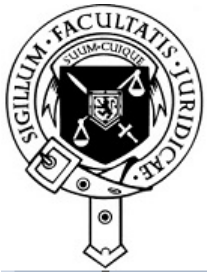

FACULTY OF ADVOCATES

REGULATION OF LEGAL SERVICES (SCOTLAND) BILL

RESPONSE: STAGE 1 CONSULTATION

Question 1

What are your views on:

(a) the principal recommendation of the Roberton Review that an independent regulator should be created to regulate legal professionals

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

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

Part (a)

1. Faculty has previously made very plain its view of the principal recommendation of the Roberton Review: it opposed it, root and branch.

2. In its response to the Scottish Government consultation in 2021, Faculty set out in detail an explanation of the status of the Faculty of Advocates and the role it plays in the administration of justice. That background – and, in particular, an appreciation of (a) the nature of the public office of Advocate in Scotland, and (b) the nature of advocacy as a specialist professional activity – are important in understanding the position of Faculty in relation to what was proposed following the Roberton Review. The explanation given at that time remains highly relevant and that material is included as an appendix. Particular reference is made to paragraphs 22 to 70. Further, paragraphs 71 to 96 set out an explanation of Faculty's overall view of potential regulatory models,

with particular reference to the deficiencies of the existing Scottish Legal Complaints Commission arrangements and the advantages of a scheme in which Faculty has responsibility as the appropriate regulator for all service and conduct complaints.

3. In relation specifically to the principal recommendation of the Roberton Review, the Faculty view was and remains as follows, in summary:

4. The proposed single independent regulator would have been a monolithic organisation, costly to set up and run, and which could not possibly have had the agility of Faculty to deal with concerns and adapt to demands.

5. It would be impossible for an external regulator to replicate the high quality, specialist training and oversight provided to devils.

6. Of most concern, the proposed model would have meant that the regulator would, alone, be responsible for the admission of Advocates to the profession. That would have meant the end of the role of the court, and the end of the public office of Advocate. That would have been a retrograde step, with no countervailing benefit. It would have been inimical to the existence of an *independent* referral Bar, which is fundamental to the operation of democracy in Scotland.

7. Further, a single regulator on the Robertson Review model would have resulted in an inevitable loss of specialist knowledge.

8. Adopting the Roberton Review model would have involved a deeply worrying interference with the core and essence of what it is to be an Advocate – namely, someone whose independence is, actually and visibly, beyond doubt. It would have provided a worse experience at greater cost.

Part (b)

9. Faculty agrees with the decision by Scottish Government not to follow the principal recommendation of the Roberton Review. Improving existing arrangements is obviously preferable to introducing a new and unnecessary regulator with all of the attendant risks and disadvantages of that course. There are improvements that can be made within the existing framework and, to an extent, the Bill addresses these. A significant proportion of the Bill involves amendments to the Solicitors (Scotland) Act

1980 and regulation of solicitors and Faculty does not seek to comment on those aspects of reform. Faculty notes the observations made by the Law Society of Scotland in its consultation response that there is substantial work to do.

10. Whilst, generally, Faculty considers that the proper approach is to improve what already exists, there are concerns that, in a number of important respects, the changes proposed go well beyond the existing framework and seek to innovate in a way that carries substantial risks to the independence of the legal profession and for which there is no objective justification. The Bill contains provisions giving the Scottish Ministers very broad powers, not only in making regulations but also allowing interventions in some circumstances. This is not so much building on the existing framework as creating unjustified mechanisms which may be used in the future in a way that undermines and compromises the value of an independent profession and independent regulation.

Part (c)

11. It is assumed that this question is directed at a possible concern that, in operating as a regulator within the meaning of section 8 of the Bill and in exercising its regulatory functions for the purpose of section 15 of the Bill, Faculty may be in a position where there are conflicts of interest. If that is indeed the concern then it is without foundation. The Faculty of Advocates has a number of roles, encompassing admissions and training, complaints handling and discipline as well as providing support to its membership in various ways. There is no conflict inherent in working in this way. Numerous professional bodies operate on a similar model, carrying out both regulatory and support functions. In relation to Faculty itself, the following points are relevant.

