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3 February 2025

Dear Minister,

Regulation of Legal Services (Scotland) Bill

Following the completion of the Stage 2 process of the Bill, it is important to recognise the considerable improvements which have now been made to this proposed legislation. As you know, the Law Society has campaigned for almost a decade for reforms to the regulatory system. We are encouraged to see so many of the changes we have pushed for being voted on and supported.

When the Bill was first lodged, our greatest concern centred on the planned new powers for Ministers to intervene directly in the regulation of solicitors. We are particularly grateful to you for addressing these concerns and for the considerable package of amendments you brought forward at Stage 2 to ensure the rule of law and independence of the legal profession were protected. The importance of this cannot be underestimated.

We also recognise that changes were made at Stage 2 in response to our concerns over the Scottish Legal Complaints Commission being able to set minimum standards on the profession directly. Other elements not originally included within the Bill have also been addressed, including broader powers for us to suspend a solicitor and increased powers for us to deal with complaints cases more quickly.

We were particularly grateful to you for accepting the amendments which we had suggested and were tabled by Tess White MSP and Paul O'Kane MSP to protect our vital powers to intervene in firms where it is necessary to do so, and to recover costs in relation to such actions.

Taken together, the amendments agreed at Stage 2 mean we have a much stronger and much better Bill.

We note your desire to move forward swiftly with the remaining stages of the Bill. To that end, we thought it important to set out where we believe matters still need to be addressed and where, without action, the public could be put at risk. Many of these issues were discussed by the committee at Stage 2 where you kindly gave a commitment to consider matters further.

- **Registered Foreign Lawyers**

We remain concerned the Bill does not provide the legal certainty required to allow Registered Foreign Lawyers (RFLs) to part-own authorised legal businesses in multi-national practices. As you know, RFLs include those who are qualified in other UK jurisdictions and are a feature in many firms in Scotland which operate on a UK wide basis.

Even with changes made at Stage 2, we feel the position of RFLs is uncertain. The policy of the Scottish Government is that RFLs would be considered as 'qualifying individuals' under Section 39 of the Bill. However, paragraph 107 of the Bill explanatory notes state there are currently no qualifying individuals. Given we already have RFLs in place, it is difficult to see how they could be considered qualifying individuals.

The question of who can and cannot be involved in the ownership of an authorised legal business is central to the profession and to the legal services market. It must not be left to interpretation of statute. To that end, we believe explicit reference needs to be made to RFLs in the Bill as some members of the committee had suggested at Stage 2.

- **Transparency in complaints handling**

Before the Bill was lodged, we had highlighted to the Scottish Government the longstanding issues we face with Section 52 of the 2007 Act which places severe restrictions on our ability to publicly disclose information relating to conduct complaints cases. We were grateful to the government for committing to address this in the Bill, particularly given some recent high-profile cases where we have been prevented, by law, from being as open and transparent as we would have wished.

The Scottish Government has sought to solve the issue by creating a new Section 51A in the 2007 Act, providing a broad enabling power to release information about complaints. However, amendment 536 only made limited changes to Section 52 itself, by saying we could release information "for the purpose of enabling or assisting a regulatory body to exercise any of the body's functions." We do not think this is sufficient legal cover.

Releasing information about a complaint would not be necessary for us to adequately deal with that complaint. So it would, in our view, be difficult for us to argue that we were releasing information "to enable or assist us in exercising our functions", which is the key test under the new provision in the Bill.

We wrote to the Bill team before the second committee session in order to highlight our concern, setting out why the proposed amendment would not give us the flexibility we needed. We also suggested a simple drafting amendment to Section 52 of the 2007 Act which would address the issue in full.

As you know, Paul O'Kane MSP tabled our drafting amendment. During the debate, you said this amendment was unnecessary and that "*reference to functions includes duties and powers and therefore includes the power of a regulator under new section 51A to disclose information*." Later in the debate, you said *"in order to clarify the position and to address the concerns that he [Mr O'Kane] raised, I would be happy to adjust the explanatory notes to the bill to refer to the disclosure of information under section 51A of the 2007 act as an example of regulators' functions*."

We disagree with the Scottish Government's position on this point. Section 7 of the Bill clearly sets out the meaning of regulatory functions. There is no reference to "duties and powers" in Section 7. We also have concerns about amending the definition of regulatory functions through explanatory notes.

We believe that linking the disclosure of information to regulatory functions places an unnecessary restriction on our proposed new power. We remain concerned that the use of this new power without further clarification could be open to significant legal challenge. This would be deeply concerning given there is, in our view, a simple adjustment which would put the matter beyond all doubt.

- **Powers to require information before a complaint is lodged**

At present, we can only require information from solicitors once a conduct complaint has been received. We are unable to require practitioners and authorised legal businesses to provide information to us in circumstances where we may wish to consider initiating our own complaint.

We have engaged the Scottish Government on this previously and sought new powers to proactively compel solicitors and firms to provide us with information to determine if further regulatory action is necessary.

Paul O'Kane MSP helpfully tabled our amendments which would have delivered us these new powers. During the debate, you raised concerns that the powers were "*overly broad and unrestricted*". You went on to say; "*it is entirely inappropriate for the Law Society to have powers that might interfere with the prosecutorial independence of the Crown Office and Procurator Fiscal Service, and the Lord Advocate*." Later in the debate, you suggested any new power would be unnecessary because the Law Society

would, under the Bill, be able to raise its own complaint without having to go through the Scottish Legal Complaints Commission.

We are concerned by the suggestion that in order to understand whether there is evidence of inappropriate conduct by a solicitor or firm the Law Society should make what would amount to a 'fishing complaint' whereby complaints are lodged without sufficient evidence, in order to root out proof of wrongdoing. This would clearly be inappropriate, could create unnecessary work and bureaucracy, and most importantly could open the Law Society to legal challenge in how it handles complaints.

