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16 February 2024

Dear Convener

### **Regulation of Legal Services (Scotland) Bill: Stage One Report**

I would like to thank the Committee for their detailed consideration of this Bill and for your constructive Stage 1 report. I would also like to thank the Delegated Powers and Law Reform Committee for its scrutiny of the delegated powers within the Bill.

I would also like to thank all those who have engaged with the Committee and the Scottish Government to help shape the Bill, and in particular to all those who provided evidence during Stage 1.

I am grateful for the comments and recommendations in the report, and I enclose the Scottish Government's response to the Committee's recommendations. I am pleased that the Committee supports the general principles of the Bill at Stage 1.

I look forward to the Stage 1 debate on 22 February 2024 and to continue working with the Committee on this important Bill at Stage 2, should the Scottish Parliament endorse the general principles at Stage 1.

I hope that the Committee finds this response helpful.

**SIOBHIAN BROWN**

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# Scottish Government response to the Stage 1 Report in respect of the Regulation of Legal Services (Scotland) Bill

## Introduction

1. This paper provides the Scottish Government's response to the specific points and recommendations made in the Stage 1 Report, where a response was sought and also where a response on the general principles of the Bill is considered helpful. It also addresses the recommendations made by the Delegated Powers and Law Reform Committee.
2. For ease of reference, the Committee's points or recommendations are shown in bold text boxes and numbered in line with the report. The Scottish Government's response is given directly underneath those boxes.

## General principles

3. The Scottish Government welcomes the Committee's recommendation that the general principles of the Bill be agreed.
4. We also welcome and share the Committee's views on the importance of working constructively to ensure that the Bill achieves its objectives and note the Committee would welcome early sight of the amendments in respect of which details have already been shared. We welcome the scrutiny of the Committee and all key stakeholders and will consider carefully all the points raised ahead of Stage 2 and keep the committee updated.
5. The Scottish Government notes that the Committee would welcome early sight of the amendments and will endeavour to lodge stage 2 amendments ahead of the lodging date where possible.

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## Overarching regulatory framework

### The case for independent regulation versus the existing framework

**80. The Committee notes the conflicting positions of the legal profession and consumer groups and others to the setting up of an independent regulator and that this echoes the findings of the Scottish Government consultation. The Committee notes the Bill as proposed, which builds on the existing framework, appears to satisfy neither group.**

**81. However, it accepts that some form of reform of the regulatory framework is long overdue having been discussed for over a decade. It recognises the urgency for reform, particularly in relation to the complaints process and the alternative business structure model from across the debate. It notes that a number of the Bill's proposals are broadly welcomed. The Committee's views on the nature of the reforms and the regulatory model are set out later in this report.**

6. The Scottish Government is pleased that the Committee recognises the differing views of the legal profession and consumer groups on the question of regulatory reform, and the fact that there is broad support for a number of the Bill's proposals.
7. We have been working with all interested parties since the Law Society of Scotland's ('Law Society') "Case for Change" paper was submitted in 2015. This work has included commissioning the independent 'Robertson Review' to consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector. The resulting 'Robertson report' accepted the need for reform and made 40 recommendations intended to modernise the current regulatory framework to ensure a proportionate approach, supporting growth and competitive provision in the legal services sector, whilst placing consumer interests at its heart.
8. Our analysis of the Robertson report established that while many of the recommendations were widely supported, the primary recommendation largely polarised the views of those in the legal and consumer landscape.
9. As a result, we carried out a public consultation based on the Robertson report recommendations, with the intention of seeking to build consensus on the way forward. Responses to that consultation continued to show that views were evenly split between support and opposition to the Robertson report's primary recommendation, and also many areas where there was broad agreement between stakeholders. All respondents, regardless of affiliation, shared as a common aspiration the need for any future model to be transparent, open to public scrutiny and efficient, to ensure that justice remains accessible to all.

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10. The responses to the consultation were invaluable in shaping the Bill and form the basis for reform of legal services regulation and the Bill is designed to take a proportionate approach which balances and delivers the key priorities of all stakeholders.

### **Category 1 and Category 2 regulators**

**99. The Committee notes the concerns expressed by consumer groups that the creation of two categories of regulator with different regimes may add rather than reduce complexity and that is not of benefit to consumers. It acknowledges that these concerns have not been adequately addressed and asks the Scottish Government how it intends to do so.**

**100. The Committee agrees that it is essential that the requirements with which Category 1 and Category 2 regulators have to comply should be set out in legislation, and by the Lord President rather than Scottish Ministers. The Committee welcomes the additional transparency that annual reporting on performance will bring.**

**101. The Committee heard concerns expressed by the Law Society that, as a Category 1 regulator, it will now be subject to FOI compliance under the Freedom of Information (Scotland) Act 2002. It is concerned that this may place a disproportionate burden on it which, due to confidentiality, may fail to provide any further transparency than exists under its current obligations. The Committee has noted these concerns but welcomes the extension of compliance and the transparency and accountability it will bring. However, it asks the Scottish Government to engage with the Law Society to discuss further and ensure that its decision to subject it to FOI compliance strikes the right balance.**

### **Regulatory categories**

11. The Scottish Government note the Committee's view, and the concerns expressed by consumer groups that the creation of two categories of regulator with different regimes does not adequately address their concerns. Those concerns are very closely linked to the support of consumers groups for a single independent regulator. The Bill instead takes a proportionate approach that seeks to balance and deliver the key priorities of all stakeholders, while providing increased transparency and accountability within existing structures.

