

#ReimagineRegulation

Appendices to our main paper



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INTRODUCTION

The current arrangements for legal complaints, and how complaint outcomes are used to improve standards in the sector, are too complex, involve too many stages, and pass through too many organisations. Faster, more efficient, and better targeted regulation can be delivered, to the benefit of consumers and the sector, by significant legislative reform.

The Scottish Government is committed to a '*consultation to review legal regulation*'. We strongly believe there are six priority areas that this consultation should address, and that government should ensure wide input from consumers and the sector.

We set out details of these in our main paper: **#ReimagineRegulation: Priorities for a consultation on legal services regulation**. That paper provides full details of challenges, solutions and should be read before this set of appendices, which provide background information. The priorities can be summarised as:

1. Unravelling the complaints maze

We want to unravel the current complaints maze to create a clearer route to consumer redress – faster for the consumer, and more cost effective for the sector.

2. Dismantling processes, focussing on outcomes

We need to dismantle a statute that focusses more on processes than outcomes, and build a system on agreed principles that delivers for consumers and the sector.

3. Ensuring compensation is received

When compensation is awarded to a consumer this must be paid - anything else is a failure in regulation and undermines confidence in the market and in lawyers.

4. Focussing on high risk areas

We believe it's time to stop seeing a single market, and use the data from 1,000s of complaints to tackle the high risk areas which every year cost consumers and the professions millions.

5. Applying the consumer principles

Consumer principles should be at the heart of a consultation on legal regulation, and we set out key areas to consider which should benefit the public and professions.

6. Learning from complaints, regulating risk

In the era of 'big data' we believe regulation should focus on learning from complaints, and assessing and managing risk, based on good market intelligence

This papers provides appendices to that main document, proving extra detail on *our **work and role**, our **strategy**, our **current performance**, how we **consulted and engaged organisations** in the development of this paper, a **summary of the debate on legal services regulation in each parliamentary session** since the Scottish Parliament was created, and links to **academic research** on these issues.*

APPENDIX 1 – WHAT IS THE SLCC AND WHAT DOES IT DO?

Who we are

The Scottish Legal Complaints Commission (SLCC) is an independent statutory body providing a single point of contact for all complaints against lawyers operating in Scotland.

A Chair and Board are appointed by Ministers, through a public appointments process. This oversees the operation of organisation. The members of the Board also sit in panels of three to make determinations on individual cases. More details can be found at: <https://www.scottishlegalcomplaints.org.uk/about-slcc/who-we-are.aspx>

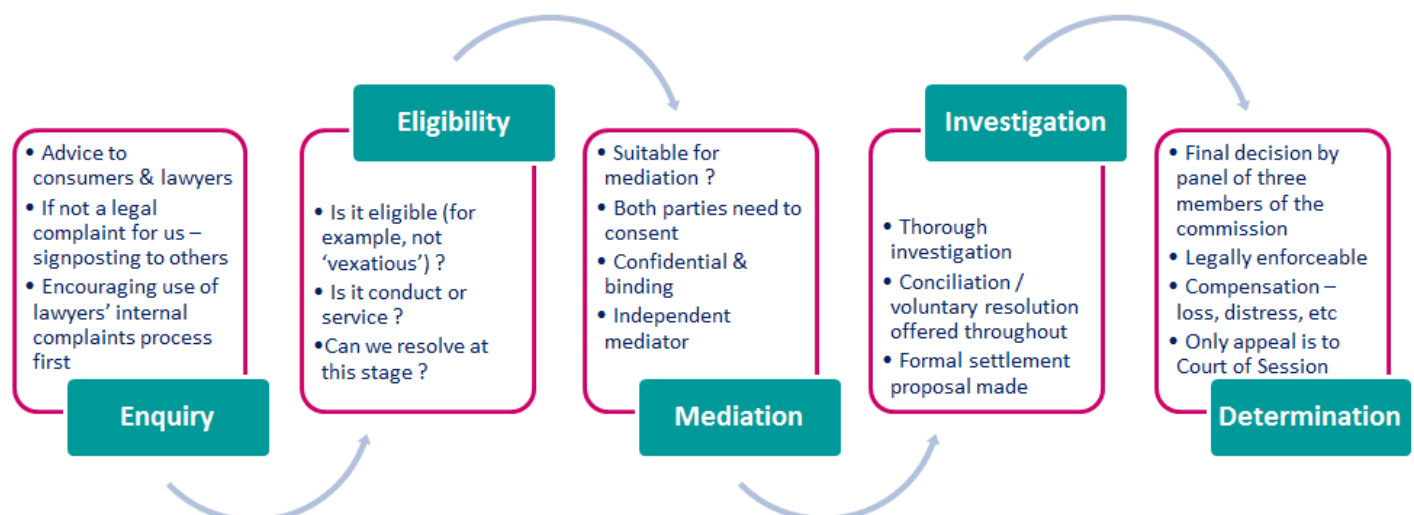
A Chief Executive and Senior Management Team run the organisation on a day to day basis. More details can be found at: <https://www.scottishlegalcomplaints.org.uk/about-slcc/who-we-are/senior-staff.aspx>

Our statutory functions

Our main statutory functions as an organisation are to:

- Provide a gateway for all complaints about lawyers in Scotland
- Manage directly complaints that relate to the **service** provided by lawyers – providing redress where appropriate
- Refer complaints about the personal **conduct** of lawyers to the ‘relevant professional organisation’
- Manage complaints about how the ‘relevant professional organisations’ have dealt with those conduct issues
- Give advice on complaints to all parties
- Issuing guidance and encouraging best practice
- Monitoring practice and publishing trend reports – to help ensure the sector learns from complaints made
- Monitoring the effectiveness of the various indemnity arrangements in the sector
- Supporting, and being guided by, our independent Consumer Panel

An outline of our core process is:



Our strategy

We have recently launched a bold new [strategy](#). As well as improving the efficiency and performance of our core process our strategic priorities are to:

Build trust	<i>so that consumers and lawyers know we are here and have confidence in how we will handle a complaint</i>
Promote strong relationships	<i>between consumers and their lawyers to fix issues quickly and reduce the cause of complaints</i>
Deliver early resolution & redress	<i>through an independent, impartial, fair, and accessible service which is efficient and effective</i>
Drive improvement	<i>through a culture of learning from complaints, quality improvement, and our influence in the sector</i>
Develop high performance	<i>as a complaints organisation and employer to: attract & retain talented people, provide quality systems, ensure faster & more efficient services, increase transparency</i>

Our values help define how we should operate as an organisation, and as individuals working within it:

People focussed	<i>We understand and are mindful of the needs of our diverse service users</i>
Trust	<i>Our processes and outcomes can be trusted by all as fair, independent & impartial</i>
Respect	<i>We respect the diverse groups we work with & are respected as an organisation</i>
Leadership	<i>As recognised leaders we take decisive, well-informed action & drive improvement</i>
Efficiency & effectiveness	<i>We make a positive, measurable impact</i>

Here, and throughout our strategy, we refer to the **diverse peoples of Scotland** who use our services and those provided by lawyers.

