

Scottish Government Consultation on Legal Services Regulation Reform in Scotland

Response from Scottish Women's Aid- December 2021

ABOUT

Scottish Women's Aid ("SWA") is the lead organisation in Scotland working towards the prevention of domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse. SWA is the umbrella organisation for 36 local Women's Aid organisations across Scotland; they provide practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our members include crisis intervention, advocacy, counselling, outreach and follow-on support and temporary refuge accommodation.

Introduction

As we commented in our 2018 response to the Robertson Review, the recommendations of which form the basis of this consultation, women and children's access to justice is a long-standing issue. Ensuring access to civil law proceedings is a significant part of how the UK should make sure it meets the obligations agreed to by through ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1986.

Enabling protection from domestic abuse is a crucial part of States' human rights obligations towards women, children and young people. For women, children and young people experiencing domestic abuse, access to justice, the ability to participate fully in proceedings impacting on their safety, wellbeing and for children, essentially the rest of their young lives, is essential, not only in the interests of ensuring justice and fairness justice, but also as a human rights issue.

Domestic abuse has serious and long-lasting consequences for women and children's health and well-being; not only is it an assault on their human rights but also on their ability to access and exercise those rights and entitlement, particularly their rights under Articles 6 and 8 of the ECHR. The costs of this failure to protect, which go far beyond simply financial and budgetary considerations, are borne by not only women and children

We reiterate that the extent to which women and children do or do not have access to justice, and legal support in particular, when experiencing domestic abuse is, in our view, an indicator of the society's commitment to women's and children's human rights. As the Competition and Markets Authority 2020 "*Legal Services in Scotland*" Research report states ¹ "...A well-functioning legal services sector is (therefore) , critical to society."

Women, children and young people experiencing domestic abuse must have adequate access to local, dependable, robust, appropriate, informed and domestic abuse- competent legal advice and support. The absence of these criteria results in service-generated harm and re-victimisation from the legal system, primarily through inaccurate advice about their rights or the wrongful suppression of references to

¹ https://assets.publishing.service.gov.uk/media/5e78cc9b86650c296f6eda63/Research_report_-_Legal_services_in_Scotland_publication.pdf

domestic abuse when this information is pivotal to both the court's understanding of the issues before them and their subsequent decision-making.

SWA therefore welcomes the proposals to reform the regulation of, and complaints system for legal services in Scotland and welcomes the opportunity to comment on the important issues raised in this consultation and we have set out our observations below.

Regulation of legal services is important for women, children and young people experiencing domestic abuse as consumers of legal services. Survivors of domestic abuse and their children use legal services when they are at their most vulnerable; they need urgent, expert assistance and place their trust in legal professionals to deliver this. Women's Aid services are able to support service users in asking legal practitioners important questions about their understanding of domestic abuse and conduct of their case but survivors and their children who are not in contact with specialist services do not necessarily have access to such expertise, meaning they are at a greater disadvantage. Stronger professional links should be in place between legal practitioners and specialist support services so that women, children and young people are better supported to be aware of their rights to appropriate representation and how to exercise those rights.

As consumers they must have adequate and understandable information around cost, quality, experience and expertise to allow meaningful comparison and identification of a legal professional capable of understanding the issues facing them and who will provide appropriate services and representation. This can be a difficult process where there are a low number of firms, specifically in rural areas, coupled with the fact that the available firms may not offer Civil Legal Aid funded services.

The **Scottish Government User Research Report- *Consumer Study on Scottish Users of Legal Services (2018)*** , while, disappointingly, not including any interviews with women experiencing domestic abuse and their experience of legal services, did, however highlight that solicitors are in a position of power and are not questioned and consumers did not make a complaint to avoid the "emotional cost" and ordeal they may have to go through all over again.

