A response to the review group's 'call for evidence'

APPENDICES to our roadmap to improvement

March 2018

A. Introduction

These appendices support our two-page response to the call for evidence from the Independent Review of the Regulation of Legal Services. That response, and our earlier *#ReimageRegulation* paper from July 2016, are available online at: ***www.scottishlegalcomplaints.org.uk/reimagine-regulation***.

B. Alignment to the policy context of the review

Our recommendations draw on our interpretation of the policy context for the review, and are targeted to ensure that the final report of the review group meets the expectations of the full range of interested audiences.

The SLCC is committed to a ***focus on the outcomes*** of regulation – for the consumers, legal professionals and the wider sector. Regulation is not an aim, or a solution, in its own right. It must create the framework for a sustainable sector and public protection. Our recommendations help achieve this.

In our earlier papers the SLCC sets out the internationally recognised ***better regulation principles*** and ***consumer principles***. Our recommendations ensure an evidence-based and best practice approach.

Our recommendations cover the key issues summarised on page 2 of the call for evidence, from how to increase ***accountability and transparency*** to ***facilitating innovation and imaginative service delivery*****.**

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 the review, illustrate the contribution we could make in the future.

Finally, our proposals have been assessed to be consistent with the key ***terms of reference*** of the review:

1. *consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector;*
2. *recommend a framework which will protect the public and consumer interest, promote the principles of accountability, consistency, flexibility, transparency, cost-effectiveness and proportionality;*
3. *ensure that the regulatory framework retains the confidence of the profession and general public; and*
4. *undertake specific research into the extent of the unregulated legal services market in Scotland and investigate any impacts on consumers, as well as developing a better understanding of the structure of the legal services market.*

C. Further detail on specific improvements which will deliver policy intent

Introduction

In our two-page response to the call for evidence we summarised the high level policy recommendations we believe the review group should be making. It is important that a clear and succinct vision of the future is given in the final report.

In this section we provide additional detail on each of the headings in the summary not because we believe this all should be covered in the review report, but to add context to, and justification of, our higher level recommendations and to illustrate how policy intention could be converted into specific action.

1. Delivering a better statutory framework: simple, understandable, agile, proportionate, affordable, fair

A new Act should be drafted:

1.1 Providing a single legislative framework for all aspects of regulation and complaints

The 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 a framework model which enables proportionate and agile regulation in a rapidly changing environment. To give clarity to the interpretation of all following sections of the Act, a single core purpose for legal regulation, and guiding principles, should be set at the start of the Act.

The Act should work 'chronologically' through typical regulatory actions and events. For example: entry to the professional register, professional standards, ongoing fitness to practice and revalidation, specialism, exit). The Law Commissions have recently taken this approach in relation to a draft bill for healthcare regulation.

Current drafting can be used, but only where fit of purpose. Where this is the case these elements can be quickly transposed into the new Act (reducing drafting, increasing certainty based on previous experience) but care should be taken that this is not done without careful consideration of effectiveness and proportionality within the new framework, whilst taking care to avoid any resultant inconsistences.

In the early stages of the development of a new legislative framework the focus should be on powers required to enable regulation to take place, drafting should not start from the perspective of all existing five statutory bodies remaining in place (which instantly limits many of the aims of a more efficient, effective and joined up system).

1.2 Embedding the 'better regulation' principles and the 'consumer principles'

These principles should guide both the drafting of the legislation and the structure proposed, as well as being contained within the Final act as requirements of the regulators. This is consistent with the approach already taken by the Scottish Government in the Regulatory Reform (S) Act 2014. The 'consumer principles' were developed from the context of how to stimulate economic growth in a market – as with all our recommendations we therefore see benefits for legal professionals and the sector, as well as consumer.

1.3 Setting out clear high level outcomes for market, entity, and individual regulation

The new legislation must clearly set out, and delineate:

a. Market / sectoral regulation (competition, access, access to justice, price transparency)
b. Business / entity regulation (formation, trading, reporting requirements, sanctions, wind-up)
c. Individual professional regulation (education, standards, revalidation, discipline).

Very different public policy considerations, market needs, and regulatory tools are involved in these different elements of regulation (and in many markets they are provided by separate bodies). The provisions should be clear and distinct.

Market regulation requires particular consideration. In Scotland there is little history of this in the legal sector, whereas in other jurisdictions specialist bodies work in this area, leading to debates on issues like price transparency and comparison, research on actual consumer need and consumer harm, and a focus on issues such as removing barriers to entry.

1.4 Focussing 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 regulators and complaints bodies to 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. 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. This framework will assist in making sure regulation is adaptable to new technological challenges, globalisation, and the need to work cross-border and in co-regulation with others.

