PE1724/B
Petitioner submission of 28 August 2019

Reply to the Lord President response dated 25 July 2019

1 I would note that the response by the Lord President has only selected certain aspects of the petition to respond to, but not others. The examples given in the petition are simply for the purpose of allowing the Scottish Parliament to consider fairly, and impartially, if there is any substance to the petition. How the Lord President and Sheriffs Principal can be isolated from the Scottish Courts and Tribunal Service as part of considering if there are to be equal rights for all legal professionals including Commercial Attorneys, and also Party Litigants in the legal system, is unclear. Perhaps clarification could be provided.

2 It is respectfully submitted that the Scottish Parliament is more than capable of considering the matter independently of the Lord President's statement. The legislation that the Lord President refers to requires complaints to be made within three months of the event. For reasons that should be clear, to suggest that a formal complaint could be made about the Lord President and Sheriffs Principal, at the same time when the revised scheme for commercial attorneys was being considered, and in some instances resisted with considerable pressure, does appear unrealistic, and unhelpful. In any event the First Minister has the power to request a tribunal be set up under Section 35, 1 (b) of the Judiciary and Courts (Scotland) Act 2008, if it is felt that there has been inappropriate conduct.

The concerns are not restricted to the issue of wearing gowns as has been suggested by the Lord President. The following are also examples of the evidence that has resulted in this petition.

The decision, if the allegations by the Scottish Government are correct, to restrict the revised Practicing Scheme for commercial attorneys without the need for any consultation, for example with the Competition and Markets Authority in 2016. (It should be noted that the revised Practicing Scheme was formally requested by the Scottish Ministers, but no mention was made of any restrictions on the extent of the Scheme at the time.) The refusal to clarify if the Lord President's Private Office, did make the decision to restrict the revised Scheme, despite being asked on six separate occasions, and also by Rona Mackay MSP in 2018. The significance of this aspect is not that a potential mistake was possibly made at the time, we all make mistakes, it is that the decision, in conjunction with an incorrect claim that it had been agreed by the Association before the revised Scheme was even requested by Scottish Ministers, was then used as justification to reject the Scheme when first submitted. The decision to reject the right to conduct litigation in the Court of Session without any consultation, (again the Competition and Markets Authority were not given the opportunity to comment), and then to subsequently include this right, without any explanation. The

decision to take over a year to carry out an “informal consultation”. The reluctance to issue clear accessible published guidance to the public, court practitioners and the courts regarding commercial attorneys, for now over ten years. The failure to alter Sheriff Court rules to inform the public that court representation in certain matters is not restricted to solicitors, despite this being a recommendation of the Competition and Markets Authority. The seeming exclusion of commercial attorneys from the Scottish Civil Justice Council. It is also perhaps worthwhile considering the fact that there are no Patent Attorneys or Trade Mark Attorneys who have ever applied for the right to practice in the Scottish courts, and the potential implications for intellectual property matters in Scotland if the English courts are seen to be preferable to the Scottish courts.

Turning now to the specific comments on the wearing of gowns, the Association did not seek the views of the Lord President in April 2017, this is factually incorrect. The request was given, in the first instance, to the Sheriffs Principal after verbal guidance from the Lord Presidents Private Office on the appropriate process. It was then “ fully considered ” and rejected by the Sheriffs Principal in August 2017. The Sheriffs Principal declined to meet with the Association to discuss or explain their concerns, which presumably would have become clear during the full consideration process. The Sheriffs Principal subsequently advised that it was a matter for the Lord President. A submission on the wearing of gowns was then made to the Lord President in October 2017, which was rejected. The consultation with the Sheriffs Principal referred to, was carried out in private, and the Association were given no opportunity to comment on what had been submitted. The comments to the Lord President from the Sheriffs Principal as part of the “consultation” are not to be disclosed despite this information being requested. As the Sheriffs Principal had already rejected the initial request, then perhaps the parliament can consider on what reasonable basis it was a fair consultation to seek their views in private, but not to give the Association the opportunity to respond. The Private Office of the Lord President has previously advised that the Lord President will not discuss the wearing of gowns by commercial attorneys, and that it cannot be reconsidered. In the petition response, it is apparently now being suggested that the Lord President might reconsider it, but only if evidence can be provided to demonstrate that the risk of confusion, for something that has never taken place, will be minimal. On the same basis that it has never taken place, how can it then be assumed that there is a reasonable risk of confusion? This does seem an unfair, and potentially impossible, burden of proof to meet. Bearing in mind that the Lord President has conceded in his letter to Rona Mackay MSP that there is no actual evidence to support his previous decision on the wearing of gowns, just the views of the Sheriffs Principal, (which are not to be disclosed), it could appear to be an automatic presumption against commercial attorneys, since it is impossible to prove what might happen in a future event. In effect, what is apparently being suggested is that the Lord President does not need evidence to prove that the public will be confused in a future event, but commercial attorneys do need evidence to prove that the public will not be confused. I would note that the Lord President makes no mention

of the fact that sheriff clerks wear gowns in court, and the public, other court practitioners, and the judiciary, do not appear to be confused. Even if there was confusion, which is not admitted, perhaps the Lord President could explain exactly what actual harm would occur, how this would take place, and who would suffer from this harm?

The legal test for bias in judicial matters, is that there does not need to be actual bias, just a reasonable perception by someone informed of the facts that there could be bias. The Scottish Parliament can establish the facts and form its own mind.

3 The revised Scheme was requested by Scottish Ministers in March 2016. Perhaps the Lord President can provide details of the actual time spent on the "very substantial assistance to the Association Secretary in relation to the revised scheme" as presumably a note will have been kept, since this is not the petitioner's recollection of what actually took place. The consultation was first proposed in October 2017. It then took over a year to be commenced due to delays by the Lord President's office. It would now appear that the consultation may not have been necessary after all, and certainly no consultation was required to restrict the revised scheme in 2016, if the Scottish Government is correct, and also later in October 2017 when it was decided that Court of Session rights were not to be considered in the revised Scheme. The revised Scheme of October 2016 was eventually granted in its entirety on the 18 June 2019, but the Scottish courts and the Judicial Office for Scotland have still refused thus far to issue guidance to the public, court practitioners, and the courts on the revised scheme. No actual evidence has ever been given to justify the reasons for the various instances of rejection during the process of considering the revised Scheme. The pattern seems to be that any request is initially dismissed without the need for consultation, and then, after sometimes years of campaigning, a consultation which can take an inordinate length of time to undertake is deemed necessary.

4 This part of the response is a significant concern. Is the Lord President of Scotland somehow suggesting that if it is just an individual raising a concern, then the Petitions Committee should consider it as being of lesser importance? Further, is the drafting of this part of the response implying that if other members of the Association do not publicly raise concerns, then the petition is to somehow be discredited? Is it the start of a "blacklisting" process ? Is it not possible that other commercial attorneys, having witnessed the ability of the Scottish Government and the Lord President to impact on their ability to earn a living, might be afraid to speak out? Public institutions have astonishing power, and people can be afraid to raise a concern, or become whistle-blower's, for fear of retribution. The e-mail of the 9th May 2017 from the Scottish Government, sent with the concurrence of the Lord President's Private Office, had the implied threat that if the Association did not restrict the revised Scheme to what the Lord President's Private Office had decided in 2016 (without consultation), there would be delays in considering the Scheme previously submitted in October 2016, and further, that it might not be approved at all. The October 2016 Scheme was finally approved in June 2019, despite the fact that no evidence has ever been put forward

to justify why the revised Scheme was not acceptable at the time of the initial submission. It is perhaps understandable that when faced with co-ordinated criticism from the bodies that can have a significant impact on someone's livelihood, people will be afraid to speak up.

If the Lord President rejects the contents of petition, then with respect, it should be on the basis of reasoned explanation and evidence. What else would the public expect from the most senior judge in Scotland?

This reply is restricted to the response by the Lord President, however the position of party litigants has not been addressed by the Lord President, and this aspect of the petition itself is also relevant.

Again, as stated previously, the Scottish Parliament can recommend that the First Minister requests that a tribunal be set up under Section 35, 1 (b) of the Judiciary and Courts (Scotland) Act 2008, if it is felt that there has been inappropriate conduct.