



CONSULTATION RESPONSE

To the Law Society of Scotland's *Regulation in the 21st Century: Entity Regulation Second Consultation Paper*

A. INTRODUCTION

The SLCC welcomes the Law Society of Scotland's [consultation](#)¹ on entity regulation and charging, and would commend the organisation for its ongoing consideration of how regulation can be more effective for consumers.

The SLCC fully supports the need to consider entity regulation, and what it might deliver.

We responded to the first stage of this consultation process (on 10th October 2014), and would refer back to that [paper](#)², as the observations remain relevant.

We believe entity regulation could deliver benefits for consumers, and could better reflect how they already view the market. Creating such a system is a significant piece of work for government, in delivering legislation, and for the Society, and the detail will be critical in whether such an approach delivers for clients. We believe it would be vital to involve a range of groups and interests at every stage of development, and to have a formal evaluation of impact five years after implementation.

B. ABOUT US

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

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

Our [annual report](#)³ and [website](#)⁴ have more information on our work.

¹ <http://www.lawscot.org.uk/media/327031/Entity-regulation-consultation-paper.pdf>

²

http://www.scottishlegalcomplaints.org.uk/media/56695/slcc_response_to_law_society_of_scotland_entity_regulation_and_charging_consultation.pdf

The consultation to which we are responding relates only to the solicitor's profession in Scotland. The Law Society of Scotland formally recognises the SLCC as a "co-regulator" in the sector in their latest [Strategy](#)⁵.

C. OUR EXPERTISE

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

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

The SLCC also has a statutory '[Consumer Panel](#)⁶', the only such panel in Scotland with a statutory role to consider consumer issues around all legal services. The Panel has an independent lay chair, and we are grateful for their input into this paper.

We have restricted our comments to areas within our direct experience, but hope there is wide debate and discussion on these issues to inform final proposals.

D. OUR RESPONSE

Section 6 of the consultation document sets out a range of questions for consideration. We respond to these later in the document, but wished first to set out some issues we believe are important if a different system of regulation is to be considered:

We also note that a move to entity based regulation would require legislative change, and therefor consider in this response factors relevant to both the government, in considering that legislation, and to the Society.

³ http://www.scottishlegalcomplaints.org.uk/media/56936/slcc_annual_report_2013-2014_-_final_electronic_version.pdf

⁴ <http://www.scottishlegalcomplaints.org.uk>

⁵ <http://www.lawscot.org.uk/media/572056/Strategy-2015.pdf> page 4

⁶ <http://www.scottishlegalcomplaints.org.uk/about-slcc/who-we-are/consumer-panel.aspx>

1. Who do consumers contract with?

In all our experience we believe consumers buy their legal services from a firm, and therefore fully support the Society's consideration of entity regulation.

We know from research that many clients consult a solicitor they know, or know of, personally or do so based on a personal recommendation. Nevertheless, when things go wrong they will see the firm as responsible. For example, if a solicitor leaves a firm they will still expect the firm to put things right, if a solicitor is off ill they do not expect their transaction to be affected, and if a solicitor fails to issue clear pricing information that will be seen as the firm's failure.

There should be a requirement on regulated firms to make clear to clients that they are regulated, which allows a simple message that any firm without that statement is not covered by the various relevant protections.

2. Entity regulation – a very different approach

Professional regulation and entity regulation are very different approaches – requiring different legislation, rules, systems, and skill sets. If entity regulation is being introduced government and the Society must ensure a full developed approach which is properly resourced.

In the document the term a 'hybrid' system of entity and professional regulation is used. We recognise the Society's approach of ensuring joined up regulation and efficiency, but we recommend any entity based scheme is fully evolved, and not simply used to plug gaps in individual professional regulation.

The focus of professional regulation tends to be around qualification, entry to a register, maintenance of the individual on a register through their upholding of a professional code, and complaints and disciplinary sanction. It is entirely focussed on individuals, and other than the issuing of the code usually quite 'passive' (requiring issues to be brought to the attention of the regulator).

Entity regulation sets standards around systems and processes, it usually insists on an internal audit cycle, will involve designated posts and statements of assurance. It draws more on the evidence base around quality improvement in industry than it

does traditional concepts of economic or professional regulation. Greater use of tools such as compliance statements with a sampling audit to check validity, are often used.

Consideration needs to be given to the very small size of the majority of law firms. A culture of systems, internal control and audit, and reporting on performance can be hard to develop for reasons of cost, culture and scale. The experience of the SLCC around entity issues and complaints (firms having a clear complaints policy, communicating it, implementing it consistently, and reporting on the outcome) suggests significant cultural change would be needed in the profession were entity regulation to be introduced.

