

Legal Services Regulation Reform in Scotland: Consultation

October 2021



Scottish Government
Riaghaltas na h-Alba
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In April 2017 the former Minister for Community Safety and Legal Affairs, Annabelle Ewing, invited Esther Roberton to Chair an Independent Review of Legal Services Regulation in Scotland. This was a commitment by the Scottish Government in response to a case for change made by the Law Society of Scotland and others.

Over the following 18 months Esther Roberton, supported by a review panel made up of legal, consumer and regulation professionals and academics, engaged with a wide-range of stakeholders, including members of the legal profession, regulatory and

representative bodies, the third sector and the public, before presenting her report and recommendations to Scottish Ministers.

The Chair's Report, 'Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland', considered the public and consumer interest; the interests of the professions and providers; and the interests of the Scottish economy.

The Report makes 40 recommendations aimed at reforming and modernising the existing legal services regulatory framework, to provide a proportionate approach to regulation whilst supporting growth and competitive provision within the legal services sector, and placing consumer interests at its heart.

In June 2019 I published the Scottish Government response to that review and announced my intention to consult on the basis of those recommendations.

As was stated in my response, the Scottish Government is open to further views on how the report recommendations should be taken forward and this consultation is intentionally broadly set to capture the fullest range of views on the recommendations and what level of reform is supported.

A handwritten signature in black ink, appearing to read 'Ash Denham'. The signature is stylized with a large, looped 'A' and a cursive 'Denham'.

Ash Denham
Minister for Community Safety

Glossary of Terms

ACA - The Association of Commercial Attorneys

Alternative Business Structures (ABS) - An alternative business structure refers to an entity that, while providing certain regulated legal activities, allows non-lawyers to own or invest in law firms. In Scotland, these entities are regulated under the Legal Services (Scotland) Act 2010.

Accountability - In the context of this consultation, regulation is responsible to those it serves: legal consumers, the wider public and the legal profession, with the aim of providing assurance that efficient, effective and proportionate regulatory arrangements are in place.

Advocate - Advocates are specially trained lawyers who are independent (self-employed). In Scotland they are members of the Faculty of Advocates. As well as initially having to have trained as solicitors they have to undergo further training (devilling) and examinations. Advocates have extended rights of audience to appear before the Supreme courts (the High Court of Justiciary, the Court of Session and also the UK Supreme court), though they may also appear in the Sheriff Court.

Audit Scotland - Audit Scotland is an independent public body responsible for auditing (conducting official financial inspections) of most of Scotland's public organisations. These include the Scottish Government, local councils and NHS Scotland.

Authorised / Approved regulator – Bodies with responsibility for regulating certain professionals, in the context of this consultation legal professionals.

Claims management companies - Commercial businesses or individuals that handle certain types of claims, including but not limited to, financial services and products, e.g. PPI, payday loans, personal injury, employment matters, e.g. unfair dismissal claims, and criminal injury.

Commercial Attorney – Commercial attorneys are members of the Association of Commercial Attorneys and have a statutory right to represent litigants in courts in Scotland in relation to construction and building law.

Consumer Scotland – The Consumer Scotland Act 2020 sets out that a new Non-Ministerial Office (Consumer Scotland) will be created to provide advice; represent the views of consumers; collect information; organise research and carry out investigations, to represent consumers' interests.

CPD – Continued professional development, the term used to describe the learning activities professionals engage in to develop and enhance their abilities. It ensures professionals maintain and enhance the knowledge and skills required to deliver a professional service to clients, and ensure that knowledge remains relevant and up to date.

Entities (Entity Regulation) - “entity-based regulation” and “law firm regulation” are terms used to describe programs that regulate law firms as well as the lawyers (and perhaps the non-lawyers) who work at a law firm.

Faculty - The Faculty of Advocates

Independence - There are three ways in which independence is referred to in this consultation:

- I. A strong independent legal profession - The independence of the legal profession enables lawyers to fulfil this function by acting for the benefit, and in the legitimate interest of, their clients and society as a whole, without fear of abusive prosecution, and free from improper influence of any kind.
- II. Independence from the profession it serves - This refers to the separation between a regulator's representative functions and its regulatory functions.
- III. Independence from Government - The independence of a regulator from Government requires that the regulator is a body which is legally separate from Government, with its own duties, powers and responsibilities clearly set out in statute. The regulator should be able to undertake its duties without seeking permission from, or the approval of, the Government.

Joint Standing Committee for Legal Education in Scotland - An independent consultative body that aims to act as a facilitator promoting the interests of legal education, in academic training and in continued legal professional development.

Law Society - The Law Society of Scotland

Legal Services Board (LSB) - The Legal Services Board is an independent body responsible for overseeing the regulation of legal professionals in England and Wales.

Lawyer - The general term used to describe legal professionals such as solicitors, solicitor-advocates and advocates.

SSDT - Scottish Solicitors' Discipline Tribunal

SLCC - Scottish Legal Complaints Commission

Single complaints gateway - A single point of contact to make complaints about legal professionals.

Solicitor - A Solicitor is a member of the legal profession qualified to deal with legal matters. In Scotland, they are members of The Law Society of Scotland. A solicitor may represent clients in the Sheriff Court and Justice of the Peace Court, and may also instruct Advocates and Solicitor-Advocates.

