

#ReimagineRegulation

Priorities for a consultation on legal services regulation



INTRODUCTION

The current arrangements for legal complaints, and how complaint outcomes are used to improve standards in the legal sector, are too complex, involve too many stages, and pass through too many organisations. Faster, more efficient, and better targeted regulation can be delivered, to the benefit of consumers and the sector, by significant legislative reform.

The Scottish Government is committed to a '*consultation to review legal regulation*'. We strongly believe there are six priority areas that this consultation should address, and that government should ensure wide input from consumers and lawyers.

BACKGROUND

Who are we?

The Scottish Legal Complaints Commission (SLCC) is the independent gateway for all complaints about solicitors, advocates and commercial attorneys. We have experience of handling over 8,000 complaints, and in 2014/15 awarded over £400,000 of consumer redress. An independent Consumer Panel also helps guide our work. We engaged with a large number of organisations in the development of this paper.

Past debate, future opportunity

The Scottish Parliament has wrestled with modernising and improving legal regulation and complaints handling since its creation, and yet 17 years later many problems spotted in 1999 remain - consumers still wait too long for redress; the public faces risks due to the time taken to remove lawyers from work; suspension options are limited; consumer understanding of, and confidence in, the process is low; the cost is significant; and key areas of risk to consumers have not been significantly tackled.

There are outstanding issues from government's own '*Research Working Group on the Legal Services Market*' in 2004, the *Which? Super Complaint* of 2007, the *Office of Fair Trading report* of 2007, and the Scottish Government's *Thomson Review* of 2010. Government and parliament must decide early in any new review process if now is the time to tackle some of these issues by significant reform, or if another bill is envisaged focussed primarily on technical changes and additional layers of regulation.

We believe the time has come to consolidate the Solicitors (Scotland) 1980, the Legal Profession and Legal Aid (Scotland) 2007, the Legal Services (Scotland) Act 2010, and other legislation in this area to create a single framework Act which takes account of the six priorities we lay out in this paper.

Strong foundations to build on

It must not be forgotten that Scotland has a legal sector which is internationally recognised for its quality and integrity - there is much to be proud of and everything in this paper seeks to build on those strengths. Our own strong performance as an organisation has helped increase confidence in the sector, and we are grateful to our Board and staff for the hard work they put in every day. We also respect the individuals at all levels across other organisations who strive hard to make the current arrangements work.

However, this should not detract from the fact there are real challenges with some aspects of the current system. We appreciate many of the issues are complex and nuanced, but in previous debates technicalities and barriers to change have often been discussed more than aspirations and solutions, and there is a missed opportunity for all if this happens again. We also believe the appeal courts have pulled the system away from the original spirit of the parliament's debate and intent, and towards an adversarial court-style process.

We are confident that if government, consumers and the sector work together positively then we can identify solutions that deliver better outcomes for consumers and encourage a thriving and sustainable legal sector across Scotland, serving the needs of our country's diverse population.

Appendices to this paper provide more detail on: our **work and role**, our **strategy**, our **current performance**, how we **consulted and engaged organisations** in the development on this paper, a **summary of the debate on legal services regulation in each parliamentary session** since the Scottish Parliament was created, and links to **academic research** on these issues.

The appendices can be downloaded from: www.scottishlegalcomplaints.org.uk/reimagine-regulation

