



## **CONSULTATION REPOSENSE**

**To the Scottish Government's consultation on the Licensed Providers Regulatory Scheme proposed by the Law Society of Scotland.**

*May 2016*

## A. INTRODUCTION

The SLCC welcomes the opportunity to respond to the Scottish Government's consultation on the proposed regulatory scheme for Licensed Providers put forward by the Law Society of Scotland.

## B. ABOUT US

The Scottish Legal Complaints Commission (SLCC) is an independent statutory body providing a single point of contact for all complaints against legal practitioners operating in Scotland. The SLCC investigates and resolves complaints about inadequate professional services; refers conduct complaints to the relevant professional body, and has oversight of complaint handling across the legal profession.

The SLCC operates independently of the legal profession and government and aims to resolve complaints early, efficiently and effectively and to improve complaints handling across the profession. Through this work we aim to improve trust and confidence in Scottish legal services.

Our [annual report](#)<sup>1</sup> and [website](#)<sup>2</sup> have more information on our work.

We have direct interest in the development of a regulatory scheme for ABS providers in Scotland as the enactment of this aspect of the Legal Services (Scotland) Act 2010 will create new types of complaints which will fall under our jurisdiction.

## C. OUR EXPERTISE

Every year we work with over 1,000 members of the public who wish to make a complaint about a lawyer. Whilst this may be a relatively small percentage of transactions which lead to a complaint, it gives the SLCC significant intelligence and evidence on the issues that can arise.

We have more experience than any other organisation of examining and determining service issues between clients and lawyers, and believe that expertise should be used to assist better standards for all.

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<sup>1</sup> [http://www.scottishlegalcomplaints.org.uk/media/56936/slcc\\_annual\\_report\\_2013-2014\\_-\\_final\\_electronic\\_version.pdf](http://www.scottishlegalcomplaints.org.uk/media/56936/slcc_annual_report_2013-2014_-_final_electronic_version.pdf)

<sup>2</sup> <http://www.scottishlegalcomplaints.org.uk>

The SLCC also has a statutory '[Consumer Panel](#)<sup>3</sup>', the only such panel in Scotland with a statutory role to consider consumer issues around all legal services. The Panel has an independent lay chair, and has submitted its own response to this consultation.

## D. OUR RESPONSE

Rather than provide a detailed commentary on the Law Society of Scotland's proposed regulatory scheme, we have made comments on a number of general issues concerning the scheme and some wider observations surrounding the introduction of alternative business structures (ABSs) in Scotland under the 2010 Act, drawing on our experience of the market from handling enquiries and complaints. Some of our comments relate to issues the Government will want to consider in approving the application from the Law Society of Scotland specifically, others relate to wider issues which would also be relevant in future applications by other regulators wishing to be approved.

We would also note that we have not been consulted by Government or by the Law Society of Scotland up to this point. This is, therefore, our first opportunity to see any details of the work or comment on those elements which relate directly to our own legal functions under the new arrangements.

## E. SETTING CONTEXT

The original consultation on introducing ABSs in Scotland set out clear aspirations. In the foreword, the then Cabinet Secretary for Justice set out some key aspirations:

*"This is a once-in-a-generation opportunity to create a more flexible and modern regulatory framework for legal services."*

*"the regulatory framework must be proportionate to the size and scope of the legal services market in Scotland. We must guard against having too many bodies and unnecessary tiers of regulation."*

The parliament endorsed a motion (15 Nov 2007) which stated new regulation should also:

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<sup>3</sup> <http://www.scottishlegalcomplaints.org.uk/about-slcc/who-we-are/consumer-panel.aspx>

*“...widen choice, provide easier access to legal services and create the conditions for more affordable services so that social justice will be at the heart of future changes”*

As well as drawing on our experience of consumers' experiences - from managing complaints - , we take account of these stated public policy intentions for a new regulatory framework, which are entirely consistent with our view that regulation should be simple and proportionate

## **F. DETAILED COMMENTS**

Our comments are laid out in two sections; one providing general feedback on the proposed scheme and the issues round it and another providing comment on the areas relating to complaints.

### **1. General Feedback**

#### **1.1. Timing**

We are pleased to see progress in taking this forward. However, the legislation was passed in 2010. Anecdotally we understand that a number of firms in Scotland which were initially pressing for a scheme in Scotland have, due to the delay in implementation, found alternative means to achieve their intended outcomes – for example, through adopting business models which effectively split legal services from non-legal services.

We also know that consumers already find the market complex and differences (for example, between a solicitor with a practising certificate and solicitor without a practising certificate) hard to understand.