1.5 Establishing a single 'start to finish' complaints body, entirely separate to representative functions

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. A single complaints organisation, able to manage complaints from start to finish, without duplication and delay, should be created. This might sit within a regulator with wider powers, or be independent, but this improvement would be a key deliverable of reform.

Complaints functions should also be entirely separate from representative functions – it is a number one concern of the public, in providing customer feedback to the SLCC, that complaints remain part of a body they see as representing lawyers' interests (this is due to many complaints being investigated by both the independent complaints body and the professional body), this undermines confidence in the system and provides the perception of conflict of interest (as well as creating unnecessary duplication).

A single 'gateway' should be 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. We have seen the difficulties in other sectors where there is consumer confusion about which body to take a complaint to (the Scottish Government is currently addressing this around phone and mail advertising, where complaints bodies are fragmented). Requiring consumers to approach multiple bodies shows bias against 'customer journey' (for both consumers and lawyers) as the starting point for process design.

1.6 Containing a 'review clause'

Transition to any new arrangements will take time, but to avoid the long gaps in review which have occurred recently, it is suggested three years from implementation would be an appropriate time frame.

2. 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

The legislation must focus on risk to the public and the integrity of the justice system:

2.1 Moving the focus of regulation to ongoing assurance, and quality improvement

In many areas the current model primarily focusses on the passive setting of standards, and intervention when things have already gone wrong. The legislation should focus on creating a culture of audit and quality improvement in the sector, which reduces the need for post-event action. It is the move to quality improvement which has led to dramatic change in sectors such as health, aviation, and oil and gas. Many lawyers already work this way, and we must build on that learning. A requirement could be set for each regulator to consult and report on how it plans to drive quality improvement in the sector, and how they will use their regulatory functions to stimulate that culture within business units. This balances ensuring a new focus with maintaining future flexibility (and avoids prescription).

2.2 Encouraging regulatory resources to be directed according to risk

The legislation should avoid prescribing detail, but should have a single section encouraging regulatory resource to be focussed on those areas leading to, or potentially liable to lead to, the most consumer detriment. Our ***#ReimagineRegulation*** paper indicated that some areas (such as conveyancing) currently cost millions of pounds a year in 'failures', whereas others rarely require regulatory intervention.

Resources need better targeted to these risk areas, in turn reducing complaints and regulatory cost. The Act should require a periodic quantification of client risk and the targeting of regulatory resources against this. Public reporting of this should be required. This will aid in the response to new technology and globalisation, either allowing risky new practice to be targeted, or conversely, allowing low risk new offerings easier access to the market. It will benefit lawyers working in lower risk areas, and the market overall.

2.3 Allowing data sharing between all bodies involved in the regulation of the sector

There is a potentially wide group of bodies, including organisations such as the Scottish Legal Aid Board, which have data relevant to risk and harm to the public. If more than one regulatory and complaints body is to continue it is vital that they can enter into information and intelligence sharing protocols in relation to key risks to the public, to allow effective and timely interventions to be developed. Past firm failures, which have cost legal professionals and the public considerable money, could have potentially been prevented or addressed earlier with better and faster information sharing.

Consideration should also be given to the routine publication of reports and other data which is currently restricted by confidentiality clauses. Again, this will better promote and demonstrate the effectiveness of the regulatory regime whilst at the same time acting as a deterrent.

2.4 Ensuring co-production of rules, professional standards, and standards of service by all involved in regulation and underpinned by consumer research

All bodies involved in quality in the sector, and with data on consumer risk and consumer harm to contribute, must be represented in a joint forum, alongside consumer groups and legal professionals, to periodically review and update professional standards (which should also be the subject of public consultation). It is no longer acceptable that there is not full public research and consultation on such matters.

2.5 Responsibility for consumer research should be allocated, with funding arrangements made clear

Consideration should be given to how to remedy the lack of consumer research and insight in legal service in Scotland – throughout the history of the Scottish Parliament and government debate the lack of evidence from consumers on legal services has been commented on as a weakness in all reforms. Consideration should be given to how this can be achieved, with one option being the enhancement of the current statutory independent 'Consumer Panel'. Consumer insight may also help drive innovation and growth in the sector. Funding needs to be identified to achieve this, either from government or the sector, but ensuring that the next 20 years of policy does not suffer from the same lack of consumer insight as the previous 20 years.

3. 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, adaptation to globalisation, and a sustainable market

Innovation and sustainability are critical for regulators and markets:

3.1 The 'digital first' approach now taken across government should be enabled by the new framework – relating to both how regulation is delivered, and in ensuring the growth of the digital market in legal services can be encouraged and accommodated

The legislation should 'assume' digital processes, online decision making, and video conferenced 'committees' will be a normal part of the future of regulation. It must be drafted in such a way that new developments in law firm structure (remote working with no central hub), law firm operation (use of Artificial Intelligence), engagement with public (complaints submitted via social media), and duties (such as GDPR) can all be accommodated both at implementation but also in terms of how these areas with develop over

the next 10 to 20 years before the next opportunity for substantive legislative reform of legal regulation is likely to arise again.