Therefore, a further important component of regulation, necessary for their protection and in building confidence in legal services, is an accessible, efficient, understandable, cost-free complaints and redress process that minimises the risk of "*referral fatigue (being referred backwards and forwards between the various regulatory/disciplinary bodies)*", holds those delivering poor services and unacceptable conduct accountable with robust sanctions and is visible to professionals and the public as delivering accountability and consequences.

Before going on to answer the specific questions posed in the consultation, we must comment on a major omission. Although the paper states that "*...the Scottish Government is of the view that legal services regulation should align and uphold Human Rights (PANEL) principles... (of Participation, Accountability, Non-discrimination, Empowerment: and Legality)*"² there is no specific mention in the paper of the necessity of addressing the needs of vulnerable consumers,³ particularly those of children and young people. We are aware that children have the same issues in sourcing a suitably informed and equipped solicitor in relation to legal representation in cases involving domestic abuse, in particular child contact,

² https://www.scottishhumanrights.com/media/1409/shrc_hrba_leaflet.pdf

³ <https://www.scottishlegalcomplaints.org.uk/media/1973/consumers-at-risk-of-vulnerability.pdf>

residence and PRR-related cases and that they rarely raise a complaint against defective services or conduct.

Any regulatory and complaints body and mechanism must be child-friendly, understandable, accessible and supportive toward children and young people and indeed, to ensure this, children and young people must be involved in the design and implementation of these processes. We suggest engaging with the children's sector to identify appropriate models of involvement, regulation and complaint, since adult-based systems cannot be replicated for children. Further, the complaints process must allow children and young people themselves, parents, specialist support workers and advocates to assist them through any processes and, indeed, lodge complaints on behalf of children and young people.

In our 2018 response to the Robertson Review, we recommended that the Children and Young People's Commissioner Scotland was consulted as a matter of urgency, to identify and resolve any barriers preventing children from accessing appropriate legal representation and participating in issues impacting on them. We maintain this position and recommend that the Commissioner is closely involved in the implementation of any new regulatory and complaints body and mechanism

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?

Options 1-Very important; 2 somewhat important; 3- not important; 4-should be removed

- *Protecting and promoting the public interest including the interests of users of legal services*
- *Improving access to justice including choice, accessibility, affordability and understanding of services by service users*
- *Embedding a modern culture of prevention, quality assurance and compliance*
- *Working collaboratively with consumer, legal professional bodies, and representatives of legal service providers as appropriate.*

SWA consider that the four principles above are very important and the most relevant in securing the best possible outcome for women, children and young people experiencing domestic abuse

For the first two sets of principles to achieve reform and be in any way meaningful for survivors of domestic abuse and their children, radical changes are required to provide real access to free, timely, gender-competent, specialist legal services available when and where needed across Scotland. (We are, with support from the Legal Education Foundation, testing a model that provides free services embedded within, or working in tandem with, local Women's Aid services.)

In terms of "...choice, accessibility, affordability and understanding of services by service users ...", it is difficult for women and children to compare a service and assess "like-for-like" given that, as stated above, the gender-competence and availability of legal representation is an issue in relation to domestic abuse. The cost of a service does not necessarily represent either the most appropriate or skilled practitioner and it is not clear how women are currently able, if at all, to assess practitioners' expertise in relation to domestic abuse and ensure a practitioner is actually skilled in the services

they are delivering. Similarly, specialist accreditation and experience in family law does not necessarily equate with the delivery of domestic- abuse aware practices.

It is important to note that, given what we know about the prevalence of financial abuse (90+% of cases), the presence of means testing for legal services reflects just how blind our current system is to the facts of domestic abuse and to the impact of abuse on women and children.

Legal practitioners and services need to possess and demonstrate a clear “*understanding*” of the position, dangers, vulnerabilities and pressures facing women, children and young people experiencing domestic abuse during their (often unwanted), engagement with the civil justice system in an effort to access and enforce their rights to protection and a secure, safe family life. This means that both practitioners, and the actual legal services and advice provided to, survivors of domestic abuse and their children, must be fully domestic-abuse competent.

