

Response ID ANON-95WV-1YN6-9

Submitted to Legal services regulation reform in Scotland
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Part 1: Strategic Change, Vision and key aspects of the regulatory model

Question 1 From the options listed, how important do you think each of the following principles and objectives are for any future regulatory model for legal services in Scotland?

Question 1 - Protecting and promoting the public interest including the interests of users of legal services:
Very important

Question 1 - Supporting the constitutional principle of the rule of law:
Very important

Question 1 - Promoting independent legal professions and maintaining adherence to the professional principles:
Very important

Question 1 - Improving access to justice including choice, accessibility, affordability and understanding of services by service users:
Very important

Question 1 - Embedding a modern culture of prevention, quality assurance and compliance:
Very important

Question 1 - Working collaboratively with consumer, legal professional bodies, and representatives of legal service providers as appropriate.:
Very important

Question 1 - Embedding the better regulation principles throughout its areas of responsibility (additionally; agility, independence, prevention, improvement, cost consideration of cost, and efficiency).:
Somewhat important

Question 1 - Promoting innovation, diversity and competition in the provision of legal services:
Somewhat important

Question 2 From the options listed, how important do you think each of the following are in supporting the framework of any future regulatory model?

Question 2 - Enable access to justice including choice and diversity:
Very important

Question 2 - Uphold the rule of law and the proper administration of justice:
Very important

Question 2 - Offer accountability in protecting the public and consumer interest:
Very important

Question 2 - Offer accountability to those regulated by the framework:
Very important

Question 2 - Secure the confidence and trust of the public:
Very important

Question 2 - Enable future growth of legal services:
Somewhat important

Question 3 From the options listed, how important do you think each of the following criteria is in a regulatory framework?

Question 3 - Support and promote sustainable legal services, which benefit consumers:
Very important

Question 3 - Agile:
Somewhat important

Question 3 - Risk based:
Very important

Question 3 - Efficient:
Very important

Question 3 - Outcomes based:
Somewhat important

Question 3 - A proactive focus continuous improvement and prevention of failures (which lead to complaints):
Very important

Question 3 - Proportionality:
Very important

Question 3 - An increased focus on independence and accountability:
Very important

Part 2: Regulatory models and landscape (page 1 of 2)

Question 4 To what extent do you agree or disagree with this recommendation?

Not Answered

Please give reasons for your answer:

We agree with certain elements of this recommendation but there are parts of it that we disagree with, namely, that there should necessarily be a regulator which is an entirely separate and independent body, and that it should be responsible for all aspects of regulation mentioned, including entry and possibly standards, as well as activities. It is also not entirely clear here what is meant by accountable to the Scottish Parliament.

Question 5 Of the three regulatory models described, which one would you prefer to see implemented?

Q5 - Of the three regulatory models described above, which one would you prefer to see implemented?:

Option 3: Enhanced accountability and transparency model

Please give reasons for your answer.:

This would involve the least change to the existing model and avoids certain complications from changing the position, and a change of a greater magnitude also does not appear to be necessary.

Question 6 Of the three regulatory models described above, please rank them in the order you would most like to see implemented? 1 most liked to see implemented, and 3 least liked to see implemented.

Q6 - Option 1: Robertson Model:

2

Q6 - Option 2: Market Regulator Model:

3

Q6 - Option 3: Enhanced accountability and transparency model:

1

Please give reasons for your answer.:

Option 3 is our preferable option, as noted above. Option 1 would be our second preference, as if there is to be a move away from the existing model, then it would make sense to have a system with a completely separate and independent regulator, rather than the half-way house of Option 2, which adds unnecessary complications to the system.

Question 7 Please rank in importance the aspects of regulation you would most like to see handled by professional regulatory bodies, through independent regulatory committees? 1 most liked to see handled and 3 least liked to see handled

Q7 - Education and entry:

1

Q7 - Oversight of standards and conduct:

2

Q7 - Complaints and redress:

3

Please give reasons for your answer.:

Education and entry can only be properly decided by the professional body. We have a similar view regarding oversight of standards and conduct, although not perhaps to the same degree. We consider that there is the greatest argument for complaints and redress to be dealt with independently from the professional body, in part because it would likely be the greatest source of criticism and lack of faith in the system, were it to be dealt with by the professional body itself.

Question 8 Of the three models described above, please rank in importance the aspects of regulation you would most like to see handled by a body independent of, and external to the professional regulatory bodies, and of government? 1 most liked to see handled and 3 least liked to see handled

Q8 - Education and entry:

3

Q8 - Oversight of standards and conduct:

2

Q8 - Complaints and redress:

1

Please give reasons for your answer.:

See above.

