Supplementary response by the Faculty of Advocates

1. Faculty considers it appropriate to address two matters arising since the submission of its response to the call for evidence by the Independent Review of the Regulation of Legal Services ('the Roberton Review')[1], namely:

(i) ***Protected professional titles:*** in support of similar proposals by the Law Society of Scotland, Faculty suggests that the terms "lawyer", "Advocate" and "counsel" should receive statutory protection, akin to that already afforded to the term "solicitor", in the interests of protecting members of the profession and public from unqualified persons who may hold themselves out as entitled to practise as members of Faculty; the terms "Advocate" and "counsel" ought, in particular, to be reserved for use by members of Faculty, in order to protect consumers from the risk of confusion as between Advocates (ie counsel, properly so called) and "solicitor advocates";

(ii) ***Response of the Society of Solicitor Advocates ("SSA"):*** in response to a recent article in *The Journal* online, Faculty refutes the assertions of SSA to the effect that Faculty has misrepresented or misunderstood certain matters in its own response to the Roberton Review; whilst reiterating its commitment to the terms of its original response, Faculty calls for a neutral assessment of conflict

[1] The Faculty's original response may be viewed in full at the following link: www.advocates.org.uk/media/2742/final-faculty-response-roberton-review.pdf

of interest in the instruction of in-house "solicitor advocates", in order to promote true and fair competition in the interests of consumers.

Protected professional titles

2. First, Faculty wishes to express its support for the submission of the Law Society of Scotland in its Written Evidence to the Roberton Review[2] in relation to what it describes (pp 13 - 14) as "the generic use of the term 'lawyer'." The Law Society recommends that the term "lawyer" should be protected, as the term "solicitor" currently is by virtue of the Solicitors (Scotland) Act 1980, section 31. Faculty agrees that the public may be misled when unqualified persons describe themselves as "lawyers", although plainly it would be necessary to recognise that any such protection should not inhibit Advocates, or indeed academic lawyers who are properly designed "lawyers" without being entitled to practise in either branch of the profession, from describing themselves as such.

3. Moreover, in addition to supporting the Law Society's recommendation, Faculty suggests that consideration be given to provision of similar protection in respect of the terms "Advocate" and "counsel".

4. At present, members of Faculty do not enjoy any statutory protection of their professional designation, as is currently enjoyed by solicitors, and solicitors with

[2] https://www.lawscot.org.uk/media/360004/legal-services-review-call-for-evidence-law-society-of-scotland-response.pdf

extended rights of audience ("solicitor advocates"). Indeed, members of Faculty may be at a significant competitive disadvantage insofar as "solicitor advocates" enjoy some statutory protection by virtue of their adoption of a hybrid designation (which informally differentiates those solicitors who have been granted extended rights of audience in terms of section 25A of the 1980 Act), whereas members of Faculty enjoy no such protection in the exercise of similar rights of audience. More fundamentally, however, the same public policy arguments apply in respect of the need for consumer protection against the provision of unregulated legal services by unqualified persons who may designate themselves as "Advocates" or "counsel", just as in the case of those who may call themselves "solicitors" or "lawyers".

5. The term "lawyer" has been described by the Law Society as generic, and Faculty readily acknowledges that the same criticism may be directed to the terms "counsel" and "Advocate". Faculty would argue, however, that there is no substantial reason why the use of such terms ought not to be restricted to qualified and regulated legal service providers only. That is particularly so, having regard to the empirical research founded upon by the Law Society with regard to the significant risk of confusion amongst consumers as to the distinction between "solicitors" and others who may describe themselves as lawyers. Indeed, Faculty notes that the term "Advocate" has been afforded similar statutory protection in other jurisdictions[3], thereby differentiating qualified and regulated legal service providers from others.

[3] Faculty believes that such provision exists, for example in: Kenya (Advocates Act, cap 16, section 33 (Penalty for pretending to be an advocate): www.kenyalaw.org/lex//actview.xql?actid=CAP. 16); Tanganyika (Advocates Act, ch 341, section 42 (Penalty for pretending to be an advocate):

6. In England and Wales, it is a statutory offence to pretend to be a barrister.[4] The Review might also wish to note the possibility of mechanism, such as that adopted by the Bar Standards Board in England and Wales, which seeks to protect the status of practising barristers (albeit as a matter of internal regulation) by connecting the act of holding oneself out as a barrister specifically with the supply of defined legal services, including any offer to supply such services.[5] Thus, a mechanism exists whereby otherwise generic terms may be suitably contextualised by reference to the particular legal professional services that are to be the subject of protection. Similarly, Faculty's own Guide to Professional Conduct provides for the regulation of the conduct of practising members of Faculty (described as "Advocates" or "Counsel") by reference to any member who "currently holds himself out as available to be instructed as an Advocate in Scotland" (p 4), and empowers the Dean to require an Advocate "to cease to hold himself out as a practising Advocate" at any time (p 35, para 16.3). Therefore,

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www.tls.or.tz/publication/view/advocates-act/); Uganda (Advocates Act, ch 267, section 65 (Unqualified person not to hold himself or herself out as qualified [as an advocate]): https://www.ulii.org/ug/legislation/consolidated-act/267); Zambia (Legal Practitioners Act, cap 30, sections 42 (Unqualified person not to act as an advocate) and 43 (Penalty for pretending to be an advocate): https://www.zambialii.org/zm/legislation/consolidated_act/30); and South Africa (Attorneys Act no 53 of 1979, section 83 – see, eg, *Noordien v Cape Bar Council & Ors* (9864/2013) [2015] ZAWCHC 2 (13 January 2015): www.saflii.org/za/cases/ZAWCHC/2015/2.pdf.

