

# Regulation of Legal Services (Scotland) Bill

## Stage 2 Briefing

### Why this Bill is needed

We believe the current regulatory system can be improved. We supported the outcome of the independent review which recommended a streamlined model of regulation, independent of the legal profession. The current proposals are a compromise, often to the detriment of changes consumer bodies have long called for. However, the proposals do provide a welcome and significant step forward and we now want to see them implemented. This must be without further compromise if the Bill is to achieve the intended benefits for consumers and lawyers alike.

The proposals in the Bill to reform the complaints system seek to reduce complexity and prescription and to increase flexibility. This will help to drive efficiency and proportionality as far as possible within the current model. Currently, the system simply doesn't meet the public or the profession's needs or expectations of an effective, efficient complaints system. The statute governing its operation is inflexible and overly prescriptive, meaning that lower-level consumer complaints likely to result in small levels of compensation require to be managed in the same way as issues of significant wider public interest.

This complexity has a real impact. 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 and a loss of confidence while complaints are investigated. It also increases the cost of the system for the regulated professionals who fund it.

The system is also overly legalistic, requiring the use of legal terminology 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 swift administrative justice that the system was intended to offer.

Everyone agrees that reform is needed in this area, and we've worked with government to propose changes that will make a real and tangible difference to those using or subject to the complaints system. The changes proposed in this Bill, and in some of the amendments now proposed by the Minister and others, will make significant improvements in all of these areas, resulting in a complaints system which is more flexible, proportionate, efficient and responsive.

However, we know some stakeholders have spoken out against some of these improvements and there are amendments which we believe create further complexity. Any proposals to reverse or further complicate much-needed changes must be resisted if the Bill is to be successful in its aims and not create further complexity and cost.

## Our views on the Stage 2 amendments

We have not commented on all amendments – only those which have a direct impact on our powers or the wider regulatory system as it affects our work, or where we wish to specifically highlight strong support or opposition to the proposals. In some cases, we have identified minor drafting changes that might be required to ensure the amendments will have the intended effect. Where appropriate, we will support those amendments in principle and work with the Minister to bring forward any necessary technical amendments at Stage 3.

### **Complaints: constitution etc. of Scottish Legal Complaints Commission**

- **Support all amendments in this group**

The amendments in this group make technical changes to allow the SLCC to carry out its role appropriately (relating, for example, to the powers reserved to Commissioners).

A key role here relates to the operation of review panels, which replace the existing costly and disproportionate appeal route. We welcome the Committee's consideration of these proposals at Stage 1 and its view that this "*should provide a more proportionate, accessible, swifter and cost-effective approach and resolution which will benefit both consumers and those against whom a complaint is made*" (Stage 1 report, paragraph 165).

We also welcome the Minister's response to the Committee's concerns about transparency and her amendments to require us include information on the review committee within our annual report (see grouping *Services complaints: procedure etc.* below).

The current appeal route is costly and disproportionate to the decisions we make. Its replacement with an internal review function, which can more swiftly address any issues raised, is consistent with the usual ombudsman approach and will ensure that any errors can be rectified while reducing the time the complaint hangs over the complaint parties.

In addition, the legal and court fees, plus staff time to support this work, is a significant cost to the organisation and this is passed on to practitioners in our levy and ultimately to legal service users in the fees they are charged by firms.

Bluntly, if this change is not retained in the Bill, then there is little hope for any significant efficiency savings. Indeed, the overall cost of the new system may go up.

We believe this change will also increase access to justice as the proposed review committee is a less costly and difficult process for either complaint party to access than an appeal in the Court of Session. That is particularly the case for unrepresented complainers who bring the majority of appeals against our decisions and can end up liable for significant costs in doing so. Those are costs we either have to pursue them for, or write off and cover from our general levy income from practitioners.

This quote from an unrepresented lay complainer in an appeal hearing just before Christmas sums this up:

*“The public must have confidence that complaints are resolved fairly and impartially. The Commission refuses to change a decision once it is made and an appeal has to be made to the Court of Session. Very few complainants would proceed to Court of Session. If that is the policy of the Commission that is unfair. That is the issue of fairness. [...] It is not fair to make someone come to the Court of Session to challenge that decision.”*

It is, of course, not our policy, but the fact of the statutory right of appeal to the court that means we are unable to change a decision once it is made. The proposed powers of review would allow us to do just that.

