# SLCC Response to the Equalities, Human Rights and Civil Justice Committee's call for views on the Regulation of Legal Services (Scotland) Bill

## About the SLCC

The Scottish Legal Complaints Commission (SLCC) is an independent statutory public 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 organisations and has oversight of complaint handling across the legal profession.

**1. What are your views on:**

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

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

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

We supported the principal recommendation of the Roberton Review to create a single independent regulator for a number of reasons:

- it is a clear and easily understandable system, with a single point of contact for the public, the profession and other stakeholders
- there are significant opportunities to drive efficiency by reducing the existing duplication of processes, functions and back-office systems across multiple bodies
- a single independent regulator would be best placed to improve access to justice and increase consumer choice by promoting competition within and across the existing legal professions, and in allowing new professions or entrants, including legal tech, to help the market evolve to meet the changing needs of consumers

- it would provide regulatory independence from both the profession it regulates and from government, with clear lines of accountability and requirements for transparency
- it would be easier for an independent regulator to take decisions at odds with professional interests, or which seem to favour or disfavour particular parts of the profession (e.g. risk-informed regulation), where that is most appropriate in the public interest
- there is clear evidence of public/ consumer concerns about potential conflicts of interest arising from bodies both representing and regulating lawyers and legal services
- it could better reflect the legal services sector of today and of the future.

While there has been significant concern raised about this approach in relation to legal services in Scotland, a single independent regulator is not a radical proposal. Independent regulation is the norm in most regulated sectors (for example, medical professions, financial services, care professions etc.). There are examples of single independent regulators already in place in legal services, for example in Victoria (Australia), and in Ireland (although the Law Society of Ireland does retain some regulatory powers), while other jurisdictions, for example, England and Wales have multiple independent regulators. The model is also proposed or under active discussion in other jurisdictions (for example in New Zealand). It is the clear direction of travel. We continue to believe this would be the optimum model for legal services regulation in Scotland.

Creating a single, independent body to take on all regulatory functions would also tackle the concerns being raised about Ministers' role in regulation, as there would be no need for an oversight function.

We do believe that the model proposed in this Bill represents significant progress on the status quo. It is a welcome and significant step forward in a number of areas, and we now want to see it delivered and implemented to realise those benefits for consumers and lawyers alike.

We understand that this model is the product of a search for consensus, trying to reconcile support for more wholesale change in the public interest from consumer bodies and the SLCC by making concessions to the existing model of professional regulation to address concerns raised by legal professional bodies. We would note, however, that in building on the existing framework, the proposed model retains much of the complexity, cost and potential conflicts of interest of the current system. For that reason, any further concessions that reinsert complexity or prescription, or reduce transparency or accountability, should be fiercely resisted.

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

The current regulatory landscape is hugely complex, especially for a jurisdiction of Scotland's size. There are multiple bodies involved in the system which inevitably creates inefficiency, the lack of a single point of accountability and issues around handovers. The impact of this complexity includes public confusion, restricted access to the market for new entrants and a lack of futureproofing.

This adds to the cost of regulation and leads to gaps of jurisdiction, and this won't be solved by the proposed model which retains multiple regulators and multiple models for regulating legal businesses.

The Roberton review noted the 'complaints maze' which members of the public and lawyers must go through where the same complaint can go to multiple bodies operating different standards and processes. Again, this won't be solved by the proposed model which retains multiple bodies involved in the complaints process and multiple regulatory schemes to measure their compliance with.

This complexity has a real influence on the personal impact of complaints on both parties. For consumers, a system that is difficult to understand can reduce agency, and sow doubt and suspicion as well as increasing the time it takes for their complaint to be dealt with. For legal practitioners, it can cause frustration, a loss of confidence while complaints are investigated and can impact on ongoing work, as well as increasing the cost of the system for all regulated professionals who fund it.

There are clear examples of existing models or proposals in other sectors (e.g. care services) and other jurisdictions (e.g. Victoria, Ireland, New Zealand) of a move towards a more streamlined regulatory system.

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

We welcome the requirements placed on regulators in relation to accountability, transparency and independence of regulatory decision making. These are in line with the regulatory principles agreed as part of the Roberton review, although they are necessarily more limited and complicated within the model proposed in the Bill.

It is in line with the regulatory principles that regulation should be proportionate and risk based, so a differential approach to different regulated activities or areas of practice could allow a balance between ensuring public and consumer protection, while ensuring regulated practitioners are subject only to the necessary and proportionate level of regulation.