12. Whilst the framework introduces greater requirements on the regulators, this should not result in increased complexity for consumers. Indeed, the intention is to improve transparency and access to information for consumers, including by:

- providing access to a register of all regulated legal services providers.

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- introducing entity regulation and minimum standards in complaints handling meaning higher standards and greater consistency in the services consumers can access.
- incorporating the Consumer Principles into the regulatory objectives, requiring regulators to take account of the needs of consumers in terms of their access to services and information and their right to be treated fairly at all times.

13. The Bill also strengthens the requirements for regulators to separate their regulatory and representative functions, which will benefit consumers and practitioners alike.

14. It is the Scottish Government's view that the current regulatory framework does not take a consistent approach to the regulation of legal professionals. The Bill will address that as part of providing a modern statutory framework which will make clear the respective duties of regulators while providing for greater statutory requirements to incorporate independence from other functions, transparency in decision-making and accountability within their regulatory approaches, intended to promote public confidence and benefit consumers.

15. The Bill does so by taking a proportionate approach to the statutory duties placed on regulators based on their categorisation, which is informed by the size and the nature of the work undertaken by their members.

### **Delegation of category**

16. The Scottish Government notes that the Committee welcomes the additional transparency that annual reporting on performance will bring.

17. In terms of the Committee's view that the requirements with which category 1 and category 2 regulators have to comply should be set out in legislation, and by the Lord President rather than Scottish Ministers, those requirements are set out within the Bill. The Scottish Government will lodge amendments at Stage 2 to narrow the scope of section 8 so that the power to change a regulator's category may apply only to accredited regulators, and that the power may apply where it is requested and approved by the Lord President.

### **Freedom of information**

18. The Scottish Government notes that the Committee welcomes the increased transparency and accountability that introducing freedom of information requirements will bring.

19. Requiring the Law Society to comply with the Freedom of Information (Scotland) Act 2002 (FOISA) will align it with other professional regulators already subject to FOI legislation, such as the General Teaching Council for Scotland, the General Medical Council and the Scottish Social Services Council.

20. Whilst of course there will be information which falls within the relevant statutory exemptions, this should not preclude the Law Society from releasing information relating to its regulatory performance.

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21. The Scottish Government view that it is in the public interest to introduce greater transparency and access to the Law Society's compliance with its regulatory functions by complying with FOISA.
22. While FOI compliance is strictly set out under the terms of the FOISA legislation, we note the Committee's encouragement for further engagement with the Law Society and the Scottish Government is happy to discuss this matter further with them.

### **Regulation of legal businesses (entity regulation)**

**110. The Committee heard broad support for, and agree with, entity regulation and the potential benefits this will bring for both regulators and consumers. However, it notes the concerns expressed by the Law Society in relation to the waiver provisions provided in the Bill in relation to the ABS scheme. It notes that it is the intention of the Law Society to offer potential solutions in the form of amendments at stage 2 and would welcome an update from the Scottish Government on its ongoing engagement to resolve the issue.**

**111. The Committee notes the concerns raised by the CMA about the potential for disproportionate regulatory costs which could restrict solicitors working in unlicensed providers. It asks that the Scottish Government gives this issue further consideration to ensure that any unintended consequences are avoided.**

### **Entity regulation**

23. The Scottish Government welcomes the Committee's position in respect of the authorisation of legal businesses (entity regulation) within the Bill. This is a proposal that is widely supported and is required as a feature of a modern regulatory framework.
24. Consumers often presume and expect that their legal services providers are regulated at an entity level, which is not necessarily the case. From the perspective of the client, their contract is with the legal firm and the client places expectations on that entity. The current legal framework for the regulation of the legal profession places the emphasis on regulating the individual solicitor rather than the law firm they are employed by.
25. The authorisation of legal firms will provide for regulation that centres on the public interest and protection of the consumer, and will provide benefits, including:
- affording better protection to the consumer as, usually, the client contracts with the entity and not the individual 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,

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- supporting adherence to professional standards by 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.

26. The Scottish Government is engaging with the Law Society to ensure that the system of entity regulation works at an operational level.

27. A relevant example of the positive change which entity regulation may introduce can be seen in the ongoing case of WW & J McClure Limited which went into administration in 2021. Authorisation of legal businesses will introduce greater consistency in the regulation of legal firms. It will also give the Law Society, as the regulator, greater powers to monitor legal businesses to identify and address deficiencies early.

### **Regulatory waivers (special rule changes)**

28. Technology and innovation can benefit the legal sector and consumers. It can provide easier, more intuitive access to services, as well as supporting the economy. As in other sectors it is increasingly a source of challenge and new opportunity, and as such should be given proportionate regulatory scrutiny. It is also important that there is appropriate oversight and a transparent process for any relaxation of regulatory rules.

29. Sections 21 to 24 of the Bill take a consistent approach which apply to all regulators of legal services to allow for the use of regulatory waivers and regulatory sandboxes<sup>1</sup>. This is intended to promote the use of technology and innovation in the legal sector and also introduce transparency to the system whereby regulators relax rules for individual practitioners<sup>2</sup>.

30. We will engage with the Law Society on these provisions and intend to introduce amendments at Stage 2 which will relax the requirements on regulators, while maintaining the key intention of transparency. This will include removing the requirement for regulators to publish an annual report of all waivers introduced whilst maintaining the requirement for a publicly accessible register.

### **Solicitors working within unlicensed providers**

31. The Scottish Government would like to provide clarification on this point to ensure there is no misunderstanding. the introduction of entity regulation will not prevent solicitors from working in businesses which are not authorised legal businesses.