THE FOUR BIGGEST CHALLENGES TO TACKLE

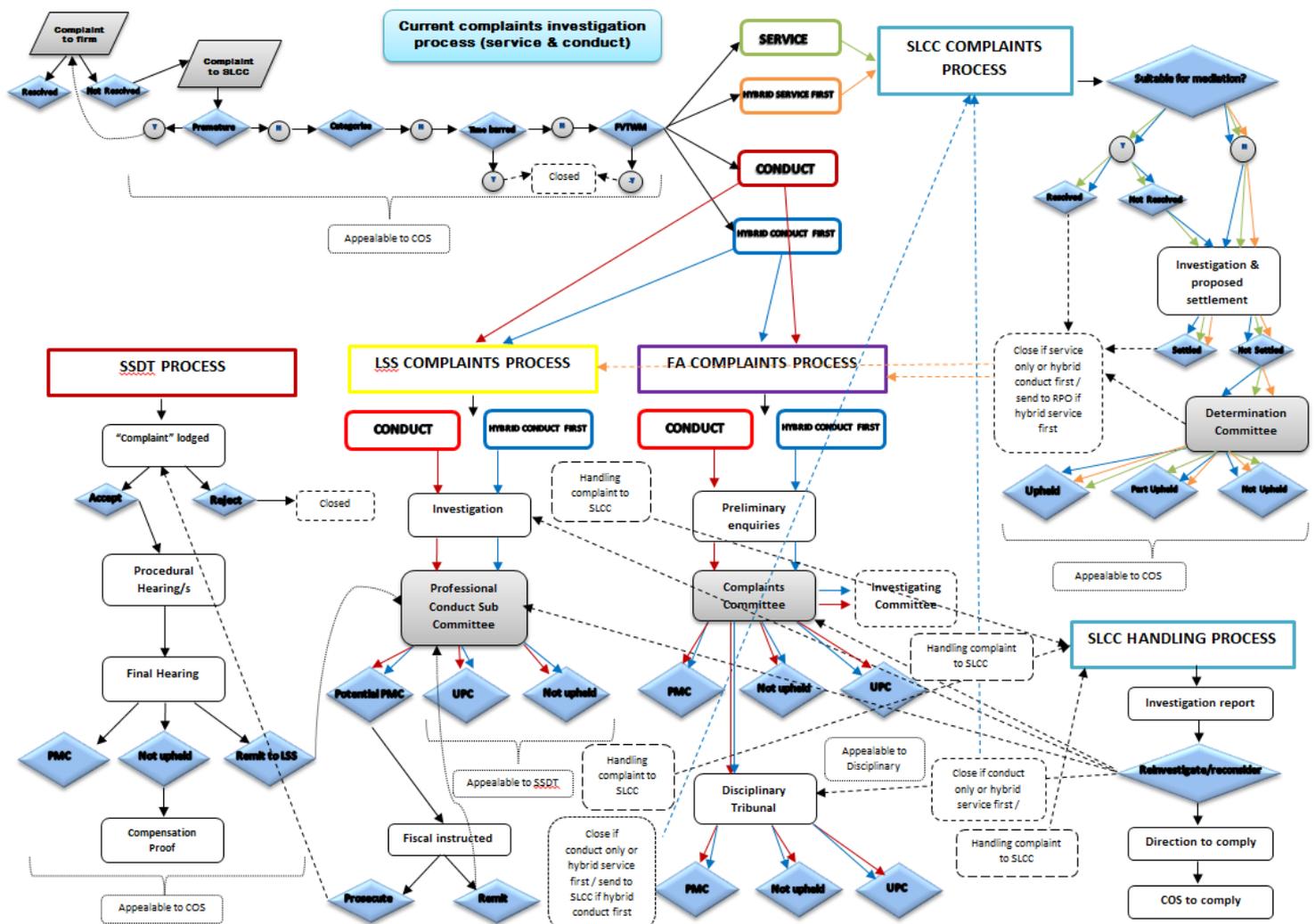
1

Complex | Costly | Slow

We want to unravel the current complaints maze to create a clearer route to consumer redress

At the moment there is a hugely complex path and set of tests applied to complaints about legal services in Scotland. Even a simplified diagram highlights the problems (a larger print version, with the explanation of key terms and acronyms, is provided in the appendices available from our website -

www.scottishlegalcomplaints.org.uk/reimagine-regulation):



How does this work in practice? The first step for a consumer travelling through this process is to make a complaint direct to the firm or lawyer, who carries out an investigation, and makes a decision, letting the person who has complained know the outcome.

The complaint can then come to us. We may decide it has a mix of 'service' and 'conduct' issues. We also have to decide at this stage if the complaint is 'eligible', applying several tests set out in legislation (although this can be challenged, and we can end up at the Court of Session on appeal even at this stage).

We then investigate, try to settle (through conciliation, or optional mediation, or sometimes both), and then determine the 'service' elements of the case (with those decisions also appealable to the Court of Session). The professional body separately investigates the 'conduct' elements, determines at committee, then may send it to one of its Fiscals for a view, a committee considers it again, then the Fiscal prosecutes at the Scottish Solicitors Discipline Tribunal, but does so on the behalf of the professional body. If the Tribunal finds against the solicitor, then months later the consumer is invited to a separate compensation hearing.

If the consumer is not happy with how their case was dealt with by the professional body, they can raise a 'handling complaint' under the legislation with us. We then investigate the professional body's investigation. In the meantime the unhappy solicitor can appeal the Scottish Solicitors Discipline Tribunal decision and matters head to the Court of Session again.