Question 9 Under the Robertson Model, to what extent do you agree or disagree that the professional bodies should have a statutory footing?

Mostly agree

Please give reasons for your answer.:

It would be sensible for the professional bodies to have a statutory footing, as this would provide greater clarity as regards their role in the regulatory system. However, the detail of what the statutory footing would involve is important and it is unclear what that would consist of at this stage.

Question 10 Which of the following methods do you think the final regulatory model should utilise to embed a consumer voice?

Seeking input from Consumer Scotland

Please give reasons for your answer.:

This will probably be the most straightforward and practical approach, in terms of having proper representative views of consumers integrated within the system. It may avoid complexities and practical problems that could arise from the other approaches.

Question 11 To what extent do you agree or disagree that Consumer Scotland should be given the power to make a Super-Complaint in respect of the regulation of legal services in Scotland?

Mostly agree

Please give reasons for your answer.:

Question 12 To what extent do you agree or disagree that a baseline survey of legal services consumers in Scotland should be undertaken?

Mostly agree

Please give reasons for your answer.:

We can see the attraction of this type of work; however, we find it difficult to envisage how it could be done on a practical level.

Question 13 To what extent do you agree or disagree with the Robertson report, that the legislative approach should make clear the role of the Lord President and the Court of Session in the regulatory framework?

Strongly agree

Please give reasons for your answer.:

Clarity is always desirable.

Question 14 To what extent do you agree or disagree that the role of the Lord President and Court of Session in the regulatory framework in Scotland is important in safeguarding the independence of the legal profession?

Strongly agree

Please give reasons for your answer.:

Question 15 Should the Lord President and Court of Session have a 'consultative' role, or 'consent' role with regard to the following potential changes to the operation of any new regulatory framework?

Q15 - Changes to professional rules: practice rules, conduct and discipline?:

Consent role

Q15 - Changes in relation to complaints practice and procedure?:

Consultative role

Q15 - New entrants to the market seeking to conduct of litigation and exercise right of audience?:

Consent role

Please give reasons for your answer.:

We think that there's the strongest case for consent in relation to the third entry here, due to the litigation and right of audience component. We consider that the second entry is more suited to a consultative role, as it doesn't clearly relate to the role or functions of the Lord President or the courts. With the first entry (changes to professional rules), the position is perhaps more nuanced, as some aspects of this, relating to, for example, court rules, practice and conduct, are most appropriately dealt with by a consent role, whereas others may be more suited to a consultative role.

Question 16 To what extent do you agree or disagree that the Lord President should have a role in any new regulatory framework in arbitrating any disagreements between independent Regulatory Committees and the professional regulatory bodies?

Mostly agree

Please give reasons for your answer.:

But it depends upon the precise regulatory framework chosen, as there may be other mechanisms to deal with disagreements.

Question 17 To what extent do you agree or disagree that the Lord President should have a role in the process of appointment of any new 'legal members' to relevant positions, such as regulatory committees, in any new regulatory framework?

Mostly agree

Please give reasons for your answer.:

But, again, this depends upon the precise regulatory framework chosen.

Part 2: Regulatory models and landscape (page 2 of 2)

Question 18 To what extent do you agree or disagree that regulatory committees, as described in the consultation, should be incorporated into any future regulatory framework?

Strongly agree

Please give reasons for your answer.:

This is based on our preferred model going forward.

Question 19 To what extent do you agree or disagree that Regulators should be required by statute to ensure that Regulatory Committees are suitably resourced, with a certain quota of persons being exclusively ring-fenced for dealing with regulation?

Mostly agree

Please give reasons for your answer.:

There should be a duty to suitably resource the committees, but it may not be necessary to have exclusive ring-fencing of persons to deal with regulation.

Question 20 To what extent do you agree or disagree that regulatory functions of Regulatory Committees should be subject to Freedom of Information legislation or requests?

Mostly agree

Please give reasons for your answer.:

We agree, as there does not appear to be a compelling reason why it shouldn't be.

Question 21 To what extent do you agree or disagree that the following aspects of 'fitness to practice' requirements or regulations are appropriate and working well in Scotland?

Q21 - content of the criteria:

Mostly agree

Q21 - frequency of career points where the criteria must be satisfied:

Mostly agree

Q21 - transparency and fairness in decision making:

Mostly agree

Question 22 Are there any changes you would make to each aspect as set out in the previous question?

