Regulation of Legal Services (Scotland) Bill

Scottish Parliament

Stage 1 debate - 22 February 2024

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Law Society of Scotland

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Law Society of Scotland

Introduction

As the professional body and regulator of over 13,000 Scottish solicitors, the Law Society of Scotland knows the regulation of legal services must change and modernise.

Scotland should be proud of its legal sector. It helps provide justice for thousands of people each year. It assists individuals during some of the most important times of their lives, such as buying a home or setting up a business. It helps resolve complex family disputes, manage the complicated processes that can flow from the death of a loved one, and provides important advice and defence to those accused of a crime.

Members of the legal profession act as trusted advisors to businesses, facilitating commercial transactions, from small businesses to global companies. The profession also accounts for tens of thousands of well-paid, highly skilled jobs, and contributes over £1 billion to the Scottish economy each year.

This legal sector is constantly changing. Today's legal services market is a diverse one, from small high street practices through to major international law firms. A quarter of the Scottish legal profession now works in-house, whether in the public or private sector. The range of services required by civic Scotland and offered by legal professionals has never been wider, with technology transforming the way in which many of those services are provided. As the legal sector changes, so too must the legislation that frames the way it is regulated.

This is why we welcome the introduction of the Regulation of Legal Services (Scotland) Bill. It is an important opportunity to introduce major and long overdue regulatory changes in the public interest, for the benefit of consumers, and those working within the sector.

The Bill marks the culmination of eight years of campaigning by the Law Society to secure reforms to existing legislation, much of which is now over 40 years old. Indeed, the process that led to the Bill's introduction came, not because of a scandal or market failure, but because the Law Society itself went to the Scottish Government back in 2015 to argue for changes that would modernise regulation and be in the public interest.

To that end, we welcome many of the Bill's reforms, not least because we requested them. New proposals for entity regulation through the creation of authorised legal businesses (ALB), and restrictions around who can and cannot call themselves a lawyer are important and positive improvements to the law which will give additional protections to consumers. There are also some important process improvements which should help speed up elements of our work to take robust regulatory action when we need to.

However, many of the suggestions we made to the Scottish Government for system improvements are currently absent from the Bill, particularly around complaints handling. We understand this was due to a lack of time before the legislation had to be lodged. Since the Bill was published, we have worked constructively with the Scottish Government to try and ensure appropriate amendments are made at Stage 2 to address this. We look forward to these being progressed.

Some parts of the current Bill are also contradictory and confusing in nature or create unintended consequences. These could add bureaucracy, unnecessarily increase the costs which will need to be met

by consumers, stymy innovation, and reduce inward investment. It is important these issues be addressed if Members of the Scottish Parliament agree to approve the principles of the Bill at Stage 1.

Of greatest concern to us, and an issue which has dominated much of the public commentary on the Bill so far, had been the initial desire of the Scottish Government to be granted extensive and exceptional new powers of intervention over how legal professionals are regulated.

A key component of a free and democratic society is the role that an independent legal profession plays in challenging government and protecting citizens from the excessive use of power by the state. These proposed new ministerial powers in the Bill, which we have not been able to identify in any other western democracy, risk seriously undermining the rule of the law and the independence of Scotland's legal sector from the state.

The Scottish Government's recent promise to significantly amend the Bill and scale back these new political powers is welcome. However, we still need to see the specific amendments before we can be sure they address the wave of criticism and concern expressed over the last year.

This briefing is intended to assist Members of the Scottish Parliament ahead of the Regulation of Legal Services (Scotland) Bill Stage 1 debate on 22 February 2024. If you would like to discuss the issues raised, or have any questions then please do not hesitate to contact us.

Contact details can be found at the end of this briefing.

Key issues for consideration at Stage 1

- **New Ministerial powers**

The Bill, as currently drafted, would introduce a swathe of new powers for Scottish Ministers to intervene directly in the regulation of legal services. When the Bill was lodged, we noted how we had never before seen such an attempt at political control over the legal sector in Scotland.

For example:

- Section 19 and 20, and Schedule 2 give the Scottish Government considerable new powers to censure and fine regulators, or even remove their regulatory functions altogether.
- Section 41 gives Scottish Ministers, for the first time, a direct role in approving rules on the way existing law firms operate and the conduct and practice of solicitors.
- Section 49 gives the Scottish Government the power to appoint itself as a direct authorisation body or regulator of legal businesses. It opens the prospect, one which had never before been suggested, that the state could regulate law firms directly.

A fundamental tenet of the rule of law is the independence of the legal profession from the state. The International Bar Association describes the independence of the profession as "*a bastion of a free and democratic society*". They say, *"lawyers must be able to carry out their duties in a free and secure environment, where they are able to ensure access to justice and provide their clients with intelligent, impartial and objective advice.*"

This matters because of the critical and unique role which solicitors play in our society, challenging government on behalf of clients and protecting citizens from the excessive use of power by the state. These sections of the Bill would allow unprecedented levels of political control and interference over many of those who work to hold the politically powerful to account. It could see the Scottish Government intervene directly on the rules and structures that decide who can and cannot be a solicitor, decide the professional requirements placed upon solicitors, and decide the way in which legal firms operate. This is deeply alarming.

It should also be remembered that the Scottish legal profession exists in a global marketplace for legal services. Clients often have a choice of which law, which jurisdiction and which dispute forum to choose when doing business in the UK. The risk of direct state intervention and even the perception of political control over the Scottish legal profession could see clients choosing to go elsewhere. It may also result in the larger multinational firms moving their operations to other parts of the UK.

These provisions have caused deep and widespread concern. This included an unprecedented intervention by Scotland's most senior judiciary. In their unanimous written evidence submitted to the committee, the Senators of the College of Justice said,

"These proposals are a threat to the independence of the legal profession and the judiciary. It is of critical constitutional importance that there is a legal profession which is willing and able to stand up for the citizen against the government of the day. The judiciary is fundamentally opposed to this attempt to bring the legal

profession under political control. If the Bill is passed in its current form, Scotland will be viewed internationally as a country whose legal system is open to political abuse."

We strongly welcome the conclusions which members of the Equalities, Human Rights and Civil Justice (EHRCJ) Committee set out in their Stage 1 report which said, *"it [the committee] is of the view that there is no place for Ministerial powers in the Bill and these should be removed."*[1]

Following extensive scrutiny by both the Delegated Powers and Law Reform (DPLR) and EHRCJ Committees, the Minister for Victims and Community Safety on 22 January 2024 set out the Scottish Government's intention to bring forward amendments which would reduce or remove the proposed Ministerial powers.[2]

We welcome the constructive approach the Minister is taking. We have yet to see the specific drafted amendments and therefore cannot offer a view on whether they will be sufficient to address all the concerns expressed. Nevertheless, the direction of travel now being taken by the Scottish Government is encouraging and we remain committed to finding a consensus on these matters.

- **The need to go further to improve the complaints system**

There is near universal acceptance that the system for dealing with legal complaints is not working as well as it should. The current legislative requirements have created a system which is too slow, too rigid, too complex and increasingly expensive to operate. There is a need for an urgent overhaul, for the benefit of all who rely on there being a fair and efficient processes for handling and resolving complaints.

There are many provisions in the Bill which we welcome and have come about because of years of positive collaborative work between the Law Society, the Scottish Legal Complaints Commission (Commission) and the Scottish Government.

In particular, we support most of the reforms which should help the Commission deal with the eligibility stage of complaints more quickly. We believe these are essential to speed up the process overall and should help ensure serious cases of alleged solicitor misconduct are referred to us faster for investigation and, if necessary, prosecution.

In particular, we welcome the new provision (Section 67 and 68) which ends the current bureaucratic and time-consuming process whereby we, when we identify possible misconduct through our own investigations, must submit a complaint to the Commission only for that complaint to be referred back to us for investigation. Instead, we would have the power to progress immediately to investigation, taking time out of the process and allowing us to move more swiftly to a decision and any appropriate regulatory action.

[1] Equalities, Human Rights, & Civil Justice Stage 1 report, paragraph 254
[2] Letter from the Minister for Victims and Community Safety to the Convener of the Equalities, Human Rights and Civil Justice Committee, 22 January 2024,

We also support Section 52 which reintroduces hybrid complaints as a category involving both conduct and service. Hybrid complaints had been an established and long-standing feature of the complaints system but ceased following a significant court case[3]. This ensures overlapping elements of poor service and any departure from professional standards of conduct are fully addressed by investigations undertaken respectively by the Commission and the relevant professional body.

We note that, in its Stage 1 report, the EHRCJ Committee called for the Bill to go further on reforming the complaints system[4]. We agree. Indeed, the Bill omits many of the suggestions we put forward to the Scottish Government for complaints reform. We believe additional reforms to conduct complaints processes are required to speed up the process overall and, in time, deliver some financial savings. For example, we seek:

- **new powers which would allow us to dispose of conduct cases early**. Similar powers exist for the Solicitors Regulation Authority in England and Wales and other professional regulators in Scotland and have proven a useful and effective tool. A consensual disposal process would allow us to protect consumers and the public interest swiftly, efficiently and at a proportionate cost by reducing the need for full evidential hearings in uncontentious cases.

  We believe these powers would help us reach the same robust regulatory decisions and outcomes, but to do so proportionately and more quickly for the benefit of all involved. This would, in turn, free up time and resource to focus on the more challenging and more serious misconduct cases, again helping us to deal with and conclude these cases more swiftly.

- **powers to issue letters of advice and warning**. This would allow us to respond to minor regulatory breaches which are not sufficiently serious to require more onerous regulatory action.

- **significantly widening our currently limited powers to suspend a solicitor** on an interim basis when possible serious wrongdoing is uncovered or alleged or to restrict a solicitor's practising certificate to afford greater public protection. We believe these additional powers are important to provide us with more flexibility to step in and protect the public when it is right to do so.

- additional powers that would allow us to **compel the provision of information by solicitors and ALBs** prior to a formal complaint being investigated. This would allow us to regulate more proactively and move quickly to protect the public interest.