All of this may relate to a complaint about whether or not a house purchase should have included £200 of kitchen appliances. This also calls into question the appropriate forum for appeal, and not just the number of appeals allowed within the current system. The Court of Session now usually only hears cases over a value of £100,000. Is it fair to consumers, or lawyers, that disputes over trivial amounts of money can quickly escalate there?

There is also an element of 'snakes and ladders' – for example, if the Tribunal does not think the test of 'misconduct' is met, but does think it may be 'unsatisfactory professional conduct' (a lower standard), it cannot make that decision there and then but must remit it back to the Law Society of Scotland to put it through its process. Likewise, if the Law Society identifies a public protection risk it must refer it to us, only for us to then have to refer it back to the Law Society to investigate.

We believe the solution is to plot a route from A to B, based on the experience of the consumers and lawyers (in all their diversity) who have to go through this process. The whole process could be reduced to three core stages:

1. **a single investigation** - ensuring there are a range of flexible options to filter out vexatious and similar complaints and allowing processes proportionate to different levels (£200 or £20,000).
2. **determination** - by the same organisation in relation to lower level issues, or by prosecution at the professional tribunal for conduct which may lead to removal from the profession
3. **appeal** - to ensure accountability and meet the requirements of natural justice there should be a single opportunity to appeal at the conclusion of the process

The diagram above does not yet include new complexity which will be introduced when Approved Regulators are created under the Legal Services (Scotland) Act 2010 – this will add several more types of complaint, and inter-crossing lines. Likewise, while we support the concept of entity regulation proposed by the Law Society of Scotland, if this is simply layered over the current arrangements it will create an even more complicated path for consumers, and equally for lawyers subject to a complaint. Finally, if the case also involves an Advocate, the consumer could be dealing with four different legal bodies at once.

Where the legislation does not codify every stage, such as in relation to mediation, we have demonstrated the benefits this flexibility brings for lawyers and consumers. We offer mediation which is fast, flexible, lower cost, and in which both parties are more likely to be happy with the outcome. We have held mediations in prison, by Skype and by phone. We are free to pilot changes to our approach to improve our performance, and evaluate the outcomes.

We are not criticising any particular element, role or organisation, but our experience of over 8,000 complaints within this system compels us to suggest that debate is needed on whether this model really delivers the best for lawyers and the public, and does so at the least cost and greatest efficiency.

To achieve faster, more efficient, and more targeted complaints handling the government must focus on a simplified customer journey, not institutions and legislative detail. A consultation should focus on the key questions:

- a) Is it time for a single independent body to handle all aspects of complaints?
- b) If not, how could stages and hand-overs be dramatically reduced - for example, a single investigation covering service and conduct, even if conduct is still prosecuted at an Independent tribunal?
- c) How many chances of appeal should there be, and is it time to consider the Sheriff Appeal Court as a more proportionate forum than the Court of Session for consumer disputes

2

Inflexible | Unresponsive | Legalistic

We need to dismantle a statute that focusses more on processes than outcomes, and build a system on agreed principles that delivers for consumers and the sector

It is not just the overall customer journey that causes problems, but the level of detail specified at every stage. New legislation must take the form of a 'framework' Act and not prescribe administrative processes in the primary legislation. This is essential for future agility and ensuring proportionate regulation for the sector, but regulation which can respond to the rapidly changing challenges to protecting the public and professions.

Legalistic and restricted drafting – an example problem:

At the moment the statute lays out that we must assess if a complaint is time barred, before assessing if it is *'frivolous, vexatious, or totally without merit'*. We could take several weeks and stages of correspondence to agree the exact dates of service with both parties, only later to say that a complaint about something like failing to answer the phone on two occasions when the office was busy is 'frivolous'.

It is not as simple as changing the order, if we did, consider the opposite issue which could occur with a different type of case – perhaps weeks of assessing if a complex allegation was 'totally without merit' with extensive correspondence, but all the time knowing at the next statutory test (time bar) it would be automatically declined as a complaint because the issue was 20 years old.

There is also no proportionality in the current system; a complaint about £200 must go through all the statutory processes, and all the potential of two appeals to the Court of Session, in the same way as a complaint for £20,000 with public protection issues.

It is clear from the original consultation and parliamentary debate that this 'eligibility' stage was meant to be a relatively quick check on whether a complaint should enter the system – was it about a lawyer, had the lawyer had a chance to respond, was it service or conduct (the latter being referred to the relevant professional body)?