Solicitor-Advocate - Solicitor advocates are solicitors who have been granted extended rights of audience before the higher courts in Scotland. In Scotland, they are members of The Law Society of Scotland.

The 1980 Act - Solicitors (Scotland) Act 1980

The 2007 Act - Legal Profession and Legal Aid (Scotland) Act 2007

The 2010 Act - Legal Services (Scotland) Act 2010

The Robertson report - The report of the independent review of legal services in Scotland.

The Robertson review - The independent review of legal services in Scotland.

The Rule of law - This refers to the concept that every person is subject to the law and that no-one is above the law, including people who are lawmakers, law enforcement officials and judges. It serves to protect the state from the actions of the individual and to protect the individual from the power of the state, and to do both without fear or bias.

Transparency - In the context of this consultation, explaining the purpose for regulatory activity and decision making improves trust and is integral to legitimate and successful governance, whilst promoting accountability.

Which parts of the consultation should I answer?

To make this consultation more accessible it is split into a **Summary Consultation** and a **Main Consultation**.

Summary consultation

A shorter and summarised version of this consultation paper, intended to be free of technical jargon and which covers the key areas that may be of most interest to consumers of legal services and the wider public. This has been designed with the intention of making it easier and quicker for those who wish to respond to this consultation. A background section helps provide context for less accustomed readers.

Main Consultation

The main consultation is longer than the summary consultation. It covers the same broad areas as the summary consultation. However the main consultation covers wider areas of regulation and in more detail whilst asking more questions, often about how an aspect of legal regulation should work in a more specific context. A background section helps provide context for less accustomed readers, but this main consultation does rely on jargon in order to ask these questions and may take longer to complete.

Responding

You don't need to read all of this paper, or answer all the questions, unless you want to. We know that different people will be interested in different issues. We have set out different parts of our proposals in different sections in this consultation. You can skip to the areas you are interested in, and just answer the questions on those sections. The same importance will be placed on all responses.

You can fill out this consultation by answering all or some of the questions and sending it to us by email or by post. Please also include the Respondent Information Form, which is at the end of this paper. We need this so that we know what to do with your response when we receive it. Please note that you can choose whether or not we publish your name alongside your response.

If you would like to access the consultation online, you can visit Citizen Space at <https://consult.gov.scot/>

All respondents should be aware that the Scottish Government has to follow the Freedom of Information (Scotland) Act 2002 and would have to consider any request made to it under the Act for information about answers to this consultation.

To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

After the closing date, we will look at all responses and considered them along with any other information we have. Responses will be published if we have been given permission to do so. An analysis report will also be made available.

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Summary consultation

Background

This Summary Consultation sets out a shorter and summarised version of this consultation paper. It is intended to be free of technical jargon and to ensure that all those who wish to respond to this consultation can do so easily. You can access the main consultation on page 20 of this paper. This consultation seeks views on the way legal services are regulated and how the legal complaints system works in Scotland.

The Report of the Independent Review of Legal Services Regulation in Scotland¹, ‘the Robertson report’ considered what changes may be required to the statutory framework for the regulation of legal services to protect consumer interests and promote a flourishing legal sector. This included ensuring that consumers understand the options open to them when something goes wrong.

The Independent review took an open and consultative approach engaging with professional, representative and consumer bodies, and regulators of other professions to gather the views of those with an interest in the Scottish legal system. A two month public consultation, commissioned via a ‘Call for Evidence’ issued in January 2018 also provided input to the evidence gathering stage of the review.

The Robertson report recognised that Scotland is home to a well-educated, well respected legal profession with a high degree of public trust, of which the Chair believes we can be proud. The Robertson report found little evidence of significant wrong-doing in the current model, instead that complaints are increasing and the complaints system is in need of reform. The Chair raised concerns of the power imbalance between client and legal service provider. There is also concern that Scotland is losing its share of the UK and Global legal services market.

The Robertson report made 40 recommendations – a majority of which are focussed on applied areas – including entry to the profession, standards and monitoring, entity regulation and complaints procedures. However it is difficult to address many of these recommendations without first addressing the primary recommendation of the Review:

“There should be a single independent regulator for all providers of legal services in Scotland, independent of those whom it regulates and of Government, responsible for the whole system of regulation including entry, standards, monitoring, complaints and redress, which covers individuals, entities and activities. That independent regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland”

¹ [Report of the Independent Review of Legal Services Regulation in Scotland - https://www.gov.scot/publications/review-of-legal-services-independent-report/](https://www.gov.scot/publications/review-of-legal-services-independent-report/)

The Scottish Government response² to the Robertson report recognised the differing views to the primary recommendation, and the implications this may have on the existing legal landscape in Scotland.

Our response set out that we would seek to find common ground and agreement on the Robertson report's recommendations where possible. As a result we formed a working group with key bodies who represent consumer interests, regulators and the legal profession to discuss the issues in advance of this consultation.

This consultation seeks views from everyone on the recommendations made in the Robertson report alongside other suggestions for change which came out of the working group discussions. It presents options intended to lead to improvements in the transparency and accountability of the way in which legal services are regulated and the operation of a complaints process.

