

EQUALITIES, HUMAN RIGHTS & CIVIL JUSTICE COMMITTEE

REGULATION OF LEGAL SERVICES (SCOTLAND) BILL

1.1 This is a response to the call for views issued by the Equalities, Human Rights & Civil Justice Committee of the Scottish Parliament in relation to the Regulation of Legal Services (Scotland) Bill.

1.2 I make this response having carried out the Independent Review of Legal Services Regulation in England & Wales, which reported to the Lord Chancellor in June 2020¹ (IRLSR). The IRLSR was established in response to the market study of the Competition & Markets Authority (CMA), which reported in 2016. In anticipation of a more fundamental official review at some point, the IRLSR sought to clarify the challenges identified by the CMA and others, and to offer some short- and long-term recommendations for reform.

1.3 In 2014-15, I also chaired the review by regulators of the legal services market (IRLSR) in England and Wales. The IRLSR was established in response to the market study of the Competition & Markets Authority (CMA), which reported in 2016. In anticipation of a more fundamental official review at some point, the IRLSR sought to clarify the challenges identified by the CMA and others, and to offer some short- and long-term recommendations for reform.

this submission include elements of that earlier response.

1.5 The views expressed here draw on the experience and conclusions of the IRLSR and the legislative options review, but are expressed personally and should not be attributed to any organisation with which I have a current or past connection.

1. The Final Report is available at <https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation> and <https://stephenmayson.com/2020/06/11/legal-services-regulation-the-final-report/>.

2. See Competition & Markets Authority (2016) *Legal Services Market Study: Final Report*; available at: <https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>.

3. See <https://legalservicesboard.org.uk/our-work/work-related-to-previous-years/work-arising-following-the-july-2014-ministerial-summit-of-legal-services-regulators>.

Question 1: What are your views on:

- a. the principal recommendation of the Robertson Review that an independent regulator should be created to regulate legal professionals;*
- b. the Scottish Government's decision to "build on the existing framework" rather than follow that principal recommendation?*

- 3.1 Given that one of my recommendations in the IRLSR (Recommendation 33) was that, in future, there should be a single regulator for the legal services sector in England & Wales, I support the equivalent recommendation for Scotland in the Robertson Review. Indeed, I believe that the case for a single regulator is stronger in Scotland.
- 3.2 One of the many challenges of the regulatory settlement for England & Wales under the Legal Services Act 2007 is the multiplicity of front-line regulators (derived from pre-existing professional bodies) and the consequent need for the Legal Services Board as an oversight regulator. The relative size of the Scottish legal services sector – at around 14,000 providers, fewer than the Bar of England & Wales – would strongly suggest that a single regulator should be the most cost-effective solution.
- 3.3 I am very aware of the need for specialist regulatory insight, particularly in relation to the critical public interest activities of advocacy and the conduct of litigation. This is why the IRLSR (Recommendation 41) suggested a dedicated arm of the single regulator for these 'public good' activities and the involvement of senior judges.
- 3.4 Finally, the absence of single regulator misses the best opportunity for consistent oversight of the entire legal services sector, and the avoidance of complexity, multiplicity, duplication and confusion. It also does not allow for an approach to regulation that can differentiate between providers on the basis of different risks (cf. Competition & Markets Authority (2020) *L* , paragraph 5.55). Without a risk-

Independence, in this sense, is a state of mind and conduct, not an aspect of

in the Bill without ever separating the focus of its response into its respectively separate and independent positions as regulator and representative body.

