

**RESPONSE BY THE
SENIOR JUDICIARY TO**

**“Fit for the Future –
Report of the Independent
Review of Legal Services
in Scotland”**

by

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Executive Summary

Introduction

1. An independent legal profession is central to the operation of the rule of law; the protection of the public from the arbitrary abuse of power by the state depends upon it. It is therefore imperative that it is protected by proper constitutional safeguards specifically aimed at securing the impartial administration of justice.
2. It is for that reason that the recommendations made by Esther A Robertson in her report “Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland”¹ are of grave concern. Put shortly, the Robertson Report’s failure to recognise the constitutional importance of the independence of the legal profession, and in particular the role of the Lord President, as Head of the Scottish Judiciary, and the Court of Session in safeguarding that independence, means that any attempt to implement the report’s recommendations would represent a serious threat to the rule of law and, by extension, our democracy.
3. The Robertson Report conflates what it sees as a need to reform the system for handling consumer complaints with a need to overhaul the entire system of regulation for the legal profession. Whilst consumer complaints are an important part of regulation, they are only one part of a much larger system. Such complaints should be handled efficiently and with appropriate involvement from outside the profession. The whole system of regulation should, however, remain the responsibility of the Lord President and the Court of Session acting as the third pillar of state authority, independent of the executive and the legislature.

What is “independence” and why is it important?

4. “Independence is not provided for the benefit or protection of judges or lawyers as such. Nor is it intended to shield them from being held accountable in the performance of their professional duties and to the general law. Instead, its purpose is the protection of the people, affording them an independent legal profession as ‘the bulwark of a free and democratic society’”²

¹ A copy of the Report can be found at <https://www2.gov.scot/Resource/0054/00542583.pdf>

² The Hon Justice Michael Kirby AC CMG citing Debeljak, J *Judicial Independence in the Modern Democratic State* (1999) 74 Reform 35 at 38 in a speech given at the Law Council of Australia Presidents of Law Associations in Asia Conference, 20 March 2005 (a copy of the speech is available at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_20mar05.html)

5. In this context, "independence" means freedom from the executive and legislative arms of the state. The doctrine of the separation of state powers requires that the judiciary, as the third organ of the state, is independent of the executive and legislature. This is necessary to avoid the "crucial evil" that is the "monopolisation of the powers of the state in too few hands, with all that that implies in terms of loss of liberty."³ The need for the wider legal profession to be independent is connected to the independence of the judiciary, and arises out of the unique societal role performed by those who practise law in a modern democracy.
6. A democracy envisages "a community where citizens are held equal before the law, a government by consent of the people, for the people."⁴ At the heart of any democracy is the rule of law: the principle that "everyone is subject to the law, which is public and which should be determined by an independent court system."⁵ It is the duty of all regulated legal practitioners to assist the courts in upholding the rule of law by advancing the interests and protecting the rights of those whom they represent, no matter how unpopular or unpleasant the client or his cause. In order to comply with that duty, lawyers must be free to act on behalf of such clients and in such cases, challenging the state where necessary, without fear of interference or disapproval, or of persecution or worse by the government or its agencies. This important role in acting for the citizen against the state is what sets lawyers apart from other professionals such as architects, accountants, teachers, doctors and dentists.
7. It is because of the need for independence that all regulated legal practitioners are officers of the court (whether or not they appear there), owing duties to the court and to the public. It is also why regulated legal practitioners are subject to particular rules about their conduct and discipline. These rules are specifically designed to ensure that they act impartially at all times. These duties and rules extend to all members of the profession. They inform every piece of advice given to a client; whether in relation to a criminal charge, a house purchase or the drafting of a will.
8. These duties and rules provide the public with the confidence that any legal advice or service which they obtain will be based on an impartial assessment of the situation and the applicable law and offered free from any personal bias or external influences, including interference from the state. That is particularly important where members of the public are involved in litigation, including tribunal applications, to which the state is a party. It is imperative that individual citizens can be confident that they will be represented by a lawyer who is independent of the state. Even where, as in the case of

³ Munro, J, *Law Basics Constitutional Law*, Thomson W. Green, 2005 (3rd edition)

⁴ Denham J, S, *The Diamond in a Democracy: An Independent, Accountable Judiciary*, (2001) 5TJR 31

⁵ *ibid*

a public defender, the lawyer is paid by the state, independence is guaranteed by virtue of the fact that regulation of public defenders is in the hands of the court.