In this term we include the protected characteristics from the Equality Act 2010 (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation) but also wider issues of socio-economic status, geographic and digital exclusion, literacy, and circumstance (like fleeing domestic violence or oppression abroad).

We work alongside the ‘relevant professional organisations’ who are the primary regulators of each of the main groups of practitioners. These bodies currently are: The Law Society of Scotland, the Faculty of Advocates, and the Association of Commercial Attorneys.

APPENDIX 2 – OUR CURRENT PERFORMANCE

Our current performance as a complaints handling body is set out in our annual report:
http://www.scottishlegalcomplaints.org.uk/media/56936/slcc_annual_report_2013-2014_-_final_electronic_version.pdf

To give some highlights:

72%

Accepted complaints resolved or upheld

£401,340

Redress awarded or agreed for complainers at all stages, including compensation, rebates and refunds

1009

NEW
COMPLAINTS
RECEIVED

300

Accepted service complaints concluded

56%

Complaints resolved without formal determination

Mediation success rate

76%

747

Law students, practitioners and others presented to by the SLCC

0%

Change in general levy rate 2014/15

-4% to -10%

Change in general levy rate set for 2015/16

APPENDIX 3 – OUR EXPERTISE AND ENGAGEMENT WORK TO SUPPORT THESE PROPOSALS

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 in Scotland of examining service issues between clients and lawyers, and believe that expertise should be used to assist better standards for all.

At our founding the Minister stated:

"Complaints handling is not just about dealing with things that go wrong, but ensuring that things go right. The commissioners will help to build a culture of learning from complaints through their oversight and promotion of standards. This focus on the quality of service will undoubtedly benefit both consumers and the profession alike."

We are keen to live up to this ambition, which accords with the number one reason the public gives for making a complaint – ensuring that their bad experience does not happen to someone else.

We fully recognise complaints are only one source of intelligence, and as an organisation that believes in evidence-based policy making, we have sought to quote a wide range of sources and expertise that we have identified in our work to ensure we are adopting best practice. We also know others will bring their respective expertise to the debate, and this will help inform a well-balanced discussion.

Our Consumer Panel

The SLCC also has a statutory 'Consumer Panel'¹, 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 its inspiring debate about how things could be better for consumers and regulated professionals, especially through understanding their experience and journeys through regulation and complaints.

A collaborative approach - how we developed this paper

This paper has been developed with input from six key sources. Legislation formed in the public interest and drawing on best practice should always be informed by a range of sources and inputs, and through the development of the thinking within this paper we have sought a collaborative and transparent approach to policy development.

Our Board – the Board are responsible for the overall policy position and for collating and prioritising views. Many of the ideas raised from the groups below were included, but on other points the Board's own knowledge and expertise meant that our final paper proposes something different. The members are independent commissioners appointed by government to deliver the functions of the SLCC. Board members have both a governance functions and sit in Determination Committees making individual decisions (giving them detailed insight into common complaints issues). Our Board members bring diverse experience, and have recently formally partnered the *50:50 by 2020* scheme and meet its requirements.

¹ <http://www.scottishlegalcomplaints.org.uk/about-slcc/who-we-are/consumer-panel.aspx>

Consumer Panel – an independent statutory panel of consumer experts who have ensured that the consumer voice is present throughout our work. The Consumer Panel includes representation from:

- Citizens Advice Scotland
- Which?
- Competition and Markets Authority
- Equality and Human Rights Commission
- Queen Margaret University Consumer Dispute Resolution Centre
- Scottish Independent Advocacy Alliance

The SLCC's 2007 Act Steering Group – technical experts on regulation and complaints in the legal sector coming together with consumer and competition bodies. The discussion topics used with the group are set out at the end of this section. The Steering Group includes representation from:

- The Law Society of Scotland
- The Faculty of Advocates
- The Scottish Solicitors Discipline Tribunal
- The Institute of Chartered Accountants of Scotland
- Association of Commercial Attorneys
- The Legal Defence Union
- Citizens Advice Scotland
- Scottish Legal Aid Board
- Queen Margaret University Consumer Insight Centre

Although in this group we looked at much wider legislative issues than just the 1980 Act, we would commend the paper already published by the Law Society of Scotland in relation to one of the pieces of legislation "*The Solicitors (Scotland) Act 1980: The case for change*"². It is important to note that the SLCC agrees with virtually all the proposals in that paper, although the detail of how they will be delivered will need careful consideration, as we noted in our response to their consultation on entity regulation³.

Roundtable on sanctions – technical experts on regulation and complaints in a range of sectors looking at the issue of sanctions in complaints processes and the sharing of best practice. The group included representation from:

- Scottish Government
- Scottish Social Services Council
- Standards Commission for Scotland
- Institute and Faculty of Actuaries
- General Teaching Council for Scotland
- Scottish Public Services Ombudsman
- Queen Margaret University Consumer Dispute Resolution Centre
- Scottish Legal Aid Board
- Equality and Human Rights Commission

Data and trends – we have examined empirical evidence from our data systems on trends, themes and other metrics

² <http://www.lawscot.org.uk/media/732471/The-Solicitors-Scotland-Act-1980-The-case-for-change-Regulation-Pa.pdf>

³ https://www.scottishlegalcomplaints.org.uk/media/62575/slcc_response_to_the_law_society_of_scotland_s_regulation_in_the_21st_century_-_entity_regulation_second_consultation_paper.pdf

Executive team – the leadership group of the SLCC who bring extensive experience of complaints policy and the practicalities of delivering a complaints system, and have insight into the trends and key issues within the 8,000+ complaints the SLCC has considered.

