

# CONSULTATION RESPONSE

## Response to the Scottish Government consultation: Legal services regulation reform in Scotland

21 December 2021

### Part 1: Strategic Change, Vision and key aspects of the regulatory model

**Question 1:** From the options listed, how important do you think each of the following principles and objectives are for any future regulatory model for legal services in Scotland?

- Protecting and promoting the public interest including the interests of users of legal services: Very important
- Supporting the constitutional principle of the rule of law: Very important
- Promoting independent legal professions and maintaining adherence to the professional principles: Very important
- Improving access to justice including choice, accessibility, affordability and understanding of services by service users: Very important
- Embedding a modern culture of prevention, quality assurance and compliance: Very important
- Working collaboratively with consumer, legal professional bodies, and representatives of legal service providers as appropriate: Very important
- Embedding the better regulation principles throughout its areas of responsibility (additionally; agility, independence, prevention, improvement, cost consideration of cost, and efficiency): Very important
- Promoting innovation, diversity and competition in the provision of legal services: Very important

**Question 2:** From the options listed, how important do you think each of the following are in supporting the framework of any future regulatory model?

- Enable access to justice including choice and diversity: Very important
- Uphold the rule of law and the proper administration of justice: Very important
- Offer accountability in protecting the public and consumer interest: Very important

- Offer accountability to those regulated by the framework: Very important
- Secure the confidence and trust of the public: Very important
- Question 2 - Enable future growth of legal services: Somewhat important

**Question 3:** From the options listed, how important do you think each of the following criteria is in a regulatory framework?

- Support and promote sustainable legal services, which benefit consumers: Very important
- Agile: Very important
- Risk based: Very important
- Efficient: Very important
- Outcomes based: Very important
- A proactive focus continuous improvement and prevention of failures (which lead to complaints): Very important
- Proportionality: Very important
- An increased focus on independence and accountability: Very important

## Part 2: Regulatory models and landscape

**Question 4:** The primary recommendation of the Robertson report was that "There should be a single regulator for all providers of legal services in Scotland. It should be independent of both government and those it regulates. It should be responsible for the whole system of regulation including entry, standards and monitoring, complaints and redress. Regulation should cover individuals, entities and activities and the single regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland." To what extent do you agree or disagree with this recommendation?

Strongly agree

Please give reasons for your answer:

Our starting point is our Reimagine Regulation publication (<https://www.scottishlegalcomplaints.org.uk/media/1469/reimagine-regulation-a-roadmap-for-improvement.pdf>) which set out a roadmap for improvement and which we fed into the Robertson review's deliberations. We said then that the overall goal of reform should be "better outcomes for consumers and the legal market achieved through agile, "future proof", responsive and proportionate regulation that manages risks, aids choice, improves quality of services and is transparent and accountable in its operation". We identified five key aspects to this:

- **Delivering a better statutory framework:** simple, understandable, agile, proportionate, affordable, fair
- **Enabling a focus on the needs of consumers and clients, including reducing risk and improving quality:** using data sharing, co-production, and consumer research to identify issues, and then target interventions
- **Affording opportunities to innovate, and delivering greater and more informed choice:** legal services can be provided in a variety of ways and

innovation is encouraged, leading to greater consumer choice and a sustainable market

- **Increasing trust and confidence in regulation and the sector:** an independent, transparent and accountable model, with joined-up and co-ordinated 'end to end' regulation and redress
- **Ensuring better protection and faster redress:** a single gateway, enabling fast and proportionate processes, ensuring redress is received when appropriate, and avoiding duplication and delay.

Those remain our priorities and we have considered the extent to which the models proposed help to achieve that goal. Our view is informed by our experience of dealing with more than 15,000 complaints over 13 years of operation.

For us, the Robertson model helps to achieve many of the priorities we set out. The benefits of a single regulator include clarity, efficiency, a view across the entire legal services market, opportunities for new professions or entrants and clearer regulation for legal tech. An independent regulator brings benefits in independence – from both the profession it regulates, but also from government – accountability and transparency. We see these all as clear aims for reform, which would help to best achieve the regulatory objectives.

Far from being a radical proposal, examples of single independent regulators are already in place in other jurisdictions, in different forms and arrangements. These include in Victoria, Australia, where the Victorian Legal Services Board and Commissioner (<https://lsbc.vic.gov.au/>) are independent statutory authorities responsible for the regulation of the legal profession in Victoria. There is much we could learn from those bodies to help develop a model for a single independent regulator best suited to the Scottish legal services market. For a small jurisdiction like ours, this model avoids multiple unnecessary bodies by bringing all regulatory activity under one roof. This approach is also under discussion in other jurisdictions, including in the recent Mayson review of legal services regulation in England and Wales.

We fully agree with the statement in the consultation paper that the independent regulator being accountable to the Scottish Parliament and the legal character of the body being set out in legislation “would ensure that it would be able to fulfil its governance objectives in a clear, consistent and comparable way, leading to a simplified and more transparent landscape and promoting greater accountability” (p39). We do not believe that could be fully achieved by the other two models. We also believe it would provide a clearer, more transparent, and more understandable system, and a single point of contact, for the public, the profession and other stakeholders.

We know that the public favours independent regulation. In July 2019 the SLCC worked with YouGov to poll the public on various issues around legal regulation (<https://www.scottishlegalcomplaints.org.uk/about-us/news/scottish-public-want-independent-regulation-of-lawyers/>). The results demonstrated strong public views regarding the importance of a regulator being separate from representative bodies, and strong support for the regulator being subject to Freedom of Information legislation (used as a proxy for accountability and transparency).

We also believe 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 entrants, including legal tech, to the market. It would be able to look not just at current regulated professions, but the market as a whole, and consider who might best deliver legal services (e.g. new types of authorised role) or what is regulated (e.g. different types of business), to help the market evolve in order to meet the changing needs of consumers. This would strengthen the market now, and better prepare the regulatory system for future developments.

Furthermore, a single, independent regulator would be better placed to be part of the solution to the great justice and sectoral challenges – from access to justice for the most vulnerable to international competitiveness. A single independent regulator could provide innovative solutions looking across the entire legal services market, rather than just provide solutions focused on one branch of the profession, in, for example, debates around legal aid, or the role of the advice sector in delivering legal services.

This model would help to achieve many of the issues highlighted later in this consultation, for example, incorporating a greater emphasis on quality assurance, prevention and continuous improvement, by bringing all data on legal services together in one place, and a single body managing the lifecycles of all processes.

This is of central importance to users. The Robertson review noted the ‘complaints maze’ which members of the public and lawyers must go through where the same complaint can go to multiple bodies with different standards and processes. Likewise, ‘ABS’, being introduced this year, will mean different regulators for the key staff (solicitors) and for the business unit. This adds to complexity and cost for business owners as well as introducing further complexity to the complaints maze. These multiple layers add cost, and lead to gaps of jurisdiction.

We also believe 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.

We note the concerns that have been raised by the profession about the issue of a single, independent regulator’s independence from political oversight. We do understand these concerns, and it is vital that the accountability and transparency requirements for the independent body are carefully considered to ensure they are appropriate. However, there are existing guidelines and controls for how that should operate, including the Venice Principles for Ombudsmen, and existing examples of where that has been successfully navigated in practice in bodies such as ourselves, the Crown Office, Audit Scotland, SPSO and many others. We also note that despite the concerns raised by the profession about the risk of political oversight in this model, the Law Society has recently voluntarily submitted itself to an oversight scheme for Alternative Business Structures that grants Scottish Ministers significant powers of oversight of the Law Society in its role as an Approved Regulator.

Finally, the general direction of travel in regulation across all sectors and legal jurisdictions is towards independent regulation. This is a longstanding trend, but has only accelerated since the Which? 'super-complaint' in 2007 raised serious concerns about legal regulation in Scotland, leading to 14 years of debate on the need for greater independence. If Scotland does not take this step now, it will likely have to return to it again and again in the coming years as it becomes more of an outlier.