9. The independence of the legal profession serves to protect the independence of the judiciary; itself a central tenet of the rule of law. The judiciary, as one of the three arms of state authority in a democracy, requires “to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.”⁶ It is, therefore, with the judiciary that responsibility for upholding the rights and freedoms of each individual citizen ultimately rests.
10. However, the judiciary is also the weakest branch of state power. It holds “neither the sword nor the purse”⁷. For judges to achieve their purpose as sworn protectors of the rights and freedoms of individual citizens, they must be able to rely upon those who come before them to present cases fairly, openly and impartially; ensuring that all relevant material bearing upon an issue is made available. The judges themselves must, of course, be able to apply the law to cases impartially, and independently of any other interests. The judicial oath sworn by judges in Scotland requires that they “do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill-will.”⁸ This is secured, at least in part, by ensuring that judges are drawn from the ranks of a robustly independent profession. It follows that the independence of the legal profession and that of the judiciary are inextricably linked. One cannot exist without the other.
11. It is for all of these reasons that the independence of the legal profession, as guardian of the rule of law and of democracy, must be protected in any scheme proposed for the regulation of the profession.

The Robertson Report Recommendations

12. The most surprising recommendation made by the Robertson Report is that a new, single regulator for the entire legal profession should be established, relieving the professional bodies, in particular the Law Society of Scotland and the Faculty of Advocates, of their regulatory functions.
13. In the first place, the report fails to recognise the potential negative effects that such a move will have on the legal profession, and its ability to comply with its duties to the court and to the public. Of greater concern is the failure of the Robertson Report to

⁶ Consultative Council of European Judges, *Magna Carta of Judges (Fundamental Principles)*, Strasbourg, 17 November 2010

⁷ see *supra* note 4 at 45

⁸ Promissory Oaths Act 1868 s.4

recognise the importance of the independence of the legal profession and the need to protect that independence.

14. The concept of regulation encompasses many different elements. These include entry to the profession, continuing education and training, conduct and practice, finance and complaints and discipline. Whilst that may be so in relation to all professions, the legal profession differs from others because of the particular role performed by lawyers in a democratic society, protecting the citizen from the arbitrary abuse of power by the state. That role requires that, in determining how best to regulate the legal profession, the independence of the profession must be the paramount consideration. This is true in respect of each individual component of the regulatory system, from education and training to complaints and discipline.
15. In the current scheme of regulation, the independence of the profession is protected by the various functions and responsibilities which are conferred upon the Lord President of the Court of Session. The profession does not regulate itself. It is regulated by the Lord President, acting, in his capacity as Head of the Scottish Judiciary, as the third pillar of state authority and independently of the executive and legislature. Whilst the Robertson Report obliquely acknowledges or, perhaps more accurately, refers to the role played by the Lord President (and, to a certain extent, the Court of Session) in the regulation of the legal profession, it fails to recognise the nature of that role and the fundamental democratic principles which underpin it. As a result, the “single independent regulator” proposed by the Robertson Report, accountable as it would be to the Scottish Parliament and Audit Scotland, would serve only to destroy the independence of the legal profession, and in turn impinge upon the independence of the judiciary.
16. This fundamental failing indicates a lack of understanding of the constitutional importance of the functions exercised by the Lord President and of the role of regulated legal practitioners in society. This might have been avoided had the true extent of the remit of the Robertson review been made clear in the “Call for Evidence”, and a proper consultation, including with the Lord President, on these issues undertaken. That has not taken place. As a result, it is no exaggeration to say that the recommendations proposed by the Robertson Report present a clear threat to the independence of the legal profession and, as a consequence, the rule of law.

Response to the Robertson Report

17. This response to the Robertson Report is intended to provide an overview of the functions presently carried out by the Lord President in pursuit of the preservation of the independence of the legal profession. It is important to note, however, that the Lord

President's role is not easily summarised. His duties and powers are spread across a multitude of legislative provisions covering all aspects of the profession. What follows should not, therefore, be taken to be exhaustive.

18. As the Lord President's regulatory functions are best understood in the context of his role as the Head of the Scottish Judiciary, the response will, first, consider the legislative provisions relating to that role, before looking at the specific functions and responsibilities that he has in relation to practitioners, as well as the functions performed by the Court of Session in that regard. The implications of the regime proposed by the Robertson Report for the legal profession and, in particular, for its ability to provide quality legal services to members of the public, will briefly be covered. It is hoped that, following on from that review, the fundamental deficiencies in the Robertson Report will become clear.

The Lord President as Head of the Scottish Judiciary and Scottish Tribunals

Judiciary and Courts (Scotland) Act 2008

19. The 2008 Act sets out the statutory guarantee of continued judicial independence.⁹ It enshrines in statute the office of the Lord President as the Head of the Scottish Judiciary¹⁰ and confers a number of important functions and responsibilities upon him in connection with the Scottish Courts and judiciary.¹¹ It is significant that it is the Lord President who has the responsibility of representing the views of the Scottish judiciary to the Scottish Parliament and Scottish Ministers, and of laying before the Scottish Parliament written representations on other matters that appear to him to be of importance in relation to the Scottish judiciary or the administration of justice.¹²