In addition, there are several additional powers we will be seeking to generally improve the efficiency of the conduct complaints process. These include:

- an ability to **adopt civil and criminal findings as fact** so that the facts do not need to be relitigated at the Scottish Solicitors' Discipline Tribunal (SSDT);

[3] Anderson Strathern [2016] CSIH 71
[4] Equalities, Human Rights, & Civil Justice Stage 1 report, paragraph 144

- the power for the **SSDT to decide unsatisfactory professional conduct cases** when they have already determined that a matter does not amount to the more serious charge of professional misconduct; and
- the ability to **award mandatory training orders** for solicitors where that is the most appropriate and effective sanction.

Finally, we are keen to further increase the transparency of our complaints system. Although the Bill includes additional publication obligations which will assist, we are significantly constrained by what we are allowed to communicate due to section 52 of the Legal Profession and Legal Aid (Scotland) Act 2007. Section 52 of the 2007 Act makes it a criminal offence for us to disclose publicly any information contained in or relating to a conduct complaint. This means that we are unable to be as open or transparent about our regulatory actions as we would like. It is right that there are some restrictions but, as currently drafted, section 52 does not allow us even to confirm or deny whether we are considering regulatory action or the number of conduct complaints we may have received on a matter. We do not wish to delete section 52 altogether but think it is appropriate to relax its terms so that we may disclose limited information when it is in the public interest to do so.

We are working constructively with Scottish Government to try and ensure these additional powers in relation to conduct complaints and increased transparency are introduced at Stage 2.

- **Strengthening public protections**

Much of the debate on the Bill has understandably focused on areas of concern. However, it is important not to lose sight of the many provisions in the legislation which do improve the system, which will better protect the public, and where there is broad support for change. It is imperative for these improvements, many of which having been in discussion for 10 years, to be delivered.

Scotland's legal sector has evolved and the expectations of consumers are changing. This is why the tools we and other bodies have in regulating the profession must also change. That way, we can ensure the legal profession is one where standards remain high, where client satisfaction stays strong, and where the international reputation of the sector endures.

In particular, we welcome:

- **New provisions for regulating legal businesses (entity regulation)** - This has been a key ask of the Law Society for many years. The bulk of the current legal framework places the emphasis on regulating the individual solicitor. Entity regulation expands regulation beyond the individual within a firm to cover all employees collectively. This recognises that many of the decisions are not taken by one individual solicitor but often increasingly by individuals who are not currently regulated, for example, paralegals. We have been in discussions with the Scottish Government on possible amendments at Stage 2 to reduce the bureaucracy and anomalies in the current drafting.

- **Regulating who can and cannot call themselves a "lawyer"** - This responds to a long-standing call from the Law Society. It remains a matter of deep concern to us that anyone, including those

without any legal education, qualification or accreditation, can legitimately call themselves a 'lawyer' and offer legal services for profit on this basis. We believe the current unrestricted use of the title 'lawyer' poses a significant risk to consumers who may not differentiate between a 'solicitor' and a 'lawyer' and are therefore potentially being misled. We have suggestions at Stage 2 for how this provision can be strengthened further.

- **Strengthening the independence of the Law Society Regulatory Committee** – the 50% lay, 50% solicitor regulatory committee has been a critical component of the Law Society for over a decade. It has helped deliver robust regulation in the public interest. We support the Bill's measures to strengthen the committee's independence, to help it be more transparent in decisions, and to create a new annual report to the Scottish Parliament.

- **Issues still to be addressed**

As we set out to both the Scottish Government and the EHRCJ Committee, there remain other areas of concern for us and which we hope can be addressed at Stage 2. These include:

- **Name of the 'Scottish Legal Services Commission'** - We have concern over the renaming of the Scottish Legal Complaints Commission to the Scottish Legal Services Commission and the possible confusion amongst the public who may think the Commission itself is some provider of legal services. We note that the EHRCJ Committee has suggested the Scottish Government "*seriously reconsiders whether a new name is necessary*".

- **Powers of the Scottish Legal Services Commission to direct regulators -** The Bill would give the Commission new powers which go well beyond its current powers to issue recommendations. Such powers would represent a major and serious departure from the current arrangement where the Commission has the power to make recommendations but where it is for the Law Society, with the relevant understanding and experience of regulation, to take final regulatory decisions.

- **Powers of the Scottish Legal Services Commission to impose required standards on the legal profession** - The Bill would allow the Commission to set minimum standards for both the regulator and the legal profession. We interpret these provisions as creating very broad powers which would, in effect, give the Commission the power to make practice rules for the profession by a back door and without any checks and balances such as a requirement to consult or the requirement for scrutiny and approval from the Lord President.

  We are also concerned at the lack of oversight of the body. The Commission plays a critical role in the regulatory system. Under the Bill, those powers are widened and strengthened. However, it remains unclear as to what, if any, checks and balances exist or what recourse would be available if the Commission was either acting unreasonably or, worse still, failing in its own regulatory responsibilities other than standard processes of judicial review. This contrasts with the

professional bodies who regulate Scottish legal services (which remain under the oversight of the Lord President and other oversight bodies such as the FCA and HM Treasury) as well as the oversight in place over many other regulatory bodies in different sectors.

- **Freedom of Information** - Many parts of the Bill increase the transparency and build in strong reporting mechanisms which we support. Indeed, we would like to see the Bill go further, with the Law Society given additional powers in relation to publishing regulatory decisions. However, we disagree with making the work of legal regulators subject to Freedom of Information (FOI). No other UK legal regulator involved in making disciplinary and regulatory decisions is currently subject to FOI, not least because decisions are so often subject to GDPR.

Parliamentary consideration of the Bill so far

The Bill was introduced in the Scottish Parliament on 20 April 2023 by the Minister for Victims and Community Safety (Siobhian Brown MSP).

A 'call for views' was issued by the Equality, Human Rights and Civil Justice Committee (EHRCJ Committee) on 31 May 2023, to which we submitted a written response.[5] Our Executive Director of Regulation (Rachel Wood) and the lay convener to our Regulatory Committee (David Gordon) appeared before the committee to provide evidence on the 21 November 2023.[6] The EHRCJ Committee published its Stage 1 report on 8 February 2024.[7]

The Bill itself followed the Scottish Government's earlier consultation '*Legal Services Regulation in Scotland'* in October 2021, to which we also responded.[8]

As some provisions of the Bill confer delegated powers to Scottish Ministers, the Bill was considered, in relation to those delegated powers, by the Delegated Powers and Law Reform Committee (DPLR Committee). Our Executive Director of Regulation (Rachel Wood) appeared before that committee on the 24 October 2023.[9] The DPLR Committee reported on the 23 November 2023.[10]

We want to thank the members of both the DRLR and the EHRCJ Committees for the considerable scrutiny they have already given this Bill and the constructive reports and recommendations made by both committees.

[5] Law Society of Scotland call for views response July 2023 see: regulation-of-legal-services-scotland-bill-call-for-evidence-response-of-the-law-society-of-scotland-27-july.pdf (lawscot.org.uk)
[6] Official Report Equality Human Rights and Civil Justice Committee 24 October 2023 See: https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=15495
[7] EHRCJ Committee, Stage 1 Report, SP Paper 526, See: Stage 1 Report on the Regulation of Legal Services (Scotland) Bill | Scottish Parliament
[8] Law Society of Scotland consultation response December 2021 see: legal-services-review-consultation-law-society-of-scotland-response.pdf (lawscot.org.uk)
[9] Delegated Powers and Law Reform Committee, Official Report 24 October 2023. See: Official Report (parliament.scot)
[10] Report SP Paper 481 – 23 November 2023. See: Delegated powers in the Regulation of Legal Services (Scotland) Bill at Stage 1 (parliament.scot)

APPENDIX

Summary of our overall commentary on the Bill

Part 1 (sections 1 to 37)

Part 1 sets out provisions for the regulatory framework for the regulation of providers of legal services in Scotland and is split into three chapters.

Chapter 1 (sections 1 to 7) sets out the objectives of the regulatory regime, principles which shall apply and key definitions which are applicable throughout the Bill and which underpin the proposed framework.

Chapter 2 (sections 8 to 24) introduces categorisation of regulators (category 1 and category 2) and the differing requirements conferred on each in delivery of the regulatory regime, such as reporting and the delivery of the regulatory functions.

Chapter 3 (sections 25 to 37) sets out how an organisation can become an 'accredited' regulator of legal service providers and how a business may become authorised to provide legal services.

We are broadly supportive of many of the provisions set out within Part 1 of the Bill, subject to those that raise concerns regarding delegated powers and on which we comment on further below. We do however, have some concerns and reservations regarding some sections in Part 1 and we share those later in this briefing. We have previously questioned the rationale for the need for two distinct categories of regulators, which adds to the complexity of the regulatory structure and regime. We note that the EHRCJ Committee appears to be unconvinced of the merits of categorisation and asks how the Scottish Government intends to address concerns raised regarding this approach.[11]

Part 2 (sections 38 to 50)

This part introduces entity regulation across the Scottish legal sector and requires a business to be authorised if it is to provide legal services as defined within the Bill. The current regulatory model only permits, with limited exceptions, for the regulation of a Scottish solicitor as an individual.

We are strongly supportive of the proposed introduction of entity regulation and it was one of the powers which we requested in our original call for changes to the regulatory framework. However, while we welcome the broad thrust of the Bill's provisions on entity regulation, we have some concerns over elements of the detail which is over-prescriptive and potentially counterproductive. The decision to duplicate provisions from the Legal Services (Scotland) Act 2010, legislation which has been found to have a number of practical flaws, contributes to the shortcomings of the Bill. There are some sections that, as

[11] Stage 1 Report, SP Paper 525, at paragraph 99.

drafted, are inconsistent with existing legislation and will require extensive amendments. Finally, there are provisions we had requested which are missing from the Bill in relation to entity regulation. These include:

- the power to “passport” existing legal practices into the new regime without requiring full applications from existing practices,
- provisions that would fix existing issues with our powers to intervene in or appoint a judicial factor over an incorporated practice, and
- deemed transfers of an ALB which is a partnership when there are changes in the partners in order to comply with Scottish partnership law.