Amongst other things, in relation to civil and family law practitioners, this requires practitioners not only to be fully cognisant of the relevant civil and family law and its particular application and obligations pertinent to domestic abuse, especially around child contact and protective orders, but also to be aware of service- generated risks, the role of coercive control and how legal procedures can be used by perpetrators to further abuse.

In relation to criminal practitioners, to improve the experiences of women, children and young people as complainers and witnesses when they are questioned before the courts, the criminal bar requires the same competency and it is important that the reforms proposed by the Evidence and Procedure Review around the treatment of victims and witnesses be progressed without delay.

- *Working collaboratively with consumer, legal professional bodies, and representatives of legal service providers as appropriate.*

Scottish Women's Aid has long advocated for and engaged in collaborative working across public and third sectors. We cannot stress highly enough the importance of working with us, and through us, with survivors and experts on domestic abuse, to coproduce a legal services landscape that delivers on Scotland's promises around human rights.

- *Embedding a modern culture of prevention, quality assurance and compliance*

As stated above, for survivors of domestic abuse and their children, this requires the development of a robust training, robust implementation infrastructure, and a culture of continuous improvement and accountability. However, it must be stressed that while training on domestic abuse to create the much-needed domestic abuse competent services is important, this cannot be a “one-off” experience; it must be built into the tuition regime for both trainee legal professionals entering the profession and also as ongoing CPD for any professionals intending to practice family and/or criminal law. Evidencing the understanding and practical application of this training is also necessary, meaning that an ongoing monitoring regime must also be in place.

Given our extensive expertise and track record in developing, delivering and evaluating such specialist training across a vast and diverse constituency of professionals and bodies, SWA would be happy to offer our services in relation to both the creation and delivery of such training to the new regulatory body, Faculty of

Advocates and the Law Society (indeed, we currently work with the Law Society on this) and on any evaluation and monitoring process.

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?

Options 1-Very important;2 somewhat important;3-not important ; 4-should be removed

- *Enable access to justice including choice and diversity*
- *Offer accountability in protecting the public and consumer interest*
- *Offer accountability to those regulated by the framework*
- *Secure the confidence and trust of the public*

SWA consider that these four are the most important and most relevant in supporting the framework of any future regulatory model.

We have commented above on the issues facing survivors of domestic abuse and their children in navigating the supply of legal professionals and firms to find a legal professional to provide necessary legal services. These apply equally in relation to Question 2.

Ideally, we are looking for a system of regulation that supports and encourages the provision and expansion of the informed, gender-competent, dedicated legal services women, children and young people need and that reduces stress and uncertainty and, in turn, the need to complain about services and conduct. Therefore this means an accessible, efficient, understandable, cost-free complaints and redress process that minimises bureaucracy, holds those delivering poor services and unacceptable conduct accountable with robust sanctions and is visible to professionals and the public as delivering accountability and consequences.

To achieve this, a greater emphasis on quality assurance, prevention and continuous improvement should help to reduce the number of complaints through offering identification of problems with practitioners at a much earlier stage. This means that either the practitioner is supported to address and rectify any issues or other remedial action, including removal from practice should the issues continue, can be taken in early course by the regulator.

Question 3

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

Options

1-Very important ; 2-Somewhat important; 3- Not important ; 4- Should be removed

The following two options are very important:

- *Support and promote sustainable legal services, which benefit consumers*
- *a proactive focus on continuous improvement and prevention of failures (which lead to complaints)*

The other options require more definition before we can rate them.