The SLCC believes the government and the Society must consult on the detailed model of entity regulation being considered and ensure it is resourced appropriately in terms of competency, staffing and funding. Clear goals must be set - is this about assisting with 'gaps' in professional regulation, or is it moving to regulating the quality of work delivered to clients.

3. 'Right touch regulation'

Any decision to introduce regulation must be proportionate and deliver value to clients who ultimately fund all the costs of legal regulation through their fees.

The Society has drawn upon evidence considered by the Nova Scotia Barrister's Society in this consultation and in last year's consultation. We think it is right to consider other jurisdictions and their experiences. Equally, we also gain insight by learning from the experiences of other professional regulators.

The Professional Standards Authority (formerly the CHRE), an expert body, overseeing regulation of health professionals (9 regulators, and over one million registrants) published a seminal paper on '[right touch](http://www.professionalstandards.org.uk/docs/default-source/psa-library/right-touch-regulation.pdf?sfvrsn=0)'⁷ regulation in 2010.

Many of the ideas would be helpful in considering what entity regulation could look like. For example, in their six principles they include a focus on risk (which we explore further below) and a focus on 'agility'. In fast moving markets regulators'

⁷ <http://www.professionalstandards.org.uk/docs/default-source/psa-library/right-touch-regulation.pdf?sfvrsn=0>

performance is often constrained by legislation rather than enabled, with terms often out of date by the time they are enacted due to the length of legislative process. It is unlikely that an entity scheme would be delivered perfectly 'first time' and a 'framework' act may be more appropriate than detailed drafting. There is excellent discussion of some of these issues in a joint work by the three UK Law [Commissions](#)⁸.

The paper also provides an evidence based 'decision tree' for whether regulation should be considered, and reminds that regulatory outcomes should be written and defined in what they achieve for the client/consumer, and not in terms of technical arrangements.

4. A risk based approach

The SLCC would encourage government and the Society to consider a risk-based approach – with consideration starting with the major risks to clients in the legal services structure and working on what regulatory solutions may be possible.

This approach is most likely to result in proportionate and effective interventions which work for the consumer, the client and the providers of services.

We would suggest the start of any legislative journey for regulation would be a thorough risk assessment of the sector to see what issues most affect clients.

The SLCC only has data on certain issues. For example, in relation to complaints it is obvious four key areas lead to most complaints⁹:

- Residential Conveyancing
- Litigation
- Family Law
- Executries Will and Trusts

The data available on the Master Policy and Guarantee Fund suggests that the trend around residential conveyancing is also present in those elements of the Society's regulatory model.

⁸ <http://www.lawcom.gov.uk/project/regulation-of-health-and-social-care-professionals/>

⁹ More data on this is provided in Appendix 1

Likewise, the largest number of complaints relate to basic issues to do with the service standards set out for solicitors¹⁰, and not more complicated entity based issues. For example:

- Failure to communicate effectively
- Failure to advise adequately
- Delay
- Failure to provide information
- Failure to follow instructions

Some of this might suggest that rethinking of, and better enforcement of, current rules (like requiring clear 'terms of business' and pricing, perhaps in a standard form that aids the consumer comparing prices) might have more impact than a whole new regulatory approach.

In examining risk we may ask questions such as:

Is entity regulation needed for all law firms? Or is that a disproportionate cost and in reality it is only needed in firms offering some types of service. We appreciate there are strong arguments for a single model for all, and access to justice issues around regulatory burden/cost for small firms. We do not seek to imply we have sufficient data to make any analysis, but would suggest the government and the Society may benefit from working with all those with data (including others such as the Scottish Legal Aid Board, the providers of the Master Policy insurance, etc) to better understand risk, and therefore response.

On a cost/benefit do we gain more for clients from introducing entity regulation or improving existing regulation? The cost of the passage of a bill through parliament is significant, as will be all the policy and change work for bodies such as the Society and SLCC, and for the sector itself. Will this deliver more for consumers than a simple review of current rules and monitoring?

The SLCC would reiterate that it believes it is likely that entity regulation could deliver benefits, but would encourage a starting point for debate of the detail based on risk and the consumer.

¹⁰ More data on this is provided in Appendix 1

5. Encouraging consumer choice

We would encourage government and the Society to consider what entity requirements are likely to assist with consumer choice.