Discussion topics we used with our stakeholders

Acronyms are explained in the glossary at the end of this document.

The Complaints Journey

- Current “system” – how user friendly?
- Length of journey
- Accessibility – too low/high a threshold for eligibility?
- Single investigation? Some cases? All cases?
- Segmentation and complexity
- Consumer awareness & confusion
- Appeals – how many “bites at the cherry”?
- Mediation outside of the general complaint process (for non-commercial complaints only)?
- Broader construction of complaint (including e.g. solicitor, agent and advocate under one complaint)

Redress & Sanctions

- Consistency in redress approaches (eg SSDT)
- Should we have a single framework of defined IPS, UPC, and PMC and sanctions
- What do consumers want/expect?
- Gaps/failings in the current redress model
- Consistency in approach to sanctions
- Regulation –vs–redress: is it possible to do one without hindering/slowing the other?

Consumer Information & Choice

- What information is currently available for legal consumers, and where?
- Central portal – “one stop shop”
- Informing consumers – other options
- Pros & Cons of league tables – how far can we go?
- Do SG want a system/market regulator (aspect of this in LS(S) Act 2010) or a professional/entity regulator, or both? And who does what?

Governance

- Board –v– Ombudsman
- Committee structures – fit for purpose?
- Should terminology and definition (committee/panel, what is lay) be the same across all bodies
- Schemes of delegation (within statutory confines) – for example, is the ‘yes’ to staff, but ‘no’ to committee still the right model

Information and Intelligence Sharing

- Public expectations
- Current restrictions
- Data vs intelligence
- Should we be using a risk management lens to consider what intelligence sharing is necessary
- Should all bodies be able to annotate the roll (i.e. SSDT and SLCC decision put on roll)

Entities & Charging

- 2010 Act & Alternative Business Structures
- Do we need licensed provider scheme and entity scheme, or just one?
- Do all entities need regulated or just conveyancing (or private small client)?

Economic impact

- Over-burdensome regulation?
- UK/EU/International cross border – enablers and inhibitors

APPENDIX 4 - UNFINISHED BUSINESS? THE LEGISLATIVE BACKGROUND

The present legal framework for regulation of lawyers and legal services (and the detail of the Scottish Legal Complaints Commission's functions) is fragmented. The central piece, the Solicitors (Scotland) Act 1980, is itself a consolidation Act, bringing together legislation dating back to 1949, and amended in 1958, 1965 and 1976. Since 1980, there have been further significant changes to the Act in 1990, 2003, 2007 (which also sets out the SLCC role) and 2010 (which also creates the concept of alternative business structures). There are various orders or revisions inserted from other legislation (for example, the Children's Hearing Scotland Act 2011). Below this sit 'rules' and regulations which several bodies in the sector have the power to issue.

Since its creation the Scottish Parliament has invested considerable time in debating legal regulation, but have all the ideas which have been discussed moved forward? Has the impact been what was anticipated?

Opportunities and challenges

Drawing on our experience of complaints handling and our oversight work we have set out six key priorities. We believe the current legislation is failing to perform adequately, both in relation to our core area of complaints handling and in relation to wider protection, redress and regulatory issues in the sector. To understand our six priorities for consultation it is useful to understand some of the background to the issues and how they have previously been considered by government and parliament

1st Session of Parliament (1999 to 2003) – Justice One Committee Enquiry

In the first session of the Scottish Parliament the Justice 1 Committee held an inquiry into regulation of the legal profession, after significant lobbying by various public interest groups and concerns from individual MSPs at how constituents' complaints were being handled. The Committee focused on the way in which the profession handled complaints, which it perceived to be the main source of public concern. The Committee also looked at the general arrangements by which the legal profession regulated itself. The report '*The Limits of Self-Regulation in the Legal Profession*' by the independent Scottish Consumer Council was influential in setting out key areas for discussion.⁴

The Committee concluded that the best option for Scotland was to retain self-regulation, but it recommended that the present system should be reformed to make it more acceptable to consumers and more representative of the public interest. The Committee made a series of recommendations aimed at building public confidence and increasing the degree of independent oversight of complaints handling by the profession.⁵

The outcome led the then Scottish Executive (now the Scottish Government) to publish a consultation paper in May 2005, entitled '*Reforming Complaints Handling, Building Consumer Confidence*'⁶. This led to the Legal Profession and Legal Aid (Scotland) Act 2007 and the creation of the SLCC.

⁴<http://webarchive.nationalarchives.gov.uk/20090724135150/http://scotcons.demonweb.co.uk/publications/reports/reports01/rp08limi.pdf>

⁵ Report by the Research Working Group on the Legal Services Market in Scotland 2006

⁶ <http://www.gov.scot/Publications/2005/05/09103027/30286>

Many of the recommendations of the Justice Committee's work have been implemented, but some, for example the removal of differentiation between service and conduct complaints (Recommendation 14 "...*The Committee recommends that the distinction between conduct and IPS complaints should be removed. A 'complaint against a solicitor' should be redefined in statute, and the new definition should be simple and widely drawn. This should be supported by an education campaign aimed at both the profession and the wider public.*") have never been fully taken forward and still cause issues and complications on a regular basis.⁷ The courts continue to wrestle with the different categories of complaint and whether or not they 'overlap'.

2nd Session of Parliament (2003 to 2007) – Research Working Group on the Legal Services Market in Scotland

The Working Group on the Legal Services Market in Scotland⁸ was established by the Scottish Executive (now Scottish Government) in March 2004 to draw together and analyse the evidence base on the Scottish legal services market. This work was driven by a desire on the part of Scottish Ministers that legal services in Scotland should be regulated in the interests of consumers, by developments at European Commission level (reviewing competition in the liberal professions) and by developments in England and Wales (a report by the Office of Fair Trading in 2001 which led to the independent review of the regulatory framework by Sir David Clementi and latterly to the publication by the Department for Constitutional Affairs of a White Paper '*The Future of Legal Services : Putting Consumers First*'⁹ in October 2005).