Tribunals (Scotland) Act 2014

20. This Act provides for the establishment and regulation of the Scottish Tribunals. At section 3, it has a similar guarantee of independence in relation to the Scottish Tribunals as is set out in the 2008 Act in respect of the Scottish Courts.
21. In terms of the 2014 Act, the Lord President is the Head of the Scottish Tribunals¹³ and his responsibilities and functions in that regard largely mirror those related to the Scottish Courts.¹⁴ Whilst the Lord President can, and to a certain extent does, delegate some of those responsibilities and functions to the President of the Scottish Tribunals (also a judge in the Court of Session), it remains the responsibility of the Lord President alone to represent the views of the membership of the Scottish Tribunals to the Scottish Parliament and the Scottish Ministers, and to lay before the Scottish Parliament written representations on matters that appear to him to be of importance in relation to the Scottish Tribunals, including those relating to the administration of justice.¹⁵

The Lord President and the Legal Profession

22. In light of his position as Head of the Scottish Judiciary and Head of the Scottish Tribunals, both of which benefit from a statutory guarantee of independence, it is not

⁹ Judiciary and Courts (Scotland) Act 2008 s.1

¹⁰ *ibid* s.2

¹¹ A non-exhaustive list of these functions is included at Appendix 1.

¹² See *supra* note 9 s.2(b) and (c)

¹³ Tribunals (Scotland) 2014 Act s.2

¹⁴ A non-exhaustive list of the more notable functions of the Lord President in relation to the Scottish Tribunals is included at Appendix 1.

¹⁵ See *supra* note 13 s.6

difficult to understand why the Lord President is given a significant role in safeguarding the independence of the wider legal profession. The provisions of section 20A of the 2008 Act which set out the rules on eligibility for the role of judge of the Court of Session (save for those, including advocates, who qualify under article six of the Treaty of Union) provide an example of why that is. Those provisions, which themselves may appear unremarkable, demonstrate how the independence of the profession strengthens and protects the independence of the judiciary, and by extension the rule of law.

23. Before turning to look at the specific functions of the Lord President in relation to the profession, it is important first to recognise that his role is not an accident of history. It has developed over time to reflect the importance of judicial independence and that of the legal profession. It is reiterated and enhanced in modern statutes, safeguarding the public from the potential abuse of power by the state.

Regulation of Advocates

24. In the first place, it is important to acknowledge that advocates hold a public office, to which they are admitted by the Court of Session. As is set out in the Legal Services (Scotland) Act 2010, only the Court of Session has the power to admit an individual to, or remove that individual from, the office of advocate.¹⁶ This is, again, no accident and reflects the important societal role played by advocates, and the need for them to exercise independence and impartiality when carrying out their functions and responsibilities.
25. The 2010 Act provides that the Court of Session is responsible for prescribing the criteria and procedure for admission to (and removal from) office¹⁷, and for regulating the professional practice, conduct and discipline of advocates.¹⁸ Those responsibilities are exercisable on the Court's behalf by the Lord President or the Faculty of Advocates in accordance with such provisions as the Court may make.¹⁹ Professional rules are, if made by the Faculty, of no effect unless and until they are approved by the Lord President. They cannot be revoked unless the Lord President has so approved.²⁰

¹⁶ Legal Services (Scotland) Act 2010 s.120(1)(a)(i)

¹⁷ *ibid* s.120(1)(a)(ii)

¹⁸ *ibid* s.120(1)(b)

¹⁹ *ibid* s.120(2)(a) and (b)

²⁰ *ibid* s.121(2)(a)

26. Under the current regime, responsibility for the regulation of advocates is delegated by the Court to the Faculty of Advocates²¹; the professional body of which all advocates are members. The Lord President retains an important role in connection with the Faculty's disciplinary procedures. In addition to his responsibility of approving the Faculty's disciplinary rules, it is also incumbent upon him to appoint the panel of chairmen (or women) to the Disciplinary Tribunal.²² In the Faculty's current 'Guide to the Professional Conduct of Advocates', much of the guidance as to the rights and duties of an advocate is informed by precedent and stresses the paramount importance of an advocate retaining his or her independence and observing his or her duties to the court.²³
27. It is open to the Court to make different provision for the regulation of advocates. It follows from the Court's continued delegation of that function that there requires to be a considerable degree of trust between the Court and the Faculty. That trust is, in part, maintained by the Faculty's recognition of the need for an advocate to uphold the ethical standards required of public office, and by the rule of law. It is also maintained by an acknowledgement among the profession that the Court will take action to protect the fundamental principle of the rule of law, which in turn protects the rights of individual citizens, where it appears to be under threat from falling standards. The Court can, and does, for example, make observations from time to time in directions, practice notes and in its written judgments. The profession must heed those observations.
28. The importance of these safeguards is most clearly evidenced by the continuing existence of the "cab-rank rule". As the Faculty set out in their response to the "Call for Evidence"²⁴, the "cab-rank rule" prohibits any advocate from refusing instructions without good reason in any case where he or she have been offered a reasonable fee. The rule operates to ensure that the rights of all citizens are protected before the courts, no matter how unpopular the individual or the case may be. This is fundamental in preserving the rule of law. It is difficult to imagine how the continued existence of such a rule, and the consequences that flow from it, could be guaranteed in the regulatory

²¹ Act of Sederunt (Regulation of Advocates) 2011

²² Faculty of Advocates Disciplinary Rules 2015 at paragraph 77 – the chair must be a retired member of the Judicial Committee of the House of Lords or Justice of the UK Supreme Court, or a retired Senator of the College of Justice, or other appropriate person, appointed by the Lord President for three years or such other period as may be necessary to achieve final disposal in terms of the rules.

