

Regulation of Legal Services (Scotland) Bill

Equalities, Human Rights & Civil Justice Committee – call for evidence

Response by Brian Inkster

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

The principal recommendation of the Robertson Review that an independent regulator should be created to regulate legal professionals was, by far, the best option for regulatory reform of legal services in Scotland.

There are clear conflicts of interest in a representative body also being a regulatory body. Robertson's principal recommendation removes those conflicts and avoids the complexities of service and conduct complaints being dealt with separately by different bodies.

b. the Scottish Government's decision to "build on the existing framework" rather than follow that principal recommendation

The Scottish Government's decision to "build on the existing framework" rather than follow that principal recommendation is a huge mistake and a missed opportunity if ever there was one.

Different jurisdictions around the world are now accepting that the regulatory function needs to be separated from the representative function. For Scotland to ignore the approach and reasoning now being taken in those jurisdictions and as recommended by the Robertson Review is bizarre to say the least.

After 10 or more years of experiencing a variety of different regulators in England & Wales the latest Independent Review on Reforming Legal Services [<https://thetimeblawg.com/wp-content/uploads/2022/07/Reforming-Legal-Services-Regulation-Beyond-the-Echo-Chambers-Stephen-Mayson-2020.pdf>] led by Professor Stephen Mayson recommends that there should be a single regulator for the legal services sector in England & Wales. The Review states:-

"A single regulator will be better able to assess and monitor risks and regulatory responses on a consistent, coherent and cost-effective basis across the whole sector. In addition, "the principle of accountability, in the context of legal services, is best met by a regulatory framework that is independent from both professional bodies and the government."

Stephen Mayson's Review was published two years after the Robertson Review. Both come to the same conclusion. In England & Wales, they have had the benefit of learning from a much earlier first attempt at regulation of their legal services market. They have identified that one regulator will be better than several.

Scotland should learn from that too and maybe for once beat England & Wales in the regulatory stakes by becoming the first jurisdiction in the world to implement this regulatory model. If we do so it looks like England & Wales will be hot on our heels in doing the same.

c. whether there is a risk that the proposals could raise concerns about a potential conflict of interests

The current proposals to ignore the principal recommendation of the Robertson Review raises serious concerns about potential conflict of interests.

The Law Society of Scotland and the Faculty of Advocates are already completely conflicted in being both representative and regulatory bodies. The principal recommendation of the Robertson Review was to remove that conflict. Only by following that recommendation can that conflict actually be removed.

The Scottish Government is in effect endorsing that this conflict should continue. A good hard look at why they are so doing should be undertaken by the Equalities, Human Rights & Civil Justice Committee.

Isn't it ironic that the Law Society of Scotland's main concern about the Bill is that, in their view, it "seriously risks" undermining the independence of the legal profession from the state.

However, a regulator that has no real independence from the representative body of the members it regulates is perfectly fine!

The key principle of good regulation according to the Competition and Markets Authority is that regulation should be independent of those it regulates.

The best legal minds at the Law Society of Scotland and at the Faculty of Advocates have failed to come up with any real argument for why we should not have one independent regulator.

About the best, that the Dean of the Faculty of Advocates, Roddy Dunlop KC, could come up with was that "Turkeys don't usually vote for Christmas"!

That was at a debate on the Robertson Review that took place on 13 February 2019 at the Royal Faculty of Procurators in Glasgow
[\[https://thetimeblawg.com/2019/02/16/the-debate-on-the-review-of-legal-services-regulation-in-scotland-aka-the-roberton-rammy/\]](https://thetimeblawg.com/2019/02/16/the-debate-on-the-review-of-legal-services-regulation-in-scotland-aka-the-roberton-rammy/).

After that debate it was commented on Twitter, by @greig_cyber, that there was:

"no real rebuttal around the point that good regulation should be independent of those it regulates, which seems to be the elephant in the room."

At that debate Christine McIntock's argument, on behalf of the Law Society of Scotland, was a fear of dismantling the legal profession into disparate groups.

On the contrary, there is a place for the Law Society of Scotland to become a stronger independent representative body. One used on behalf of its members to improve the separate independent regulation of legal services in Scotland. Moreover, if members are having unreasonable problems with that independent regulator, a membership body to turn to for assistance. That is something that is completely absent under the current conflicted system of joined regulation/membership.