We also welcome provisions that make it easier for new entrants to the regulatory market as this could increase choice and access to justice.

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

With new requirements for regulators in discharging their regulatory functions, it seems clear there is a need for oversight of performance against these requirements and for action to be taken if they are not met. We believe the roles set out for Scottish Ministers and for the Lord President, both individually and jointly, balance the need for regulatory independence from government with independence from regulated profession. We also note that these measures mirror those already in force in the Legal Services (Scotland) Act 2010 in relation to Approved Regulators of legal services.

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

**England and Wales**

England and Wales introduced a form of independent regulation in 2007, with a structure that includes an oversight regulator for the whole sector, plus multiple approved frontline regulators for different branches of the legal profession and the Legal Ombudsman with responsibility for resolving disputes between consumers and legal service providers. The Legal Services Board is accountable to Parliament through the Lord Chancellor and is sponsored by the Ministry of Justice.

The regulatory map is complex, due to the number of frontline regulators, but the size of the jurisdiction is significantly larger than Scotland, where such a complex system is even less justifiable.

The Act governing legal services regulation does not allow for complete separation or complete independence, but since 2007 there has been a continued move towards greater independence, and now approved regulators with both representative and regulatory functions must delegate the discharge of those regulatory functions to a separate regulatory body.

In addition, the Legal Services Board, as oversight regulator, has set rules (https://legalservicesboard.org.uk/wp-content/uploads/2019/07/IGR-2019.pdf) intended to "enhance regulatory independence as far as reasonably practicable; to create and maintain clear divisions which prevent the representative functions prejudicing the regulatory functions, to promote the regulatory objectives and to uphold the better regulation principles".

This has resulted in a clear regulatory focus on the public interest, for example, a focus on issues such as price transparency and continued competence. In other areas more proportionate levels of regulation have reduced the burden on professionals without any discernible impact on public protection.

Despite this, proposals for single independent regulator continue to be made by independent experts, such as Professor Stephen Mayson of UCL who carried out an independent review of legal services regulation (https://stephenmayson.com/2020/06/11/legal-services-regulation-the-final-report/) and from regulatory bodies operating in England and Wales.

Finally, the regulatory system in England and Wales has allowed greater market innovation, choice and competition, having had a system of regulating alternative legal business structures for the past 15 years; a system which was permitted in Scotland by the Legal Services (Scotland) Act 2010, but is still not yet in operation.

There are other countries where independent regulation is also in operation, in different forms, or is being actively explored.

**Ireland**

The Legal Services Regulatory Authority (LSRA) is the independent regulator for legal services providers in Ireland. Its key functions are to regulate the provision of legal services by legal practitioners and to ensure the maintenance and improvement of standards in the provision of legal services. It is also the first point of contact for complaints about solicitors and barristers. The LSRA operates to meet six key statutory objectives:

- protect and promote the public interest
- support the proper and effective administration of justice
- protect and promote the interests of consumers relating to the provision of legal services
- promote competition in the provision of legal services in the State
- encourage an independent, strong and effective legal profession and
- promote and maintain adherence to the professional principles of legal practitioners as specified in the Legal Services Regulation Act 2015.

The LSRA is an independent body established under the Legal Services Regulation Act 2015. Its members are appointed by the government following a nomination process designed to ensure the independence of the Authority. The Authority is required by law to be independent in the performance of its functions.

**Victoria, Australia**

The Victorian Legal Services Board + Commissioner (see: www.lsbc.vic.gov.au) is the main regulator of the legal profession in the state of Victoria, Australia and was established in 2005. The Board and the Commissioner are independent statutory authorities, operating as one body. The VLSB+C is accountable to the Victorian Parliament, and its powers to regulate the profession are set out in the Legal Profession Uniform Law Application Act 2014. It is responsible for licensing lawyers and overseeing service standards and conduct. This includes handling complaints about lawyers, investigating poor conduct and overseeing management of trust accounts. It is also the steward of the public purpose and fidelity funds, and administer these to support legal regulation and access to justice in Victoria.

The Commissioner handles all complaints about registered lawyers in Victoria. Any person or body may lodge a complaint about a lawyer, and in some circumstances the Commissioner may self-initiate a complaint. Most complaints are resolved without a formal disciplinary hearing. However, in the more serious cases, the Commissioner may initiate disciplinary proceedings, which are usually heard before the Victorian Civil and Administrative Tribunal (VCAT) and can be appealed to the Supreme Court of Victoria. Decisions by VCAT, or the courts, are usually published on a publicly available website.