[4] Legal Services Act 2007, section 181 (Unqualified person not to pretend to be a barrister): "It is an offence for a person who is not a barrister – (a) wilfully to pretend to be a barrister, or (b) with the intention of implying falsely that that person is a barrister to take or use any name, title or description..."

[5] BSB Handbook, section B (scope of practice), p 94, in the context of entitlement to carry out "reserved legal activities" under the Legal Services Act 2007, sections 13 and 14: https://www.barstandardsboard.org.uk/media/1918141/bsb_handbook_1_february_2018.pdf

appropriately qualified and regulated members of Faculty are prevented, as a matter of internal regulation, from engaging in such activities as might undermine the general availability of the independent referral bar. Yet unqualified and unregulated individuals are not prevented from engaging in such activities as would undermine public confidence in the same professional services, by similarly holding themselves out as Advocates or counsel where they are not entitled to do so.

7. It is well-established as a matter of law that professional bodies are properly entitled to prevent non-members from passing themselves off as members, and to obtain civil remedies to this end, thereby protecting their professional "brand" and consequently protecting the public.[6] Faculty considers that it remains appropriate to strengthen the protection of professional members and consumers alike, by affording them the clear statutory protection of the criminal law, in the form of offences of such professional pretence, as presently exist in the case of solicitors and others.

8. As already indicated, in the event of statutory protection of the terms "lawyer", "Advocate" and "counsel", suitable provision ought to be made to ensure that members of Faculty are entitled to use all such terms to refer to themselves in the provision of professional legal services. In the particular case of the terms "Advocate" and "counsel", however, Faculty would suggest that those terms ought to be restricted to use by members of Faculty only. In this regard, Faculty would observe that the legal

[6] See, eg, *General Osteopathic Council v Sobande* 2011 SLT 377, Lord Wheatley at paras 11 – 12 and the cases cited therein

profession is well-acquainted with the technical distinction of solicitors (being members of the Law Society of Scotland) and Advocates (being members of the Faculty of Advocates). Faculty simply calls for equality in the statutory recognition and protection of those respective terms. Separately, there remains a need to recognise the distinction between "counsel" and "solicitor advocates", where there has been judicial recognition that these terms may be confused, and are not interchangeable.[7] Given the numerous and fundamental distinctions between the respective roles of members of the Law Society (including "solicitor advocates") and members of Faculty, as discussed in the Faculty's original response paper, Faculty considers that the need for statutory protection, for the purposes of consumer protection, includes the need to protect consumers from any ongoing confusion in this regard.

Response of the Society of Solicitor Advocates ("SSA")

9. Secondly, Faculty notes the somewhat intemperate response by the SSA[8] to Faculty's own response to the call for evidence. Faculty begs leave to differ from SSA regarding much of what it says, and responds as follows.

[7] *Yazdanparast v HM Advocate* 2016 JC 12, Opinion of the Court delivered by Lady Dorrian at para 21, citing *Addison v HM Advocate* 2015 JC 107, Lord Justice General (Gill) at para 22, Lord Justice Clerk (Carloway) at para 36, and Lord Brodie at para 44

[8] Reported at http://www.journalonline.co.uk/News/1024686.aspx#.Wt417ojwaUk (the full text of SSA's original or "further submission" to the Roberton Review does not appear to have been made publicly available)

10. The SSA's response accuses Faculty's own submission of offering "a skewed picture of an important aspect of access to justice for the citizen and consumer", and a "fundamental misunderstanding of the relevant rules". When preparing its own submission, Faculty was of course aware that certain proposals made therein might attract protest from other aspects of the legal profession. The depth of feeling conveyed in SSA's response is, perhaps, understandable: the same organisation advanced a thinly-veiled accusation of bias on the part of the judiciary after the comments in *Yazdanparast*[9]. It is respectfully suggested, however, that rather than resorting to emotive obloquy, what is needed is a dispassionate and neutral assessment of a problem that has arisen; has been highlighted at the highest levels of the judiciary; and yet has not been properly addressed.

11. SSA derides Faculty's submission as "brimming with undisclosed self-interest", a description that is surprising: of course any submission made by Faculty is made in the interests of Faculty, that is surely self-evident. Faculty's submission is no more "brimming with undisclosed self-interest" than is that of SSA itself. But, again, it is suggested that what is truly needed is a neutral assessment of the position.

