



Law Society  
of Scotland

# Consultation Response

Consultation on a consumer body for Scotland

September 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Consumer Law sub-committee, together with our Competition Law sub-committee, welcomes the opportunity to consider and respond to the Scottish Government consultation on establishing a consumer body for Scotland.<sup>1</sup> The committees have the following comments to put forward for consideration.

## General remarks

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We welcome and support the proposal to establish an independent consumer body in the form of Consumer Scotland which will represent and promote the interests of Scottish consumers.

The creation of Consumer Scotland presents the opportunity to create a genuinely consumer-centric independent body, which is dedicated to identifying and understanding consumer harm and which has the objective of promoting policy led initiatives to protect and enhance consumer rights and which recognises and considers jurisdictional differences from the wider UK consumer market. In particular, we would advocate a more comprehensive advice service than is offered at present. Often a consumer will face more than one problem: it is important that advice takes account of all relevant factors if a proposed solution is to be effective. A coordinated approach could bring far greater benefits to consumers.

We also consider that it can be difficult to navigate the range of consumer bodies. Creation of a “one-stop-shop” and effective signposting to the advice, or information required could also assist consumers and empower them to exercise their rights more effectively.

In addition to disseminating information to consumers, we also consider that Consumer Scotland could play an important role in gathering, collating and analysing data in collaboration with existing consumer

<sup>1</sup> <https://consult.gov.scot/energy-and-climate-change-directorate/establish-a-consumer-body/>

bodies. This could facilitate more targeted action to improve outcomes for consumer by better identifying areas of concern and key themes to be taken forward.

More generally we welcome many of the proposals set out in the consultation paper, however, we consider that additional information is needed on a number of topics before we can comment further.

## Comments from a regulatory perspective

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One of the benefits we envisage is that Consumer Scotland will provide sectoral regulators, such as ourselves, with a central point of contact to discuss consumer matters such as proposed initiatives and consumer focused projects which will help to ensure that the consumer perspective is fully and carefully considered before further development. This is an option which is currently lacking in Scotland. Therefore, as the professional body for Scottish solicitors with a statutory duty to protect and promote the interests of consumers,<sup>2</sup> we look forward to working closely and engaging with Consumer Scotland to consider, develop and promote consumer interests in relation to the legal services market.

In 2014 we supported the Scottish Legal Complaints Commission (SLCC) in the creation of its consumer panel. This came into existence in 2015<sup>3</sup>, primarily established at that time with the objective of being a representative voice in the legal services market on behalf of consumers and in relation to the functions of the SLCC, with its Terms of Reference clearly set out within legislation.<sup>4</sup> At that time there was no other body with the objective of representing the interests of consumers in relation to complaints within the Scottish legal sector. However, we have noted that the Consumer Panel is, in our view, increasingly undertaking work which may go beyond the SLCCs core function as a complaints handling body.

We understand that the new proposed Consumer Scotland will have a wider remit than that of the SLCC Consumer Panel in relation to consumer legal services, with greater statutory powers, increased prominence, clearer objectives, greater transparency and independence. We understand it will be staffed by experts in the relevant markets. This will all be vital to the success of the new Consumer Scotland and is to be welcomed.

With the creation of Consumer Scotland and considering the greater powers which this new consumer body will have, we suggest that it will not be necessary to have two separate consumer focused organisations within the legal sector, in the form of the SLCC Consumer Panel and Consumer Scotland. To have two bodies may lead to duplication/overlap of work, confusion to the consumer, inconsistency, differences in policy and views etc. Therefore, we envisage that the SLCC Consumer Panel would either cease to operate or focus more closely on considering matters relating to core functions of the SLCC. If the

<sup>2</sup> Legal Services (Scotland) Act 2010 section 1(b)

<sup>3</sup> This was established under provisions of the Legal Profession and Legal Aid (Scotland) Act 2007.

<sup>4</sup> [https://www.scottishlegalcomplaints.org.uk/media/57840/slcc\\_consumer\\_panel\\_-\\_terms\\_of\\_reference.pdf](https://www.scottishlegalcomplaints.org.uk/media/57840/slcc_consumer_panel_-_terms_of_reference.pdf)

latter is to be the case, we would welcome clarification on how the two separate consumer bodies will interact to avoid these potential issues.

