



Law Society
of Scotland

Stage 1 Briefing

Consumer Scotland Bill

January 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 has considered the Consumer Scotland Bill from a public policy perspective and we have also considered it from an organisational perspective in our capacity as a regulator. We previously responded¹ to the Economy, Energy and Fair Work Committee's *call for written views on the Consumer Scotland Bill*² and note the publication of their Stage 1 Report.³ We have the following comments to put forward ahead of the Stage 1 debate.

Comments on the Bill

General comments

We support the overall objective of the Bill but do not consider that the Bill gives sufficient clarity as to how the new Consumer Scotland will operate and, in particular, how it will interact with existing consumer bodies and the regulators which are tasked with taking enforcement action to protect consumers in their respective areas.

We understand from colleagues at the Scottish Government that the intention is that Consumer Scotland will be able to provide an overview and coordination function to collate and analyse data from various sources across the Scottish consumer landscape. This will drive its activities in relation to the two pillars of

¹ https://www.lawscot.org.uk/media/363619/lss-response_consumer-scotland-bill_september-2019.pdf

² <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/112287.aspx>

³ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EEFW/2019/12/28/Stage-1-Report-on-the-Consumer-Scotland-Bill/EEFWS052019R13.pdf>

advocacy and advice. In our response to the Scottish Government's consultation last year,⁴ we identified the need for a body to undertake this function and considered that Consumer Scotland would be ideally placed to take this forward. We are therefore enthusiastic about the prospect of a body to take on this function and facilitate collaboration between stakeholders and a more coordinated approach to tackling consumer issues. We consider that this should be set out in more detail in the Bill.

Achieving collaboration and avoiding duplication

The Bill does not provide sufficient clarity as to what Consumer Scotland will actually do. The way in which Consumer Scotland will fit into the consumer landscape and the need to work in collaboration with other bodies should be set out more clearly.

We support the idea Consumer Scotland should work closely with other bodies but it is not clear how streamlining of services will work in practice. The landscape can become clouded in any situation where there are so many interested bodies; we are concerned that there is a danger of duplication of functions which could lead to unnecessary and costly duplication of efforts. For example, it would be inefficient for Consumer Scotland to carry out a market investigation which the CMA was already pursuing, particularly given the CMA's enforcement powers.

While not a matter for legislation, it would be helpful for Consumer Scotland to be invited to join the Consumer Protection Partnership (along with the CMA, BEIS, CAS, CAB, CMA etc), which is one of the mechanisms already in place to prevent duplication in the landscape.

Furthermore, we note that while the Bill grants wide information-gathering powers to Consumer Scotland, there is no general obligation for reciprocal cooperation. While this may not prove problematic in practical terms, in principle we consider that a duty to this effect could be helpful in reinforcing the importance of collaboration in the consumer sphere.

Sharing information

We believe that the information sharing function should be addressed more specifically in the legislation. We note that Consumer Scotland has been granted the power to demand information from other bodies (see comments above) but note that there is no reciprocal gateway to help other authorities' investigations. We consider that Consumer Scotland should be enabled/obliged to share information with other bodies, including regulators and the Scottish Government, in order to create a more collaborative, efficient and effective ecosystem of information-sharing around consumer issues.

Relationship between Consumer Scotland and the Law Society

In our capacity as a regulator, we have identified a further role, which we would be keen to see added to the formal remit of Consumer Scotland. While we note that Consumer Scotland has a formal duty to

⁴ https://www.lawsco.org.uk/media/361114/cons-comp-law-society-response-to-consumer-scotland-consultation_2018.pdf

provide advice to the Scottish Government and power to request information from other regulators, there seems to be no specific duty on Consumer Scotland to work with regulators in return. In our regulatory capacity, we consider that the expertise of Consumer Scotland could prove particularly beneficial. For example, as we develop rules, guidance and regulatory approaches to address an evolving legal services market, it would be helpful to approach Consumer Scotland for insight and feedback from a consumer perspective. As we previously set out in our response to the Scottish Government's Consultation on the creation of Consumer Scotland,⁵ one of the benefits we envisaged is that Consumer Scotland would 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 and we believe that it would benefit consumers and regulators alike to expressly include a responsibility on the part of Consumer Scotland to actively engage with sector regulators when requested to do so. This would also demonstrate a commitment to help drive consumer interests.

