



FACULTY OF ADVOCATES

LEGAL SERVICES REGULATION REFORM IN SCOTLAND CONSULTATION RESPONSE BY THE FACULTY OF ADVOCATES

PART 1: STRATEGIC CHANGE, VISION AND KEY ASPECTS OF THE REGULATORY MODEL

A. PROPOSED REGULATORY MODEL PRINCIPLES AND OBJECTIVES

Question 1

From the options listed, how important do you think each of the following principles and objectives are for any future regulatory model for legal services in Scotland?

Options

1. Very important
 2. Somewhat important
 3. Not important
 4. Should be removed
-
- Protecting and promoting the public interest including the interests of users of legal services
1. Very important
-
- Supporting the constitutional principle of the rule of law
2. Very important

- **Promoting independent legal professions and maintaining adherence to the professional principles**
3. Very important. Faculty regards promoting the independence of the legal professions as the most important principle and objective for any future regulatory model for legal services in Scotland. The independence of the professions is the pre-requisite to all of the other principles and objectives discussed.
- **Improving access to justice including choice, accessibility, affordability and understanding of services by service users**
4. Very important
- **Embedding a modern culture of prevention, quality assurance and compliance**
5. Very important
- **Working collaboratively with consumer, legal professional bodies, and representatives of legal service providers as appropriate**
6. Very important
- **Embedding the better regulation principles throughout its areas of responsibility (additionally; agility, independence, prevention, improvement, cost consideration of cost, and efficiency)**
7. Very important
- **Promoting innovation, diversity and competition in the provision of legal services**
8. Very important

Question 2

From the options listed, how important do you think each of the following are in supporting the framework of any future regulatory model?

Options

1. **Very important**
 2. **Somewhat important**
 3. **Not important**
 4. **Should be removed**
-
- **Enable access to justice including choice and diversity**
9. Very important
-
- **Offer accountability in protecting the public and consumer interest**
10. Very important
-
- **Offer accountability to those regulated by the framework**
11. Very important
-
- **Secure the confidence and trust of the public**
12. Very important
-
- **Enable future growth of legal services**
13. Very important

Question 3

From the options listed, how important do you think each of the following criteria is in a regulatory framework?

Options

1. **1. Very important**
2. **2. Somewhat important**
3. **3. Not important**
4. **4. Should be removed**

- **Support and promote sustainable legal services, which benefit consumers**

14. Very important

- **agile**

15. Very important

- **risk based**

16. Very important

- **efficient**

17. Very important

- **outcomes based**

18. Very important

- **a proactive focus continuous improvement and prevention of failures (which lead to complaints)**

19. Very important

- **proportionality**

20. Very important

- **an increased focus on independence and accountability**

21. Very important

PART 2: REGULATORY MODELS AND LANDSCAPE

22. At the outset, Faculty would wish to draw attention to the work done by Faculty in response to the Scottish Government's previous consideration of the regulation of legal services in Scotland, leading to the introduction of the Legal Services (Scotland) Act 2010.¹ There is ongoing relevance in the considerable material produced by Faculty for that purpose, including the Office of Fair Trading Report on prohibiting Advocates from forming legal relationships,² and the independent report commissioned from the Institute for Law, Economy and Global Governance, University of Manchester, in respect of the economic organisation of Faculty.³ Accordingly, the substantive comments that follow should be read against that background.⁴
23. Before turning to the questions posed, it may be helpful to set out the background to Faculty, and the role it plays in the administration of justice in Scotland in 2021.
24. Faculty is the professional body to which Advocates⁵ in Scotland belong. By statute, Faculty has regulatory responsibilities in relation to the profession. In order to understand Faculty's nature and role, it is necessary to appreciate: (a) the nature of the public office of Advocate in Scotland; and (b) the nature of advocacy as a specialist professional activity.

¹ 'Access to Justice: a Scottish perspective: a Scottish solution' – A response by Faculty of Advocates to the Scottish Government Policy Statement on Regulation and Business Structures in the Scottish Legal Profession dated 13 May 2008; see, also, Justice Committee Legal Services (Scotland) Bill – Written submission from Faculty of Advocates dated 1 December 2009:

<http://archive.scottish.parliament.uk/s3/committees/justice/inquiries/LegalServices/Submissions/LS2.FacultyofAdvocates.pdf>.

² 'Access to Justice: a Scottish perspective: a Scottish solution' (*supra*), Appendix 1.

³ 'Access to Justice: a Scottish perspective: a Scottish solution' (*supra*), Appendix 2.

⁴ For ease of reference, the documents referred to are produced as appendices to this paper.

⁵ Often referred to as "Counsel", and to be distinguished from "Solicitor Advocates", a term commonly used to describe Solicitors with Extended Rights of Audience.

25. No picture of Faculty would be complete without an appreciation of the role which it has played in the maintenance and development of Scotland's distinctive legal system and, more broadly, in the life of the nation. Faculty has been one of the key institutions responsible for maintaining Scotland's national identity, in particular since 1707.
26. The [then] Lord President observed recently⁶ that: "*[T]he public interest lies in the survival of a vigorous, independent referral bar*". He has described the essential qualities to which Faculty of Advocates is dedicated in the following terms: "*a commitment to excellence, a commitment to scholarship and learning, a commitment to the noblest ideals of professional conduct and, above all, a commitment to justice for all in our society*"⁷.
27. When the Court of Session was established in 1532 as a College of Justice, legislation required the Court to admit individuals to plead as Advocates before the Court. Initially, the Court itself exercised discipline directly over Advocates, but by the end of the seventeenth century the Court had delegated to Faculty: (i) the examination of intrants (i.e. persons who wished to become Advocates); and (ii) the exercise of professional discipline over Advocates. The Court retained responsibility for admitting Advocates and removing Advocates from office.
28. This regulatory structure was broadly replicated in the Legal Services (Scotland) Act 2010⁸. By virtue of that Act, the Court of Session is responsible for: (i) admitting persons to (and removing persons from) the office of Advocate; (ii) prescribing the criteria and procedure for admission to (and removal from) the office of Advocate, and (iii) regulating the professional practice, conduct and discipline of Advocates.
29. The Court may not delegate its responsibility to admit persons to and remove them from the office of Advocate. However, the Court's other responsibilities are exercisable, in accordance with such provision as the Court may make, by the Lord

⁶ Speech to the Commonwealth Law Conference - Independence of the judiciary and the legal profession (13 April 2015) available at: <http://www.scotland-judiciary.org.uk/26/1422/Lord-President's-speech-to-the-Commonwealth-Law-Conference-2015>.

⁷ Remarks on the introduction of the new Dean of Faculty, 5 February 2014.

⁸ ss. 119-122.

President or by Faculty. The Court has, by Act of Sederunt⁹, delegated those functions to Faculty. Amendments to the rules which Faculty may make in relation to the matters delegated to it require to be approved by the Lord President.

30. The 2010 Act correctly refers to “the office of advocate”. In Scotland, Advocates hold a public office to which they are admitted by the Court. This reflects the independence with which Advocates are required to approach their functions, the responsibilities which are incumbent on Advocates and the public nature and importance of those responsibilities.
31. An Advocate is required to fulfil his or her responsibilities independently of any other person. An Advocate is instructed on behalf of a litigant¹⁰, but in fulfilling those instructions the Advocate must exercise his or her independent judgment. For example, an Advocate representing a person accused of crime must advance the accused’s defence, but it is for the Advocate to decide how that should be done – the client has no right, for example, to insist that the Advocate lead a particular witness or examine a witness in a particular way. Likewise, in giving advice on the law, an Advocate must give objective and candid advice, independently of any other consideration.
32. As the [then] Lord President has recently observed¹¹:

“The public nature of the office [of Advocate] is reflected in the duty of counsel to appear on behalf of any litigant who requests his services and tenders a reasonable fee. It is reflected in the power of the Dean of Faculty to require counsel, in exercise of Faculty’s tradition, to withdraw from a case if counsel should be required to defend an accused person who for any reason is without proper representation. It is also reflected in the rules of priority that require counsel, when instructed for the Appeal Court or the Inner House, to return conflicting instructions for any lower court... This complex of rights and public duties holds the College of Justice together and maintains standards of conduct in the justice system.”

⁹ Act of Sederunt (Regulation of Advocates) 2011.

¹⁰ An Advocate does not enter into a contract with solicitor or client: *Batchelor v. Pattison and Mackersy* (1876) 3 R 914.

¹¹ *Taylor Clark Leisure plc v. HMRC* 2015 SC 595, para. 22

33. The rule that an Advocate may not, without good reason, refuse to accept instructions in any case where the Advocate is offered a reasonable fee is known as “the cab-rank rule”. It was contained in the 1532 legislation establishing the Court of Session and is still in force¹². The rule ensures that every member of the Scottish bar is available to any litigant who requires the services of an Advocate. An unattractive or unpopular litigant or accused person has, by reason of the cab rank rule, the same right to have his or her case professionally presented to the Court as anyone else. The rule also secures the independence of the Advocate: accepting the instruction is a matter of professional obligation, not choice. The constitutional importance of the cab rank rule in underpinning access to justice and the rule of law has been affirmed by many eminent judges.¹³ Although it is rarely formally invoked, it is part of the culture of practice at the referral bar. Solicitors (including solicitors with extended rights of audience: “solicitor-advocates”) are not bound by the cab rank rule.
34. Advocacy is inherently an individual activity. The individual who is standing up in Court has to master the material which he or she needs in order to carry out the task. Although the Advocate may be supported by a team, if that individual has not done the necessary preparation the case cannot be properly conducted, no matter the other resources which may have been applied to it. If advocacy is to be done well, it demands a high level of professional skill and focused application to the case in hand. It demands: (a) a deep understanding of the law relevant to the case; (b) mastery of the factual position and of the evidence which is available; and (c) forensic skills, whether in the examination and cross-examination of witnesses, or in presenting persuasive argument to judges. One of the keys to effective advocacy, assuming the necessary levels of skill, is preparation - and the time to prepare properly. The individual nature of advocacy explains why it is individuals and not

¹² The rule is regarded by all the independent referral bars as a core professional principle; it was first articulated in Scotland in the 1532 legislation as an incident of the public office of Advocate.

¹³ See eg *Rondel v. Worsley* [1969] 1 AC 191, 227 per Lord Reid (“it is essential that the duty must continue: justice cannot be done and certainly cannot be seen to be done otherwise”), 274-275 per Lord Pearce; *Arthur Hall v. Simons* [2002] 1 AC 615, 686 per Lord Hoffmann (“a valuable professional ethic”), 730 per Lord Hutton (of “fundamental importance”), 739-40 per Lord Hobhouse (“a fundamental and essential part of a liberal legal system”; *Medcalf v. Mardell* [2002] UKHL 27, para. 52 per Lord Hobhouse of Woodborough.

entities which have rights of audience and why advocacy may be effectively practised as a sole practitioner in the context of the independent referral bar.