The agreed research aims were to identify, describe and analyse the different legal services markets operating in Scotland; to identify restrictions, whether deriving from statute, professional rules or custom and practice, which might have the effect of preventing, limiting or distorting competition in the different Scottish markets; and to identify access to justice, public interest and consumer protection factors that might justify such restrictions and to evaluate whether the restrictions were proportionate to their purpose.

The Group also undertook to examine the evidence on alternative systems and structures across comparable jurisdictions including alternative business structures and the availability of rights of audience and rights to conduct litigation.

Numerous sources of data and information were used in the course of this work. However, it was noted there were areas "*where the evidence base was poor and where, in the absence of ready remedy, the debate had to be based on a balanced range of opinion rather than objective evidence. In particular there was a lack of evidence on the likely effects of a change in policy or practice on specific issues, including the likely effects on consumers.*"¹⁰

The absence of real consumer voice throughout is striking, for example, there is a highly technical debate on fees with little reference to the issues consumers face or the information they need to make informed buying decisions. No public research was undertaken as part of the exercise, and while there are simplistic 'polls' available on consumer perceptions of lawyers there is little real work to this day which can inform regulatory approaches. If reform is considered, it may be vital to engage the public this time around.

The report did not make recommendations, but it did draw conclusions. On some of these the position has arguably improved (for example, a set of restrictions on advertising by solicitors were removed as a result of this work and eventual report, as noted within it) on others the position has deteriorated – for example, it was concluded that reform and modernisation of auditors of court was critical because of the importance to

⁷ <http://archive.scottish.parliament.uk/business/committees/historic/justice1/reports-02/j1r02-11-vol01-01.htm>

⁸ <http://www.gov.scot/Resource/Doc/111789/0027239.pdf>

⁹ <https://www.gov.uk/government/publications/the-future-of-legal-services-putting-consumers-first>

¹⁰ <http://www.gov.scot/Resource/Doc/111789/0027239.pdf>

consumers, and instead at Sheriff Court level they have been abolished. All agencies in the sector have experience of seeing manifestly unfair fees charge (with executory work a particular concern where the lawyer takes funds from monies in an estate before passing on the remainder to those named in the will), but there is a shortage of mechanisms to address this. A decade on, will this issue be tackled?

3rd Session of Parliament (2007 to 2011) – The Which? Super-complaint and OFT response

In May 2007, the consumer organisation ‘Which?’ submitted a super-complaint to the Office of Fair Trading (OFT), under the provisions of s11 of the Enterprise Act 2002. The super-complaint asserted that restrictions imposed on providers of legal services harmed the interests of consumers, and also submitted that the regulatory structure for legal services should be reformed, with the creation of a new oversight regulator – the Scottish Legal Services Board (this perhaps bought history ‘full circle’, as it is clear from evidence at the time that the original creation of the Law Society of Scotland was as a central regulator, whilst the various bars were the representative voice¹¹).

The OFT published its response on 31 July 2007¹². That response did not set out a final view as to whether the introduction of an oversight regulator would be the most appropriate regulatory arrangement for Scotland, and suggested that regulatory arrangements for legal services in Scotland should be given further consideration by the Scottish Government. The response set out the OFT’s view that, in general, the restrictions on business structures set out in the super-complaint were unjustified, and asked that the Scottish Government set out its own views on how it proposed to take these issues forward - the Law Society of Scotland and the Faculty of Advocates should carry out wide-ranging reviews of their respective rules and make significant and transparent progress towards lifting the restrictions.

The Scottish Consumer Councils response to both the OFT and Which? papers also provides a useful perspective on some issues, for example looking at the governance of professional regulators and making recommendations which in other sectors (such as health) have now been delivered.¹³

This led to the publication of the Scottish Government paper ‘*Wider Choice and Better Protection*’¹⁴, on 5 January 2009, and then to the Legal Services (Scotland) Act 2010. This implemented some changes (such as potentially allowing some external ownership of law firms) but the government did not accept or implement other recommendations from Which?, such as the establishment of the independent oversight regulator (as there now is in England and Wales). The new Act required that the Law Society of Scotland create a statutory ‘Regulatory Committee’ with a lay chair and even number of lay and solicitor members, but independent oversight of profession was not taken forward. Nearly a decade on from the super-complaint and OFT report little has changed in the legal market in terms of legal provision direct to citizens in terms of the barriers examined at the time.

Previous attempts of the government, pre-dating the Scottish Parliament, to introduce greater competition in the market (such as the introduction of licensed conveyancing and executory practitioners) have also failed, and those functions originally held by a different independent panel have now been passed to the Law Society of Scotland. In contrast, in England and Wales there are vibrant markets of alternatives to solicitors in some areas (for example, Legal Executives regulated by the Chartered Institute of Legal Executives).

¹¹ Notes of the History of the Solicitor’s profession in Scotland, John Spencer Muirhead LL.D., President of the Law Society of Scotland, (Pub. William Hodge and Company, 1952)

¹² http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/super-complaints/oft946.pdf

¹³ <http://webarchive.nationalarchives.gov.uk/20090908164026/http://scotcons.demonweb.co.uk/legal/documents/responsetotheofficeoffairtradingrelatingtothewhichsuper-complaintaboutrestrictionsonbusiness.pdf>

¹⁴ <http://www.gov.scot/Publications/2008/12/29155017/0>

During this parliamentary session the government also launched a review of rights of audience in the Supreme Court – The Thomson Review¹⁵. In this area there is a choice of regulator and competition in the market with clients able to choose and advocate (regulated by the Faculty) or a Solicitor-Advocate (regulated by the Law Society of Scotland). There has been huge growth in the number of solicitor-advocates since the first one was admitted in 1993. As with other reviews, some recommendations have been implemented, but others are outstanding (without ever having been formally discounted). Recommendations included revalidation, single entry examination and standards, and our own powers at the Commission should be amended so that in relation to all pleaders (whether advocate or solicitor advocate) we applied the same standards and complaints processes. This report also suggested that, in relation to this group, the Commission should be responsible for conduct investigations to avoid two different bodies applying different standards.

4th Session of Parliament (2011 to 2016) – Waiting for ABS and minor technical changes

After the significant time spent on the 2010 Act it is not surprising that no major work was undertaken on legal regulation in the 4th term of the parliament.

