Response by the Scottish Law Agents' Society to the

Regulation of Legal Services (Scotland) Bill

The Scottish Law Agents' Society is the largest voluntary body of solicitors in Scotland, incorporated by Royal Charter in 1884. We are not, we have never been and we do not aspire to be a regulator. This response is directed at specific elements of the Bill which in our view are especially significant.

We feel also that there are important matters that are not included in the Bill, and we refer to those in this Response.

Introduction

The International Bar Association's 2016 report on *The Independence of the Legal Profession* notes that a "strong, democratic society that observes and upholds the rule of law cannot survive by relying solely on the good faith of those who govern its political institutions. The effective protection of society from potential threats emanating from the abuse of power and the circumvention of basic democratic principles rests on, *inter alia*, the existence of a system of checks and balances. The independence of the judiciary and the legal profession is a fundamental pillar of this system."

Significantly, the IBA mentions judges and lawyers in the same sentence and emphasises that both must retain freedom from interference by the state. Importantly, though, this independence is not to be equiparated with unaccountability, since:

"Independence is not provided for the benefit or protection of judges or lawyers as such. Nor is it intended to shield them from being held accountable in the performance of their professional duties and to the general law. Instead, its purpose is the protection of the people, affording them an independent legal profession as the bulwark of a free and democratic society."

These observations should be of universal application. Compared to surveillance states such as communist Hong Kong, Scotland is relatively enlightened, and yet it is not enough that we have to rely on the benevolence of the Scottish government. Insofar as the Bill empowers the state to interfere in the regulation of legal professions it should be opposed.

Solicitors and advocates are "officers of the court", admitted to practice by the Court of Session, not by the government. This makes sense. Courts are politically neutral. They do not have an agenda of seeking to impose policies, quotas or performance targets on anyone or requiring solicitors to monitor or to collect data about their clients' private, financial and personal details.

This Bill would jeopardise the independence of the legal profession. The following are examples of how the Bill undermines the principle of separation of powers and the rule of law:

(a) Section 3 governs existing regulators, such as the Law Society of Scotland and sets out "regulatory objectives" for example that "a consumer should be treated fairly at all times." Section 4 patronisingly sets out "professional principles" such as that "a person providing legal services should ... maintain good standards of work". Somewhat a statement of the obvious.

(b) Section 5 allows the Scottish Ministers by regulation to "add, amend or remove a regulatory objective" or professional principle. The Government has to "consult" the Lord President, which does suggest that the drafters of this Bill may have had an inkling that the executive is coming perilously close to encroaching into the territory of the judiciary. In fact, the Bill repeatedly seeks to draw the Lord President into administrative collaboration with the Scottish Ministers, potentially blurring the separation of powers and the respective roles and spheres of the executive and the judiciary. Thus jeopardising a fundamental pillar of society within a democracy.

(c) Section 20 Measures open to Scottish Ministers – (including Directions)

This provides for Directions and other measures to be imposed by Scottish Ministers (SM) upon Regulators including the Law Society of Scotland (LSS).

We are strongly opposed to this and any measure of direct State control over the profession. Section 20 provides for "measures open to the Scottish Ministers", empowering them to set performance targets and directing action and imposing penalties. The Henry VIII provisions contained in Sections 89 and 90 amount to *carte blanche* legislation, allowing politicians to make "any incidental, supplementary, consequential, transitional, transitory or saving provision." While such powers may be appropriate to make incidental changes and corrections to legislation they have no place in a Bill which so fundamentally puts at risk the rule of law.

The Bill would impose further administrative burdens on businesses, while enabling the government to infringe the independence of the legal professions which should be a source of concern to everyone in Scotland who values the checks and balances protecting us against the over-zealous use of power and control by the executive.

1.1 The first question is why is this necessary? The Scottish Government generally refers, with apparent approval, to an "evidence based" approach. Where is the evidence of a need for Section 20? As we understand it, it was not requested either by the LSS nor the Scottish Legal Complaints Commission, so this has come out of nowhere.
If the SM disapprove of something done by LSS they are quite able to show their displeasure without this provision and enter a dialogue about it.