²³ Faculty of Advocates 'Guide to the Professional Conduct of Advocates, Fifth Edition, October 2008 available at <http://www.advocates.org.uk/media/1417/guide-to-conduct-fifth-edition.pdf>

²⁴ Response by the Faculty of Advocates to Independent Review of the Regulation of Legal Services Call for Evidence - <http://www.advocates.org.uk/media/2742/final-faculty-response-roberton-review.pdf>

scheme proposed by the Robertson Report standing the proposed new regulator's accountability to the Scottish Parliament and Audit Scotland.

Regulation of Solicitors

Solicitors Generally

29. The legislative provisions relating to the regulation of solicitors are primarily located in the Solicitors (Scotland) Act 1980 and the Legal Services (Scotland) Act 2010.
30. Responsibility for the regulation of solicitors rests mainly with the Council of the Law Society of Scotland, or more particularly, with the independent regulatory committee which the Council requires to create.²⁵ The purpose of the regulatory committee is clear: to ensure that the Council's regulatory functions are exercised independently of any other person or interest, and properly in other respects, with a view to maintaining public confidence.²⁶ The Council is prohibited from "unduly" interfering with the regulatory committee's business.²⁷ Thus, the notion of independence from external influences and considerations is preserved at the heart of the regulatory framework for solicitors.
31. The functions of setting the standards of qualification, education and training, admission to the profession, keeping the roll and other registers, administering the guarantee fund and making regulatory rules, all fall within the remit of the Council²⁸, or more particularly, its regulatory committee²⁹. Individuals are, however, formally admitted as solicitors by the Court of Session. The 1980 Act provides for a significant overarching role for the Lord President in the regulation of this branch of the profession. The following examples from the 1980 Act offer a flavour of the nature of his role:-
- the Council must obtain the Lord President's agreement before making regulations for the practical training of solicitors, their attendance at a course of legal education and the passing of exams (s.5);
 - the Lord President has a right of approval in relation to rules concerning rights of audience in the Court of Session and High Court of Justiciary etc, including rules as to the conduct of persons who have obtained such rights (s.25A(8) read with s.34(3));

²⁵ Solicitors (Scotland) Act 1980 s.3B

²⁶ *ibid* s.3B(2)(a) and (b)

²⁷ *ibid* s.3B(3)(b)

²⁸ *ibid* s.3F

²⁹ By virtue of the operation of section 3B of the 1980 Act

- the Lord President may request that a solicitor advocate be suspended from exercising his/her extended rights of audience where a complaint has been made alleging professional misconduct by that solicitor advocate in the exercise of those rights, and on receipt of such a request the Council “shall” suspend the solicitor advocate (s.25A(14));
- the solicitors’ conduct and practice rules and accounts rules shall have no effect unless the Lord President has, after considering any objections which he thinks relevant, approved the rules so made (s.34(3));
- rules as to professional indemnity must be made “with the concurrence of” the Lord President and a failure to comply with these rules may be treated as professional misconduct or unsatisfactory professional conduct (s.44(1) and (4));
- rules in relation to the making, hearing and determining of complaints made to the Scottish Solicitors’ Discipline Tribunal, certain appeals, inquiries and certain appeals under sections 20, 20ZB and 20ZE of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, and generally as to the procedure of the SSDT, require the concurrence of the Lord President (s.52(2));
- the Lord President appoints solicitor members to the SSDT on the recommendation of the Council, and non-lawyer members after consultation with the Scottish Ministers (schedule 4 para 1A(a)&(b)); and
- the Lord President may, from time to time, terminate the appointment of any member of the SSDT and fill the vacancy in accordance with the Act (schedule 4 para 3).

Solicitors acting within Licensed Providers of Legal Services

32. The opening up of the legal services market in Scotland for the first time to businesses run by solicitors and non-solicitors in partnership presented a potential threat to the independence of the profession and therefore, the rule of law. To counter that threat, a significant role was conferred upon the Lord President in relation to the regulation of the new business models which were provided for by the 2010 Act. The 2010 Act sets out that:-

- before deciding whether a body can become an “approved regulator” in terms of section 6 of the Act, the Scottish Ministers must first consult with the Lord President (s.8) and must not approve the applicant without the Lord President’s approval (s.9);