35. The distinction between the role of the Advocate and of the solicitor in a system such as ours reflects, as a South African judge has observed¹⁴, in terms which are equally applicable in Scotland,

“the reality of two distinct professions engaged in different fields of legal expertise. People choose to become attorneys [solicitors] or Advocates ... because of the different challenges which they offer: one, the attorney mainly office-based, people-orientated, usually in partnership with other persons of like inclinations and ambitions, where administrative skills are often important, the other, the Advocate, court-based, requiring forensic skills, at arm’s length from the public, individualistic, concentrating on referred problems and usually little concerned with administration.”

36. The same judge went on to identify¹⁵ the following benefits for the client in the role of the Advocate:

“(1) the encouragement of independence of thought and action, and candour and objectivity in advice; (2) the avoidance of emotional involvement or friction with the client, both of which... can seriously undermine proper professional service; attorneys by contrast often have ongoing business or professional relationships with their clients; (3) a clear division of responsibility allowing the Advocate to serve the client expertly without the likelihood of conflict or compromise with his instructing attorney; (4) avoidance of financial involvement with the client and the likelihood of dispute about fees or their recovery; (5) the receipt of instructions which have been filtered through the attorney for relevance and importance and directed by the attorney to an Advocate known by the attorney to be skilled in the particular field in which his client requires assistance; (6) in a good working relationship between Advocate and attorney, an effective, efficient and complementary pooling of skills and knowledge in which the client benefits by more than the mere sum of the parts”.

¹⁴ *Rosemann v. General Council of the Bar of South Africa* 2004 (1) SA 568, para. 26 per Heher JA.

¹⁵ *ibid*, para. 30.

37. Other advantages include the following: (1) Because an Advocate does not have a burden of office administration or the responsibility for client care, the Advocate is free to organise his or her time so that he or she can undertake the preparation which is required for the forensic task in hand – indeed to devote time which a solicitor, with heavier overheads, might well find uneconomic; (2) This applies both to the preparation for court work and appearance in court, and also to advisory work: good quality legal advice demands the application of time and skill to research and consider the question; (3) An Advocate who is well instructed is able to develop a high level of skill and expertise in the particular forensic tasks which are undertaken by Advocates, as well as experience of the techniques of advocacy which may be appropriate in different forensic settings and before different tribunals; (4) The ethical training of Advocates is focused on the issues which arise in the context of forensic advocacy – and, in Scotland, the ethical and institutional framework within which Advocates’ work is focused on and adapted to the practice of advocacy at a referral bar.
38. All Advocates are members of Faculty. The membership of Faculty includes: (i) practising members; (ii) non-practising members; (iii) retired judicial members; and (iv) honorary members. Only practising members may exercise rights of audience as Advocates. The non-practising membership includes members of Faculty who are not in practice at the referral bar but are employed in other capacities, and retired Advocates. It includes judges and sheriffs who are members of Faculty, academic lawyers and others.
39. Faculty is led by elected office-bearers and an elected Council. The office-bearers of Faculty are the Dean of Faculty, the Vice Dean, the Treasurer, the Clerk, and the Keeper of the Library. Faculty also elects the Chair of Faculty Services Limited, a service company established to provide administrative and other support services to Advocates, and has also appointed a (lay, non-Advocate) Chief Executive Officer with responsibility for both Faculty and Faculty Services Limited. Faculty Council comprises members elected for constituencies organised by seniority, and a non-practising constituency. Much of Faculty’s work is undertaken by committees established for particular purposes. The office-bearers and Council members remain in practice and receive no remuneration for the work they undertake for the profession.

40. Faculty has a small secretariat, which supports the office-bearers and committees in the work of Faculty. The regulatory work of Faculty is adapted to, and proportionate to, the particular requirements of practice at an independent referral bar. For example, because Advocates do not handle clients' money, Faculty does not require to replicate the Law Society of Scotland's regulation of that aspect of solicitors' practice.
41. The process of admission as an Advocate takes place within the context of a Petition to the Court for admission. Faculty prescribes criteria before a Petition may be presented. Once the Petition has been presented, the Court remits the matter to Faculty. Faculty prescribes the academic and practical requirements which an intransit must satisfy. The academic requirements comprise examinations in specified substantive legal subjects, and Faculty's examination in Evidence, Practice and Procedure ("EPP"). In practice, most intransits are exempted from most or all exams, apart from EPP, by reason of having passed exams in the equivalent subjects during a Scottish law degree. The practical requirements comprise a period of training in a solicitor's office, followed by a period of pupillage with Faculty. During pupillage, the intransit is required successfully to complete the Scheme for Assessment of Devils, which requires the intransit to demonstrate competence in advocacy in: (a) examination of a witness; (b) legal submissions; (c) drafting a writ; and (d) drafting an opinion. There are special rules for European lawyers and barristers from England & Wales and Northern Ireland. Flexibility is secured by provisions for exemption.¹⁶
42. The period of pupillage, known as "devilling", comprises a course of training which lasts up to nine months, but may be less, and which is provided to intransits free of charge. During that period, the intransit will undertake nine weeks of classwork. The classwork includes both advocacy skills training and taught elements. The skills training is delivered by Advocates who have been specifically trained in advocacy training. Faculty's skills training programme was first developed over twenty years ago on the basis of the best international thinking in advocacy training and has been kept under review by successive Directors of Training. All the teaching is

¹⁶ See, generally, 'Becoming an Advocate - General Admissions Information', available at: <http://www.advocates.org.uk/about-advocates/becoming-an-advocate/general-information>.

delivered by experienced Advocates, among them some of the leaders of the profession. During the remainder of devilling, the inrant shadows one or more experienced Advocates (“devilmasters”), undertakes drafting and opinion work on which the devilmaster will comment, and observes proceedings in court, consultations with clients and other meetings, with the opportunity to discuss matters with the devilmaster.

43. Once Faculty’s requirements have been satisfied, the inrant is admitted as a member of Faculty, and by the Court to the public office of Advocate. Faculty is currently undertaking a review of the Regulations as to Intrants¹⁷, any changes to which will require the approval of the Lord President.
44. Faculty promulgates: (a) a Guide to Professional Conduct and other guidance on matters of professional practice; and (b) a Complaints and Disciplinary Procedure.
45. The Guide to Professional Conduct¹⁸ sets out the principles and rules of professional conduct applicable to Advocates in Scotland. It reflects and adopts the Code of Conduct for European Lawyers promulgated by the CCBE (the Council of European Bars and Law Societies)¹⁹, amplified and adapted to the circumstances of the independent referral bar in Scotland. The Dean of Faculty may also, subject to the Lord President’s approval, issue Dean’s Rulings on particular matters of professional practice arising from time to time. Faculty has also promulgated guidance on other matters – for example, Faculty’s Anti-Money Laundering Committee recently issued updated Anti-Money Laundering guidance.
46. Faculty is also proactive in promoting the continuing improvement of the professional standards of its practising members. From November 2016, Faculty has taken the significant step of introducing a Quality Assurance (“QA”) programme, which is designed to ensure a minimum standard of performance in core advocacy skills by way of five-yearly individual, peer-review assessments of all, including the

¹⁷ Regulations as to Intrants (July 2009 edition) available at: www.advocates.org.uk/about-advocates/becoming-an-advocate/admission-regulations.

¹⁸ Guide to the Professional Conduct of Advocates (5th edn, October 2008) available at: www.advocates.org.uk/media/1417/guide-to-conduct-fifth-edition.pdf.

¹⁹ The umbrella organisation for European Bars and Law Societies.

most senior, practising Advocates. Advocates are also subject to enhanced continuing professional development (“CPD”) requirements, including completion of minimum requirements in respect of specialist advocacy training with a particular focus on the skills of oral and written advocacy in different court or tribunal settings.

47. Advocates are enjoined by the Guide to Conduct to seek advice in cases of difficulty or uncertainty, ultimately from the Dean of Faculty or the Vice Dean – and Advocates are obliged to follow the instructions of the Dean or Vice Dean in relation to matters of professional conduct. This culture of seeking and giving advice is an important mechanism for supporting Advocates and making sure that they exercise their professional responsibilities at all times in accordance with the highest ethical standards.
48. As things stand, any complaint against an Advocate must be lodged, by statute, with the Scottish Legal Complaints Commission (“SLCC”). If the SLCC considers that the complaint is a conduct complaint, the complaint will be remitted to Faculty for disposal in terms of Faculty of Advocates Disciplinary Rules 2015.²⁰ Faculty has worked with the SLCC to produce guidance on good practice in complaints handling, which was launched in January 2015.²¹
49. Under the current regulatory regime, a service complaint will be dealt with by the SLCC. A conduct complaint will be remitted to Faculty, and will ordinarily be dealt with, at least in the first instance, by a Complaints Committee, comprising an equal number of Advocates and lay members. Faculty’s Disciplinary Tribunal, which is chaired by a retired judge and has Advocate and lay members, hears appeals against decisions of the Complaints Committee and disposes of cases remitted to it by the Complaints Committee for sentence where the powers of the Complaints Committee are inadequate.

²⁰ Faculty of Advocates Disciplinary Rules 2015, available at: <http://www.advocates.org.uk/media/1916/disciplinaryrules2015.pdf>.

²¹ The Practical Guide for Complaining Parties (“Complainers”) and Counsel is available at: www.advocates.org.uk/making-a-complaint/how-to-make-a-complaint.

50. The Dean of Faculty historically exercised a very significant disciplinary role. While that role has diminished with the creation of the SLCC, it has not disappeared. If a matter which calls for inquiry is drawn to, or comes to, the Dean's attention, the Dean may require the Advocate in question to explain the circumstances. He or she may initiate a complaint against an Advocate (which would, like any other complaint, be made to the SLCC). If, pending disciplinary proceedings or as a result of a determination by Faculty's Disciplinary Tribunal, an Advocate is to be suspended or removed from practice, the Dean petitions the Court, which alone may remove an Advocate from office.
51. Current practice as an Advocate is characterised by two features: (i) every Advocate is a sole practitioner; and (ii) Advocates practise as independent referral professionals.
52. The independence with which holders of the public office of Advocate are obliged to exercise their functions is underpinned by the fact that Advocates practise as sole practitioners. Under Faculty's Guide to Professional Conduct, Advocates are prohibited from entering into partnership or any other business relationship with another Advocate or any other person for the purpose of jointly offering professional services to the public.²²
53. The "no partnership" rule maximises choice, by ensuring that the whole bar is available to every client. If Advocates were to operate in partnerships or other legal forms along with others, conflicts of interest would become endemic. In a small jurisdiction such as Scotland, there is, in any particular field of law, typically a small number of specialists: the "no partnership" rule makes sure that all are available to any client (unless already instructed on behalf of another client in relation to the same matter). Moreover, when a solicitor is putting together a team of counsel to deal with a particular case, he or she is not confined to Advocates who operate within a single partnership or firm but can choose the separate members of the team from the whole bar.

²² *Guide to Professional Conduct*, para. 16.1 (see *infra*).