We note that it was originally suggested that any newly created consumer body would adopt the role of a consumer ombudsman, not dissimilar to the model adopted in other EU countries, such as Sweden and the Netherlands. However, the refined proposals make no reference to the ombudsman function and it is not clear why it has been decided not to carry this forward. See further our response to question 6.

The proposals are silent upon how Consumer Scotland will be funded. We are presuming that this will be publicly funded and there would be no funding reliance from the relevant markets falling under the Consumer Scotland remit. It is crucial that enough resources and public funding is made available for Consumer Scotland to develop and be maintained so as to proactively and effectively operate, demonstrating its commitment to consumer interests. Only with enough and continued resource and funding can there be certainty that the core functions and objectives, as proposed, will be delivered with consumer and market confidence advanced and upheld.

We also note that the consultation makes reference to the unregulated legal services market and correctly states that there has been little or no research to investigate the extent of this sector within the legal market and the impact this has on the consumer. We have, on many occasions and most recently in our response to the independent review of legal services,<sup>5</sup> expressed our concerns regarding the unregulated market. We believe that the unregulated provision of legal services poses a significant risk to consumer protection and confidence. For example, there is no statutory requirement in the unregulated sector for professional indemnity insurance should something go wrong. By contrast, a legal service provider regulated by the Law Society offers the benefit of both the statutory Client Protection Fund and professional indemnity insurance requirements, including the Master Policy. Those consumers receiving services from other regulated professionals, such as accountants, will have the protections afforded and required by the relevant regulator.

Should the consumer have any issue with the service they have received from an unregulated provider or if something manifests itself which, in the view of the consumer, raises concerns about the conduct of the provider, then there may not be any route of complaint or redress. An unregulated provider may have a complaints process, but they are not obliged or required to do so. A regulated provider will provide the consumer with a course of redress, either through the regulating professional body or, in the case of a solicitor or regulated law firm, through the SLCC under the provisions of the Legal Profession and Legal Aid (Scotland) Act 2007.

Promoting and protecting the interests of consumers is one of our core objectives and functions, one which is protected in legislation<sup>6</sup> and which is fundamentally important in the legal sector. In this regard, we have

<sup>5</sup> <https://www.lawscot.org.uk/media/359509/case-for-change-revisited-law-society-of-scotland.pdf>

<sup>6</sup> Legal service act 2010, section 1

recently undertaking several initiatives which recognise the changes in the legal market sector and the increased expectations of consumers.

For example, in November 2017 we published our annual plan<sup>7</sup> in which we set out our intended project to respond to the issues identified by the Competition & Markets Authority (CMA)<sup>8</sup> around price transparency and consumer choice in its recent review of the legal services market. Although the focus of the review was the legal services market in England and Wales, we believe that it was important to investigate and consider some of those issues identified as affecting consumer choice in Scotland. In progressing this project, we have carried out research into international practice and consulted with members, stakeholders and consumers and we are now in the process of developing specific proposals for consideration by our Regulatory Committee.

In relation to complaints, over recent months we have been working closely with the SLCC in developing 'quick fix' changes to the current cumbersome complaints process to simplify the system for the benefit of the consumer and legal profession. The current complaints process has been overly complicated by the terms of the Legal Profession and Legal Aid (Scotland) Act 2007. We have recently written, jointly with the SLCC, to the chair of the review group suggesting interim improvements to the eligibility stage which we believe will significantly improve and speed up the process and which can be introduced through secondary legislation. In the longer term, we made recommendations in our submission to the Legal Services Review<sup>9</sup> which we believe will significantly improve the complaints journey of the consumer.

In relation to the Legal Services Review, we have made substantial submissions setting out our desire, and the need, for a new regulatory framework which will allow for the proactive and effective regulation of the legal services market and legal profession with a central focus on consumer protection and interests.<sup>10</sup>

## Response to questions

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### Q1. Do you have any comments on the consumer landscape in Scotland?

