

**RESPONSE BY THE FACULTY OF ADVOCATES**  
**TO AMENDMENTS PROPOSED BY TESS WHITE MSP**

1. Faculty is surprised and disappointed to see that, in amendments proposed by Tess White MSP on 15 January 2025, there is resurrected a hare that was considered to have been caught and shot long ago: namely, the proposal that the Scottish Legal Complaints Commission should be charged with investigating and determining all complaints, both services and conduct, made against legal professionals in Scotland.
2. This has been debated at length, indeed seemingly interminably, since the Robertson review in 2017. The proposal has met with little support. It has been dismissed as unhelpful, impracticable and costly by Faculty, by the Law Society and by the Senior Judiciary. Doubtless for that reason, it finds no place in the Bill as presented. However, Ms White seeks to resurrect the proposal. For the reasons that follow, Faculty remains vigorously opposed to this.
3. 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.<sup>1</sup> 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<sup>2</sup>, and the independent report commissioned from the Institute for Law, Economy and Global Governance,

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<sup>1</sup> '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>

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

University of Manchester, in respect of the economic organisation of Faculty<sup>3</sup>.

Accordingly, the substantive comments that follow should be read against that background.<sup>4</sup>

4. Before turning to the detailed reasons for opposition, it may be helpful to set out the background to Faculty of Advocates, and the role it plays in the administration of justice in Scotland in 2025.
5. Faculty of Advocates is the professional body to which Advocates<sup>5</sup> 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.
6. 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.
7. The [then] Lord President observed recently<sup>6</sup> 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

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

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

<sup>5</sup> often referred to as "Counsel", and to be distinguished from "Solicitor Advocates", a term commonly used to describe Solicitors with Extended Rights of Audience

<sup>6</sup> 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>.

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”<sup>7</sup>.

8. 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.
9. This regulatory structure was broadly replicated in the Legal Services (Scotland) Act 2010<sup>8</sup>. 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.
10. 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 President or by Faculty. The Court has, by Act of Sederunt<sup>9</sup>, delegated those functions

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<sup>7</sup> Remarks on the introduction of the new Dean of Faculty, 5 February 2014

<sup>8</sup> ss. 119-122

<sup>9</sup> Act of Sederunt (Regulation of Advocates) 2011

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.

11. 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.

12. An Advocate is required to fulfil his or her responsibilities independently of any other person. An Advocate is instructed on behalf of a litigant<sup>10</sup>, 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.

13. As the [then] Lord President has recently observed<sup>11</sup>:

“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

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

<sup>11</sup> *Taylor Clark Leisure plc v. HMRC* 2015 SC 595, para. 22

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."

14. 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 force<sup>12</sup>. 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.<sup>13</sup> Although it is rarely formally invoked, it is part of the culture of

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<sup>12</sup> 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.

<sup>13</sup> 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

practice at the referral bar. Solicitors (including solicitors with extended rights of audience: “solicitor-advocates”) are not bound by the cab rank rule.

15. 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 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.

16. 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 observed<sup>14</sup>, in terms which are equally applicable in Scotland,

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part of a liberal legal system”; *Medcalf v. Mardell* [2002] UKHL 27, para. 52 per Lord Hobhouse of Woodborough.

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

“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.”

17. The same judge went on to identify<sup>15</sup> 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

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<sup>15</sup> *Ibid*, para. 30

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”.

18. 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 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.

19. All Advocates are members of Faculty of Advocates. 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.

20. 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 (lay, non-Advocate) Chief Executive Officers 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.

21. 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.

22. 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 intrants 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 intrant is required to complete successfully the Scheme for Assessment of Devils, which requires the intrant 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.<sup>16</sup>

23. 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 intrants free of charge. During that period, the intrant 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 delivered by experienced Advocates, among them some of the leaders of the profession. During the remainder of devilling, the intrant shadows one or more experienced Advocates

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

("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.