Question 4

The primary recommendation of the Robertson report was that “*There should be a single regulator for all providers of legal services in Scotland. It should be independent of both government and those it regulates. It should be responsible for the whole system of regulation including entry, standards and monitoring, complaints and redress. Regulation should cover individuals, entities and activities and the single regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland.*”

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

Strongly agree

In order to comply with these Principles, streamline and make processes consistent, accessible and understandable for consumers and professionals alike, it is necessary to have a single regulator, responsible for the whole system of regulation, complaints and redress, independent of those it regulates, is the best way to achieve this. It has been observed that the Relevant Professional Bodies’ current dual role as both regulator and professional representative of their professions makes their independence difficult in relation to regulation.

Question 5

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

- ☐ **Option 1: Robertson Model**
- ☐ **Option 2: Market Regulator Model**
- ☐ **Option 3: Enhanced accountability and transparency model**

Please give reasons for your answer.

For the reasons given above, Option 1 with an independent, single regulator, responsible for the whole system of regulation, complaints and redress, is the preferred option likely to deliver the most potential benefits for consumers

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

- ☐ **Option 1: Robertson Model**
- ☐ **Option 2: Market Regulator Model**
- ☐ **Option 3: Enhanced accountability and transparency model**

Please give reasons for your answer.

- ☐ Option 1: Robertson Model
- ☐ Option 2: Market Regulator Model
- ☐ Option 3: Enhanced accountability and transparency model

As stated above, to achieve consumer confidence and for simplicity of operation, Option 1, with a single regulator covering for-profit legal service providers and responsible for the whole system of regulation, complaints and redress, independent of those it regulates, in that the professional bodies would no longer have a role in regulating themselves, is the best way to achieve this. We would support the regulator being accountable to the Scottish Parliament as this would enhance the accountability

and transparency that consumers and other stakeholders such as SWA wish to see in any reformed model

Recognising that further discussion around these models will take place, while Option 2, the Market Regulator Model option, may merit further consideration in creating a single regulator, independent of those it regulates, that can bring a consumer focus to the regulatory landscape and help to drive consumer confidence, choice and accountability, it has serious flaws. This model is similar to that used in England and Wales, which has created numerous issues due to the presence of additional regulator bodies that render it less than satisfactory and complicated, a position we would not wish replicated in Scotland. Also, there may be issues between regulatory committees and their professional bodies where opinions differ and it is not clear how the consumer voice would be appropriately and sufficiently engaged and represented, particularly in relation to consistency of engagement across the different committees.

Option 3 should not be considered further as it does not bring any obvious improvement to the current system of regulation and complaints in relation to increasing transparency, addressing the need for independent regulation to prevent conflicts of interest, and ensuring a consumer and stakeholder confidence in the regulation and complaints regime

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

We are uncomfortable with the choices implied in this question.

Please give reasons for your answer.

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

- ☐ Education and entry
- ☐ Oversight of standards and conduct
- ☐ Complaints and redress

We are uncomfortable with the choices implied in this question.

Question 9

Under the Robertson Model, to what extent do you agree or disagree that the professional bodies should have a statutory footing? Please give reasons for your answer.

We do not have a view on this question

Question 10

Which of the following methods do you think the final regulatory model should utilise to embed a consumer voice? Please give reasons for your answer.

- ☐ Seeking input from Consumer Scotland
- ☐ Through a consumer panel

- **A requirement for consumer expertise within regulatory committees**
- **A combination (please specify)**

In addition to consultation and engagement with the public and consumers of legal services in general, as representatives of vulnerable consumers, we would expect SWA, our local Women's Aid groups and their service users to be involved in a regular and ongoing consultation and be involved as expert contributors in any regulatory committees.

SWA would welcome the opportunity to support survivors engaging in our Participation Network to take part in this work and we also have an expectation that the regulatory body will engage directly with SWA. Our Survivor Reference Group is working with us to co-produce a guide to ethical and effective practice for participation and consultation with child and adult survivors of domestic abuse. We strongly urge the officials tasked with this element of reform to work with our organisation and others that are expert to embed consumer influence in regulatory processes and to eschew token, unrepresentative, and sometimes dangerous direct engagement with survivors.

Question 11

To what extent do you agree or disagree that Consumer Scotland should be give the power to make a Super-Complaint in respect of the regulation of legal services in Scotland? Please give reasons for your answer.

- **Mostly agree ;Strongly agree; Mostly disagree; Strongly disagree**

SWA have no view on this

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; Strongly agree; Mostly disagree ;Strongly disagree**
Please give reasons for your answer.

Strongly agree.

See our answer to Question 10 above. This would be particularly useful in identifying areas needing further work in the new system and prioritising areas such as domestic abuse in order to identify the disparity between numbers of women and children seeking support from Women's Aid and those seeking legal service.

A survey is unlikely to be an appropriate tool to reach vulnerable consumers, particularly those who would find it difficult to engage, particularly with an online survey. To ensure that all consumer voices are heard, particularly those less likely to participate and who have been under-represented in the complaints process, genuine and frequent engagement with consumers, particularly women, children and young people experiencing domestic abuse and the specialist services supporting them must be undertaken.

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; Mostly agree; Mostly disagree; Strongly disagree
Please give reasons for your answer.

All aspects of the regulatory system must be clear and transparent, including the role of the Lord President and the Court of Session.

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? Please give reasons for your answer.

Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

We do not have a view on this question

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? Please give reasons for your answer

- ☐ **Changes to professional rules: practice rules, conduct and discipline?**
- ☐ **Changes in relation to complaints practice and procedure?**
- ☐ **New entrants to the market seeking to conduct of litigation and exercise right of audience?**

Please give reasons for your answer

In order to ensure independence and transparency of the process and any new regulatory framework, the role should be consultative.

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? Please give reasons for your answer.

Strongly agree; Mostly agree ; Mostly disagree; Strongly disagree

We do not have a view on this question

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?

Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

Please give reasons for your answer.

Appointments to any regulatory committees should be transparent and carried out through the public appointments process.

Question 18

To what extent do you agree or disagree that regulatory committees, as described above, should be incorporated into any future regulatory framework?

Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

Please give reasons for your answer.

We mostly disagree.

We favour the Robertson model; if elements of Model 2 are considered, it is vital that it is independent regulatory committees, as described in the consultation paper, who are responsible for any regulatory activity discharges by the professional bodies. This ensures greater independence and accountability

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? Please give reasons for your answer.

Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

We favour the Robertson model and would comment that if elements of Model 2 are considered, and regulatory committees form part of the regulatory system, they must be able to operate independently and be consumer focussed, for which they will require resources.

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? Please give reasons for your answer.

Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

We strongly agree.

All statutory bodies discharging statutory duties should be subject to Freedom of Information legislation or requests.

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?

Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

- ☐ ***content of the criteria***
- ☐ ***frequency of career points where the criteria must be satisfied***
- ☐ ***transparency and fairness in decision making***

We have no information to enable us to comment on whether these are working in practice.

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.

Given that solicitors will be working with survivors of domestic abuse, in relation to paragraph 4.2 of The Law Society of Scotland guidance⁴ on the matter, this list should be amended to include behaviour constituting stalking and harassment, inappropriate online communication, coercive control and domestic abuse related offences and any civil or criminal protective orders granted in relation to any such behaviour.

⁴ <https://www.lawscot.org.uk/media/367851/fitness-and-properness-guidance.pdf>

The Faculty of Advocates Admission Regulations⁵ are much less detailed in relation to behaviour and conduct, requiring only a declaration stating that an entrant certify that they have no prior criminal convictions or outstanding criminal proceedings, that there are no complaints of professional misconduct or negligence which have been upheld against or which are outstanding; and insolvency and the Disciplinary Rules⁶

In relation to criteria, we would comment that for both, evidence of repeated complaints against a solicitor or advocate, whether or not upheld, should be taken into account. Also, while these criteria apply to entrants to the respective professions, there do not appear to be similar public-facing rules applying these criteria to existing professionals, which will be confusing to the public.