54. The collegiate nature of Faculty creates a professional environment in which, although Advocates are sole practitioners, good practice and experience may be shared amongst practitioners, albeit that they are in competition with one another. The environment also fosters relationships of trust between practitioners – something which is valuable in maintaining professional integrity and in securing the effective administration of justice. The professional obligation on Advocates to seek advice on issues of professional conduct – ultimately from the Dean or the Vice-dean – and to follow instructions given by the Dean or the Vice-dean, underpins Faculty’s commitment to high standards of professional conduct.
55. The collegiate nature of Faculty also enables economies of scale to be secured in relation to the facilities which an Advocate requires in order to be able to conduct his or her practice. Advocates collectively fund the Advocates’ Library, so that all Advocates – however junior and whether engaged in relatively poorly remunerated (or *pro bono*) but socially important work – have equal access to the best legal resources. In the 1970s, Faculty established its service company, Faculty Services Limited, to provide clerking, administrative and fee collection services to Advocates who subscribe for those services (as most Advocates do). Advocates who subscribe to Faculty Services Limited are organised in stables, each of which is served by a clerking team employed by the company. Stables have significant autonomy – engaging, for example, in marketing and promotional activities – but benefit from collective services, such as HR, IT, and an electronic fee-rendering system.
56. Section 122 of the Legal Services (Scotland) Act 2010, reflecting earlier legislation, provides that any rule under which an Advocate is prohibited from forming a legal relationship with another Advocate or any other person for the purpose of jointly offering professional services to the public is of no effect, unless it has been approved by Scottish Ministers after consulting the Competition and Markets Authority. Faculty’s rule was approved under the predecessor legislation following a report from the Director General of Fair Trading.²³

²³ See fn 2, *supra*.

57. Advocates practise on a referral basis – i.e. they do not offer their services directly to the public at large, but act on the instruction of an appropriately qualified professional, usually a solicitor. This secures a number of the advantages mentioned above. There is a similar recognised bar of specialist Advocates who practise on a referral basis in England & Wales²⁴; Hong Kong; Ireland; Lesotho; the Australian jurisdictions; New Zealand; Namibia; Northern Ireland; and South Africa.
58. The law distinguishes between the right to conduct litigation and rights of audience in court. Ensuring that those who conduct litigation before the Courts on behalf of clients, and those who appear to represent clients in the Courts, are appropriately qualified protects the interests of clients and, at the same time, promotes the effective and sound administration of justice. A professional who conducts litigation takes responsibility for the management of the case, the lodging of documents, the arrangement of witnesses, and the like. A professional exercising rights of audience has the right to appear in Court on behalf of a client.
59. Solicitors have the right to conduct litigation in all courts in Scotland. Members of the Association of Commercial Attorneys may also qualify to conduct certain litigation.
60. Advocates have rights of audience in all courts in Scotland. Solicitors have rights of audience in the sheriff courts; and may qualify for higher court rights of audience in either the criminal courts, or the civil courts, or both.
61. Advocates do not, however, have the right to conduct litigation, and may accordingly appear in court only on the instruction of a professional who does have the right to conduct litigation in that court. The distinction reflects the specialisation of function between Advocate and solicitor outlined above.
62. Advocates may appear in tribunals, arbitrations and other non-court *fora*, and may give advice, on the instruction of solicitors or anyone who has direct access rights

²⁴ Although the English bar now has arrangements permitting direct public access, many barristers still practice on a referral basis.

under Faculty's direct access rules. The Direct Access Rules²⁵ list members of other recognised professions, as well as a range of other bodies, who may instruct counsel direct in contexts which do not require instruction by a professional with the right to conduct litigation.

63. The existence of a bar of independent Advocates, available to represent or advise clients in any court or tribunal in Scotland (or elsewhere on matters of Scots law) – as well as in the United Kingdom Supreme Court, the European Court of Human Rights, and the Court of Justice of the European Union – promotes access to justice, and the quality of legal services, across Scotland. Every solicitor has access, on behalf of all the solicitor's clients, to the wide range of expertise and skill at the bar. Small firms across Scotland, including firms in rural Scotland, can, in this way, enhance the service which they provide to their clients and compete more effectively.
64. No firm of solicitors can replicate the range of experience and expertise at the independent referral bar. Advocacy is a time-intensive activity – both in terms of preparation, and by reason of the requirement to be present in court throughout the case. Solicitors' firms which have substantial litigation practices can, by using the bar, resource the peaks and troughs of litigation work economically.
65. Likewise, in the course of a litigation, the solicitor may use the range of experience and expertise at the bar to provide an economical service to the client: an opinion may be taken from a QC with specialist expertise before the action is launched; the Summons may then be drafted by a relatively newly qualified Advocate; a more experienced Advocate may be instructed for a contentious motion in the course of the litigation; and the QC may be brought back in to conduct a debate or a proof, perhaps assisted by the junior who drafted the Summons. Or the solicitor may choose to have continuity and instruct the same team of counsel throughout.
66. The cab-rank rule underpins the commitment of Faculty to access to justice for all. Many Advocates are, in addition, willing to accept instructions to undertake civil work – particularly personal injury claims on behalf of pursuers – on a speculative

²⁵ Faculty of Advocates Direct Access Rules (October 2006), available at: www.advocates.org.uk/media/2708/new-direct-access-rules.pdf.

basis (i.e. no win, no fee) – an approach to funding which secures high quality representation for ordinary men and women (usually against insurers or large employers) at no cost.

67. Moreover, Faculty's Free Legal Services Unit secures *pro bono* advice and representation for cases which have been referred to it by recognised advice agencies, which could not reasonably be funded in other ways. The Free Legal Services Unit also provides a *pro bono* service to individuals seeking to appeal to the Employment Appeal Tribunal whose appeals have been struck out and who wish to have a hearing under rule 3(10) of the Employment Appeal Tribunal Rules 1993.
68. Faculty's great contribution to Scotland's national culture is the role which Advocates have played, since the establishment of the Court of Session, in the maintenance and development of Scots law. In the sixteenth and seventeenth centuries (and to a lesser extent in subsequent centuries), many Advocates studied on the Continent, usually in the Netherlands. The profession was steeped in the legal learning of Continental Europe. It was at this time that the foundations of Scots law, as a system based on principle with its roots firmly in the Civilian tradition of Continental Europe, were established.
69. Advocates play an essential role, not only in the defence of the rights of litigants, but also, through their work in court, in the development of the law. As Sir George Mackenzie, Dean of Faculty in the late seventeenth century, wrote: "*our College of Justice is but one body, in which the Senators are the judicative faculty, and the Advocates the inventive*". Judges, in our system, depend on the lawyers who appear before them to present fully researched arguments and to bring forward the relevant legal materials to enable the judges to determine legal questions which arise.²⁶ It is through this process that the law, in Scotland, has been developed and refined. It is

²⁶ In other systems, judges undertake much more of their own research, and may, indeed, have staff who are employed to support them in that regard. Our judicial system is not resourced in a way which would enable judges to do this: only the two most senior judges, the Lord President and the Lord Justice Clerk, have the benefit of dedicated assistance in view of the importance of the cases chaired by them, and the significant additional administrative and extra-judicial functions entailed in their roles. In effect, in our system, the job of legal research required to inform the Court properly is privatised. In any event, the issue is not simply one of research: it is the value to the Court, and to the development of the law, which is derived from the competing arguments of counsel, each of whom is engaged to advance his or her client's case vigorously.

critical to this process that Advocates are in a position, by training and mode of practice, to fully research the law, and work within a culture which encourages legal rigour and legal creativity.

70. Outside the courtroom, Faculty actively engages in law reform work through its Law Reform Committee. It responds regularly to consultation papers issued by Scottish Government and others. The Dean and other members of Faculty, as required, give evidence before Parliamentary Committees, both at Holyrood and Westminster. When invited to do so, Faculty provides comment, both in writing and in discussion with civil servants engaged in legal policy work, and to Bill teams.

PART 2A: POTENTIAL REGULATORY MODELS

71. It is notable that the present consultation does not contemplate the maintenance of the *status quo*. That is, with respect (and subject to the *caveats* below regarding the disciplinary process), a regrettable omission. It is of primary importance to emphasise that the continued existence of an independent referral bar, subject to appropriate regulation, is a vital component of 21st century legal services in Scotland. That is so for all of the reasons outlined above as to the working context of Faculty within the wider Scottish legal system. First and foremost, however, Faculty considers that the independent referral bar is the only viable method by which to ensure access to justice for all members of the community, in the public interest, in Scotland. Moreover, Faculty considers that it remains the most efficient and cost-effective method by which to deliver high quality, specialist legal professional advocacy services, in the interests of consumers and legal service providers alike, in Scotland.
72. In summary, Faculty considers that the current regulatory landscape ought to be maintained in respect of entry to, and the qualifications of, Advocates; the setting of standards applicable to practice as Advocates; and the monitoring of compliance with those standards. Significant change would be welcome, however, in respect of the current regulatory regime applicable to complaints handling, in relation to Advocates, by the SLCC. Separately, Faculty also considers that the current rules in respect of the organisational structure of legal service providers in Scotland, insofar

as relevant to Advocates, may merit further investigation. These various points are considered below.

Entry, qualifications and standards

73. The regulatory regime applicable to entry to the Advocate profession, and practising as an Advocate thereafter, is set out in a handful of relatively short and easily comprehensible documents, which are made freely accessible to the public and kept under regular review by Faculty. The regime has been explained in some detail above, and is not repeated here.
74. For present purposes, however, it may be relevant to note that the current iteration of the regulations on entry to the profession strikes a fair balance between the necessary requirements of academic excellence, and knowledge of and familiarity with Scots law and legal practice on the one hand, and Faculty's commitment to facilitating ease of access to the profession on the other. In particular, the regulations provide significant flexibility, where appropriate, to allow entry to the profession by those who may have followed alternative career paths to law. The regulations also enable ease of transfer between the Advocate and solicitor branches of the profession, thereby facilitating choice on the part of legal service providers as to their preferred business model (i.e. whether to exercise rights of audience in the higher courts as a self-employed Advocate, or as a solicitor-advocate in employment or partnership with others). Equally, the regulations allow for ease of transfer between jurisdictions, such that barristers may follow a relatively straightforward route to practice at the Scots Bar.
75. The regulation of entry to the profession and maintenance of standards at the Bar is something that Faculty has undertaken for centuries, at no cost to the public, and without a scintilla of evidence of any difficulties. To cast all this aside and allocate such matters to an independent regulator would achieve no benefit whatsoever, to prospective or actual Members of Faculty or to the public whom they serve. It would involve a paradigm instance of attempting to fix that which is patently not broken.

Monitoring compliance, making complaints and obtaining redress.

76. The current regulatory regime in respect of the handling of service and conduct complaints made against Advocates has been explained in detail above. In particular, however, Faculty would emphasise that the operation of the current Faculty Disciplinary Rules in connection with conduct complaints is desirable, and consistent with the overriding character of the regulatory regime applicable to Advocates as a whole. As described earlier in this paper, Advocates, as holders of public office, are (historically and presently) subject to direct oversight by the independent senior judiciary in Scotland. That, of itself, demonstrates Faculty's commitment to, and compliance with, the highest standards of independent scrutiny and professional conduct. Faculty considers that such a regime remains appropriate and proportionate today, as it has done for centuries, and it would be anomalous and highly undesirable for the discipline of Advocates to be removed from the jurisdiction of the courts and otherwise regulated to any extent.
77. The operation of the current Faculty Disciplinary Rules is, in any event, subject to the further safeguards of transparency and publicity in the conduct of disciplinary proceedings against Advocates. Any hearings of the Disciplinary Tribunal must be held in public, unless it would be inappropriate to do so²⁷, and decisions are published and made available for inspection in respect of any complaint that is upheld, or upon the request of the Advocate concerned where the complaint is dismissed²⁸. Additional publicity may be given to the complaint where the circumstances justify it.²⁹
78. The primary focus of any conduct complaint is the comparison of the conduct complained of, and the standards to be expected of responsible or reputable Advocates. Nevertheless, Faculty's Disciplinary Rules recognise that, in some cases, it may be appropriate not only to impose a financial penalty where a conduct complaint is upheld against an Advocate, but also to provide monetary redress to the complainer. Currently, therefore, the Disciplinary Rules provide for the imposition of fines and/or compensation up to £15,000 in respect of findings of

²⁷ Disciplinary Rules 2015, rule 55.