12. First, Faculty as an institution does not exist simply to protect its members' interests. Members of Faculty are legal practitioners but, importantly, they are holders of the public office of Advocate. As public office holders, Advocates have duties to the Court and regulation by Faculty must be understood in that context. The relationship between the Court and Faculty is fundamental. By virtue of the Legal Services (Scotland) Act 2010, 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. That reflects the position which has existed for centuries.

13. 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 (Act of Sederunt (Regulation of Advocates) 2011), delegated those functions to Faculty. Amendments to the rules which Faculty may make in relation to the matters delegated to it require to be approved by the Lord President. In carrying out its regulatory function, Faculty already acts in the public interest, because it is discharging a responsibility given to it by the Court in respect of the conduct of public office holders.

14. Secondly, proper regulation is not just in the public interest; it is also in the interest of all members of Faculty. All members have an interest in the institution maintaining high standards of professionalism and behaviour and in there being public confidence in Faculty and its processes. Understood in that way, there is no conflict at all.

15. Thirdly, Faculty already has in place arrangements which serve to bring a perspective from outside Faculty in the context of complaints and disciplinary matters. Under the current regulatory regime, a service complaint will be dealt with by the SLCC. A conduct complaint will be remitted to Faculty, and will ordinarily be dealt with, at least in the first instance, by a Complaints Committee, comprising an equal number of Advocates and lay members. Those lay members are drawn from a panel appointed for the purpose by the Scottish Ministers. Faculty's Disciplinary Tribunal is chaired by a retired judge and comprises two members of Faculty and three lay persons, with the Chairman holding the casting vote. The Disciplinary Tribunal 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. It has a clear majority of persons who are not practising members of Faculty and any hearings of the Disciplinary Tribunal must be held in public. This model works in a way that leaves no room for conflict of interest and, insofar as the current proposals seek to build on the existing framework, Faculty sees no basis for a concern about such conflicts.

Question 2

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

16. Faculty has submitted a great deal of commentary on the current regulatory landscape for legal services in its previous Response to Independent Review of Legal Services Call for Evidence dated 30 March 2018 and its Response of 22 December 2021 to the consultation on Legal Services Regulation Reform in Scotland. Reference is made to those documents for an explanation of the current regulatory landscape as it applies to Faculty and why that landscape is the way it is.

17. The critical point is that members of Faculty provide legal services in a way which is materially different to other providers of legal services. That is so for a number of reasons, including the nature of the public office of Advocate, the nature of work which may be undertaken by Advocates (and the nature of work which Advocates are not permitted to undertake), the fact that Advocates do not provide their services directly to members of the public, the restrictions on the way in which Advocates are entitled to practice (e.g. they may not form partnerships), and the existence of the cab rank rule and its role in ensuring access to justice.

18. It is fair to acknowledge that the current regulatory landscape for legal services in Scotland is not without some degree of complexity. But such complexity as exists is, in part, reflective of the fact that there are material differences between the different branches of the legal profession in Scotland. This means that a 'one size fits all' approach to regulation is not appropriate. Any system of regulation of the provision of legal services in Scotland requires to recognise and cater for these differences. It follows that a certain level of complexity cannot be avoided.

19. As regards simplicity, Lord Rodger of Earlsferry once remarked that appellate judges should follow the philosopher's advice to "Seek simplicity, and distrust it" (***Customs & Excise Commissioners v Barclays Bank plc*** [2007] 1 AC 181 at paragraph 51). The point is that, while aiming for simplicity is laudable, over-simplification is to be avoided (just as much as over-complication).

20. Faculty's view is that the current regulatory landscape, insofar as it applies to Faculty, is neither more complex nor more simple than it needs to be. It does not seek to make

comment on the complexities of the Solicitors (Scotland) Act 1980 and the need for updating that legislation.

Question 3

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

21. Faculty agrees with the policy aim that the proposed division of regulators seeks to achieve, namely a proportionate and risk-based approach to regulation: policy memorandum, para 103. It also agrees that, if the proposed division of regulators is adopted, it should be assigned as a category 2 regulator: section 8(3).