32. The Competition and Markets Authority's (CMA) response to the Committee's call for views set out its concerns: *"As noted in the CMA Market Study, requiring all licensed professionals to also be licensed through an entity restricts the entities within which certain*

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<sup>1</sup> A regulatory sandbox is a regulatory approach that allows live, time-bound testing of innovations under a regulator's oversight. Novel financial products, technologies, and business models can be tested under a set of rules, supervision requirements, and appropriate safeguards.

<sup>2</sup> By way of comparator, the Solicitors Regulation Authority operates a public register in relation to its waiver system.

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*professional titles can be employed. This would be the case particularly for solicitors, who would be restricted from working in unlicensed providers, even when carrying out only unreserved legal activities. A lack of access to regulated titles may restrict the ability of unlicensed providers to compete given the impact that these titles have on consumer decision-making and trust. Unlicensed providers would also be less able to harness the expertise of solicitors. This may directly affect the services that unlicensed firms can offer and reduce their ability to compete. This is relevant as unlicensed firms may employ different innovative business models or may be able to offer the same services that solicitors offer in relation to unreserved legal activities more cheaply than licensed entities.”*

33. The Scottish Government reflected on these comments and provided the CMA with the following information by way of clarification:

*“The focus of the Bill in respect of entity regulation (authorisation of legal businesses) is not on the individual solicitor, but requires entities (legal businesses) themselves to be regulated. A legal business is any business entity that provides (or offers to provide) legal services to the public for fee, gain or reward that is either wholly owned by a solicitor or solicitors or a qualifying individual or qualifying individuals. Qualifying individuals are other persons who are regulated by a category 1 regulator. Currently the only category 1 regulator would be the Law Society of Scotland.*

*A solicitor holding a practising certificate, working in a legal business owned by solicitors, providing legal services (whether reserved or unreserved) to the public for fee, gain or reward will be subject to entity regulation.*

*We view that a solicitor can retain a practising certificate and practise unreserved legal services within a business owned by non-solicitors, and without a requirement for that business to be authorised in respect of entity regulation. The solicitor will continue to be regulated on an individual level if they retain their practising certificate. The business entity itself will not fall within the definition of an authorised legal business in the Bill for the purposes of entity regulation and so will not require to be authorised. As long as it does not provide reserved services it won't fall foul of the Solicitors (Scotland) Act 1980. This will retain the status quo in respect of solicitors providing unreserved legal services.”*

34. This was reflected in the comments by the representative of the CMA at the evidence session of the Tuesday, October 3, 2023: *“The point that you may be referring to is that we had highlighted concerns about all licensed professionals being required to also be licensed through an entity. We were concerned that that would restrict the entities within which certain professional titles could be employed. It would mean, for example, that solicitors would be restricted in working in unlicensed providers, even when they were carrying out unreserved legal activities. We discussed with the Scottish Government our concern that that was what the bill intended, and we understand that is not the case.”*

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## Complaints

### Reform to the legal complaints system

**143. The Committee heard from stakeholders and consumer groups that the current complaints system is overly complex, slow and in need of reform. The Committee recognises and welcomes the Scottish Government's intentions to address this.**

35. We welcome the Committee's recognition of the realities of the current complaints system, and the Scottish Government's efforts to address this. The handling of complaints is one of the most important parts of any regulatory system. It is crucial that users of legal services have access to an efficient, effective and fair process for dealing with their complaint. Equally, legal professionals rely on a complaints system which is efficient, effective and can resolve complaints in an impartial manner.

36. Many of those who have been involved in the current legal complaints process, including the Scottish Legal Complaints Commission ('SLCC'), have expressed frustration with the process, partly in terms of the length of time which may be needed to reach a conclusion to a complaint as well as the complexity of the process.

### Complexity of the complaints process

**144. However, while there is support for simplifying the process, the Committee agrees that a lot of complexity will remain, largely due to the retention of a multiagency approach rather than the creation of a single complaints process. This will invariably make communication and navigation of the system more difficult for everyone involved. The Committee is concerned that the Scottish Government may have missed an opportunity to take a simpler, more user-friendly approach in creating a single streamlined complaints process which would have benefited consumers and regulators alike. The Committee also notes concerns expressed by the Faculty of Advocates in relation to hybrid complaints and its assertion that the set of facts may be duplicated before the Commission and the Faculty. The Committee strongly recommends that the Scottish Government looks again at how the process can be further simplified, taking on board the compelling evidence presented to it by all stakeholders.**

37. The Scottish Government will bring forward amendments at Stage 2 intended to deliver further improvements to the legal complaints system. We have been working closely with the Law Society on amendments which will make significant improvements to the legislation which governs the conduct complaints process. These changes will provide the Law Society with more flexibility as to how they conduct complaints investigations and will enable them to speed up the process significantly.

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38. We have also been working with the SLCC on further changes to their complaints processes, including further enabling the early resolution of complaints and greater enforcement powers where a solicitor refuses to provide information on a complaint, resulting in delays to the investigation.

## Hybrid complaints

39. A hybrid complaint relates to a single complaint from a member of the public which raises both conduct issues and service issues. For instance, if a solicitor refuses to transfer a case to another lawyer despite a validly signed mandate or the authority to do so, this is a conduct issue (where the solicitor has not carried out the client's instructions to transfer the case), but also has elements of poor service (the case is delayed from progressing).

40. It is understood that a significant number of complaints each year feature both conduct and service elements but the Legal Profession and Legal Aid (Scotland) Act 2007 ('2007 Act') currently does not allow for complaints to be investigated in this way.