Please give reasons for your answer.:

With the content of the criteria, we generally agree but it could be considered a little vague.

Regarding the frequency of career points where the criteria must be satisfied, it should be recognised that e.g. on the Diploma in Professional Legal Practice, providers are required to communicate to the Law Society of Scotland any issues which raise questions about an individual's fitness to practise. In addition, there is an ongoing requirement for a person to be a fit and proper person in order to remain a practising solicitor.

For the issue of transparency and fairness in decision making, our answer is correct as far as we are aware, but we do not have the full picture regarding that issue to give a definitive answer.

Question 23 To what extent do you agree or disagree that there should be a test to ensure that non-lawyer owners and managers of legal entities are fit and proper persons?

Strongly agree

Please give reasons for your answer.:

If non-lawyers are able to participate in the owning and managing of legal entities, then they, like lawyers, should be subject to a fit and proper person test.

Question 24 To what extent do you agree or disagree that Legal Tech should be included within the definition of 'legal services'.

Strongly agree

Please give reasons for your answer.:

It should be treated like other legal services, so long as what is being provided constitutes legal services.

Question 25 To what extent do you agree or disagree that those who facilitate and provide Legal Tech legal services should be included within the regulatory framework if they are not so already. If so how might this operate if the source is outside our jurisdiction?

Strongly agree

Please give reasons for your answer.:

So long as what is being provided constitutes legal services.

As regards how it might operate if the source is outside our jurisdiction, the provider should be required to submit to our jurisdiction, otherwise they should not be permitted to operate here.

Question 26 To what extent do you agree or disagree that, not including legal tech may narrow the scope of regulation, and reduce protection of consumers?

Strongly agree

Please give reasons for your answer.:

Question 27 To what extent do you agree or disagree that the inclusion of legal tech in a regulatory framework assists in the strength, sustainability and flexibility of regulation of legal services?

Strongly agree

Please give reasons for your answer.:

Question 28 To what extent do you agree or disagree that the Scottish regulatory framework should allow for the use of Regulatory Sandboxes to promote innovation?

Mostly agree

Please give reasons for your answer.:

With suitable controls and some regulation.

Question 29 To what extent do you agree or disagree that the Client Protection Fund works well?

Not Answered

Please give reasons for your answer.:

In principle, it is a good and necessary component of the system. However, we cannot comment on how it operates in practice at the present time.

Question 30 What, if any, changes should be made to the Fund?

Please give reasons for your answer.:

We are unaware of any compelling reasons to make changes.

Part 3: Legal Services providers and structures

Question 31 To what extent do you agree or disagree that any future regulatory model should incorporate a greater emphasis on quality assurance, prevention and continuous improvement than the current model provides?

Mostly agree

Please give reasons for your answer.:

Question 32 To what extent do you agree or disagree that the rules within the regulatory framework should be simplified with the aim of making them more proportionate and consumer friendly?

Mostly agree

Please give reasons for your answer.:

Making the rules simpler and more proportionate is desirable. We can understand the value of making the rules more consumer friendly; however, the rules are directed towards solicitors and often deal with highly complicated matters, so it may not always be possible or straightforward to make them entirely consumer friendly.

Question 33 Which of the following methods do you think regulatory model should incorporate to provide quality assurance and continuous improvement?

a system of self-assessment for all legal professionals

Please give reasons for your answer.:

Formalising a system of self-assessment seems appropriate. Many legal professionals will already be doing this and it appears sensible from a business perspective, given the desire to retain existing clients and attract new clients.

A peer review system seems undesirable for practical and operational reasons.

This should be seen in the context of a system that has e.g. CPD requirements.

Question 34 To what extent do you agree or disagree that there should be a definition of legal services?

Strongly agree

Please give reasons for your answer.:

Given that there is a distinction between who can and cannot provide legal services, a definition is sensible. However, we appreciate that there may be difficulties in formulating the definition.

Question 35 To what extent do you agree or disagree that the definition of legal services should be set out in primary legislation?

Strongly agree

Please give reasons for your answer.:

If there is to be a definition, then including it in primary legislation seems appropriate. Given that we do not think it will be necessary to change the definition frequently, using primary legislation is preferable to secondary legislation.

Question 36 To what extent do you agree or disagree that there should be no substantial change at this stage to bring more activities within the scope of those activities "reserved" to solicitors or to remove activities?