The VLSB+C has also established a Consumer Panel to help foster legal services that are responsive to all consumer needs.

**New Zealand**

In 2021 the New Zealand Law Society commissioned an independent review into legal services regulation, stating that "over time it had been clear that the legislation, including the complaints process, was no longer fit-for-purpose and was not serving the public or the profession well" and that it wanted to "take the opportunity to shift to a more modern regulatory environment given the changes that have taken place in New Zealand and internationally since the Lawyers and Conveyancers Act was introduced in 2006".

That independent review published in March 2023 (https://www.lawsociety.org.nz/about-us/independent-review/) and recommended the establishment of a new independent regulator and an overhaul of the system for handling complaints about lawyers. The independent review report stated that, "The rationale for occupational regulation is to protect consumers and the public. However, the current regulatory model, with the Law Society exercising dual functions, does not adequately protect and promote the interests of consumers. The Law Society's responsibility to promote the interests of the profession conflicts squarely with its duty to regulate in the interests of the public."

The New Zealand Law Society is currently considering the report (https://www.lawsociety.org.nz/news/law-society-statements/legal-and-structural-change-recommended-in-law-societys-independent-review-report/) and is expected to make recommendations to the Minister for Justice shortly.

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

**The current complaints system**

There are a number of significant deficiencies in the current complaints system.

Firstly, the system simply doesn't meet the public or the profession's needs or expectations of an effective, efficient complaints system. The statute and rules governing its operation are inflexible and overly prescriptive, meaning that lower-level consumer complaints likely to result in small levels of compensation require to be treated the same as issues of significant wider public interest. The system

requires complaints (and complaint parties) to be passed between multiple bodies, causing delay, duplication, gaps and confusion.

The inefficiency of the current system makes it costly for the profession who fund it, and ultimately for consumers of legal services.

Furthermore, poor engagement and compliance with statutory requests for information from a section of the profession causes additional unnecessary cost and delays. Few levers exist to deal with this beyond costly and time-consuming court procedures.

The system is also overly legalistic, requiring the use of legal terminology in decision documents (for example categorising ineligible complaints as ‘frivolous’ or ‘totally without merit’) which can be at best confusing, and at worst offensive for consumers. This, along with the disproportionate appeal route to the highest civil court in Scotland, works against the benefits of administrative justice.

The current system requires an unhelpful mutually exclusive distinction to be drawn between ‘service’ and ‘conduct’ issues in a complaint which can cause a trade-off between public protection and consumer redress. Currently, complainers have less scope to receive compensation when issues are investigated by the professional bodies via the ‘conduct’ route, but issues which may have wider public protection consequences are less likely to be addressed if redress for the individual complainer is prioritised.

The current system of professional indemnity insurance and consumer protection funding does not guarantee that a complainer will receive any redress awarded to them, and so complainers may go through a full complaints investigation, have their complaint upheld and yet see no action taken to put things right for them.

In addition, the system can focus only on dealing with the individual complaints we receive. It cannot easily address systemic issues, promote preventative action or support continuous improvement.

Finally, in terms of its complexity, proportionality and its external appeal route, the legal complaints system in Scotland is a significant outlier in terms of ombudsman/ complaints schemes in other sectors and markets operating in the UK. For example, the Legal Ombudsman of England and Wales has no external appeal route.

It is of significant note that a far simpler system was originally proposed in the Bill which led to the 2007 Act setting out the current system. A large number of amendments were tabled, but the operational impact of these was not always foreseen, nor the fact that each additional step or test in the process often has a cost in time and resource. This created a far slower system, impacting both public and the profession, and a more costly one, again impacting the profession, than had been originally envisaged. We hope there can be positive learning from that previous legislative process, and that the steps to a more flexible and proportionate system taken in the Bill are not then reduced during its progress adding back in unnecessary time and cost to the complaints process.

**What the Bill would achieve**

The Bill would make some significant improvements to the complaints system. We believe it would create a complaints system closer to the public, the profession and Parliament's expectations of an appropriate system for delivering consumer redress and administrative justice.

It would be a significant step towards creating a process that focuses on customer journey (i.e. one which retains the single gateway for complaints and reduces handovers between organisations). It would allow us to operate a flexible, agile complaints process that allows a proportionate approach to different types of complaint.