41. In its earlier years the SLCC developed a process which meant that each issue raised in a complaint could be looked at as both a service and a conduct issue. However, a court ruling in 2016 determined that the 2007 Act did not allow for complaints to be dealt with as "hybrid issue" complaints, and that the existing practice in this regard developed by the SLCC should be discontinued.

42. Under the current process in place since then, a complainer whose complaint raises issues of both service and conduct risks that complaint being dealt with only as a conduct complaint. As a result, the complainer does not have the opportunity to benefit from any compensation above the statutory ceiling of £5,000 for conduct issue complaints under the current framework or for sanctions focused on the rectification of the error for the complainer or a reduction or refund in the fees the complainer was charged.

43. The intention within the Bill is that a services complaint offers consumer redress and, where appropriate, offers compensation to address any form of loss. Conduct complaints are intended to address poor behaviour of legal practitioners. It is considered that this will be a more flexible approach to how complaints are separated. It will be for the Commission to establish its own rules as to how complaints are analysed to determine whether they relate to services, conduct or both. The Bill removes the potential for a consumer to receive compensation twice for the same complaint by providing that compensation only be considered in respect of services complaints.

44. We note that Roddy Dunlop, Dean of the Faculty of Advocates indicated that parallel proceedings are "not necessarily a good thing" It may be worth noting that the proceedings will be examining different elements of a particular set of circumstances. We also note that the Faculty's suggested approach was that it should deal with all complaints, whether conduct or hybrid.

45. For the reasons noted above, the Scottish Government view the reintroduction of hybrid complaints as beneficial for consumers and practitioners alike.

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## Bodies responsible for investigating legal complaints

46. The Scottish Government gave careful consideration to which bodies should have responsibility for investigating conduct, services and regulatory complaints. While there is general agreement that improvement is needed, this is another area where there is significant divergence of views as to what that improvement should look like.
47. In our engagement on this question following the Robertson report, the consultation showed support for maintaining and improving the current system.
48. Whilst the Bill retains the multi-agency approach, it also introduces changes which will vastly simplify and strengthen the process to the benefit of consumers, practitioners and the bodies responsible for handling complaints.
49. The Bill establishes a new legislative framework which will allow the SLCC to design its own flexible and responsive complaints system. It is intended to create a system which is proportionate in terms of how complaints are processed. The Bill also removes steps within the current system which slow down the investigation of complaints, by allowing the Law Society and the Faculty to raise a complaint and directly investigate it without first going through the SLCC, in certain circumstances.
50. We have listened to the views of stakeholders on the current complexity of the system and the changes being introduced by the Bill. We remain of the view that, on balance, the improvements being introduced will act as a counterweight to any additional complexity from the introduction of hybrid or regulatory complaints. And the introduction of these new systems, as well as the new ability for the SLCC or a regulator to initiate its own complaint, will be hugely beneficial for consumers and practitioners alike.
51. We will bring forward Stage 2 amendments to make additional improvements to the Law Society's powers around conduct complaints and the SLCC's functions, as set out in this response.

## Renaming of the Commission

**145. The Committee notes concerns expressed by senior judiciary, the Law Society and the Faculty that renaming the Scottish Legal Complaints Commission as the Scottish Legal Services Commission may cause confusion among the public as to its function due to the removal of the word "complaint". The reasons for the name change remain unclear. The Committee recommends that the Scottish Government seriously reconsiders whether a new name is necessary.**

52. We have listened to the views expressed and will amend the Bill to retain the SLCC's current name.

## Complaints about unregulated or unreserved legal services

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**146. The Committee notes the broad support to extend the Commission’s powers to investigate unregulated legal services. It welcomes this as a proportionate response to work in a new area. It also supports the creation of a voluntary register of service providers. However, it notes concerns expressed that providers may choose not to register voluntarily and that this may pose a risk to consumers. It asks the Scottish Government to consider strengthening this provision and creating a mandatory register of unregulated legal services rather than a voluntary one in order to provide adequate consumer protection.**

53. The Scottish Government notes the Committee’s positive response to the introduction of a power for the SLCC to investigate complaints against unregulated legal services providers.

54. We seek to clarify the position here. A body’s presence on the register will not affect the SLCC’s ability to consider complaints about it or its practitioners. The SLCC will be able to consider a complaint against any unregulated legal services practitioner regardless of whether they or their employer are on the register.

55. The intention behind the register is to exist as a ‘kitemark’ (or recognition that those legal service providers were part of a consumer redress scheme) to those providers who wished to join, allowing consumers to make an informed choice when selecting legal services. The intention is that the benefit to, and the incentive for, the provider in joining is that membership of the register will see it charged a lower ‘complaints levy’ where a complaint against it is upheld.

56. We have previously considered the question of whether the register should be mandatory for all unregulated legal services providers. However, we consider that there would be significant challenges in enforcing such a measure and the proposals in the Bill take a proportionate approach. As highlighted, the fact that the register is voluntary will not affect whether the SLCC can consider a complaint relating to a particular unregulated provider or their employee.

### **Commission permitted to initiate a complaint in its own name**

**147. The Committee heard overwhelming support for the introduction of rules to enable the Commission to raise a complaint in its own name where a public interest issue arises and welcomes this positive addition to the Bill. However, the Committee agrees with the Faculty who highlighted that there must be necessary demarcation in the Commission between those initiating a complaint and those adjudicating it.**

57. The Scottish Government notes the Committee’s positive response to this addition to the Bill and their comment on necessary demarcation. We will introduce amendments in line with the Committee’s recommendation at stage 2.