²⁸ Disciplinary Rules 2015, rule 71.

²⁹ Disciplinary Rules 2015, rule 73.

“unsatisfactory professional conduct” or “professional misconduct”.³⁰ Any award of compensation by the Tribunal would, of course, be without prejudice to the ability of the complainer to seek further redress by way of a claim for damages.

79. Faculty considers, therefore, that the current regulatory regime operated by Faculty itself in respect of professional disciplinary matters embodies the highest possible standards of quality, proportionality and fairness, and ought to be maintained.
80. However, Faculty respectfully suggests that serious consideration ought to be given as to whether the existing SLCC model is efficient, from the point of view of complaints (re services and conduct) made against Advocates.
81. The existing complaints regime is not working satisfactorily. At present, it may take up to 23 weeks for the SLCC to classify a complaint, before it can even be referred for investigation by Faculty or otherwise. That, in Faculty’s view, is unacceptable. The decisions of the SLCC have been the subject of appeal on dozens of occasions over the decade or so of its existence. A very substantial number of those appeals have been successful, either by concession or by decision of the Court of Session. A real question arises as to why this is so: there is no similar history of difficulties arising from decisions made either by Faculty’s Discipline Tribunal or indeed the Scottish Solicitors Discipline Tribunal³¹. Moreover, in Faculty’s experience, and having regard to the published decisions of the courts in professional regulatory matters, there has been no equivalent surge in appeals from comparable regulatory bodies dealing with professions other than the law.
82. It is clear that complaints arise disproportionately from certain areas of practice. The experience of those members of Faculty who practise in the field of professional regulation and discipline is that complaints arise overwhelmingly from what might be termed consumer facing “High Street” legal services. Those services primarily

³⁰ Disciplinary Rules 2015, rules 25 and 26 (Imposition of penalties by the Complaints Committee) and rule 63 (Imposition of penalties by Disciplinary Tribunal).

³¹ There is no recorded instance of a judicial challenge to a decision of Faculty’s Discipline Tribunal. Whilst there have been several appeals over the years regarding decisions of the Scottish Solicitors Discipline Tribunal, the vast majority of these have failed.

include residential conveyancing (but not, it is thought, commercial conveyancing), child and family law, and wills and executries.

83. None of the above, however, supports the conclusion that there ought to be a single new regulator for *all* legal services. Indeed, there is no basis upon which to suppose that any such regulatory body could do the job better, more quickly or at less expense, at least so far as complaints against Advocates are concerned. On the contrary, there is every reason to suspect the opposite.
84. Each year since inception of SLCC, there has been only a modest number of complaints involving counsel, for reasons that are clear:
- a. Advocates do not carry out any transactional conveyancing or administrative executry work, which are the source of a large number of complaints;
 - b. Advocates tend to have responsibility only for certain aspects of any particular client matter or case – they may have a one-off involvement in a preliminary or advisory capacity, or they may be involved only in particular stages of court or similar proceedings, by comparison with the transactional solicitor who may be viewed as responsible for the conclusion of matters as a whole;
 - c. Advocates do not handle client money;
 - d. Many Advocates practise in fields, such as commercial law, where complaints are comparatively rare; others work predominantly on behalf of large institutional clients, such as public authorities, banks or insurance companies, who rarely use the complaints system;
 - e. Crucially, Faculty has a long-established collegiate culture, and a system of rules and customs whereby advice from senior practitioners (and, in particular, from Faculty’s office bearers) is always available to any member with a professional or ethical difficulty. The ready availability of such advice, and the clear professional duty to seek (and follow) advice in cases of doubt, have a significant effect in preventing complaints from arising.

85. Of the complaints that have been made against Advocates in recent years, the vast majority have been deemed unsound: either by being deemed ineligible at the very outset, or by being rejected on investigation. One service complaint against an Advocate was initially upheld by the SLCC but subsequently overturned by the Court, in terms which included trenchant criticism of the SLCC's analysis and decision-making process.³² This history is such as to call into question the utility of the SLCC's involvement so far as complaints against Advocates are concerned, for reasons discussed below.
86. All conduct complaints have been, or are currently being, investigated and dealt with by Faculty itself, according to the disciplinary rules outlined above. Faculty observes that to remove the SLCC as the "gatekeeper" of that process would have no negative impact on the handling of those complaints: they would continue to be investigated and dealt with as they are at present. Moreover, the removal of the current requirement for the SLCC to "classify" complaints against Advocates as either conduct or service complaints, and to refer them for investigation by disparate bodies accordingly, could be expected to have a significant positive impact on the efficiency with which all complaints against Advocates may be resolved. As has been noted, this need for classification already causes significant delays, which are in the interests of no one – least of all the complainer.
87. Faculty maintains a panel of eminent counsel who prosecute cases before the Disciplinary Tribunal. In addition, Faculty brokers professional indemnity insurance on behalf of all practising Advocates, which entitles them to high quality specialist representation in the event of disciplinary proceedings being prosecuted against them. Together these features produce an extremely high quality and efficient process for the resolution of complaints. Faculty would be eminently capable of extending its existing facilities and expertise to cater for the small number of complaints overall, including both conduct and service complaints, that may be made against Advocates from time to time.
88. In Faculty's view, and with the benefit of its knowledge of the SLCC's experience to date, there is simply no realistic prospect that anything approaching the quality of

³² *Bartos v Scottish Legal Complaints Commission* 2015 SC 690.

the disciplinary procedures adopted by Faculty could be recreated by a new statutory regulator. Such regulation would necessarily be “one size fits all”, to a greater or lesser extent, and at least in the composition and experience of any regulatory tribunal that may be appointed³³. It would, inevitably, reduce the quality of decision-making in respect of those complaints currently (or to be) dealt with by Faculty under its demonstrably successful self-regulatory model.

89. In the event of the removal of SLCC functions in respect of all complaints against Advocates, which Faculty supports, Faculty anticipates that a significant positive impact would be observed. There would be a single point of contact for consumers in respect of all and any aspects of criticism or complaint that may be raised against Advocates. Prior to the inception of the SLCC, Faculty found no need to “sift” complaints. The volume of complaints was (and may be expected to remain) such that Faculty was (and is) able to investigate them all to the full extent necessary to enable a fair and principled decision to be made. The bureaucracy and additional complication of the SLCC’s “sifting” jurisdiction was (and would be) avoided, leading to a streamlined and transparent process. Most obviously, there would be no need for complainers to wait several months for a preliminary classification decision to be reached by the SLCC: all complaints would proceed to investigation immediately, and the process would speed up dramatically overall.
90. Faculty suggests, therefore, that the evidence strongly supports the conclusion that there is no significant problem as regards complaints of any nature against Advocates. There is, therefore, no justification whatsoever for the imposition of additional layers of regulatory complexity, at disproportionate and unjustifiable expense in terms of the associated operating costs levied against Advocates, despite the low level of complaints against them. The better course, in Faculty’s view, would be simply to return jurisdiction to Faculty over all complaints against Advocates, under an efficient and proportionate self-funded and self-regulatory system. As Faculty has sought to demonstrate in the course of this paper, to do so would provide quicker, cheaper and higher-quality decision making than exists under the present hybrid system operating as between Faculty and the SLCC, or

³³ Cf the concerns raised by the Inner House in *Bartos*, cited earlier, at [90].

could reasonably be anticipated to exist under any newly established external statutory regulator.

91. Of course, Faculty recognises that some, perhaps many, will have an instinctive opposition to that suggestion, pointing to a perceived need for independent regulation. But such a stance would ignore three truisms. First, it has for centuries, and even since the inception of the SLCC, been accepted that the regulation of conduct complaints – which are generally considered to amount to more serious allegations than services complaints – is appropriately left to Faculty as the professional regulator. “Independent” regulation cannot sensibly be more important for services complaints than for conduct complaints. Secondly, in those centuries there has never been any concern raised about a lack of proper independent scrutiny of complaints made against Advocates. On the contrary, the importance to Faculty of the reputation of the Office of Advocate means that the complaints process is robust and fair. And finally, the process is, and can properly be seen to be, independent. Whilst members of Faculty sit on both the Complaints Committee and the Disciplinary Tribunal, (a) those members are themselves, as with all Advocates, fiercely independent; and (b) those members do not constitute a majority in either forum: the Disciplinary Tribunal, for example, will have three lay persons; two members of Faculty; and a retired judge (whose independence is, as a former Senator, beyond question) as Chairman. There is thus a clear majority, with the Chairman carrying the casting vote, made up of persons who are not practising members of Faculty.
92. There is thus a very easy solution, which comes at no cost, indeed a saving, to the public purse: return all complaints made against Advocates to Faculty as the appropriate regulator, under the delegated authority of the Court.
93. If necessary, consideration may be given to retention of an oversight role, undertaken by an independent ombudsman or the like, regarding the way complaints are handled by Faculty as a regulatory body (“handling complaints”), subject to the continuing need to avoid unnecessary or unduly complex sifting procedures. For the avoidance of doubt, Faculty does not consider that such a function would be necessary, having regard to the existing direct oversight of Faculty by the Court. But if it were thought necessary, from the point of view of public confidence, to

have the further protection of such oversight by an independent body, then Faculty would of course cooperate fully: the central point is that the existing complaints process does not work well, and can be replaced (so far as Advocates are concerned) with ease, with confidence, and with a substantial saving, for the reasons given.

94. The Consultation paper indicates that:

“The Scottish Government is of the view that the final regulatory model to be taken forward in primary legislation should deliver a regulatory framework which meets the following criteria:

- *agile*
- *risk based*
- *efficient*
- *outcomes based*

whilst also incorporating:

- *a proactive focus continuous improvement and prevention of failures (which lead to complaints)*
- *proportionality*
- *and an increased focus on independence, accountability and transparency.”*

95. That neatly describes the *status quo* for the regulation of Advocates. It is hard to see how a “super regulator” could be, for the regulation of the Bar, any more “agile, risk based, efficient or outcomes based” than is Faculty. Moreover, Faculty has throughout its history shown a proactive focus on continuous improvement and prevention of failures. It adopts measures that are clearly proportionate. And, crucially, the current structures are a guarantee of complete and unending independence.

