



## Consumer (Scotland) Bill – stage 3

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law.

### General principles

As an organisation, we must have regard to regulatory objectives (set by the Legal Services (Scotland) Act 2010), including protecting and promoting the interests of justice, the consumer interest and access to justice. We support the overall objectives of this Bill, in creating a new consumer body for Scotland.

This body 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 advocacy and advice. In our response to the Scottish Government's consultation last year<sup>1</sup>, 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 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.

### 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,

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<sup>1</sup> [https://www.lawscot.org.uk/media/363619/lss-response\\_consumer-scotland-bill\\_september-2019.pdf](https://www.lawscot.org.uk/media/363619/lss-response_consumer-scotland-bill_september-2019.pdf)



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.

## **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 remit of Consumer Scotland formally, or included as part of its work. While we note that Consumer Scotland has a formal duty to 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, 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.

## **Duty for consultation – designated regulators**

Sections 8 to 12 of the Bill place duties on designated regulators. We believe that the provisions in this section do not take into account the statutory powers available to some regulators. In the case of the Law Society of Scotland, we are the regulator for the Scottish solicitor profession but do not have the powers the Bill anticipates to take effective enforcement action against entities, such as practice units, which may be designated providers. Further issues would arise were Consumer Scotland to make a reference to the Law Society should a designated provider fail to comply with a Section 8 notice. We believe that the Bill could be amended to ensure the Scottish Ministers consult with all proposed 'designated regulators' to better understand the powers available before bringing forward regulations, allowing Ministers to develop regulations which take into account the challenges faced by competing statutory provisions and ensure the policy intent of the Bill is realised.

## **Exemptions from requirement to provide information**

We have also suggested that amendment could be made to section 12 of the Bill. This section aims to set out in regulations exemptions from the requirement to provide information. We have suggested that there could be greater certainty around this section, particularly around the treatment of information that would be covered by legal professional privilege.

Further, 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 public. Safeguards must be put in place to ensure that certain types of data – particularly e.g. sensitive



commercial data – remains confidential. When considering the model of CMA investigations, we note that the Enterprise Act sets out specific safeguards. These protections could 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.

## **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 been carrying out 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. The current Covid-19 situation highlights that vulnerability may also be contextual, with many more now vulnerable currently.