Crispin Passmore (a former director at the Solicitors Regulation Authority, before that at the Legal Services Board, and prior to that at the Legal Services Commission) writing on 16 December 2021 about the Scottish Government's then consultation on regulatory reform [<https://www.passmoreconsulting.co.uk/scotland-time-to-be-brave>] said:-

"Government is seeking a consensus, but... that will never include the professional bodies. We can predict that the Law Society of Scotland and Faculty of Advocates will warn of unintended consequences, will stress how competitive the market already is (every monopolist starts with that), call for more regulation of currently unregulated legal services, and argue for more efficient complaints handling. The Faculty will seek to separate themselves from the mischief being addressed and stress their role in providing the judiciary of the future – and reform will threaten that supply of high quality judges. I hope I am wrong on all of this and that they welcome full scale reform."

Crispin Passmore was not wrong. He very accurately predicted the responses of the two main professional bodies in Scotland.

The Equalities, Human Rights & Civil Justice Committee should call before it representatives from those bodies and properly question them on the conflict issue. There can be and will be no real rebuttal to it.

When the Consultation Analysis on Legal Services Regulation Reform in Scotland was published, I blogged about the responses on the question of a single independent regulator [<https://thetimeblawg.com/2022/07/17/legal-services-regulation-reform-in-scotland-consultation-analysis-reviewed-part-2-the-potential-regulatory-models/>]

In response to my blog post the Dean of the Faculty of Advocates, Roddy Dunlop KC, asked:

"What is the rebuttal to the intervention of the judiciary, warning that the plans threaten the independence of the legal system and thus the rule of law itself?"

Which is an argument also put forward by the Law Society of Scotland.

Crispin Passmore responded to Roddy Dunlop by asking:

“Are Scottish or English and Welsh judges in the UK Supreme Court lacking independence because they are part of system of regulation (in England and Wales) that has independent regulation at its core?”

and then stating:

“It is Parliament that has given certain lawyers a monopoly on certain legal activities. Parliament can amend, add, reduce that. It is Parliament that puts in place legislative (i.e. regulatory) framework for that monopoly and no reason why that cannot include independent regulation. Parliament sits atop all of this regardless of regulation being done by lawyers or experts.”

Roddy Dunlop KC, who is well known for his Twitter spats, remained unusually silent. He apparently had no retort to this.

From my experience (and this is something that the Bill does not tackle) the Law Society of Scotland needs a good hard look at how they actually conduct inspections of legal practice units.

The process is unduly slow, cumbersome and unnecessarily adversarial. The inspection staff hallucinate in a way that would put ChatGPT to shame. They make assumptions that bear no resemblance to reality. Statements made by the practice unit are twisted and turned into something that was never said or meant. No real help or assistance is on offer.

The issues surrounding inspections demonstrates the problem with a lack of a truly independent regulator. Solicitors cannot easily, or readily, seek help from their own representative body in challenging or dealing with inspectors who have gone off the rails and/or processes and procedures that are not fit for purpose.

I made this point at the online conference on ‘The Scottish Legal Services Regulation Reform Bill: what’s needed and what’s next?’ (Organised by Mackay Hannah) on 27 April 2023 [<https://www.mackayhannah.com/The-Scottish-Legal-Services-Regulation-Reform-Bill-whats-needed-and-whats-next>].

In response Rachel Wood, Executive Director of Regulation at the Law Society of Scotland, said:-

“We make no apology to Brian Inkster or anyone else that we have a robust and strong inspection system.”

This demonstrates clearly the conflict that exists. I was being critical of their inspection system and the clear failings that exist in it. I have plenty of evidence of that. I also stated at the conference that:-

“This is an issue that I will be more than happy to discuss after today’s event with Diane McGiffen [CEO of the Law Society of Scotland] and Rachel Wood as it really is a serious problem that the Law Society needs to urgently address.”

Rather than being interested in my concerns as a member of the Law Society of Scotland and seek to address those concerns, and as a result hopefully improve the current regulatory function of the Law Society of Scotland, they doubled down as no criticism can clearly ever be made of that function.