96. Against that background, none of the potential regulatory models suggested in the Consultation Paper carries the approval of Faculty. Each would be demonstrably

less efficient, less knowledgeable, more unwieldy and more costly than is the present case. It is of the first importance that there be no interference with the fact that Advocates are appointed to the Office of Advocate, and as such Members of the College of Justice. That ensures complete independence. Any interference with or watering-down of such independence would, both actually and as a matter of perception, be to the detriment of the administration of justice in Scotland. Faculty is sure that this cannot be the intention of the Scottish Government.

97. The three proposed models are now taken in turn:

Option 1: Robertson Model

98. In this proposal, a new single independent regulator would be responsible for entry, standards, monitoring, complaints and redress in respect of the legal profession as a whole. This was proposed by Esther Robertson alone – it was not supported by the eminent legal practitioners who had sat on her review committee. It does not meet with the approval of Faculty, for the reasons already given.

99. What is proposed would be a monolithic organisation, costly to set up and run, that could not possibly have the agility of Faculty to deal with concerns and adapt to demands. It would involve replacing the current expert set up devoted to the training and admission of devils. This is simply illustrated.

100. At present, Faculty employs a Director of Training and a Deputy Director of Training. Both are practising Members of Faculty. They are responsible for the running of a six week introductory course, that is mandatory (unless exemption is given, which happens rarely and only for intrants with significant advocacy experience elsewhere) and full-time. It involves exposure to multiple senior members of the profession and of the judiciary, all of whom give their time without charging therefor. Throughout the nine-month period of devilling, there are regular updates, including a further two week skills course and assessments in the skills of drafting and pleading, again all under the supervision of assessors at no cost to the public.

101. It would be simply impossible for an external regulator to replicate this. The Regulator would require to hire multiple staff, with absolutely no guarantee (on the

contrary, significant reason to doubt) that they would be able to hire people of the requisite quality. At the risk of repetition, there has never, at any point in time since 1532 so far as Faculty is aware, been any concern voiced as to the work of Faculty in training its members and in arranging quality assurance once admitted. To allocate this to a new body would add substantially to cost, in return for a system that could not possibly be as good. Quite why anyone would want to expend money in making things worse is inexplicable.

102. Most worryingly, this proposed model would mean that the new statutory regulator would alone be responsible for the register of Advocates, and for their admission to the profession. That would mean the end of the role of the court, and the end of the Public Office of Advocate. That would be an act of vandalism. It would involve taking a profession that has for centuries been actually and visibly independent of the Executive, responsible only to the independent judiciary, and making it instead answerable to a different body which itself is unconnected to the judiciary. That would be such a retrograde step, with no countervailing benefit, that it cannot sensibly be supported. Faculty has no wish to be alarmist or hyperbolic in this regard, but is driven to stress this fundamental point: an *independent* referral Bar is fundamental to the operation of democracy in Scotland. It cannot be sacrificed on the altar of perceived modernisation.
103. Of less concern, but still deeply worrying, would be the inevitable loss of specialist knowledge that would be inherent in a “super regulator”. The Consultation denies that this would be a “one size fits all” model, but there would inevitably be a flavour of that. No regulator tasked with entire oversight of the legal profession as a whole could possibly replicate the specialist knowledge of Faculty in this regard. To suggest otherwise is to demonstrate a troubling lack of insight into the actuality.
104. For these reasons, the Robertson model is opposed root and branch. To adopt this model would involve a deeply worrying interference with the core and essence of what it is to be an Advocate – namely, someone whose independence is, actually and visibly, beyond doubt. It would provide a worse experience at greater cost. It, simply, makes no sense.

Option 2: Market Regulator Model

105. Per the Consultation, “*in this regulatory model, an independent market regulator would oversee the work of the ‘authorised regulators’, each having distinct roles and purpose*”.
106. Faculty would therein retain many of its current responsibilities. To that extent, Model 2 is of less concern, and less objectionable, than Model 1. It, however, remains sub-optimal, having regard to the suggested role of the Market Regulator.
107. That Regulator would again be answerable to Parliament. Faculty’s concerns regarding dilution of independence are reiterated. It would add unnecessary layers of complexity to aspects which are not presently considered problematic, including authorisation of Faculty as a regulator; setting minimum entry, education and training standards; oversight of quality assurance, CPD, evaluation and monitoring; and reviewing reserved activities or the/ definition of legal services. There is no demonstrated need for any of this, so far as the profession of Advocate is concerned. There is no evident benefit to be gained from this.

Option 3: Enhanced accountability and transparency model

108. Of the three options in the consultation, this is by far and away the least objectionable, and the least obviously problematic. Indeed, it might be seen as a way of enhancing the *status quo* such as to address such problems as can genuinely be said to exist therein.
109. The main change from the *status quo* would be the introduction of a statutory regulation committee. It is suggested that this is unnecessary: Faculty already has the equivalent of this in the Office Bearers and in Faculty Council.
110. One of the proposals in this model is increased transparency. Faculty has no difficulty with, indeed embraces, that suggestion. It would be happy to work with SLCC with a view to ensuring greater transparency. However, it is not clear why the involvement of a statutory regulation committee would assist in that regard. As with the other options, there is no clear reason why such a committee would be able to be as agile, flexible and knowledgeable as Faculty itself. Rather, Faculty would willingly submit to greater reporting requirements if that is thought to be desirable. Such reports could be addressed by SLCC without the need for any additional statutory body.

111. This Option, like the others, does not address the one true difficulty with the *status quo*, namely the complexity of the complaints process. This can and should be simplified. Faculty suggests that the SLCC should remain the gateway for complaints against Advocates, with an ability to reject complaints as time-barred, premature, manifestly unfounded or vexatious. Once past the SLCC sift, however, all complaints should be passed to Faculty Complaints Committee for investigation. That would considerably simplify and speed up the current process. The Faculty Complaints process should be, as is currently the case, subject to the oversight of SLCC, which should retain the ability to require a reconsideration where the correct process has not been followed.
112. Faculty should thereafter report to the SLCC, on an annual basis, on regulatory steps taken in that year. SLCC should have the power to make suggestions as to improvements, but Faculty should ultimately remain independent, and answerable only to the Lord President. Faculty would also be happy to undertake, voluntarily or as a result of statutory direction, to meet biannually with, and consider suggestions made by, Consumer Scotland.

Question 4

The primary recommendation of the Robertson report was that “There should be a single regulator for all providers of legal services in Scotland. It should be independent of both government and those it regulates. It should be responsible for the whole system of regulation including entry, standards and monitoring, complaints and redress. Regulation should cover individuals, entities and activities and the single regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland.

113. Faculty strongly disagrees with this proposal, for the reasons given above.

Questions 5 and 6

Of the three regulatory models described above, which one would you prefer to see implemented? Rank them in order.

114. For the reasons given, Faculty suggests that the retention of the *status quo* should be considered, so far as Faculty itself is considered. If any model is to be adopted, it should be Option 3.
115. Option 1 is considered by Faculty to be wholly unacceptable, for the reasons given. Option 2 is less objectionable, but only slightly.

Question 7

Please rank in importance the aspects of regulation you would most like to see handled by professional regulatory bodies, through independent regulatory committees?

116. Faculty sees no need for independent regulatory committees. For the reasons given, all three subjects (Education and entry; Oversight of standards and conduct; Complaints and redress) should remain with Faculty.

Question 8

Of the three models described above, please rank in importance the aspects of regulation you would most like to see handled by a body independent of, and external to the professional regulatory bodies, and of government?

117. This has already been answered in the response to Question 7.

Question 9

Under the Robertson Model, to what extent do you agree or disagree that the professional bodies should have a statutory footing?

118. Faculty is already recognised in statute, and has been since 1532. There is no need for any change in this regard.

Question 10

Which of the following methods do you think the final regulatory model should utilise to embed a consumer voice?

119. Faculty agrees that it would be sensible to take input from Consumer Scotland, and would be happy to do so as discussed above.

Question 11

To what extent do you agree or disagree that Consumer Scotland should be given the power to make a Super-Complaint in respect of the regulation of legal services in Scotland?

120. Faculty has no strong views on this point.

Question 12

To what extent do you agree or disagree that a baseline survey of legal services consumers in Scotland should be undertaken?

121. Faculty has no strong views on this point.

B. THE ROLE OF THE LORD PRESIDENT AND THE COURT OF SESSION

Question 13

To what extent do you agree or disagree with the Robertson report, that the legislative approach should make clear the role of the Lord President and the Court of Session in the regulatory framework?

122. Faculty strongly agrees that, whatever legislative approach is taken, it should make clear the role of the Lord President and the Court of Session in the regulatory framework. It could not be suggested otherwise. Clarity is essential in any legislative scheme.
123. It may be that, in asking this question, what is actually sought is a view as to whether there should be a role for the Lord President and the Court of Session in the regulatory framework. If that is so, then the answer from the Faculty of Advocates is that there should indeed be such a role.

Question 14

To what extent do you agree or disagree that the role of the Lord President and Court of Session in the regulatory framework in Scotland is important in safeguarding the independence of the legal profession?

124. Faculty strongly agrees that the role of the Lord President and the Court of Session in the regulatory framework in Scotland is important in safeguarding the independence of the legal profession.
125. The Lord President has an important and valued role within the existing framework, both in relation to Advocates and solicitors. In this response, we pay particular attention to the role of the Lord President in relation to Advocates and to Faculty, but that is not to diminish the significance of the functions exercised by the Lord President in respect of solicitors, specifically in the approval of rules as to professional practice, conduct and discipline in terms of section 34 of the Solicitors (Scotland) Act 1980.
126. In relation to Advocates, there is a special role for the Lord President and the Court of Session. That now finds its statutory form in sections 120 and 121 of the Legal Services (Scotland) Act 2010, but the relationship between Advocates and the Court of Session is of very long standing. When a person is admitted to the office of Advocate, he or she is admitted to a public office. He or she becomes an officer of the court and owes duties to the court. These duties are integral to the proper performance of the work of an Advocate. At their core, those duties require that an

Advocate is honest and fair in all of his or her dealings with the court, both in presenting argument on the law and in providing information about matters of fact, whether in writing or in oral advocacy. As explained in response to Question 4 (see in particular paragraphs 30-54 above), these duties guarantee the independence of the Advocate and of Faculty. An Advocate cannot do anything which would put himself or herself in conflict with those duties to the court. That is the first and best protection against any suggestion that an Advocate is partisan or otherwise subject to improper influence.

127. It follows from that that the Lord President and the Court of Session have an obvious interest in seeing that those duties are adhered to, both in individual cases and, more generally, in the maintenance of rules relating to the conduct of Advocates. If an Advocate fails, or is alleged to have failed, in a duty owed to the Court, the Court, naturally, has an interest and must be able to be satisfied that that failure or allegation will be addressed. Ultimately, the Court must be able to exercise control over those who are its officers, and only the Court may deprive an Advocate of his or her office. The Court's responsibilities for the admission to and removal from the office of Advocate, prescribing the criteria and procedure for admission to and removal from office, and for regulating the professional practice and conduct of Advocates are exercised on behalf of the Court by Faculty. That is a necessary and sensible allocation of responsibility but, ultimately, it is a matter for the Court. The role of the Court is absolutely fundamental. To take the Court, or the Lord President, out of the statutory picture would sever or at least seriously damage the relationship between the Advocate and the Court. The effect would be to abolish the public office of Advocate and, with that, would go the guarantee of independence that is vital to the promotion of the regulatory objectives which are currently set out in section 1 of the Legal Services (Scotland) Act 2010, including supporting the constitutional principle of the rule of law and the interests of justice and also vital to the interests that consumers have in being advised and represented by an independent Advocate.
128. If the Lord President and the Court of Session have no role in ensuring that officers of the Court fulfil their duties, then the office ceases to be a public office in any meaningful sense. The significance of the existing role cannot be overstated.