Smaller amendments have been made by regulation. For example, at the request of the Scottish Legal Complaints Commission the *Scottish Legal Complaints Commission (Modification of Duties and Powers) Regulations 2014/232* created a statutory Consumer Panel as part of our governance structure to make clear as a matter of law that the consumer voice should be at the heart of our work in running a system of independent and impartial complaints handling.

One issue that was topical was legal aid. It must be stressed that although the source of significant public expenditure (over £138 million¹⁶) it is only one small part of the legal sector in Scotland, so issues within legal aid should not be equated to the sector as a whole. The Scottish Government signaled its intention to introduce regulations which would allow SLAB to contract with criminal legal aid suppliers in its strategy paper 'A Sustainable Future for Legal Aid' (October 2011)¹⁷, and the Scottish Legal Aid Board started to engage on possible models.¹⁸ These discussions identified some potential areas which any contracting model may have wished to ensure law firms were considering and delivering when that work was publicly funded work. These areas overlap with ones regulators could, or perhaps should, look at (even if setting the bar at a different level for private work). For example:

- Accessibility of services
- Service standards – hours of opening, emergency cover, etc.
- Conditions to encouragement to take trainees (the only route to entry to the profession, and so wide interest)
- Quality measures
- Demonstrable experience and expertise before a solicitor could practice in a certain area – and peer review to ensure that on an ongoing basis.

Some of the dialogue on contracting, which is now not currently being progressed as a model, will be worth returning to for policy makers to decide what is a minimum for all lawyers and providers, and what is a higher standard which may need applied to publicly funded work. This also links to whether new legislation is trying to achieve the regulation of professionals (as it currently does) or in some way achieve

¹⁵ <http://www.gov.scot/Publications/2010/03/15112328/0>

¹⁶ <http://www.slac.org.uk/news/articles/AnnualReport.html>

¹⁷ <http://www.gov.scot/Publications/2011/10/04161029/0>

¹⁸ <http://www.slac.org.uk/providers/reforms/criminal/Contracting.html>

market regulation (there are ‘hints’ of this in the 2010 Act, such as a need to consider competition in licensing firms under that Act, but not in relation to licensing ‘traditional’ firms under the 1980 Act).

Current debates in England and Wales

The Competition and Markets Authority (which succeeds the former OFT – Office of Fair Trading) has launched an investigation into the legal services market in England and Wales which sets out three major themes – consumer access to information to aid decisions, whether there are consumer protection issues not currently addressed by regulation, and whether the framework is beyond what is required to protect consumers (and so distorts the market)¹⁹. In interim report on findings is available.²⁰

At the same time the Solicitors Regulation Authority has published research in support of Treasury proposals that they should become fully independent from the Law Society of England and Wales – over 82% of people thought regulation should be independent (1800+ telephone interviews). The Ministry of Justice is widely expected to publish a paper on this after the EU referendum. The Law Society ‘countered’ with a proposal for a single regulator for all legal services – lawyers, barrister, legal executives, etc..

The Legal Services Board has led sophisticated debates on the needs of consumers in the legal market and has undertaken detailed research, all of which is made publically available²¹. The Scottish Government signalled an intention there should be some greater focus on consumers in Scotland by the creation of a statutory Consumer Panel²². However, the suggestion of consumer research funded by the profession was met with significant hostility from the professional bodies²³ and even the suggestion this was *ultra vires* (outwith the powers of the SLCC panel). In response to such significant stakeholder feedback this work area was significantly cut, but it will leave us with far less data than many jurisdictions on consumer needs in relation to regulation.

5th Session of Parliament (2016...) – What next?

By the end of this session the statutory arrangements for the regulation of legal services and professions will have been in the hands of the Scottish Government and Scottish Parliament for over two decades. It will ultimately be for the government to decide whether there is unfinished business from all the debate and analysis to date.

The SLCC acknowledges some issues have moved on, and much of the rest of this paper focusses on the future, not the past. However, understanding the context is relevant in many ways: the approach of ‘tinkering’ does not seem to have delivered significant change; previous work has added complexity, without ever stepping back to look at the overall functioning of the system; consumer input has been relatively low in all debates; and there are issues which appear to be of common concern which have not been addressed through four parliamentary terms.

The powers of the parliament have also changed. As a result of the Smith Commission consumer issues have, for the first time, been delegated to the Scottish Parliament. The parliament may be looking at consistency of approach across consumers issues, or may have more flexibility to act in the consumer interest with these powers.

Finally, as a nation we now have the National Performance Framework²⁴ (see below). The government of the day is most likely to progress work that clearly fits with these priorities and targets.

¹⁹ <https://www.gov.uk/cma-cases/legal-services-market-study>

²⁰ <https://www.gov.uk/cma-cases/legal-services-market-study>

²¹ <http://www.scottishlegalcomplaints.org.uk/consultation>

²² S16 <http://www.legislation.gov.uk/sdsi/2014/9780111023846>

²³ See responses to our consultation on strategy, published at: www.scottishlegalcomplaints.org.uk/consultation

²⁴ <http://www.gov.scot/About/Performance/scotPerforms>

We believe that by the end of this parliamentary term legislation should have been introduced which places the needs of consumers and clients first, is based on consistent principles, is risk based and proportionate focussing regulation on where it counts, and which is agile and responsive to change. There is much to be proud of in the work to date, but we believe there is more to be done to come close to achieving these aims, and will provide further examples and details in the sections to come.

The National Performance Framework

NB. For those not familiar with the National Performance Framework²⁵, each phrase in bold in this section relates to a different aspect of it.

The decision making of the SLCC is independent of government, and based on our governing statute we set our own priorities and budgets, something that is key to **ensuring the mutual confidence of the professions & the public in how we impartially resolve disputes**.

However, in providing an important public role and benefit we believe the SLCC should be inspired by the Government's National Performance Framework and the commitment to measurement of progress within it. Likewise, we understand that legislation proposed will need to demonstrate its value against the framework.

Studies, and the recent experiences of the economic crisis, show that consumer confidence is critical to **economic stability & growth** (one of government's '*higher level purposes*'), and effective complaints handling plays a vital role in that. We also know that effective legal services, and the resolution of issues about those services, help ensure Scotland is an **attractive place for business**. We note that the profession's case for reform focusses strongly on the potential economic benefits for the country, and we entirely support that proposition.