What we would like to hear from you and how to respond.

We would like to hear your views and experiences of legal services regulation and the legal complaints process in Scotland. We would find it helpful to hear who you think should regulate legal professionals and who should deal with complaints about them in Scotland. We would also welcome your views on how to promote competitiveness in the legal sector to benefit consumers and others using legal services.

You can reply directly to the suggested models of regulation which we set out in this paper, or you can give us your own views on how the regulation system should work in Scotland.

You can:

- (i) provide a written submission,**
- (ii) answer some, or all the questions in the consultation paper, or**
- (iii) you can do both (provide a written submission and answer the consultation questions).**

You might find it helpful to read the '**Glossary of Terms**' on page 4 and the '**The Current Regulatory Landscape**' in the main consultation on page 28 before considering your submission.

² [Scottish Government response to independent review - https://www.gov.scot/publications/scottish-government-response-fit-future-report-independent-review-legal-services-regulation-scotland/](https://www.gov.scot/publications/scottish-government-response-fit-future-report-independent-review-legal-services-regulation-scotland/)

Part A: Potential regulatory models that we have developed and are seeking views on

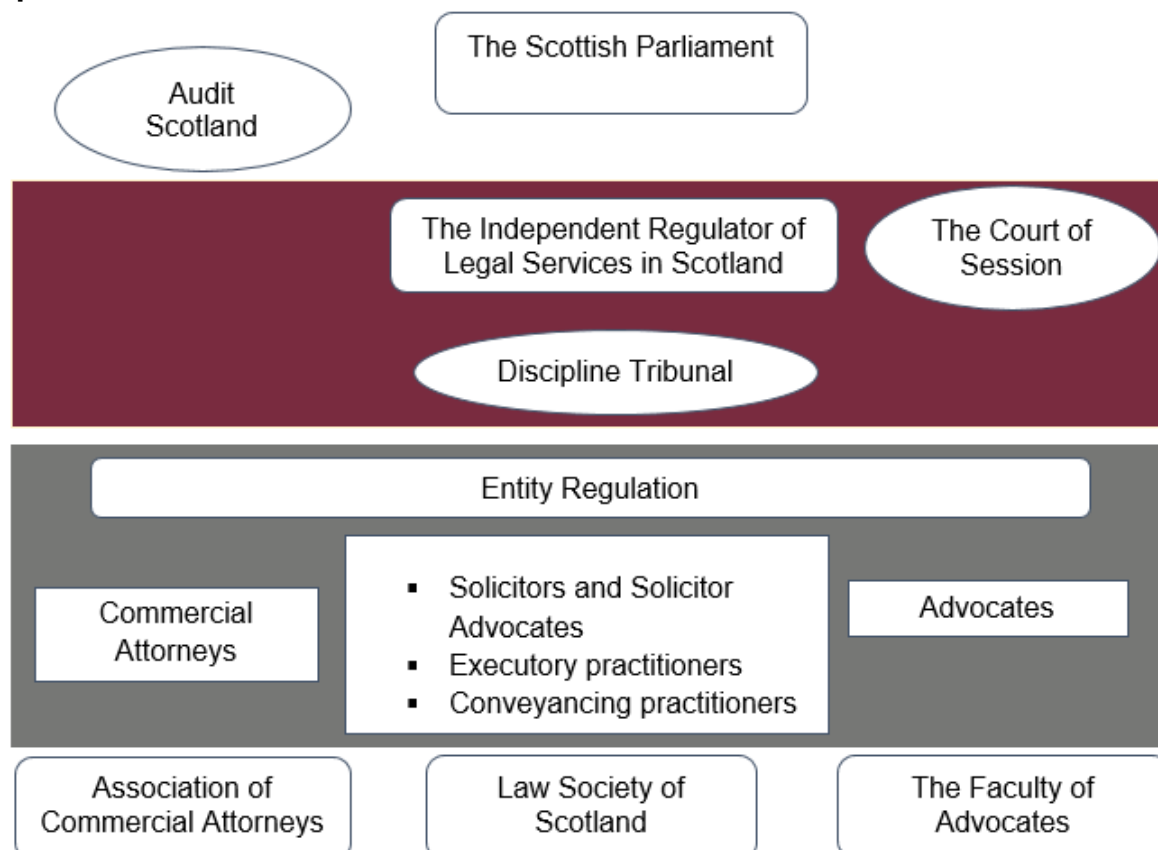
The Robertson report made 40 recommendations to improve the way in which legal services are regulated and complaints against legal service providers are handled. The primary recommendation was that there should be a single independent regulator for all providers of legal services, independent of those it regulates and Scottish Government. Most of the recommendations relate to the delivery of that primary recommendation. In seeking to build agreement, this paper contains alternative viable models of regulation in addition to the one proposed by the Robertson report. It would be helpful if you could:

- Answer question numbers 4 and 5 to indicate your preference on the models set out below.
- Alternatively in a written submission, indicate your preference on the models set out below, or your view on how the system should work.
- This is covered in more detail in Part 2 A of this consultation where you can also answer question numbers 1 to 3 and 6 to 12 to give more detail of your views.