**Question 5:** Of the three regulatory models described, which one would you prefer to see implemented?

Option 1: Robertson Model

Please give reasons for your answer:

We stated above that we believe the Robertson model best helps to achieve the regulatory objectives. We also believe that there are clear flaws in the other models, and particularly in model 3, that mean they cannot fully realise these objectives.

**Question 6:** Of the three regulatory models described above, please rank them in the order you would most like to see implemented? 1 most liked to see implemented, and 3 least liked to see implemented.

- Option 1: Robertson Model: 1
- Option 2: Market Regulator Model: 2
- Option 3: Enhanced accountability and transparency model: 3

Please give reasons for your answer:

We have set out above why we favour Model 1.

Model 2 broadly meets some of the regulatory objectives and some of the priorities we have set out. This model could look broadly similar to the current set up in England and Wales, or the model in Ireland, where the LSRA (<https://www.lsr.ie/>) is the independent regulator of all legal services, and the first point of contact for complaints about lawyers, but the various branches of the profession retain some regulatory duties, with oversight from the LSRA.

Model 2 introduces an aspect of market regulation into the system, which is welcome, and there may be reform of the complaints process within this model which would help to achieve our aim of a single complaints process to help achieve swift, effective, consumer-friendly resolution and redress. This model could help to achieve the objective of promoting competition, as it will take a view across the entire market. However, as any new entrants would require to set up their own regulator, and meet all of the requirements set out for regulatory committees, that is likely to prove prohibitive to many.

However, as well as maintaining the existing five bodies already involved in regulating legal services (and requiring others to be added as any new entrants to the market emerge), it automatically adds another in the form of the market regulator. This model is welcome because it recognises the importance of independent, market-wide regulation, but an additional body with oversight of the

existing bodies does not appear to be the most efficient way to achieve this. Indeed, it is hard to see how that could do anything other than add cost to the system. In order to reduce the number of bodies in this model, it might be appropriate for the market regulator and complaints body to merge or to merge backroom functions. That could also build on the SLCC's extensive experience of oversight through our oversight powers and now ABS. However, that is still a less streamlined approach than a single, independent regulator.

The regulatory aims are best achieved through a single, proportionate, regulatory system, which also addresses many of the other regulatory issues being grappled with (e.g. entity regulation, ABS, new market entrants, consumer-focused regulation, proportionality, addressing legal need etc.). In addition, the experience of England and Wales, where regulators are already significantly more independent from representative bodies, and accountable to a market regulator, suggests this is unlikely to go far enough to achieve the stated regulatory aims, and that the debate on the need for regulatory reform would continue. Indeed we note the recent Mayson report in England and Wales which recommended a move away from a similar model to "a single, sector-wide, regulator" and a greater focus on a regulatory response to meeting legal need. Model 2 would still leave us significantly behind the model England and Wales is currently considering moving away from.

We would note, that there may also be a lesson from history here. The creation of the SLCC was itself a solution based on adding an extra body to the regulatory structure, to avoid moving to fully independent regulation whilst fixing problems identified at the time (lack of investment in complaints, lack of independence of regulation). However, almost immediately after implementation many complained that it added to cost and complexity. The same solution, adding another body, is being proposed this time to avoid a move to fully independent regulation. We believe it is highly likely that post-implementation of such a model the debate moves in the same way to then criticising the cost and complexity of the new model.

While we may have significant concerns about the viability of model 2, as outlined above, it remains closer to achieving some of the objectives outlined above by introducing market regulation into the system.

Model 3 appears to be simply a restating of the existing arrangements, with some minor enhancements to accountability for the existing bodies. It is also hard to see how this model could be anything other than prohibitive for new entrants to the market, who would have to set up their own regulator. The only positive we can see in this model is the opportunity for reform of the complaints system – if no other change is forthcoming, we believe there must, at the very least, be a single independent complaints process situated within a single organisation.

**Question 7:** Please rank in importance the aspects of regulation you would most like to see handled by professional regulatory bodies, through independent regulatory committees? 1 most liked to see handled and 3 least liked to see handled

- Education and entry: -
- Oversight of standards and conduct: -
- Complaints and redress: -

Please give reasons for your answer:

We have set out above why we favour the Robertson model, which would pass the powers of the existing regulators to a single, independent regulator, including all of the aspects highlighted above. However, if model 2 or 3 is favoured, and regulatory committees continue to have a role in regulation, then we believe those aspects of regulation most directly linked to consumers should be prioritised for handling by independent bodies, because of the clear impact on consumer and public confidence. In addition, new legislation may need to set out principles for how the regulatory committees engage in consumer research and feedback, as the lack of such evidence in decision making was a key problem with the current system identified by the Robertson review.

**Question 8:** Of the three models described above, please rank in importance the aspects of regulation you would most like to see handled by a body independent of, and external to the professional regulatory bodies, and of government? 1 most liked to see handled and 3 least liked to see handled

- Education and entry: 3
- Oversight of standards and conduct: 2
- Complaints and redress: 1

Please give reasons for your answer:

We have set out above why we favour the Robertson model, which would pass the powers of the existing regulators to a single, independent regulator, including all of the aspects highlighted above. However, if model 2 or 3 is favoured, and regulatory committees continue to have a role in regulation, then we believe those aspects of regulation most directly linked to consumers should be prioritised for handling by independent bodies, because of the clear impact on consumer and public confidence.

This is particularly important for complaints and redress. In July 2019 the SLCC worked with YouGov to poll the public on various issues around legal regulation. The polling highlighted the barriers that the current model of regulation creates for people considering complaining, including concerns about fairness, bias, and impartiality, their complaint being taken seriously, and not understanding legal jargon. This appears to be damaging confidence in the system and putting people off coming forward to raise concerns. 55% of those asked said that they'd be worried about raising a complaint about a lawyer within the current system, where the organisations that regulate lawyers also represents them. When asked to put this into their own words:

- 36% of responses included concerns about fairness, bias, and impartiality
- 18% raised themes around lawyers sticking together or protecting each other
- 19% raised concerns around whether their complaint would be taken seriously
- 12% thought not understanding legal issues or use of legal jargon would be a barrier.

Some examples of the comments we received are: “I had a complaint but I did not pursue it because I felt that lawyers would protect each other” and “[I would be concerned] that the complaint would not be taken seriously or those dealing with the complaint may favour the lawyer without weighing up all the information”.

**Question 9:** Under the Robertson Model, to what extent do you agree or disagree that the professional bodies should have a statutory footing?

Mostly disagree

Please give reasons for your answer:

In a model where the professional bodies have no statutory regulatory role, we are not clear what basis there would be for a statutory footing. Our understanding is that it is rare for professions or sectors to have a statutory representative body, although were this to be a development it may be of interest to others. Others may be better placed to answer this question.

**Question 10:** Which of the following methods do you think the final regulatory model should utilise to embed a consumer voice? A combination (please specify)

Please give reasons for your answer:

In any model, careful consideration should be given to the need for consumer voice to provide ongoing support and challenge to the regulator(s) to protect and promote consumer interests. Ideally, the final regulatory model should seek to embed a consumer voice across all its work, and all of its constituent parts. That consumer voice will ensure the system has a clear understanding of consumer needs and expectations, and takes into account issues such as consumer vulnerability in discharging its duties. Different models of consumer voice and consumer engagement, including all of the methods above, can be seen in operation across the regulatory sector, and it is appropriate that they are all considered and embedded if they are likely to be beneficial. To some extent, the most useful models might be dependent on the overall regulatory model adopted.

The SLCC’s experience is that our Consumer Panel has been immensely helpful, providing advice, support and challenge to us in discharging our duties. We would like to see this model continued into the reformed system. However, we also note the frustration the Panel has voiced about the restrictions of its limited scope and remit, particularly compared to the equivalent panel in England and Wales, which can look across the entire regulatory system, as well as the lack of dedicated resources for it to discharge its duties. We believe this should be remedied in the reformed system. This links to our response to Q12 – we believe that such a panel would be able to lead on this type of work, given the remit and resources described.