The establishment of a consumer body for Scotland presents the opportunity to strengthen the consumer environment. The consumer landscape in Scotland is constantly evolving as is highlighted in the consultation paper.

In terms of formal consumer disputes, the Scottish Crime and Justice Survey 2014-15, the last year for which civil justice data is available, indicated that 7% of people in Scotland had faced legal problems with

<sup>7</sup> <https://www.lawscot.org.uk/about-us/strategy-reports-plans/annual-plan/>

<sup>8</sup> CMA Legal Services Market Study <https://www.gov.uk/cma-cases/legal-services-market-study> (accessed 15 March 2018)

<sup>9</sup> <https://www.gov.scot/About/Review/Regulation-Legal-Services>

<sup>10</sup> <https://www.lawscot.org.uk/media/359509/case-for-change-revisited-law-society-of-scotland.pdf>

“money finances or anything paid for” in the previous three years; further 3% of people in Scotland had experienced legal problems with “faulty goods/services”. Of all the people who had faced civil law problems, 21% had or planned to contact a Citizens Advice Bureau and 19% a solicitor. The number of people facing consumer issues more widely (not simply a legal dispute) is likely to be far higher.

As we have commented previously, access to justice, access to services (and goods through online purchases), and social inclusion are increasingly predicated on internet access.

However, whilst the general public are more computer literate, as at April 2018 we still have 5% of homes and businesses in Scotland unable to access fibre broadband despite the general success of the Digital Scotland Superfast Broadband project.<sup>11</sup> This undoubtedly puts those in the remaining 5% at a significant disadvantage. Further, there are parts of the population who despite having access to fibre broadband remain unlikely to be able to utilise internet advice services, most notably the elderly and financially vulnerable.

We also note that courts and tribunal services are increasingly moving to online systems, for example employment tribunal cases are almost exclusively online. Individuals and businesses seeking access to justice or even wishing to defend a claim against them will therefore require a good internet connection.

However, it is not only formal legal processes for seeking redress which rely on technology: many company complaints procedures are handled through digital channels and can facilitate cheap and effective resolution of potential disputes.

We are also concerned about wider social questions around inclusion where so many aspects of daily life rely upon internet access. This is not just a question of access to private goods and services but as outlined above can include access to justice. As outlined in the consultation document itself, there are many areas of life where online access is a necessity and some services – eg online banking – can in fact be more crucial to those in more remote communities.

There is also a significant volume of information available online which may help inform consumer choices, for example by facilitating comparison between goods or services providers. The online dimension of the consumer environment is therefore an important one to bear in mind.

Access to justice is a key concern for us. In our response to the Scottish Government’s Independent Strategic Legal Aid review in 2017, we noted that independently commissioned research had identified a risk that people in rural areas who were eligible for legal aid would not be able to find solicitors to provide advice. We cautioned that if steps are not taken to remedy this it could result in a two-tier justice system. Where it is not possible to obtain advice in person easily, it is perhaps even more important to have access to remote advice to fill the void.

The independent legal aid review, in its February 2018 report, Rethinking Legal Aid, outlined the landscape for the provision of advice and representation to people across Scotland. Citizens Advice Bureaux, Shelter

<sup>11</sup> <https://beta.gov.scot/news/95-percent-broadband-coverage/>

and other organisations across the third sector provide advice to the general public and vulnerable groups, while court or tribunal representation largely conducted by solicitors under the legal aid scheme. The review highlighted the need for greater coordination between the various agencies and organisations involved in the provision of advice and representation, for instance, through embedding solicitors in third sector organisations with significant civil caseloads, building more effective referral networks, establishing an online and telephone gateway service and ensuring a ‘any door will do’ approach to accessing such services. It was recognised that the current system of legal aid is overly burdensome procedurally in getting to a position where oral advocacy is available. The financial test for determining whether someone qualifies for legal aid in full or part is overly complicated. If the Scottish Government has a genuine desire to provide more holistic advice services one of the first areas of focus should be making court advocacy for the consumer more accessible and more straightforward procedurally. Effective funding of legal aid and the advice sector will be crucial to addressing this challenge.