We are pleased to note that the EHRCJ Committee recognises the benefits for consumers, and are broadly supportive, of entity regulation at the same time as recognising that there will need to be amendments to the Bill if the benefits of entity regulation are to be fully realised.[12]

We intend to provide suggested amendments for Stage 2 of the Bill’s parliamentary passage.

Part 3 (sections 51 to 77)

Part 3 is focused on complaints and makes changes to the Legal Aid and Legal Profession (Scotland) Act 2007. It makes changes to how complaints are investigated and managed, providing additional powers to both the retitled Scottish Legal Services Commission and regulators of legal services. Part 3 also introduces a new ‘voluntary’ register for those who are not regulated but provide legal services to the public for ‘profit’ or ‘gain’.

Some of the most important elements of any regulatory system are the processes relating to consumer complaints and professional discipline. However, the current legal complaints process and framework is slow, complex and expensive. It is simply not meeting the needs or expectations of consumers or the legal profession and this has been recognised and acknowledged by the EHRCJ Committee.[13]

For many years, we have advocated for a complaints process which is timely, agile, and proportionate, one which is not prescriptive or constraining and adopts principles of transparency, accountability, proportionality and consistency. We therefore welcome provisions within the Bill which seek to improve the complaints journey. However, we believe the Bill could be improved and, in some cases, go further than proposed. In addition, we have concerns relating to the proposed increased powers of oversight to be conferred on the Commission. We intend to provide suggested amendments at Stage 2 to further improve the complaints journey and build upon the improvements already made by the Bill.

Part 4 (sections 78 to 87)

Part 4 sets out miscellaneous, but substantial and important provisions relating to licensed legal service providers, the removal of practising restrictions and offences of pretending to be a regulated legal services provider. It introduces restrictions on using the title ‘lawyer’, reduces the majority ownership in relation to

[12] Stage 1 Report, SP Paper 525, paragraph 110.
[13] Ibid, paragraphs 143 - 148

licensed legal service providers and introduces provisions intended to make it simpler for charities and third sector organisations to provide legal services.

We welcome many of the provisions of part 4, the majority of which bring forward amendments to existing regulatory legislation, including the Solicitor (Scotland) Act 1980 and the Legal Services (Scotland) Act 2010. However, there are still further improvements that can be made to the existing legislation and we intend to provide suggested amendments at Stage 2.

Part 5 (sections 88 to 93)

Part 5 covers general matters, including interpretation and commencement.

We have no major concerns to raise in regard to those provisions in part 5.

Schedule 1

Schedule 1 primarily amends various provisions of the Solicitors (Scotland) Act 1980 i to give effect to the provisions of the Bill.

Although we have no major concerns with regards to many of these, there are many other amendments that could be made to the 1980 Act that would provide improved consumer protection and further improve and strengthen the regulatory regime. We intend to bring forward suggested amendments in that regard at Stage 2.

Schedule 2

Schedule 2 set outs further provisions regarding measures open to Scottish Ministers in the exercising of delegated powers under sections 19 and 20 of the Bill.

We are strongly opposed to the extent of the delegated powers under sections 19 and 20, and consequently to the measures contained in Schedule 2. We set out more detail regarding our concerns below.

Schedule 3

Schedule 3 sets out minor and consequential changes to existing legislation. Although many of those do not cause concern or issue, there are many other consequential technical changes to existing legislation which will need to be considered further at a future stage. For example, in some instances the term “solicitor” in the 1980 Act has been amended to “ALB” where it is not appropriate to do so and in others, the conversion has not been made where it should be. We will provide a more detailed analysis of these changes at a future stage.

In addition, Schedule 3 makes legal sector regulators, for the first time, subject to Freedom of Information requirements. This is concerning and it should be noted that no other UK legal regulator involved in making disciplinary and regulatory decisions is currently subject to FOI. FOI requirements would be expensive, cumbersome, and disproportionate given the extent of transparency and publication measures

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within the Bill. The additional cost of administering FOI would also need to be borne by the profession and ultimately passed on to consumers. The EHRCJ Committee has noted these concerns and has requested that the Scottish Government engage with the Law Society to discuss these with a view to striking the right balance between concerns raised and promoting transparency[14]

[14] Stage 1 report, SP paper paragraph 101.

Concerns regarding delegated powers

As we have highlighted in this briefing, one of the shared major concerns relating to the Bill is the unprecedented extensive powers the Bill proposes to delegate to Scottish Ministers. We are pleased to note that these concerns are also shared by the EHRCJ Committee which has stated in its Stage 1 report that the committee '…*is of the view that there is no place for Ministerial powers in the Bill and that these should be removed…'*[15]

We have also noted the extensive discussions and correspondence between the Minister and both the DPLR Committee and the EHRCJ Committee over recent months relating to the delegation of powers. In that regard, we welcome the Minister's acknowledgment of the concerns raised and further welcome the Minister's commitment, in correspondence to the EHRCJ Committee of the 22 January 2024, to bring forward amendments at Stage 2 to address many of those. However, although we welcome the encouraging and ongoing direction of travel, we are unable to form or share a firm view on whether the proposed changes to be brought forward at Stage 2 will address the concerns raised until such time as we have had sight of the specific amendments.

We note that the EHRCJ committee in its Stage 1 report recommendations has requested early sight of the Scottish Government proposed amendments regarding Ministerial powers and for the opportunity to consult with legal sector stakeholders in an extended Stage 2.[16]

We welcome and support this recommendation. It is crucial that the Scottish Government amendments are subject to careful and full scrutiny and the views of legal sector stakeholders sought and taken into account in determining if the amendments address and alleviate the concerns raised. In this regard, we very much look forward to working collaboratively with the committee and providing our assistance as the committee continues to deliberate the Bill at Stage 2.

Below we have set out those sections of the Bill that raise the most concerns regarding delegated powers.

Section 5 proposes to introduce powers to allow Scottish Ministers to modify the regulatory objectives and professional principles for legal services as set out in sections 2 to 4 of the Bill. In our submission to the EHRCJ Committee's call for views and our evidence before the DPLR Committee[17] we expressed our extreme concern that this provision risked impeding upon the rule of law and the independence of the legal sector. Section 5 provides Scottish Ministers with *direct control* over the ethical and practice behaviour of Scottish solicitors. This may, for example, allow Ministers to introduce restrictions on acting in any matters challenging the Scottish Government. These concerns have also been voiced by many other stakeholders, including the Senators of the College of Justice.

We therefore welcome the recommendation of the DPLR Committee that the powers conferred by section 5 of the Bill should not be delegated and in the view of the committee'…*the power is unacceptable and*

[15] Ibid paragraph 254.
[16] Stage 1 report, SP paper 525, para 263.
[17] Report 24 October 2024: See: Official Report (parliament.scot)

presents constitutional issues..'[18]. We also note and welcome the Minister's commitment to bring forward an amendment at Stage 2 for the deletion of section 5 in its entirety from the Bill.

Section 8(5) proposes powers to be delegated to Scottish Ministers to assign and reassign regulators as either a category 1 regulator or category 2 regulator. Although we are not necessarily opposed to the categorisation of regulators, we have previously questioned the rationale for such an approach, and we have called on the Scottish Government for clarification.

In our evidence session before the DPLR Committee we expressed the view that categorisation of a regulator should require the consent of the Lord President. We again welcome the Minister's commitment to bring forward an amendment at Stage 2 to reflect this.

Sections 19/ 20 introduce sweeping levels of Ministerial intervention into the regulation of the legal profession. These sections set out measures which the Scottish Ministers may take in relation to a regulator following a review of their regulatory performance. These measures include setting performance targets, imposing financial penalties and changing or removing some or all of the regulator's regulatory functions.

The powers conferred by sections 19/20 allow unprecedented levels of political control and interference over many of those who work to hold the politically powerful to account. It could see the Scottish Government intervene directly on the rules and structures that decide who can and cannot be a solicitor, decide the professional requirements placed upon solicitors, and decide the way in which legal firms operate. The powers pose a risk not only to the independence of the legal profession, but that of the judiciary, a concern noted by the DPLR Committee.[19] These powers would demolish a cornerstone of democracy.

We welcome the Minister's intention to bring forward amendments at Stage 2 regarding the extent of the Lord President's involvement.[20]. However, until we have had sight of the proposed amendments, we are unable to say whether they will address our concerns. This is also a view shared by the DPLR Committee. The committee in its report, echoing the views of the Lord President, stated that *'much more information will be needed about the details of how the Government proposals are intended to operate'*

We therefore look forward to considering the Scottish Government's proposed amendments in due course.

Section 29 relates to the creation by application of new legal service regulators and provides that the application must be considered by Scottish Ministers and the Lord President. The power is exercisable through regulations subject to the affirmative procedure.

Although we have no firm views in relation to the delegated powers conferred by section 29, we note and welcome the Minister's commitment to bring forward an amendment at Stage 2 to the effect that it will be

[18] Delegated Powers and Law Reform Committee, SP 481, session 6 page 8, paragraph 30.
[19] Delegated Powers and Law Reform Committee, SP 481, session 6 page 8, paragraph 30
[20] Letter from the Minister for Victims and Community Safety to the Convener of the Equalities, Human Rights and Civil Justice Committee, 22 January 2024

for the Lord President alone to consider an application by a body wishing to enter the legal services sector as a new regulator.

Section 35 provides that Scottish Ministers may, through regulations, establish a regulatory body for the purposes of regulating providers, replacing a discontinuing regulatory body. The power is exercisable through regulations subject to the affirmative procedure.