Regulatory Models

The first regulatory model and main focus of this consultation is that proposed by the independent review in the Robertson report:

Option 1: Robertson Model



Key points of the Option 1 model

This model is the primary recommendation of the Robertson report.

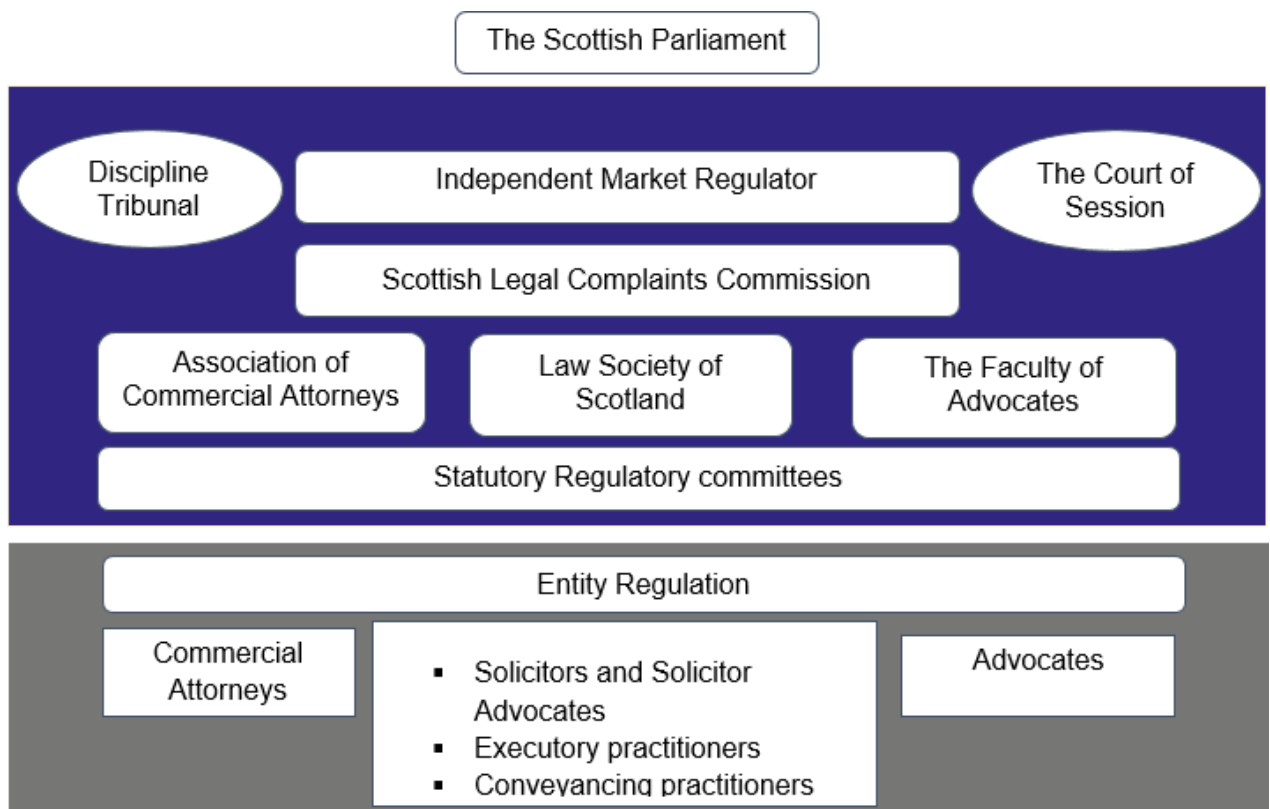
All legal professionals would be regulated by a new independent body which would be accountable to the Scottish Parliament, and subject to scrutiny by Audit Scotland.

All complaints relating to legal professionals would be handled by that body, replacing the role of the SLCC and current regulators.

That new body would be funded through a levy on those it regulated, the legal profession. The cost to the profession would be intended to be no more than the current system.

Current regulators, The Law Society of Scotland, The Faculty of Advocates, and The Association of Commercial Attorneys, would no longer have regulatory roles. Instead they would be invited to work with the new independent regulator as professional organisations.

Option 2: Market Regulator Model



A similar model currently operates in England and Wales where the Legal Services Board is an oversight regulator which sits at the top of the regulatory framework. It provides regulatory oversight of the “approved regulators”.

The role of a market regulator:

To monitor the supply of legal services – A market regulator would authorise the regulators of legal professionals. It would have the ability to act and make recommendations to help geographic or subject specific areas where services are reduced or in decline.

To monitor risks within the sector – A market regulator would have a broad regulatory tool-kit to help balance and reduce potential risks in respect of legal services.

Act as economic regulator – A market regulator would act impartially, and aim to align and balance the interests of the legal profession with the interests of those who use legal services such as consumers.