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## Rules on monitoring and standard setting

**148. The Committee notes the conflicting views on one hand from the Law Society and Faculty of Advocates that new powers for the Commission on monitoring and standard setting “go too far” and that there are insufficient checks and balances in place and on the other, those from the Commission who welcome this additional “backstop” power. The Committee notes it is the intention of the Law Society to offer potential solutions in the form of amendments at stage 2 and it would welcome an update from the Scottish Government on its ongoing engagement to resolve the issue. One suggestion may be to consider imposing a duty on the SLCC to consult regulators ahead of issuing guidance.**

58. The support for independent regulation by consumers, and the bodies representing them, is the basis for greater independent oversight of complaints.

59. The new ability for the SLCC to set minimum standards in relation to regulators’ complaints handling and to direct legal practitioners as to minimum standards in complaints handling, follows the model set by the Scottish Public Service Ombudsman (SPSO). We note that the SPSO’s view of these provisions, which the Committee heard in evidence:

*“It is not just best practice—it enables the development of best practice.”*

60. To provide reassurance, the Bill as introduced requires the SLCC to consult with regulators in advance of setting any minimum standards, in line with the committee recommendation. This will ensure a collaborative process and give regulators an opportunity to provide comment and require the SLCC to have regard to the views of the regulators.

61. In any case where the Commission and a regulator find themselves in dispute, the Bill requires both parties to consider whether the dispute should be submitted to arbitration. If the dispute does not go to arbitration, and the regulator does not comply with the new standard, the question may ultimately be decided by the court. We consider that this provides sufficient safeguards to allay any concerns in relation to the setting of minimum standards.

62. This oversight will bring a degree of consistency in respect of the investigation of legal complaints across the sector, with all legal regulators requiring to adhere to the same minimum standards.

63. The majority of legal complaints relate to service issues, the most common of these being about communication. The Bill allows the SLCC to set minimum standards in relation to how complaints are handled and the issues which lead to complaints being made. This will introduce greater consistency for consumers on how complaints are dealt with and address some of the key issues which lead to complaints being made. This greater focus on continuous improvement and prevention of failure may have the potential to inform better

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practices that are designed to better serve consumers of legal services and reduce the number of complaints raised.

## Appeals

**164. The Committee heard conflicting views on the removal of the direct route of appeal for decisions on service complaints by the SLCC to the Court of Session and whether an internal review committee is the right approach. It notes concerns expressed by the Law Society, Faculty of Advocates and others that the right to appeal to court should be an automatic right and it is appropriate that any appeal should remain with the court that has regulatory responsibility.**

**165. However, it recognises the view of the SLCC that the current route is an “anomaly” for an ombudsman which can be disproportionate given the issues involved. On balance, the Committee agrees that the internal review committee procedure should provide a more proportionate, accessible, swifter and cost effective approach and resolution which will benefit both consumers and those against whom a complaint is made. The Committee also calls on the Scottish Government to give consideration to putting in place a review process of the new committee to monitor progress and ensure transparency.**

64. We welcome the Committee’s consideration of this issue and agreement with the benefits of an internal review system. The Scottish Government will lodge amendments at require the SLCC to include information on the Review Committee within its annual report to ensure the process is transparent.
65. The intention is to make the appeals system for complaints more affordable and accessible. The Committee heard in its evidence that the average court fee to raise an appeal is approximately £950. This does not include legal fees which may be significant.
66. The proposed approach is similar to the position in respect of other ombudsmen for services complaints including the Scottish Public Services Ombudsman, the Legal Ombudsman (for England & Wales), and the Financial Ombudsman Service . However, as with other public bodies, decisions will remain open to judicial review.
67. In respect of current oversight of the SLCC, as an Executive Non-Departmental Public Body it is held to account by the Scottish Parliament under the terms of its founding Act, in that their Statement of Accounts is subject to audit by the Auditor General for Scotland and the audited statement is laid before the Parliament in accordance with such directions as may be given by the Scottish Ministers. The Commission must also prepare an annual report on its functions and submit that report to the Scottish Ministers as soon as practicable after the end of each financial year. The 2007 Act sets out that the Scottish Ministers must consult with the Lord President when appointing SLCC members, and the Lord President may, by written notice, remove the chairing member of the SLCC from office

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in certain circumstances. The Lord President is also required to agree all removal of members from the SLCC by the chairing member.

## **Broader complaints issues discussed (not provided in the Bill)**

### **Mechanism to access information in a timely way**

**186. The Committee has heard evidence about additional ways in which the Bill could be amended to further improve the complaints system.**

**187. The SLCC already holds powers to access information it requires to investigate service complaints. However, it highlighted to the Committee that some solicitors' firms fail to respond to requests for their files. The Committee notes that the SLCC's only recourse is to go to the Court of Session for an order to comply which is costly and disproportionate. We note that it seeks a power to apply a £500 statutory fine for non-compliance within 14 days and that this may be a practical and proportionate solution.**

68. The Scottish Government recognises that failures by practitioners to comply with a requirement to submit information is a significant concern for the SLCC and for consumers involved in legal complaints. The Scottish Government is conscious of the relatively new Law Society practice rule requiring cooperation with the SLCC which is intended to help with this difficulty.<sup>3</sup> The Scottish Government is working on amendments to provide greater enforcement powers to the SLCC where a solicitor fails to comply with the requirement to produce information about a complaint.

### **Request for additional powers for the Law Society of Scotland and the Scottish Solicitors' Discipline Tribunal**

**188. Similarly, both the Law Society and the Scottish Solicitors Discipline Tribunal made a number of suggestions outlined in this report which may resolve conduct complaints more efficiently.**

**189. The Committee welcomes the ongoing engagement by the Scottish Government with these stakeholders and asks that it considers the merit of these ahead of stage 2.**

69. We have been working closely with both the Law Society and the SSDT and will bring forward Stage 2 amendments to introduce significant additional improvements to the legislative framework under which both bodies operate in terms of conduct complaints. For example, provisions which allow for the early resolution of legal complaints.