## **2. Do you agree with the proposed functions of Consumer Scotland?**

The proposed functions of Consumer Scotland are laudable however, greater clarity is needed as to the precise scope and remit of the body. We note that bodies such as the CMA and Financial Conduct Authority (FCA) are tasked with achieving specific outcomes: this makes their respective purposes clearer. This allows them to be held to account in meeting their responsibilities and also provides demarcation where necessary to avoid duplication and conflict.

Further detail is needed as to how Consumer Scotland would interact with organisations such as Citizens Advice Scotland (CAS), the CMA and those dealing with trading standards within councils. Close collaboration with the CMA will be particularly important to ensure effective sharing of information and avoid unnecessary duplication of efforts. In this regard we also note the CMA’s recently expanded presence in Scotland, which may facilitate closer cooperation.

We are also concerned that the consultation does not address the issue of trading standards funding, which has reduced over recent years.

It is important to ensure that there are resources at local level for feeding issues into the new body to direct the issues it focuses on. Anecdotally the reliance on CAS volunteers as the primary mode of intelligence gathering has not been successful. It would be helpful if local authorities were also involved in gathering information identifying areas of harm.

See further comments in relation to question 3 below.

## **3. Which powers and duties would you like Consumer Scotland to have, in order to carry out its proposed role?**

Before considering what powers and duties Consumer Scotland should have, if CAS are to continue to provide advocacy services this needs to be better resourced in order that the court advocacy service is able to adequately represent the interests of those who require the service, in addition to broader advocacy investigations into energy suppliers for example.

It is also not clear how it is proposed that remedies should be conferred. Effective, affordable remedies are an essential part of consumer access to justice. The organisation must have powers to ensure that essential changes are brought about if it is to be effective, particularly in the absence of enforcement powers of its own.

It would be useful if Consumer Scotland had the power to refer issues to regulators for further investigation in parallel to the way in which the Scottish Government is already empowered to refer competition cases to the CMA. This type of power could apply to eg the Trading Standards Authority or other regulators as well as the CMA and might be a way of giving Consumer Scotland “teeth”. A similar system could be introduced in reporting back to the Scottish Government where consumer issues would be better dealt with by, for example, infrastructure provision.

We note the socio-economic duty under the Equality Act 2010, which could be applied to Consumer Scotland as a public body. This duty to reduce poverty and inequality may influence the types of consumer issues and activities that the organisation prioritises, such as those involving vulnerable consumers.

#### **4. What are the criteria that would constitute a specifically Scottish consumer issue?**

It may be difficult to assess what would constitute a specifically Scottish consumer issue. However, the higher proportion of rural populations and island communities in Scotland may highlight issues which can be shown to affect the Scottish population particularly, more so than the rest of the United Kingdom.

Examples include delivery of parcels and access to broadband, which is of increasing importance in terms of access to goods and services, access to information, enforcement of rights and avoiding social exclusion.<sup>12</sup>

It would be worthwhile considering the geographical areas within Scotland more generally, particularly those where there are higher rates of poverty, and then looking at whether communities in those areas are faced with particular issues which could be alleviated with a focus by Consumer Scotland - for instance whether the use of pay day loans and high cost credit could be reduced by a more inclusive proactive approach to supporting local credit unions and my giving consumers information about the other types of credit which are available.

<sup>12</sup> See further [https://www.lawscot.org.uk/media/10569/cons\\_comp\\_rur\\_tech\\_iss-response-to-broadband-uso-consultation-on-design.pdf](https://www.lawscot.org.uk/media/10569/cons_comp_rur_tech_iss-response-to-broadband-uso-consultation-on-design.pdf); <https://www.lawscot.org.uk/media/359579/rur-comp-digital-connectivity-in-scotland-inquiry-final.pdf>

## 5. Which criteria might Consumer Scotland consider when assessing the level of harm needed to be reached before an investigation is pursued?