1.2 There is a provision that these measures (except the financial penalty) do not have effect without the written consent of the Lord President (LP), Scotland's most senior judge. Some may say that this neuters the above. However, it puts too much pressure on the LP and places him in a political context which is not appropriate for his office involving him in day to day operations of the LSS and is likely to be time and trouble

intensive to LSS and the LP for no apparent actual benefit. There is no reason why the financial penalty does not require LP consent.
What is wrong with a straightforward direct dialogue, instead of heavy handed and overly "legal" process and procedure that is not necessary.

1.3 No other Profession is subject to such a form of State control. The legal profession is being singled out and targeted in this prejudicial way. There seems to be prejudice on the part of the legislature against the legal profession.

There is no equivalent imposed on the Regulators of Accountants, Doctors, Nurses, Surveyors. There is no equivalent imposed on SLCC not as a regulator but as a legal body with power over the Profession.

We have a concern that the SG would use their powers to impose upon the legal profession

1) Section 49 Powers of the Scottish Ministers to intervene

This is possibly the most outrageous extension of power by a legislature over a legal profession. This is truly Orwellian in nature.
The SM may by regulations make provision establishing a body with a view to it becoming a category 1 regulator and specifying circumstances under which SM may directly authorise and regulate legal businesses. This has no place in a democratic state.
There is no evidence for the SG concluding that there would be a need of a "last resort" provision.

No regulations are to be made under this section without the agreement of the LP, and unless SM believe that their intervention is necessary, as a last resort, in order to ensure that the provision of legal services by legal businesses is regulated effectively.
Hopefully, requiring the consent of the LP may ensure this provision is never implemented but this intervention is wrong in principle. We are doubtful that the SG would be able to provide any examples of when this would be necessary.

The draconian powers contained in the Bill are not to be found in other states within the Western European liberal democracies. There is no evidence to suggest such powers are necessary. Adherence to the rule of law in substance and spirit is at the core of the obligations of candidate states seeking admission to the EU. This proposed legislation is not compliant with the SG's aspiration to EU member.

2) Section 51 Change of Name of SLCC to Scottish Legal Services Commission

The SLCC is a principally a complaints handling body. It does not provide "services" and to suggest that it does is wholly misleading. By contrast, there is in Glasgow a long established law centre

named the Legal Services Agency. It does provide legal services and its name correctly reflects that. While the SLCC has certain oversight functions in relation to the Guarantee Fund/Client Protection Fund and the handling of conduct complaints by LSS further muddying of the waters of the role of a dispute resolution mechanism with the role of the regulator is unwise and will only serve to further the legal professions' concerns as to the competence and overreach by the SLCC.

"Scottish Legal Services Commission" looks like the name of a body that provides legal aid. Many people, certainly in the UK and Commonwealth, will think that this is its function.

The Legal Services Commission of South Australia is essentially a provider of legal aid. So was the (now defunct) Legal Services Commission of England and Wales and the (equally defunct) Legal Services Commission of Northern Ireland.

The Legal Services Commissioner of New Zealand provides and administers legal aid there.

To be fair, the Legal Services Commissioners in New South Wales, Victoria and in Queensland do deal with complaints against solicitors, as opposed to being legal aid providers, but this inconsistency of meaning indicates that the SLCC should retain its current name; nobody will be confused over its remit and function.

The Scottish Legal Services Commission is a complete misdescription. The omission of the word "Complaints" would not be in any way helpful to consumers. This change will be totally confusing to the general public and consumers of legal services. Solicitors are often criticised rightly or wrongly for using confusing legal jargon. We would like to think the SLCC did not suggest this name change. If the change was meant to clarify the role of SLCC it clearly does the opposite.

SLCC is meant to be an independent Complaints body favouring neither complainers nor solicitors. It is basically an Ombudsman scheme for complaints with some "add-ons".

There can now be other providers of legal services. Was this change trying to reflect that? If so, it fails to do so. If it is meant to reflect this then the word "Providers" would need to be added. However, all service providers are covered by the word "Legal".
Some positive alternative suggestions are:

1) Retain current name SLCC or
2) Scottish Legal Complaints Service or
3) Scottish Legal Complaints Ombudsman Service

In 2 and 3 of our suggestions the reference to Service is to the service that the body supplies to Complainers and legal service providers to resolve complaints. The word "Commission" adds nothing.

3.) An omission from the Bill

As long ago as July 2020 we proposed that the Scottish Legal Complaints Commission charge a modest fee, refundable on success, to those who wish to complain. The amount suggested was £60.

Needless to say, this proposal has never materialised in the context of the regulation of the legal profession in Scotland. This Bill is an opportunity, probably the last for many years, to address this issue.

Let us be open minded and look elsewhere for how things can be done better. The legal profession of South Australia is a useful model against which to compare that of Scotland. The general population of the state is about 40% of ours. Its Law Society is about a third of the size of Scotland's. The SLCC received 1146 complaints in 2021/22 whereas the South Australian Legal Profession Conduct Commissioner received 380, about a third of that figure.

However, the regulators of solicitors in South Australia recognise that it is appropriate and fair to expect a fee from complainants. The Legal Practitioners Act 1981, as amended, allows the Commissioner to fix and require the payment of fees. Unlike the unbalanced system that prevails under the SLCC, the fees in South Australia encompass complainers as well as lawyers.

Since November 2020, anyone wishing to complain about a lawyer in, for example, Adelaide must pay a sum of 110 Australian dollars, including goods and services tax of 10%. This total happens to equate to about £60 sterling. Importantly, the sum is refunded to the complainant in the event of the lawyer being found to have been at fault.

The 2022 Annual Report of the South Australian Commissioner explains that "The introduction of the fee to lodge a complaint was intended to ensure that a complainant is serious about making a complaint."

The Commissioner may waive payment of the 110 dollars where the complainant is on benefits or would struggle to pay. Prisoners, juveniles, seniors and those who have recently been in receipt of legal aid are exempted. This all means that poverty is not a barrier to access to a system of redress. The system is clearly not intended primarily to be a form of raising funds. In fact, in 2022, the fees were waived for most complaints in South Australia. In 2022, the first full year following introduction of the complaint fee, the sum of 12,200 Australian dollars was ingathered, excluding GST. That is around £7000. If the SLCC did likewise the equivalent would be about £20,000. But the policy would also deter frivolous or opportunistic claims and free up the resources that they consume. Also, in accordance with the "polluter pays" principle, where a complaint fails the person who brought it contributes even in a small way to the cost that they themself have created.

The South Australian system is eminently fair and sensible. Charging a fee of £60 or 110 AU dollars is bound to deter some complaints that are spurious or vexatious, thereby freeing up the commission to deal more expeditiously with meritorious cases. The 2022 Report states that "It is reasonable to assume that the introduction of that fee has had some impact on the total number of complaints received" That stands to reason.

In his 2022 Report the Commissioner considered that "a not insignificant amount of resources of my Office are applied to dealing with what are ultimately unproved or unmeritorious allegation about legal practitioners" and that this "obviously impacts on the time it takes to determine genuine and reasonable complaints and investigations". There is a public interest here.

By sharp contrast, any complaint in Scotland, even one that is frivolous or malicious, will be to the inescapable detriment of the solicitor. This happens in two ways. Firstly, the unrestricted budget of the SLCC is met entirely by the legal profession, with no contribution whatsoever by the taxpayer. Secondly, there is the unremunerated time and energy that must be devoted by the solicitor to responding to a complaint. On the other hand, the complainant faces no financial impact whatsoever, regardless of whether they are an opportunist or not. They have literally nothing to lose. Be under no illusion, the present system is open to abuse by complainers, to the detriment of genuine complainers.

4) Section 58 Appeals to a Commission Review Body (CRB)

The present appeal structure to the Court of Session (COS) is replaced with appeals to a CRB. This is a major departure from appeals from the COS to a new Review by a Review Committee of the SLCC itself, there is no proposal for an independent review committee. There is no proposal to appeal to any Court including the Sheriff Court within the Bill.

We can see that for complainers and solicitors this has the potential to be very much cheaper provided, that the costs of the Review are borne by the unsuccessful party. This is not provided for in the Bill so will fall on the solicitor as part of the General or Case Levy. This is wholly unfair and totally unacceptable. The Complainer should lodge a "Complainer Levy", equal in amount to the usual Case Levy imposed on solicitors, refundable if successful.

Following a review, the CRB may make such decision as it considers appropriate (including a decision that substitutes its own decision for the decision to which the application for review relates). Where a the CRB upholds a services complaint or confirms a determination under section 9(1) to uphold a services complaint, the review committee may direct that such of the steps mentioned in section 10(2) as it considers fair and reasonable in the circumstances be taken.