Where the consumer panel (or its functions) sits will depend on the overall regulatory model. The consumer panel should have a close relationship with the complaints function, as the part of the regulatory model that most often interacts directly with consumers, and one which stands to benefit significantly from the insight and



challenge a consumer panel can bring. However, it is also vital that this insight and challenge can also benefit the wider regulatory system, bringing the voice of consumers into those areas where interaction with individual consumers is rare or inappropriate, but which could benefit from having a stronger understanding of consumer needs.

Beyond the work of a dedicated consumer panel, there should be a clear duty on any bodies discharging regulatory functions within the legal services market to inform, consult and involve consumers in setting and applying their regulatory objectives (for example, being subject to the Public Sector Consumer Duty). While it should not fall to a consumer panel to carry out this engagement on their behalf, a consumer panel could support regulatory bodies to build consumer engagement into their own working practices, including sharing best practice from within and beyond the sector.

**Question 11:** To what extent do you agree or disagree that Consumer Scotland should be given the power to make a Super-Complaint in respect of the regulation of legal services in Scotland?

Strongly agree

Please give reasons for your answer:

Given its statutory role, it is appropriate that Consumer Scotland should have this power, in addition to existing bodies such as Which? and Citizens Advice Scotland.

**Question 12:** To what extent do you agree or disagree that a baseline survey of legal services consumers in Scotland should be undertaken?

Strongly agree

Please give reasons for your answer:

The Robertson review highlighted the lack of research on consumer needs in Scotland. A baseline survey would help to inform the priorities of the new regulatory system and provide a useful baseline to track improvements in consumer confidence, choice and protection achieved through a modernised regulatory system. We note that the Legal Services Consumer Panel conducts an annual survey of people who have used legal services in the last two years (see last year's results: <https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2021/07/LSCP-2021-How-consumers-are-choosing-FINAL.pdf>). This is a task an appropriately remitted and resourced consumer panel could deliver.

**Question 13:** To what extent do you agree or disagree with the Robertson report, that the legislative approach should make clear the role of the Lord President and the Court of Session in the regulatory framework?

Strongly agree

Please give reasons for your answer:

It is appropriate that all aspects of the regulatory system are clear and transparent. That includes the role of the Lord President and the Court of Session.

**Question 14:** To what extent do you agree or disagree that the role of the Lord President and Court of Session in the regulatory framework in Scotland is important in safeguarding the independence of the legal profession?

Not Answered

Please give reasons for your answer:

We would note that greater transparency is relevant to this question too. If the Lord President has a role in ensuring independence then lawyers, members of the public and regulators should know what the powers and responsibilities are, how to raise concerns if they believe those principles are being infringed, and the sanctions available to the Lord President. A theoretical responsibility, without clear specification, can lead others not to act in a situation, believing that part of regulation sits with the Lord President, but without being clear if action has been taken by that office.

We believe others are better placed to answer this question more fully.

**Question 15:** Should the Lord President and Court of Session have a 'consultative' role, or 'consent' role with regard to the following potential changes to the operation of any new regulatory framework?

- Changes to professional rules: practice rules, conduct and discipline?: Consultative role
- Changes in relation to complaints practice and procedure?: Consultative role
- New entrants to the market seeking to conduct of litigation and exercise right of audience?: Consent role

Please give reasons for your answer:

As stated in answer to Q13, we believe it is appropriate that all aspects of the regulatory system are clear and transparent, including the role of the Lord President and Court of Session. While we believe it is appropriate that the Lord President is consulted on changes to professional rules, practice rules, conduct and discipline and changes in relation to complaints practice and procedure, we do not believe it is necessary for the Lord President to have to give consent to these changes. This accords with the current system for the SLCC, where we must consult, but do not have to seek consent.

There may also be a conflict of interest issue which needs considered. Where the Lord President consents to rules, as head of the courts, it is not then clear if Judicial Review of those rules is possible, or what the Lord President's role is as both the person approving the rules, and the head of the courts who will determine any Judicial Review of those rules.

However, acknowledging the authority and responsibility the Lord President has over the courts, we believe it is appropriate for the Lord President to be able to give

consent to new entrants to the market seeking to conduct of litigation and exercise right of audience. In achieving the transparency highlighted above, however, it is important that the way in which that consent is sought, and the process and rationale for giving or withholding consent, are set out clearly and transparently, so that everyone involved, including the regulator and any new entrants knows what to expect and how those decisions will be made.

**Question 16:** To what extent do you agree or disagree that the Lord President should have a role in any new regulatory framework in arbitrating any disagreements between independent Regulatory Committees and the professional regulatory bodies?

Strongly disagree

Please give reasons for your answer:

We have set out our views on our preferred model, which would remove the role of the Regulatory Committees. However, if Regulatory Committees remain within the chosen model, they should have clear roles, responsibilities and accountabilities set out in statute. That should make clear that they have primacy in matters relating to regulation. On that basis, there should be no need for an arbitration role within the system – if the Regulatory Committee and Professional Bodies disagree on a regulatory matter, the views of the Regulatory Committee should take precedence.

**Question 17:** To what extent do you agree or disagree that the Lord President should have a role in the process of appointment of any new 'legal members' to relevant positions, such as regulatory committees, in any new regulatory framework?

Mostly agree

Please give reasons for your answer:

We believe it is appropriate that the Lord President is consulted on the appointment of any new 'legal members' to relevant positions, such as regulatory committees, in any new regulatory framework. The Lord President may have relevant insight or views into the appropriateness of a particular individual, or on the collective legal composition of any board or committee, which may well prove helpful to the individual or body carrying out the appointments process. However, as highlighted in our response to Q13, in achieving a clear and transparent regulatory system, it is important that the way in which that is sought, and whether it is comment or consent being sought, needs to be set out clearly and transparently, so that everyone involved knows what to expect, how decisions will be made, and by whom.

We also believe that it is not appropriate for the Lord President to have the power to remove the (lay) chair of the SLCC (as is the case at present – see Section 5(3) of the Legal Profession and Legal Aid (Scotland) Act 2007), or the chair of any other or any future independent regulatory body.

**Question 18:** To what extent do you agree or disagree that regulatory committees, as described in the consultation, should be incorporated into any future regulatory framework?

Mostly disagree

Please give reasons for your answer:

Please give reasons for your answer.

In response to Q5 and 6, we outlined our reasons for favouring model 1. However, if model 2 or 3 is preferred, then we believe it is vital that it is independent regulatory committees, as described in the consultation paper, who are responsible for any regulatory activity discharged by the professional bodies. This ensures greater independence and accountability. As stated in response to Q16, those Regulatory Committees should have primacy in matters relating to regulation.

It may be that the statute should require publication of a clear scheme indicating how the independence of the regulatory committee is supported through governance, budget, staffing, and decision making, so that this is clear and transparent to all.

**Question 19:** To what extent do you agree or disagree that Regulators should be required by statute to ensure that Regulatory Committees are suitably resourced, with a certain quota of persons being exclusively ring-fenced for dealing with regulation?

Strongly agree

Please give reasons for your answer:

In response to Q5 and 6, we outlined our reasons for favouring model 1. However, if model 2 or 3 is preferred, and regulatory committees form part of the regulatory system, then in order to operate independently, they must be suitably resourced. In order to discharge their regulatory duties, they will, at time, have priorities which are not shared by the representative body. They must be able to discharge their duties, in line with their statutory objectives, even when the representative body does not share their priorities. To do that, they need to have dedicated resources they can deploy at will.

**Question 20:** To what extent do you agree or disagree that regulatory functions of Regulatory Committees should be subject to Freedom of Information legislation or requests?