With that in mind, we question the extent to which the proposed scheme will be an attractive proposition to the legal profession and consumers in Scotland. Does Government remain convinced there is demand (from business and consumers) which justifies the increased complexity and cost compared to alternatives, for example, to using new legislation to create a single type of legal entity regulation.

We also note the current review by the Competition and Markets Authority of the legal market in England and Wales. With interim findings in July 2016 and the final report due in December 2016 the Scottish scheme may be being authorised and

launched just as findings on the impact of changes in England and Wales are announced, leading to comparisons on arrangements being drawn. It may be helpful to explain how the new arrangements in Scotland will assist with the core issues of the review:

*“Are consumers able to make informed decisions about buying legal services and thereby drive competition between providers of legal services?”*

*Are consumers getting enough protection under the current regulations and are they able to get satisfactory redress if legal services go wrong?*

*Is the current regulatory framework which governs providers of legal services distorting competition in the market in any way?”*

We have also used these themes, which are relevant to all functioning markets, in providing this response.

### **1.2. A level playing field?**

We welcome the fact that, in terms of competition, the introduction of ABSs in Scotland should better place legal practitioners in Scotland with their equivalents south of the border. The ability of firms in Scotland to provide their clients with a wider range of services can only be viewed as a positive outcome for both practitioners and their clients.

However, the lack of clear definition over legal services means that in many areas it is essentially a voluntary scheme, and it will be possible for businesses not approved by the regulatory scheme to provide a similar breadth of unregulated services (for example, employment law). The nuances in many areas of practice between what would require a firm to be registered, as opposed to unregulated, seem small and technical, and there is no evidence provided as to how consumers might be informed of the relative risks and benefits. Good regulatory practice would usually suggest that an activity either needs regulated or not, rather than this regulatory scheme which focuses on the business model, and introduces huge complexity for the provision of services which could be offered by a non-regulated entity.

Our concern would be if the requirements of the regulatory scheme were disproportionately burdensome to the detriment of competition and therefore potentially, by extension, customer choice. Particularly in relation to the rural makeup of much of Scotland, we question whether there are consequent and real dangers in terms of access to justice. Is the scheme simple and proportionate enough to be attractive to spark competition around the provision of consumer legal services?

### **1.3. Consumer interest**

As noted above, we acknowledge the benefits to consumers in terms of a wider range of services being possible, and the attractiveness of the “one stop shop” model where legal and other services are provided alongside each other.

However, we are aware from our experience that consumers already find the Scottish legal regulatory system complicated and the roles of different bodies, schemes, and standards confusing. Adding complexity may not assist consumers unless delivered in such a way that their experience of it is simplified.

We also highlight the existing complexities within the legal complaints system and the particular issues surrounding “hybrid” complaints. This has the potential to be exacerbated with the potential for additional regulatory and handling complaints arising from the same set of circumstances (see 2.2 below). In addition to this being increasingly difficult for consumers to navigate, we consider that this also introduces the potential for significant delays to be built into the complaint handling process.

We found few references to the consumer principles within the regulatory scheme, and yet the 2010 Act clearly envisages that approved regulators would to some extent become ‘market regulators’, responsible for elements of competition.

Coupled to the above comment, we question how consumers will be made aware of the scheme and would suggest that a comprehensive consumer-awareness campaign should be required to inform the public. They may now use firms both marketed as ‘solicitors’ and both ‘regulated by’ the Law Society of Scotland. However, some will have been capital adequacy checked (ABS), some will not (traditional firm). How will consumers be made aware of what protections they have? It is not clear who should shoulder responsibility for such a campaign.

We also note that there is no targeting or risk based aspect to the scheme based on knowledge of consumer risk. For example, we know conveyancing accounts for 29% of complaints, and therefore at a crude level 29% of the SLCC's £3 million operating costs. This is already a lot of money, but we know conveyancing also accounts for well over 70% of items paid or reserved on Master Policy in 2015, the professional indemnity for the profession in Scotland (at a cost of around £8.4 million) and that it is an element of the costs of the Guarantee Fund as it is one of the ways in which law firms hold client funds. This means that consumers are arguably paying for over £10 million per annum of 'failures' in this market. It would seem this would be an area to target in relation to regulation, whereas, for example, virtually no complaints or claims were seen in relation to employment law (where there is also a thriving non-regulated competitor market which does not seem to have a public complaints/failures issue).