Key points of the Option 2 model

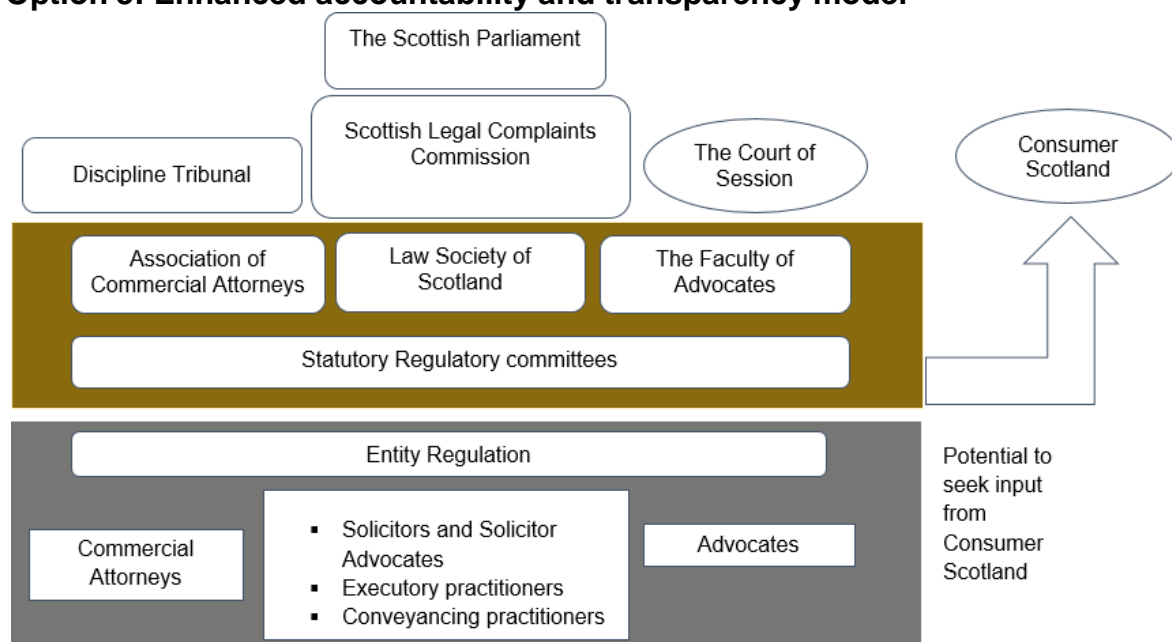
A new independent market regulator would be created which would have oversight of the current regulators. It would be accountable to the Scottish Parliament.

The current regulators would keep many of their current responsibilities, they would be required to host an independent statutory regulatory committee which would be accountable to the market regulator. The market regulator would then be responsible for authorising each committee's regulatory responsibilities. The SLCC would continue to handle complaints.

The extent of the market regulator's responsibilities, and the complaints process would be informed by the views expressed to this consultation.

The market regulator, approved regulators and SLCC would be funded through a levy on those regulated, the legal profession, with the cost intended to be no more than the current system.

Option 3: Enhanced accountability and transparency model



Key Points of the Option 3 model

No new organisation would be created. Instead each of the current regulators would host an independent statutory regulatory committee which would be accountable to the Scottish Parliament or the Lord President.

The SLCC would continue to handle complaints.

The extent and form of accountability, and the complaints process would be informed by the views expressed to this consultation.

The regulators and SLCC would be funded through a levy on those regulated, the legal profession, with the cost intended to be no more than the current system.

Part B: Complaints and redress

The Robertson report's view was that the current complaints system for legal services in Scotland is not working due to its complexity. For example, in the current system, a complaint about a £200 transaction must go through all stages of the complaints process, including potentially up to two appeals to the Court of Session, in the same way as a complaint for £20,000 where there are public protection issues³. The Robertson report recommended that a single independent body should deal with all complaints in proportion to the complexity of each case.

The shape of a future complaints system will be dependent on the wider framework but it would be helpful if you could:

- Answer question numbers 47 to 54
- Alternatively in a written submission, indicate who you think should deal with complaints. The following are some questions you may wish to consider and answer:
 - Should there be a single gateway or point of contact for all types of legal complaints?
 - Who should deal with complaints about service of legal professionals?
 - Who should deal with complaints about the conduct or discipline of legal professionals?
 - Should the complaints system be more flexible so that each complaint can be dealt proportionately based on its complexity, but with guiding principles, or be based on strict rules?

This is covered in more detail in Part 4 of this consultation.

³ [ReimagineRegulation - https://www.scottishlegalcomplaints.org.uk/media/2085/reimagine-regulation-sccc-priorities-for-a-consultation-on-legal-services-regulation-v100.pdf](https://www.scottishlegalcomplaints.org.uk/media/2085/reimagine-regulation-sccc-priorities-for-a-consultation-on-legal-services-regulation-v100.pdf)

Part C: Titles, Legal Services and Business Structures

Titles

The term lawyer is most readily thought of in terms of legal services. However, a lawyer is not always qualified in law or regulated for the services provided. The term solicitor is more accurate as most people who use legal services will interact with a solicitor. It is a criminal offence for any person to pretend, wilfully and falsely, to be a solicitor. There are no such restrictions around the use of the term lawyer. Other notable legal professionals in Scotland include advocates and commercial attorneys.

This consultation seeks views on if you think 'Lawyer' should become a protected title in the same way as 'Solicitor' already is:

It would be helpful if you could:

- Answer question numbers 38 to 41
- Alternatively in a written submission, indicate your view if the term 'Lawyer' should be a protected title.

This is covered in more detail in Part 3 C of this consultation.