### **Complaints: minor and consequential amendments**

- **Support all amendments in this group**

These amendments include important changes to support the SLCC’s powers to allow it to raise a complaint in its own name where a public interest issue arises (see grouping *Services complaints: procedure etc.* grouping below) and to support the disclosure of information about complaints where it is in the public interest to do so (see *Disclosure of information about complaints* grouping below), as well as technical changes to the SLCC levy.

These amendments also address concerns raised by the Law Society of Scotland and shared by the SLCC about the changes in the Bill to the process for ‘handling complaints’; that is complaints made to the SLCC about how a relevant professional body has dealt with a conduct of regulatory complaint. The amendments return the process to its existing approach, which both bodies agree works well.

### **Complaints: ineligible or premature complaints**

- **Oppose all amendments in this group**

The changes proposed in the Bill, and in the amendments from the Minister (see grouping *Complaints: Commission rules as to practice and procedure* below), would allow us to operate a flexible, agile complaints process that allows a proportionate approach to different types of complaint. This will also lead to greater efficiency, which benefits the profession who fund the complaints system. Without stripping out process prescription in the existing legislation, there is little chance of improvement in the cost or efficiency of complaints handling.

This would be achieved particularly through a streamlined ‘triage’ process which would allow complaints requiring further investigation to proceed swiftly to either resolution or to the relevant regulator, and those which do not to be closed.

We note concerns raised in evidence sessions and by the Committee that we must *“ensure a system is in place to efficiently deal with complaints without merit to avoid*

*clogging up the system and causing unnecessary delay*” (Stage 1 report, paragraph 190). We agree that this is necessary component of an efficient and effective complaints system and is in the best interests of all parties. This is something we will be required to ensure as both the Bill and existing [2007 Act](#) require us to make rules about our practices and procedures, including decisions that a complaint does not merit investigation.

In making or varying these rules we will be required to consult with the Lord President, Scottish Ministers, the professional bodies, the Consumer Panel, other consumer groups and groups representing the interests of the legal profession. We will also need to publish these rules. We believe this provides sufficient checks to ensure that the Committee’s concerns will be addressed.

In its letter to the Committee of 17 January the Law Society says *“The Bill as lodged contains many important steps to speed up and improve the complaints system. The eligibility process overseen by the SLCC is improved, meaning conduct complaints reach us more quickly.”* We agree. Drawing on our 15 years’ experience of dealing with over 18,000 complaints, we know where delays and blockages occur and where improvements would improve the process. We’re confident the Bill can provide that improved process, as far as possible within the proposed system.

As we set out in our oral evidence, we also believe this Bill provides an opportunity to remove some of the at best legalistic, and at worst, offensive language (such as ‘frivolous’ or ‘totally without merit’) that we are required to use with complainers when we tell them that their complaint is not eligible for investigation.

However, these amendments cut across all those improvements. As such, we believe they serve to add back in complexity and prescription and would actually increase inefficiency and delay. We believe that if they are supported, it would raise significant concerns about the viability of the Bill in practice and the financial assumptions made about efficiency improvements arising from it.

### **Services complaints: notice where not upheld or upheld**

- **Oppose amendment 572**

This amendment sits with the grouping above (*Complaints: ineligible or premature complaints*) and so we urge the Committee to oppose it on the same basis.

### **Disclosure of information about complaints**

- **Support all amendments in this group**

Taken as a package these amendments allow the SLCC (and regulators) to disclose information about complaints where it is in the public interest to do so. This could include, for example, being able to share clearer and more detailed guidance and advice with consumers where a firm ceases, or where we see a trend in complaints that suggests a consumer protection risk. Importantly, these amendments do not

allow us to disclose any information which could identify the complainer unless the complainer consents to its disclosure.

### **Services complaints: procedure etc.**

- **Support all amendments in the group**

The amendments in this group make improvements to the SLCC's powers and procedures.

This includes the power for the SLCC to raise a complaint in its own name where a public interest issue arises. We welcome the Committee's support for these proposals at Stage 1 and we were pleased to work with Scottish Government to respond to the Committee's request to ensure there is sufficient demarcation in the process between those initiating a complaint and those adjudicating it (Stage 1 report, paragraph 147).

These amendments also support the SLCC in its focus on early and proportionate resolution of complaints, recognising where firms have handled complaints well and there is nothing further we can achieve for the complainer, as well as driving improvement by allowing us to make directions for improvements to firms' systems and services.