Any new regulatory system must develop a robust, transparent, clear “*fitness to practice regime*” based on the views of consumers and professionals

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? Please give reasons for your answer.

Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

We strongly agree.

There has been discussion that other “professionals” acting as non-lawyer owners and managers of legal entities will be subject to their own professional standards criteria and regime, etc but this does not take into account the fact that non-lawyer owners and managers may not be members of other recognized professions. Also, these professional requirements may differ in degrees of scrutiny, accountability and culpability. Therefore, we agree that there should be a robust test of the nature suggested, and that consumers and those working with them should be consulted on, and contribute to the work on any test.

Question 24

To what extent do you agree or disagree that Legal Tech should be included within the definition of ‘legal services’. Please give reasons for your answer.
Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

We strongly agree.

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? Please give reasons for your answer.
Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

We strongly agree.

⁵ <http://www.advocates.org.uk/media/2363/regulations-as-to-entrants.pdf>

⁶ <http://www.advocates.org.uk/media/3139/disciplinary-rules-june-2019.pdf>

All legal services providers are brought within the regulatory framework in order to ensure that services are appropriately regulated and complaints addressed through the new proposed system.

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?
Please give reasons for your answer. Please give reasons for your answer.**

Strongly agree; Mostly agree ;Mostly disagree ;Strongly disagree

We strongly agree.

See our answers to Questions 24 and 25 above.

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? Please give reasons for your answer.
Strongly agree; Mostly agree ;Mostly disagree ;Strongly disagree**

We strongly agree.

See our answers to Questions 24 and 25 above.

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?
Strongly agree; Mostly agree; Mostly disagree; Strongly disagree
Please give reasons for your answer.**

We mostly disagree.

The consultation paper explains that “*Regulatory sandboxes typically involve temporary relaxations or adjustments of regulatory requirements to provide a “safe space” for start-ups or established companies to test new technology-based services in a live environment for a limited time, without having to undergo a full authorisation and licensing process.*” The unregulated nature of these services would not necessarily be clear to consumers and therefore neither will the implications and consequences for them of using such a legal service. Any such measures must be thoroughly tested and publicly consulted on before being implemented with any degree of permanence.

Question 29

**To what extent do you agree or disagree that the Client Protection Fund works well?
Strongly agree ; Mostly agree; Mostly disagree;Strongly disagree
Please give reasons for your answer.**

We do not have a view on this as we have no experience of the Client Protection Fund

Question 30

**What, if any, changes should be made to the Fund? Please give reasons for your answer
Strongly agree ;Mostly agree; Mostly disagree;Strongly disagree**

See our answer to Question 29 above.

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?

Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

Please give reasons for your answer.

We strongly agree.

Often women simply do not have the energy to pursue a complaint because they are still engaged in the court process or ongoing difficulties with court-ordered contact arrangements and their children's safety and security are the priority. They may have had difficulties in securing a lawyer in the first instance and do not want to "rock the boat" by making a complaint against them for fear of the solicitor withdrawing from acting, which might disrupt the proceedings, often to their prejudice and detriment.

Similarly, women may fear that by making a complaint, they will be labelled "difficult" and therefore other practitioners will be unwilling to take on their case, a particular issue in small and/or rural communities. Women have raised the issue about having to complain to the Client Relations Manager and the difficulties this brings in dealing with small practices and sole practitioners.

A greater emphasis on quality assurance, prevention and continuous improvement should help to reduce the number of complaints through offering identification of problems with practitioners at a much earlier stage. This means that either the practitioner is supported to address and rectify any issues or other remedial action, including, removal from practice should the issues continue, can be taken in early course by the regulator.

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?

Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

Please give reasons for your answer.

We strongly agree.

Please see our answers above. The current complaints process is too convoluted and not understood by consumers, due to complaints handling being carried out through several bodies. Any simplification and streamlining of this is welcome.