In common with other organisations within the Justice sector, much of our work focusses on the government's 'strategic objective' of **safer & stronger communities**. Looking to the 'justice outcomes' we consider that complaints resolution is part of **ensuring respect in exercising rights & responsibilities** and that our work, and the opportunities of new legislation, will help contribute to making **legal services (which) are fair & accessible**. We are guided by the objective that **institutions & processes are effective & efficient**, and our focus on framework legislation and processes based on 'consumer journeys' are aimed at delivering this.

We also note that access to legal service contributes to **social cohesion** (another of government's '*higher level purposes*'), often levelling the economic and social divides; we help ensure that all those using lawyers receive an appropriate service. We have our own challenges, such as making sure those from lower socio-economic groups are aware of our services and can easily access them, and our learning from complaints gives us insight into the opportunities for regulation to assist in reducing divides.

The 'National Indicators' also guide our thinking on many areas. Every aspect of our work needs to assist in **tackling inequality** – from appointments to our Board and our own arrangements for staff to ensuring our service is accessible to all. Legislative work can also assist in many ways, one example we share is moving to gender neutral drafting so the Scottish parliament is not passing legislation in which a lawyer is always a 'he'. Being part of Scotland's unique and historically separate legal system, and the values it upholds, plays a part in a **strong, fair & inclusive national identity**. Again, the opportunity of legislation which emphasises a fair and inclusive society, and the mechanisms which will deliver that, will be essential.

²⁵ <http://www.gov.scot/About/Performance/scotPerforms>

APPENDIX 5 – SOME FURTHER READING

Introduction

In developing our proposals we have considered the academic research available on the issues, and are also developing concepts and proposals we have made as an organisation in previous papers.

In this section we give some examples of further papers those working on the detail of a consultation and/or draft bill may wish to consider.

The references are grouped according to which of the six priorities set out in our main paper they most closely relate to.

1. Unravelling the complaints maze

There is evidence that the public approach to complaints handling and its reliance on a detailed legislative scheme has not always delivered the best outcomes for consumers when compared with ‘private sector’ models. Recent research by Naomi Creutzfeldt²⁶ of Oxford University demonstrated that private schemes often outperformed public scheme in terms of consumer experience. Some of the ‘private’ schemes were statutory bodies (such as the Legal Services Ombudsman in England and Wales) but their greater separation from government (as the SLCC already enjoys) and their greater flexibility (which we do not have) appears to allow better performance.

Indeed, the very scheme the original proposals in Scotland were based on, from the Office of the Legal Services Commissioner (NSW – Australia), shows how an organisation less constrained by statute can perform better and in a way more proportionate²⁷

Further insights into current practice in complaint handling organisations in the UK comes from the responses to the UK government consultation on a public sector ombudsman for England²⁸ (and some UK matters) along with Queen Margaret University’s study *Defining Consumer Ombudsmen*²⁹.

The Law Society of Scotland has made positive proposals for entity based regulation which we formally supported in our response to the consultation.³⁰ The SLCC supports the concept of entity regulation, but believes if it is simply layered on top of the current arrangements it could lead to greater complexity and cost, rather than delivering for consumers. We published our views in our consultation response.³¹

The government has also recently consulted on an application from the Law Society of Scotland to become an ‘Approved Regulator’ under the Legal Services Act 2010. The responses of the SLCC³² and the SLCC’s

²⁶ What people expect from ombudsmen in the UK A report on the findings of the project on ‘Trusting the middle---man: impact and legitimacy of ombudsmen in Europe’, <https://ukaji.org/2015/10/28/trusting-the-middle-man-impact-and-legitimacy-of-ombudsmen-in-europe/> Naomi Creutzfeldt

²⁷ <http://www.olsc.nsw.gov.au/>

²⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486797/PSO_-_Consultation_Response_-_Final.pdf

²⁹ <https://www.ombudsman-services.org/downloads/Defining-Consumer-Ombudsmen-Report-2016.pdf>

³⁰

https://www.scottishlegalcomplaints.org.uk/media/62575/slcc_response_to_the_law_society_of_scotland_s_regulation_in_the_21st_century_-_entity_regulation_second_consultation_paper.pdf

³¹

https://www.scottishlegalcomplaints.org.uk/media/65408/slcc_response_to_the_scottish_government_s_consultation_on_the_licensed_providers_regulatory_scheme_proposed_by_the_law_society_of_scotland.pdf

³² https://www.scottishlegalcomplaints.org.uk/media/65455/slcc_consumer_panel_-_response_to_licensed_providers_regulatory_regime_consultation_-_17_may_2016.pdf

independent Consumer Panel³³ have been published and are available online. Again, while the principle of ABS is supported, the arrangements chosen by government and the approved regulator in this case seem to introduce significant extra complexity into the market without being able to make a clear case for improved consumer benefit.

Both developments could be positive but there is a very real risk that increased complexity may lead to confusion, duplication of effort, and create a model more complicated than proportionate for a small country such as Scotland, with consumers picking up the cost.

2. Dismantling processes, focussing on outcomes

In addition to the points made in the main paper, which focus on how processes are set out in statute, there are other considerations about how the rules of regulators are drafted.

The OFT, in its report, recommended a wide ranging review of rules.³⁴

The SLCC has previously publicly support an approach which focusses on principles and outcomes for consumers (although delivered through a rules framework)³⁵. The idea is that rules should not be framed in terms of the process or professional interest:

for example, “you shall provide the following information to the client in writing...an estimate of the total fee to be charged for the work, including VAT and outlays which may be incurred in the course of the work”

but the outcome for the client:

for example, “you must ensure the client understands and has a record of...an estimate of the total fee to be charged for the work, including VAT and outlays which may be incurred in the course of the work”

This also helps assess where rules are being laid for public benefit and consumer protection, and where they may be for the protection of the professional involved – there will of course need to be engagement with the profession and the public in the development of a new rules framework.

This debate has been happening in other sectors for years – for example, the move from paternalistic medical intervention to the concept of ‘informed consent’, where the patient must be able to understand the procedure and risks they are consenting to.

It will help in managing complaints by clarifying where, on the one hand, a solicitor must be able to evidence compliance with a process or where, on the other, there must be an actual outcome for the client. Such drafting would also assist in the handling of complaints, giving clarity as to the exact level of responsibility of the solicitor to the client in different circumstances. All of this draws on our experience of complaints, and we believe this could assist in making the process more efficient and effective.