Because of the jealous guard to preserve its role of being a regulator, then being critical of that role as a member is not an option. No one will listen or support you in a representative capacity. However bad their regulatory oversight is (and there are clear and unambiguous failings that do exist) they will defend that to the hilt to the detriment of their members.

This is the conflict that exists. It is a conflict that will unfortunately and unnecessarily continue under the Scottish Government's current proposals. It is a conflict that could and should be immediately removed by adoption of the principal recommendation of the Robertson Review.

2. What are your views on the current regulatory landscape for legal services in terms of complexity or simplicity?

The current regulatory landscape for legal services in Scotland is too complex.

The Robertson Review highlights this numerous times. For example:-

"The key issues were around the constraints that the current complex model of regulation imposes on the potential for growth in the sector." [page 1]

"The first challenge I faced when commencing the Review was understanding the current complex landscape." [page 12]

"The legal services market is complex and it is difficult to understand who or what is regulated and who or what is not." [page 13]

"In my discussions I found that there was widely shared concern that the system was still too complex and that some of the frontline regulators were too small to have the capacity to deliver their responsibilities effectively." [page 26]

"Our jurisdiction is small, however our regulatory structure is complex, inefficient and comparatively expensive." [page 29]

"It is a confused and complex landscape, hard for those inside and outside the sector to understand." [page 38]

"This reflects the complexity and cluttered landscape of regulation and complaints handling." [page 47]

"I soon realised that the current complex regulatory framework was a serious constraint on growth, investment and innovation." [page 49]

Adopting the recommendations in the Robertson Review would have simplified the regulatory landscape. Nothing in the Bill, as introduced, does anything to actually do that.

The Equalities, Human Rights & Civil Justice Committee should scrutinise why, having commissioned an Independent Review, the Scottish Government are ignoring the recommendations made by that Review.

3. What are your views on the proposed division of regulators into two categories and the requirements which these regulators will have to comply with, as set out in Part 1 of the Bill?

The proposed division of regulators into two categories just adds an unnecessary degree of complexity to something that could be simplified completely by adoption of the principal recommendation of the Robertson Review.

4. Section 19 of the Bill gives Ministers the power to review the performance of regulators' regulatory functions. Section 20 sets out measures open to the Scottish Ministers. What are your views on these sections?

Oversight is necessary and currently lacking. The Law Society of Scotland's response to this issue is a clear overreaction. The quote by Crispin Passmore, previously referred to, applies here too:-

"It is Parliament that has given certain lawyers a monopoly on certain legal activities. Parliament can amend, add, reduce that. It is Parliament that puts in place legislative (i.e. regulatory) framework for that monopoly and no reason why that cannot include independent regulation. Parliament sits atop all of this regardless of regulation being done by lawyers or experts."

The Bill allows the Scottish Ministers to review the performance of a regulator if requested to do so by the Scottish Parliament, the Competition and Markets Authority or Consumer Scotland. A request may be made only where the requesting body is concerned that the regulator is failing to exercise its regulatory functions in a manner that is compatible with the regulatory objectives or the public interest.

As Jamie Wilhelm from the Scottish Government pointed out at the online conference on 'The Scottish Legal Services Regulation Reform Bill: what's needed and what's next?' (Organised by Mackay Hannah) on 27 April 2023 this is a last resort with checks and balances and the Lord President would be involved in the process.

Professor Stephen Mayson at that online conference stated that these concerns were "overstated".

Should any regulator not have some form of oversight in case it is failing in its duties?

5. What is your understanding of the experiences of other jurisdictions, for example England and Wales, where independent regulators have been introduced to regulate legal services?

The introduction of independent regulators in other jurisdictions, for example England and Wales, has clearly resolved the conflict of interest problem. It has generally been welcomed for that.

There have, however, as I understand it, been other issues arising from the continued existence of multiple regulators and regulators seeking to enhance their remit and powers.

To combat these issues, and as previously stated, in England & Wales the latest Independent Review on Reforming Legal Services led by Professor Stephen Mayson recommends that there should be a single regulator for the legal services sector in England & Wales. The same as the Robertson Review, before it, recommended for Scotland.

The question of seeking to enhance remit and powers, sometimes unnecessarily so, is something that the Scottish Parliament can and should control via legislation thus alleviating that issue.