3.2 The act should enable regulated businesses and persons without trying to predict what the market will need, instead allowing flexibility to accommodate that

For example, the SLCC support the concept of ABS and the concept of entity regulation. However, the risk we have been highlighting since October 2015 is that both of these are 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 and a new 'entity regulation 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 (and 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, which did not have 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 accountants, and 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.

3.3 Flexibility should be given on regulatory fee structures, subject to rigorous consultation

At the moment statutory levies relate primarily to individual professionals. As part of a move to 'entity regulation' fees for businesses will need considered. There is also a piecemeal statutory fee and levy structure for different types of activity which has evolved over time, and is not always well suited to current models of work. Fees are often 'one size fits all' with little opportunity to use them as a regulatory lever or to reflect risk of practice. Sign-off arrangements vary greatly for the approval of fees. This complexity also contrasts with 'total cost of practice' which is the prime issue for an individual and firm. Regulators and complaints bodies need greater flexibility to cope with a changing and evolving market.

3.4 Market regulation requirements should be introduced – to promote competition and choice

The Legal Services (Scotland) Act 2010 started to introduce 'market' regulation requirements (such as a duty to consider competition and access) for the first time in relation to legal services. However, it only introduced these in relation to the regulatory arrangements for the new business models, and did so layering them in with professional and business entity regulation requirements. New legislation needs to clearly define standalone market responsibilities for a regulator, which sit over and above their duties in relation to individual business units and professionals.

3.5 A move to data driven regulation allowing greater targeting (and therefore efficiency)

The current model is often 'one size fits all', failing to use risk to target intervention. In our original paper, we use the example of conveyancing (using the latest figures at that time). The data showed this area accounted for 29% of complaints, and therefore, at a crude level, 29% of our £3 million operating costs. In addition, we knew conveyancing also accounted for well over 70% of items paid or reserved on the Master Policy (the professional indemnity scheme for solicitors) at a cost of around £8.4 million, and that it is an element of the costs of the Client Protection Fund (until recently called the Guarantee Fund) as it is one of the ways in which law firms hold client funds.

Whilst both the Master Policy and the Client Protection Fund are strengths of the Scottish market, this means that consumers were arguably paying for over £10 million per year for 'failures' in the conveyancing

market (and whilst the money comes from client fees, solicitors will also feel this regulatory burden on them). The limited oversight functions the SLCC was given of these funds in legislation has made it difficult to pursue meaningful work in this area. However, it would seem conveyancing would be an area to target in relation to regulation, in contrast to employment law, for example, where virtually no complaints or claims are seen (and where there is also a thriving non-regulated competitor market which does not seem to have a public complaints/failures issue).

4. 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

A cohesive regulatory model must be delivered, with all bodies remaining after the recommendations of the independent review are implemented having harmonised:

4.1 Business planning and reporting years, and rigorous public consultation requirements

All bodies should be required to consult on the business plans and budgets annually, increasing transparency and accountability. Business years should be synchronised, allowing scrutiny each year of the total plan for regulation and complaints in the sector before it is implemented, and scrutiny on the achieved delivery and outcomes at year end. Clear public consultation and approval standards, the same for each body involved, should be set for all schemes and rules.

4.2 Responsibilities under the Regulatory Reform (S) Act 2014 and Freedom of Information (S) Act 2002

All bodies involved in complaints and regulation should be subject to this legislation requiring them to follow the best practice in the Scottish Regulators' Strategic Code of Practice and report on this publicly, and improving the transparency of regulation and complaints handling

4.3 Streamlined accountabilities to the Lord President – with that post's role defined and a public report required on how the post's regulatory functions are dispensed

The Lord President currently has multiple roles in legal regulation, offering similar functions, but to different statutory requirements, in relation to different bodies. The role is vital in providing accountability whilst ensuring the independence of the legal profession from the state. The functions should be clearly defined in a single place within the Act, and an annual report on the dispensing of those functions should be published.

4.4 Accountabilities to parliament and Audit Scotland - overseeing how income raised from statutory fees is spent

Clear accountability should be set directly to parliament (ensuring the independence of the profession from the government of the day). Audit Scotland should be given a defined role to oversee all spend of income raised from statutory fees and levies. This will help ensure a consistent framework and best value in the delivery of regulation arising from the statutory charges.