However, highly detailed and legalistic drafting of the Act, heavily amended during the parliamentary process by competing interests, meant the actual statute did not deliver this. The situation has become worse based on the outcome of various appeals to the court which have turned what was meant to be a consumer complaints process into a highly legalistic court-style approach, sometime requiring 18 pages of reasoning (at a stage which was meant under the act to be pre-investigation) and full analysis of evidence.

Defining processes in this level of detail will never allow flexible, proportionate, and innovative systems that work for consumers and those subject to a complaint.

We believe the legislation needs dismantled, and rebuilt from scratch. The 'Better Regulation Executive' sets out five principles of good ('right touch') regulation (**Proportionate, Consistent, Targeted, Transparent, and Accountable**), which are supplemented by a sixth, **Agility**, in the approach recommended by the Professional Standards Authority.

The solution is a framework act - setting out principles of operation, powers, and specific limits on powers, but avoiding detail which will inhibit operations as much as possible. Counterbalancing assurances can be put in - statutory duties to consult on our rules, publish statistics, and so on. The three UK Law Commissions have recently carried out detailed work, including a draft bill, on how such a model could be delivered in relation to the health professions – there is much evidence we could draw on from that consultation.

We would note that this approach would be valuable in a far wider range of areas than simply complaints, for example in relation to the governance arrangements of various organisations (our prescribed terms of office lead to risk each time the board is almost completely replaced within an eight month period), legal business creation and regulation, and the financial regulation of firms.

The government should consult on a model which allows the widest possible discretion to the complaints bodies, but ensuring safeguards through debate on:

- a) areas of legal regulation meriting legislation, based on the 'better regulation' principles
- b) the specific high level principles for what is trying to be achieved with complaints and redress (instead of debate on, and drafting of, process) in the sector – an independent process, fair to all parties, efficient, effective, proportionate to the complaints, etc.
- c) how rules are set by the complaints bodies specifying the process(es) if there is less detail in statute - for example, a statutory duty to consult

3

Avoidance | Evasion | Delay

When compensation is awarded to a consumer this must be paid - anything else is a failure in regulation and undermines confidence in the market and in lawyers

In our current strategy (2016 to 2020) we have set out a commitment to examining how we can ensure all consumers receive compensation and fee refunds which are awarded through our statutory process, as we currently see too many cases where this does not happen.

Five example situations are:

- a) Rebate of fees is awarded, the lawyer has been sequestered and current indemnity arrangements do not cover this.
- b) Compensation is awarded, but is lower than the self-insured excess of the lawyer, and the lawyer has no assets. In recent years the amount of the self-insured excess has been increased at a national level to keep indemnity fees down for lawyers. In addition, individual lawyers can double their personal excess to save a further 10% on their annual fee. This means even awards of six or seven thousand pounds can be below the excess and so become non recoverable by the client.
- c) A practice is closed and a new one opened, the lawyer may be practising in the same town with the same clients, but recovery is not possible against the original practice.
- d) The struck-off solicitor 'disappears' – we have seen cases where the individuals have managed to go to ground, and even using debt collectors we have not been able to serve notices. Where we can't serve a notice we can't achieve recovery even if they have assets.
- e) The lawyer deliberately transfers assets into the new SIPP pension arrangements, meaning a solicitor may retain their law firm office and their own house, but because they are now in a personal pension pot they are not recoverable through debt enforcement.

Whilst as an overall percentage of legal transactions the number of these cases is tiny, they have a disproportionate effect on consumer confidence and undermine the whole profession's credibility. We believe all consumers should receive redress when an award is made by a statutory body, and believe these gaps and failures in client protection should be addressed.

There are other examples of protected payments post insolvency (such as a fund for workers redundancy) based on public protection principles. There may also need to be a debate on 'capital adequacy' in law firms, as many partnerships trade whilst technically insolvent in a way which would not be legally allowed by a company structure. The cash amounts are low (sometimes lower than the costs being spent on attempted recovery) and a small fund may need to be considered, paid for by the sector, to tackle this issue.

Complaints about unfair fees – taxation and the auditors or court

Taxation allows a client to have their legal fees reviewed by an independent person (the auditor of court) to assess if they are fair. Much billing is on hourly rates, so an expert eye is needed to see if the time spent on a case is reasonable. In several past reviews it has been concluded reform and modernisation of this system was critical because of the importance to consumers because it is currently the only mechanism to address this issue. Instead at Sheriff Court level these arrangements have been abolished.

All agencies in the sector have experience of seeing manifestly unfair fees charged (with executry work a particular concern where the lawyer takes funds from monies in an estate before passing on the remainder to those named in the will) and there appears there is consensus the issues needs to be considered.