Consumer Scotland's powers

Providing advice

We consider that the powers to provide advice to and represent consumers are appropriate. We also consider it is helpful that Consumer Scotland may advise the Scottish Government. In terms of advocacy we note that there is no obligation on the Scottish Ministers to respond to the reports which Consumer Scotland produces. The body's ability to make a substantive difference to the experience of Scottish consumers will therefore depend on its ability to build strong relationships with Government and other rule-makers.

Collecting information and conducting investigations

In principle we support powers to collect information, organize research and carry out investigations but we are concerned that the scope of those powers as set out in the Bill are not sufficiently well defined, both in terms of procedural safeguards and in terms of the remit of Consumer Scotland itself. In this latter regard we note that devolved competence is limited to advocacy and advice: we see that power to gather information around consumer experience, available consumer redress procedures and remedies etc from both consumers themselves and businesses/regulators will be an important tool for Consumer Scotland in understanding how best to advocate for improvements on behalf of consumers and to give practical and targeted advice.

In relation to the information-gathering and investigation powers, it is of paramount importance that businesses and individuals can pass information to Consumer Scotland on a confidential basis. This will also help ensure trust and collaboration. While it may be appropriate for Consumer Scotland to collect certain information in order to fulfil its functions, this does not mean that the information should be made

⁵ *Ibid*

public. Safeguards must be put in place to ensure that certain types of data – particularly eg sensitive commercial data – remains confidential. When considering the model of CMA investigations we note that the Enterprise Act sets out specific safeguards. These protections must be replicated in the context of Consumer Scotland investigations. Without this, Consumer Scotland could face resistance to requests for information, which could otherwise be shared without raising concerns. On this note, clarification is needed as to whether confidential information provided to Consumer Scotland can be protected from FOI requests where its release would genuinely not be in the public interest.

Modifying Consumer Scotland's functions

In relation to the power to modify Consumer Scotland's functions set out in s.19(1), these are not well-defined and it would be clearer if their scope were clarified by connecting the potential for amendment to the overarching consumer protection objective. We welcome the requirement to consult appropriate persons. We also consider that any regulations introduced under this section should be subject to the super-affirmative procedure and should be capable of amendment during the passage of the instrument.

Filling the gaps

In practical terms, it is essential to recognize that Consumer Scotland will only be able to deliver the proposed outcomes if it is adequately and properly resourced to carry out proper functions.

We note that there are currently gaps in the support available. It may not be possible to fill those gaps by providing direct advice to consumers; if the problem lies in the fact that there is no remedy, or the remedies available are insufficient, Consumer Scotland will need to influence policy-makers and other rule-makers/enforcers, such as the CMA and sector regulators, to bring about improvements.

In addition, we note that at present the majority of public bodies will not act on behalf of an individual consumer. Any body may be persuaded there is an issue but as a general rule this does not solve the immediate problem for that individual because even those organisations which are able to act do not have sufficient resources to deal with all the individual complaints which may be notified to them. Because of the potential for high costs, consumer rights are rarely enforced by the individuals themselves.

We also note that there is no mandatory ADR process outside regulated industries. There is therefore often a gap between harm identified and allowing individual to gain actual remedy. In this context, we note that under the bill, Consumer Scotland may, but would not be required to, act for individual consumers. Again, we refer to issues around resourcing, although the body may have the power to act, it is not clear when it is anticipated that the power would be used.

In terms of priorities beyond the coordination function identified above, we consider that Consumer Scotland's priorities should be to "fill in the gaps", ensuring that as wide a range of consumer issues as possible are addressed. This would mean focusing on areas which are not already subject to regulation and taking up issues identified by other regulators which are outwith their remit.