Mostly agree

Please give reasons for your answer.:

We have not identified additional activities that should be brought within the scope of reserved activities or activities that should be removed. However, we support writing wills and other testamentary documents becoming a reserved activity.

Question 37 To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated?

Mostly agree

Please give reasons for your answer.:

We consider that the regulator should have a role here, but it shouldn't be solely the regulators who determine which activities are reserved. In addition, it is unclear what the consequences would be (in legal terms) where proposals are made to the Scottish Government.

Question 38 To what extent do you agree or disagree that there should be a change such that the title 'lawyer' would be given the same protections around it as the title 'solicitor'?

Mostly agree

Please give reasons for your answer.:

We can understand the desire for providing some protection for the title of lawyer. However, there is a need to allow for certain parties e.g. an academic or a non-practising solicitor to refer to themselves as a "lawyer". The protection regarding the term should be limited to prevent a party holding themselves out as a "lawyer" for the purposes of providing services that only a solicitor or advocate could (legitimately) provide.

Question 39 To what extent do you agree or disagree that the title 'advocate' should have the same protections around it as the title 'solicitor'?

Mostly disagree

Please give reasons for your answer.:

There doesn't seem too much confusion around this or a desire to change the law. The term is also a generally used one. However, there could possibly be specific protection regarding parties referring to themselves as "advocates" and giving the impression that they are able to provide the services which only legal advocates can provide.

Question 40 To what extent do you agree or disagree that the legislation should allow for the protection of other titles in relation to legal services as appropriate?

Mostly agree

Please give reasons for your answer.:

In principle, it seems appropriate to make that provision. No examples are given of the titles that could be so protected, but perhaps paralegals would be an appropriate example.

Question 41 To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which titles to protect?

Mostly agree

Please give reasons for your answer.:

We consider that the regulator should have a role here, but it shouldn't be solely the regulators who can make such proposals. In addition, it is unclear what the consequences would be (in legal terms) where proposals are made to the Scottish Government.

Question 42 To what extent do you agree or disagree that the 51% majority stake rule for Licenced Legal Services Providers should be removed?

Mostly disagree

Please give reasons for your answer.:

While we would support the possibility of employee and community ownership and outside investment there need to be protections, as this is a regulated profession and regulated professionals should have a key stake in the business. As such, we would be hesitant about removing the 51% majority stake rule.

Question 43 To what extent do you agree or disagree that entity regulation should be introduced?

Strongly agree

Please give reasons for your answer.:

We strongly agree with entity regulation, especially if new types of business models are to be used to provide legal services.

Question 44 To what extent do you agree or disagree that all entities providing legal services to the public and corporate entities should be subject to a "fitness to be an entity" test?

Strongly agree

Please give reasons for your answer.:

We strongly agree with the concept, but the wording of the test could be improved for clarity purposes.

Question 45 To what extent do you agree or disagree that, as all lawyers providing legal services will be regulated – entity regulation should engage only those organisations who employ lawyers where those organisations are providing legal services for a profit – with the exclusion that when that legal service is in the context of an organisation whose main purpose is not to provide a legal service (for example banking) then regulation would remain at the level of an individual lawyer only and no entity regulation would apply?

Mostly agree

Please give reasons for your answer.:

We agree that there should only be individual regulation where legal services are only incidental or secondary to the primary activities of the entity. However, there may be some instances in which it is difficult to ascertain whether the primary activities are legal services.

Question 46 To what extent do you agree or disagree that the Scottish Government should commission or facilitate a baseline study to identify the current quantum of the sector's contribution to the economy and to identify those niches in the global market where we might target our efforts?

Mostly agree

Please give reasons for your answer.:

We agree that this would be an interesting study and there are benefits of targeting efforts to grow the Scottish legal sector and expanding its business; however, there may be practical difficulties in undertaking the study and achieving the growth and expansion sought.

Part 4: Complaints and Redress

Question 47 To what extent do you agree or disagree that there should be a single gateway for all legal complaints?

Mostly agree

Please give reasons for your answer.:

This is more straightforward than having multiple systems, whereby a complaint could be made to the wrong place and there might be delays and other complications as a result. However, its success depends upon the correct allocation of complaints thereafter.

Question 48 Dependant on the regulatory model taken forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, where a complaint is generated by an external complainer such as a client, or non-client?

Mostly agree

Please give reasons for your answer.:

We agree that it depends on the model involved.

Question 49 Dependant on the regulatory model take forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, with regard to the investigation and prosecution of regulatory compliance issues?