A decision of the review committee under this section is final.".

This is a major change for appeals formerly to the COS to the Reviews by a CRB of the SLCC. It has missed out the possibility of an appeal to the Sheriff Court. It is a very drastic change. The CRB, as an extension to SLCC, would in effect be marking its own homework, without the possibility of independent oversight. We remain concerned in relation to the rights established within Article 6.

This would be a regressive measure, as solicitors would by winning at COS and these costs falling on the unsuccessful party, the whole cost of this is set to be put upon the profession. There is no new provision that the unsuccessful party will pay the costs of the other party and of the SLCC regarding the Review.

The only appropriate path would be to have appeals heard within the Sheriff Court. There are numerous reasons for appeals to be heard within the Sheriff Court. Firstly, costs are lowered in comparison with an appeal to COS.

Secondly, it is absurd that a technical complaint should go before the SLCC, and an appeal lodged whereby the CRB, as an extension of the SLCC, marks their own homework.

Thirdly, the Sheriff Court applies the principle of polluter pays.

Section 59 Publishing of Reports

Section 13 of the 2007 Act is amended as follows. Section 30 (2) After subsection (1), insert—

"(1A) Where the Commission identifies that a number of services complaints against a particular practitioner have resulted in an outcome mentioned in any of paragraphs (a) to (c) of subsection (1) (or any combination of the same), the 35 Commission may, if it considers it appropriate to do so, publish a report relating to the complaints and the outcomes.".

However, it applies in relation to a report under subsection (1A), where the circumstances or number of complaints is exceptional. This indeed should be the case, in so far as only exceptional cases should be reported.

5) Section 64 Annual General Levy and Complaints Levy

Problems

1) The Complaint system is required by Human Rights Act to be fair to both parties, client and solicitor alike. It is not in several respects and change is required.
2) A fault of the current system is that the complainer has nothing to lose encouraging abuse
3) There is no attempt to introduce a "polluter pays" principle and no attempt to make the levies fair on both parties to a Complaint. A system where the solicitor pays irrespective of the complaint being without substance is not a polluter pays system. The SLCC and LSS are both aware of the clogging of the system by baseless complaints. What that does is

slow genuine complaints but the Bill does nothing about this. Theoretically a Complainer could submit 500 spurious complaints in a calendar year.

4) Complaints can be raised with no fear of costs being incurred by the vexatious complainer. While complainers will satisfy a consumer test in a significant number of cases the person complained about will be a micro business i.e one employing <20. They are frequently included within the definition of consumer. As such, the current 100% weighting of the costs of a complaint on the microbusiness are inappropriate.
5) If the consumer is central to the complaint system he should not be held up and delayed justice as a result of the many hopeless cases clogging up the system. It is a drain on resources and time.
   There should be a small returnable deposit of say £60 a sum fixed in South Australia) returnable on success by the Complainer.
6) The new change to a review instead of appeal may reduce costs, but it would appear that instead of avoiding costs, as solicitors would by winning at COS and these costs falling on the unsuccessful party, the whole cost of this is set to be put on the profession.
7) There is no new provision that the unsuccessful party will pay any of the costs of the other party and of the SLCC regarding the Review by the review committee.
8) If an independent Case Investigator at SLCC concludes that there is no IPS or that there is IPS and recommends a settlement amount then if the solicitor accepts that, but the complainer does not, there is no reason for imposing a levy of £3-5000 on the solicitor as occurs at present. It is unfair as the matter could have been settled. It is the Complainer who has gone against the recommendations, so if they proceed to force the matter to go a review committee then they ought to pay in relation to the review . It is an absurdity that solicitor faces the £3-5000 levy, despite the solicitor accepting the original decision of the SLCC.

There is also no provision for complainers forcing a review to pay appeal costs as there would if this had been an appeal to the COS which the review replaces. This requires to be reconsidered although in part it can be dealt with by SLCC rules.

6.) <u>Section 80 Majority Ownership.</u>

This heading is completely misleading. It is providing for a <u>minimum</u> of solicitor ownership of 10% in place of the 51% minimum under the 2010 Act which was majority ownership.