Strongly agree

Please give reasons for your answer:

The SLCC is currently subject to Freedom of Information legislation and requests. This is appropriate given the legitimate public interest in our work. We believe this would also be appropriate for other statutory bodies in the regulatory system. It does not make sense for some parts of the regulatory system to be subject to lesser

statutory duties than others in this area – all regulation is conducted in the public interest. The consultation paper highlights the Scottish Government’s own research which suggested that bodies who exercise administrative authority could be made subject to Freedom of Information. That would apply to the Regulatory Committees in models 2 or 3.

In July 2019 the SLCC worked with YouGov to poll the public on various issues around legal regulation (<https://www.scottishlegalcomplaints.org.uk/about-us/news/scottish-public-want-independent-regulation-of-lawyers/>). The results strong support for the regulator being subject to Freedom of Information legislation.

**Question 21:** To what extent do you agree or disagree that the following aspects of ‘fitness to practice’ requirements or regulations are appropriate and working well in Scotland?

- content of the criteria: -
- frequency of career points where the criteria must be satisfied: -
- transparency and fairness in decision making: -

**Question 22:** Are there any changes you would make to each aspect as set out in the previous question?

Please give reasons for your answer:

We are not sure what is meant here by current ‘fitness to practice’ requirements or regulations. We do not believe that there is a ‘fitness to practice’ regime currently operating for legal services, beyond the requirements for initial entry to the profession, financial inspections and the complaints process. In addition, we are aware there are certain requirements to meet a minimum number of hours of CPD each year, and that some aspects of that, most importantly, risk management, are now compulsory.

There has been discussion on these issues in England and Wales, where the Legal Services Board recently published reports on international approaches to ongoing competence (<https://legalservicesboard.org.uk/research/international-approaches-to-ongoing-competence>) and research into public attitudes on ongoing competence (<https://legalservicesboard.org.uk/research/ongoing-competence-in-legal-services-research-into-public-attitudes>). The former identifies the Quality Assurance Scheme run by the Faculty of Advocates as an example of genuine revalidation. The latter highlights the public’s expectation, and indeed, assumption, that legal professionals should have to demonstrate they remain competent to do their jobs throughout their careers.

We understand that the Legal Services Board is in the process of approving a statement of policy and consultation paper on ongoing competence, to understand if legal regulators have appropriate frameworks in place to ensure that the professionals they regulate remain competent throughout their careers. The LSB noted that “the approach in this sector is unusual compared with other professions, where there is greater focus on assessing and understanding levels of competence and resulting use of additional measures such as periodic reaccreditation, peer

reviews, spot checks or feedback as well as CPD”. The draft statement of policy proposes that regulators “must pursue the following general outcomes:

- Set the standards of competence that those they regulate should have at the point of authorisation and throughout their careers.
- Regularly assess and understand the levels of competence within the profession(s) they regulate, and identify areas where competence may need to be improved.
- Make appropriate interventions to ensure standards of competence are maintained across the profession(s) they regulate.
- Take suitable remedial action when standards of competence are not met by individual authorised persons.”

(<https://legalservicesboard.org.uk/wp-content/uploads/2021/11/06.-21-60-Ongoing-Competence-Policy-Proposals.pdf>). We believe this might provide a useful model.

We believe a genuine fitness to practise regime would be a helpful addition to the regulatory landscape in Scotland. This could draw on best practice from other jurisdictions (see LSB policy statement above) and professions, such as health and clinical professions and social services.

Looking specifically at the remedial action currently available to regulators when standards of competence are not met, it is also clear there is a gap. The sanctions available to the SSDT, for example, are punitive or restrictive, but do not include making orders for training or support which might support an improvement-focused fitness to practice regime. This type of approach could also be helpful in shaping a more improvement focused approach that might help to proactively protect consumers, rather than wait until something goes wrong to take action.

We note that some regulators can use ‘fitness to practice’ to mean the conduct complaint process. As is apparent from the above, we do not believe these are the same thing. Our views of the need for a simplified complaints process within a single body are noted in response to other questions.

Finally, in terms of how ‘fitness to practice’ is used in some regulators, as noted above, we would note the absence within the current legal regulation model of a ‘health procedure’ which allows failings by a practitioner, perhaps due to mental health issues, to be dealt with in a specialised way, rather than through the use of conduct and service complaints (which tackle symptoms, but not cause, and do not fully recognise the vulnerability of the practitioner). There are examples of this type of approach in other sectors and jurisdiction that might provide helpful models for this.

**Question 23:** To what extent do you agree or disagree that there should be a test to ensure that non-lawyer owners and managers of legal entities are fit and proper persons?

Strongly agree

Please give reasons for your answer:

This seems an appropriate but proportionate response to the potential risk to consumers. Any test for owners of legal entities should be replicated across the sector – it should not be the case that lawyer or non-lawyer owners or managers are subject to different tests.

**Question 24:** To what extent do you agree or disagree that Legal Tech should be included within the definition of 'legal services'.

Strongly agree

Please give reasons for your answer:

Use of legal tech is growing, and it has the potential to benefit consumers by providing more accessible, cheaper and more varied legal services. However, it also poses a different kind of consumer risk. It should therefore be included within the definition. This will also help to future proof the definition.

Legal tech is also an example of where a single regulator, with market regulation responsibilities, is likely to be more effective. A regulator of one professional group may be able to regulate legal tech for that group, but not for any other provision of legal service. This risks multiple regimes for the regulation of legal tech developing aligned to professional groups and not public needs, with the potential to lead to gaps or duplication, or to stifle innovation.

**Question 25:** To what extent do you agree or disagree that those who facilitate and provide Legal Tech legal services should be included within the regulatory framework if they are not so already. If so how might this operate if the source is outside our jurisdiction?

Strongly agree

Please give reasons for your answer:

In order to facilitate consumer choice and improve access, while providing appropriate levels of consumer protection, it is appropriate that all legal services providers are brought within the regulatory framework. That will ensure they can provide services to consumers and that any consumer detriment is able to be addressed through the regulatory and complaints system. It would be for the regulator to consider how this might operate if the source is outside its jurisdiction.

**Question 26:** To what extent do you agree or disagree that, not including legal tech may narrow the scope of regulation, and reduce protection of consumers?

Strongly agree

Please give reasons for your answer:

See our answers to Q24 and 25.

**Question 27:** To what extent do you agree or disagree that the inclusion of legal tech in a regulatory framework assists in the strength, sustainability and flexibility of regulation of legal services?

Strongly agree

Please give reasons for your answer:

See our answers to Q24 and 25.

**Question 28:** To what extent do you agree or disagree that the Scottish regulatory framework should allow for the use of Regulatory Sandboxes to promote innovation?

Strongly agree

Please give reasons for your answer:

This type of approach balances support for innovation which could benefit consumers, with ensuring an appropriate level of protection while the innovation is tested. It's vital that where this type of approach is used, there is clear and transparent information for consumers about the implications of using a legal service which is part of it. There is much that could be learned from regulatory sandboxes already in operation in other sectors and jurisdictions (e.g. FCA regulatory sandbox, legal sandboxes in England and Wales, Arizona, Utah and California).

**Question 29:** To what extent do you agree or disagree that the Client Protection Fund works well?

Mostly agree

Please give reasons for your answer:

The SLCC has statutory oversight of the Client Protection Fund arrangements and has commissioned analysis to try to assess their effectiveness (see: <https://www.scottishlegalcomplaints.org.uk/about-us/who-we-are/oversight-research/research-trends-in-practice/client-protection-fund/>). Overall, we have found it challenging to date to answer this question clearly. As a key consumer protection, overseen by the Regulatory Committee of the Law Society, we would like to see greater transparency about and accountability for the Fund's operation. For example, it would be helpful if there was greater transparency about how decisions on claims are made, by whom, and against what criteria, as well as the proportion of claims which are upheld. This would enhance public and consumer confidence and understanding, as well as driving accountability. This could form part of an annual report published by the regulator/ regulatory committee responsible for the Fund. We hope to undertake further analysis in the coming year to help us to better assess whether the Fund currently works well, and to identify any potential improvements.