We also think the provisions will lead to greater efficiency, and we would note that without stripping out process prescription in the legislation, there is little chance of improvement in the cost or efficiency of complaints handling. Reduced cost is also specifically linked to reduced legal and court fees with the replacement of appeals to the Inner House of the Court of Session with an internal review function, which is more in line with the usual ombudsman approach (for example, in the Legal Ombudsman in England and Wales).

In addition, that change should help to make the process less legalistic, and a more appropriate administrative justice approach to dealing with consumer complaints. We believe it will also increase access to justice as the proposed review committee is a less costly and difficult process than an appeal in the Court of Session for either complaint party to access. That is particularly the case for unrepresented complainers who now bring the majority of appeals against our decisions, in the main at the stage where we say they are not eligible for further investigation.

The provisions to clarify that a single element of the complaint may constitute both a conduct complaint and a services complaint (and, where appropriate, a regulatory complaint) will remove the current trade-off between public protection and consumer redress.

A greater focus on prevention and continuous improvement will be achieved through minimum standards for complaint handling and trends in practice which lead to the making of complaints, and we would have the ability to investigate and address systemic issues which could affect current and future legal service users. In addition, where public protection supports it, and subject to specific safeguards, we will be able to publish of details of upheld complaints and the names of the practitioners responsible to alert and protect consumers to a potential risk. There will also be increased protection for consumers using a wider range of legal services, including currently unregulated providers.

All of this will reduce consumer detriment and harm and improve the service which legal service users receive from providers. It will also support the sector as a whole by more effectively addressing challenges in individual firms to reduce the collective cost burden on the profession.

**What the Bill won't achieve**

There are a number of key improvements the Bill, as currently drafted, will not achieve. Some of those could be addressed through amendments, while others are an inherent part of the proposed model.

The Bill will not achieve the seamless end to end complaints process we have called for and which we believe is in the best interests of consumers and practitioners. Responsibility for dealing with complaints will remain split over multiple bodies so handovers and the existing 'complaints maze' highlighted in the Roberton review will remain.

Conduct complaint handling will continue to be the responsibility of the professional bodies, and will not be entirely separate from representative functions, which is the norm and direction of travel in other sectors and jurisdictions, and the public expectation for a consumer complaints process.

In addition, the Bill proposes no amendments to the process for dealing with conduct complaints to improve proportionality or efficiency. While responsibility for this sits with others, we see the impact of this on complaint parties through both our complaint handling and oversight functions.

As currently drafted, the Bill provides no additional powers to ensure we get access to the information we need in a timely way to handle complaints efficiently, or to be able to conclude complaints when that information is not forthcoming. We have raised this directly with the Bill Team in Scottish Government and we hope they will bring forward amendments to address this at Stage 2 (see our answer to Q9 below).

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

**a. generally?**

**b. in relation to consumers of legal services?**

It is a key principle of a successful consumer market that consumers should have access to a choice of providers. A system of regulating alternative legal business structures was permitted by the Legal Services (Scotland) Act 2010 but is still not in operation. We believe this could improve competition and choice for consumers, and any barriers to its operation should be removed. Over 1000 alternative businesses are safely operating in England and Wales in a regime that came into law in 2007 without this requirement.

We are concerned that 13 years on from the legislation we still do not have a system to regulate alternative business structures in Scotland. We believe this should inform thinking on reasonable timescales for implementation of these provisions to ensure there is a mechanism to deliver swift change to benefit the public and the profession.

The Bill also maintains multiple different schemes to regulate legal businesses, and we believe this could be further streamlined to reduce complexity, cost and confusion.

**8. What are your views on the provision of:**

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

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

Entity regulation is welcome. In practice, consumers often believe they are contracting with a legal service or law firm, rather than an individual practitioner, so this simply mirrors their expectations.

There is also a role for business owners, who have the greatest ability to improve services for consumers, to take responsibility for what happens in their firm, regardless of who carries out the work. Our experience from dealing with service complaints is that they often relate to a firm's ways of working (e.g. arrangements for communication with clients, complaint handling processes, administrative checks etc.) that are often best regulated, addressed and improved at entity rather than individual level.

As noted above in relation to alternative business structures, it's important that the legislation should enable regulated businesses and persons to enter and operate within the legal services market, without trying to predict what a rapidly adapting market will need, instead allowing flexibility to accommodate and be responsive to consumer choice and requirements.

We have no specific comment to make on title regulation, but enforcement will be needed for it to be meaningful, which is a specific challenge for regulation for the term 'lawyer' where no one body is responsible for the term or those who might be eligible to use it.