22. Faculty does not consider that the Scottish Ministers should be given the power to make regulations reassigning a regulator to a different regulatory category and that subject only to a requirement to have regard to certain specified (but in some respects unspecific) criteria and to consult with certain bodies: section 8(5)-(9). Whether a regulator should be assigned as a category 1 or category 2 regulator is significant. It determines the nature and extent of the regulatory obligations incumbent upon a regulator. A regulator should be able to know whether it is a category 1 or category 2 regulator having regard to the terms of the Act. To that end, clear and specific criteria should be set out in the Bill to determine whether a regulator should be a category 1 or category 2 regulator.

23. The clearest and simplest criterion to determine whether a regulator should be categorised as a category 1 regulator is essentially that presently expressed in section 8(6)(b), namely whether the legal services are (or are to be) provided directly to members of the public. All other regulators should be categorised as category 2 regulators.

24. If that were adopted as the determining factor, Faculty would remain a category 2 regulator. Advocates are permitted to provide legal services to solicitors and a limited number of other professions or bodies permitted by Faculty's direct access rules: Faculty of Advocates Direct Access Rules (October 2006) (see

www.advocates.org.uk/media/2708/new-direct-access-rules.pdf). They do not provide legal services directly to members of the public.

25. Allied to the foregoing concern, Faculty is concerned that section 5 confers upon the Scottish Ministers the power to make regulations modifying the regulatory objectives and professional principles. Those objectives and principles are already set out in sections 1 and 2 respectively of the Legal Services (Scotland) Act 2010. There is no obvious or explained justification for the proposed power of modification to be conferred upon the Scottish Ministers. It would be inconsistent with the independence of regulators for the core values that those objectives and principles express to be readily capable of modification by the Scottish Ministers subject only to scrutiny under the affirmative procedure. That would, in effect, give the government direct control over the ethical and professional standards of the profession. That is unwarranted and represents an interference with independent regulation. Section 5 should be removed from the Bill.

Question 4

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

26. Faculty is of the view that sections 19 and 20 of the Bill represent a very considerable innovation on the status quo, for which no-evidence based justification has been put forward. It is no exaggeration to say that, if enacted, these sections may threaten the independence of the referral Bar in Scotland and risk politicising the office of Lord President. They should be removed from the Bill.

27. The fundamental observation Faculty would make in relation to these sections is that they open the way to 'regulation' being used as a back-door by which the Executive branch of the State may seek to control or influence the independent legal profession, whose role is often to hold the Executive to account. That possibility need only be stated for its undesirability in a modern democracy to be manifest. Faculty does not suggest for a moment that this is perceived to be the intention of current Ministers but history teaches us that, where the exercise of Executive power is concerned, it is not always present intention that matters. Making the agreement of the Lord President a

pre-requisite to the taking of various actions by the Ministers in relation to the legal profession generally, and Faculty in particular, is in no way a satisfactory solution to this problem. It potentially brings the Lord President into conflict with Ministers in relation to political matters. That is plainly undesirable, not least because of the possibility of judicial review proceedings being brought in relation to decisions of Ministers under these sections, and the Court having to decide on the lawfulness or otherwise of such decisions.

28. As explained in Faculty's Response to Independent Review of Legal Services Call for Evidence dated 30 March 2018 and its Response of 22 December 2021 to the consultation on Legal Services Regulation Reform in Scotland, the regulatory functions that Faculty exercises have been delegated to it by the Court. As it is put in the section on Regulating the Legal Professions on the Judiciary Scotland website (https://judiciary.scot/home/judiciary/role-of-judge):

"The Lord President is the head of the Scottish judiciary and has a wide variety of roles.

One of these is the responsibility for regulating the legal professions in Scotland.

This role is held on behalf of the Court of Session, Scotland's highest civil court. This guarantees that the professions are kept independent of the Government and free from any kind of political pressure. It ensures that lawyers can give their clients the advice they need without 'fear or favour'.

The regulatory objectives for legal services are set out in law and include supporting the rule of law, protecting and promoting the interests of consumers, promoting access to justice and promoting competition in the provision of legal services.

…

Regulatory responsibility must lie with the Court and the Lord President in order to ensure the independence of the legal professions and the judiciary. The courts often decide disputes between citizens and the State and lawyers advise clients in those disputes. This means the courts and lawyers must always be entirely independent of the State in order to protect the rights of citizens and the rule of law."

29. Faculty considers that it should be for the Lord President, rather than the Ministers, to decide on what measures, if any, ought to be taken as regards Faculty's exercise of its regulatory functions.

30. The following observations on the drafting of sections 19 and 20 are made subject to Faculty's fundamental objection to the presence of these sections in the Bill. It must be emphasised that in making the following comments Faculty does not endorse, and should not be taken to agree with, the inclusion of these sections in the Bill.

Section 19 - Review of regulatory performance by the Scottish Ministers

31. Turning first to the power of review under section 19, as a starting point Faculty proceeds on the basis that the likelihood of a review having to be undertaken of the Faculty as a category 2 regulator is relatively low. Faculty does not consider that the power under section 19 ought to be exercised lightly or frequently. In any event, Faculty does not consider that its exercise of regulatory functions is likely to give rise to any concern of it failing to meet the regulatory objectives specified in section 2(1) of the Act.

32. Faculty notes that such a review can only be undertaken following a request from the Scottish Parliament, Competition and Markets Authority or Consumer Scotland, and only where one of those bodies is concerned that the regulator is failing to exercise its regulatory functions in a manner that is compatible with the regulatory objectives, or in the public interest.

33. In terms of the drafting of section 19(2), Faculty would suggest that the request should only be made where a requesting body has <u>reasonable grounds</u> to be concerned that a regulator is failing to exercise its regulatory function. This would make it clear that a requesting body would have to hold (objectively) reasonable grounds for their concern. Faculty considers that the current drafting (*"is concerned that"*) is too vague and could permit requests to be made which are not based upon (objectively) reasonable grounds, but something less, including entirely subjective considerations. Given the potential consequences of a review, that is clearly undesirable. While we accept that this may be unlikely in practice, the issue could – and, in Faculty's view, should - be avoided with a small amendment.

34. The requirement to provide information following a reasonable request from the Ministers in section 19(4) is sensible in principle, although the feasibility of providing the requested information within only 21 days may prove difficult. We note that the Ministers have discretion to extend the period. However, Faculty's view is that a longer period of perhaps 28 days at a minimum would be more reasonable.

35. Faculty considers that the requirement in section 19(5) to prepare and publish a report following a review would be appropriate.

36. The power to delegate the review function to *"such a person or body ("the delegate") as they consider appropriate"* is vague. Faculty considers that, in reality, the Ministers would likely always in practice delegate this function and it is of concern that the Bill does not give any indication of who might be considered appropriate for such a task, or the criteria by which they might be selected. Faculty considers that it would be desirable for the Bill to set out the nature of the experience and/or qualifications that a delegate (whether a person or body) must have, in order to be eligible for appointment as the section 19(5) delegate. In addition, Faculty considers that, if the request for a review relates to Faculty, it should be a requirement that the agreement of the Lord President be obtained to the identity of the proposed delegate before the Ministers may exercise the power to delegate. Faculty also considers that it should be made clear that the body requesting the review under section 19(1) may not also be the body to whom the functions of the Ministers are delegated under section 19(5), in order to avoid what would be a clear conflict of interest situation. Faculty takes no issue with a delegate having to send the Ministers their report, and thereafter that report having to be published by the Ministers along with an indication of what steps the Ministers intend to take.

Section 20 - Measures open to the Scottish Ministers

37. Faculty notes that the Lord President's agreement is required before any of the measures in section 20(4)(a), (b), (c) or (e) can be taken. As indicated above, Faculty considers that it is not sufficient that the Lord President's agreement must be obtained. Faculty considers that it should be for the Lord President to decide whether or not to take any of the specified measures and, if so, which measures to take. In any event, Faculty does not understand why it is considered appropriate that a financial penalty could be imposed without the agreement of the Lord President. In Faculty's view, no

measure should be available that has not been agreed by the Lord President. This ensures that the constitutional position of the Court is properly respected.

38. Before turning to the proposed procedures in Schedule 2, Faculty also notes that section 20(6) provides the Ministers with power by regulations to specify other measures they could take or make further provision about the measures they can take, along with further provision around procedure. Faculty does not consider it appropriate that the Ministers be given these powers that could simply be exercised under secondary legislation. Given how serious these measures or their implications could be, it is only appropriate that they be the subject of primary legislation. Faculty notes that it is proposed in section 20(8) that any such secondary legislation would be subject to the affirmative procedure. While that is welcome as far as it goes, it does not give Faculty sufficient comfort that any proposed additional measures or procedures would be subjected to scrutiny commensurate to the gravity of these provisions.

Schedule 2

39. It is not possible to consider section 20 fully without turning to Schedule 2, which makes provision concerning the measures in section 20(4) and the procedure to be followed in taking them.

40. Perhaps confusingly, the procedure for imposing a measure is found in the final part of Schedule 2 (Part 6, paragraphs 27 – 31). As a pure drafting point, Faculty considers it might be more sensible to re-order this to put the applicable procedure at the start of Schedule 2, rather than the end.

41. Leaving that point aside, Faculty notes that this procedure appears to be cautious. This is a good thing. Before any measure could be taken, the Ministers would have to issue a notice of intention (copying it to *inter alios* the Lord President). There would then be a 28 day period of consultation where the regulator could make representations. The Ministers would thereafter have to consult the Lord President, who is obliged to give such advice as he or she considers appropriate, taking particular account of the impact of the proposed measure on the operation of the Scottish Courts. The Lord President is given the power to require information from the regulator (or anyone else holding relevant information). Thereafter, the Ministers are required to publish a decision notice, having taken account of any representations and the advice of the Lord

President (or other consultee). The content of the decision notice is specified and must include *inter alia* reasons for the decision. Leaving aside the fundamental question of whether such a power should be conferred on the Minsters at all, Faculty considers that the procedure proposed in Part 6 is generally unobjectionable.

42. One aspect that is not clear, however, is how the Ministers' "decision notice" as provided for in Schedule 2 Part 6, paragraph 30(2) sits with the requirement to obtain the agreement of the Lord President for the taking of certain measures under section 20(5). Faculty considers that it should be made explicit that a "decision notice" will be of no effect unless and until the Lord President has agreed to the taking of the measure(s) proposed in the "decision notice".

43. Part 1 of Schedule 2 deals with the setting of performance targets. Faculty does not consider it appropriate that the Ministers would have any role in setting performance targets. That should be a matter solely for the Lord President.

44. Part 2 of Schedule 2 deals with directions. Leaving aside Faculty's general objection, we are pleased that no direction could be framed by reference to a specific disciplinary case. This provides some comfort that the independence of individual disciplinary proceedings could not be undermined. Faculty does not oppose the ability for the Ministers to petition the Court to enforce a direction in terms of paragraph 8, as this gives appropriate weight to the oversight of the Court.

45. Part 3 of Schedule 2 provides for statements of censure. Of all the proposed measures, Faculty takes least issue with this. This proposed measure would allow the Ministers, following agreement with the Lord President, to publicly mark their concern without actively controlling or influencing the regulator's independent discharge of its functions.

46. Part 4 of Schedule 2 deals with financial penalties. Faculty does not consider it appropriate that these penalties could be imposed without the agreement of the Lord President. That is simply wrong as a matter of principle. Further, it is not clear why it is thought that any financial penalty should be payable to the Scottish Ministers rather than to the Court. Leaving this aside, Faculty notes that there are only limited circumstances where a financial penalty could be imposed (failing to adhere to internal governance arrangements or to comply with a direction). This is therefore not a general

stick with which a regulator can be, metaphorically, beaten. Faculty considers it appropriate that a maximum penalty would be set via regulations. Faculty considers that the maximum level of any such penalty ought to be fixed by reference to Faculty's ability to pay, bearing in mind Faculty's relatively small practising membership (approximately 445 at the time of writing, and which may fluctuate from time to time). The maximum level ought to be the subject of consultation with Faculty and the agreement of the Lord President prior to being fixed. It is sensible that provision is made to vary the date by which any penalty would be paid, or to allow it to be payable by instalments. Faculty supports the appeal provisions in paragraphs 17 – 19. No issue is taken with the provisions regard interest or default.

47. Part 5 concerns making changes to regulatory functions. Faculty notes that this is positioned as a measure of last resort. While that sentiment is to be welcomed, Faculty simply does not consider that such a measure is appropriate, even with the agreement of the Lord President. Further, Faculty does not consider that it is appropriate that changes could be made via secondary legislation. In particular, it is entirely inappropriate that paragraph 23(3) is a Henry VIII clause permitting amendment to primary legislation. Henry VIII clauses are *prima facie* objectionable in themselves and Faculty does not support their use in this Bill. While Faculty notes that the draft regulations would require to be the subject of consultation with the regulator and thereafter approved by a resolution of the Scottish Parliament, this procedure does not provide an adequate safeguard for the independence of the legal profession.

48. In conclusion, Faculty does not support section 20 (or by extension Schedule 2) of the Bill.

Question 5

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

49. At the outset, it is important to emphasise that the arrangements in place in England and Wales must be understood in the context of the Bar of England and Wales comprising some 17,000 practising barristers. The Scots Bar is a mere fraction of that size, making it difficult to draw meaningful conclusions from the system in England and Wales. Faculty plainly cannot speak from direct experience of regulators in other

jurisdictions, and moreover would not normally seek to comment on other regulators, whether in this jurisdiction or in other jurisdictions. With these caveats, Faculty would therefore confine itself to noting the following:

(a) It is understood that in England and Wales, the Bar Standards Board ('BSB') is a part of the General Council of the Bar of England and Wales ('the Bar Council'), but that the BSB was established to independently exercise the regulatory functions of the Bar Council. It is an approved regulator. The Legal Services Board ('LSB') has, as its principal role, oversight of the approved regulators for the legal profession in England and Wales.

(b) The current Vice Chair of the Bar in England and Wales, Sam Townend KC, has publicly raised concerns about the LSB, suggesting that it is stepping beyond its remit (Why the Bar's oversight regulator, the Legal Services Board, is in need of some oversight (barcouncil.org.uk)). Such concerns are explained in detail in the Bar Council's Response to the LSB's 'Draft Business Plan 2023-24' consultation paper. The Bar Council is understood to have asked for a Ministry of Justice departmental review of the role and performance of the LSB.

(c) The LSB prepares an annual review of the progress of regulatory bodies in meeting the standards and outcomes in the LSB's 2018-22 regulatory performance framework. In January 2023, the LSB published a report of the review completed in November 2022. The published RAG chart which showed the level of assurance each body provided the LSB in respect of each of five standards showed two red ('insufficient') ratings, and three amber ('partial') ratings, for the BSB.

Question 6

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

50. Faculty considers the main deficiencies in the current complaints system are those highlighted in Faculty's Response of 22 December 2021 to the consultation on Legal Services Regulation Reform in Scotland (the "Response"). A copy of the relevant paragraphs of the Response is set out below. The core deficiency in the current

complaints system is the complexity of the SLCC process. The complexity leads to delay and inefficiency in the resolution of complaints. The delay and inefficiency results primarily, but not exclusively, from the SLCC having to classify complaints before substantive investigations can begin and from the different treatment in respect of 'services' complaints and 'conduct' complaints.

51. Faculty does not consider that the proposals in the Bill are sufficient to address this issue. Rather, Faculty considers that the Bill retains the existing complexity and adds yet further layers of complexity. The removal of the "frivolous, vexatious and totally without merit" test appears to us particularly unwise, as it necessarily means that obviously unmeritorious complaints will be retained in the complaints system, using up valuable time and resources.

52. It may be thought that removing the right of appeal to the Court of Session in respect of service complaints determined by the SLCC, which would be achieved by repealing section 21 of the 2007 Act, is intended to be a step towards improving efficiency. The Explanatory Notes do not make that clear. Faculty disagrees with the removal of a right of appeal. It is a vital external check on SLCC decision-making. It is better that that check can be made using a dedicated statutory appeal mechanism than that parties are required to use judicial review.

53. Faculty maintains the view expressed in paragraphs 111 and 112 of the Response, as to the best way to address the issue of complexity:

"*111 … Faculty suggests that the SLCC should remain the gateway for complaints against Advocates, with an ability to reject complaints as time-barred, premature, manifestly unfounded or vexatious. Once past the SLCC sift, however, all complaints should be passed to Faculty Complaints Committee for investigation. That would considerably simplify and speed up the current process. The Faculty Complaints process should be, as is currently the case, subject to the oversight of SLCC, which should retain the ability to require a reconsideration where the correct process has not been followed.*

112. Faculty should thereafter report to the SLCC, on an annual basis, on regulatory steps taken in that year. SLCC should have the power to make suggestions as to improvements, but Faculty should ultimately remain independent, and answerable only to the Lord President.

Faculty would also be happy to undertake, voluntarily or as a result of statutory direction, to meet biannually with, and consider suggestions made by, Consumer Scotland."

Question 7

What do you consider the impact of the Bill's proposed rules on alternative business structures might be:

a. generally?

b. in relation to consumers of legal services?

54. Alternative business structures will have no direct impact on Faculty and Faculty does not seek to offer comment on this.

Question 8

What are your views on the provision of:

a. "Entity regulation" (as set out in Part 2 of the Bill)?

b. title regulation for the term "lawyer" (section 82)?

55. "Entity regulation" will have no direct impact on Faculty and Faculty does not seek to offer comment on this.

56. Faculty welcomes the protection given to the title 'lawyer' in section 82 of the Bill but considers that that protection should be extended to the title 'Advocate'. To an extent, that is addressed by the terms of section 84, which is also very much welcomed by Faculty, although it is not entirely clear whether a person describing himself or herself as an 'Advocate' would fall foul of section 84(1)(a). It would seem that that is the intention, but it would be helpful to make that express. In relation to the protection of the title of 'Advocate', Faculty has previously explained its views which are, in summary, as follows.

57. It is important to understand that 'lawyer' encompasses both solicitors and Advocates. It may seem anomalous were there to be protection for the umbrella term 'lawyer', and for the term 'solicitor' which describes one branch of that profession, but no protection for the term 'Advocate' which describes the other branch of the profession.

58. The term 'Advocate' should also be protected as referring only to members of the legal profession who have been admitted to Faculty. This is in distinction to the more generic 'advocate' which can and does encompass those appearing before the Mental Health Tribunal, for example. Faculty is concerned that in the absence of protection for the term 'Advocate', there is scope for confusion arising among members of the public as to a person's role and qualifications.

59. Having regard to the terms of section 84(1)(a), realistically, the only title that an Advocate can use to denote membership of the Faculty of Advocates is "Advocate". If the legislative intention is to reserve that use to members of Faculty, that should be made plain.

60. It is not entirely clear what "addition" means in section 84(1)(a).

Question 9

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

61. Faculty does not seek to provide a comprehensive analysis of the Bill in its entirety. It will welcome the opportunity to engage further with the Committee as the Bill progresses. There are, however, a number of further points to make.

Section 4

62. There is little to object to in the "professional principles" set out in this section. In large part, these reflect the contents of Faculty's own Guide to the Professional Conduct of Advocates (Fifth Edition), as well as the Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community (16.IX.1977) and the Code of Conduct for European Lawyers produced by the CCBE.

63. However, there are several questions about the drafting. The way in which brackets are used in section 4(1)(b) and (d) is puzzling. Why is "(in the interests of justice)" included in brackets? Is it intended to qualify the obligation to "act with independence"? What is meant by "good standards of work" in section 4(1)(e)? If that is a statutory duty, then the person subject to that duty would need to know what that means (and, in particular, by what criteria it will be determined whether work is of "good" standards or not and by whom this might be determined). Why is it necessary

to have subsections (1)(f), (g) and (h) at all? The duties in (1)(f) already exist. Does it help to make it a statutory obligation? Section 4(1)(h) refers to an obligation to act in conformity with professional ethics, but "professional ethics" are not defined in the Bill. Presumably, they are to be regulated by the regulatory authorities.

Section 5

64. Faculty strongly disagrees with the proposal that the regulatory objectives and professional principles should be able to be modified by the Scottish Ministers using a regulation-making power. Reference is made to paragraph 25 above.