We would also wish to see the Master Policy professional indemnity arrangements considered in this way, as they also provide a key consumer protection. The SLCC has recently published a report on the indemnity arrangements, which made a



number of recommendations for improvement (see: <https://www.scottishlegalcomplaints.org.uk/about-us/who-we-are/oversight-research/research-trends-in-practice/master-policy/>). These recommendations include a clear role for the Regulatory Committee in setting expectations for the arrangements to ensure they meet regulatory requirements.

In relation to the models proposed, we believe that indemnity and protection fund arrangements should be governed or overseen (if not managed) by an independent body to ensure there is clear regulatory input, that arrangements are transparent and accountable, and to ensure that consumers received the redress they have been awarded wherever possible.

Finally, it is important that where redress is awarded by a complaints body the client should receive this. When a law firm goes out of business redundancy payments to the lawyers and staff will be met through a statutory fund, but clients entitled, for example, to a rebate of fees will be left as an ordinary creditor and unlikely to receive their award. Excesses on these policies can also be high, which can mean no payments are made by indemnity funds unless the amount due is more than the excess. This undermines confidence in the system. The SLCC has been working with the Law Society of Scotland and the Master Policy brokers over the past couple of years to take all possible action to ensure clients receive the redress they have been awarded. This includes discussions with the broker to allow payments to be made to cover outstanding claims and discussing potential changes to the principal terms of the Master Policy with the lead insurer. We have also worked with the Law Society and Scottish Government to consult on changes to the 2007 Act, including to allow for a process where, when an awarded rebate of fees cannot be paid by the practitioner due to death, insolvency or cessation, the equivalent amount can be treated as an actual loss for the client/complainer, and so instead be paid out by the professional indemnity insurance scheme (<https://consult.gov.scot/justice/amendments-to-legal-complaints/>).

**Question 30:** What, if any, changes should be made to the Fund? -

Please give reasons for your answer:

See our answer to Q29 above.

### Part 3: Legal Services providers and structures

**Question 31:** To what extent do you agree or disagree that any future regulatory model should incorporate a greater emphasis on quality assurance, prevention and continuous improvement than the current model provides?

Strongly agree

Please give reasons for your answer:

In many areas the current model primarily focuses on the passive setting of standards, and intervention when things have already gone wrong. The new model

should focus on creating a culture of quality assurance, prevention and improvement in the sector, which reduces the need for post-event action.

We fully concur with the statement in the consultation paper that “the Scottish Government agrees with the Robertson report that, regardless of the model pursued, the regulatory framework should incorporate a greater emphasis on quality assurance, prevention of failure, which usually lead to consumer complaints, and continuous improvement for the benefit of the legal profession and consumers. The regulatory framework should be flexible in adapting to failure and therefore able to reduce complaints. There is also potential to link quality assurance and continuous improvement in the legal profession to interact more closely with the legal complaints system currently managed by the SLCC.” (p65)

We believe regulation 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). As well as discharging its statutory duties to handle those complaints which have not been resolved at first tier, we believe the complaints body should be able to set standards and guidelines for first tier complaint handling. This could move beyond the statutory guidance already developed by the SLCC and taken into account when complaints are being determined at second tier, to include developing model complaint handling procedures for the sector, and supporting and holding firms to account for their implementation and appropriate use (as SPSO does with its MCHPs). This would help to drive improved first tier complaints handling, resulting in fewer complaints reaching second tier, and in greater learning and quality improvement. It would build upon work already commenced by the LSS Practice Rule Changes relating to client communications and law firms' client relations manager. We also believe that both regulators and complaints bodies should have access to the ‘first tier’ complaints records of firms. The SLCC have recommended rule changes in this area several times to the professional bodies, but these have not been fully taken forward. To understand risk in the sector, and to understand whether a complaint is a ‘one off’ or a systemic issue, there should be the ability for all relevant parties, including the complaints body) to access first tier complaints records (there is already a rule requiring these records to be kept).

The consultation paper also notes an example from the Robertson report which highlighted a system of self-assessment in New South Wales, Australia, which “helped firms, especially small firms, address areas of poor performance that could have led to more serious problems if not identified and was welcomed by those firms” (p66). In December 2020 the SLCC published an analysis tool to help firms to identify and reduce the common causes of complaint (<https://www.scottishlegalcomplaints.org.uk/about-us/news/new-tool-to-help-firms-reduce-common-causes-of-complaint/>). As well as promoting this through our outreach work, we send this to all firms who have a complaint upheld against them. However, we are not able to require firms to use this tool.

There are also good models available in specific parts of the system. The Legal Aid Quality Assurance Peer Review Schemes offer a useful model, which non legal aid firms may find just as valuable. Similarly, the LSB’s recent report on ongoing competence highlighted the example of the Faculty of Advocates’ Quality Assurance Scheme to assess the competence of members of the Bar

(<https://legalservicesboard.org.uk/news/new-ongoing-competence-report-what-can-england-and-wales-learn-from-other-jurisdictions>).

Furthermore, as highlighted in our comments on the models, we believe that the current fragmented regulatory system does not best support a preventative approach. Data sharing and compatibility across bodies is limited, and it is often the case that a failing firm may be visible to a number of bodies (e.g. ourselves, the Law Society of Scotland and SLAB), but with only part of the issue visible to each body, limited ability to share that information and in some cases, limited powers to take action on it, that firm can continue to take on new, unsuspecting clients, causing avoidable consumer harm and detriment. This is a significant regulatory failure.

Finally, we see that 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. Ideally, of course, they want the issue not to have arisen in the first place. That can only be achieved through prevention, quality assurance and a system focused on learning from what has gone wrong previously. That means designing and supporting a system that doesn't just deal with complaints and award redress, but focuses on supporting practitioners to provide a good service. A system that doesn't just censure, fine or prosecute practitioners whose conduct has fallen below the appropriate standard, but identifies early signs of struggling firms, practitioners lacking in competence, or problematic practices, and seeks to take action on them through a toolbox of interventions to avoid consumer detriment occurring. That would ensure practitioners get the support they need to provide a good service to their clients, and that those unable to do so would be identified early and either supported through a fitness to practice regime or removed from situations where they could cause harm to consumers.

**Question 32:** To what extent do you agree or disagree that the rules within the regulatory framework should be simplified with the aim of making them more proportionate and consumer friendly?

Strongly agree

Please give reasons for your answer:

The SLCC has long argued that delivering a better statutory framework; one that is simple, understandable, agile, proportionate, affordable and fair, is a key plank of the reform needed. New legislation should replace the 1980, 2007, 2010 and related Acts, in relation to all sections covering legal regulation and complaints. The focus should be on delivering a framework model which enables proportionate and agile regulation in a rapidly changing environment.

For complaints, we believe that framework legislation should allow the complaints body to set proportionate pathways for different types of complaint (public protection, value, etc.) and define 'tools' and outcomes, not processes. This would avoid the multiple statutory stages (and their accompanying court appeals), which are often disproportionate, whilst still ensuring simple, low value, low public interest complaints

could be dealt with quickly, and that resources could be used for those which are more complex, high value, or have greater public interest.

The language used in the legislation must also take account of public reaction to it – terms such as ‘frivolous’ may have technical legal meaning, and in a decision appealable to the courts must be explicitly referenced, but are often found to be actively offensive by the public. By contrast, a ‘public interest’ test could allow those complaints which would be disproportionate to investigate (for example, a single failure to return a call, later remedied) to be removed from the process at an early stage and for this to be explained to the consumer without resorting to language they may deem offensive.