129. Faculty is not aware of any suggestion from any quarter that it is inappropriate that the Lord President and the Court of Session should have a role in the regulatory framework. It is very difficult to see what foundation such a complaint could have. The first and most important point is that set out above: the Court regulates the conduct of its officers. The status of an Advocate as a holder of that office is integral to the independence of Advocates.
130. Furthermore, the Lord President is clearly the office holder best placed to exercise the ultimate oversight of Advocates' conduct. The Lord President is independent. On the basis of his own judicial and professional experience and that of his judicial colleagues, he is uniquely well-informed as to proper practice within court and in connection with Advocates' other duties.
131. It is noted within the consultation paper that if certain regulatory functions were not carried out by the Lord President they would require to be transferred to another body. In the first place, adding another body to the framework would diminish the role of the Court and the ability of the Lord President to regulate the conduct of those who appear before that Court. At best, that would be confusing. At worst, it would nullify, or seriously weaken, the value of the public office of Advocate and the independence of that role. In any event, it is very difficult to see that a new and separate body, not involving the Lord President, would have the direct experience necessary to carry out the regulatory and oversight function that the Lord President exercises at present.
132. Reference is made in the consultation paper to the regulatory regimes in England and Wales and in California. It is suggested that these are of limited assistance in informing a proper approach to the involvement of the Lord President and the Court of Session in regulation of the legal profession in Scotland. However, it may be noted that in both systems there is an important role for the Court.

Question 15

Should the Lord President and Court of Session have a 'consultative' role, or 'consent' role with regard to the following potential changes to the operation of any new regulatory framework?

- **Changes to professional rules: practice rules, conduct and discipline?**
 - **Changes in relation to complaints practice and procedure?**
 - **New entrants to the market seeking to conduct of litigation and exercise right of audience?**
133. Faculty considers that the Lord President and the Court of Session should have a consent role in all of the matters mentioned.
134. For the reasons given above, the Lord President and the Court of Session have a direct and vital interest in the conduct of matters in court and in the conduct of those who practise before them and who hold public office. That interest goes beyond the conduct of litigation. The Lord President has a central role in the legal system as a whole.
135. For that role to be fulfilled in a meaningful way, it is necessary for the Lord President to be able to intervene where necessary. It can be expected that that power will be exercised judiciously. Limiting the role to a consultative one places too much distance between the Court and the regulator and runs the risk of creating an unhealthy and counter-productive divergence of view.

Question 16

To what extent do you agree or disagree that the Lord President should have a role in any new regulatory framework in arbitrating any disagreements between independent Regulatory Committees and the professional regulatory bodies?

136. Faculty strongly agrees that the Lord President should have such a role. The Lord President, uniquely, has the independence and expertise to discharge such a function.

Question 17

To what extent do you agree or disagree that the Lord President should have a role in the process of appointment of any new 'legal members' to relevant positions, such as regulatory committees, in any new regulatory framework?

137. Faculty strongly agrees that the Lord President should have such a role. The Lord President currently exercises functions in relation to membership of the SLCC. There is a value in having a check on appointments performed by an office holder who is both independent and well-informed. It is consistent with the Lord President's role within the legal system as a whole that he should have this nature of involvement in appointments. Faculty does not seek to anticipate how that role might change. At a minimum, maintenance of the status quo is desirable.

C. REGULATORY COMMITTEES

Question 18

To what extent do you agree or disagree that regulatory committees, as described above, should be incorporated into any future regulatory framework?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

138. Faculty strongly disagrees that regulatory committees, as described above, should be incorporated into any future regulatory framework.
139. Faculty's position has long been that there is no justification for the imposition of additional layers of regulatory complexity, with attendant, and unnecessary, bureaucracy and cost.³⁴ Given that the creation of an independent Regulatory Committee will entail additional complexity, bureaucracy and cost, it is a proposal with which Faculty strongly disagrees.
140. Chapter 2 of Part 4 of the Legal Services (Scotland) Act 2010 deals with regulation of Faculty at present. Under this Chapter, the Court of Session is responsible for: (i) admitting persons to (and removing persons from) the office of Advocate; (ii) prescribing the criteria and procedure for admission to (and removal from) the office of Advocate, and (iii) regulating the professional practice, conduct and

³⁴ Cf. Response by Faculty to the Independent Review of the Regulation of Legal Services - Call for Evidence at 91.

discipline of Advocates. Admission and removal is reserved to the Court of Session, but the other responsibilities have been delegated to Faculty.³⁵

141. Faculty currently has a Complaints Committee and a Disciplinary Tribunal, whose operation and constitution is governed by Faculty of Advocates Disciplinary Rules 2015.
142. The composition of the Complaints Committee is balanced between two lay persons and two senior members of Faculty. The composition of the Disciplinary Tribunal includes three lay persons, two members of Faculty (or one member of Faculty and a senior solicitor) along with a retired Senator (or other appropriate retired senior member of the judiciary).
143. Faculty is not aware of any problem with the efficiency, fairness or independence of its current arrangements. Nor is Faculty aware of any failing to maintain public confidence. Moreover, having the Disciplinary Tribunal chaired by a retired senior judge ought to instil the utmost public confidence in the system.
144. Leaving aside the mechanics of how Faculty would set up a proposed independent Regulatory Committee with separate legal personality, the more fundamental question is: what benefit would this bring to the profession or to consumers? In Faculty's view, the proposal would bring no real value to the profession or consumers. It would simply add cost and bureaucracy. These costs would likely fall directly onto the individual members of Faculty. As sole practitioners, members of Faculty, particularly more junior members or those who accept legal aid or judicial recovery only cases, are not able to simply pass on any increased costs to clients.
145. Faculty is not aware of any evidential basis to suggest that the preparation and laying of an annual work plan and annual report before the Scottish Parliament from such a Regulatory Committee provides any true public benefit. Further, the additional cost of this Committee being subject to Freedom of Information requests is likely to be disproportionate to any theoretical benefits.

³⁵ Act of Sederunt (Regulation of Advocates) 2011.

146. For these reasons, Faculty strongly disagrees with the necessity of creating an independent Regulatory Committee for Faculty.

Question 19

To what extent do you agree or disagree that Regulators should be required by statute to ensure that Regulatory Committees are suitably resourced, with a certain quota of persons being exclusively ring-fenced for dealing with regulation?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

147. As noted above, Faculty strongly disagrees with the necessity and proportionality of the creation of such Committees. However, if they are to be created then it makes sense for them to be suitably resourced. That said, it does not follow that “suitably resourced” means that a certain quota of persons should be exclusively ring-fenced for dealing with regulation.

148. The idea of ring-fencing is unnecessarily prescriptive. Faculty is, respectfully, better placed to decide how best to resource such a Committee, if one required to be created. It would be better to say that Faculty neither agrees nor disagrees with this question, but this option was not available.

Question 20

To what extent do you agree or disagree that regulatory functions of Regulatory Committees should be subject to Freedom of Information legislation or requests?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

149. Faculty strongly disagrees that regulatory functions of Regulatory Committees should be subject to Freedom of Information legislation or requests.

150. As noted above, bringing such an independent Regulatory Committee within the scope of the Freedom of Information regime would add even greater costs to an already disproportionate proposal. Faculty does not believe any public interest would outweigh the burden that including such a Committee within the FOI regime would entail.

D. FITNESS TO PRACTICE

Question 21

To what extent do you agree or disagree that the following aspects of ‘fitness to practice’ requirements or regulations are appropriate and working well in Scotland?

- **content of the criteria**

151. Faculty has no comment on the content of the criteria in respect of fitness to practise, other than to note there is nothing that concerns Faculty. However, Faculty notes that the Consultation Paper refers to a solicitor being able to produce a certificate to the effect that he or she has been actively engaged in practice as a Solicitor in Scotland for at least three years prior to the presentation of his or her Petition, and that he or she is a fit and proper person to be admitted to Faculty and therefore being exempt “*from certain other entry requirements as an advocate*”. In fact, the only potential exemption gained in terms of r.10(1) of Faculty’s Regulations as to Intrans to a solicitor who can produce such a certificate is the need to have obtained a Diploma in Legal Practice from a Scottish University. Given that obtaining such a Diploma has been a mandatory part of legal training in Scotland for over 40 years, the Consultation Paper perhaps somewhat overstates the importance of being able to submit such a certificate.

- **frequency of career points where the criteria must be satisfied**

152. Faculty has no comment on the frequency of career points where the criteria must be satisfied in respect of fitness to practise, other than to note there is nothing that concerns Faculty.

- **transparency and fairness in decision making**

153. Faculty has no comment on the transparency and fairness in decision making in respect of fitness to practise, other than to note there is nothing that concerns Faculty.

Question 22

Are there are any changes you would make to each aspect as set out in the previous question?

Please give reasons for your answer.

154. Faculty has no particular concerns on any aspect, and so would not suggest any changes.

Question 23

To what extent do you agree or disagree that there should be a test to ensure that non-lawyer owners and managers of legal entities are fit and proper persons?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

155. Faculty mostly agrees that there should be a test to ensure that non-lawyer owners and managers of legal entities are fit and proper persons.

156. Faculty sees no reason to not subject non-lawyer owners and managers of legal entities of an Alternative Business Structure to a fit and proper person test. However, given this does not concern Faculty, no further comment is warranted.

E. LEGAL TECH

Question 24

To what extent do you agree or disagree that Legal Tech should be included within the definition of 'legal services'.

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

157. Faculty mostly disagrees that Legal Tech should be included within the definition of 'legal services'.
158. The definition of 'legal services' used in the Robertson review (p.13) is *"legal advice in connection with legal documents such as contract, deed, writ, will or others, as well as legal advice and/or representation for the purpose of applying the law or seeking a legal dispute resolution."*
159. Faculty notes that "Legal Tech" is not defined in the Consultation Paper, or in the Robertson Review.
160. Faculty is perhaps not best placed to offer a comprehensive definition of "Legal Tech". It is still a growing area, whose limits are not yet clearly defined. However, two broad strands can be identified. The first are technologies aimed at legal service providers to facilitate the practice of law (e.g. practice management software, document storage, billing/accounting software, e-discovery platforms and AI/machine learning document analysis software). The second are technologies

aimed at consumers/businesses designed to either connect them to legal service providers, or to minimise or remove the need to use a legal service provider at all.

161. In Faculty's view, the first strand does not present any particular regulatory risk. They simply provide tools by which regulated persons can enhance the service they provide. The second strand, where these tools are being marketed directly to consumers and, in particular, where they purport to minimise or obviate the need to obtain professional advice, present a more obvious regulatory concern.
162. Where a Legal Tech product or provider purported to offer 'legal services' as defined above, it follows logically that they ought not to escape regulation simply because they are operating on a technology platform. However, it also follows that simply operating within the Legal Tech space does not mean that 'legal services' are being provided.
163. Accordingly, the provision of any 'legal services' that are presently regulated should cause someone to fall within the regulatory orbit, rather than the mode by which such services are being provided.

