

Executive Summary

Introduction

The subject matter of this consultation is a matter of the utmost constitutional importance.

The foundation of our democracy is the rule of law and the doctrine of the separation of powers. An independent legal profession, and an independent judiciary, is central to the operation of the rule of law; the protection of the public from the arbitrary abuse of power by the state depends upon it. It is for this purpose that the First Minister, the Scottish Ministers and the Scottish Parliament are under a statutory duty to uphold the continued independence of the judiciary.¹

It is of grave concern that this consultation fails to recognise suitably the constitutional importance of the Lord President and the Court of Session's role in regulating the legal profession. The fundamental constitutional principles which underpin the existing regulatory regime appear to have been overlooked.

Despite our previous representations to the Scottish Government on this matter, the consultation appears to have proceeded on the fundamentally flawed premise that the legal profession in Scotland regulates itself. This is incorrect. The regulator of the legal profession is the Court of Session in the form of the Lord President. The Lord President is a regulator who is independent from government and parliament and independent from those he regulates. Limited self-regulation by the professional bodies is controlled by the Lord President, as the ultimate regulator.

It is not necessary to remove the Lord President as regulator in order to reform the legal services market in Scotland. One does not necessarily follow the other, as appears to be presumed in this consultation. Issues such as competition, Alternative Business Structures and the professional bodies' regulatory structure can still be addressed whilst the Lord President retains his position as regulator, and the regulatory regime safeguards the rule of law.

In each one of the three models of regulation proposed in this consultation, the power to regulate the legal profession would be removed from the Court and transferred to a body responsible to parliament. This would create an unwarranted and unacceptable interference by the government and parliament with the judiciary.

To be clear, such an interference with role of the Lord President and the Court of Session in the manner proposed in this consultation is, in our opinion, an interference with the rule of law. The judiciary will resist with all its strength this, and any other attempt by government or parliament to remove the Court's regulatory powers.

¹ Judiciary and Courts (Scotland) Act 2008 s.1

Evidence base

It is unclear to us on what basis wholesale regulatory reform to the legal services market in Scotland is necessary or appropriate. A new regulatory regime for the 21st century was put in place by the Scottish Parliament as recently as 2010 in the form of the Legal Services (Scotland) Act 2010. At this time, other models of legal services regulation were discounted by the Scottish Government in favour of the existing regime. It is perplexing that the Scottish Government is now reconsidering the regime which it put in place only just over a decade ago. We acknowledge the desire to improve transparency in the system and the complaints handling process. However, we observe that the themes of competition, proportionate regulation and consumer interest are already clearly identified as key objectives under the 2010 Act. There appears to have been no examination or evaluation of the effectiveness of that legislation. We find it surprising that such radical changes for reform are predicated on such little assessment of the existing regulatory system.

The evidence base provided by the Competition and Market's Authority, must be weighed against that of the Law Society of Scotland's members' consultation, and its independent poll of users of legal services in December 2021. As the evidence base is mixed, it is challenging to understand the proposal for overhauling the entire regulatory landscape in Scotland, in order to increase transparency and improve the complaints handling process. Both aims can be achieved by more proportionate, reasoned and cost effective measures.

Consultation response

There are several questions in the consultation which we have chosen not to answer for the reasons stated above, or due to the format of the question. A ranking or tick box exercise is simply an unacceptable way to deal with complex issues of such constitutional magnitude as the regulation of legal services in Scotland. To do so would risk points of critical importance being missed.

The false premise on which this consultation has proceeded has, unfortunately, prevented any credible discussion of the issues raised. To compare three alternative models of regulation, without an accurate and detailed discussion of the current regulatory regime, or how the role of Lord President and the Court of Session may fit in to any future regime, is an entirely artificial exercise.

In June 2019, the senior judiciary sent a confidential paper to the Scottish Government outlining our concerns in respect of the Robertson report and setting out in great detail, the importance of the Lord President and the Court of Session in the existing regulatory regime. This paper is annexed and should be read in conjunction with our response to this consultation.