Question 33

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

- **peer review**
- **a system of self-assessment for all legal professionals**
- **both of these**
- **neither, or other**

Please give reasons for your answer.

Peer review and self-assessment are useful but independent, external scrutiny by the regulator is vital.

Question 34

To what extent do you agree or disagree that there should be a definition of legal services? Please give reasons for your answer.

Strongly agree; Mostly agree; Mostly disagree; Strongly disagree

We strongly agree.

Consumers need to be aware of what type of services they are accessing, if these are subject to appropriate formal regulation and governed by a complaints procedure therefore the body responsible overseeing their rights and protection and how they access this protection and redress.

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; Mostly agree; Mostly disagree; Strongly disagree

Please give reasons for your answer.

We strongly agree.

This would help make regulation more accessible, accountable and transparent to consumers around what is and is not covered by the regulator.

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?

We mostly agree.

Any change to the definitions of “reserved” and “unreserved” may negatively impact on third sector and not-for –profit organisations providing advice on housing, debt and money; for example, local Women’s Aid groups provide women experiencing domestic abuse with specialist, targeted information and advice around their rights to housing.

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?

We mostly agree.

We refer to our answer to Question 36 and would comment that such decisions around reserved and regulated activities should be informed by consumer research, engagement and consumer experiences of services provided by legal professionals and the third sector and not-for –profit organisations. Since any decisions in this area will impact on the protection afforded consumers, given that the regulator will be answerable to the Scottish Parliament, such proposals by the regulator in this area should be subject to Parliamentary scrutiny and public consultation.

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’? Please give reasons for your answer.

We mostly agree.

Consumers currently are likely unaware that there is any difference in these titles and that one is “protected” and the other not. We would support this if it results in additional protection for consumers and they should be protected when using any legal service.

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’?

We mostly disagree.

There is a different issue in relation to the title “advocate” since that is already widely used in relation to non-legal services where support is given to, particularly, vulnerable parties, to navigate systems, such as civil, and specifically, criminal court processes. Indeed, a professional development award in domestic abuse advocacy, the IDAA or Independent Domestic Abuse Advocacy qualification, is available for practitioners working in Scotland, in addition to other extensive, informal advocacy support across a range of issues provided by local Women’s Aid workers to service users, including Children’s Advocacy Workers.

Any move to “protect” the term advocate, although in this case related to members of the Faculty of Advocates, would have extensive, unforeseen consequences for the support of survivors of domestic abuse and their children, and indeed, would interfere with the support provision for children planned through the Children (Scotland) Act 2020.

We therefore would not support this.

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?

We mostly agree.

See our answer to Q38.

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?

We mostly disagree.

See our answer to Questions 37 and 38 above.

Question 42

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

Strongly agree; Mostly agree; Mostly disagree; Strongly disagree
Please give reasons for your answer.

We do not have a view on this question.

Question 43

To what extent do you agree or disagree that entity regulation should be introduced? Please give reasons for your answer.

We mostly agree.

While we support entity regulation for firms offering legal services, to ensure that consumers are protected, we do not support the extension of such regulation to third sector and not-for-profit groups offering free advice and support on legal matters.

Regulation such as this would have serious unintended consequences for organisations such as local Women's Aid services, whose provision of free advice around options, entitlements and rights, essentially "plug gaps" in formal legal services delivered by regulated professionals and firms, is part of their extensive armoury of many other services supporting women, children and young people experiencing domestic abuse and could seriously impact on our ability to deliver, and their right to access, such free advice and support.

Importantly, it could hinder third sector and not-for-profit organisations from hiring regulated legal professionals to improve their services and for Women's Aid, this could impact on access to justice for women, children and young people experiencing domestic abuse.