- the Scottish Ministers are to impose such conditions as are reasonably requested by the Lord President in relation to the “necessary expertise as regards the provision of legal services” of the applicant (s.9(2));
- the Lord President’s agreement must be obtained in relation to any conditions or restrictions imposed upon the applicant regulator by the Scottish Ministers under section 7(2) and (3) (or any variation thereof under section 7(4)) (s.9(3));
- the Lord President’s agreement must be obtained in relation to any amendments to an approved regulator’s regulatory scheme (s.12(4)(b)(i));
- the Scottish Ministers must obtain the Lord President’s agreement before making regulations providing for the internal governance of approved regulators which must relate to the regulatory functions of the approved regulators (s.29(3));
- the Scottish Ministers must obtain the Lord President’s agreement before determining whether to take certain measures against an approved regulator under section 38(4) (s.38(6));
- the Lord President’s agreement must be obtained before the Scottish Ministers can make provision in regulations either for the establishment of a body, or for themselves, to act as an approved regulator (s.44(4)(a));
- the Scottish Ministers must seek the Lord President’s agreement before making regulations which confer additional functions on approved regulators (s.45(2)(a));
- the Scottish Ministers must have the Lord President’s agreement prior to making regulations concerning what is or is not to be regarded as a regulated profession, a professional association, professional activities (or qualifications) or membership of a profession for the purposes of defining “regulated profession” under section 49(3) (s.49(5)(a)); and
- the Lord President must be consulted prior to the Scottish Ministers making provision in regulations regarding the Heads of Legal and/or Heads of Practice or their functions (ss.51(10) and 52(8)).

33. The functions conferred upon the Lord President in the 1980 and 2010 Acts are the modern safeguards that protect the independence of the entire solicitor branch of the legal profession, whether or not those solicitors appear in, or conduct litigation before, the courts. If those functions were to be exercised by another body, such as one accountable to the Scottish Parliament and, therefore, exposed to a heightened degree of risk of being influenced by political considerations or ideals, solicitors could all too

easily become subject (perhaps unwittingly) to the beliefs and interests of those in government at any time.

34. Those most in need of legal services would lose the protection that independence provides. Access to justice, and not just to the courts but to legal advice or services of any kind, for those with unfavourable or unpopular causes or connections could ultimately become non-existent, with potentially catastrophic consequences for our democracy. The difficulty with the scheme proposed by the Robertson Report is that it would, if implemented, considerably increase the risk of exactly that kind of situation arising.

Notaries Public, Conveyancing Practitioners, Executory Practitioners and other Legal Professionals

Notaries Public

35. Admission is, as with solicitors, a matter for the court in terms of the Solicitors (Scotland) Act 1980.³⁰ Under section 59A of that Act, the Council of the Law Society may make rules in relation to the admission, enrolment and professional practice of notaries public. Such rules have no effect unless the Lord President, after considering any representations which he thinks relevant, has approved them.³¹ Failure to comply with the rules may be treated as professional misconduct or unsatisfactory professional conduct.³²

Conveyancing and Executory Practitioners

36. The Lord President retains a right of approval in relation to rules regulating the conduct and practice of conveyancing and executory practitioners registered with the Council of the Law Society of Scotland.³³ Such rules may cover *inter alia* the educational and training requirements for practice and issues concerning complaints.³⁴ A breach of the rules may amount to professional misconduct or unsatisfactory professional conduct.³⁵

³⁰ Solicitors (Scotland) Act 1980 s.57(2)

³¹ *ibid* s.59A(3)

³² *ibid* s.59A(4)

³³ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 ss.17(11A) & 18(10A)

³⁴ *ibid* ss.17(11) & 18(10)

³⁵ *ibid* ss.17(11C) & 18(10C)

Bodies seeking to acquire rights of audience or to conduct litigation

37. In terms of sections 25 to 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, a body may apply to acquire and exercise rights to conduct litigation on behalf of the public and rights of audience. Commercial Attorneys are, to date, the only body to have done so.
38. Any application for such rights must be made to the Scottish Ministers³⁶ and the Lord President³⁷. It falls to the Lord President either to grant or to refuse the application.³⁸ In considering any such application, the Lord President must have regard to the desirability of there being common principles which apply to the exercise of rights to conduct litigation and rights of audience by all practitioners in relation to the court or courts mentioned in the application.³⁹

The Lord President and the Scottish Legal Complaints Commission

39. The Commission was established to operate as the first point of contact for all complaints against lawyers in Scotland. The consumer focus of the Commission is clear from the criteria to be applied by the Scottish Ministers when appointing members. Regard is to be had to the desirability of including those with experience of, and capacity in, “consumer affairs or complaints handling”.⁴⁰ In line with this approach, the majority of the Commission’s members are lay members (including the chair)⁴¹. They are appointed by the Scottish Ministers, albeit after consultation with the Lord President.⁴²
40. On the face of it, the Commission, by virtue of its very purpose and composition, presents a potential threat to the independence of the legal profession and, by extension, the rule of law. However, the legislative framework establishing the Commission includes safeguards to protect against that threat. Those safeguards, which are set out in the Legal Profession and Legal Aid (Scotland) Act 2007, take the form of various functions and powers conferred upon the Lord President, including that:-

³⁶ The legislation continues to refer to the Secretary of State however following devolution the function of the Secretary of State in this respect transferred to the Scottish Ministers.