In effect, this provision, similar to that contained in section 49 below, would allow Scottish Ministers to appoint themselves as the regulator of the legal profession without the full parliamentary scrutiny which primary legislation would provide. There are serious and significant rule of law and human rights implications for such an approach. In addition, this section provides Scottish Ministers with powers to make any changes they may wish to Part 1 of the Bill. Part 1 is one of the key parts of the Bill underpinning the entire proposed regulatory regime and includes those sections relating to the regulatory objectives, the professional principles, the definition of “legal services”, the functions of the regulatory committee etc.

In its report, the DPLR Committee has recognised the seriousness of the concerns raised regarding this section and has stated that it is not content with the power as drafted

We are pleased to note and welcome the Minister’s recognition of concerns and the commitment to bring forward amendments at Stage 2 reflective of those concerns. As we understand, the Minister’s intention is to remove the powers under section 35 that would allow for Scottish Ministers to make such regulations to establish a new body.

However, until we have had sight of the proposed amendments, we are unable to comment on whether they will address our concerns. We look forward to considering the government amendments in due course.

Section 39 sets out the requirements for a legal business to be authorised and provides Scottish Ministers with the delegated powers to amend the maximum fine that may be imposed where a person is convicted of an offence under section 39. This power is exercisable by regulation subject to the negative procedure.

We agree with this power being delegated to Scottish Ministers. However, as we stated in our supplementary written evidence to the DPLR Committee, the exercise of these powers should be evidence-based. Therefore, Scottish Ministers should consult the relevant regulator in advance of changing the amount of the fine. Such consultation would also demonstrate transparency and accountability.

Section 41 provides Scottish Ministers with powers to set out what regulatory matters the practice rules for ALBs should deal with and rules to be made will require the agreement of both Scottish Ministers and the Lord President. The powers are exercisable through regulation and subject to the affirmative procedure.

We take the view that section 41(2) is an unwarranted extension of Ministerial powers into the regulation of legal businesses. The powers conferred are extremely broad and disproportionate. We suggest that it is for the regulator to set the practice rules for the legal profession, subject to the approval of the Lord President. Not only is this appropriate - reflecting the current process for the introduction / amendment of rules, and in

relation to which no concerns have been raised by the Scottish Government or others - but it allows for an agile response to identified issues and promotes a pro-active approach.

We are pleased to note that the Minister intends to bring forward amendments at Stage 2 to section 41. As we understand, these amendments will provide that only the consent of the Lord President will be required for the making of ALB rules.

However, again we are unable to provide any firm views on whether the proposed amendments will address our concerns until such time as we have had sight of those.

Section 46 provides the power to Scottish Ministers to make regulations regarding regulatory conflicts and before making these regulations, to obtain the consent of the Lord President. This power is exercisable through regulations subject to the negative procedure.

We do not have strong views on this provision. However, if this provision is to proceed in the Bill, then any proposed regulations should be subject to consultation with relevant stakeholders and the affirmative procedure.

However, we note the DPLR Committee's recommendation that any regulation to be brought forward to address regulatory conflicts should only be made on the request of the Lord President.

Section 49 is closely linked to section 35 of the Bill. It provides the power to Scottish Ministers to create a body with a view to it becoming a category 1 regulator and specify circumstances under which Scottish Ministers may directly authorise and regulate legal business. As we understand the Scottish Government's rationale for the inclusion of this power is to provide a mechanism in the unlikely event that a category 1 regulator (the Law Society) becomes unable to perform its regulatory functions

This section raises very significant and serious concerns. In effect, section 49 would also allow the Scottish Government to appoint itself as a direct authorisation body or even to become a regulator itself of legal businesses. It opens the prospect, one never before suggested, that the state could regulate law firms directly. We believe it is dangerous and wrong to undermine the independence of the legal profession in this way. Not only will it weaken the Scottish legal sector in what is an increasingly internationally competitive market, it will also seriously damage the global reputation of Scotland and its justice sector. This is a major concern and no legislative safeguards regarding the exercising of this power would make this acceptable.

We therefore welcome the Minister's commitment to lodge an amendment at Stage 2 to remove section 49 in its entirety from the Bill, and the Minister's recognition that the '*risk of the Law Society of Scotland being unable to operate its regulatory functions as a category 1 regulator is sufficiently low as to negate the requirement for this provision'.*[21]

[21] Letter from the Minister for Victims and Community Safety to the Convener of the Equalities, Human Rights and Civil Justice Committee, 22 January 2024

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Our comment on individual sections of the Bill

Below we set out our views on those sections where we believe there is room for improvement, where ambiguities arise and where we have concerns. In relation to many of these, we intend to bring forward suggested amendments at Stage 2.

Part 1- Regulatory Framework

Chapter 1- Objectives, principles and key definitions

Section 2 – Regulatory objectives.

This section sets out the objectives of regulating legal services which are relevant to regulators who must ensure they exercise their regulatory functions in a way that meets the objectives.

Largely, these reflect the existing regulatory objectives set out in the 2010 Act,[22] with some additions. Section 2(1)(iv) provides that one of the regulatory objectives is to promote '*effective communication between regulators, legal services providers and bodies that represent the interest of consumers'.* It is ambiguous as to what will be considered 'effective,' which is a subjective test and could lead to challenges. In addition, effective communication is dependent on all the parties engaged in that communication. If effectiveness is to be measured in any meaningful way, then it will require correlated requirements applying to all stakeholders and regulators.

Section 3 - Application of the regulatory objectives.

This section places a duty on 'regulatory authorities' to exercise their regulatory functions in a manner which reflects the regulatory objectives and takes into account several consumer principles.

We note that section 3 removes the wording included under sections 77 and 119 of the 2010 Act which state a regulator must act in a way which is compatible with the regulatory objectives 'so far as practicable' and 'with a view to meeting…[objectives]'**.**

We are not sure why the obligations in section 3 of the Bill have changed to drop this sensible wording.

One general concern in this section is the adoption of the principles under section 3(2). These are derived from the Commission's Consumer Panel's principles, '…*published to help those involved in regulation - and legal professionals - to think about the consumer interest in a structured way…*'.[23]

These are currently for guidance only, and we are concerned the Bill is seeking to transpose guidance into statutory form, with little recognition given as to the practicalities of delivering these. Whilst we welcome, and are supportive of, the intent behind the principles, we do not believe that they should be prescribed in legislation – especially given that they could, from time to time, be amended.

[22] Section 1 Legal Services (Scotland) Act 2010
[23] See Commission Consumer Panel at: https://www.scottishlegalcomplaints.org.uk/about-us/consumer-panel/consumer-principles/

It also appears the intention is that regard must be had to the consumer principles at all times. However, as the wording is taken directly from the Commission's Consumer Panel's principles, it fails to recognise that many users of legal services are not always individual 'consumers', but businesses or corporate consumers of legal services. In addition, the Bill does not recognise that there may be a tension between what a particular 'consumer' or other buyer of legal services may want and key overarching principles like wider public interest or the interests of justice.

Section 3(2)(a) provides that the regulatory authority must take into account the consumer accessibility to *'…a range of legal services that are affordable…'* How is '*affordable*' to be determined? Is the suggestion that the regulator will influence pricing in some way? We would argue that it is not compliant with competition law for a regulator to set or influence the costs charged by service providers. This is a matter for providers to determine themselves.

Section 3(2)(b) requires the regulatory authority to take into account that the consumer '*should receive sufficient information about the consumer's rights and services …available*'. Is it the intention that regulators provide 'legal advice' on consumer rights? If so, this is outside the scope of regulation and is not a role for the regulator. Our practice rules already include comprehensive requirements on information to be provided to consumers of legal services by solicitors, including a requirement that consumers are informed of their right to complain and how to do so.

Section 3(4)(b) requires regulatory functions to be '*exercised in a way that contributes to achieving sustainable economic growth*'. It is not clear to us what this means or how it may be achieved given the other provisions of sections 2 and 3. Our regulatory system is principally one of conduct regulation and we do not have the powers or framework to influence economic growth in the way that perhaps regulators in other sectors do (such as financial services regulators).

Section 3(5) sets out those bodies considered to be 'regulatory authorities'. Those listed all perform a regulatory role. However, the Scottish Solicitors Discipline Tribunal (SSDT), which plays a significant part in the regulatory regime, is absent from the list. We believe this may be an inadvertent oversight and have flagged this omission to Scottish Government.

Chapter 2 - Regulators

Section 7 – Meaning of regulatory functions.

Some of the regulatory functions set out, for example section 7(a) *'..setting standards for admission …etc'* are only applicable to regulators (for example, the Law Society of Scotland) and not to wider regulatory authorities as defined in section 3 (for example, the Commission). It would be helpful if the Bill set out which functions are attached only to a single regulator and those which are relevant to all regulatory authorities as defined in section 3. This would provide clarity and certainty.

Section 7 also omits administering the Guarantee Fund (Client Protection Fund) from regulatory functions. This is a crucial consumer protection tool and is currently a defined regulatory function under the Solicitors

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(Scotland) Act 1980.[24] It is unclear why this is now omitted from section 7 of the Bill, and we believe this may have been an inadvertent oversight on the part of the Scottish Government. We strongly believe it is crucial this be set out as a regulatory function, as it currently is under the 1980 Act.

Section 9 – Exercise of regulatory functions.

This section ensures that the regulatory functions of a category 1 regulator are exercised independently through a regulatory committee, as the Law Society does currently. The section then proceeds to strengthen the independence of the Law Society's Regulatory Committee and we agree with that principle. To further strengthen the independence of the Regulatory Committee, we will be proposing an amendment at Stage 2 that in section 9(4)(a), the word 'may' should be replaced with 'must'. However, the wording of section 9(4)(b) should remain as 'may'.

Section 10 – Regulatory Committee: composition and membership.

Reflecting the 1980 Act,[25] section 10(5) requires that the Regulatory Committee must have 'at least 50%' lay persons within its membership.

Currently the Law Society's Council has oversight of the committee's membership and is required to approve appointments to the Regulatory Committee. We agree that it is an important strengthening of the independence of the Regulatory Committee that the Council should play no future role in appointing members to the committee.