Mostly agree

Please give reasons for your answer.:

It depends on the model involved.

Question 50 From the complaint issues below please give a preference between the options a) an independent body or; b) a professional regulatory body; who you think should investigate each of the following:

Q50 - Service:

Q50 - Unsatisfactory conduct:

Q50 - Professional misconduct:

Please give reasons for your answer.:

We have not indicated preferences here as the matter is dependent upon the particular model chosen.

Question 51 To what extent do you agree or disagree that there should be a level of redress for all legal complaints, regardless of regulated activity?

Mostly agree

Please give reasons for your answer.:

Our answer is dependent on the level of redress being proportionate.

Question 52 To what extent do you agree or disagree that there should be a single Discipline Tribunal for legal professionals, incorporated into the Scottish Courts and Tribunals Service?

Mostly agree

Please give reasons for your answer.:

It would be more efficient and easier to understand and use the system. However, the position depends upon the model chosen.

Question 53 To what extent do you agree or disagree that any future legal complaints model should incorporate the requirement for the complaints budget to require the approval of the Scottish Parliament?

Mostly agree

Please give reasons for your answer.:

This may help to address some of the current criticisms. However, further details are required regarding what the approval process would involve.

Question 54 From the options listed how important do you think each of the following principles and objectives are for any future regulatory model? Model 1 (Robertson report recommendation)

Q54 pt1 - Uphold the rule of law and the proper administration of justice.:

Very important

Q54 pt1 - Provide access to justice.:

Very important

Q54 pt1 - Operate for the public interests (offer accountability in protecting the public and consumer interest).:

Very important

Q54 pt1 - Have a high degree of public confidence and trust, embedding a modern culture of prevention, continuous quality improvement, quality assurance and compliance. Promote improvements, use information and evidence gathered to identify sector-wide issues.:

Very important

Q54 pt1 - Work collaboratively with consumer and legal professional bodies as appropriate. Encourage companies to act on complaints data. Publish guidance, and provide training to help firms and the sector improve complaint handling. Provide support for 1st tier complaints management (be able to provide guidance on handling).:

Very important

Q54 pt1 - Embed the better regulation and consumer principles throughout its areas of responsibility.:

Somewhat important

Q54 pt1 - Accessible, remove barriers to people seeking the redress they are entitled to. There should be a single gateway and investigation for complaints. 3rd party complaints would be allowed.:

Somewhat important

Q54 pt1 - Effective, able to resolve consumer complaints and have adequate enforcement powers to hold providers to account when things go wrong.:

Very important

Q54 pt1 - Transparent, publish a range of information including decision criteria, complaints data and outcomes of cases. Be able to advise on trends and issues emerging from 1s tier complaints.:

Very important

Q54 pt1 - Have an increased focus on independence and accountability. Provide an impartial service to both consumers and providers. Accountable, to a competent authority or a regulator. Undertake periodic reviews on the effectiveness of ADR schemes and publish the results.:

Very important

Q54 pt1 - Enable early consensual resolution, which would include mediation as a key process should be built upon.:

Somewhat important

Q54 pt1 - Provide prompt resolution, proportionate to the complexity of the complaint.:

Very important

Q54 pt1 - The levy for entities should be on a financial turnover basis.:

Should be removed

Q54 pt1 - Appeals process simplified whilst adhering to ECHR. No appeal from the Complaints Ombudsman, but the ability to appeal to the Court of Session in relation to misconduct.:

Very important

Q54 pt1 - There should be no appeal in terms of the amount of compensation awarded, similar to other professions.:

Not important

Question 54 continued From the options listed how important do you think each of the following principles and objectives are for any future regulatory model? Model Options 2 & 3

Q 54 pt 2 - There should be a Memorandum of Understanding between the complaints body and the professional bodies on cross-referring cases.:

Very important

Q 54 pt 2 - The presence of conduct issues should not delay, complicate the process or disadvantage the outcome of service complaints for consumers.:

Very important

Question 55 Please provide any further comments on the proposals set out in this consultation in the box below.

Please provide any further comments on the proposals set out in this consultation in the box below:

There were some questions for which there did not appear to be adequate discussion or framing within the consultation paper.

About you

What is your name?

Name:

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Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:

We are acting as a working group of the Centre for Scots Law at the University of Aberdeen

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response with name

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

I confirm that I have read the privacy policy and consent to the data I provide being used as set out in the policy.

I consent

Evaluation

Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:

Slightly satisfied

Please enter comments here.:

Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:

Slightly satisfied

Please enter comments here.: