



Scottish Government Consultation:

*Legal Services Regulation Reform in
Scotland*

A Response by
CILEX (The Chartered Institute of Legal Executives)

[December 2021]

Contents	Page
1. Introduction	3
2. Regulatory Principles & Objectives	3
3. Regulatory Models and Landscape	4
4. Legal Tech	6
5. Definition of Legal Services and Reserved Activities	7
6. Titles	7
7. Conclusion	8

1. Introduction

- 1.1. CILEX (The Chartered Institute of Legal Executives) is one of the three main professional bodies covering the legal profession in England and Wales. The 20,000-strong membership is made up of CILEX Lawyers, paralegals and other legal professionals. Our members are judges, advocates, partners in law firms and specialist lawyers working across every aspect of the law.
- 1.2. Having engaged with discussions and consultations related to the reform of legal services regulation in the jurisdiction of England and Wales (particularly in light of the Mayson review finalised last year¹), CILEX sees many parallels in the proposals put forth by the Scottish Government at this time. The Robertson report's recommendation for a single independent regulator of legal services (Option One) is a narrative shared across the border and one that CILEX strongly supports for its ability to simplify an otherwise labyrinthine regulatory environment. However, in the interests of ensuring that the model doesn't over-simplify what is inherently a complex market covering multiple practice areas, varying levels of risk and consumer vulnerability, and a mix of regulated and unregulated providers, sufficient flexibility and nuance is still needed to safeguard against a 'one-size-fits-all' approach.
- 1.3. CILEX therefore advocates that the single regulator model, partnered with a risk-based framework building on activity-based regulation, would offer an effective balance between creating baseline standards of assurance for consumers, whilst still providing adequate flexibility and inclusivity for a healthy and diverse legal services sector. These views are discussed in more detail below.

2. Regulatory Principles and Objectives

(Response to Questions 1, 2 & 3)

- 2.1. CILEX agrees that the Scottish Government's proposed objectives are important for regulatory reform. This includes those referenced as accords with the Legal Services (Scotland) Act 2010², as well as those that form an extension beyond this scope to account for collaborative input and greater diversity in legal services.
- 2.2. Ambitions such as *"working collaboratively with consumer, legal professional bodies, and representatives of legal service providers as appropriate"* could ensure that any new regulatory model is able to offer effective and proportionate regulation that is sensitive to the needs and challenges facing the market. Not only could this help in responding to challenging circumstances (such as COVID-19), but in paving the way for future growth in the sector.
- 2.3. As the Scottish Government rightly emphasises, *"a strong independent legal profession is a cornerstone of the rule of law and modern democracy"*³ and CILEX welcomes the focus

¹ UCL Centre for Ethics and Law, Professor Stephen Mayson, *Independent Review of Legal Services Regulation: Final Report*, June 2020.

² Namely: Protecting and promoting the public interest including the interests of users of legal services; Supporting the constitutional principle of the rule of law; Promoting independent legal professions and maintaining adherence to the professional principles; Improving access to justice including choice, accessibility, affordability and understanding of services by service users and Promoting innovation, diversity and competition in the provision of legal services.

³ Scottish Government, *Legal Services Regulation Reform in Scotland: Consultation*, October 2021, p.26.

on innovation and diversity for stimulating healthy competition in this regard. We welcome reference throughout the report for any new regulatory regime to account for new entrants to the market and believe that a single regulator could help to facilitate this where “arrangements for each of the professional areas [are] designed to be appropriate and proportionate to the business carried out by those professional groups, and the level of risk to the consumer.”⁴ For us, such a model effectively balances a proportionate risk-based approach with the need to remain agile to allow for future innovation and growth, and we applaud the Scottish Government’s focus on ‘business carried out’ as the primary subject of regulation (see more at paras 4.5 and 5.1 below).

3. Regulatory Models and Landscapes

(Response to Question 4)

- 3.1. CILEX welcomes the primary recommendation of the Robertson Report for a single regulator of legal services in Scotland. The benefits of this proposal, in our view, include:

3.1.1. **Regulatory independence**

A single regulator model will achieve full separation between the regulatory and representative parts of the profession, avoiding the challenges that have been faced in England and Wales under the market regulator model (in which professional bodies continue to act as Approved Regulators (ARs) with all regulatory powers subsequently delegated to their respective Regulatory Bodies (RBs)).

This model (which would be replicated under Options 2 and 3 of the consultation) has been proven to create an environment in which regulatory and representative functions are separated and yet not fully independent, embedding unnecessary complexity within the regulatory framework to the detriment of clarity. Not only has this made the regulatory landscape in England and Wales harder to navigate and less visible to the consumer, but the relationship created between ARs and RBs is inherently one in which responsibility and control are fragmented and unclear, often making it harder for the regulatory and professional bodies to effectively collaborate.⁵

In recognition of these challenges, the regulatory model in England and Wales has since sought to move towards greater independence⁶; a useful insight that points to the benefits of Option One for the Scottish jurisdiction.

⁴ See footnote 3, p38.

⁵ See footnote 1, Mayson Finding 7: “The nature of the separation and independence of regulatory functions from representative functions remains unsatisfactory [in England and Wales]. The current approach and requirements of regulation and the internal governance rules make the desirable cooperation and collaboration between regulatory and representative functions problematic to achieve.”

⁶ As witnessed by the Legal Services Board’s Internal Governance Rules. The most recent changes in 2019 were prompted by a desire to “enhance regulatory independence within the framework provided by the Legal Services Act 2007”. See more here: <https://legalservicesboard.org.uk/news/lwb-updates-rules-to-enhance-regulatory-independence>

3.1.2. **Simplification for consumers**

A single regulator would make navigating the legal services market much easier for the average consumer.⁷ In the jurisdiction of England and Wales, the Legal Service Consumer Panel has attested to the complexity of a multi-regulator model and the limitations this creates for consumers accessing the market:

“Without a shadow of a doubt change is needed to the regulatory framework [of England and Wales]. The existing model does not provide a sustainable model that offers consumers the best system of consumer protection or supports a competitive marketplace. It remains the case that consumers have to navigate their way around the maze that is legal services regulation, with duplication in regulatory structures that contribute to higher cost for consumers, and inconsistencies in policy and practice across regulators that cause confusion.”⁸

This has had consequential impacts to public legal education and consumer confidence in accessing both legal services and redress when things go wrong.⁹

3.1.3. **Consistency for providers**

A single regulator model would ensure one set of prescribed standards in the market, making it clearer and easier for existing and future legal services providers to access the market, as well as invest in new business models, offerings and solutions.¹⁰ The Scottish Government’s criteria for outcomes-based regulation will be key to achieving consistency, whilst still catering for a fuller diversity of providers in the market.

For example, in the context of education standards and ongoing quality assurance (*questions 31 & 33 of the consultation*), an outcomes-based approach should enable providers to undertake continuing improvement as it applies to their legal practice area and level of seniority, whilst still securing the confidence of employers and consumers of their ‘fitness to work.’

In many ways, this is the model of the training and education of CILEX practitioners: unique in their graduate and non-graduate routes of entry founded on an ‘earn as you learn’ model, built on an employer-led competency framework, and trained as specialist lawyers who are only authorised to deliver those services that they have obtained qualifying employment in. Quality assurance is then subsequently achieved through outcomes-focused CPD, and the requirement to undertake additional training and qualification if an individual wishes to offer wider services.

⁷ In the jurisdiction of England and Wales, the Legal Service Consumer Panel (LSCP) attested to the complexity of a multi-regulator model for consumers, stating: *“Without a shadow of a doubt change is needed to the regulatory framework. The existing model does not provide a sustainable model that offers consumers the best system of consumer protection or supports a competitive marketplace. It remains the case that consumers have to navigate their way around the maze that is legal services regulation, with duplication in regulatory structures that contribute to higher cost for consumers, and inconsistencies in policy and practice across regulators that cause confusion.”* (LSCP, *Consumer Impact Report*, March 2020, p.48).

⁸ Legal Services Consumer Panel, *Consumer Impact Report*, March 2020, p.48. This very much aligns with the Robertson report finding that a single regulator model would be more cost effective and efficient.

⁹ See footnote 1, Mayson p.48, 62

¹⁰ The Legal Services Board (LSB) has attested to the complexity of the multi-regulator model in England and Wales creating barriers to innovation and entry for new providers (LSB, *The State of Legal Services 2020* report, p12, para 12).

Furthermore, when looking to progression and growth of the market, a single regulator's role as an impartial body (disconnected from any pocket of the profession) will place it in a better position to accommodate, evolve and respond to changes in legal need, consumer demand and market behaviours, and to do so consistently without inadvertently creating unfair advantage.¹¹

4. Legal Tech

(Response to Questions 24, 25, 26, 27 & 28)

- 4.1. There has been increased interest and investment for legal technologies in the UK legal services market; a trajectory that is unlikely to change as the impacts of COVID-19 sees greater dependency on digital solutions and online consumption. CILEX therefore strongly agrees that Legal Tech should fall within the remit of legal services regulation in order to safeguard consumer protection when engaging with these services, but equally to inspire innovation and value creation in the market.
- 4.2. There has also been a growing narrative and wealth of evidence to suggest that regulation can play a key role in stimulating innovation when developed collaboratively.¹² Regulatory Sandboxes are useful as temporary measures in this context, helping to identify where risks may emerge in legal tech and supporting software developers in user testing and interrogation of digital solutions so that they are fit and safe for the market. However, more permanent measures are still necessary to ensure that the regulatory framework is flexible enough to accommodate legal tech solutions as they grow and develop at pace.
- 4.3. Much like the model currently used in England and Wales, the narrow gateway of entry created through title/profession-based regulation, risks that this will not be the case. This is because digital solution providers, largely driven by third-party players in the technology sector, generally involve input from non-lawyers who do not currently fall within the remit of legal sector regulation in the Scottish jurisdiction. With the technology itself unregulated, and non-regulated persons entrusted with writing it, a disconnect arises even where there is some input from a regulated legal professional; inevitably, it is who writes the code and how it is written, that shall drive service outcome.
- 4.4. CILEX therefore recommends that the regulatory framework will need to shift to enable digital solutions, which are created, coded and maintained by non-legally trained intermediaries, and may even eliminate the role of legal practitioners entirely, to be effectively regulated, or at the very least moderated, so as to ensure minimum standards within legal service delivery.
- 4.5. One way of achieving this aim would be, as proposed by the consultation, to bring those that facilitate and provide legal tech services into the regulatory fold; however, CILEX envisages that delineating these individuals based on job title or profession (particularly where they have originated from outside the Scottish jurisdiction) would be problematic in practice. Rather, as advocated by Professor Stephen Mayson, an approach of activity-based regulation (what you do, as opposed to who you are)¹³ could provide an effective and risk-based solution able to penetrate the digitally-driven legal services supply chain.