A major focus on this and the previous sections of our main paper, is the idea that a high level ‘framework’ act is required rather than prescriptive legislative drafting which lacks flexibility and proportionality. Relevant work has been recently carried out in this field. Between 2012 and 2014 the three UK Law Commissions worked together jointly on a review of the regulatory arrangement for health care

³³

https://www.scottishlegalcomplaints.org.uk/media/65408/slcc_response_to_the_scottish_government_s_consultation_on_the_licensed_providers_regulatory_scheme_proposed_by_the_law_society_of_scotland.pdf

³⁴ http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/super-complaints/oft946.pdf

³⁵ https://www.scottishlegalcomplaints.org.uk/media/56692/slcc_response_to_law_society_of_scotland_pofr_consultation.pdf

professionals, covering nine regulators, 32 professional and 1.44 million individual registrants.³⁶ Many of the issues of historic and organic growth also affected legalisation in this area, and lack of consistency across governance, process, sanctions, and approaches led to inconsistencies between different branches of healthcare. Much of the research, consultation discussion, and drafting is highly relevant to the issues faced in the legal sector, giving us a head start in relation to what might be possible.

3. Ensuring compensation is received

Our figures in relation to the Master Policy came from the most recent annual report we were able to access.³⁷

Appendix 4 of this document provides citations on how the issue of taxation has been discussed over recent years.

4. Focussing on high risk areas

The figures on key areas of risk come from our own annual report. The figures cited are from the 2014/15 annual report³⁸, but are broadly consistent over the seven published years of data we have.³⁹

These key trends are seen in many other jurisdictions, for example New South Wales⁴⁰ and their Office of the Legal Services Commissioner,- the organisation on which the original plan for the SLCC was based.

The interim OFT report on England and Wales (July 2016, page 11) also notes that regulation is not well risk focussed, being disproportionate in some areas (for example, regulating all activities provided by a firm to the same standard whether they are 'reserved' or not, and where others can provide the service through unregulated models without apparent increased risk to consumers).⁴¹

5. Applying the consumer principles

As noted in our main paper, The Consumer Panel of the Legal Services Board in England and Wales has published a guide for regulators on '*The consumer interest: Using consumer principles*'⁴², to encourage thinking in this area.

The Panel has also published : '*Recognising and responding to consumer vulnerability: A guide for legal services regulators*'⁴³. This helps focus debate about the responsibilities of a regulator across a diverse population with vulnerable members and individuals with legally recognised 'protected characteristics'.

A further point to make in this area is that some legislation has a requirement for an accompanying 'plain English' guide to be provided to all rules, regulations and processes used by an organisation. The SLCC's Consumer Panel's response⁴⁴ to government in relation to the approval of a new regulator under the Legal Service (Scotland) Act 2010 flagged that no one is currently responsible for consumer education in relation to the complex regulatory models. This means the average consumer may struggle to understand the pros and cons or the different types of regulated body. If further complexity is created there will be an even greater need for consumer information.

³⁶ <http://www.lawcom.gov.uk/project/regulation-of-health-and-social-care-professionals>

³⁷ MASTER POLICY FOR PROFESSIONAL INDEMNITY INSURANCE - THE LAW SOCIETY OF SCOTLAND – Annual Report 2015

³⁸ https://www.scottishlegalcomplaints.org.uk/media/62999/slcc_annual_report_2014-15_december_15.pdf

³⁹ <https://www.scottishlegalcomplaints.org.uk/resources/annual-report-accounts.aspx>

⁴⁰ <http://www.olsc.nsw.gov.au/>

⁴¹ <https://assets.publishing.service.gov.uk/media/577f76daed915d622c0000ef/legal-services-market-study-interim-report.pdf>

⁴²

<http://www.legalservicesconsumerpanel.org.uk/ourwork/ConsumerEngagement/documents/UsingConsumerPrinciples2014.pdf>

⁴³

http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Guide%20to%20consumer%20vulnerability%202014%20final.pdf

⁴⁴ https://www.scottishlegalcomplaints.org.uk/media/65455/slcc_consumer_panel_-_response_to_licensed_providers_regulatory_regime_consultation_-_17_may_2016.pdf.

6. Learning from complaints, regulating risk

In our main paper we cite The 'Better Regulation Executive' which sets out *five principles of good ('right touch') regulation*⁴⁵. These are supplemented by a sixth in the approach recommended by the Professional Standards Authority (formerly the CHRE), an expert body, overseeing regulation of health professionals in its seminal paper on '[right touch](#)'⁴⁶ regulation in 2010.

Both these papers are worth considering, and using as a framework for consultation with the profession and public about the future regulation of legal services.

Other issues - Complaints information and comparison websites

The future role of disruptive technology, and how legal regulation will engage with that, needs to be considered.

For some time leading commentators, such as Richard Susskind,⁴⁷ have suggested, perhaps somewhat melodramatically, that robots and artificial intelligence will one day start taking the place of lawyers.

This could seem remote, but in Spring 2016 we saw the announcement that a major law firm was investing in IBM's AI Ross technology⁴⁸: In June of the same year we saw news that an artificial-intelligence lawyer 'chatbot' had helped successfully contested 160,000 parking tickets across London and New York for free.⁴⁹

In our main paper we used the example of comparison websites. We are starting to see bodies engage with comparison and feedback sites for this reason, and driven by the consumer principles around information for consumers to inform buying choices. The Legal Services Board in England and Wales⁵⁰ is now, as part of its strategy, examining how comparison websites might be encouraged in the legal sector, and what barriers could be preventing their evolution in legislation and regulation.

In the interim OFT report on England and Wales (July 2016) places a key focus on the issues around, and opportunities to improve, consumer information on price and service quality available prior to purchasing decisions and is considering the use of remedies within its power to encourage this.⁵¹ If this course of actions was followed, Scotland would need to consider whether action needed taken for Scottish legal consumers.