The current process is a slow and potentially costly one. Few consumers will understand that they have the option to do this, nor will they understand the language and process used. If the submitted account is determined to be fair and not excessive, then the applicant is usually liable for the full costs of the process.

The SLCC has limited powers to intervene on fee issues, and often if the 'letter of engagement' is clear on hourly rates there is no ability to assess whether the hours expended were necessary or fair. In contrast, a 'fair' fee may have been charged but the SLCC can intervene and award a reduction if the wording on cost given to the consumer was not clear. The position seems anomalous and again shows a past legislative approach based on detail and process, and not the consideration of outcomes.

The government should consult on:

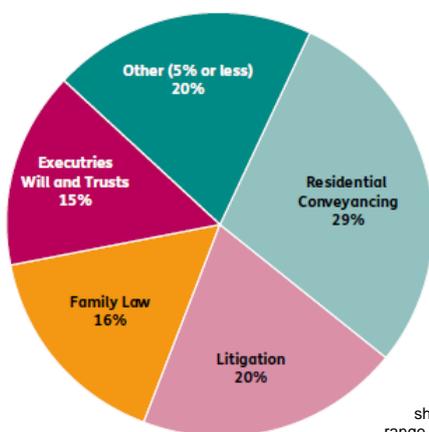
- a) The principle that compensation awarded by a statutory body should always be paid to the consumer, and the best methods of delivering this
- b) How best issues of unfair fees can be addressed – improving access to 'taxation' or awarding new powers to another body capable of addressing this key consumer issue

4

Unfocused | disproportionate | risk-naïve

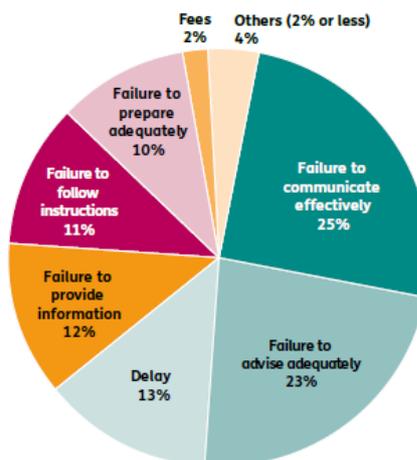
We believe it's time to stop seeing a single market, and use the data from thousands of complaints to tackle the high risk areas which every year cost consumers and the professions millions

Accepted service complaints by business area



NB – the top 'slice' shows 20% of our work is on a range of areas, each below the 5% threshold at which we report individually.

Accepted service complaints by type



We analyse what areas of law, and what types of issues, lead to the most complaints each year. In 2014/15 the trends remained similar to previous years, with the key issues being shown above.

If we take conveyancing as an example, it can be seen this accounts for 29% of complaints, and therefore, at a crude level, 29% of our £3 million operating costs. This is already a lot of money. However, we know conveyancing also accounts for well over 70% of items paid or reserved on the Master Policy (the professional indemnity scheme for solicitors) in 2015 (at a cost of around £8.4 million), and that it is an

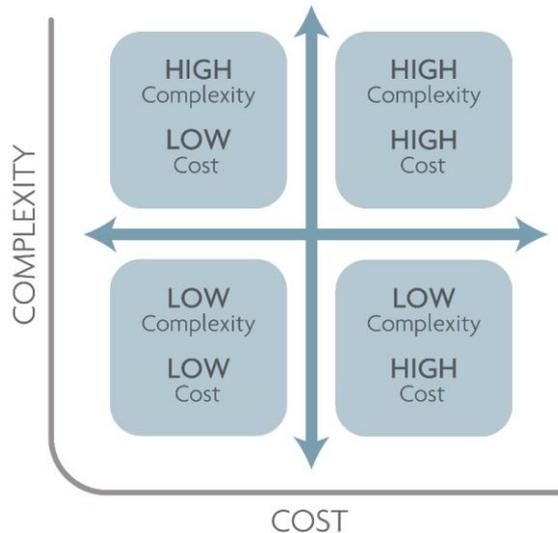
element of the costs of the Client Protection Fund (until recently called the Guarantee Fund) as it is one of the ways in which law firms hold client funds.

Whilst both the Master Policy and the Client Protection Fund are strengths of the Scottish market, this means that consumers are arguably paying for over £10 million per year for ‘failures’ in the conveyancing market (and whilst the money comes from client fees, solicitors will also feel this regulatory burden on them). The limited oversight functions the SLCC was given of these funds in legislation has made it difficult to pursue meaningful work in this area. However, it would seem conveyancing would be an area to target in relation to regulation, in contrast to employment law, for example, where virtually no complaints or claims are seen (and where there is also a thriving non-regulated competitor market which does not seem to have a public complaints/failures issue).

It must be emphasised that this failure rate should not be seen as a criticism of lawyers or regulation. Indeed, it may be the underlying ‘black letter’ law in this area is too complex or has defects, or a range of other factors. But why are these high risk areas not a clearer priority in regulatory debate in the sector?

There is also a risk that as the legal profession becomes increasingly internationalised, as more and more lawyers work in-house, and as a focus on excellence is pursued in relation to an international competition perspective problems may occur. It may mean the basic needs, key issues, and minimum standards for the typical Scottish consumer trying to access a local service become a lesser priority, or less funds are spent on these issues. There has been some recent discussion in the sector as to what ‘core statutory functions’ are, and we would welcome a debate on this for each of the statutory bodies in the sector. The Scottish public needs regulatory efforts focussed on their priorities.

Another example in this area would be that the SLCC has little ability within its ‘one size fits all’ process, prescribed in statute, to manage risk. Imagine the different parameters potentially influencing a case. For this example we take cost and complexity (although you could also factor for public interest, ongoing risk to consumers, likelihood of an issue being systemic, or other factors)



Examples:

Some cases can be high in complexity and cost - a very complicated multiparty conveyancing transaction with several title issues, several parties and law firms, and changes of representation during the progression of the transaction. The consumer may be out of pocket by tens of thousands of pounds.

Other cases will be simpler and relate to lower values of money, like the example we used earlier of £200 of kitchen appliances and whether there was ‘offer and acceptance’ as part of a house sale.

Should these be treated the same in a prescribed statutory process? Or are different approaches and options needed, possibly allowing faster and cheaper solutions which benefit all involved? And allowing better management of consumer risk?

There is an argument that the focus of regulators, or the focus of legislation, should be targeted on the issues most affecting local consumers and lawyers. Is market reform needed for all areas of law (for example, entity regulation for all law firms)? Or could the regulatory burden be reduced in some low risk areas (where it could be argued to be disproportionate), whilst targeted intervention in others would actually allow improved consumer protection and outcomes overall?

The government should consult on whether the time has come to:

- a) move from ‘one size fits all’ regulation to a focus on the areas of greatest consumer risk
- b) engage consumers, lawyers and experts on the approaches that would tackle these ‘high risk’ consumer areas
- c) consider the core statutory functions for each body in the sector, and what discretion they have for other work beyond that.

THE TWO GREATEST AREAS OF OPPORTUNITY

5

Choice | Access | Information

Consumer principles should be at the heart of a consultation on legal regulation

There are seven well recognised 'Consumer Principles' which apply to all markets. Some are already well addressed in legal regulation in Scotland, but others have been considered less. The consultation should focus on how the seven principles can be delivered:

Access – can people get the legal services they need or want? If regulation means only the privileged few or the state funded have access is that good enough? Do new models need to be considered?

Choice – what options can consumers choose from around price, quality, delivery channel, locality? Do they have all the information they need to make informed choices on the best option for them?

Quality/Safety – are the services safe and fit for purposes, how can harm be reduced?

Information – is it available, accurate, easily understandable and useful?

Fairness – are some or all consumers unfairly discriminated against?

Representation – do consumers have a say in how goods or services are provided?

Redress – if things go wrong, is there a system for putting them right?

The SLCC believes that an approach which focuses on the consumer from the start may help manage expectations and ensure consumers have information to make informed choices, and so reduce some of the common causes of complaints.

The Consumer Panel of the Legal Services Board in England and Wales has published a guide for regulators on '*The consumer interest: Using consumer principles*' to encourage thinking in this area. They have also published papers on the needs of vulnerable consumers in particular, focussing on the diverse needs of different members of society. The debate around consumers and advocates is even less well evolved. Scotland risks lagging behind.

In the past, consultations and legislation have primarily focussed on *quality* and *redress* – how does regulation set standards, and how does the system react when things go wrong? There has been some discussion of *access* and *choice* – in the Legal Services (Scotland) Act 2010 access and competition must be taken into account in the decision by an 'Approved Regulator' to allow 'licensed providers' to enter the market. However, the complexity of this Act means six years on there is no approved regulator, and no licensed providers. Whereas there are over 1,300 business units authorised under existing regulation, and many new ones added every year, where access and competition do not need to be considered at all.

