association or prison, where complaints are determined by the SPSO, with an internal right of review, but no external right of appeal, provides a helpful point of comparison. It's not clear why complaints about legal services should require a different or special route (although it should be noted that the appeal process for conduct complaints against practitioners which are investigated by the professional bodies remains unchanged, in line with other professions' disciplinary findings).

In addition, the great majority of appeals made to the Court of Session have been against decisions taken not by our Determination Committees in the final determination of complaints and decisions on redress, but at the eligibility stage of our process. At that point, we are making a decision on the initial sift of whether the low bar to allow a complaint to be investigated has met, and whether that should be investigated by us and/ or the relevant professional body (a decision which will become significantly less contentious with the reintroduction of hybrid issues of complaint as part of the Bill).

A right of review to the SLCC's independent commissioners would provide a free, swifter, less daunting and more proportionate route for complainers or lawyers to challenge the appropriateness of a decision. It would allow any errors to be addressed quickly at source, or decisions remade on the basis of relevant and

appropriate new information. Crucially, in those cases it would avoid the appellant having to pay for the review at all, or potentially being subject to costs being awarded against them if the decision wasn't made in their favour, both of which are the case in appeals to the Court of Session. It would avoid the delay caused by waiting for an appeal case to conclude (in her evidence Lady Dorrian stated this to be on average 34 weeks) which sees complaints hanging over both practitioners and consumers for far longer than necessary. It also provides a review mechanism more appropriate to the nature of the decisions we make – that is, decisions which seek to resolve customer service issues or gateway decisions on whether a complaint merits further investigation.

The financial cost to the SLCC, and by extension to the profession and ultimately to consumers, of the current system is threefold:

- Legal and court costs where we lose or concede an appeal or leave to appeal decision
- Legal and court costs where we win an appeal or leave to appeal decision, but we are not awarded expenses or cannot recover awarded expenses from the appellant (this is not uncommon in leave to appeal hearings lost by complainers appearing without legal representation)
- The cost of preparing for appeal hearings, including staff costs and any legal advice required in advance of hearings which is not usually covered by any costs awarded, plus the cost of staff time in keeping both parties updated during the appeal process.

Over the last three years, the cost of defending appeals has averaged around £185,000 per year (this excludes all SLCC staff costs). In contrast, we have only been able to recover an average of around £12,500 per year in costs in relation to cases where we have been successful. Overall, this is a significant cost for the organisation and one which is difficult to predict and manage, and not possible to avoid.

In addition, as we set out to the Committee in our written and oral evidence, there is an additional, non-financial cost which relates to the wider impact that this appeal mechanism has on our operations. Knowing that any decision – including all decisions taken at the eligibility stage – can be appealed to the Inner House at great expense to the organisation inevitably influences the way we perform our statutory functions. That means we are more likely to write lengthy decisions in all cases using technical legal terminology which we feel are inappropriate and disproportionate in an accessible complaints process, simply because the risk and cost of a decision being overturned on that basis on appeal is too high.

Finally, I wanted to address the point about the proposed review mechanism inserting additional stages into the process. The SLCC, as a public body, is currently subject to judicial review, however this does not extend to those decisions where there is a statutory right of appeal, which is currently the case for our individual complaint decisions. As Lady Dorrian outlined in her evidence, judicial review is a more restricted jurisdiction than a statutory right of appeal. Petitions for judicial review could only be brought where one of the recognised grounds for judicial review could be made out and would be subject to the granting of permission by the Court of Session.

There may be good reasons to expect that the availability of a statutory review mechanism would reduce the number of cases in which an aggrieved party may be motivated to raise judicial review proceedings in comparison with the current number of appeals.

At present, the first opportunity for review by anyone who disagrees with a decision is by way of appeal to the Inner House. The proposed review mechanism will provide a forum for parties to raise concerns about the SLCC's decision-making without recourse to the court, with judicial review being considered only in the reduced number of cases where concerns remain at the conclusion of the review procedure. That is certainly the experience of other complaints bodies who are subject to this procedure, such as the SPSO or the Legal Ombudsman (our equivalent in England and Wales). For those bodies, petitions for judicial reviews are raised from time to time, but at a far lower rate than our rate of appeals.

I hope all of this explains why we believe that the review process proposed is more efficient, more proportionate, more user friendly, and likely to be swifter and less costly. Ultimately, it is for Parliament to decide what mechanism is the most appropriate and then our role is to deliver that, as we do now. We simply wish to see that decision taken on the basis of the full picture of facts of the current situation, the equivalent process in other comparable systems and a full understanding of the impact of the changes being proposed. I hope this information has been helpful in that regard.

Why we believe the Bill is positive and should progress

In closing, I realise the Committee has heard conflicting evidence from stakeholders about the various proposals in this Bill and has much to consider. Those polarised views also dominated the earlier consultation and will not doubt continue to frame the discussion on legal services regulation.

That does not mean that there is not much in this Bill which is positive, or on which there is significant agreement among stakeholders. That includes important

proposals which would make significant improvements to the experience of both legal consumers and members of the legal profession in dealing with the complaints process. Many of those proposals arose from joint work between the SLCC, the Law Society of Scotland and Scottish Government which has been ongoing since the independent review commenced in 2017.

In my oral evidence I urged caution in unpicking any further the steps the Bill does take to a more citizen-focused regulatory system. On that basis, I do hope the Committee will feel able to recommend that Parliament agree to the general principles of the Bill and to engage with stakeholders to address the concerns raised regarding certain provisions in the Bill at Stage 2.

If I can provide any further information to the Committee that would be helpful, I would be very happy to do so.

Yours sincerely

Neil Stevenson
Chief Executive