³⁷ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s.25(1)

³⁸ *ibid* s.26(6)

³⁹ *ibid* s.26(2)

⁴⁰ Legal Profession and Legal Aid (Scotland) Act 2007 schedule 1 paragraph 4(a)(i)

⁴¹ *ibid* schedule 1 para 2(3) and (8)

⁴² *ibid* schedule 1 para 2(2)

- the Lord President must be consulted before any rules are made or varied in relation to the practice and procedure of the Commission (s.32(5)(a));
- the Scottish Ministers must consult the Lord President prior to appointing members thereto (including both lawyer members and non-lawyer members) (schedule 1 para 2(2));
- the chairing member may not remove a member from office without the agreement of the Lord President (schedule 1 para 5(2)); and
- the Lord President may by written notice remove the chairing member of the Commission from office if he is satisfied that the chairing member is insolvent, has been absent from meetings for a period of 6 months without the permission of the Commission, has been convicted of a criminal offence, is otherwise unable or unfit to discharge the functions of a member or is unsuitable to continue (schedule 1 para 5(3)).

41. These provisions operate as a crucial check on the exercise of power by the executive arm of the state. They counter the risk posed to the rule of law by the inclusion in the regulatory system of individuals (lay members) who are not subject to the same ethical obligations and responsibilities as the profession which they in part regulate, and who may instead be at risk of influence by political or other interests or ideals. The Robertson Report has failed to grasp the importance of these functions. It makes no provision for similar checks to be implemented in relation to its proposed new regulator. Instead, it focuses on the interests of the consumer in respect of complaints. It ignores the potential effects of so doing on the wider consumer interest, which depends upon the operation of the fundamental principle of the rule of law which the legal profession serves to uphold. It fails to appreciate the damage its proposals will cause to the very consumer interests which it seeks to protect.

The Role of the Court of Session

Regulation of Proceedings

42. The Court of Session has powers, both inherent and statutory, to regulate the conduct of proceedings before it, the Sheriff Appeal Court and the Sheriff Courts.⁴³ These powers complement the regulatory role of the Lord President, both in his capacity as Head of the Scottish Judiciary and more particularly as Chair of the Scottish Civil Justice Council. The purpose of the Council is *inter alia* to review practice and procedure in civil proceedings in the Court of Session, Sheriff Appeal Court and Sheriff Courts. In

⁴³ For the statutory powers see sections 103 and 104 of the Courts Reform (Scotland) Act 2014

combination, the Court and the Lord President act to ensure that the civil justice system is fair and impartial to all who come before it.

Arbiter of Standards

43. The judges of the Court of Session and High Court of Justiciary take their role in protecting the public from the risks posed by falling standards very seriously. Reference has already been made to the Court's practice of making observations as to standards and conduct within its judgments. Some of the most recent examples of this practice include:

- in its written opinions in *Dreghorn v HM Advocate*⁴⁴ and *Donegan v HM Advocate*⁴⁵, the Court criticised the use of inappropriate cross-examination techniques and stressed the need for vigilance on the part of trial judges to ensure that witnesses are treated properly and fairly;
- in *Addison v HM Advocate*⁴⁶ and *Yazdanparast v HM Advocate*⁴⁷ the Court reminded practitioners of the importance of free and informed choice as to representation in murder trials;
- in *Bartos v Scottish Legal Complaints Commission*⁴⁸ the Court stressed the need for the Commission to maintain independence, objectivity and impartiality when considering complaints;
- in *Fyfe v Council of the Law Society of Scotland*⁴⁹ the Court commented upon the essential qualities of a solicitor and reminded practitioners that professional value will not operate as a counter to any failure by a solicitor to meet the standards required; and
- in *Lundy v HM Advocate (No.1)*⁵⁰ the Court reminded prosecutors of their obligation to adhere to good and proper ethical practice in criminal trials, and again stressed the importance of the role of the trial judge in ensuring a fair trial.

Appeals

44. The Court of Session is the final forum for most appeals arising out of the complaints and disciplinary processes for members of the legal profession. The Robertson Report

⁴⁴ 2015 SCCR 349

⁴⁵ [2019] HCJAC 10

⁴⁶ 2015 JC 107

⁴⁷ 2016 JC 12

⁴⁸ 2015 SC 690

⁴⁹ 2017 SC 283

⁵⁰ 2018 SCCR 269

does not, explicitly at least, propose the removal of the Court of Session from the appeals process, nor does it make any particular criticism of the Court's processes or determinations. Nevertheless, the report contends that the new regulator should "develop a simple process of appeals which are only available at the end of the complaints process", offering the view that the current scheme is "unwieldy and unworkable".⁵¹