Amendment 450 requires the SLCC to include information in its annual report about the work and independence of the review committees. We welcome and fully support this. However, we have significant concerns about the second part of this amendment which requires the SLCC to consult on its annual report in advance of publication. The SLCC is already required to consult on its budget and operating plan, which set out our plans for the year ahead, and to lay those in Parliament. We also lay our annual report and annual accounts in Parliament. However, consulting on our annual report, which is by definition a retrospective report on the year past, would be at best time-consuming and unhelpful, and at worst could result in delays to its publication, making it a less helpful tool for holding us to account. In addition, our annual report is laid and published along with our annual accounts, which are subject to external audit by Audit Scotland following a strict timetable set out by them for that audit. This amendment could disrupt that process to no obvious benefit.

### **Conduct and regulatory complaints: procedure etc.**

- **Support amendments 525 and 531**

These amendments allow relevant professional bodies to share decisions on conduct and regulatory complaints with the SLCC, so we have an overview of complaints and their outcomes across the regulatory system. They also clarify the need for the professional bodies to advise parties on their right of appeal and right to make a handling complaint.

## **Complaints: disclosure of information from/about practitioners**

- **Support amendments 347, 348, 349, 350, 351, 357, 358, 359, 360 and 361**

These amendments allow the SLCC to deal efficiently with complaints where a practitioner or firm does not comply with our statutory request for the information we need to investigate the complaint. That failure causes significant additional cost, delay and distress but currently there is little we can do other than embark on costly and time-consuming court procedures.

These amendments will help 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. This was discussed by the Committee during its Stage 1 scrutiny. We welcome the Committee's support for this principle (Stage 1 report, paragraph 187) and hope the Committee will support these amendments.

## **Unregulated providers of legal services: voluntary register and resources**

- **Support amendments 372, 373 and 374**
- **Oppose amendments 646, 647, 648 and 649**

Section 62 of the Bill gives the SLCC a new role in dealing with complaints about unregulated legal services. This is a key, new consumer protection meaning those using unregulated legal services can seek redress if something goes wrong. We can also recoup a "complaints contribution" from the provider towards the cost of dealing with the complaint. We welcome and support those proposals.

The Bill also provides the opportunity for unregulated providers of legal services to make a request to be voluntarily entered onto a register to be established by the SLCC. There is a benefit to introducing a voluntary register which could provide a 'kitemark' for currently unregulated providers, allowing consumers to make an informed choice when selecting legal services, but this would need to be developed incrementally to meet consumer need.

In addition, the interaction of the voluntary register with the complaints powers in the Bill provides the opportunity for us to set the "complaints contribution" against the "annual contribution" providers are required to make to be on the register (see section 65, page 26, lines 12-15). That provides an incentive for firms to register. Again, we support these proposals.

We have concerns about how amendments 646, 647, 648 and 649 would work in practice, as well as the proportionality and cost of the approach proposed.

The Bill consultation didn't consider creating a mandatory register so this hasn't been consulted upon and there's little information about who would be captured by it. That could be everyone from legal tech firms offering DIY wills to global accountancy firms offering tax advice to trade unions giving advice to paying members on employment law. Some of those could stray into reserved areas, but the extent of this has not

been investigated. Some of those providers would currently be subject to no regulation and others would already be highly regulated by other regulators (for example, ICAS), creating an additional regulatory burden for them.

A voluntary register puts the onus on the provider to 'opt-in' to regulation, meaning that the SLCC would be required to advertise the register as an option. With a mandatory register it's not clear what resources we would need to devote to identifying and communicating with a vast, and by definition undefined landscape of providers in order to advise them of the requirement to register. That is likely to be a very costly and significant task and one which has not been considered in the Financial Memorandum. In practical terms creating a register incrementally as people choose to join is very different to setting one up all in one go so everyone can join as mandated on day one. We have not considered the resource required to deliver this, but it would be substantial. Currently our only source of income is from regulated legal services providers, so it's not clear how that work would be funded.

While it may be hard to see why an unregulated provider might register voluntarily, there are good reasons why that option might be attractive to some. There is the opportunity to set the cost of registering against any potential complaint contributions. Furthermore, the experience from England and Wales is that some providers outwith the pre-existing regulated professions sought regulation because it provides them with a 'badge' or 'kitemark' they can provide to clients to help them compete with the existing professions. It's not inconceivable that groups of providers could seek to test out registration in advance of applying for regulated status themselves, or indeed register with us and never seek regulation.

Finally, it is not clear what additional consumer protection is achieved by spending resource on registering, for example, accountants giving business-to-business tax law advice, and it could distract the SLCC from its current focus on helping individual consumers. On that basis, and because making registration mandatory would require significant additional – and as yet unquantified – resources for the SLCC and create an additional regulatory burden for many businesses, we do not believe these amendments should be supported.