The legislation should focus on an agile framework and principles, not a prescriptive set of processes. Enabling powers should allow those leading regulation and complaints to put in place standards and processes to achieve the outcomes required by legislation. A focus should be on a ‘toolbox’ or powers that ‘may’ be used, rather than obligating the regulator or complaints body to use processes which may not work for some cases, or as the market evolves. This will allow more agile and responsive regulation, and adaption around issues such as globalisation. It will also help to avoid issues where court rulings significantly change regulatory processes (such as the court ruling in 2016 which found the wording of the 2007 Act did not allow for hybrid issues), because of a drafting issue with the legislation. Clear and consistent standards of public consultation, and approval, for schemes and rules should be set out to ensure accountability. Discretionary powers are subject to Judicial Review, ensuring bodies are held to account on appropriate usage.

Fundamentally, the easiest way to make the regulatory framework more consumer friendly is to deliver a clear, simple and transparent system that regulates in the public interest, taking into account consumer views. We believe model 1 delivers this.

**Question 33:** Which of the following methods do you think regulatory model should incorporate to provide quality assurance and continuous improvement?

neither, or other

Please give reasons for your answer:

Ultimately, this should be for the regulator to decide. However, we understand the methods suggested have been effective in other sectors in supporting quality assurance and continuous improvement. For example, peer review is used by SLAB for both solicitors and advice providers. Systems of self-assessment are used in other sectors such as care services to help facilitate reflection and improvement. A range of new quality improvement based consensual resolutions and orders (sanctions) should be incorporated to allow, for example, direction to a firm to improve training or supervision of staff, implement a system for complaints handling, improve its record keeping, or improve its process for responding to customers. We would want to see the regulator develop a toolbox of methods and approaches, including these and others, as different tools will be effective in different situations and with different groups.

**Question 34:** To what extent do you agree or disagree that there should be a definition of legal services?

Strongly agree

Please give reasons for your answer:

A definition of legal services is needed so that everyone is clear what services are regulated, and for what purpose. This would also help to make regulation more transparent to the public, and to help consumers understand what protections are available to them in using legal services.

The Robertson model deals with this issue – the regulator can define (and propose any changes) to the definition, looking across legal services and the professions. Similarly, in model 2, the market regulator could do this. It is not clear who would define legal services, or propose changes to that definition, in model 3.

Any definition needs to be flexible enough to take into account who the public actually go to for legal advice and support, not just those professions currently defined as delivering regulated legal services, and to cover legal services which might emerge in future. This is an access to justice issue.

We note that there is currently thinking underway in England and Wales about how to bring the ‘unregulated’ market into the definition of legal services, and therefore under some form of regulation (e.g. redress available from the Legal Ombudsman). In his review of regulation in England and Wales, Professor Stephen Mayson, noted that “the regulatory framework should better reflect the legitimate needs and expectations of the more than 90% of the population who face a legal issue and for whom it is not currently designed”. He made this recommendation on the basis of survey evidence that about one-third of people who had faced a legal issue in the past four years did not receive any help, and of the two-thirds who did receive help, just under half of them received it from a regulated lawyer (<https://stephenmayson.com/2020/06/11/legal-services-regulation-the-final-report/>). We understand that the Legal Services Board is currently looking into this issue.

**Question 35:** To what extent do you agree or disagree that the definition of legal services should be set out in primary legislation?

Mostly agree

Please give reasons for your answer:

We agree that setting this definition out in primary legislation would help to make regulation more accessible, accountable and transparent to the public, the legal profession and other stakeholders. However, if it is to be set out in primary legislation, then the definition must be flexible enough to cover all the legal services the public actually use (not just those professions currently defined as delivering regulated legal services), and to cover legal services which might emerge in future. Otherwise, such a definition could become a barrier to new entrants to the market,

reducing competition, and therefore limiting the choice available to consumers. This could either be achieved through primary legislation that can be amended by regulations, and/ or by a broad definition in primary legislation, with more detail set out in regulations, or, ideally, by the regulator. However, this latter option would rely on either the Robertson model or model 2 being in place.

**Question 36:** To what extent do you agree or disagree that there should be no substantial change at this stage to bring more activities within the scope of those activities “reserved” to solicitors or to remove activities?

Mostly agree

Please give reasons for your answer:

It should be for the regulator to decide on a proportionate approach to regulation, including whether certain types of service or activity should attract a greater degree of regulation, and what form that regulation should take. This would best be done across the whole legal services market. This issue was considered at length by Professor Stephen Mayson in his independent review of legal services regulation in England and Wales (<https://stephenmayson.com/2020/06/11/legal-services-regulation-the-final-report/>). However, it is not clear how this could be achieved in model 3, where the regulators only have responsibility for their own branch of the profession.

**Question 37:** To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated?

Strongly agree

Please give reasons for your answer:

See our answer to Q36. We believe this works in models 1 and 2, but are not clear how this could be achieved in model 3, where the regulators only have responsibility for their own branch of the profession.

**Question 38:** To what extent do you agree or disagree that there should be a change such that the title ‘lawyer’ would be given the same protections around it as the title ‘solicitor’?

Mostly agree

Please give reasons for your answer:

This decision should be taken by the regulator. Consumers are unlikely to be familiar with which terms are protected and which are not. Therefore it’s vital that any protections are accompanied by powers for the regulator to take action where they are breached, and consumers are at risk of detriment or making an uninformed choice by assuming a provider is regulated when they are not (consumers may

choose to use an unregulated provider, but they should have the information to make an informed choice about the implications of that).

**Question 39:** To what extent do you agree or disagree that the title 'advocate' should have the same protections around it as the title 'solicitor'?

Mostly agree

Please give reasons for your answer:

See our answer to Q38

**Question 40:** To what extent do you agree or disagree that the legislation should allow for the protection of other titles in relation to legal services as appropriate?

Strongly agree

Please give reasons for your answer:

See our answer to Q38

**Question 41:** To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which titles to protect?

Strongly agree

Please give reasons for your answer:

The regulator is best placed to make this decision looking across the whole legal market, balancing the cost of regulation with the benefits to consumers. It is not clear how this could be achieved in model 3, where the regulators only have responsibility for their own branch of the profession.

**Question 42:** To what extent do you agree or disagree that the 51% majority stake rule for Licenced Legal Services Providers should be removed?

Strongly agree

Please give reasons for your answer:

Over 1000 alternative businesses are safely operating in England and Wales in a regime that came into law in 2007 without this requirement, and we see no reason why this significant barrier to entry and competition should be maintained.

Again, there is also a lesson from the past which may inform future reform. When ABSs were introduced in England and Wales, and the legislation introduced in Scotland, the claim made by those opposing was that these compromised the independence of the profession. Not only has that not proven to be the case, but all those dissenting bodies have now moved to a position of supporting ABS. While

change is often threatening to those involved, it does not always mean there is an actual threat, as proved to be the case in this previous debate.

**Question 43:** To what extent do you agree or disagree that entity regulation should be introduced?

Strongly agree

Please give reasons for your answer:

For many types of legal service, consumers often believe they are contracting with a law firm, rather than an individual practitioner. They expect the firm to deliver an adequate service, and to take responsibility for anything which does not go to plan, regardless of who carries out the work. In addition, 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, penalised and improved at entity rather than individual level.

Looking to the future, the legislation should enable regulated businesses and persons without trying to predict what the market will need, instead allowing flexibility to accommodate that, so we support the concept of entity regulation. However, the risk is that entity regulation, like ABS, is layered on top of existing regulation creating further complexity and clashes, and that both are designed to deal with a fixed idea of what businesses will look like, rather than long term solutions to support and encourage a rapidly adapting market.

New arrangements should create a single entity regulation scheme which does not differentiate on ownership itself, but sets common standards for any ownership model to meet. We believe Scotland's market is too small for a separate ABS model to be valuable or sustainable (in regulatory terms, financial viability, and in relation to the market). A single scheme would positively build on a direction of travel set by government in the Legal Services (Scotland) 2010 Act, but to extend this further. It would also allow some complexities which have become apparent in implementation to be tackled, and some of the duplication of trying to create different schemes for different models to be removed.

If there was a single regulatory body, without conflicting representative functions, this would also allow all legal businesses could be regulated by that one body, rather than the need for up to three Approved Regulators envisaged in the 2010 Act, to potentially allow others to enter the market, which again can only add to the complexity and cost of the current model of regulation for businesses and consumers.