24. 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.

25. Faculty promulgates: (a) a Guide to Professional Conduct and other guidance on matters of professional practice; and (b) a Complaints and Disciplinary Procedure.

26. The Guide to Professional Conduct<sup>17</sup> 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)<sup>18</sup>, 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.

27. 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

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<sup>17</sup> Guide to the Professional Conduct of Advocates (5<sup>th</sup> edn, October 2008) available at: [www.advocates.org.uk/media/1417/guide-to-conduct-fifth-edition.pdf](http://www.advocates.org.uk/media/1417/guide-to-conduct-fifth-edition.pdf)

<sup>18</sup> The umbrella organisation for European Bars and Law Societies.

way of five-yearly individual, peer-review assessments of all, including the 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.

28. 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.
29. 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.<sup>19</sup> Faculty is in constant dialogue with the SLCC to ensure good practice in complaints handling.
30. 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

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<sup>19</sup> Faculty of Advocates Disciplinary Rules 2015, available at: <http://www.advocates.org.uk/media/1916/disciplinaryrules2015.pdf>

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.

31. 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 may himself 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 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.

32. The collegiate nature of Faculty creates a professional environment in which, although Advocates are sole practitioners in competition with one another, good practice and experience may be shared. 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.

*Monitoring compliance, making complaints and obtaining redress.*

33. 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.

34. 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 so<sup>20</sup>, and decisions are published and made available for inspection in respect of any complaint that is upheld, or upon

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<sup>20</sup> Disciplinary Rules 2015, rule 55

the request of the Advocate concerned where the complaint is dismissed<sup>21</sup>. Additional publicity may be given to the complaint where the circumstances justify it.<sup>22</sup> As has been discussed, both the Complaints Committee and the Discipline Tribunal are made up of 50% lay persons, wholly independent of the Faculty and its members. The Tribunal is always chaired by a retired judge, whose independence is unquestionable.

35. 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 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 Rules provide for the imposition of fines and/or compensation up to £15,000 in respect of findings of “unsatisfactory professional conduct” or “professional misconduct”.<sup>23</sup> 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.

36. The existing disciplinary regime is entirely funded by Faculty. There is no cost to the public purse or to consumers. The suggestion that all of the foregoing should be passed to the Scottish Legal Complaints Commission is not something that has been costed, in any way. The only thing that can be said in this regard with any certainty is that this

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<sup>21</sup> Disciplinary Rules 2015, rule 71

<sup>22</sup> Disciplinary Rules 2015, rule 73

<sup>23</sup> Disciplinary Rules 2015, rules 25 and 26 (Imposition of penalties by the Complaints Committee) and rule 63 (Imposition of penalties by Disciplinary Tribunal)

proposal would come at a significant, yet unknown, cost: it plainly cannot be any cheaper than the current system (which Faculty provides for free).

37. 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, at no cost to the public purse, and ought to be maintained.

38. The proposal to pass all of the foregoing to the SLCC is yet more alarming when one considers the history of that body since its inception.

39. 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 Tribunal<sup>24</sup>. Moreover, in Faculty's experience, and having regard to the published decisions of the courts in professional regulatory matters, there has been no

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<sup>24</sup> 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.



equivalent surge in appeals from comparable regulatory bodies dealing with professions other than the law.

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

41. None of the above, however, supports the conclusion that there ought to be a single regulator for *all* legal complaints. 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.

42. Each year since inception of SLCC, the number of complaints involving counsel has been modest, for reasons that are clear:

- a. Advocates do not carry out any transactional conveyancing or administrative executry work, which is 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 practice 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.

43. 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.<sup>25</sup> 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.

44. All conduct complaints have been, or are currently being, investigated and dealt with by Faculty itself, according to the disciplinary rules outlined above.