Question 25

To what extent do you agree or disagree that those who facilitate and provide Legal Tech legal services should be included within the regulatory framework if they are not so already. If so how might this operate if the source is outside our jurisdiction?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

164. Faculty strongly agrees that those who facilitate and provide Legal Tech legal services should be included within the regulatory framework if they are not so already.

165. It follows from Faculty's answer to Question 24 above that those who facilitate and provide Legal Tech legal services should be included within the regulatory framework if they are not so already.
166. Faculty is not best placed to comment on how this might operate in practice, particularly if the source is outside of our jurisdiction.

Question 26

To what extent do you agree or disagree that, not including legal tech may narrow the scope of regulation, and reduce protection of consumers?

Please give reasons for your answer.

167. Faculty strongly agrees that not including Legal Tech firms who were purporting to provide regulated legal services would narrow the scope of regulation and reduce protection of consumers. The method of delivery of legal services should not be the touchstone of whether it ought to be regulated or not.

Question 27

To what extent do you agree or disagree that the inclusion of legal tech in a regulatory framework assists in the strength, sustainability and flexibility of regulation of legal services?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

168. Faculty mostly agrees that the inclusion of legal tech in a regulatory framework assists in the strength, sustainability and flexibility of regulation of legal services. It would certainly seem to assist with strength, as it would increase the regulatory purview. In terms of sustainability, given this is a growing area, it would seem that

any new regulatory environment, if it were intended to be sustainable over the longer term, would need to take account of this sector. However, it is less immediately clear how the inclusion of Legal Tech *per se* would assist with the flexibility of regulation of legal services. Perhaps it could be argued that by designing a system that takes account of Legal Tech, it may be easier for a flexible system to be put in place? The latter point is far from clear to Faculty.

Question 28

To what extent do you agree or disagree that the Scottish regulatory framework should allow for the use of Regulatory Sandboxes to promote innovation?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

169. Faculty mostly agrees that the Scottish regulatory framework should allow for the use of Regulatory Sandboxes to promote innovation.

170. Faculty has no objection to the use of Regulatory Sandboxes, and notes that the FCA has now worked with seven cohorts³⁶. However, Faculty has no experience of participating in a regulatory sandbox, and its ability to comment is restricted to reviewing the limited evidence available from the FCA, which points to some early indications of success.³⁷ Thus, Faculty can say little more than it has no basis to object to incorporating such an idea.

³⁶ <https://www.fca.org.uk/firms/innovation/regulatory-sandbox>

³⁷ <https://www.fca.org.uk/publications/research/regulatory-sandbox-lessons-learned-report>

F. CLIENT PROTECTION FUND (GUARANTEE FUND)

Question 29

To what extent do you agree or disagree that the Client Protection Fund works well?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

171. Faculty has no comment on the operation of the Client Protection Fund.

Question 30

What, if any, changes should be made to the Fund?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer

172. Faculty has no reason to believe that any change is required to the Fund.

PART 3 - LEGAL SERVICES PROVIDERS AND STRUCTURES

A. ENTRY, STANDARDS AND MONITORING

Question 31

To what extent do you agree or disagree that any future regulatory model should incorporate a greater emphasis on quality assurance, prevention and continuous improvement than the current model provides?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

173. Faculty mostly disagrees that any future regulatory model should incorporate a greater emphasis on quality assurance, prevention and continuous improvement than the current model provides.
174. Faculty accepts that quality assurance, prevention and continuous improvement are important aspects of regulation of the legal profession. Faculty's disagreement with the statement in Q31 is simply on the basis that it takes the view that the current model, in its application to Advocates, already places appropriate emphasis on quality assurance, prevention and continuous improvement. Faculty has been proactive in promoting the continuing improvement of the professional standards of its practising members:
175. In November 2016, Faculty took the significant step of introducing a Quality Assurance ("QA") programme, designed to ensure a minimum standard of performance in core advocacy skills by way of five-yearly individual, peer-review assessments of all, including the most senior, practising Advocates.

176. Advocates are subject to enhanced continuing professional development (“CPD”) requirements, including completion of minimum requirements in respect of specialist advocacy training with a particular focus on the skills of oral and written advocacy in different court or tribunal settings.
177. Advocates are enjoined by the Guide to Conduct to seek advice in cases of difficulty or uncertainty, ultimately from the Dean of Faculty or the Vice-dean – and Advocates are obliged to follow the instructions of the Dean or Vice-dean in relation to matters of professional conduct. This culture of seeking and giving advice is an important mechanism for supporting Advocates and making sure that they exercise their professional responsibilities at all times in accordance with the highest ethical standards.

Question 32

To what extent do you agree or disagree that the rules within the regulatory framework should be simplified with the aim of making them more proportionate and consumer friendly?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

178. Faculty mostly disagrees that the rules within the regulatory framework should be simplified with the aim of making them more proportionate and consumer friendly.
179. The regulatory regime applicable to entry to the Advocate profession, and practising as an Advocate thereafter, is set out in a handful of relatively short and easily comprehensible documents, which are made freely accessible to the public and kept under regular review by Faculty.
180. When considering the regulations for entry to the Advocate branch of the profession, it is crucial to understand that Scotland, like England & Wales, has a ‘split’

profession where the Bar, and the solicitor branch of the profession, are separate. The distinction between the role of the Advocate and of the solicitor in a system such as ours is explained above at paragraph 35.

181. Maintaining such a distinction has many practical benefits for members of the public, and the good functioning of the legal system. For example, (i) an Advocate is able to offer independent and objective advice, unclouded by any ongoing business relationship between solicitor and client; (ii) the differing business models allow an Advocate, in undertaking the preparation required for court appearances or advisory work, to devote time which a solicitor, with heavier overheads, might well find uneconomic; (iii) smaller solicitors firms, wherever in Scotland they are based, are able to provide their clients with a high-quality service by engaging an Advocate with expertise in specialist areas to act in a particular case which is outwith their normal practice experience. However, a corollary of the legal profession being structured in this advantageous way, is that the entry requirements for each branch of the profession must be appropriately calibrated to the particular knowledge and skills which each branch requires. Thus Faculty prescribes academic and practical requirements to be satisfied by those seeking admission to the Bar, which include successful completion of a period of pupillage with Faculty. The latter consists of a skills training programme (first developed over twenty years ago on the basis of the best international thinking in advocacy training and kept under review by successive Directors of Training), and the shadowing of existing Advocates. It remains important and appropriate that entry requirements in Scotland should relate to the specific branch of the profession which the applicant seeks to enter (as is the case in other jurisdictions with a 'split' profession, such as England & Wales), so that the requirements in the qualification frameworks can be tailored in a proportionate fashion to the particular skills and experience necessary competently to perform the role. The Joint Standing Committee for Legal Education in Scotland provides a suitable forum for discussion and co-ordination between the two branches of the profession in Scotland, and the legal education providers.
182. Currently the regulations for entry to the Advocate branch of the profession strike a fair balance between the necessary requirements of academic excellence, and knowledge of and familiarity with Scots law and legal practice on the one hand,

and Faculty's commitment to facilitating ease of access to the profession on the other. In particular, the regulations provide significant flexibility, where appropriate, to allow entry to the profession by those who may have followed alternative career paths to law. The regulations also enable appropriate ease of transfer between the Advocate and solicitor branches of the profession, thereby facilitating choice on the part of legal service providers as to their preferred business model (i.e. whether to exercise rights of audience in the higher courts as a self-employed Advocate, or as a solicitor-advocate in employment or partnership with others). Equally, the regulations allow for ease of transfer between jurisdictions, such that barristers may follow a relatively straightforward route to practice at the Scots Bar.

183. The setting of standards for those in practice at the Bar in Scotland has been dealt with in our answer in relation to Part 2 above.

Question 33

Which of the following methods do you think regulatory model should incorporate to provide quality assurance and continuous improvement?

- **peer review**
- **a system of self-assessment for all legal professionals**
- **both of these**
- **neither, or other**

184. Faculty considers that **peer review** should be incorporated by any regulatory model to provide quality assurance and continuous improvement.

185. As explained in the answer to Q31, Faculty already has in place a Quality Assurance ("QA") programme, which is designed to ensure a minimum standard of performance in core advocacy skills by way of five-yearly individual, peer-review assessments of all, including the most senior, practising Advocates.

B. DEFINITION OF LEGAL SERVICES AND RESERVED ACTIVITIES

Question 34

To what extent do you agree or disagree that there should be a definition of legal services?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

186. Faculty mostly agrees that there should be a definition of legal services.

187. Given that a definition of legal services currently exists for certain purposes, it would seem appropriate that this be maintained, or expanded to have a more general application.

Question 35

To what extent do you agree or disagree that the definition of legal services should be set out in primary legislation?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

188. Faculty mostly agrees that the definition of legal services should be set out in primary legislation.

189. Given that the existing definition of legal services is to be found in primary legislation, there seems no reason for a different approach to be taken.

Question 36

To what extent do you agree or disagree that there should be no substantial change at this stage to bring more activities within the scope of those activities "reserved" to solicitors or to remove activities?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

190. Faculty is not best-placed to comment on this issue, which relates only to the solicitor branch of the profession.

Question 37

To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

191. Faculty mostly agrees that it should be for the regulator(s) to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated.
192. It would seem appropriate that the reservation of further issues to legal professionals in the future should be proposed by the profession as regulators (or the profession in conjunction with any external regulator which might be brought into existence in future).

C. TITLES

Question 38

To what extent do you agree or disagree that there should be a change such that the title 'lawyer' would be given the same protections around it as the title 'solicitor'?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

193. Faculty strongly agrees that there should be a change such that the title 'lawyer' would be given the same protections around it as the title 'solicitor'.
194. The solicitor branch of the profession will be better placed to comment upon the difficulties which arise from the fact that 'solicitor' has a protected status, whereas there is no similar protection for 'lawyer'. It is, however, important to understand that 'lawyer' encompasses both solicitors and Advocates. Faculty would observe that it may seem anomalous were there to be protection for the umbrella term 'lawyer', and for the term 'solicitor' which describes one branch of that profession, but no protection for the term 'Advocate' which describes the other branch of the profession.

Question 39

To what extent do you agree or disagree that the title 'advocate' should have the same protections around it as the title 'solicitor'?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

195. Faculty strongly agrees that the title 'Advocate' should have the same protections around it as the title 'solicitor'.
196. Faculty remains of the view that the term 'Advocate' should also be a protected term, as referring only to members of the legal profession who have been admitted to Faculty. This is in distinction to the more generic 'advocate' which can and does encompass those appearing before the Mental Health Tribunals, for example (as specifically referenced in the Robertson report). Faculty is concerned that in the absence of protection for the term 'Advocate', there is scope for confusion arising among members of the public as to the role and qualifications. In any event, as already noted it would seem anomalous for the terms 'lawyer' and 'solicitor' to enjoy protections, but for such protections not to be in place for the term 'Advocate'. An alternative method of achieving the goal of avoiding any confusion or misrepresentation to the public, would be to make it an offence for a person to hold him/herself out as a practising Member of Faculty where that is not in fact the case.