45. The scheme proposed by the Robertson Report, whereby appeals become available only at "the end of the complaints process" could expose parties to significant, but meaningless, costs in terms of time, resource and money, in cases where an erroneous decision on a preliminary matter has allowed a case to proceed to its conclusion when it ought otherwise to have been disposed of at an early stage. It could see the development of a body of precedent which is simply wrong in law.
46. A more fundamental criticism of the Robertson Report relates to its treatment of the importance of article 6 of the European Convention on Human Rights (the right to a fair trial). The Robertson Report notes that the current appeals process is created in the image of court business, with layers of appeal. It is suggested that this may have been instituted "with an eye to ensuring Article 6 compliance."⁵² The Robertson Report contains a brief explanation of the nature of the right protected by article 6, concluding with the remark that "having a right of appeal to a higher forum is *desirable* to ensure compliance"(emphasis added).⁵³
47. This is an example of the Robertson Report's failure to recognise the importance of the rule of law and, by extension, the importance of an independent legal profession. The article 6 right to a fair trial is at the heart of the system that those principles seek to protect. The Robertson Report fails to recognise that to leave the appeals process, and indeed the regulation of the legal profession more generally, to a single regulator accountable to the Scottish Parliament, would, of itself, be putting the fundamental rights and freedoms of the public, such as that enshrined in article 6, at risk.

The Professional Bodies

48. In addition to its failure to understand the important role played by the Lord President and the Court of Session, the Robertson Report appears to have misunderstood, and underestimated, the many different ways in which the professional bodies, such as the Faculty of Advocates and the Law Society of Scotland, and their individual members,

⁵¹ Robertson Report at 44

⁵² *ibid*

⁵³ *ibid*

contribute to the regulation of the profession. As a consequence, it fails to appreciate the way in which this significant contribution is funded.

49. The professional bodies carry out important duties in providing education for members. Although funding for that comes from the subscriptions paid to the bodies by the members, a significant amount of the work undertaken in providing that education and training is carried out by individuals, whether solicitors, advocates or lay persons, on a voluntary basis.
50. This is also the case with other aspects of the regulation of the profession. For example, advocates sitting on the Faculty of Advocates Disciplinary Tribunal, Office Bearers of the Faculty and advocates who are Committee Members all provide those services free of charge. Solicitor members of the SSDT are unpaid, as are the majority of the solicitor and lay members who participate in the Law Society of Scotland's numerous regulatory and non-regulatory committees and sub-committees⁵⁴. These individuals contribute considerable amounts of time and expertise in an effort to maintain and improve standards across the profession. The Robertson Report fails to recognise this. It offers no indication of how such work might be carried out and funded in its proposed scheme.
51. The report fails to appreciate the very real possibility that the current professional bodies will disappear once their regulatory functions have been removed. There is the potential for them to be replaced with smaller self-interest groups formed according to practice areas or the particular interests of the individual members. Nowhere in the report is there any discussion of the potential impact of that change on the profession, and the consequential effects it may have on the voluntary contributions made by members of the profession to the regulatory regime, particularly in relation to education and training. Any threat to the quality of the education and training provided to members of the legal profession is a threat to the quality of services ultimately provided by the profession to the public. The Robertson Report offers no indication of how such a threat might be countered in its new regime.

Conclusion

52. The importance of an independent legal profession cannot be overstated. Any system of regulation imposed upon that profession must respect its independence and contain built-in safeguards for its protection. At present, those built-in safeguards are to be

⁵⁴ A diagram of the Law Society Committee Structure can be found at <https://www.lawscot.org.uk/media/359096/committee-structure-2017.pdf> and information as to the Law Society of Scotland's remuneration arrangements can be located at <https://www.lawscot.org.uk/about-us/strategy-reports-plans/financial-information/>

found in the various powers and duties conferred upon the Lord President, as Head of the Scottish Judiciary, complemented by the Court of Session.

53. The current framework, which is embodied in modern statutes, has been specifically designed to respect the need for lawyers to be able to protect the fundamental rights and freedoms of individual citizens, without fear of interference from or persecution by the state. The scheme proposed in the Robertson Report offers no such protection. Instead, it proposes to hand over the regulatory reins to the very institution which poses the greatest threat.
54. It may be suggested that such an abuse of power by the state could never occur in Scotland. Without the protection afforded by the rule of law, that possibility becomes all too real. Recent events in some of our European neighbours illustrate the circumstances in which the protections afforded to the rule of law principle have proven to be all too fragile in the face of growing feelings of national unrest and political discontent. The most recent of these examples is the situation in Poland.
55. Poland, a member of the European Union and Council of Europe, is, in the words of its Constitution, “a democratic state ruled by law and implementing the principles of social justice”.⁵⁵ A series of legislative reforms introduced by the governing party, following its election in late 2015, and aimed at restructuring the judiciary and courts system, have given rise to growing concerns over the continuing operation of the rule of law and potential infringements of the fundamental rights and freedoms of individual Polish citizens.⁵⁶
56. As a result of those growing concerns, the National Judiciary Council of Poland was suspended from the European Network of Councils for the Judiciary. The mechanism provided for under article 7(1) of the Treaty on European Union by the European Commission was triggered. A number of cases were presented to the Court of Justice of the European Union, including proceedings related to infringements of European Law. In one such case, the Advocate General has now issued his Opinion, which is to the effect that the particular laws in question violated the principle of irremovability and