**Question 44:** To what extent do you agree or disagree that all entities providing legal services to the public and corporate entities should be subject to a "fitness to be an entity" test?

Mostly agree



Please give reasons for your answer:

This seems an appropriate but proportionate response to the potential risk to consumers.

**Question 45:** To what extent do you agree or disagree that, as all lawyers providing legal services will be regulated – entity regulation should engage only those organisations who employ lawyers where those organisations are providing legal services for a profit – with the exclusion that when that legal service is in the context of an organisation whose main purpose is not to provide a legal service (for example banking) then regulation would remain at the level of an individual lawyer only and no entity regulation would apply?

Mostly agree

Please give reasons for your answer:

This seems an appropriate but proportionate response to the potential risk to consumers. However, we believe this should a decision for the regulator to take, on the basis of an assessment of the balance of potential consumer harm and detriment with cost and regulatory burden, and in consultation with relevant stakeholders.

**Question 46:** To what extent do you agree or disagree that the Scottish Government should commission or facilitate a baseline study to identify the current quantum of the sector's contribution to the economy and to identify those niches in the global market where we might target our efforts?

Not Answered

Please give reasons for your answer:

Others are better placed to answer this question

## Part 4: Complaints and Redress

**Question 47:** To what extent do you agree or disagree that there should be a single gateway for all legal complaints?

Strongly agree

Please give reasons for your answer:

We have argued for a single, streamlined complaints process to achieve swift, effective, consumer-friendly resolution and redress. That means retaining the single gateway and rationalising the process so that there is a single investigation carried out by one body, up to the point of prosecution.

Removing the single gateway would reduce the independence within the system, make it less consumer focused, and is more likely to create greater inefficiency and ineffectiveness. We have seen the difficulties in other sectors where there is

consumer confusion about which body to take a complaint to. Requiring consumers to approach multiple bodies shows bias against 'customer journey' (for both consumers and lawyers) as the starting point for process design. It would also mean duplicating the enquiries and eligibility functions across the complaints body and the various regulators, leading to greater costs and inefficiency. This would be a significant backward step.

**Question 48:** Dependant on the regulatory model taken forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, where a complaint is generated by an external complainer such as a client, or non-client?

Strongly disagree

Please give reasons for your answer:

A key focus of the evidence presented to date by the SLCC has been the inefficiency and ineffectiveness of the current 'complaints maze' of five statutory bodies. We have argued for a single, streamlined complaints process to achieve swift, effective, consumer-friendly resolution and redress. An independent body is best placed to investigate all consumer complaints in full, avoiding an early and artificial distinction between service and conduct, and ensuring a consumer friendly and efficient process throughout, without handovers between different bodies. That means a single complaints body, able to manage complaints from start to finish, without duplication and delay, should be created. This improvement would be a key deliverable of reform.

A single complaints body would ensure that the single 'gateway' is meaningfully maintained – this provides a single point of, and clearly visible, contact for the public. It also ensures a single body is collating consumer feedback and identifying themes capable of driving improvement.

This approach would also have the benefit that, should the legal services market in Scotland become more diverse, the single complaints body would more easily be able to assume responsibility for complaints handling for new entrants, making it much easier to extend basic consumer protection (i.e. an opportunity for redress) to cover all legal services providers.

We also strongly believe that complaints handling should be entirely separate to representative functions. It is vitally important for public and consumer confidence that the body handling complaints is, and is perceived to be, independent of the profession and its representative bodies. It is a number one concern of the public, in providing customer feedback to the SLCC, that complaints remain part of bodies they see as representing lawyers' interests (due to many complaints being investigated by both the independent complaints body and the professional body). This was also evidenced by polling data on public perceptions of regulation (poll the public on various issues around legal regulation (<https://www.scottishlegalcomplaints.org.uk/about-us/news/scottish-public-want-independent-regulation-of-lawyers/>)). This undermines confidence in the system and provides the perception of conflict of interest (as well as creating unnecessary

duplication). Creating a single complaints body would have the benefit of ensuring that complaints functions are entirely separate from representative functions.

In order to create a more efficient and proportionate process, a single investigation should take place (abolishing the 'service' and 'conduct' split currently made at the initial eligibility stage). The difference between conduct and service is clear at the extremes, but very indistinct across a large area of overlap. Making a classification *before* being allowed to investigate a case is irrational and often counterproductive to a proportionate outcome. An initial finding of fact then allows proper classification in relation to resolution, determination or prosecution (for the most serious conduct issues). A single investigation is faster, cheaper, and allows more proportionate approaches to be taken. Crucially, this will help tackle the trade-off between public protection (conduct) and redress to a consumer (service) created by the decision of the courts that 'hybrid' issues were not allowable.

The same single organisation should be responsible for investigating all complaints through to an initial finding of facts. Where more 'minor' issues are suggested, the same body should go on to make a formal determination, and if appropriate, application of sanctions.

Only the most serious cases should be prosecuted at an independent tribunal – where matters of conduct are suggested by the initial finding of facts the single complaints body should act as prosecutor at an independent tribunal. If a matter is found not to be misconduct, the tribunal should be able to uphold a lesser lever of conduct and/ or have a straightforward route to remit it back to the complaints body for a finding. Consumer compensation and redress would be handled by the single complaints body in all cases, meaning that any award of consumer redress should not be delayed awaiting the outcome of any related conduct prosecutions.

Finally, there should be no blanket restrictions on publication, but the complaints body should be empowered to develop its own rules to govern appropriate use of publication powers, including setting the threshold for publication of decisions. This should also be the case for the discipline tribunal. This is important for public confidence and protection.

The consultation sets out the intention to reduce the cost of regulation. Streamlining the complex complaints process is one clear way in which that could be achieved, as well as offering significant improvements for all parties.

**Question 49:** Dependant on the regulatory model take forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, with regard to the investigation and prosecution of regulatory compliance issues?

Not Answered

Please give reasons for your answer:

Consumer complaints should not be only source of regulatory action. The regulator (or the Regulatory Committees of the RPOs, if they retain regulatory powers relating

to professional discipline and compliance with professional standards) should have the power to initiate its own investigations relating to professional discipline and compliance with professional standards (regardless of model), and, as required, to pursue those to the point of prosecution to the independent tribunal.

For example, this might occur when an issue comes to light through the regulator's own investigations. In this case, the issue would not have to be considered a 'complaint' (there being no true complainer other than the investigating regulator). However, in models 2 or 3 where the regulator and complaints body are separate, but an information sharing protocol would need to be developed to ensure that details are shared between the regulator(s) and the complaints body to aid identification of trends or issues likely to lead to public harm or consumer detriment.

In response to Q5 and 6, we outlined our reasons for favouring the Robertson model. However, if model 2 or 3 is preferred, then we believe it is vital that it is independent regulatory committees, as described in the consultation paper, who are responsible for any regulatory activity discharged by the professional bodies, including any role in the investigation and prosecution of regulatory compliance issues. This ensures a greater degree of independence and accountability.

**Question 50:** From the complaint issues below please give a preference between the options a) an independent body or; b) a professional regulatory body; who you think should investigate each of the following:

- Service: an independent body
- Unsatisfactory conduct: an independent body
- Professional misconduct: an independent body

Please give reasons for your answer:

We believe that where a complaint is generated by a consumer/ external complainer such as a client or non-client, there should be a single, independent complaints process. This helps deliver a single, streamlined customer journey, based on service design principles, a single point of contact for complainers, and a more efficient service. It also avoids complaints being artificially split or curtailed before they have been fully investigated. As stated in the consultation document, the Robertson review found that "the legislation restricts opportunity to make any significant improvement to the complaints process, and that from a consumer perspective, a complaint is a complaint and may have elements of both service and conduct.[...]It is unhelpful to be required to make such a distinction early in the complaints process."