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<sup>25</sup> *Bartos v Scottish Legal Complaints Commission* 2015 SC 690

45. 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. Faculty has also introduced a system in which complainers have access to free representation by counsel before the Complaints Committee or the Discipline Tribunal (the counsel are paid for this work, but by Faculty: there is no cost to the complainer him- or herself). Together these features produce an extremely high quality and efficient process for the resolution of complaints.

46. 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 the disciplinary procedures adopted by Faculty could be recreated in the event of this jurisdiction being passed to the SLCC. 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 appointed<sup>26</sup>. 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.

47. 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

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<sup>26</sup> Cf the concerns raised by the Inner House in *Bartos*, cited earlier, at [90]

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.

48. 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.

49. The Bill as it stands leaves the current system in place, subject always to the direct (and again entirely independent) oversight of the Lord President. That drafting was well-advised and arrived at after lengthy debate and consideration of the issues. The suggestion that all of that should be thrown away by way of a Stage 2 amendment is, with respect, wholly unwise.
50. Most worryingly, this proposal would mean that the SLCC would alone be responsible for the discipline of Advocates. That 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 body which is itself answerable to the Executive. 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 forms a bulwark against Executive overreach. It cannot be sacrificed on the altar of perceived modernisation. The Judiciary made this point forcibly in the earlier consultation on the Bill. Ministers plainly listened to these warnings. It is hoped that Ms White will do the same.
51. Of less concern, but still deeply worrying, would be the inevitable loss of specialist knowledge that would be inherent in this proposal. 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 worrying lack of insight into the actuality.

52. In closing, it is worth stepping back and considering what this amendment would entail, were it to be passed. That would involve, at least, the following:

- a. There would need to be new rules for conduct complaints considered by SLCC. This is not catered for in the proposed amendments.
- b. SLCC would need to have a far greater degree of expertise in the knowledge of the profession of Advocate than is currently the case. It is hard to see how they could do that without recruiting Advocates to consider complaints.
- c. This would require to be funded. As discussed above, there has been no attempt to cost any of this. It would inevitably require a significant increase in the levy paid by practitioners to the SLCC. That will, in turn, lead to higher fees charged to clients.
- d. At present, complainers are entitled to free representation by counsel before the Complaints Committee and the Discipline Tribunal. There would be no basis for Faculty to provide such a facility for complaints to the SLCC.
- e. If Faculty's role as regulator is removed, it would become more akin to a Members' Association, in which the primary interest would be representing the interests of its Members rather than, as things stand, maintenance of standards and improvements in the administration of justice.
- f. As has been stressed by the Judiciary, the proposal would imperil the independence of the legal profession. The current system ensures that regulation of the profession is actually and as a matter of perception independent of Government. Handing regulation to a quango which is answerable to Government or to Parliament sacrifices that independence.

- g. Faculty has spent a significant amount of time and money in the last year in redrafting the entirety of its disciplinary rules, with the assistance of a Parliamentary draughtsman. The redrafting exercise was designed to improve the current system by minimising delays and improving efficiency. It would not be possible simply to transfer those new rules across wholesale to the SLCC. Significant further time, and cost, would be needed for that exercise.
- h. As things stand, complainers have their cases decided by independent and skilled KCs (at the Complaints Committee stage) or by a retired judge (at the Tribunal), in each instance sitting with experienced lay persons appointed by the First Minister on the recommendation of the Lord President. It is simply inconceivable that the SLCC could replicate that expertise. A bespoke and expert determination system would be scrapped and handed to something that would inevitably be vastly inferior.
- i. There is simply no benefit to any of this. There is no reason to think that passing conduct complaints to the SLCC would result in a system that is quicker (standing the delays experienced with SLCC), or cheaper (given that the current system is cost-free), or better for the complainer (who currently has, but would lose, the right to free representation).

53. Doubtless for these reasons, the proposal to pass all complaints to the SLCC seemed to have been abandoned long ago. It should not be resurrected. Ms White's amendment is doubtless well-intentioned, but it is extremely ill-advised.