Legal Services

Legal services can be classified as either reserved or unreserved. This has important implications for who can provide such services:

- 'Reserved Legal services' can be described in legislation as a set of legal activities that can only be provided by authorised legal professionals, such as solicitors and advocates. In general terms, court proceedings are included in these activities.
- 'Unreserved Legal services' are not specifically defined in legislation, and are not restricted to being provided by authorised legal professionals. For example, charities can provide general advice to their clients in relation to some aspects of legal matters.

It would be helpful if you could:

- Answer question numbers 34 to 37
- Alternatively in a written submission, indicate your view on whether and to what extent legal services should be defined and classified.

This is covered in more detail in Part 3 B of this consultation.

Business Structures

There are currently restrictions on who can own a legal firm in Scotland and how organisations can hire legal professionals to undertake 'Reserved Legal services'.

The Legal Services (Scotland) Act 2010 made provision to remove certain restrictions which previously prevented solicitors entering into business relationships with other regulated professionals i.e. non-solicitor professionals such as accountants. The 2010 Act therefore allowed investment in law firms by both solicitors and non-solicitors, with the aim of greater flexibility, more competition and reduced barriers to competition. Regulated professionals will require to hold at least a 51% majority stake in the business. The Scheme that would allow these alternative business structures is not yet in place. The Scottish Government is working closely with the Law Society to put the final steps in place that would allow the Law Society to regulate such legal providers.

This consultation seeks views on Alternative Business Structures and if you think ownership requirements should be opened up, to relax requirements which allow for:

- employee and community ownership of legal firms,
- outside investment into legal firms,
- and which could allow charities to directly employ legal professionals to undertake what is currently reserved activity, such as court proceedings.

It would be helpful if you could:

- Answer question number 42
- Alternatively in a written submission, indicate if you think legal services should be able to be provided through a wider variety of ways than are currently permitted.

This is covered in more detail in Part 3 D of this consultation.

Part D: Other Matters

This consultation also seeks views on a number of other matters relating to legal services and the legal profession in Scotland. The full content and discussion on these topics can be found set out in the Main Consultation pages. These are:

- The role of the Lord President and the Court of Session,
- Regulatory committees,
- Fitness to practice,
- Legal tech,
- Client Protection Fund (Guarantee Fund),
- Entry, standards and monitoring of legal professionals,
- Entity regulation,
- The economic contribution of legal services,
- The Competition and Markets Authority Legal Services in Scotland Research report.

It would be helpful if you could:

- Read any details in the Main Consultation on the other matters listed above which you are interested in,
- Answer any remaining question numbers 13 to 33 and 43 to 46 but only if you want to,
- Alternatively in a written submission, indicate your views on any of the other matters listed above but only if you want to.

These other matters are covered in more detail in Parts 2, 3 and 5 of this consultation.

Response

You may submit your contribution by post or submit a written submission by email. There is no restriction to the length of your statement. Please send your views and comments either by post to:

Access to Justice Unit
Scottish Government
Justice Directorate
St Andrew's House
Edinburgh
EH1 3DG

Or by email to: LegalServicesRegulationReform@gov.scot

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Main Consultation

Background to this consultation

The Need for Robust Legal Regulation and Reform of the Current Regulatory Landscape

There is significant potential for “market failure” in the provision of legal services whereby consumers either receive or perceive that they have received a poor service⁴. Consumers are less likely to make a well informed purchasing decision when consuming legal services versus a typical purchasing decision, because:

- Consumers tend to use legal services infrequently, and have limited ability to learn about legal products and service providers
- Legal services, as well as the law itself, are extremely complex
- Legal services are often purchased during traumatic or stressful circumstances.
- It is often the case that the same providers are responsible for diagnosing problems, and offering and executing solutions

In addition the Robertson report identified an absence of a comprehensive baseline survey of consumers of legal service in Scotland. These conditions are not unique to the legal services industry however. For example, medical and financial sectors also have to overcome many of these factors. While these factors have the potential to lead to a number of poor outcomes for consumers, damaging the quality of the services they receive and/or increasing the costs of those services they receive, effective regulation can guard against these and protect consumer interests.

Effective and proportionate regulation has an important role to play in ensuring that the legal profession in Scotland continues to be regarded as one of the best in the world and is able to grow and thrive. Ensuring that Scotland is able to maximise the benefits that a strong legal sector represents is a priority for the Scottish Government. The sector is worth over £1.5 billion to the Scottish economy each year and is responsible for over 20,000 high value jobs. Both the sector and the Scottish Government are working together to ensure the sector makes its maximum possible impact in a competitive global market.

Despite this, it is widely agreed that there are some elements of the current regulatory regime that could be significantly improved: current restrictions which may inhibit competition and the complex complaints system are key areas.

The need for reform is therefore well understood and supported. However, there is no clear preferred model for legal regulation agreed amongst stakeholders. A wide range of views which incorporates the views of the consumer voice and the legal

⁴ Alongside the Robertson review, a report on legal services in Scotland was produced by Europe Economics that considers these issues in more detail. It is available at: https://www.webarchive.org.uk/wayback/archive/20190323001929mp_/https://www2.gov.scot/Resource/0054/00542304.pdf

profession will be an important factor in supporting the Scottish Government in its decision making around this reform.