### **Introduction of a complainer's fee**

<sup>3</sup> [B1.17 Duty to Co-operate with the Scottish Legal Complaints Commission | Law Society of Scotland \(lawsociety.org.uk\)](https://www.lawsociety.org.uk/b1-17-duty-to-co-operate-with-the-scottish-legal-complaints-commission)

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**190. The Committee also heard arguments supporting the introduction of a fee for making a complaint. The Committee rejects those arguments for the reasons outlined by the SLCC and the Law Society. However, it urges the Scottish Government to work with the SLCC to ensure a system is in place to efficiently deal with complaints without merit to avoid clogging up the system and causing unnecessary delay.**

70. The Scottish Government agrees with the Committee that it would not be appropriate for individuals to require to pay a fee to raise a legal complaint. This would be a barrier to access to justice and may have unintended consequences in that the cost to administer such a system may cost more than the potential savings.

71. The Scottish Government notes that the Committee recommends we work with the SLCC to ensure a system is in place to efficiently deal with complaints without merit to avoid clogging up the system and causing unnecessary delay and can assure the Committee we will do so.

72. The Bill allows the SLCC to create its own eligibility tests which are flexible enough to meet the variety of complaints they receive. This will be a significant improvement compared with the current triage process which, just to assess a complaint before it goes elsewhere, is time-consuming, inflexible and can be confusing or at times distressing for consumers and practitioners, because of the requirements in legislation. This compares with a process which in many complaints bodies would be a low-level administrative decision. As a comparison in respect of England and Wales, the ombudsman has equivalent flexibility to set eligibility rules.

### **Alternative Business Structures**

**206. The Committee heard broad support for the reduction in business ownership threshold and welcomes proposals in the Bill. It agrees that this new model will provide consumers with more choice and will benefit not for profit advice services and law firms.**

**207. The Minister told the Committee that a 10% figure was chosen to provide a balanced compromise. However, the Committee agrees that no satisfactory explanation has been given to why 10% was decided upon nor why the percentage is not removed entirely. It notes that safeguards already exist in relation to investors in ABSs in the Legal Services (Scotland) Act 2010, in particular, section 62 provides a fitness or suitability test for outside investors. It also considers that requiring 10% of investors to be solicitors or other regulated professionals could limit the number and types of investors who might invest in ABSs.**

**208. However, the Committee also notes concerns raised by SLAS as to whether the new rules allowing non-solicitor investors to have up to a 90% stake are sufficient to deal with situations where individual investors each**

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**have less than 10% stakes and are exempt from the current fitness test (section 63 of the 2010 Act). It asks the Scottish Government to consider whether any additional safeguards are required to deal with this situation beyond those already provided in the Legal Services (Scotland) Act 2010. It would welcome clarity on this point in advance of stage 2.**

73. The Legal Services (Scotland) Act 2010 ('2010 Act') sets out that an entity can only be a licensed provider if the qualifying investors (solicitors or members of other regulated professions) together have at least a 51% stake in the total ownership or control of the entity. A licensed provider is a business entity which provides (or offers to provide) legal services to the public for a fee, gain or reward and is licensed to do so.
74. In England and Wales the legislation allows for the ownership of an ABS to be completely open, subject to meeting certain suitability requirements, and that ABSs are available to the non-profit sector. Since they were introduced in England and Wales in 2007, almost 1,300 have been established. The CMA view that the adoption of alternative business structures in other jurisdictions illustrates that they have an important role to play in breaking down the regulatory restrictions on business models, with little apparent downside. It has also been reported that the Solicitors Regulation Authority in England and Wales view that there is little evidence that non-lawyer ownership has increased professional risk.
75. The Bill seeks to liberalise licensed providers by removing restrictions which currently require such firms to operate for 'fee, gain or reward', and to have a minimum ownership of 51% by regulated professionals. Instead, regulated professionals would be required to have at least a 10% stake in the total ownership or control of the entity. This would allow greater flexibility to address concerns that Scottish legal firms are at a competitive disadvantage compared to other jurisdictions, remove barriers to competition and promote access to justice.
76. The Bill's proposals would place an ownership requirement intended to balance the interests of those who support retaining a requirement for regulated professionals to have a majority ownership in licenced providers, and those who seek the requirement removed.
77. However, based on the evidence to the Committee and the Committee's comments in the Stage 1 report, the Scottish Government will bring forward amendments to remove the ownership requirement for regulated professionals and liaise with the Law Society to develop a greater risk based and proportionate system to the fitness test in respect of non-solicitors.

### **Regulating the term "lawyer"**

**222. The Committee heard conflicting views on whether the term "lawyer" should be regulated. The Committee agrees that there is a generally held public perception that the term "lawyer" is interchangeable with the term**

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**“solicitor” with the potential that consumers may think they have received legal advice from a regulated professional (a solicitor) when this may not be the case.**

**223. However, it notes that all legal services do not require to be provided by a solicitor and many legal services are provided by those with other qualifications such as paralegals. There is the added complication that solicitors without a practising certificate are not authorised to practise as a solicitor but are still entitled to use the title “solicitor”. The CMA and others highlighted that its regulation could have unintended consequences which would outweigh the benefit.**

**224. The Committee agrees that it is important for consumers to understand and be absolutely clear what service they are being offered and by whom. It agrees that confusion exists amongst consumers within the current landscape and asks the Scottish Government to look at ways to reduce this confusion. It also heard concerns about potential unintended consequences for regulation particularly in relation to academic lawyers who give legal opinions. On balance however, the Committee supports the regulation of the term “lawyer”. However, it asks the Scottish Government to give further consideration as to whether an exception to the rule for academic opinion may be appropriate**

78. The Scottish Government welcomes the Committee’s consideration of this question and support for the regulation of the title ‘lawyer’. We also note the comments that the Scottish Government should consider options to reduce the confusion experienced by some consumers and will continue to engage with legal regulators and consumer bodies interests to consider this further ahead of stage 2.