12. What is wholly absent in the SSA's response[10] is any indication of what it is that Faculty has either misunderstood or misrepresented. The sections in Faculty's response of which complaint is made are found in paragraphs 95-101. The first two paragraphs

[9] See the final paragraph of the response published at http://www.scottishlegal.com/2015/09/09/after-yazdanparast-solicitor-advocates-counsel-fair-play/

[10] (at least insofar as its content is reported in *The Journal:* see n 8, *supra*)

quote – accurately – from comments made in a recent Supreme Court case, and by the current Lord President and Lord Justice General in his speech to the World Bar Conference in April 2016.

13. At paragraph 97, Faculty identified that an Act of Adjournal had been passed to address the problem of internal instruction in criminal cases, but that no such measure existed in civil matters. That is correct. The SSA does not suggest otherwise, nor does it indicate how the real concerns identified (by the judiciary, it must be stressed, and not by Faculty) have been addressed in any way in civil matters. The concerns expressed with regard to the practical application of the Act of Adjournal are readily acknowledged to be anecdotal, based upon the experience of members of Faculty in this area.

14. At paragraph 98, Faculty points out that internal instruction stultifies competition. SSA does not quarrel with that contention – nor, realistically, could it. The simple fact of the matter is that when internal instruction takes place, that is anti-competitive. There is no true competition between the internally instructed solicitor advocate and the Bar as a whole when the instructing solicitor decides to keep the work in-house. Whilst the decision to be represented by an in-house solicitor advocate is ostensibly that of the client, the real risk is that it may be effectively vitiated by the inherent conflict of interest discussed below.

15. At paragraph 99, Faculty offered an illustration of the problem. Again, SSA does not, and cannot, quarrel with either the illustration or the conclusion that the situation

illustrated creates "a clear and irresolvable conflict of interest". Rather, SSA says – remarkably – that the conflict "is one which occurs commonly for advocates, solicitors and solicitor advocates and is readily managed by obtaining informed consent and observing the relevant professional rules". This suggestion is, with great respect, incomprehensible and baseless, insofar as it refers to Advocates. The notion of internal instruction is peculiar to the solicitor's branch of the profession: counsel has no access to clients without instruction by solicitors. If, exceptionally, a Member of Faculty found himself in a conflict as a result of "internal instruction" (although Faculty simply does not understand how that could ever happen, standing the fact that its members operate as independent sole practitioners) then Faculty's Guide to Professional Conduct would require the Member of Faculty to decline instructions.

16. What is yet more surprising is SSA's assertion that the conflict – which it acknowledges – is "readily managed by obtaining informed consent". That betrays, with respect, a surprising ignorance of the professional rules applicable to all solicitors – including solicitor advocates. The Law Society's Practice Rules could not be clearer: where an ***actual*** conflict arises the solicitor must not act: Rule B1.7.1. Informed consent is only available as a panacea when the conflict is merely ***potential***; and even then the solicitor is enjoined to exercise caution: Rule B1.7.2. The SSA does not suggest that the conflict presently under discussion is inevitably merely potential, not could it: in *Yazdanparast*, for example (one of the cases accurately cited by Faculty, and rather ignored by the SSA) the High Court said (at [25]) "a mere recitation of the options will not suffice, particularly in the case where, as here, ***there is a conflict of interest*** in that one of the

solicitor-advocates instructed is a senior member of the firm in which the solicitor is employed".

17. At paragraph 100, Faculty commented on the difficulties inherent in a situation in which a solicitor is tempted to resort to internal instruction rather than looking to the market as a whole (by which is meant all persons entitled to plead before the higher courts, including solicitor advocates outwith the firm as well as counsel) – especially where that means the instruction of someone who might not have the necessary experience for the particular case in question (as in *Woodside*). Again, SSA does not seem to be able to quarrel with what is said there, or with the contention that the present situation is anti-competitive.

18. Faculty offered its own suggestion at para 101. In doing so, it said expressly that "doubtless the precise solution would require to turn on the views and evidence from across the legal sector". All interested parties will doubtless have their own views to express. The solution offered would mean that the instructing solicitor had access to all counsel and solicitor advocates in Scotland. That creates true and fair competition. A solution which involves an instructing agent only having resort to a limited pool of pleaders within his or her own firm prevents such competition. Again, SSA does not seem to quarrel with this.

19. In closing, Faculty makes no apology for the response which it has presented. It is, of course, happy to discuss all matters arising with any interested party. But it refutes the contention that Faculty is looking to re-establish any monopoly regarding rights of

audience. That should be clear from the proposal that any instructing agent should be able to instruct any Advocate ***or solicitor advocate*** as long as the choice is one made without a conflict of interest. There is, in truth, only one monopoly here: that of the solicitors and their exclusive access to the client. That monopoly is an integral part of the split profession, and Faculty thus recognises that it is both inevitable and necessary. But that recognition does not mean that steps should not be taken to address lack of competition or difficulties with conflict where they arise.

Faculty of Advocates

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