### **Complaints: Commission rules as to practice and procedure**

- **Support all amendments in this group**

These amendments allow the SLCC to make rules as to its practice and procedure to support the proper functioning of the complaints system and the changes proposed in the Bill to allow us to operate a flexible, agile complaints process that allows a proportionate approach to different types of complaint. For the reasons set out in the sections above, we urge the Committee to support these amendments.

## **Complaints: monitoring and minimum standards**

- **Support all amendments in this group**

When raising a complaint, most consumers say they want anything which has gone wrong for them put right, but also to ensure the same thing doesn't happen to others in future. The current model focuses primarily on intervention when things have already gone wrong. The proposed model brings a greater focus on continuous improvement and the prevention of failures.

This includes new powers for us to issue guidance (which may set minimum standards) to relevant professional organisations relating to their role overseeing how practitioners deal with complaints, standards that must be set by those organisations in relation to how complaints are dealt with by the profession, and in respect of any practice we identify that we consider contributes significantly to complaints. This would help to support improved complaints handling within firms, resulting in fewer complaints reaching us and reducing the collective cost burden of complaints on the profession. It will also reduce consumer detriment and harm and improve the service consumers receive.

We are disappointed that some of the amendments to Section 69 of the Bill remove the power for us to directly set minimum standards for the sector, and instead require us to issue guidance (which may set minimum standards) to relevant professional organisations relating to standards that they must then set for the practitioners they regulate. We believe this is a less efficient model and could lead to greater cost and delay in setting such standards. However, we are content that the proposals are workable in practice.

We strongly support amendment 395 which allows us to share information with relevant professional bodies where we identify a matter of concern relating to practitioners or firms, and amendment 396 which allows us to obtain information about complaints from practitioners to support our work to monitor and identify any trends in practice and to inform guidance to the sector on complaint handling.

## **Regulation by Law Society of Scotland: conduct and regulatory complaints**

- **Support amendment 472**

This amendment adds the SLCC to the list of bodies to be consulted on draft rules on complaints which allows us to share insight drawn from complaints with the Society to inform this work.

## **Miscellaneous: other modifications of enactments**

- **Support amendment 513**

This amendment allows the Discipline Tribunal to share its decisions with us, so we have an overview of complaints and their outcomes across the regulatory system.



## Our message to the Committee at Stage 2

We are very grateful to the Committee for its detailed consideration of the Bill at Stage 1, and for ensuring a focus on the needs of both the public who use legal services, and legal services practitioners.

The model of regulation and complaints proposed in this Bill is a compromise between more wholesale change in the public interest supported by consumer bodies and the SLCC, and concessions made to the existing model of professional regulation to address concerns raised by the legal profession. That compromise is already firmly weighted towards the legal profession and further concessions could lead to the proposed improvements for consumers being so minimal as to have little to no impact on consumer protection or ensuring regulation is carried out in the public interest. That would be a wasted opportunity and could create additional regulatory cost for little gain. That is not in anyone's interest.

MSPs will be aware of the strong voice from the legal profession they've heard in the Stage 1 evidence, through briefing and in the media. While it's vital that the voice of the profession is heard, it's equally important that the views of consumers are listened to and help to shape regulation.

In building on the existing framework, the proposed model retains much of the complexity, cost and potential conflicts of interest of the current system. That includes much of the Legal Services (Scotland) Act 2010 which remains unimplemented 14 years later, although similar legislation has been operating successfully elsewhere during that time. For that reason, any further concessions that reinsert complexity or prescription, or reduce or remove the improvements proposed in the Bill, should be fiercely resisted. This will ensure that the intended overall benefits of the Bill are achieved.

While the SLCC stands ready to implement the Bill Parliament agrees, we urge the Committee to ensure its scrutiny continues to focus on improvement and the public interest. That means welcoming amendments that help to achieve the Bill's stated aims to "*provide a modern, forward-looking regulatory framework for Scotland that will best promote competition, innovation, and the public and consumer interest in an efficient, effective, and efficient legal sector*" and rejecting those which do not support these aims.

We would be happy to answer any questions or provide any further information the Committee may find helpful. Please contact Vicky Crichton at [Vicky.Crichton@scottishlegalcomplaints.org.uk](mailto:Vicky.Crichton@scottishlegalcomplaints.org.uk) or call 0131 201 2130.