The SLAS position is unchanged in that independence should remain a key guiding principle and duty in the profession. The SG put independence as a Guiding principle in Section 4 but do not seem to understand what it means. SLAS would urge solicitors to think long and hard about agreeing to allow their practices to become such an ABS with external control and especially in view of the totally inadequate "Suitability Test" (ST).

The ST was set out in the 2010 Act and may possibly have been sufficient when the minimum percentage that a solicitor owned was 51% but the ST is totally inadequate when the minimum is only 10%.

It is not fit for purpose and raises huge concern over the possibility of money laundering and criminal control of this ABS model.

1) No ST is required for holders of less than 10%.
   Example. 10 holders of 9% do not need a suitability test at all. They could be part of a criminal gang with various family and associates holding the shares. This is completely open to abuse and does not square with the aim of AML legislation and requirements.
   STs should apply to every applicant no matter the percentage share of the holding
2) The LSS or other Regulator are tasked with determining suitability but unfortunately lack and are not to be given the tools to do so.
   a) LSS must obtain a Disclosure report in respect of Criminal Records of all new outside owners. Such info is not publicly available and is protected so they would need this power.
   b) There should be a provision that the onus of proof of being suitable is on the applicant. The problem with STs is that in practice the onus is on the LSS to prove the person is unsuitable. If refused by LSS there is every likelihood of a successful challenge under Human Rights legislation which will be potentially very expensive and need concrete evidence to resist.
      So putting the onus on the applicant should assist. The applicant should require to prove they are suitable and require to provide all evidence of their suitability.
   c) Also they should be required to provide info as to family members and associates requested by LSS with consent from each of the family members and associates to allow LSS to require similar searches of the criminal records of those family members and associates
      Failure or delay to do so should result in refusal of the application.
   d) LSS or other regulator will require the right to demand details of the names of all relatives by blood or marriage or civil partnership or live in partners and associates from the applicant. Failure or delay to do so should result in refusal of the application.

3) We are not aware of SG considering the AML position and issuing a Risk Assessment of this substantial change with potential negative consequences and whether it is possible to take mitigation measures and if so what measures are required to avoid AML implications of the change.

Other notable changes

1) FOI Category 1 regulators (so includes the LSS) are subject to FOI legislation. This is not a desirable change
2) SLCC Accounts Audit and supervision of SLCC Accounts. No provision for scrutiny. We have said in the past that Audit Scotland should approve the draft annual budget of the SLCC. Proper accountability is not compatible with the SLCC, or any organisation, especially a public body, scrutinising itself.
3) Time limit for prosecution of offences

Proceedings for certain offences may be commenced within the period of 6 months beginning with the day on which relevant evidence came to the prosecutor's knowledge. No such proceedings may be commenced more than 2 years (a) after the commission of the offence, or (b) in the case of a continuous contravention, after the last day on which the offence was committed. If a continuous contravention, the complaint may specify the entire period during which the offence was committed. The 2 year time limit for offence proceedings should be made to apply as the time limit for making complaints instead of 3 as at present. This would introduce consistency.

Conclusion

There are positive measures within the Bill, such as protecting the public against unscrupulous individuals seeking to pass themselves off as solicitors by adopting the term 'lawyer.' Perhaps consideration should also be given to prohibit the term 'law' within the name of a firm, if the business is not a regulated firm of solicitors.

However, there are other measures within the Bill which have to be addressed such as the Complaints system, which needs to be fair and reasonable to both Complainers and Solicitors. The changes we propose regarding a returnable on success contribution are fair to both Complainers and Solicitors, as they are very likely to reduce the amount of hopeless Complaints. Thus, reducing the clogging of the system and leading to more expeditious progress of the genuine Complaints to the benefit of genuine Complainers. We are certain that this is an excellent practical way of improving the Complaints system, introducing the sensible principle of polluter pays.

We hope that SLCC in their response will have suggested a plan that would have a similar significant effect in improving the Complaints system.

Unfortunately, the Bill in its present form contains damaging and draconian powers in respect of eroding the rule of law, and the separation of powers.

The rule of law and separation of powers must be maintained within a democratic society, in order to prevent abuse of power by the state, present or future. It is critically important the SG addresses this element of the Bill.

Darren Murdoch
President of Scottish Law Agents Society

8th August 2023