We also believe the position set out by the Scottish Government fails to properly understand or address the problem needing solved. Over the last two years, some specific events in the profession have led MSPs to understandably call on the Law Society to be more proactive in its approach and, wherever possible, prevent problems from arising. A good example has been the circumstances surrounding the collapse of McClures and transfer of business to Jones Whyte LLP, which we have discussed on several occasions.

We would also be concerned if policy-making on this point was driven by concerns from an important but relatively small part of the legal profession. The prosecutorial work of solicitors in the Crown Office has long standing protections when it comes to legal or regulatory action. We do not see how the new powers sought could or would interfere with this. Equally, we think care is needed to avoid a suggestion that those solicitors working in the COPFS are completely above or outwith the system of regulation. Like all members of the Law Society, COPFS solicitors must adhere to the standards of conduct and practice rules which apply across the profession.

At the heart of this legislation is the protection of the public. We hope the Scottish Government will recognise the need to give regulators like the Law Society more powers to take proactive regulatory action when it is needed. A key part of that must be those regulators to have the power to get a hold of the necessary information.

- **SLCC directions on minimum standards**

We strongly welcome the amendments brought forward by the Scottish Government and agreed at Stage 2 which remove the proposed powers of the SLCC to set minimum standards on the profession directly. We are grateful to you for understanding and accepting our concerns on this point.

However, under the Bill, the SLCC would still be able to direct the Law Society to introduce a minimum standard. During discussions with Scottish Government, we accepted this provision but explained how we needed some mechanism for when the SLCC made a direction that the Society believed was clearly not appropriate.

As things stand in the Bill, there is no route or process for the Society to challenge or appeal the requirement to bring in minimum standards before the process for implementing that minimum standard.

This is not a theoretical problem. The SLCC has at times in the past issued reports and recommendations to the Law Society which would have had serious and negative consequences for consumers. In such circumstances, we set out our reasoning as to why we would not accept such recommendations.

The Scottish Government has suggested to us that the consultation requirements on the SLCC and the Lord President's approval of the rules implementing the minimum standards provide sufficient safeguards. We disagree. While consultation is welcome and important, there is no requirement on the SLCC to act on the basis of feedback to that consultation. The Lord President's approval of rules is an important part of the process, but it comes at the end of a lengthy rule making process.

This is why we believe an early mechanism is needed for those occasions when we, for good reason, do not agree with the proposed minimum standard. The only option open under the Bill currently would be to raise a Judicial Review action. This would be disproportionate, costly and time consuming for all parties, and would not reflect well for the reputation of the legal profession and regulatory stakeholders.

That is why we should have a power to challenge an SLCC minimum standard through an independent process via the Lord President's Office. We do not see any downside to such a provision.

- **Membership and role of the Regulatory Committee**

While the Bill delivers a range of important reforms which help to strengthen the independence of the Regulatory Committee, there remain practical issues with some of the current drafting.

Section 10(3)(b) of the Bill provides that a member of a regulatory committee must not be, or have been for at least two years, 'involved in the governance of the regulator'. However, section 9 of the Bill states that the regulatory committee is to determine its governance arrangements. Members of the regulatory committee will, therefore, be required to be 'involved in the governance of the regulator'. As drafted, section 10(3)(b) contradicts the requirements of section 9.

Separate to this, section 10(5) provides that the regulatory committee membership shall be made up of 'at least 50%' lay members. This means the Bill, as drafted, could allow for 100% lay membership. During Stage 2, you spoke at committee on the lay/solicitor split of the Scottish Legal Complaints Commission and the importance of striking the right balance in primary legislation. We agree with this and believe that principle should also apply to the Law Society.

We are also concerned that the current Bill does not provide the clarity needed to ensure proper authority to delegate the delivery of regulatory functions to sub-committees and staff. In practice many regulatory functions are exercised by sub-

committees or by staff members under authority granted by sub-committees with the approval of the regulatory committee. It is essential this remains permissible.

- **Consultation on annual reports**

During Stage 2 of the Bill, Paul O'Kane MSP questioned Scottish Government amendment 450 which introduced a new requirement on the SLCC to consult on its annual report. We realise the SLCC itself raised concerns about this new requirement. In response, you committed to consider this matter further at Stage 3.

It is not clear to us why different consultation requirements would exist when it comes to the respective annual reports of the SLCC and of the Law Society. To that end, we would be keen to be involved in any discussions on the principle of whether consulting on retrospective annual report is appropriate given Section 13(4) of the Bill introduces new consultation requirements on the Law Society's own annual report.

- **Licensed legal services providers**

As you know, we were keen to see some changes to the Legal Services (Scotland) Act 2010 which would update and simplify the requirements in relation to licensed legal services providers. The provisions we sought included ensuring that law centres and charities could apply to become a licensed legal services provider, reducing the ownership restrictions and allowing us to grant waivers of the rules regulating licensed legal services providers in limited circumstances. We hope to see amendments in relation to these points coming forward at Stage 3.

I hope this has helped to set out the key remaining issues as we see them. Separate to the issues I have highlighted, there are other technical corrections we believe are necessary. We will discuss these with the Bill team directly.

I started this letter recognising the tremendous progress made to the Bill at Stage 2 to improve the regulatory system. We are therefore keen to engage with you and your officials to see where the Bill can be strengthened further and where agreement is possible.

Best wishes

David A Gordon
Non-Solicitor Convener
Regulatory Committee

Cc Members of the Equalities, Human Rights and Civil Justice Committee
Office of the Lord President