Much of this is due to the historic focus on professional regulation (of individuals) rather than market regulation (of entities and the functioning of the market). It means areas like *information* – how consumers make informed buying choices, can compare providers, and what 'key facts' (such as a clear indication of price) are provided at the outset of a relationship - are not well addressed in terms of statutory powers for bodies, nor in terms of the rules and regulations issued by the professional organisations.

Finally, we would note that 'professional principles' should also be laid out to ensure a strong and independent profession is maintained. The Legal Services (Scotland) Act 2010 already does this, and the list there may be a starting a point which could be developed and become part of a new framework Act.

The government should formally consult on:

- The appropriate balance between 'professional regulation' of individuals and 'market regulation'
- How to ensure the consumer principles are delivered to assist a thriving and sustainable market
- Whether an amended version of the regulatory and professional principles in the 2010 Act should be applied to all aspects of legal regulation.

6

Analyse | Learn | Improve

In the era of 'big data' we believe regulation should focus on learning from complaints, and assessing and managing risk, based on good market intelligence

When the SLCC was launched the then Cabinet Secretary stated: *"Complaints handling is not just about dealing with things that go wrong, but ensuring that things go right. The commissioners will help to build a culture of learning from complaints through their oversight and promotion of standards. This focus on the quality of service will undoubtedly benefit both consumers and the profession alike."*

Standards

We believe there is huge potential to learn from data to help lawyers tackle the common causes of complaints and therefore improve the outcomes for all consumers. However, the extent to which we can do this has been disputed in a recent consultation on our new strategy.

We believe consideration should be given to powers to allow us to make directions to the professional regulators to consider changes to their standards based on evidence from complaints, and/or the power to issue our own guidance on such matters. An alternative approach would be a statutory requirement for the regulators to consult on all matters of rules and guidance, and to demonstrate how consideration of responses and consumer data has guided the final approved versions.

Complaints handling by lawyers

We also still find poor handling of complaints by lawyers before they arrive at the SLCC. Indeed, we have evidence of lawyers refusing to consider a complaint properly at firm level based on a view 'they pay the SLCC to do that job', thus passing on what are arguably business costs to the whole sector. Proper consideration of evidence and a complaint by a lawyer can lead to quicker and better outcomes for consumers which are cheaper for the sector as a whole. Even if resolution is not found at that level it can make our handling of the complaint quicker and more focussed, and can mean the relationship with the client is less damaged (allowing resolution to be earlier in our process). We believe we should have statutory powers to issue guidance on how complaints are handled at firm level, and the ability to apply 'strict liability' penalties where a lawyer does not adequately follow that guidance.

Information sharing and risk

The current legislation is largely predicated on institutions and on demarcated processes, rather than on the idea of risk management.

A common theme in our discussion with stakeholders was that different statutory agencies around Scotland have access to data on lawyers which may link to risks for consumers. There were often stringent rules inhibiting the sharing of data, coming from specific legislation or due to data protection. It was commonly felt that this inhibited risks being tackled.

A hypothetical example might be this:

- The Scottish Legal Aid Board has some concerns over the latest peer review of a solicitor
- The Law Society, as regulator, notes the solicitor has been late paying their annual renewal fee
- The Law Society as a membership organisation has had calls to their professional practice helpline from other firms concerned at delays in responses from the firm
- The SLCC trend reporting function identifies issues – four minor complaints, all around delay
- A sheriff is frustrated that there have been several non-appearances of the practitioner, but does not see it as his or her role to make a formal complaint
- The Faculty of Advocates is concerned that Counsel's fees have been going unpaid

Other agencies may hold data of even more fundamental significance to public protection – the Crown Office and Procurator Fiscal Service, Police Scotland, or in time Revenue Scotland.

What is critical is that no single organisation has data that says there is definitely a problem, and no one organisation has data that suggests it's a big problem (rather than administrative issues). However, the pattern may well be concerning, and although the above example is hypothetical it is not entirely dissimilar to a recent sequence of events that led to consumer detriment and significant cost for the sector.

It is important data is not used to jump to conclusions too early. However, there are also systems which do not 'assume' an issue. There can be 'neutral' sharing of information which can allow a risk profile to be developed (for example, on its own a high turnover of firm partners may or may not be a cause for concern), and the use of multiple inputs helps focus on patterns rather than individual issues. A graduated scale of responses (perhaps starting with a phone call / letter to the firm to ask if everything was ok, but with the potential to move to more formal stages such as triggering an inspection) also ensures a proportionate approach.