However, the Bill proposes no minimum requirement for solicitor members on the committee. This could result in a future Regulatory Committee appointing no solicitor members at all to the committee. Given that the Society remains a membership body for Scottish solicitors, retaining solicitor representation on the Regulatory Committee is important. We suggest it would be more appropriate to require the composition of the committee within the Bill at 50% non-solicitor and 50% solicitor membership. Clarifying the membership of the committee in this way is also in keeping with the provisions of section 74 of the Bill relating to membership of the Commission.

Section 10(4)(d) prohibits any person convicted of an '*offence involving dishonesty*' from membership. However, there are numerous other offences, many of which can be serious, that do not fall under the definition of 'dishonesty' and which may make it inappropriate for an individual to be a member of the Regulatory Committee. We suggest that the discretion should be given to the Regulatory Committee to determine if a proven offence is of such nature and seriousness as to restrict appointment to its membership.

Section 11 – Regulatory Committee: lay and legal members

[24] Section 3F Solicitors (Scotland) Act 1980.
[25] Section 3C Solicitors (Scotland) Act 1980.

This section sets out criteria for who may be a lay or legal member of a regulatory committee. We are broadly supportive of the provisions in section 11 but will be bringing forward some technical amendments for the sake of consistency at Stage 2.

Section 12 – Regulatory Committee: convener, sub-committees, and minutes.

This section provides the powers to regulatory sub-committees to co-opt members. However, the Bill is silent on the power of the Regulatory Committee to co-opt to its *own* membership. We believe this may be an unintentional oversight, as it effectively gives the sub-committees greater flexibility and powers than those of its oversight and parent committee.

Currently both the Regulatory Committee and its sub-committees may co-opt members for a period of up to 12 months. Co-option is necessary for several reasons - to ensure committee membership, and decisions, are quorate and to support the work of the committee where a particular skill set or knowledge is required.

Section 13 – Annual reports of category 1 regulators.

This section places a duty on the Regulatory Committee of a category 1 regulator to provide annual reports. We endorse the principle of reporting on the work of a regulator. However, we have several concerns and observations to make in respect of this section.

Section 13(2)(e) requires the regulator or its regulatory committee to set out how decisions have been reached and criteria used to determine claims made on professional indemnity insurance. The regulator will not be in a position to provide this data as it is the insurance providers, and not the regulator, which determine claims and set the criteria for paying claims. The regulator plays no role in these decisions and may not have access to the information. Insurance companies generally do not disclose the detail of the decisions they make or the criteria used for those decisions and therefore the Master Policy insurers may be reluctant to provide that information for the regulator's annual report. Forcing this requirement on insurers could have a detrimental impact on which companies are prepared to come forward to offer indemnity coverage.

Section 13(2)(f) may require disclosure of disciplinary proceedings. Such information will need to be considered with reference to section 52 of the 2007 Act, especially if section 52 of the 2007 Act is not amended. It is not clear to us whether section 13 of the Bill would override the 2007 Act.

Section 13(4) requires the regulator to consult on its reports. We question why this is necessary and note that it adds potentially lengthy bureaucracy for no stated purpose. Also, it is not clear on exactly what is to be consulted upon.

Section 13(6) places a duty on Scottish Ministers to lay the annual report before the Scottish Parliament. We suggest it would be more appropriate that the report is laid directly by regulators to alleviate any perception of possible political influence and remove the potential risk of any undue delay in the Scottish Parliament having sight of the report.

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Section 13(7) defines the reporting year as the 12 months from 1 April, ending the 31 March. This may not be practical for regulators and the information required will often be determined by reference to the regulator's 'operating year'- i.e. financial/accounting information. Reporting across two different operating years creates challenges, especially in relation to annual accounts. Our own operating year is 1 November – 31 October annually. We suggest that it should be for the regulator to determine its own respective 'reporting year' and this should not be set out in primary legislation.

Section 14 – Compensation funds.

This section relates to compensation fund for clients who suffer financial loss as a result of dishonesty by a legal service provider. The Law Society currently operates the Guarantee Fund (Client Protection Fund), which serves the same purpose as that proposed.

We are supportive of much of the policy intent of this section. However, section 14(6) requires regulators to consult the independent advisory panel of the Commission before making or amending any rules regarding the operation of the 'compensation fund'. We believe this may dilute the Regulatory Committee's powers in relation to the operation of the fund. We also do not think it is necessary given the increased extent of the Regulatory Committee's independence. In addition, the current provisions of the 1980 Act that relate to the Guarantee Fund work well and, to the best of our knowledge, there have been no issues or concerns regarding how the fund is administered from an operational perspective. The section has the effect of creating unnecessary complexity. There is a risk that this provision simply adds complexity for no benefit.

Section 15 – Exercise of regulatory functions.

We note this section, which sets out the requirements for category 2 regulators, is significantly less prescriptive than what is required for category 1 regulators. We refer to our earlier comments regarding categorisation and the lack of compelling evidence to justify a two-tiered approach of regulators.

Section 16 – Annual reports of category 2 regulators.

As highlighted previously, we note these are much more light touch than reporting requirements of category 1 regulators.

Section 17 – Register of regulated legal services providers.

We are supportive of the general intent of this section which, in effect, mirrors the purpose of the Roll of Solicitors which we currently maintain under the provision of the 1980 Act.[26] It also reflects similar provisions contained within the 2010 Act.[27] The register therefore is an extension of this, and we welcome the proposal to make this available electronically. We do, however, have some observations and questions to raise.

[26] Section 7 Solicitors (Scotland) Act 1980
[27] Section 83 Legal Services (Scotland) Act 2010

Section 17(2) requires the register to record information pertaining to the individual. However, it omits much information that would be useful to consumers. For example, status in relation to being a notary public (not all solicitors are authorised to perform notary services), solicitor advocate with extended rights of audience, and those registered to do criminal legal aid etc.

It is not clear how section 17(3) would operate at a practical level. Is this an attempt to mimic the existing Roll where a solicitor's details and records are maintained and their name may remain on this Roll even if they do not practice? This could be confusing to consumers.

We also note that the information to be accessible via the register is narrower than that applying to licensed providers under section 83 of the 2010 Act - notably there is no requirement to publish details of disciplinary actions.

Section 18 – Professional indemnity insurance.

This relates to the requirement to have in place rules regarding professional indemnity insurance**.** Sub-section (6) sets out the definitions of 'authorised insurer' and 'professional liability'. These differ from those in the 1980 Act and further amendments will need to be made for consistency.

Section 21 to section 24

These sections relate to practice rules and provide regulators with the powers to 'waive' the application of practice rules in defined circumstances. We have outlined concerns in principle with these provisions in our response to question 8(c) of the call for evidence and wish to add more detail here.

We are unclear as to why these new provisions have been added to the Bill and have various concerns about the provisions as drafted. The powers which these provisions are seeking to provide for already exist under the 1980 Act and the ability to waive most of the existing practice rules[28] is in force and works well.

We have policies and guidance[29] in relation to how and when we use our waiver powers and we are not aware of any challenge to or issue with how the process currently works. Our existing waiver system would allow us to create and operate a regulatory or legal tech sandbox for solicitors and solicitor-owned practice units if and when necessary. Therefore, we have not requested any changes to our current powers under the 1980 Act.

The provisions of sections 21-24 would be counterproductive and frustrate the efficient operation of the current waiver system. Most waivers we grant are urgent and subsist forever (though only in relation to the specific transaction where they are transactional). It would not be possible to grant waivers in a timely manner if we had to consult external stakeholders in advance. In most cases, it would not work if waivers were time limited as the rule must either apply to the situation or transaction or not – in perpetuity. In addition, waiver decisions often refer to personal information of the applicant, commercially confidential

[28] With the exception being the rules in B1 (Standards of Conduct), B8.4.2 (Appearance in a Superior Court), Section C Rule 2 (Incidental Financial Business) and C4.1 and C4.2 (re acquiring Rights of Audience).
[29] Waivers Policy and Guidance see: https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b2/advice-and-information/b2-2-applying-for-waiver/

information about the operation of a practice or client confidential information. This would make it, at best, difficult to publish waiver decisions and, at worst, consume significant time and resource to redact the decisions before publication.

Furthermore, section 21(3)(a) states that we may not disapply or modify a rule that regulates conduct or discipline but, as a conduct regulator. All of our rules are conduct rules. Section 21(3)(b) states that we may not disapply or modify a rule that regulates the handling of complaints, but no such rules exist. Our complaints policies and processes are governed through statute and not rules.

The powers in section 22 to amend or revoke waivers could prejudice anything done in good faith by an ALB while a waiver was in place. Such revocation or amendment could also be contrary to established rules of law such as fair notice.

Sections 21 through 24 simply add complexity for no benefit.

However, we do seek the power to grant waivers in relation to licensed providers under the 2010 Act.[30] We anticipate a waiver regime for licensed providers operating in the same way as it does currently for solicitor-owned practice units. The ability to waive certain requirements in certain circumstances (often subject to conditions which can be tailored to fit) is invaluable in allowing an effective, proportionate, and appropriate regulatory response to circumstances, events or developments which could not have been anticipated when the relevant rule was made. Waivers can support innovation, reduce regulatory conflict, or overlap and avoid disproportionate regulatory burdens adversely affecting competition or increasing costs (or reducing choice) for consumers.

We would urge deleting the proposed sections 21-24 and instead amend section 12 of the 2010 Act as previously requested. We will be putting forward amendments at Stage 2 to reflect this position.

Chapter 3 - New regulators of legal services (sections 25-37)

This chapter and associated sections provide powers to allow further organisations to seek to be accredited as a legal services regulator.

Whilst we are supportive of the policy intent of these provisions, this is on the basis that it must expressly exclude the creation of a further regulator for the Scottish solicitor profession. The creation of a further regulator of Scottish solicitors would be detrimental to both the interests of consumers and the profession by potentially applying inconsistent regulation, differing standards and rules and leading to complexities in the regulatory structure.