This context explains why this consultation represents an opportunity to build consensus and help deliver important reforms that can underpin continued growth in an internationally competitive and consumer focused legal sector in Scotland.

A short history of the legal profession in Scotland

Legal professionals in Scotland have been organised in professional bodies since at least the sixteenth century. The Faculty of Advocates was established as the body for practising advocates in 1532, though its origins are thought to date from earlier than that. Other lawyers were represented by associations and faculties of procurators and solicitors. Among those that still exist, the Society of Writers to Her Majesty's Signet (the WS Society) was formally established in 1594 and the Royal Faculty of Procurators in Glasgow was incorporated before 1668.

As the legal profession expanded in line with the volume of legislation introduced in the twentieth century, it became clear that a representative body for all solicitors was required. The Legal Aid and Solicitors (Scotland) Act 1949 established the Law Society of Scotland as the governing body for solicitors. The current legislative framework, the Solicitors (Scotland) Act 1980, incorporates earlier legislation within a (at the time) modern statutory basis.

The move to a modern 21st century legal profession and the consumer focus

At the first Session of the Scottish Parliament (1999 to 2003), The Justice One Committee held an inquiry into regulation of the legal profession after significant lobbying by various public interest groups and concerns from individual MSPs on how constituents' complaints were being handled. The Committee focused on the way in which the profession handled complaints, which it perceived to be the main source of public concern. The Committee also looked at the general arrangements by which the legal profession regulated itself. The report 'The Limits of Self-Regulation in the Legal Profession'⁵ by the independent Scottish Consumer Council was influential in setting out key areas for discussion.

The Justice Committee concluded that the best option for Scotland was to retain self-regulation, as it believed that it would be more effective to maintain that system. However it did recommend that the system should be reformed to make it more acceptable to consumers and more representative of the public interest, through the additional independent regulatory mechanism of an Ombudsman. The Justice Committee made a series of recommendations aimed at building public confidence and increasing the degree of independent oversight of complaints handling by the profession⁶.

⁵ [The Limits of Self-Regulation in the Legal Profession](#)

⁶ [Justice 1 Committee, 11th Report 2002 Report on Regulation of the Legal Profession Inquiry Volume 1: Report and evidence](#)

The outcome led the then Scottish Executive to publish a consultation paper in May 2005, entitled 'Reforming Complaints Handling, Building Consumer Confidence'⁷. This led to the Legal Profession and Legal Aid (Scotland) Act 2007 and the creation of the SLCC. The main purpose of that Act was to establish a new statutory complaints handling body, the Scottish Legal Complaints Commission, to be independent of the legal professional bodies and to reform and improve the system for the handling of complaints against lawyers.

The move to a more competitive legal sector

In England and Wales in 2004 the review of the Regulatory Framework for Legal Services, the Clementi Review⁸, led to the Legal Services Act 2007. This sought to liberalise and regulate the market for legal services in England and Wales to encourage more competition and to provide a new route for consumer complaints. It did this by creating a new "super-regulator", the Legal Services Board, to license the regulators of legal services, and also by establishing a comprehensive regulatory framework overseen by the LSB. A key change was the introduction of Alternative Business Structures that allowed non-lawyers to take a financial stake in, and become partners of, established law firms. Equally, new legal businesses could be founded under a shared ownership model between lawyers and non-legally trained managers. As a result English and Welsh solicitors and barristers were able to operate in a variety of business structures that their Scottish counterparts were not.

Subsequently in Scotland, the Legal Services (Scotland) Act 2010 aimed to allow the creation of ABS north of the border, and provided that there must be a degree of demarcation between the representative and regulatory roles of the Law Society of Scotland⁹. The Scottish Government's position at that time was that this was essential for a body which may represent the interests of a single profession and may have a regulatory role over businesses which included other professionals, for example accountants, in their management and oversight. The Scottish Government position at that time was that such demarcation would be possible within the overarching framework of the Law Society and their Council, but that the protection of a separate independent regulatory role must be present and clearly expressed¹⁰.

The 2010 Act provided for a Regulatory Committee to carry out the Council of the Law Society of Scotland's regulatory functions, namely to regulate solicitors, firms of solicitors, incorporated practices and licensed providers as well as to make appropriate regulatory rules. The Committee was required to be independent of any other person or interest and have at least 50% lay membership. The Committee is also required to have a lay convenor and be chaired by a lay person¹¹.

⁷ [Reforming Complaints Handling, Building Consumer Confidence: Regulation of the Legal Profession in Scotland](#)

⁸ [Clementi Review](#)

⁹ [Section 27 – Internal governance arrangements, Legal Services \(Scotland\) Act 2010 Explanatory Notes](#)

¹⁰ [Para 214, Legal Services \(Scotland\) 2010 Policy Memorandum](#)

¹¹ [S 133 Legal Services \(Scotland\) Act 2010](#)

The Case for Change

In December 2015, the Law Society of Scotland submitted a paper ‘The Solicitors (Scotland) Act 1980 Case for Change’¹² to Scottish Ministers, which set out proposals for developing primary legislation that would deliver reforms to the regulatory powers of the Law Society. The stated intention behind those proposals was to support growth in the legal services sector, through a more modern and proportionate approach to regulation, and to strengthen consumer protection.