Question 40

To what extent do you agree or disagree that the legislation should allow for the protection of other titles in relation to legal services as appropriate?

- Strongly agree
- Mostly agree

- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

197. Faculty mostly agrees that the legislation should allow for the protection of other titles in relation to legal services as appropriate.
198. It would seem prudent to allow for the protection in future of other titles in relation to legal services, lest there comes a time when there is a concern that members of the public could be misled as to whether persons were appropriately qualified and regulated for the work that they hold themselves out as performing.

Question 41

To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which titles to protect?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

199. Faculty mostly agrees that it should be for the regulator(s) to propose to the Scottish Government which titles to protect.
200. It would seem appropriate that this should be proposed by the profession as regulators (or the profession in conjunction with any external regulator which might be brought into existence in future).

D. BUSINESS STRUCTURES

Question 42

To what extent do you agree or disagree that the 51% majority stake rule for Licenced Legal Services Providers should be removed?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

201. Faculty offers no comment on this issue.

E. ENTITY REGULATION

Question 43

To what extent do you agree or disagree that entity regulation should be introduced?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

202. Since it is not proposed that this would encompass, or impact upon, Advocates, Faculty offers no comment on this.

Question 44

To what extent do you agree or disagree that all entities providing legal services to the public and corporate entities should be subject to a "fitness to be an entity" test?

- Strongly agree
- Mostly agree

- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

203. Since it is not proposed that this would encompass, or impact upon, Advocates, Faculty offers no comment on this question.

Question 45

To what extent do you agree or disagree that, as all lawyers providing legal services will be regulated – entity regulation should engage only those organisations who employ lawyers where those organisations are providing legal services for a profit – with the exclusion that when that legal service is in the context of an organisation whose main purpose is not to provide a legal service (for example banking) then regulation would remain at the level of an individual lawyer only and no entity regulation would apply?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

204. Since it is not proposed that entity regulation would encompass, or impact upon, Advocates, Faculty offers no comment on this.

F. ECONOMIC CONTRIBUTION OF LEGAL SERVICES

Question 46

To what extent do you agree or disagree that the Scottish Government should commission or facilitate a baseline study to identify the current quantum of the sector's contribution

to the economy and to identify those niches in the global market where we might target our efforts?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

205. Faculty strongly agrees that the Scottish Government should commission or facilitate a baseline study to identify the current quantum of the sector's contribution to the economy and to identify those niches in the global market where we might target our efforts.

206. Faculty would always encourage the promotion and adoption of Scots law as the governing law, and the prorogation of the exclusive jurisdiction of the Scottish courts, in both public and private sector procurement and other contractual contexts. In its current form, the Scottish legal system has much to offer litigants world-wide, in terms of speed of litigation, value for money, availability of expertise and dependable and high-quality adjudication. Faculty is confident that a baseline study would confirm the sector's contribution to the economy, and also agrees that such a study would assist in identifying target areas for development in the global litigation market.

PART 4: COMPLAINTS AND REDRESS

A. COMPLAINTS PRINCIPLES AND OBJECTIVES

Question 47

To what extent do you agree or disagree that there should be a single gateway for all legal complaints?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

207. Faculty mostly disagrees that there should remain a single gateway for all legal complaints. For the reasons set out earlier in this paper, the better course, in Faculty's view, would be for jurisdiction over all complaints against Advocates (whether relating to service or conduct) to be returned to Faculty under an efficient and proportionate self-funded and self-regulatory system. That would allow for a single point of contact for consumers in respect of all and any aspects of criticism or complaint that may be raised against Advocates. The modest volume of complaints against Advocates would allow all complaints to proceed to investigation immediately and for all complaints to be investigated to the full extent necessary to enable a fair and principled decision to be made.

208. If the gateway model is to be retained, Faculty's view is that the SLCC should remain the gateway for complaints against Advocates, with an ability to reject complaints as time-barred, premature, manifestly unfounded or vexatious. However, once past that initial sift, all complaints should be passed to Faculty for investigation. That will be a simpler, quicker and cheaper model which allows for higher-quality decision making than exists under the present hybrid system operating as between

Faculty and the SLCC, or could reasonably be anticipated to exist under any newly established external statutory regulator.

Question 48

Dependant on the regulatory model take forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, where a complaint is generated by an external complainer such as a client, or non-client?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

209. Faculty strongly agrees that it should maintain a role in the handling of all complaints against Advocates. Faculty's view is that jurisdiction over all complaints against Advocates should be returned to Faculty. Reference is made to the answer to question 47 above.

Question 49

Dependant on the regulatory model take forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, with regard to the investigation and prosecution of regulatory compliance issues?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

210. Faculty strongly agrees that it should maintain a role in the handling of all complaints against Advocates. Faculty's view is that jurisdiction over all complaints against Advocates should be returned to Faculty. Reference is made to the answer to question 47 above.

Question 50

From the complaint issues below please give a preference between the options a) an independent body or; b) a professional regulatory body; who you think should investigate each of the following:

- Service
- Unsatisfactory conduct
- Professional misconduct

Please give reasons for your answer.

211. Faculty considers that it should maintain a role in the handling of all complaints against Advocates, including the investigation of all complaints about service or conduct. Reference is made to the answer to question 47 above.

B. REDRESS

Question 51

To what extent do you agree or disagree that there should be a level of redress for all legal complaints, regardless of regulated activity?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

212. Faculty strongly agrees that there should be a level of redress available for all legal complaints arising from all forms of regulated activity. However, Faculty strongly disagrees that any scheme of redress should disregard the nature of the regulated activity undertaken by the subject of the complaint.
213. Any effective and fair system of redress must recognise the role and degree of responsibility undertaken by the subject of the complaint in the matter which has given rise to it. That requires any system of redress to recognise the fundamental distinction between the roles of Advocates, solicitors and others authorised to conduct regulated activities. In particular, it requires any system of redress to recognise that Advocates tend to have responsibility only for certain aspects of a particular client matter (e.g., for the conduct of particular parts of court proceedings). For these reasons, any effective and fair system of redress cannot safely disregard the nature of the regulated activity which gives rise to a complaint.

C. DISCIPLINE TRIBUNAL

Question 52

To what extent do you agree or disagree that there should be a single Discipline Tribunal for legal professionals, incorporated into the Scottish Courts and Tribunals Service?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

214. Faculty strongly disagrees with this recommendation, for the reasons set out above and here.
215. Faculty currently operates a Discipline Tribunal under the delegated authority of the Court. This Tribunal, chaired by a retired judge, whose independence is, as a

former Senator, beyond question, comprises two members of Faculty and three laypersons, with the Chairman holding the casting vote, thus ensuring that there is a clear majority made up of persons who are not practising members of Faculty. Any hearings of the Disciplinary Tribunal must be held in public. The decisions of the Tribunal are published and made available for inspection in respect of any complaint that is upheld. This is all done at no cost to the public purse.

216. It should be borne in mind that admission to the office of Advocate in the Supreme Courts has been delegated by the Court to Faculty, insofar as Faculty prepares intransits for admission. It would seem paradoxical for the Court to operate a disciplinary function having delegated admission to Faculty. Moreover, it would always be open to the Court to refer an individual Member of Faculty in respect of any disciplinary matter, and it would seem at odds with natural justice if the Court could ever be complainer, judge and jury in such a situation.

D. COMPLAINTS BUDGET

Question 53

To what extent do you agree or disagree that any future legal complaints model should incorporate the requirement for the complaints budget to require the approval of the Scottish Parliament?

- **Strongly agree**
- **Mostly agree**
- **Mostly disagree**
- **Strongly disagree**

Please give reasons for your answer.

217. Faculty mostly agrees with this recommendation, on the basis that any complaints budget requires public scrutiny before the allocation of any funds towards it takes place.

218. This is against a background, however, where the complaints procedure as operated by Faculty is operated currently at no cost to the public purse. The return of so called “service complaints” to Faculty’s complaints and discipline regime would take place at no cost to either the public purse or to any individual member complained about.

Question 54

219. Faculty notes that, perhaps in error, question 54 asks different questions about Model 1, the Robertson report recommendation, and the other models. Faculty wishes to make clear that the same principles and objectives apply to each model and has answered on that basis.

From the options listed how important do you think each of the following principles and objectives are for any future regulatory model?

Options

- 1. Very important**
- 2. Somewhat important**
- 3. Not important**
- 4. Should be removed**

- **Uphold the rule of law and the proper administration of justice.**

220. Very important. This is one of the fundamental purposes of any regulatory model.

- **Provide access to justice.**

221. Very important. This is one of the fundamental purposes of any regulatory model

- **Operate for the public interests (offer accountability in protecting the public and consumer interest).**

222. Very important. This is one of the fundamental purposes of any regulatory model

- **Have a high degree of public confidence and trust, embedding a modern culture of prevention, continuous quality improvement, quality assurance and compliance. Promote improvements, use information and evidence gathered to identify sector-wide issues.**

223. Very important.

- **Work collaboratively with consumer and legal professional bodies as appropriate. Encourage companies to act on complaints data. Publish guidance, and provide training to help firms and the sector improve complaint handling. Provide support for 1st tier complaints management (be able to provide guidance on handling).**

224. Somewhat important.

- **Embed the better regulation and consumer principles throughout its areas of responsibility.**

225. Very important.

- **Accessible, remove barriers to people seeking the redress they are entitled to. There should be a single gateway and investigation for complaints. 3rd party complaints would be allowed.**

226. Very important. This question combines a number of different issues. Faculty agrees that any regulatory model requires to be accessible and considers that there should be a single gateway and investigation for complaints, hence its desire to see the return of so called “service complaints” to its ambit.

- **Effective, able to resolve consumer complaints and have adequate enforcement powers to hold providers to account when things go wrong.**

227. Very important.

- **Transparent, publish a range of information including decision criteria, complaints data and outcomes of cases. Be able to advise on trends and issues emerging from 1s tier complaints.**

228. Very important.

- **Have an increased focus on independence and accountability. Provide an impartial service to both consumers and providers. Accountable, to a competent authority or a regulator. Undertake periodic reviews on the effectiveness of ADR schemes and publish the results.**

229. Very important. Again this question combines a number of different issues. Faculty strongly agrees that any regulatory framework must be independent and accountable.

- **Enable early consensual resolution, which would include mediation as a key process should be built upon.**

230. Somewhat important.

- **Provide prompt resolution, proportionate to the complexity of the complaint.**

231. Very important.

- **The levy for entities should be on a financial turnover basis.**

232. Should be removed.

- **Appeals process simplified whilst adhering to ECHR. No appeal from the Complaints Ombudsman, but the ability to appeal to the Court of Session in relation to misconduct.**

233. Should be removed.

- **There should be no appeal in terms of the amount of compensation awarded, similar to other professions.**

234. Somewhat important.

Model Options 2 and 3

- **There should be a Memorandum of Understanding between the complaints body and the professional bodies on cross-referring cases.**

235. Not important.

- **The presence of conduct issues should not delay, complicate the process or disadvantage the outcome of service complaints for consumers.**

236. Very important.