It could potentially allow and promote a sector ‘split’ in relation the Scottish solicitor profession. It would also bring confusion to both the consumer and the Scottish solicitor profession and would be disproportionate given the limited size of that profession.

[30] Amendments would be required to section 12 of the 2010 Act in order for us to grant waivers from the Regulatory Scheme under that Act.

Part 2 - Regulation of legal businesses.

Section 39 – Requirement for legal businesses to be authorised to provide legal services.

This section defines a legal business as being wholly owned by either (a) solicitors OR (b) qualifying individuals, but not a mixture.

Subsection (8) makes it clear that a solicitor cannot be a 'qualifying individual' and explanatory note 107 says there are no qualifying individuals at present. The consequence of this drafting is that Registered Foreign Lawyers would be excluded from ownership of firms of solicitors and incorporated practices, which is currently allowed under the 1980 Act.

This in turn would mean that no multi-national practices in Scotland could be authorised by the Law Society to deliver legal services in Scotland. Almost all of the big Scottish law firms are multi-national practices. We assume that the policy intent is to require all businesses which provide legal services to the public for a fee to be authorised, and not to bar multi-national practices from practicing in Scotland. If those are the policy objectives, then extensive amendments will be required to section 39.

Section 40 – Offence of pretending to be an authorised legal business

This section makes it an offence for a person to pretend to be an ALB. We have similar concerns to this section and the need to demonstrate the 'intent to deceive' as we do in relation to section 82 with respect to the offence of using the title "lawyer" (see below).

Section 41 – Rules for authorised legal businesses.

This section requires regulators to make rules for authorising and regulating ALBs.

Section 41(2)(c) provides a wide discretionary power to Scottish Ministers to make regulations on '*such other regulatory matters*' as they may wish, and we make the same observations regarding Ministerial interference as we refer to earlier in this response. In addition, the exercise of this power requires no consultation with, for example, the Lord President or regulator and therefore lacks transparency.

Section 41(4) requires prior approval of Scottish Ministers for rule changes. Again, we have significant concerns regarding the involvement of Ministers in the regulatory regime and do not believe this is appropriate. Notwithstanding this, we question why prior approval is necessary, as there is no such requirement for practice rules for individual solicitors. If there is a need for prior approval, then we believe this should rest with the Lord President and it should be for the regulator to consult with '*such other person or body they consider appropriate*.'

Section 41(5) requires regulators, '*in preparing (or amending) its ALB rules',* to consult with at *least* six separate stakeholders. We believe this is totally disproportionate and would require a time and resource-heavy process that will result in significant delay should an amendment be required urgently to address a highlighted risk. It could potentially result in an extensive consultation exercise for even the smallest change.

The current process for introducing/amending rules requires consultation with the membership and approval by the Lord President (section 34, Solicitors (Scotland) Act 1980). We believe this process continues to be the most appropriate and we are not aware of there being any issues or concerns raised regarding this. Notwithstanding the need to consult with an extensive number of consultees, if this is to be the case, then it should only be for new and 'material' amendments. 'Material' will need to be clearly defined to provide certainty.

Section 42 – Authorisation rules.

This section sets out what the regulator must cover when making its authorisation rules in relation to entity regulation. Much of this section introduces requirements that, in our view, are not necessary.

Section 42(1)(b) refers to the attachment of 'conditions' to authorisation. However, this appears to only allow conditions at the initial point of authorisation. This alone is not appropriate or sufficient. Powers should be provided for conditions to be attached to the ALB at any point of the authorisation period, not just at the outset. This may be the policy intent, however, for clarity this needs to be expressly included. This would be consistent with similar condition attachment powers for licensed providers.

Section 42(1)(c)(i) provides that rules are to be made regarding the renewal of a legal business authorisation. Annual renewal of authorisation is not necessary and to introduce such a requirement would create additional cost associated with administration and resource on the part of the regulator, cost which ultimately would be passed on to the consumer. This would be a further administrative burden for the profession. It is also inconsistent with the requirements in relation to licenced providers under the 2010 Act and in relation to incorporated practices under the 1980 Act. However, the regulator should retain the power to charge an annual authorisation fee.

Section 42(1)(c)(ii) provides that the rules set out the circumstances where authorisation may be withdrawn. It is uncertain if this includes voluntary surrender of authorisation on the part of the ALB. However, we suggest in any case that this should be expressly included to ensure clarity and provide an avenue should an ALB, for one reason or another, wish to cease as an ALB – effectively surrendering its authorisation.

Section 42(1)(d) and (3)(d) provides that the rules must set out the basis of how fees are to be determined. We do not believe that it is appropriate to set this 'criteria' out in rules - this should be a matter for the regulator to determine on an ongoing basis with the ability to change the fees as and when required. The factors to be taken into account when determining fees will be varied and to 'hard wire' these into rules will constrain the regulator from considering any new emerging factors or applying any kind of discretion.

Section 43 – Appeals in relation to authorisation decisions.

We are supportive of many parts of this section. However, we do have some concerns.

Section 43(3)(a)(ii) refers to refusal of an application for renewal. However, as highlighted above, we do not believe that annual renewal is necessary. Removing the need for annual renewal would negate the need for this provision. We also make the same observations regarding the attachment of conditions - (43(3)(b)- as we do in relation to section 42.

Section 44 – Practice rules.

This section sets out what the practice rules should cover in relation to the regulation of ALBs.

Section 44(1)(c) specifies '*accounting and auditing*'. The current account rules, as set out in the 1980 Act[31], relate to the operation of client accounts and the monies held within those accounts. However, it is not clear if (1)(c) is also narrowly defined or if the intention is for much wider application that will require rules regarding obligations that are already and separately legislated for.

Various legislative provisions relating to company law already set out the obligations of firms to meet accounting and auditing requirements. It is not the role of the legal regulator to determine rules of how business should meet those requirements or how business should have regard to other company and insolvency law requirements.

Section 44 (1)(e) & (f) relates to rules regarding complaints. In relation to individual solicitor regulation, the corresponding requirements are set out in legislation and not the current practice rules. The process for how complaints are handled should be, in our view, set out in primary legislation, as they currently are in the 2007 Act. This provision has been lifted from the 2010 Act, and the issues this causes have been previously highlighted to the Scottish Government. We are concerned that those issues will be compounded by inclusion in rules relating to ALBs

Section 44(2)(ii) requires that the practice rules must require ALBs to have regard to the regulatory objectives. This is not appropriate - it is for the regulator to have regards to the regulatory objectives, not ALBs. An ALB should have regard to the professional principles instead.

Section 44(2)(v) requires rules regarding professional indemnity. Professional indemnity will provide redress for consumers for losses arising from the negligence of a firm. However, the provision omits similar rule requirements for the Guarantee Fund (Client Protection Fund). This fund is separate and provides a route of redress for losses incurred due to acts of dishonesty.

Section 45 – Financial sanctions.

This section provides powers to introduce financial sanctions that may be imposed on ALBs. We are supportive of the policy intent of this section.

Section 45(3) provides that the financial penalty is payable to Scottish Ministers and reflects the current position in relation to financial sanctions imposed by the SSDT. However, unlike the provision relating to

[31] Section 34 Solicitors (Scotland) Act 1980

individual solicitors, the regulator will collect the financial penalty on behalf of Ministers. The regulator will incur costs in meeting this requirement.

Therefore, powers should be given to recover costs incurred in collecting the financial penalty, as this will require additional resource on the part of the regulator. In addition, regulators should be given the power to abandon pursuit of the penalty where this is proving futile. This would restrict costs incurred, otherwise those costs may exceed the amount of the penalty pursued.

Section 46 – Reconciling different rules.

This provision has been lifted from the 2010 Act in relation to licensed providers where such provision is necessary, as the licensed provider may be regulated by two or more regulators – for example the Law Society of Scotland and the Institute of Chartered Accountants Scotland.[32]

However, it may not be necessary for ALBs, as these business structures will be 100% solicitor-owned, therefore will be subject only to one regulator. We are uncertain of what 'regulatory conflicts' the Scottish Government foresee arising in relation to ALBs.

Subsection 2(c) makes reference to legal or '*other services'.* Again, we are uncertain as to what these other services may relate to, and it would be helpful if the Scottish Government could share an example so that we may further consider.

Section 47 – Monitoring of performance of authorised legal businesses.

This section places a duty on regulators to monitor the performance of ALBs. We are supportive of the policy intent of this, which provides for a more proactive approach to regulation, with powers to review/investigate performance of a legal business.

However, we believe that our powers to monitor and proactively investigate performance and compliance should be extended to include our entire regulated population, in other words similar (but not necessarily identical) provisions should be made in relation to in-house solicitors and solicitors employed by the Crown Office. The ongoing Post Office/Horizon enquiry is an example of where it might be relevant for us to proactively investigate and require information from in-house or Crown Office solicitors before a formal complaint is raised and the Bill as drafted would not allow us to do so.

Section 48 – Law Society of Scotland.

This section sets out the time frame by which the Law Society of Scotland must prepare the ALB rules, being three years from the point that Part 2 (relating to entity regulation), comes into force.

This is unduly prescriptive and fails to recognise the significant work that must be undertaken before we would be in a position to accept applications from business seeking to be authorised. Much of the development of the ALB scheme is reliant on external factors, for example consulting with numerous

[32] See section 13 Legal Services (Scotland) Act 2010

stakeholders, factors that we are not able to influence. We believe there should be a degree of flexibility in this time frame to allow variation and to be extended, if necessary, but with such variation or extension being subject to the agreement of the Lord President.

Section 49 – Powers of the Scottish Ministers to intervene.

This section gives Scottish Ministers powers to intervene directly in the authorisation and regulation of legal businesses. As we have set out earlier in this response, we have serious concerns regarding such extensive powers.

This section would allow Scottish Ministers to create what would, in effect, be a government-appointed regulator, with subsection (2) providing further concerning powers for Scottish Ministers to amend, or if so wished, totally disregard all provision set out in Part 2. We suggest that this may also extend to disregarding the regulatory objectives.

Part 3: Complaints

Section 51 – Change of name to the Scottish Legal Services Commission.