6. What are the main deficiencies in the current complaints system and do you believe the proposals in the Bill are sufficient to address these issues?

The main deficiencies in the current complaints system are:-

- If a complaint is lodged late it should be ineligible to be considered. It has prescribed. There should be no discretion allowed. I am unsure if that is adequately covered or not by section 53 of the Bill.
- There should be time limits for responding that is equally fair to all parties. Currently the Scottish Legal Complaints Commission dictate short time limits for responses and then sometimes take forever and a day to deal with matters at their end.
- There should be full disclosure to each party of all relevant documents produced that a party may need to study and comment upon.
- The Scottish Legal Complaints Commission should not get involved in potential professional negligence claims and treat those as service complaints. These should involve full legal arguments and an analysis of the law. This is not something that complaint handlers are equipped to deal with and it should be the preserve of the court system.
- Mediation of complaints should be compulsory.

- The £5,000 fee if the matter goes to and is upheld by a determination committee should be removed. This is used unfairly to persuade solicitors to accept settlement recommendations that are not necessarily fair and reasonable.

I do not believe that the proposals in the Bill are sufficient to address these issues. The question of how complaints will be handled appear to be left very much in the hands of the new Scottish Legal Services Commission (a name change that is possibly unnecessarily confusing).

The Equalities, Human Rights & Civil Justice Committee should scrutinise what the existing deficiencies in the current complaints system are and what should be done to address those.

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?

The Bill proposes to change the rule on solicitor ownership of alternative business structures from 51% to 10%. That is simply daft and yet another fudge on regulatory reform by the Scottish Government.

In their response to the Consultation Analysis the Scottish Government said:-

“We agree on the need to liberalise alternative business structures (ABS), removing restrictions which under the Legal Services (Scotland) Act 2010 currently require such firms to operate for ‘fee, reward or gain’, and which require to have a minimum ownership of 51% by regulated professionals.

This would allow greater flexibility in respect of ABS, to address concerns that Scottish legal firms are at a competitive disadvantage compared to other jurisdictions.”

However, the proposal to reduce the ownership percentage to 10% does not address concerns that Scottish legal firms are at a competitive disadvantage compared to other jurisdictions when in England & Wales it is 0%!

The Robertson Review states:-

“In Scotland, progress towards establishing an Alternative Business Structure regulator or regulators is being made. The current statute includes a mandatory 51% ownership rule for solicitors or named regulated professionals to own most of the business with no external investor ownership. In England and Wales, up to 100% non-lawyer ownership is allowed in Alternative Business Structures, although at least one of the managers must be a regulated lawyer. The 51% rule does not fully enable Scottish firms to compete with non-domestic competitors and puts them at a

disadvantage with regard to sourcing capital. The rule also prevents employee or community ownership schemes.”

At the online conference on ‘The Scottish Legal Services Regulation Reform Bill: what’s needed and what’s next?’ (Organised by Mackay Hannah) on 27 April 2023 Alison Hook, co-founder of Hook Tangaza, pointed out that the 10% limit was a potential barrier to seamless LawTech. She said that some ABS models would not be possible with this limit in place.

There is no good reason why there should not be parity on this with England & Wales. The current 51% rule and the proposed 10% rule should both be removed entirely.

In 2016 the Law Society Gazette (i.e. the Gazette of the Law Society of England & Wales) looked at the question of Alternative Business Structures in Scotland with the headline ‘ABSs in Scotland – rarer than Nessie’ [<https://www.lawgazette.co.uk/practice/abss-in-scotland-rarer-than-nessie/5057191.article>]. They commented on the delays in implementing the Legal Services (Scotland) Act 2010:-

“Four years ago the Law Society of Scotland reported an upsurge in interest in law firms north of the border becoming ‘licensed providers’, but warned that new regulations enabling them to convert remained ‘some way off’.

So it has proved. The issue, then as now, was the regulatory framework, encompassing matters such as spent convictions, rules relating to investors and limited partnerships. The Law Society submitted a proposed draft outline in 2012, but this has since gone through a number of iterations.

The Society’s website discloses that in early 2014 a revised draft scheme for licensed legal services providers was submitted to the government following further revision. That bounced back once again, until 18 months later – in December last year – the Society’s submitted another revised draft. This ‘followed further amendments made in light of comments from the government and other stakeholders’.