Women's Aid services in Scotland are rigorously and continuously assessed against a range of quality standards and quality assurance mechanisms. Such mechanisms include National Care Standards, SSSC Code of Practice, Funder Outcomes and National Standards for Domestic Abuse Services

We are not aware of any issues arising or any call from partners or others to further regulate Women's Aid or other third-sector organisations

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? Please give reasons for your answer.

We mostly agree.

This seems an appropriate but proportionate response to the potential risk to consumers.

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?

We strongly agree.

Many people who access free advice and support on legal matters from third sector and not-for-profit groups would be unlikely to seek it elsewhere. We would be concerned about any changes that could affect people's ability to receive free advice and support.

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?

Strongly agree; Mostly agree ;Mostly disagree;Strongly disagree

Please give reasons for your answer.

We have no view on this question

Question 47

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

We strongly agree.

Please see our answers to previous questions above. A faster, simpler and more accessible complaints handling procedure involving a single gateway and single point of contact for consumers is vital.

Question 48

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, where a complaint is generated by an external complainer such as a client, or non-client?

We strongly disagree.

As we have stated above, the current complaints process is complicated, slow, difficult for consumers to understand and navigate due to the working of the governing regulation and the fact that complaints handling happens across multiple bodies causes duplication in process. Further, the professional bodies' role in complaint handling, carried out in tandem with their role as representative bodies for their respective professions, has not instilled confidence in consumers around the independence of the process.

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?

We favour the Robertson model but would comment that independent regulatory committees, as described in the consultation paper would hold responsibility for any regulatory activity discharged by the professional bodies to ensure greater independence and accountability.

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:

- Service - an independent body
- Unsatisfactory conduct an independent body
- Professional misconduct an independent body

Option a.

We believe that where a complaint is generated by a consumer/ external complainer such as a client or non-client, there should be a single, independent complaints process.

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?

We strongly agree.

As stated above in our responses above, since consumers are unlikely to be familiar with which activities are, or are not, reserved and/or regulated, they will assume that this exists for all legal complaints and so must be in place..

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?

We do not have a view on this question.

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?

We mostly agree.

The regulator and complaints body must be accountable and transparent.

Question 54

From the options listed how important do you think each of the following principles and objectives are for any future regulatory model?

1-Very important;2-Somewhat important ;3-Not important; 4-Should be removed

Model Option 1 (Robertson report recommendation)

- Uphold the rule of law and the proper administration of justice.
- Provide access to justice.
- Operate for the public interests (offer accountability in protecting the public and consumer interest).

- *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.*
- *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).*
- *Embed the better regulation and consumer principles throughout its areas of responsibility.*
- *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.*
- *Effective, able to resolve consumer complaints and have adequate enforcement powers to hold providers to account when things go wrong.*
- *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 1st tier complaints.*
- *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.*
- *Provide prompt resolution, proportionate to the complexity of the complaint.*

We consider all of the above to be very important. This option should be removed:

- *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.*

The appeal should be to the sheriff court, not the Court of Session, as this process will only represent a further expensive and complicated barrier to consumers obtaining satisfaction. We are not convinced that there should not be a further appeal from the Complaints Ombudsman.

Regarding:

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

See our comments on mediation above as care would be needed around mediation due to the power dynamics between legal professionals and consumers, particularly vulnerable consumers

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

We have no view on this.

- *The levy for entities should be on a financial turnover basis.*

We have no view on this.

Model Options 2 and 3

- *There should be a Memorandum of Understanding between the complaints body and the professional bodies on cross-referring cases.*
- *The presence of conduct issues should not delay, complicate the process or disadvantage the outcome of service complaints for consumers.*

As stated above, our preference is for a single body to deal with complaints from start to finish, making the process simple and efficient for consumers. If the Robertson Model is not chosen, there should be Memoranda of Understanding between the various bodies involved in handling complaints and the presence of conduct issues should not in any way delay, complicate the process or disadvantage the outcome of service complaints for consumers.

Question 55

Please provide any further comments on the proposals set out in this consultation.