**Question 51:** To what extent do you agree or disagree that there should be a level of redress for all legal complaints, regardless of regulated activity?

Strongly agree

Please give reasons for your answer:

Redress can come in many forms – from compensation for actual loss, to rebate of fees, to requiring work to be put right, or requiring an apology. While taking into account issues such as proportionality, indemnity (and cost of indemnity) and the

nature of provision (free legal advice provided by not for profit versus commercial legal advice for profit), it is likely that some redress mechanisms will be appropriate in relation to all regulated activity.

**Question 52:** To what extent do you agree or disagree that there should be a single Discipline Tribunal for legal professionals, incorporated into the Scottish Courts and Tribunals Service?

Strongly agree

Please give reasons for your answer:

A single discipline tribunal would help to reduce duplication in the system, make it more accessible for smaller professions/ new entrants and ensure consistency of approach. Being housed within the Scottish Courts and Tribunals Service could also help to provide additional capacity on certain issues. It would also help to ensure public and professional confidence in the impartiality of the tribunal, and support appropriate governance, for example in making appointments through an appropriate process and ensuring that legal and lay members are appointed and remunerated on an equal basis.

**Question 53:** To what extent do you agree or disagree that any future legal complaints model should incorporate the requirement for the complaints budget to require the approval of the Scottish Parliament?

Strongly disagree

Please give reasons for your answer:

We absolutely agree that all bodies delivering statutory regulatory duties (including regulators/ regulatory committees, complaints bodies and discipline tribunals) should be accountable and transparent. This includes publishing and laying budgets and annual reports in Parliament, and consulting on their budgets with appropriate stakeholders.

The SLCC already has a statutory duty to consult on its budget (the RPOs and the Consumer Panel are statutory consultees, and we publish it to allow other interested groups to comment) and to lay it in Parliament. Our accounts are also subject to scrutiny by Audit Scotland, overseeing all spend raised from statutory fees. We believe that is appropriate, given our role and functions, and we also believe that should apply to others within the regulatory system.

However, we do not believe this proposal is proportionate or appropriate. It could lead to more uncertainty and delays in approving a budget, which would have knock on implications for those collecting and paying the levy. In addition, our budget does not come from the block grant administered by Parliament (as is the case for bodies subject to this type of budget approval), but from the profession, which makes this approval seem inappropriate, and it could be seen to amount to the type of political oversight which others have consistently warned against. It would not be consistent with the arrangements in other professions, for example the General Medical

Council, General Dental Council, or the General Teaching Council for Scotland. All these bodies have a model similar to the SLCC due to the concerns about the independence of the regulatory model.

However, if it is deemed appropriate for the 'complaints budget' to require the approval of the Scottish Parliament, then we believe that should apply to the whole 'complaints budget' – i.e. the regulatory costs levied and spent on discharging statutory duties on complaints, by all of the bodies who have a role in that system. The consultation paper notes that "in general regulation is financed by the profession paying fees to their professional/regulatory bodies. In addition the complaints system, administered by the SLCC, is financed by a levy on members of the legal profession" (p28), and proposes that in model 3, "regulators would have a statutory requirement to ensure that these regulatory committees are suitably resourced" (p46). On that basis, there is no obvious rationale for not applying the same level of scrutiny, transparency and accountability across the entire regulatory budget.

Indeed, we note that earlier this year the Legal Services Board published new Rules and Guidance to increase transparency on how legal services regulators spend practising certificate fees – this could form a helpful model for fee/ levy transparency in whatever model is adopted.

**Question 54:** From the options listed how important do you think each of the following principles and objectives are for any future regulatory model? Model 1 (Robertson report recommendation)

- Uphold the rule of law and the proper administration of justice: Very important
- Provide access to justice: Very important
- Operate for the public interests (offer accountability in protecting the public and consumer interest): Very important
- Have a high degree of public confidence and trust, embedding a modern culture of prevention, continuous quality improvement, quality assurance and compliance. Promote improvements, use information and evidence gathered to identify sector-wide issues: Very important
- Work collaboratively with consumer and legal professional bodies as appropriate. Encourage companies to act on complaints data. Publish guidance, and provide training to help firms and the sector improve complaint handling. Provide support for 1st tier complaints management (be able to provide guidance on handling): Very important
- Embed the better regulation and consumer principles throughout its areas of responsibility: Very important
- Accessible, remove barriers to people seeking the redress they are entitled to. There should be a single gateway and investigation for complaints. 3rd party complaints would be allowed: Very important
- Effective, able to resolve consumer complaints and have adequate enforcement powers to hold providers to account when things go wrong: Very important
- Transparent, publish a range of information including decision criteria, complaints data and outcomes of cases. Be able to advise on trends and issues emerging from 1s tier complaints: Very important

- Have an increased focus on independence and accountability. Provide an impartial service to both consumers and providers. Accountable, to a competent authority or a regulator. Undertake periodic reviews on the effectiveness of ADR schemes and publish the results: Very important
- Enable early consensual resolution, which would include mediation as a key process should be built upon: Very important
- Provide prompt resolution, proportionate to the complexity of the complaint: Very important
- The levy for entities should be on a financial turnover basis: Appeals process simplified whilst adhering to ECHR. No appeal from the Complaints Ombudsman, but the ability to appeal to the Court of Session in relation to misconduct: Very important
- There should be no appeal in terms of the amount of compensation awarded, similar to other professions: Very important

**Question 54 continued** From the options listed how important do you think each of the following principles and objectives are for any future regulatory model? Model Options 2 & 3

- There should be a Memorandum of Understanding between the complaints body and the professional bodies on cross-referring cases: -
- The presence of conduct issues should not delay, complicate the process or disadvantage the outcome of service complaints for consumers: Very important

**Question 55:** Please provide any further comments on the proposals set out in this consultation in the box below.

Over the past ten years discussions have continued about the best way to regulate legal services, to drive choice and innovation in the market, and to promote public confidence and protect legal service users from harm. In that time, little has changed to achieve this. The reforms that have been introduced have layered further complexity over already convoluted regulatory arrangements, or have proved unworkable in practice. We believe it's time for fundamental reform to create a regulatory system fit for the future – one that works for legal service users and providers, and meets society's need for a well-functioning legal services market.

We have not argued for the future of the SLCC in its current form – we may be at the heart of a new solution or our functions and teams may merge with others. This underscores our commitment to a better system for all, rather than the maintenance of current institutional roles. Nevertheless, we hope this integrity, our leadership of the calls for reform, and the policy expertise and analysis which we have contributed to this debate, illustrate the contribution we could make in the future.

Reforming the regulation of legal services could have real benefits for all. For lawyers and legal service providers it should mean more proportionate regulation, based on the work they do and the risk it carries for the public interest and for consumers. It should help foster innovation within the legal services sector. That innovation might include new legal services and providers in areas where access to justice is challenging, or where consumers currently avoid seeking legal support. For those needing to access legal services it should provide greater confidence in doing

so, knowing that the protections they expect are in place. Most importantly, it should ensure that regulation delivers for the public good, reflecting the vital role that legal services play in our society.

Conversely, if five bodies regulating legal services are left in place, or a sixth added, even with radical reform, we believe many issues will remain. Everyone in the system will work hard to make it work, but in reality it is likely it remains a system of duplication, cost, process mazes, failings around handoffs and handovers, problems with data sharing, failure to focus on the full market (rather than individual professional roles), and gaps in jurisdiction (or one organisation leaving it to another to act, and that latter organisation then not acting).

Although not mentioned in this consultation, we also believe the system of taxation of fees must be reformed and resourced. This is an issue which has been raised in several previous reviews of legal regulation and complaints. It may be a taxation function could be located within the complaints body to allow a 'one stop shop' rather than complainers with a fee issue having to go to both taxation and the complaints body. In looking at existing independent regulators, we have noted that those operating in both Ireland and Victoria, Australia, deal with complaints about taxation of fees alongside other complaints, and we believe this approach would be helpful.