The new proposed ABS appears to take no account of risk to consumers, and therefore may be seen to over-regulate in some areas and under regulate in others. We recognise that to move to more targeted or risk based regulation in relation to practice areas in this scheme, would mean a different regulatory approach to the current market, but equally not doing so builds in existing issues to new arrangements. As we note below, there may be an opportunity to address this as part of the debate on entity regulation.

#### **1.4. Entity regulation**

In 2015 we responded to the Law Society of Scotland's [consultation on entity regulation](#)<sup>4</sup> and our views remain as then – that overall we welcome the move towards this.

Through recent conversations, we understand that any future scheme of entity regulation will appear not dissimilar to the proposed regulatory scheme.

We would reiterate our comments from the previous consultation response and, in particular, we question the requirement in a relatively small legal sector and country of two similar regulatory schemes, particularly where the current landscape is already complex.

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<sup>4</sup> <https://www.scottishlegalcomplaints.org.uk/resources/consultation-responses.aspx>

The SNP, which is the major party after the 5 May 2016 election, has made the following manifesto commitment:

*“We will take forward a consultation to review the regulation of the legal profession in Scotland and to support a modern and effective legal sector, including new forms of business model”*

The SLCC is not yet fully aware of what this will involve. However, a launch of ABSs now appears to pre-suppose that model will survive any review (certainly firms investing in the complex process of meeting the new regulatory requirements and paying for an application would want this certainty). If that is the case it appears to set a path where increased regulatory complexity is committed to (unless the alternative, of regulating all legal businesses as an ABS, and stepping down existing arrangements for partnerships) is proposed. It is not clear if this is proportionate to the market and to the consumer interest, or whether a single ‘entity’ model would be better. We see significant opportunities through such a review for a simplification which will benefit legal providers and consumers, and would not wish that opportunity to be missed.

## **2. Complaints**

### **2.1. New types of complaints and underlying regulations**

The SLCC’s most direct interest in any approved regulatory scheme will be in relation to new types of complaints, about which no great detail is as yet available.

In anticipation of receiving complaints under the new scheme, we look forward to learning more about these, and considering the practicalities for implementing a complaint handling process to deal with them.

The legislation creates a challenging timeline, meaning that the SLCC will be immediately liable to handle complaints<sup>5</sup> from the day a regulator is approved, but cannot consult on fees (and therefore charge them) until such time as the Approved Regulator is set up. Either Government must provide funding, or those who pay the current costs of the SLCC will, at least in the short term, need to pay any immediate costs. This also highlights a conflict, discussed below, in terms of the representative arrangements on fee setting (see section 2.3).

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<sup>5</sup> Even if this is only to sift them as a part of our ‘gateway’ function.



In particular, the issue of approved regulator complaints is of significance to the Commission. These are complaints which are possible from day one, and which the Commission would pass to the Minister (but which the Minister may then ask the SLCC to investigate). We would welcome an early opportunity to discuss the regulations governing those complaints with Government. We understand these regulations have yet to be drafted. We believe any Minister would also want clarity, rather than having to develop an approach ad hoc when the first complaint comes in, particularly as some complaints can have some form of political or policy sensitivity. On the basis that the Commission could, in theory, receive a complaint about an approved regulator at the point a regulatory scheme is approved, we would suggest that the intentions around laying regulations should be clarified before a scheme is approved.

Approved regulator complaint work could include complaints concerning the approved regulator's corporate governance arrangements, internal assessment processes, the robustness of governance measures, the financial arrangements of the regulator, a 'judicial review' style function for decisions made by the regulator, issues relating to compensation funds, etc. The nature of these complaints, therefore, will be quite different in character from the Commission's current complaint handling remit.

Government also needs to clarify who would pay for such an investigation. Would Ministers, on the basis the duty is theirs to investigate (although they can delegate it to SLCC) or would it be the Approved Regulator? Looking at other 'oversight regulators', it can be seen the cost of such complaints could be significant. As an example, if the SLCC were examining, on behalf of ministers, a complex investigation into the governance structures of the Law Society of Scotland in relation to how an application had been handled it is likely the SLCC would need legal advice. It is also likely that both the applicant and the Law Society of Scotland would be legally represented in relation to the complaint and the defence of it. Experience from other oversight regulators, such as the Professional Standards Authority, suggests that in such an adversarial context costs can quickly move into tens of thousands per investigation.

## 2.2. Regulatory complaints

We note that the approach within the 2010 Act is to treat regulatory complaints as conduct complaints which are investigated and determined by the approved regulator. In practice we believe that it could be the case that matters complained about relate to service but, given the definition in the Act, are nevertheless regulatory complaints and are, as a matter of necessity, passed to the regulator. For example, it is difficult to see how any service complaint (about the service provided to the consumer) would not also be a regulatory complaint (about whether the licensed provider had met its duty to protect and promote the interests of the consumer). This could have unhelpful consequences in practice with the approved regulator being required to investigate and determine what are, on the face of it, services issues which under all other circumstances would be investigated and determined by the Commission. It will also mean consumers will have access to lower levels of redress than is currently the case, and would be the case had they used a traditional law firm. This could give rise to inconsistency in practice, and further confusion on the part of the public.

More generally, in terms of s.57A(5) of the 2010 Act, the approved regulator is obliged “without delay” to send to the Commission a complaint where it concerns “the conduct of, or any services provided by, a practitioner within one of its Licensed Providers”. As a result, the Act does not appear to provide for the approved regulator being obliged to send to the Commission any complaint received concerning a licensed provider (as an entity). We do not see the rationale behind this apparent omission and consider that this resultant “gap” could have serious implications for the Commission’s single gateway status. We would suggest Government could address gaps like this by ensuring they are a requirement of the approved scheme, even if not enshrined in the legislation.

Likewise, if Scottish Ministers delegate authority to the Commission to investigate and determine complaints against approved regulators, the fact that regulatory complaints will be investigated and determined by the approved regulators may well lead to inconsistency as to how the Regulatory Objectives of the 2010 Act are applied as two different bodies will be applying them.

We also note that, under s.57C(5) of the 2010 Act, the Commission is obliged to provide advice in relation to the process of making a regulatory complaint. Without a published scheme as part of the application to become an Approved Regulator the SLCC will have a statutory duty from day one of the regulator being approved to give advice, without any way to dispense that statutory duty. Again, this reinforces our view that, for practical reasons, a scheme should not be approved before regulations and schemes are laid.

### **2.3. Approved regulator representative functions**

We believe that clarity is required around the representative functions of the approved regulator. In terms of the 2010 Act, we understand that such attributes are not intended. However, under the 2007 Act they become the “relevant professional body” in terms of consulting with the Commission on our fees. We question the extent to which new ASB entities will understand that our statutory requirement is to consult the approved regulator who will represent their views on these. The relevant section of our Act also refers to ‘members’ of the Relevant Profession Organisations (which an Approved Regulator will now become one of). This language, of membership, suggests it was intended that at least in relation to fees the Approved Regulator is dispensing a membership function.

We also note that in our fees consultation it will mean the Law Society of Scotland must represent both its own members’ interests (individual solicitors), and must represent the interest of new ABSs (even if only in relation to our fees) and in the future (if entity regulation is introduced) may need to represent the interests of those entities. Some of these interests could appear to be in conflict – for example, whether set-up costs for the SLCC complaints system for these new entities comes out of new ABS fees or existing fees. We did not see any evidence in the governance arrangements as to how these different representative functions will be dispensed.

### **2.4. Information sharing and other matters**

We note that the proposed scheme duplicates some pre-existing deficiencies and issues which have been discussed at recent meetings of the 2007 Act Steering Group. For example, there are questions surrounding the role and responsibilities of Heads of Legal Services which replicate current uncertainties surrounding Client

Relations Managers. These include issues such as access to complaints logs and written complaints procedures. It would be helpful if the scheme addressed these matters, preferably allowing the SLCC access to these to inform our statutory ability to promote best practice in complaint handling.

We have previously highlighted the importance of information and intelligence sharing for effective regulation. We envisage that, through day-to-day complaints monitoring, there could be situations where the SLCC has concerns about a licensed provider and considers that it would be appropriate for the Approved Regulator to consider undertaking a “special assessment”. While we can see no explicit bar to that approach in the scheme, it would be helpful if that ability were explicitly included, together with the ability of an Approved Regulator to feedback to the SLCC the outcome of any such assessment.

We question whether self-reporting by licensed providers is an adequate safeguard for the public. We also note that the Approved Regulator has an obligation to send its annual review of performance to Scottish Ministers. Should it be the case that complaints about Approved Regulators are delegated to the SLCC, it would be helpful for these reports also to be made available to the SLCC to take into account when investigating complaints.

## **G. CONCLUSION**

We note again this is the first opportunity we have had to contribute to discussion and coming to these complex issues late in the day, and without yet having funding or resource we can expend on them, means that we raise more questions than solutions.

The SLCC supports wider choice in the legal market, and hopes that the issues can be positively addressed to ensure workable arrangements for all affected parties.