Information which helps clients select the right provider for them, and which helps manage their expectations about the service they will receive, will help reduce complaints and assist both parties. For example:

- Clear rules on letters of engagement – focussed information clearly understandable by the client, especially around price.
- Clear rules on firms displaying their own standards of service, to allow consumers to make informed choices and to manage expectations and thus avoid complaints.
- The publishing of entity compliance data by the Society through its ‘find a solicitor’ function – like Companies House, does a firm submit returns on time, does it submit the required data? This will assist consumers in choosing their law firm.
- A requirement on entities to publish certain data on their website – client relations partner name, the firm’s own service standards for clients, the internal complaints policy, the right of the consumer to refer an issue to the SLCC.
- The publication of the range of accessibility options for clients with a range of impairment.

Again, every thought should be given to what information entities are commonly required to publish to aid consumer choice.

6. Reducing complaints

Where ever possible the SLCC believes it is better for the consumer if complaints are effectively addressed by individual firms, and as early as possible.

In considering the arrangements for an entity based scheme particular attention should be paid to the relationship between clients and firms, and the systems that will support that. This might include:

- Rules on a firm-level complaints handling process
- That training requirements include training in complaints handling and client care

- A requirement on entities to monitor client satisfaction/dissatisfaction and plan changes based on that – something at the heart of any quality improvement model
- A clearer requirement to maintain an internal complaints log
- Particular consideration of sole practitioners (and 2-5 partner firms), where our previously published evidence suggests they are more likely to be complained about and subsequently have issues in dealing with a complaint
- Requirements to support a culture of risk assessment around transaction types, staffing, and clients may assist in better entity performance
- Ensuring complaints are used as a source of learning to improve client care

Such measures, applied proportionally, may reduce the cost of regulation/complaints for both lawyers and clients.

7. Resolving complaints earlier

If a complaint does progress to the SLCC, the next best and most cost efficient outcome is often achieved by early resolution within our process.

Consideration should be given to how entity regulation may encourage early resolution within the existing systems. One example could be that entities be requested to state in advance in their consumer contracts if they will automatically opt-in to SLCC mediation if the client is willing, something which would also assist consumer choice.

8. New powers for the SLCC

In an entity based regulatory environment, government may wish to consider new powers to assist the SLCC in supporting this model. The following are some ideas to stimulate discussion in this area – none are firm proposals:

- The power to audit firms' complaints logs – allowing us to assess an individual client's complaint in light of whether there are repeated issues in that area. In order to support this, firms would be required to submit complaints procedures and complaints logs as part of their compliance submissions.
- The power to look at 'like cases' to assess if there has been a system failure within the firm.

- The current Section 40 “guidance” on best practice should be strengthened to binding “rules” for entities.
- There could also be an option for the SLCC to certify high quality complaint handling by entities.
- We may need the power to charge an entity levy, instead of/as well as an individual solicitor levy to mirror changes to the regulation of the sector – allowing us, for example, to follow the Society’s intention and reduce levy further for those subject to few complaints, but increase it in relation to those sources from which complaints are common. This would mean the same arrangement for entities under this proposed model, as will be in place for Licensed Provider entities under the Legal Services (Scotland) Act 2010.
- The ability to share information and intelligence with other bodies.

We would hope government actively engage the SLCC in discussion of new legislation in this area and that the Society also work with us on this.

9. New sanctions for the SLCC

In order to ensure the effective enforcement of any new powers, the government should consider making new sanctions available to the SLCC, for example:

- Explicit powers covering ‘enforcement notices’ requiring improvements in systems and data within a specified period, and monitoring powers for the body applying that.
- Provision for ‘strict liability’ offences, such as not issuing a Terms of Engagement Letter allowing minor process failure to be dealt with more quickly and cheaply to the benefit of all

10. Licensed Providers

The government and Society need to consider if having separate arrangements for ABS/Licensed Providers and other legal entities is appropriate and proportionate.

The government passed legislation to allow entity regulation of legal providers in 2010, but no scheme is yet available. Two considerations are important. Firstly, whether all the issues that have faced a scheme for that form of entity regulation will also cause issues in this new proposal, meaning more legislation but without

delivery. Secondly, whether another regulatory scheme increases or decreases risks.

The SLCC is not competent to comment on much of the detail of this, but would note that we have extensive experience of consumers already finding the regulatory system complicated and the roles of different bodies, schemes, and standards confusing. Adding complexity may not assist the consumer unless delivered in such a way that their experience of it is simplified.