We have identified the following criteria, which should be considered when assessing whether an investigation should be pursued:

- Materiality of harm
- Number of people affected
- Level of vulnerability of those affected
- Ability of consumers to take proactive steps to mitigate harm

The materiality of harm should be assessed from the perspective of those actually affected rather than looking at eg the sums of money involved in the abstract. In this context it may be particularly relevant to look at poverty-related issues such as fuel poverty (eg reliance on power cards which are less cost effective but easier to manage for those on tight budgets) or access to internet (as those without broadband access may find it more difficult to look for better prices from other providers).

We note that it may be difficult to identify lack of consumer choice where this is the harm suffered as it is not a numeric calculation: this should be borne in mind when carrying out investigations.

The CMA's prioritisation principles<sup>13</sup> and the proposed revised strategic steer may also be of assistance in determining the criteria to be applied. It has also carried out work around vulnerable consumers which may similarly prove helpful.<sup>14</sup>

## 6. Are there additional functions you think Consumer Scotland should have to allow it to deliver impacts for consumers in the current landscape?

As referred to above, the idea of Consumer Scotland performing an ombudsman function had previously been discussed. One function which Consumer Scotland might perform in its advocacy role would be to consider particular complaints and look at taking these forwards on behalf of consumers, although further consideration would need to be given as to how this would operate in practice.

We are not aware of any other additional functions which would allow Consumer Scotland to deliver impacts. This should be kept under review so that new functions could be granted if appropriate in future.

<sup>13</sup> See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/299784/CMA16.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf)

<sup>14</sup> <https://www.gov.uk/government/news/cma-takes-action-to-support-vulnerable-people>; <https://www.gov.uk/government/publications/vulnerable-consumers> ; <https://www.gov.uk/government/speeches/addressing-the-challenges-that-vulnerable-consumers-face>

## **7. Are there any additional functions Consumer Scotland should have that will enable it to adapt and respond to future consumer challenges?**

See response to question 6 above.

## **8. What are your views on the current consumer advice system? How could it be strengthened?**

Many aspects of the current consumer advice system work well. However, anecdotally it has been suggested that the system is not as “joined up” as it might be. Benefits might be realised from greater sharing of information between organisations.

From a consumer perspective, we also consider that a one-stop shop, for example a consumer advice portal or general consumer helpline could be helpful to signpost consumers to the advice they need.

We also consider that the current consumer advice system would benefit from increased funding.

## **9. What are your views on how the Scottish Government could improve how it commissions and funds advice to individuals?**

We highlight the recent independent strategic review of legal aid, and the recommendations made around funding of advice and representation services. We believe that it is important that the legal and advice sectors have sustainable funding to be able to provide access to justice to people across Scotland.

## **10. How can advocacy develop greater capacity to bring change for consumers?**

The effectiveness of advocacy will depend to a significant extent on the resources available.

## **11. What are your views on whether there should be a duty on public authorities to consider the impacts on consumers of policies or decisions?**

We believe that this is an issue requiring further consideration. There are already a number of factors for public authorities to consider in the exercise of their decision-making, including, recently and for some, socio-economic inequality. Whether individuals interacting with public authority services would be included in such consideration, as ‘service users’ or consumers, may also merit further consideration.

## **12. Beyond the actions set out in section 2, how should Scottish Government use its resources and powers to improve outcomes for consumers?**

We welcome the fact that the Scottish Government is “determined to build a fairer Scotland, one where inequality is reduced and inclusive economic growth is the norm.” Inclusivity can involve extending the transactional function of contract to people at present marginalised, to let them better participate in economic and consumer activity. The modern trend in business to consumer contracts is to shift focus from the technicalities of entering and being totally bound by often complex contracts, towards regimes of consumer protection and contract fairness, including having the terms and effects of contracts prescribed by law. This must go much further to achieve full access, on fair terms, to goods and services for consumers who encounter barriers. Obvious elements include insistence upon easy-read language where contracts are in writing. It should be recognised that people with limited capabilities, who may sometimes have very limited means, have even greater need to be able to transact safely, effectively and fairly. A body such as is proposed could and should be a driver in developing greater transactional inclusivity.

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