What those amendments are is unclear. The Society told the Gazette the December draft is not available.

It gets still more involved. A government consultation on the Licensed Providers Regulatory Regime – consumer watchdogs responded to it in May this year – is now closed. The Scottish government was initially unable to supply any further information and there is nothing posted on its website – but it did issue a statement to the Gazette later, making it clear there is still no timescale.

A spokesperson said: ‘The Law Society of Scotland has applied to Scottish Ministers for approval as an approved regulator in terms of the Legal Services (Scotland) Act 2010 so that it may license entities seeking to be licensed providers of legal services.

‘Before Scottish Ministers can approve, they must consult those who have relevant interests in the Law Society’s Regulatory Scheme, and the Lord President. The targeted consultation ended in May and responses analysed. Timescales for the approval and authorisation process are being considered.’

Of course, with Scotland’s profession ticking over nicely, stakeholders in government and the profession could be forgiven for not being greatly exercised about liberalising legal services.”

It is quite ridiculous that the implementation of the Legal Services (Scotland) Act 2010 has been allowed to be delayed by over 13 years. The Equalities, Human Rights & Civil Justice Committee should scrutinise why that has been the case and ensure no such delays can happen with the implementation of this latest Bill when enacted (and hopefully after extensive and necessary amendments are made to it).

It should also be noted by the Equalities, Human Rights & Civil Justice Committee that the 51% rule could currently be removed by Scottish Ministers who can do so by regulation (under Section 147(1) of the Legal Services (Scotland) Act 2010). There is no need to wait for a new Legal Services Act.

- 8. What are your views on the provision of:**
- a. “Entity regulation” (as set out in Part 2 of the Bill)?**
 - b. title regulation for the term “lawyer” (section 82)?**

I favour both but only if regulation is by an independent regulator as per the principal recommendation of the Robertson Review.

However, care needs to be taken over the regulation of the term “lawyer” to ensure that a sledgehammer is not being used to crack a nut. The proposal to regulate the term appears to come from one incidence of a struck of solicitor doing unregulated work and calling themselves a lawyer.

There may be unintended consequences arising from an overzealous approach to regulating the term “lawyer”. The Equalities, Human Rights & Civil Justice Committee should scrutinise this.

- 9. Do you have any further comments on the Bill and any positive or negative impacts of it?**

In general there is very little positive about the Bill but plenty that is negative about it.

I was asked, at the online conference on ‘The Scottish Legal Services Regulation Reform Bill: what’s needed and what’s next?’ (Organised by Mackay Hannah) on 27 April 2023 where I gave a talk ‘On being ambitious in regulatory change’ [<https://thetimeblawg.com/2023/04/30/on-being-ambitious-in-regulatory-change/>],

to consider whether it is possible to move from consensus on concerns to consensus on solutions. As I said then:-

“However, I am not sure that we ever had consensus on concerns.

The Consultation Analysis on Legal Services Regulation Reform in Scotland showed the lack of real consensus with often, as Siobhian Brown MSP [Minister for Victims and Community Safety] pointed out, about a 50:50 split in views. Although the analysis did point out that, there was evidence of coordination of responses. Mostly, this was respondents supporting the Law Society of Scotland’s organisational response. I am not sure that the Scottish Government gave this factor the weight they should have when deciding to abandon the primary recommendation of Esther Robertson.

Can we have consensus on solutions? Probably not as we already have the Law Society of Scotland up in arms and claiming that the Bill undermines the independence of the legal profession from the state.

A lot of the Bill is also a bit of a fudge. Possibly trying to please everyone but unlikely to please anyone. What Siobhian Brown MSP referred to as a “proportionate approach for stakeholders”!

If there remains any opportunity when the Bill progresses through its various stages in the Scottish Parliament to grasp the opportunity to revisit the primary recommendation of the Robertson Review that should be done.

An independent review into regulating lawyers in New Zealand (the Paterson Review) has very recently recommended the establishment of a new independent regulator to regulate lawyers.

It will be a sad indictment for Scotland if we ignore the Robertson Review but in New Zealand they accept the Paterson Review.

Brian Inkster

30 July 2023