Section 15

65. In the first place, it is not clear why provision is made in two different places for the way in which a regulator is to exercise its regulatory functions. In section 3(1), "a regulatory authority must exercise its regulatory functions in a manner which (a) is compatible with the regulatory objectives, and (b) it considers most appropriate to meet those objectives." In section 15(1), "a category 2 regulator must exercise its regulatory functions (a) independently of its other functions or activities (if any), [and] (b) properly in all respects (in particular with a view to achieving public confidence)."

66. It is quite unclear why it is necessary to have a statutory obligation at all to exercise functions "properly". That is in the nature of the existence of a regulatory function. Further, it duplicates an obligation to exercise functions "in a manner compatible with the regulatory objectives". Much of this wording is otiose and brings risks of confusion. Moreover, it is unclear what "with a view to achieving public confidence" means. Public confidence is achieved and maintained by having a functioning regulatory system. Is a regulator expected to do something else in addition to achieve public confidence, and, if so, what?

Section 18

67. Section 18(2)(a) and (b) envisage that there may be rules in respect of establishing and maintaining an indemnity fund and the regulator taking out insurance. These would not apply to Faculty, which does not operate in that way. There are existing duties to which Advocates are subject in respect of adequate professional indemnity insurance.

Section 25

68. In relation to Advocates, the policy rationale for the inclusion of section 25 and the further sections which follow is not made out. The membership of Faculty encompasses a diverse range of individual Advocates practising in all areas of law. A separate regulator for Advocates, alongside Faculty, would be not only unnecessary but also confusing and damaging both to the profession and the public interest.

69. As has already been explained, Faculty exercises its regulatory functions because that responsibility has been delegated to it by the Court. On a proper understanding of the nature of the public office of Advocate, the relationship between the Court and Faculty is essential.

Section 49

70. Part 2 of the Bill concerns regulation of legal businesses and is not of direct relevance to Faculty. However, Faculty notes with concern the proposed provisions in section 49 which would allow the Scottish Ministers, exercising a regulation-making power, in effect to appoint themselves to authorise and regulate legal businesses. Notwithstanding the protection built in in section 49(3) requiring the agreement of the Lord President and a condition that intervention is needed "as a last resort" (however that is understood), it is surprising and alarming to find this kind of power in legislation. It is quite unclear in what circumstances such an intervention might be thought necessary. Certainly no evidence-based justification for such a power has been put forward.

Section 51

71. There is no good reason to change the name of the SLCC to the Scottish Legal *Services* Commission. That suggests a substantial broadening of its remit and it is not accurate, whereas the current name properly reflects what the SLCC does.

72. If, however, the name change is intended to signal an expansion of the powers of the SLCC into the territory of setting service standards, or otherwise, then there is a more fundamental objection.

Section 58

73. Faculty is not satisfied that an internal review carried out by a review committee within the SLCC is adequate. The availability of an external appeal mechanism should be maintained.

Section 69

74. This section will introduce new powers allowing the SLCC to monitor and set minimum standards. It would appear that the issuing of guidance is intended to go beyond guidance in respect of how complaints are to be investigated and will encompass conduct standards themselves. Read with section 71, there will be a statutory obligation to meet the SLCC's minimum standards. Faculty considers that that goes too far. In the first place, there is an inconsistency between guidance and something which is binding, but the objection is more important than that. Setting and enforcing minimum conduct standards which are set by the SLCC, rather than the relevant professional organisation, introduces control over conduct standards which is inconsistent with Faculty's role as a regulator and, potentially, with the ultimate role of the Court.

Section 73

75. Changes to Faculty's disciplinary rules to provide for publication of conduct complaint determinations are currently pending, and it is anticipated that these will shortly be approved by the Lord President. There is no need to include this specific provision. The Bill does not seek to impose other requirements in relation to Faculty Rules, and it would not be appropriate for it to do so.

Section 74

76. Faculty welcomes the change in composition of the SLCC reflecting an even split between lawyer and non-lawyer members. The proposed increase in duration of appointment (from five years to eight, with the possibility of a further eight-year period) seems excessive.