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

**General comments**

We believe the current system can be improved. This Bill is a welcome and significant step forward in a number of areas, and we now want to see it delivered and implemented to realise those benefits for consumers and lawyers alike.

We want to see better outcomes for consumers and the legal market achieved through agile, futureproof, responsive and proportionate regulation that manages risks, aids choice, improves quality of services and is transparent and accountable in

its operation. Our view on how to best achieve that is informed by our experience of dealing with more than 15,000 complaints over 15 years of operation.

Regardless of the regulatory model, we believe its core principles should be:

- regulation in the public interest
- a focus on consumer detriment/ harm.

**Prevention, assurance and quality improvement**

The greater focus of the reformed regulatory system on prevention, assurance and quality improvement is very welcome.

When raising a complaint, most consumers say they want anything which has gone wrong for them put right, and to ensure the same issue doesn't happen to others – they want both appropriate redress and continuous improvement.

The current model primarily focuses on the passive setting of standards, and intervention when things have already gone wrong. The proposed model brings a greater focus on creating a culture of quality assurance, which should be proactive, focused on continuous improvement and prevention of failures, as well as reactive to those failures which occur (and which may lead to complaints). The measures proposed include the ability to address systems or process issues, not just individual failures.

We believe we can make a real contribution to a system that is more improvement focused, building on our oversight and outreach work to date. We welcome the proposed new powers to set standards and guidelines to help to drive improved first-tier complaints handling, resulting in fewer complaints reaching us, and in greater learning and quality improvement.

While the fragmented nature of the current and proposed regulatory system does not best promote a preventative approach, the measures highlighted above help support this. However, further amendments to these powers could roll this back, so we believe they should be resisted.

**Independent Consumer Panel**

The independent Consumer Panel was set up in 2015 and is supported by the SLCC. In that time, it has made a significant contribution to the consumer focus of the SLCC's work, and to the wider debate on legal services regulation and consumer issues more broadly. Our experience of the Panel's work is that is provides helpful advice, support and constructive challenge to us in discharging our duties.

There is a clear need for a strong voice for consumers to protect and promote consumer interests in a market where providers (rightly) have a strong representative voice. In addition, businesses and markets with better consumer insight and understanding generally perform better economically, meaning the Consumer Panel can also add value to the sector.

We welcome the expansion of the Consumer Panel's remit across the regulatory system. We believe it could bring much needed insight and challenge and could help to address the dearth of consumer research, insight and voice identified by the Roberton review.

However, it needs to be appropriately resourced if it is to carry out that function, including engaging with groups representing vulnerable consumers, researching consumer needs and trends and engaging with bodies across the regulatory system. Its costs are currently met from the SLCC budget, funded by practitioners, which has not always been without controversy or question. It has no independent secretariat and Panel members are volunteers, meaning that, in reality, its work is subsidised by the organisations, many of them third sector, whom they represent. That is in contrast to the equivalent body in England and Wales (https://www.legalservicesconsumerpanel.org.uk/) where Panel members are remunerated, there is an independent secretariat hosted by the Legal Services Board and the Panel has a substantial ring-fenced budget for research and engagement activity.

The Financial Memorandum makes no mention of the increased cost of the Consumer Panel's expanded remit, which we believe is a significant oversight. As a core part of the regulatory system, it is vital that the Panel's role is recognised and supported, and that it is given the respect and resource needed to discharge its functions.

**Other issues**

We have identified a number of specific issues in the drafting of the Bill which will believe could have important implications for the successful implementation of its provisions. All of these can be considered technical rather than changing the policy intent in relation to each section. Many of our comments come from our experience of operationalising legislation and the complexities that arise at that stage which are often hard to envisage in the drafting. We have raised these directly with the Bill Team in Scottish Government and we hope they will bring forward amendments to address these issues at Stage 2. For transparency, those issues include:

- additional powers to secure the information we need to investigate a complaint and powers to conclude cases in the absence of that information
- technical updates to support operational implementation including:
    - ensuring we have clear powers to make and investigate complaints in our own name
    - ensuring we continue to be able to access required confidential and privileged information in appropriate cases
    - ensuring eligibility decisions are the 'quick sift' envisaged by the Bill
    - ensuring we can recognise where practitioners have made appropriate efforts to resolve a case fairly
    - ensuring that, where appropriate in the public interest, we can use the power proposed to publish a single report in relation to multiple services complaints against a practitioner.