This section changes the name of the Scottish Legal Complaints Commission to the Scottish Legal Services Commission.

We do not agree with this change. We believe it will cause confusion to the consumer and is potentially very misleading. The proposed name suggests that the Commission has a role in the delivery of legal services to consumers. It risks being seen as an advice body, and one that is able to even offer legal services directly when that is absolutely not the case. We believe the current name should be retained.

These concerns have been recognised and noted by the EHRCJ Committee which has recommended that the Scottish Government 'seriously' reconsider if a new name for the Scottish Legal Complaints Commission is necessary.[33]

Section 52 – Receipt of complaints: preliminary steps

Section 52(3)(e)(iv) would involve removing the existing eligibility test for complaints of "frivolous, vexatious and totally without merit" from legislation. While this could still be included in the Commission's rules, there is no guarantee of this.

We believe that, overall, this has been an important test which should be maintained, given it helps to weed out unmeritorious complaints at an early stage. We do however, support removing the word "totally", as complainers can misunderstand and react badly to being informed that their complaint is "totally without merit."

Section 54 – Commission process relating to complaints.

[33] Stage 1 Report, SP Paper 525, paragraph 145.

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As highlighted earlier, this section is a further example whereby greater flexibility is being conferred on the Commission to steer its own processes, and providing discretion to several procedural aspects that are currently mandatory. For example, section 54(7) repeals that part of the 2007 Act that requires the Commission to provide notice in writing of its determination of the complaint to the complainer and practitioner, setting out the reasons for the determination. In our view, this impacts on the legal principle of fair process and transparency.

Section 55 – Regulatory complaints against authorised legal businesses.

This section sets out the regulatory complaints process for ALBs. This section inserts into the 2007 Act provisions that require us to investigate and report on regulatory complaints in the same way we currently do for conduct complaints under the 2007 Act. We support the introduction of regulatory complaints against ALBs. However, as with conduct complaints, the system should be made more proportionate and efficient. For example, section 55 does not provide a mechanism for discontinuing an investigation. As with conduct complaints, we hope to gain additional powers to dispose of appropriate cases more proportionately and will propose amendments at Stage 2.

In addition, we think it is important that the SSDT play a role in the determination of more serious regulatory complaints, as they do with conduct complaints and we will be bringing forward an amendment at Stage 2 to this effect.

Section 62 – Complaints against unregulated persons.

We support the principle of the ability to pursue service complaints against unregulated providers of legal services. However, as currently drafted, the definition of an "unregulated provider" in section 62 is inconsistent with section 39 which creates an obligation for any business which provides legal services to the public for a fee, gain or reward to be authorised by a category 1 regulator. We will discuss this point with Scottish Government to ensure the wording is clearer so the intention of section 62 is realised.

Section 63 – Handling complaints.

This section extends handling complaints to include new ALB complaints and, as with many others, provides the Commission with greater flexibility in its operational processes.

Currently the Commission is required to provide reasons for its decisions, in relation to handling complaints, to the complainer, practitioner and regulator. However, section 63(2) repeals this requirement. As previously highlighted, removing requirements to provide reasoning raises concerns regarding fair process and transparency, it will leave both complainer and practitioners in the dark as to why, and on what basis, decisions have been reached. This is not reflective of an open complaints process focused on delivering fair outcomes.

We are very concerned and opposed to the power conferred on the Commission to issue 'directions' to the regulators (section 63(3)). This is totally disproportionate and unnecessary and will not be conducive to a

collaborative regulatory regime. There is also a risk that such directions may not be financially or operationally viable and, if they are, could carry disproportionate cost to implement.

As an alternative we believe that it would be more appropriate for the Commission to make recommendations to the regulator, and if the regulator disagrees, having provided reasons, then the Commission retain the right to refer to the matter to the Lord President to determine the final outcome.

A recommendation system, with the power for the Lord President to enforce if appropriate, would encourage greater collaboration between the Commission and the regulator.

Section 64 – Annual general levy and complaints levy

Section 64(4) amends section 29 of the 2007 Act. This section concerns the amount payable for the levies.

The Commission is funded by the legal profession through an annual levy applied individually to all legal professionals, with a small number of exceptions. Since its formation in 2008, the Commission has imposed changes to its levy, sometimes substantially above inflation increases, without any oversight. Under the provisions of the 2007 Act,[34] the Commission is only required to consult with '*relevant professional organisations*' (regulators) each January and to lay the finalised budget before the Scottish Parliament by the end of April. There is no opportunity for scrutiny of the budget, either by the Scottish Parliament or by those who fund the Commission. There is no requirement for the Commission to respond to the limited consultation. We are aware of the tension that the Commission's budget causes with the legal profession and have previously highlighted our concerns about the budget and the impact this has on the profession. In our response to the Scottish Government consultation exercise in 2021[35] we highlighted that it is crucial that the budgeting process is fully transparent and the Commission is required to demonstrate evidence of its spending of the revenue which is generated through application of the annual levy. The opportunity should be given to challenge this if necessary and such provision should be made within the Bill.

Section 64(4) (e) introduces an additional requirement on the regulator to assist the Commission with enquiries relating to size and income of each ALB. This is financial data that we, as a regulator, do not collate and it will require additional resource and thus increased cost. Many businesses may be reluctant to share their income, as this will likely be considered as commercially confidential information.

Section 65 – Unregulated providers of legal services: voluntary register, annual contributions and complaints contributions.

This section provides powers for the Commission to introduce a register for unregulated providers, those business providing non-reserved legal services. Although we have advocated for many years for the

[34] Section 29 Legal Profession and Legal Aid (Scotland) Act 2007.
[35] Legal Services Regulation Reform in Scotland, Law Society of Scotland response. See: https://www.lawscot.org.uk/media/372054/legal-services-review-consultation-law-society-of-scotland-response.pdf

regulation of the unregulated legal services sector, we have concerns with the proposal for a voluntary register.

If the policy intent behind section 65 is to extend regulation to currently unregulated providers of legal services, then we would suggest that amendments to section 65 are required. The Commission has the *discretion* to introduce the register, but it is not required to do so.

Likewise, the unregulated legal services provider is under no obligation to sign up to the register. Given that there will be a cost attached to becoming registered and the provider will be subject to the complaints requirements and procedure in section 62 if they do register, it is unlikely there will be any kind of meaningful uptake. The section as drafted creates an illusion of a degree of regulation over the unregulated sector.

In relation to cost, we also note with some concern that the Commission is to have the discretion to waive a fee or 'annual contribution' for being registered. If it does so, then who will bear the cost of this register and the additional administrative burden of the Commission of not only maintaining the register, but administering the additional complaints that may be generated relating to those businesses which are registered on the register? We are concerned that the Commission will impose increased levy fees on the regulated profession to subsidise the cost of the register for the unregulated sector and associated complaints – and this we would strongly oppose.

If the proposal in section 65 is to be carried forward, and if it is to have any effect of bringing an element of regulation to the unregulated sector, then it should not be discretionary. The Commission should be required to introduce the register, all those unregulated businesses providing unreserved legal services to the public should be required to join, and the Commission required to cover its costs of administrating the register from a levy on the unregulated sector only - not via an increased or additional levy on the current regulated sector.

The concerns raised in relation to a voluntary register have also been recognised by the EHRCJ Committee. The committee, in its Stage 1 report, has asked the Scottish Government to consider making the register mandatory in order to provide better consumer protection.[36]

Section 69 – Conduct and regulatory complaints: setting of minimum standards by the Commission.

Section 69(4) gives the Commission power to set guidance and standards for regulators relating to how they are to investigate and determine conduct and regulatory complaints. This provision goes beyond oversight and strips the Law Society of its operational autonomy. Such standards could require us to incur significant additional cost and reprioritise agreed operational plans with limited notice and no checks and balances.

[36] Stage 1 Report, SP Paper 525, at paragraph 146.

Section 69 also gives the Commission the power to 'set minimum standards for practitioners' and to 'issue [mandatory] guidance… in respect of practice…'. This amounts to introducing practice and conduct rules for the legal profession by the back door. It is the role of the regulator, not the Commission, to set the rules, standards and guidance for its regulated population. Even if it were appropriate for the Commission to have such powers, there are no checks and balances in the Bill in relation to creating such standards or guidance – no requirement to consult and no scrutiny or approval by the Lord President (who is ultimately responsible for approving all practice rules set by the current legal regulators). We are strongly opposed to these provisions in the Bill and will be seeking to delete them at Stage 2.

Section 70 – Compensation funds: setting of minimum standards by the Commission.

This section provides powers to the Commission to set minimum standards relating to the operation and effectiveness of the Guarantee Fund (Client Protection Fund).

Section 70(2) proposes that minimum standards be set within guidance to be issued by the Commission. This is not appropriate. As we have highlighted in relation to section 69, it is not appropriate to set out what are considered as requirements (i.e. mandatory) in guidance (discretionary). Any conflation of the two raises the potential for uncertainty.

We are also concerned that this will confer the Commission with powers to interfere at an operational level where it does not have the experience or knowledge to understand how the Guarantee Fund (Client Protection Fund) is administered, especially without necessary checks and balances in relation to those powers.

Section 71 – Enforcement of minimum standards.

This section provides the 'enforcement' mechanism relating to the setting of minimum standards.

We are seriously concerned at the extent of powers to be conferred on the Commission by this section (as well as those throughout other Part 3 sections) without there being any notable checks or balances in place to ensure that these are used appropriately, reasonably and proportionally.

We do not see the evidence or policy reasoning for the provisions of section 71, and we are strongly opposed to this. It proposes an approach which is not conducive to a collaborative and mutually respectful working relationship and risks raising tension and conflict between regulators and the Commission.

Section 71(4) provides for a route to arbitration should there be a disagreement between the regulator and the Commission. However, sections 71(4) and 71(5) indicate that arbitration must be by agreement from both parties. This inevitably raises the question of what would happen if the Commission refused to agree?