4.5 Duties to publish relevant regulatory information to guide consumers, and to require entities to do so

The Act should require regulators to publish performance information which, in the public interest, will help inform the buying decisions of consumers in relation to legal services, and to inform understanding of what acceptable quality is. Consideration should be given to what should be made available under the *Reuse of Public Sector Information Regulations 2015* for comparison websites (an issue of growing debate in the legal market in England).

As part of market regulation regulators should be required to set information provision standards for business entities – ensuring consumers can compare services, understand key terms, understand what consumer protections they have, and understand what risk they assume as a client.

5. 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

The proportionate and effective handling of complaints and redress are a key priority for change:

5.1 A single body should manage all aspects of complaints, up to prosecution for conduct

The current complaints maze needs dramatic simplification – this requires radical thinking, but the current model serves neither the profession nor the public well, in terms of speed, cost, and public protection.

The distinction between service and conduct, pre-investigation, should be removed. 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. Currently this can result in differing views on the part of the relevant regulators and must raise the question of how consumers are expected to know the nature of what they wish to complaint about. An initial finding of fact then allows proper classification in relation to determination or prosecution (for serious issues).

5.2 A single investigation should take place (abolishing the 'service' and 'conduct' split at stage 1)

The same single organisation should be responsible for investigating all complaints through to an initial finding of facts - this creates a single point of contact, and cuts out the current duplication and confrontation between complaints bodies caused by the immediate split of issues into service or conduct at a stage before investigation is allowed by the Act. 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 recent decision of the courts that 'hybrid' issues were not allowable.

5.3 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. This should include a proportionality test, a 'likelihood of being upheld' test, and the current tools in the Act (including allowing mediation at all stages, where appropriate).

Where more 'minor' issues are suggested by the finding of facts, the same body should go on to make a formal determination, and if appropriate application of sanctions – the same single body which investigated the case should have the power to deal with service issues (currently called Inadequate Professional Service) and more minor conduct issues (likely to lead to, for example, a formal warning letter – currently called Unsatisfactory Professional Conduct). The decision maker would be a single 'Ombudsman' style role (replacing various different 'committees' under the current arrangements).

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 (such as the current Scottish Solicitors Discipline Tribunal). This would not deal with consumer compensation, but only the matters of conduct

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.

There would be a single appeal to the courts, at completion of the process only (which does not remove the public's or profession's right of judicial review at any other stage of the process).
The language used in the Act must 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' tests allows 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.

5.4 For all complaints, the burden of proof should be 'on the balance of probabilities'
This would replace the far higher standard of 'beyond reasonable doubt' currently used for misconduct, which is now anachronistic in risk-based professional regulation, with most other professions having moved away from it some time ago.

5.5 There should be the power to move from a complaint into an audit if systemic issues are identified
The current focus is on individual complaints, as framed by the complainer, not overall risk to the public. The grouping of complaints, and investigation/audit to assess systemic issues (such as persistent failure to issue terms and conditions, or respond to mandates) should be allowed (which then relates to allowing sanctions focussed on quality improvement – see 5.3 above).

5.6 Regulators and complaints bodies should have access to the 'first tier' complaints records of firms
The SLCC have recommended rule changes to the professional bodies in this area several times, 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 to access first tier complaints records (there is already a rule requiring these records to be kept).

5.7 When redress is awarded by a statutory regulator or 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. Lawyers are currently allowed up to a £9,000 excess, which can also mean no payments are made by indemnity funds unless the amount is more than this (and then only by the amount over the excess). This undermines confidence in the system. The Master Policy and Client Protection Fund arrangements should be reformed to ensure consumers always receive redress.

5.8 The system of taxation of fees must be reformed and resourced
This would allow clients easier access to a review of legal fees, without the risk of costs, even if only in cases where another body (regulator or complaints body) also concurs fees need examined

C. Next steps…

The SLCC is recommending that these proposals should all be reflected in the final report of the review of the regulation of legal services. The full body of our work to ***#ReimagineRegulation*** will be used by the SLCC to assess the final report of the independent review and guide our public response to it.

We would welcome further engagement – providing further explanation of the recommendations or the evidence base behind them, discussing potential alternatives to achieving the aims of the review, or talking about the practical implications of changes for businesses and consumers.

We would conclude this submission on the same point made right at the start of our original case for change published two years ago. After 19 years of legal regulation being a devolved responsibility, many issues identified in the first parliamentary term remain. Once this review is complete, it may be one or two decades before the next legislative window is made available for substantive reforms. This review creates the unique opportunity to finally address long outstanding matters, but with that comes the responsibility to ensure that recommendations serve the profession, public and a rapidly changing market well in the coming decades.

All our work to *#ReimagineRegulation* can be found online at:
www.scottishlegalcomplaints.org.uk/reimagine-regulation