79. The new provisions do not prevent legally qualified persons from referring to themselves as lawyers in many circumstances but target the improper use of the title when providing services to the public for money.

80. We also note the Committee’s comments about an exception for academic option. Whilst we view that the tests currently applied in the Bill, that the offence must be committed with an ‘intent to deceive’ and where the person is providing services to the public for a fee, strikes the right balance between restricting those who use the term in bad faith, in comparison to those who have a legitimate reason to use the title, such as academics and retired lawyers, we will consider this further ahead of stage 2.

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## Powers to Scottish Government Ministers

**254. Various sections of the Bill give powers to the Scottish Ministers. The Committee heard significant opposition from the Law Society, Faculty of Advocates and the Senators of the College of Justice among others in relation to these proposals that these powers are inappropriate and have potential for political interference and bias. The Committee shares these concerns. It is of the view that there is no place for Ministerial powers in the Bill and these should be removed.**

**255. The Committee accepts that this is a complex process which affects various parts of the Bill and welcomes the Scottish Government's commitment to resolve these issues by way of amendment at stage 2 and to keep the Committee updated. It notes its ongoing engagement and significant progress that has been made and welcomes the updates within the correspondence from the Lord President's office and the Minister's letter.**

**256. The Committee would also welcome clarification from the Scottish Government on what mechanisms are in place within the current system to "oversee the overseer" and ensure that all decisions are transparent and open and there are sufficient checks and balances in place.**

81. The Scottish Government absolutely recognises the importance of an independent legal profession and is committed to upholding that independence. While we consider that the Bill already incorporates safeguards which protect the independence of the legal profession, we have listened to the views being expressed on this issue and want to ensure the Bill strikes the right balance between differing interests.
82. As the Committee is aware, the Scottish Government will table amendments at Stage 2 to address concerns raised in respect of the role placed on Scottish Ministers within the Bill.
83. We continue to work closely with the Lord President's office on the changes which focus on transferring responsibility for carrying out those functions from the Scottish Ministers to the Lord President. We remain committed to keeping the Committee updated as work progresses.
84. In terms of oversight of the regulatory framework, the Lord President of the Court of Session is the head of the Judiciary in Scotland and has responsibilities in relation to the regulation of the legal profession and has a regulatory function in relation to the SLCC. The Bill retains and builds upon the current oversight role of the Lord President in the legal services regulatory framework, prioritising the continued independence of the legal profession. It is appropriate that the powers conferred by the Bill are exercised by the Lord President and they will, of course, act in accordance with the law when operating those powers.

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85. Ultimately the system of legal services regulation is set out in statute. Whilst the Bill aims to future proof the regulatory system, we will of course continue to engage with stakeholders from both the legal and consumer sectors to ensure the framework is operating effectively for all.

### **Delegated Powers within the Bill**

86. The Bill contains 21 delegated powers. The Scottish Government notes that the Delegated Powers and Law Reform Committee ('DPLRC') was content with regard to the majority of the delegated powers in the Bill. The following provides a summary of the Scottish Government position to the DPLRC's recommendations.

### **Section 5(1): Power to modify regulatory objectives and professional principles**

87. **Summary:** Section 5 provides that the Scottish Ministers may modify the regulatory objectives and professional principles for legal services set out in sections 2 to 4 of the Bill, in consultation with the Lord President, the SLCC, the independent advisory Consumer Panel, the Competition and Markets Authority, each category 1 and category 2 regulator and each approved regulator of licensed providers.

**30. The Committee recommends that the power in 5(1) should not be delegated. It is clear to the Committee from evidence received from stakeholders that, in their view, the power is unacceptable and presents constitutional issues.**

88. **Response:** The Scottish Government have reflected on the DPLRC's recommendation and of the view of stakeholders and will bring forward an amendment at Stage 2 to remove section 5.

### **Section 8(5): Regulatory categories**

89. **Summary:** The power to add, remove or remove a regulator from the face of the Bill reassign the category of a regulator, or change its name.

**39. The Committee recommends that the power in 8(5) should not be delegated. It is clear to the Committee from evidence received from stakeholders that, in their view, there are questions as to the necessity of the power being delegated.**

90. **Response:** We will lodge amendments at Stage 2 to narrow the power to change a regulator's category, so it applies to accredited regulators. The power will also only apply where it is requested and approved by the Lord President.

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91. The creation of a category system for regulators creates an inherent requirement for flexibility to respond to any changes, or proposed changes, to how a regulator operates or in its membership numbers and is intended to futureproof the regulatory framework. It is possible that a new accredited regulator may enter the legal services sector in the future at category 2 and grow in size. In such a circumstance it would be remiss not to have an ability to reassign that regulator to category 1 to ensure that it is subject to the same regulatory requirements as potential counterparts such as the Law Society.

### **Section 20(6): Measures open to Scottish Ministers**

92. **Summary:** The power to add new sanctions or remove existing sanctions in respect of section 20.