⁵⁵ Polish Constitution as cited and translated into English in Pietrzak, M, *The Constitutional Court of Poland: The Battle for Judicial Independence*, The Foundation for Law Justice and Society (2017) available at <https://www.fljs.org/sites/www.fljs.org/files/publications/The%20Constitutional%20Court%20of%20Poland.pdf>

⁵⁶ For a brief summary of the events and the criticisms being levelled at the ruling party as a result see Pietrzak, M op. cit. 55 and Matczak, M, *Poland's Constitutional Crisis: Facts and Interpretations*, The Foundation for Law Justice and Society (2018) available at https://www.fljs.org/sites/www.fljs.org/files/publications/Poland%27s%20Constitutional%20Crisis%20-%20Facts%20and%20interpretations_0.pdf

independence of judges. As a consequence, Poland was in breach of its obligations under article 19(1) of the Treaty on European Union.⁵⁷

57. The question of any infringement of EU law by Poland is a matter to be determined by the Court of Justice. These events serve as a timely reminder of the need for constant vigilance in the protection of the rule of law. That principle, which protects the rights and freedoms of individual citizens, is itself protected by the independence of the judiciary and legal profession. That is why the independence of the legal profession must be protected since the rule of law and democracy itself depend upon it. As Michael Kirby said:

“where there is no independent legal profession there can be no independent judiciary, no rule of law, no justice, no democracy and no freedom.”⁵⁸

⁵⁷ Opinion of Advocate General Tanchev issued on 11th April 2019 in *European Commission v Republic of Poland*, Case C-619/18

⁵⁸ The Hon Michael Kirby AC CMG commenting in a release issued by the [International Bar Association's Human Rights Institute](#) condemning the persecution of human rights lawyer Ramazan Demir in Turkey

Appendix 1

The notable powers and responsibilities of the Lord President as provided for in the Judiciary and Courts (Scotland) Act 2008 and the Tribunals (Scotland) Act 2014 include the following:

Judiciary and Courts (Scotland) Act 2008

- the Lord President has responsibility for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts (s.2(2)(a));
- the Lord President has responsibility for laying before the Scottish Parliament written representations on other matters that appear to him to be of importance relating to the Scottish judiciary or the administration of justice (s.2(2)(c)(i) and (ii));
- the Lord President is responsible for making and maintaining appropriate arrangements for the welfare, training and guidance of judicial office holders (s.2(2)(d));
- the Lord President is responsible for making and maintain appropriate arrangements for the investigation and determination of any matter concerning the conduct of a judicial office holder and the review of such determinations and may make rules providing for such matters (ss.2(e)(i) and (ii) and 28(1));
- the Lord President has powers to give a judicial officer formal advice, a formal warning or a reprimand following an investigation having been carried out in terms of section 28 and the person carrying out the investigation has recommended the Lord President do one of those things (s.29(1) and (2));
- the Scottish Ministers may not appoint a person to be Judicial Complaints Reviewer without the consent of the Lord President (s.30(1));
- the Lord President has powers to suspend a judicial officer from acting as a judge or from any of the judicial offices mentioned in section 43 if he considers it necessary for the purpose of maintaining public confidence in the judiciary (s.34(1)); and
- upon a request from the Lord President, the First Minister “must” constitute a tribunal to investigate and report on whether a person holding the offices of Lord President, Lord Justice Clerk, judge of the Court of Session, Chairman of

the Scottish Land Court or temporary judge is unfit to hold the office by reason of inability, neglect of duty or misbehaviour (s.35(1) read with (2)).

Tribunals (Scotland) Act 2014

- the Lord President is responsible for representing the views of the membership of the Scottish Tribunals to the Scottish Ministers and Scottish Parliament, and laying before the Scottish Parliament written representations on matters that appear to be of importance in relation to the Scottish Tribunals including as to the administration of justice (s.6);
- the Lord President also has responsibility for making and maintaining appropriate arrangements for securing the efficient disposal of business in the Scottish Tribunals (s.7(1));
- the Lord President is responsible for ensuring that appropriate arrangements are made and maintained as to the welfare of the members of the Scottish Tribunals (s.7(2));
- the Lord President may give directions to the President of the Tribunals as to the exercise of her functions by virtue of the Act (s.9(1)); and
- the Lord President's approval must be sought before the Scottish Ministers make regulations under section 20(2) and 23(2) in relation to the organisation of the First-tier Tribunal and the Upper Tribunal and the allocation of the Tribunals' functions between their respective chambers and divisions; (s.11(1)).