11. Concern at unregulated law firms

The SLCC has noted the growth of legal services providers, owned and staffed by solicitors, providing services directly to the public and with the individuals advertising their status as a solicitor, but outwith the traditional regulation model. The solicitors are operating as 'in-house' paying a reduced levy for complaints, and this means there is no Master Policy or Guarantee Fund cover for clients.

The SLCC believe this relates to the current consultation in two ways. Firstly, on a risk analysis basis, is this a greater risk and should resource/time be directed to this rather than the risks which entity regulation seeks to address? Secondly, could entity regulation be a 'perverse incentive', encouraging firms to move to this lower cost regulatory model and avoiding the extra perceived burden of entity regulation?

Again, the SLCC does not have competence to form a conclusion on these questions, but is using the consumer data we have to inform discussion.

12. Summary

We believe all of these issues are capable of being positively addressed as consultation and planning evolves, and we remain supportive of the discussion on what well executed entity regulation may deliver for the consumer.

E. THE SOCIETY'S SPECIFIC QUESTIONS

Introduction

In this section we specifically answer questions raised by the Society. Some responses are brief, as the issues relate to those we have already set out in our main response.

Do you think a hybrid system of entity and individual regulation could, in principle, improve adherence to professional principles?

If no, could you explain your reasons?

If yes, what do you regard as essential features for such a hybrid system?

Yes, we believe there is potential and fully support the consideration of an entity based approach.

Do you think a 'management-based' system is the best approach? If not, can you suggest a better one?

The SLCC supports a management-based approach.

Do you think entities should be required to examine and assess their own management, governance and compliance systems and practices against set objectives?

Yes, fundamental to good entity regulation is an internal system of compliance, audit, and ongoing improvement.

Should they have to report the results to the regulator and, if so, when?

Yes, annually, and with the Society publishing compliance data to inform consumer choice.

Should this apply to new entities, prior to commencing practice or to all?

The system must apply to all, or could be an unfair barrier to entry for new providers when existing ones may not meet the standard.

How should any objectives be set? Critical places to start are the professional principles and the standards of conduct but additional relevant material could include common causes of client complaints and negligence/insurance claims.

Please see our earlier discussion on risk as the basis for proportionate regulation.

Should any self-assessment be audited by the regulator? If so, when? Should this be a pre-condition to a new entity being permitted to practise?

A risk-based audit cycle should be established by the Society, with a mixture of targeting and sampling techniques used to monitor self-assessment.

Any false declaration on a self-assessment should automatically be a conduct issue.

Should there be a requirement to nominate a compliance officer with responsibility for conducting self-assessments and reporting to the regulator?

Yes, this will give clarity and focus. However, the Society may wish to adjust all professional standards to ensure others have a duty to support the compliance officer and understand personal responsibility remains. Ideally the same titles would be used for these roles in entity regulation and the Licensed Provider scheme to minimise client confusion.

Should that officer be required to hold a particular status in the entity beyond holding an unrestricted practising certificate? Should compliance officers have other responsibilities such as recording and reporting breaches? If so, should there be a requirement to immediately notify the regulator of a material breach?

The compliance officer should hold a full PC, be trained and competent in the roll, and have sufficient management authority to allow him/her to carry out their duties.

The duties of an '[accountable officer](#)'¹¹ in the public sector provide an example of the types of responsibility which may be appropriate, once adapted for the private sector, in terms of responsibility for governance, finance, probity, and to seek clarity from the regulator if asked to do something they perceive as outwith appropriate conduct.

Is it correct to assume that some authorisation or licensing process would be an essential feature of any entity system, if only to identify the entity being regulated? If all entities require to be licensed or authorised to practise then some kind of passporting would be required for existing firms.

The system must apply to all, or could be an unfair barrier to entry for new providers when existing ones may not meet the standard. Instead of 'passporting', the government and the Society should consider 'phase entry' using risk profile, or more arbitrary measures such as region (as used for land registration reforms) to phase in all firms against a common standard.

¹¹ <http://www.gov.scot/Resource/0039/00393289.doc>

What changes, for example in a traditional partnership, should trigger the need for a 'new' entity to be authorised? Should this be any change in the identity of the partners or does it depend on the circumstances (it may be that two partners leaving a 30-partner firm should be treated differently from two partners leaving a four-partner firm)? Where a traditional partnership splits, who continues as already authorised and who has to seek authorisation as a new entity?

How is responsibility for past compliance failures to be dealt with?

It is essential for consumers to know the business they are dealing with meets required standards. The SLCC does not have data or experience to comment on the issue further.