**53. The Committee is not content with the power as currently drafted at section 20(6). Based on the evidence received, the Committee cannot come to a view on whether the proposed additional safeguards would alleviate concerns. The Committee echoes the Lord President's view that "much more information will be needed about the detail of how the Government's proposals...are intended to operate".**

93. **Response:** The Scottish Government intend to lodge amendments with the effect that the powers at sections 19 and 20 are to be transferred to the Lord President. While we intend to retain the delegated power to make changes to possible measures at section 20, we will introduce amendments which will ensure this power may only be used at the recommendation of, and with the approval of, the Lord President.

### **Section 26(1): Regulatory scheme**

94. **Summary:** The power to add other matters to regulatory scheme requirements in respect of accredited regulators.

**58. The Committee is content with the power in principle and that regulations made under the power would be subject to the affirmative procedure.**

95. **Response:** While the DPLRC are content, the Scottish Government will lodge amendments at Stage 2 to add a requirement for the Lord President's consent.

### **Section 35(1): Replacement regulatory arrangements for authorised providers**

96. **Summary:** Where an accredited regulator ceases to function or has its rights revoked, this power allows for a new body to be set up, rights to be transferred to another regulator or for the Scottish Ministers to directly regulate where necessary.

**79. The Committee is not content with the power as currently drafted at section 35(1). Based on the evidence received, the Committee cannot come**

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**to a view on whether the proposed additional safeguards would alleviate concerns.**

97. **Response:** The Scottish Government intend to lodge amendments to transfer responsibility for section 35 to the Lord President. We will remove the ability to create a new body by regulations.

98. We consider that it remains appropriate to have the ability to transfer regulatory functions to another regulator, with that body's permission. There may also be a requirement for direct regulation powers for the Lord President, for a limited time and only if the members of a discontinuing regulator were considering making an application to become a new accredited regulator.

### **Section 41(2) & (6) – Rules for authorised legal business**

99. **Summary:** The power at subsection (2) allows for other matters to be added to the list of what must be included in a regulatory scheme for authorised legal businesses.

100. The power at subsection (6) would allow for regulations to authorise regulatory schemes for legal businesses to deal with services other than legal services.

**100. The Committee recommends that the Scottish Government review how delegated powers in this section of the Bill should operate in light of comments about “further clarity” by the Lord President.**

101. **Response:** The Scottish Government will lodge amendments at Stage 2 to include additional safeguards for section 41(2) so the power may only be exercised where requested by the Lord President, the regulator or the Consumer Panel, and approved by the Lord President, and to remove section 41(6).

### **Section 46(3): Reconciling different rules**

102. **Summary:** Allows for further provision to be made as to how regulatory conflicts may be reconciled.

**112. The Committee recommends that additional safeguards are built in to the power, including that such regulations may only be made on request from the Lord President**

103. **Response:** In line with the DPLRC's recommendations, the Scottish Government will lodge amendments so that that power may only to be used at Lord President's request or at the recommendation of category 1 regulator and approved by the Lord President.

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## **Section 49(1): Powers of the Scottish Ministers to intervene**

104. **Summary:** The provision is intended to ensure that there always an appropriate category 1 regulator in place to regulate authorised legal businesses should there be no other suitable regulator. Power allowed Scottish Ministers to establish a new body or directly regulate where necessary, as a measure of last resort.

**121. The Committee is not content with the power as currently drafted at section 49(1). Based on the evidence received, the Committee cannot come to a view on whether the proposed additional safeguards would alleviate concerns. The Committee echoes the Lord President’s view that “much more information will be needed about the detail of how the Government’s proposals...are intended to operate”.**

105. **Response:** After considering the views of stakeholders and both committees, the Scottish Government intends to lodge amendments to remove section 49.

## **Section 86: Power to adjust what constitutes restricted legal services**

106. **Summary:** Inserts new section 32A into the Solicitors (Scotland) Act 1980 allowing for changes to the list of services reserved to solicitors and other practitioners.

**133. The Committee accepts the power in principle, but suggests that its exercise should be subject to additional parliamentary scrutiny, commonly referred to as the "super affirmative procedure", such as laying draft regulations in Parliament on which representations may be made.**

107. **Response:** The Scottish Government notes this recommendation and will lodge amendments in line with the DPLRC’s recommendation.

## **Schedule 1, Paragraph 6: Guarantee fund: further provision**

108. **Summary:** Inserts section 43A into the 1980 Act allowing for regulations to make further provision about the Guarantee Fund (Law Society’s compensation fund).

**151. The Committee recommends that additional safeguards are built in to the power including that such regulations may only be made on request from certain bodies, and that there should be a requirement that the Scottish Ministers obtain the Lord President’s consent before making the regulations.**

109. **Response:** In line with DPLRC’s recommendations, the Scottish Government will lodge amendments introducing a requirement for the Lord President’s consent and so that regulations may only to be made at the request of the Lord President or the Law Society.

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## **Schedule 2, Paragraph 23: Making changes to regulatory functions**

110. **Summary:** Power to make changes, by regulations, to a regulator's functions where a section 19 review has been upheld and the measure is deemed appropriate.

**160. The Committee is not content with the power as currently drafted at schedule 2, paragraph 23. Based on the evidence received, the Committee cannot come to a view on whether the proposed additional safeguards would alleviate concerns. The Committee echoes the Lord President's view that "much more information will be needed about the detail of how the Government's proposals...are intended to operate".**

111. **Response:** The Scottish Government intend to lodge amendments to remove the ability to remove some of a regulator's functions. The remaining power will be exercisable by the Lord President.

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