If the Commission refused to agree to arbitration, then section 71(6) would come into play, giving the Commission powers to issue a 'direction' to the regulator with potential recourse to the courts should the regulator fail to take the direction forward. Section 71, read holistically, therefore provides the Commission unfettered powers to bring forward *any* minimum standards it wishes, with no real right for the regulator to

challenge the standards (as the Commission must agree to arbitration) and to issue direction should the regulator, for what may be a very good reason, be unable or refuse to comply with a direction.

Section 71(2) – introducing section 40B (enforcement of minimum standards in relation to practitioners) also raises equally concerning proposals. This provides the Commission with powers to directly set minimum standards and issue 'directions' to those providing legal services. Read in conjunction with section 69, section 71 provides the Commission powers to introduce - without any kind of oversight, checks or balances or consultation with stakeholders - rules governing the legal profession. We believe that this is not appropriate and interferes with the regulator's role. It may lead to inconsistent and conflicting regulation and cause confusion to both consumer and the legal profession.

Section 74 – Commission membership.

This section sets out proposed changes to the membership structure of the Commission's Board. We note that the proposed amendments to membership numbers do not correspond with referenced paragraphs of Schedule 1 of the 2007 Act. However, we note the Keeling Schedule provides clarity that the intention is to create an equal balance of legal and non-legal members to the board.

Section 74(3)(a) increases the maximum term limits a member of the Commission may serve from 10 years (two x five-year terms) to 16 years (two x eight-year terms). We do not agree with this excessive term of service which does not reflect the Nolan Principles of good governance. No reason has been given as to why such an increase is necessary.

Section 75 – Role of the independent advisory panel.

This section sets out the proposed role of the new 'Independent Advisory Panel'. In reality, this is a retitled Commission Consumer Panel.

We are concerned with the proposal set out in section 75(2)(b)(e) to confer powers on the panel to make recommendations to the regulator. The reality of this is that this would result in Scottish Ministers, the Commission and the panel all having recommendation or direction powers over regulators – this is disproportionate, particularly given the increased independence of the Regulatory Committee as proposed within the Bill.

In our view it would also result in even further complexities to the regulatory framework as conflicting recommendations could be made by different entities. We would also respectfully suggest that, as the panel will be comprised of consumer representatives / non-legal members, then it is unlikely that the panel will have the knowledge and insight of the working of the legal sector and the internal operation of the regulator to make informed recommendations.

It would be more appropriate for the panel to refer any concerns or issues it may have in relation to regulators, to the Commission in the first instance. The Commission could thereafter consider and decide to make recommendations to regulators if it is considered necessary and appropriate to do so.

In addition, if the panel is to have powers to make recommendations, it is not set out as to what will be the extent of the onus and expectations placed on regulators to implement those recommendations.

Although it appears that the panel is to have some superficial oversight of the Commission, this is minimal, and we also note that the panel is not to have powers to issue 'directions' to the Commission and may make recommendations only. This contrasts with the Commission's new proposed powers as contained in sections 70 and 71, to make 'directions' targeted at regulators.

Section 76 – Commission reports.

This section sets out the reporting requirements of the Commission. We note that this is much less prescriptive than the requirements to be imposed on regulators regarding reporting and as set out in section 13. There is no clear reason provided as to the disparity between what the Commission and the regulator are expected to report on.

We also highlight that, unlike regulators, the Commission is not required to consult with any legal sector stakeholders - this is another example of the disparity between the checks and balances applicable to the regulator and those of the Commission.

Part 4 – Miscellaneous

Section 82 – Offence of taking or using the title of lawyer.

We strongly welcome this provision in the Bill, which seeks to make it an offence for any person to use the title of 'lawyer' when not entitled to do so.

This responds to a long-standing call from the Law Society that there should be strict controls over who can and cannot call themselves a 'lawyer'. It remains a matter of deep concern to us that anyone, including those without any legal education, qualification or accreditation, can legitimately call themselves a 'lawyer' and offer legal services for profit on this basis. We believe the current unrestricted use of the title 'lawyer' poses a significant risk to consumers, many of whom, understandably, do not differentiate between a 'solicitor' and a 'lawyer' and are therefore potentially being misled. The consumer's perception is that a 'lawyer' is a solicitor, or other legal professional, who is appropriately qualified and regulated and therefore adheres to strong moral, ethical and legal standards.

We are pleased to note that the EHRCJ Committee are equally supportive of this provision, recognising the confusion that arises amongst consumers.[37]

However, we question whether this section is potentially weaker because an offence would only be committed if a person uses the title of lawyer "with intent to deceive". This subjective term risks creating an unhelpful loophole in the legislation and could still allow an unqualified person to continue to offer legal

[37] Stage 1 Report, SP Paper 525, paragraph 224.

services and call themselves a lawyer so long as they are not intending to deceive. We believe this still risks placing consumers at risk.

Our preference would be for this to be amended to a term of acting "wilfully and falsely" as a lawyer. This would bring consistency with the long-standing offence of pretending to be a solicitor which has been covered effectively for many years under Section 31 of the Solicitors (Scotland) Act 1980.

Section 83 – Offence of pretending to be a regulated legal services provider.

This section makes it an offence for a business to pretend to be a regulated legal services provider. We have similar concerns to this section and the need to demonstrate the 'intent to deceive' as we do in relation to section 82.

Part 5 - General

Section 88 – Individual culpability for offending by an organisation.

This section provides for the prosecution of specified individuals who are 'responsible officials' of an organisation which has committed an offence involving the consent of the official. Although supportive of the policy intent, this will only apply to those offences committed under the 2023 Bill, it will not include offences committed in terms of the 1980 Act.

In addition, there is some inconsistency in terminology. We propose that this section be extended to include offences under the 1980 Act.

Schedule 1 – The Law Society of Scotland

Part 1 paragraph 6 relates to the Guarantee Fund[38]

We have previously suggested that the name of the fund be changed to better reflect its aim and purpose. The current name does not reflect the aim of the fund and suggests that it in some way 'guarantees' to pay out to consumers who have suffered loss, when this is not the case. The fund applies in situations where there has been dishonesty or fraud by a solicitor and is a fund of last resort. Each matter is determined on its own merit, and none are 'guaranteed'.

We believe that the name should be amended to the Client Protection Fund, to better reflect its function. This would also reflect the operational name of the fund which has been used by the Society for many years.

Paragraph 6(6) inserts a new section 43A into the 1980 Act. This provides Scottish Ministers with powers to make regulations in relation to the fund. This has the potential for significant change to be made which may adversely impact on the operation of the fund, for example, amending the criteria for the grants. This may have financial consequences on the fund or amend the contributions required from the regulated

[38] For further information on the Guarantee Fund see: https://www.lawscot.org.uk/for-the-public/client-protection/client-protection-fund/

population, which would increase costs to consumers. The fund is one of the jewels in the crown of Scottish legal regulation – very few sectors or jurisdictions have such a public protection in place – so it is important not to unintentionally and adversely impact the fund. There is also no requirement for the Lord President's consent in relation to any changes brought in through regulations.

Paragraph 1(4) of Schedule 3 of the 1980 Act sets a maximum limit of £250,000 for any grant from the Guarantee Fund (Client Protection Fund). We have previously asked for this to be removed, but this has not been carried forward into the Bill. The £250,000 value was set many years ago, and reflects, for example, typical property values at that time to arrive at an overall prudent value of the fund at that time. The figure is crystallised and therefore has not taken into account inflation and increases in property values and values of typical estates. It is insufficient to cover the likely losses claimants may suffer as a result of the acts of dishonesty on the part of solicitors against typical house purchase and estate values.

What we have previously suggested to the Scottish Government is that no crystallised figure should be set out in legislation. To do so would result in the Guarantee Fund (Client Protection Fund) facing the same challenges within a very short period of time.

Paragraph 13 makes amendments to section 34 of the 1980 Act regarding rules for professional practice, conduct and discipline. Paragraph 13(2) has the effect of requiring the Society to comply with section 41 of the Bill when bringing forward any practice rules in relation to the regulation of the solicitor profession. Section 41 states that the Society may not prepare or amend rules without first consulting with the Commission and those other organisations as set out in section 41. We are uncertain if this is the policy intent and would welcome clarification. If this is the intention, we would be strongly opposed. The regulator is best placed to determine the rules by which to deliver its regulatory functions and objectives. The combined effect of the amendments to section 34 of the 1980 Act and section 41 of the Bill would also lead to oversight duplication and extend the time required to implement new or amended rules, as we would still be required to consult and, separately, seek approval from the Lord President.

In addition, the proposed amendments to section 34 of the 1980 Act may require additional consideration depending on the intent behind the definition of legal services in section 6 and the requirements in relation to ALB rules under section 41.

We also highlight that 13(2) makes reference to '*including incorporated practices'* However, this is only referenced in some sections of the Bill, and not in others where we would expect to see it. This causes uncertainty where not included. If the intended position is that any reference to 'authorised legal businesses' will always include incorporated practices, then it is better not to confuse the issue by specifying sometimes but not always.

<u>Schedule 2 - Further provision about measures open to the Scottish Ministers</u>

This schedule relates to, and is inserted by, section 20 and sets out further detailed provisions relating to powers of Scottish Ministers, including the powers to direct. As highlighted earlier in this response, we are strongly opposed to powers conferred by sections 19 and 20 of the Bill, and this includes all those provisions set out in Schedule 2.

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Schedule 3 – Minor and consequential modifications of enactments

Additional consequential changes to existing legislation.

Finally, we would like to take this opportunity to highlight that there are many consequential technical changes to existing legislation which will need to be considered further at a future stage.

For example, in some instances the term "solicitor" in the 1980 Act has been amended to "ALB" where it is not appropriate to do so and in others, the conversion has not been made where it should be. Constructive discussions with the Scottish Government about tidying up these technicalities are ongoing.

For further information, please contact:
Brian Simpson
Regulation Policy Executive
Law Society of Scotland
DD: 0131 476 8184
briansimpson@lawscot.org.uk