How is responsibility for breach to be apportioned between the entity and certain individuals within it? It may be that responsibility needs to be worked out on a case-by-case basis depending on all the facts – a rogue individual may still be able to commit a breach despite the firm having robust, well-designed and well-maintained systems aimed at preventing compliance failures; or a breach may be allowed (or even encouraged) by a systemic failure, poorly designed or implemented firm compliance management or even unethical policies adopted by the firm. The same response is unlikely to be appropriate in all cases and considerable flexibility is likely to be required in relation to the investigative and disciplinary options available to the regulator – against the individual and the entity.

This highlights the risk of a 'hybrid' model. The SLCC would recommend one set of standards and compliance activity for an individual, and one set for the entity, rather than a model where responsibility is argued on a case by case basis which could be unfathomable to the consumer.

When an issue arises the first step would be to consider the entity, as this is the body the consumer has contracted with, and what action is needed there. Service complaints will almost always initially be against the entity in such a model.

Once that decision is made, decisions can be considered in relation to individuals within the entity. It will become common for entities and individuals to be pursued in relation to failures, and the costs of this must be considered.

What sanctions should be available against the entity? Obvious possibilities include censure and financial penalty but it may also be appropriate for suspension or revocation of licence or authorisation to be available for the most serious cases subject to prior hearing and appeal processes.

We agree with these sanctions. Explicit powers should also cover 'enforcement notices' requiring improvements in systems and data within a specified period, and monitoring powers for the body applying that.

Should the imposition of some sanctions be reserved to the Scottish Solicitors' Discipline Tribunal or should we be able to exercise all entity level sanctions?

The Solicitors' Discipline Tribunal may need significant restructuring and the support of additional resources, were it to take on an enforcement role around entities.

When do you think it would be appropriate to publish disciplinary action taken against an entity?

All entity based compliance and disciplinary data should be published to assist consumer choice.

'Disciplinary' is a term more commonly used in professional regulation, with 'enforcement' perhaps being the term used in relation to entities. There is different applicable case law and practice. It is this type of issue that SLCC flags when it notes its concern at a 'hybrid' model, whilst supporting full examination of professional regulation, entity regulation and how they interface.

Do you have other comments or ideas you would like to add at this time?

No

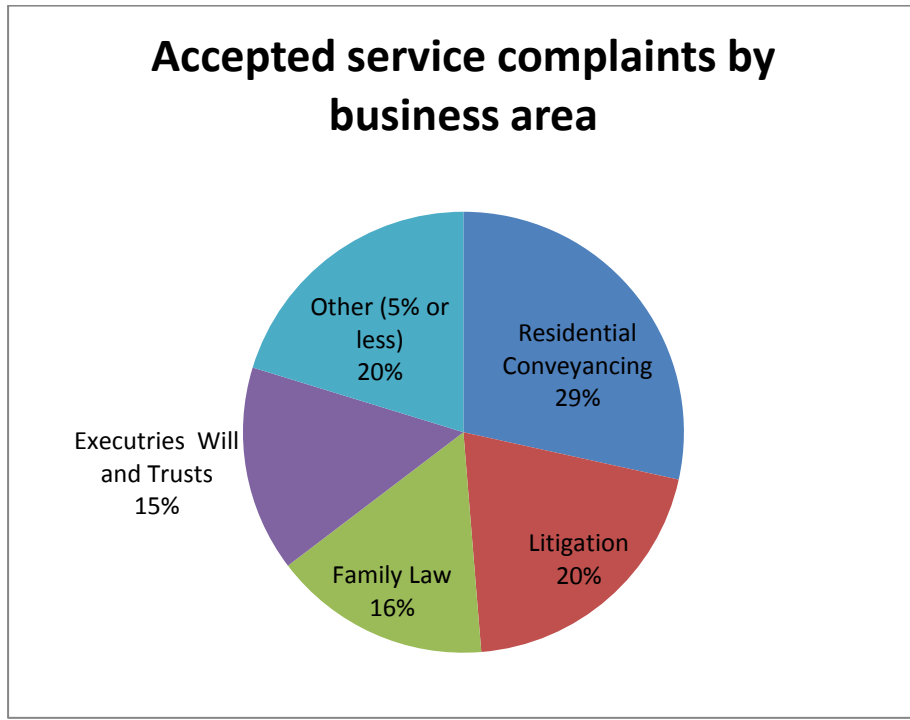
Would you be willing to engage in detailed further consultation, perhaps in facilitated workshops? Detailed consultation may, at some stages, be more effective if targeted at invited participants who are representative of the

profession as a whole and so it would be useful to identify willing potential participants at this stage.