Data sharing is complicated, and balances must be struck, but new legislation is an opportunity to consider how the regulation of legal services can become more intelligence driven and joined up (as has needed to happen in health, child protection, and other areas) and how legislation may facilitate this.

The government should formally consult on:

- a) How it can be ensured learning from complaints improves standards for all clients, using the example we have set out around involvement in standards.
- b) Whether the SLCC should have the power to issue rules on how lawyers should handle complaints at first tier, and the power to impose 'strict liability' offences where lawyers do not have, or follow, their own internal process.
- c) How better information and intelligence sharing might be delivered and lead to risk reduction for consumers

OTHER ISSUES

We will also raise a number of other issues as the debate on legislative change progresses. These are based on feedback from consumers and lawyers, and issues we have identified in carrying out our work which could be tackled in any review. Three illustrative examples are:

Gender neutral drafting - the current legislation all considers a lawyer to be a 'he'. Despite all arguments about legislative drafting convention, in 2016 should we not be able to draft a new act which is gender neutral?

Complaints information and comparison websites – is it time greater information on complaints levels against firms was published to aid consumer choice? If not every complaint, perhaps where there is a high level of upheld complaints? Is this something that should be displayed on a published version of the statutory list of lawyers? Or under the new *Reuse of Public Sector Information Regulations 2015* should this data be made available to others so it could be used by comparison websites (an issue of growing debate in the legal market in England)?

Whistleblowing, candour and apologies – unlike many professions there is no duty for a lawyer to blow the whistle when they know another lawyer is breaking regulations, nor is there a duty of candour in responding to someone raising a complaint, nor is there any obligation to apologise to consumers even when things have gone wrong. Parliament has recently debated these issues in relation to other professions and sectors, and it may be these should be addressed in legislation.

WHAT WILL THESE CHANGES DELIVER?

The role of the SLCC is to be independent and impartial. We are not a consumer body, nor are we a professional body. We therefore make these proposals strongly believing they offer opportunities to

improve current arrangements for both consumers and legal professionals, whilst increasing the levels of wider public protection in relation to the legal services market.

A framework act allowing proportionate and targeted regulation will deliver many measurable improvements:

Resolving complaints faster benefits consumers and lawyers – both want matters resolved, and for both the personal uncertainty, pressure and stress of an outstanding complaint can be considerable

Resolving complaints more cost efficiently benefits consumers and lawyers – our operating costs come from the profession, but they in turn must bill clients to cover this. We would have the flexibility to resolve complaints in a manner appropriate to their cost and complexity

Increasing the effectiveness of redress – this is a key public protection and essential for individual consumers who have suffered detriment, but evidence also strongly shows that markets with effective redress enjoy increased consumer confidence and therefore spending

Reducing risk to consumers (by focussing legislation and regulation on the areas of highest risk) should increase public confidence, reduce complaints (and costs), and reduce mistakes which no lawyer or consumer wants and which both find stressful

Increasing market confidence, again evidence strongly shows that markets applying the consumer principles enjoy increased consumer confidence and therefore spending, ensuring a sustainable sector for lawyers and those who need their services

CONCLUSION

When the government consults on the current regulation of the legal market we believe focussing on these six key areas (four big challenges to tackle, two tremendous opportunities for the future) is the priority. Any consultation must use concepts and approaches which empower consumer and public engagement, and not just professional (although that will be essential and invaluable), giving citizens a voice in the debate of the future of legal services regulation over the next twenty years.

Consultation and new legislation bring the exciting opportunity to really tackle issues. If missed, it may be decades before there is another opportunity for substantive reform.

The details of a final consolidated bill will be complex, and the right level of detail for a flexible and responsive framework approach challenging. Competing interests will need to be balanced, and the temptation merely to tinker with current arrangements will be compelling. However, if the legislative time and cost is to be justified, then new solutions, above those tried over the last 17 years, must be considered.

HOW TO GET INVOLVED

With this paper we aim to ensure that if there is a government consultation or review around the regulation of legal services then the key issues we set out are opened up for debate by consumers, the public and lawyers. Final decisions on these issues are for the government and for parliament.

If you are interested in this area and wish to assist the debate then you can:

- publish an article discussing our ideas
- invite us to come to speak to you, or ask to visit us, or for us to send further information
- Contact your MSP or your professional body
- blog or tweet - copy us in **@slcccomplaints** and use the hashtag **#ReimagineRegulation**
- share views with us by email to consult@scottishlegalcomplaints.org.uk

More information is on our website at www.scottishlegalcomplaints.org.uk/reimagine-regulation