Vulnerable consumers

We fully support the creation of a duty to consider the interests of vulnerable consumers. However, we consider that the definition of “vulnerable consumers” could be improved. Although the list is not definitive the current definition appears to mirror older legislation. However, we note that bodies including the CMA and FCA have both published and are carrying out ongoing work in this area which would suggest a definition which better reflects current thinking around consumer vulnerability. In particular we are keen to see acknowledgement of the impact of mental health. Other factors should also be considered such as inclusion of English as a second language and more circumstantial vulnerability, for example in the context of bereavement. It may also be helpful to refer to protected characteristics as set out in the Equalities Act: while not all of these factors necessarily imply vulnerability, they may do so in particular contexts.

Public body duty to consider impact of policies on consumers

Consumer Scotland is not an enforcement body *per se*. Where problems are identified, Consumer Scotland may highlight these to Scottish Government in its role as a consumer advocate. It would also be possible to create a specific mechanism where Consumer Scotland could raise concerns in this context and the relevant enforcement body (eg the CMA or FCA) would then be able to investigate.

Generally speaking, we welcome the principle that a public authority should have a duty to consider consumer interests in making decisions of a strategic nature about how to exercise its functions. However, there is a question of how this interacts with the obligations on public authorities already in existence. Unless and until it is clear what they are, it may be difficult to assess who this obligation might interact with others – for example the obligation on bodies such as OFGEM to give priority to consumer interests – and therefore to assess whether it is a useful power. It may also be helpful to give further consideration to the situation where a local council took a position but had failed to take account of the consumer interest and how this would interact with existing local government legislation. Lastly, we note that the only way to challenge the breach would be by judicial review, which seems a disproportionate remedy where other accountability mechanisms could be simpler and more effective.

Statutory duties for designated providers and regulators

We note that sections 8-12 seek to place statutory duties on designated providers and regulators to provide information to Consumer Scotland. More specifically, section 10 seeks to place a duty on designated regulators to take enforcement action to compel designated providers to provide information to Consumer Scotland where the provider has failed to do so in the first instance. For some designated regulators, sections 8-12 may raise a number of challenges where for instance there is an existing regulatory and legislative framework. For example, in the event that the Law Society were to be categorised as a designated regulator and the solicitor profession and practice units as designated providers, there may be challenges in relation to the provisions of the Legal Profession and Legal, Aid (Scotland) Act 2007. The 2007 Act sets out the statutory provisions relating to the functions of the Scottish Legal Complaints Commission (SLCC), the processes around conduct and services complaints against Scottish legal practitioners and the Society’s duties in respect of those. One challenge for example which would need to be clarified is how we would handle a referral from Consumer Scotland where a designated

provider has failed to provide information as required. This would potentially require us to refer this to the SLCC upon receipt as a potential conduct complaint, therefore preventing any further action on our part for a period of time.

It is not clear if consideration has been given to the interaction between existing regulatory functions and those enforcement functions as set out in the Bill. If not, we suggest that this is considered further, in particular the provisions of the 2007 Act.

Creation of a Board

We note that Schedule 1 does not specifically mention the creation of a Board although this is clearly implied. We consider it would be helpful for this to be explicitly provided for in the legislation.

Devolution issues

Consumer Scotland is not a law-making body so it will not be able to change either reserved or devolved laws. While this may limit its ability to bring about improvements in the consumer experience at a general level, its functions are consumer advocacy and advice. The fact that consumer protection powers are reserved to the UK Parliament may make it more difficult in practical terms to persuade the UK Parliament to take action, perhaps particularly where issues are of particular concern to Scottish consumers but do not affect consumers in the UK as a whole, but this should not constrain its ability to exercise its functions to advocate on behalf of consumers in general terms, nor to provide advice.

As we have commented elsewhere, there may be specifically “Scottish” aspects to a particular issue where there is an interaction with the geographic spread of the Scottish population, most often in relation to any disproportionate impact on rural areas. It will be open to Consumer Scotland to highlight these effects and the body may have a stronger voice if its information-gathering powers enable it to provide more robust evidence to support its arguments than other stakeholders might be able to gather.

For further information, please contact:

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