Yes, the SLCC would be willing to be involved

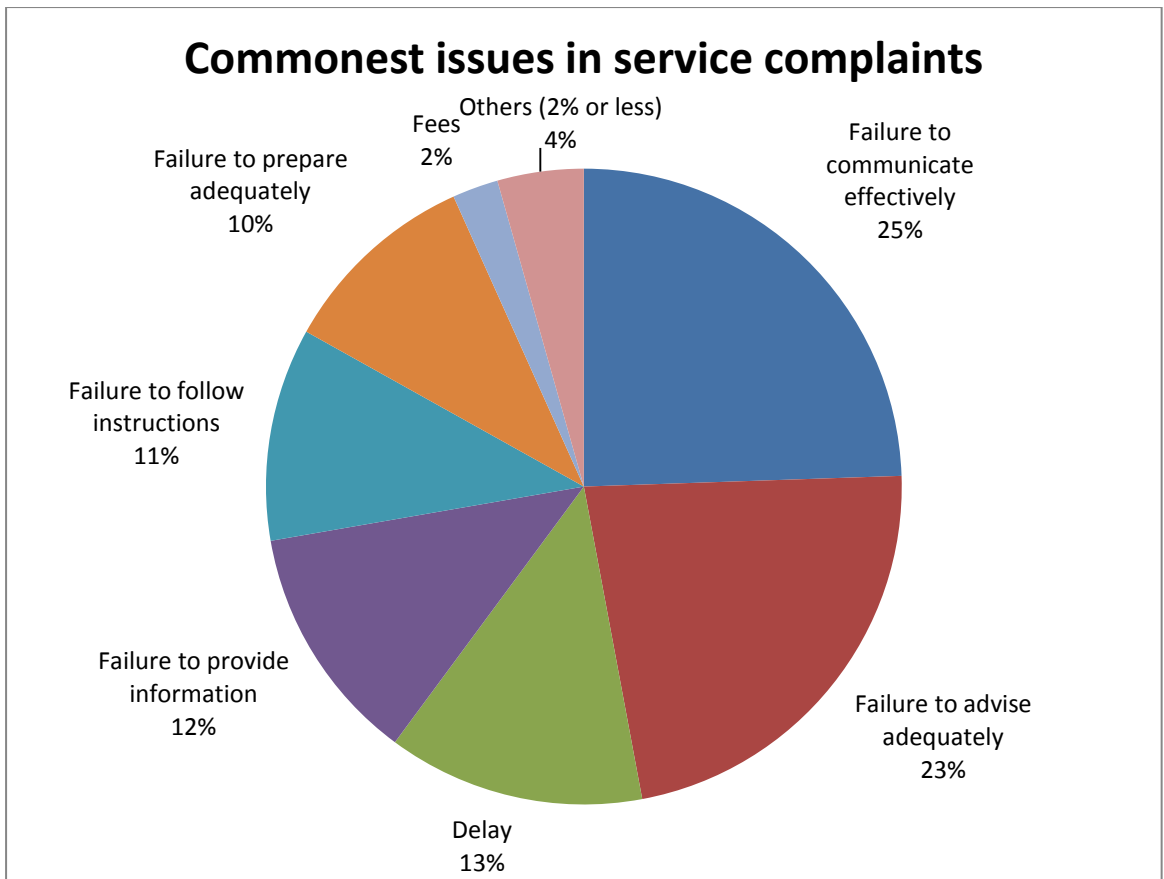
APPENDIX ONE – TREND DATA

The statistics below are based on service complaints accepted by us for investigation in the Annual Report year 2014/15.



The top four areas of legal work for complaints were Residential Conveyancing, Litigation, Family Law and Executries Will and Trusts. This matches what we found in 2013 when we undertook a similar analysis for the first five years of the SLCC.

While perhaps unsurprising, it is important to note that these are all areas with high emotional stakes. A survey last year found that buying or selling a property, relationship break-up or divorce and a death in the family are in the top five of the most stressful experiences in life.



Contact the SLCC

The SLCC can be contacted at the following address:

Scottish Legal Complaints Commission
The Stamp Office
10 - 14 Waterloo Place
EDINBURGH
EH1 3EG

Phone: 0131 201 2130

Fax: 0131 201 2131

Email: enquiries@scottishlegalcomplaints.org.uk