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<http://webarchive.nationalarchives.gov.uk/20100407162704/http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf>

⁴⁶ <http://www.professionalstandards.org.uk/docs/default-source/psa-library/right-touch-regulation.pdf?sfvrsn=0>

⁴⁷ The End of Lawyers? (2008); Tomorrow's Lawyers (2013); and with Daniel Susskind, The Future of the Professions: How Technology Will Transform the Work of Human Experts (2015)

⁴⁸ <http://www.rossintelligence.com/>

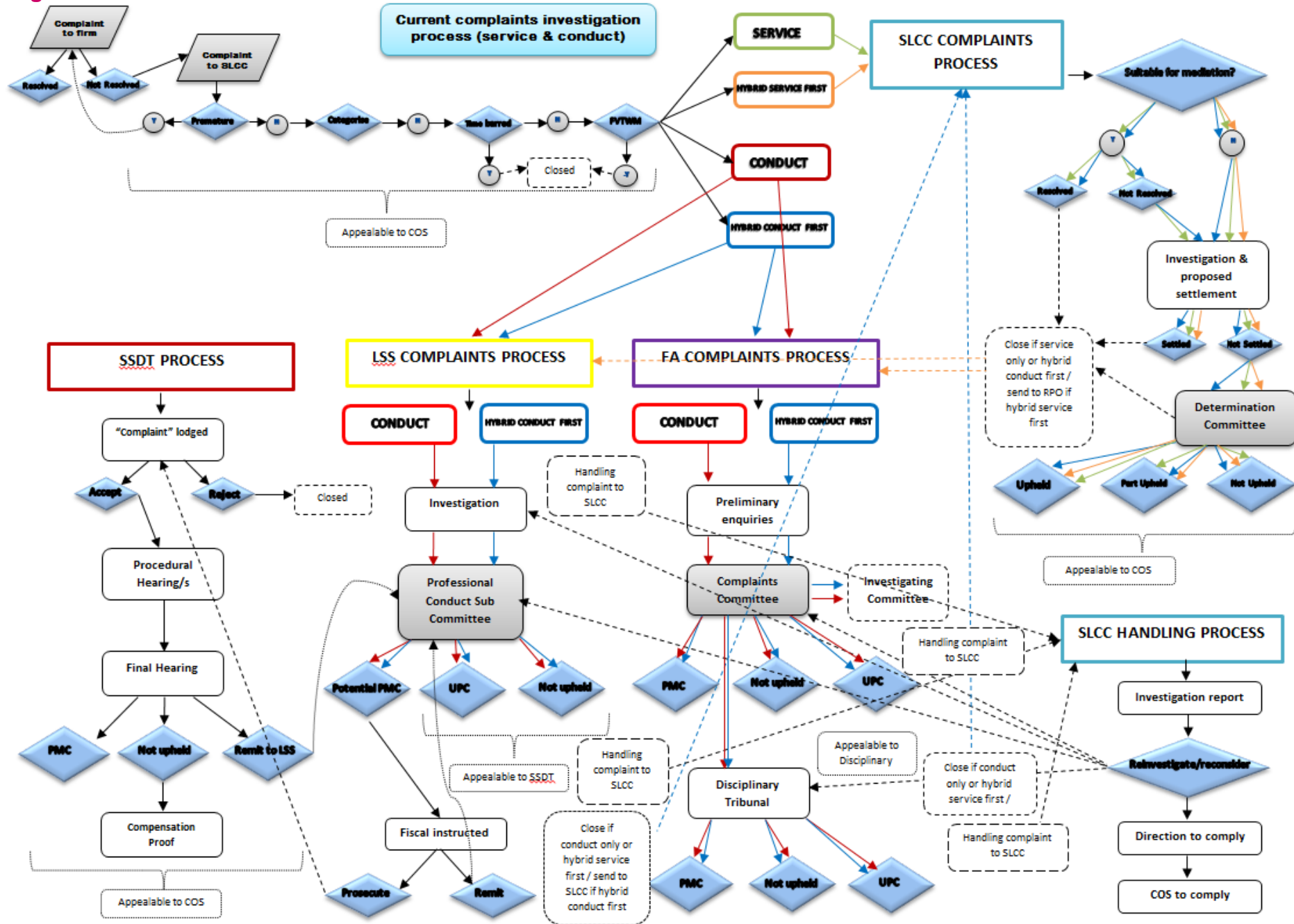
⁴⁹ <https://www.theguardian.com/technology/2016/jun/28/chatbot-ai-lawyer-donotpay-parking-tickets-london-new-york>

⁵⁰ http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2015/The_Strategy_2015_18.pdf

⁵¹ <https://assets.publishing.service.gov.uk/media/577f76daed915d622c0000ef/legal-services-market-study-interim-report.pdf>

APPENDIX 6 – THE CUSTOMER JOURNEY THROUGH COMPLAINTS

Diagram



Glossary on following page

Glossary

Term	Brief Description
ACA	Association of Commercial Attorneys
Categorise	Is the complaint service, or conduct, or does it have elements of both?
Conduct	A serious issue, which could question a person's fitness to practice. Likely to lead to a finding of UPC or PMC (see below).
Conduct	This covers UPC and PMC
COS	Court of Session
DC	Determination Committee
FA	Faculty of Advocates
FVTWM	Frivolous, Vexatious or Totally Without Merit – statutory test
Hybrid	A complaint that constitutes both a conduct and service complaint
Hybrid – conduct first	Where there are both service and conduct complaints, and we allow the professional body to investigate first, and then we consider the service elements
Hybrid – service first	Where there are both service and conduct complaints, and we decide to investigate first, than allow the professional body to investigate
IPS	Inadequate Professional Service
LSS	The Law Society of Scotland
PMC	Professional Misconduct – the higher level of conduct (likely to lead to, for example, large fine/removal from practice)
Premature	Has the lawyer had a chance to resolve the complaint?
RPO	Relevant Professional Organisation
Service	A failure in the service provided to a client, but not one which questions the core integrity of the individual lawyer. Likely to lead to a finding of IPS (see above).
SLCC	Scottish Legal Complaints Commission
SSDT	Scottish Solicitors Discipline Tribunal – an independent tribunal under the supervision of the Lord President
Time barred	For service and conduct there are different time limits, calculated from different points in the client/lawyer relationship. If a complaint is older than this limit it will only be admitted in exceptional circumstances
UPC	Unsatisfactory Professional Conduct – the lower level of conduct (likely to lead to, for example, small fine/censure)