¹¹ For example, as may be implied by the protective status afforded to 'Solicitors' as compared with 'Advocates'.

¹² LSB, *Striking the Balance: How legal services regulation can foster responsible technological innovation* (April 2021).

¹³ See Mayson's proposals for a wider approach to activity-based regulation that addresses concerns raised by the

5. Definition of Legal Services and Reserved Activities

(Response to Questions 34, 35 & 36)

- 5.1. An activity-based regulatory model would also have the benefits of delineating 'legal services' by categorising types of service activity, the associated risk and subsequent requirements in terms of licensing and authorisation. This would provide greater assurances and parameters for the profession to operate in, whilst not being confined to the rigidity of an official statutory definition for 'legal services'.¹⁴
- 5.2. With respect to defining the reserved services, CILEX would be particularly interested to know the level of consumer understanding around reserved vs unreserved services in Scotland. In the context of England and Wales, it has been found on numerous occasions that consumers tend to assume all legal professionals and legal services are regulated,¹⁵ creating a gap between the perception and reality of legal practice. This in turn has been thought to have compromised consumer understanding, confidence and trust in the market.¹⁶ For this reason, in the jurisdiction of England and Wales, CILEX has called for a simplified regulatory framework that reflects the expectations of the public, i.e.: for all legal services and legal service providers to fall within the fold of regulation, proportionate to the activities they provide. The Scottish government and Scottish Ministers may therefore wish to assess if the situation is the same in the Scottish jurisdiction before establishing whether any further change is necessary to the model of reserved activities.

6. Titles

(Response to Questions 38, 39, 40 & 41)

- 6.1. The discrepancies highlighted in the consultation paper around consumer understanding of the terms 'solicitor' vs 'lawyer' vs 'advocate' is in our view evidence of the lack of clarity within the legal framework as a whole when seeking to address the regulated and unregulated market in a framework that operates under title-based regulation. To us, as above, given consumer expectations and the need for proper consumer protection, if a legal service looks like it should be regulated, and consumer expectations are that it is, it probably should be. Consequently, the solution lies in moving to a system of activity-based regulation in the longer term. CILEX therefore cautions against the temptation to tinker with title or terminology, as in the short to

Robertson review, by not seeking to outline and identify every legal activity conducted in a specific or 'locked-in' manner, but to categorise risk in a manner that is able to flexibly accommodate the market and evolve with the market. See footnote 1, Mayson, p.120, para 4.6.3.

¹⁴ Indeed, from CILEX's own experiences, the rigidity of statute can often create delays in the ability of legal services regulation to reflect modern-day practice; a barrier that has perhaps been witnessed in the context of changes to the reserved legal activities under the Legal Services (Scotland) Act 2010 s118.

¹⁵ LSB, Law Society of England and Wales, Yougov, *Legal Needs of Individuals in England and Wales: Technical Report 2019/2020*, (January 2020) p.64: "When probed on why people dealing with a contentious legal issue did not check whether their main adviser was regulated most people simply say they assumed their adviser would be regulated (31%). One in ten (13%) felt that regulation was not important. Pointing towards some gaps in knowledge, young people (aged 18-29) are more likely than any other older age group to report that they did not know what regulation meant (11%)."
See also: Footnote 1, Mayson and IRN Research, *Consumer Legal Services Report 2020*, (April 2020).

¹⁶ See footnote 1, Mayson Finding 1: "There is a discrepancy between consumer expectations of regulatory scope and protection, and the current reality of that scope and protection."

medium term, this risks restricting market entry for legal services providers (and therefore consumer choice).

7. Conclusion

- 7.1. CILEX welcomes the Robertson report's recommendations for a single regulator in the Scottish jurisdiction, ensuring regulatory independence, consistency of standards and a simplified regulatory framework for consumers and providers to navigate. In order to allow for the entry of new providers to the market (such as legal tech providers, Alternative Business Structures and diverse talent pools) the use of a risk-based and outcomes-based approach to regulation, founded on an activity-based model, we believe would help to achieve the regulatory objectives set out by the consultation. We welcome any opportunities for further engagement with the Scottish government on how this new system of regulation may apply, acting as an enabler to a strong independent legal profession, whilst still safeguarding quality standards and access to justice in the interests of the consumer.

For further details

Should you
require any
further
information,
please contact;

Chandni Patel
Head of Policy
chandni.patel@cilex.org.uk