3.20 This clear con

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3.31 Clause 41(4)(a) requires the prior approval by Scottish Ministers of amendments to a regulator's ALB rules. Given that those rules must be consistent with the requirements of clause 41(2)(a) – including matters which Ministers have previously required to be included – clause 41(4)(a) is unnecessary. It seems to me that the Lord President's

3.38 In particular, the Bill keeps the representative body as the statutory regulator and requires only a 'committee' of it to act as the regulatory body (rather than a separate

Question 7: What do you consider the impact of the Bill's proposed rules on alternative business structures might be:

- a. generally;**
- b. in relation to consumers of legal services?**

- 3.44 It is right that the 51% majority stake rule for licensed legal services providers should be removed. It is not clear, however, why the required stake should be reduced to 10% rather than removed entirely. There is no evidence that the public interest or consumer protection requires a limit on 'non-lawyer' involvement, and the practical experience of alternative business structures in England & Wales bears this out.
- 3.45 Any assertion that those who are not lawyers will inevitably and somehow interfere with or influence the independence of those who are is simply not proven. There is no inherent lack of ethicality in those who are not lawyers (who, after all, represent about 99.75% of the population), just as there is plenty of evidence to show that lawyers are not themselves universally ethical. Any examination of the private practice of lawyers will also reveal a strong profit motive as well as many questionable personal and organisational incentives designed to realise it (see also paragraph 3.8).
- 3.46 Continuing with any minimum required stake is therefore likely to deter some potential alternative business structures from entering the market (thus reducing the effectiveness of the policy intention to increase the number and variety of providers of legal services in the market) as well as consequently depriving consumers of the additional choice (when there is no evidence that allowing that choice is likely to lead to consumer harm).

Question 8: What are your views on the provision of:

- a. "entity regulation" (as set out in Part 2 of the Bill)?**

- 3.47 I strongly support entity regulation being a feature of legal services regulation. With the possible exception of advocacy, most consumers and others will commission legal services through a business model or organisation that is, to them, an 'entity'.
- 3.48 As suggested in paragraph 3.8 above, there are also elements of organisational culture or incentives that operate to shape the behaviour of staff (whether lawyers or not). In the modern world of legal services, it is important therefore for regulators to be able to address their attention to entity-level requirements and concerns, and to be able to hold certain key individuals to account for entity-level failures or contraventions as well as for purely personal ones (see also IRLSR paragraph 4.7.3).

Question 8: What are your views on the provision of:

- b. title regulation for the term "lawyer" (section 82)?**

- 3.49 I do not support the title 'lawyer' being protected and given the same current protections as 'solicitor'. The expression 'lawyer' can be used legitimately in many different circumstances, including by those who are not professionally qualified as well as those who are but who use the title with a modifying adjective (such as academic,

retired, or non-practising). Although not regulated to practise, their use of the title is not inappropriate – and, indeed, in a more risk-based regulatory environment, their ability to offer some legal advice to consumers might be something to restrict and manage rather than prohibit outright (as, in particular, under the Bill's proposals, they could be subject to registration and the oversight of the Scottish Legal Services Commission).

- 3.50 It is questionable whether any legal titles should be protected by statute (including 'solicitor' and 'advocate'). The more important factors for consumers are:
- (a) Whether any given provider is competent to provide the legal services in question: I accept that the holder of a professional title might well be considered competent, but I do not consider that regulatory authorisation from the mere fact of professional qualification in today's circumstances of widespread and complex law should be regarded as definitive of initial or continuing competence or as a reason not to allow other routes to authorisation.
 - (b) That they can establish whether or not a given provider is regulated as such: a process of public registration is sufficient for this purpose, and should not be limited only to those who hold a professional title (see also paragraph 3.42 above).

Neither of these factors requires the title 'lawyer' to be protected. Instead, it would be sufficient that it would be an offence for any provider to pretend to be regulated or registered when they are not (clause 83), or to claim to be qualified or to hold any particular status or title when they do not (section 31 of the Solicitors (Scotland) Act 1980, and clause 84 of the draft Bill).

Question 9: Do you have any further comments on the Bill and any positive or negative impacts of it?

- 3.51 The draft Bill maintains the public interest as a regulatory objective; but it is one of many. It is interesting to see the Scottish regulatory objectives being developed beyond those in the English Legal Services Act, in particular with the pleasing addition of supporting 'the interests of justice'.
- 3.52 However, there is no primary regulatory objective or even a hierarchy of the objectives; this leaves a set of regulatory objectives that are more varied than before and not necessarily always aligned. They are also capable of both supporting and opposing almost any interpretation of the priorities or emphasis used to justify a