The Law Society argued that legal services are an essential part of a strong economy and that the current regulatory framework required modernisation to take account of recent developments in the way in which legal services are provided in other jurisdictions, for example ABS in England and Wales. It said that the existing regulatory framework put the legal services market in Scotland at a competitive disadvantage as provisions to allow for ABS had not been implemented in Scotland.

The Law Society’s 2015 paper also made the case that the regulation of the legal services market is central to consumer protection, supported by three main principles which the Society considered a regulatory framework must contain:

- controlling entry into the profession, setting qualification standards and administering authorisation to practice
- the conduct of the profession, rules of professional conduct and monitoring these
- a complaints and redress system

The Law Society paper made the point that the Solicitors (Scotland) Act 1980 was out of date and had been amended by piecemeal legislative change since first enacted. It pointed out that the legal market had changed out of all recognition in terms of the move away from traditional high street solicitor firms (albeit that they do still exist and provide an important local service) towards cross-border firms, new business areas, internationalisation and new technology.

The Law Society also sought new powers to allow for the regulation of “entities” through a licencing system. Its paper suggested that the traditional partnership firm is largely unregulated as an entity, although the framework for the Scottish Legal Complaints Commission does regulate the profession at firm level, as do anti-money laundering rules. Their view was that the regulation powers of the Law Society seemed to be restricted to financial inspections and the requirement for firms to have professional indemnity in place. A system of licensing entities would allow for requirements such as management training, quality control systems and better complaints processes.

The Law Society’s 2015 paper ultimately led to the Robertson review and in January 2018 the Law Society submitted a new paper, ‘The Case for Change: Revisited’¹³ to coincide with the Robertson review. The Law Society suggested in this paper that the single gateway for complaints be abolished, with either the SLCC or the Law Society able to receive complaints and pass on complaints to the other where appropriate.

¹² [The Solicitors \(Scotland\) Act 1980 The case for change](#)

¹³ [The Case for Change: Revisited](#)

Such a move would be similar to the arrangement in England and Wales between the Legal Ombudsman service and the Solicitors Regulation Authority.

The Independent Review

In response, the Scottish Government listened and acted on the concerns raised by the Law Society of Scotland and others. This was highlighted in the 2016 Programme for Government commitment:

“Independent reviews of legal aid and the regulation of legal services are underway to consider how best to reform the legal aid system and what regulation is necessary. We will consider the recommendations and engage with the legal profession and users of legal services to ensure that arrangements for the regulation of legal services support the needs of those who rely on them.”

To further develop views on potential reforms, the Scottish Government established an independent review of the regulation of legal services in April 2017. That review was taken forward by an independent panel chaired by Esther Roberton with the following remit:

- to consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector;
- to recommend a framework which will protect the public and consumer interest, promote the principles of accountability, consistency, flexibility, transparency, cost-effectiveness and proportionality;
- to ensure that the regulatory framework retains the confidence of the profession and the general public;
- to undertake specific research into the extent of the unregulated legal services market in Scotland and investigate any impacts on consumers, as well as developing a better understanding of the structure of the legal services market.

In October 2018 the review’s report ‘Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland’¹⁴ was published, a culmination of 18 months of research and evidence gathering by the independent panel and its Chair, Esther Roberton. This report made 40 recommendations intended to reform and modernise the current regulatory framework to ensure a proportionate approach, supporting growth and competitive provision in the legal services sector, whilst placing consumer interests at its heart.

The Roberton report accepted a view that the current framework of legal services regulation operating in Scotland is dated and in need of reform to ensure that it is fit for the 21st Century. The report also accepted that the legal complaints system could be improved and the legislative structure streamlined.

¹⁴ [Fit for the Future Report of the Independent Review of Legal Services Regulation in Scotland](#)

The Chair of the review set out early in the report that the recommendations contained in the report were hers, and that although all of the panel members agreed with some of the recommendations, some members did not agree with all recommendations. A minority of panel members expressed significant disagreement with the primary recommendation:

“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.”

The Chair’s primary recommendation is a departure from the current model which may be described as co-regulation but which can sometimes be perceived from a lay perspective as self-regulation.

The primary recommendation would be a move to a framework wholly independent of those regulated, where a new independent body would regulate all legal professionals. The professional bodies would no longer carry out a regulatory function but would continue to be professional and representative membership bodies who support and promote their professions. In doing so the Chair sought to deliver a risk-based regulatory regime aimed at providing independent regulation within a context of clear accountability for the delivery of the key principle of public interest, whilst also having a degree of accountability to the professions it serves.

The Robertson model is not dissimilar to the regulatory frameworks in Victoria in Australia, and in the U.S. state of California. The Victorian Legal Services Board and Commissioner are independent statutory authorities responsible for the regulation of the legal profession in Victoria, accountable to the Victorian Parliament. The State Bar of California is directly responsible to the Supreme Court of California, however its Trustees are appointed by the Supreme Court, the California Legislature and Governor of California. Following recent reform the State Bar of California retained regulatory functions, while voluntary trade association activities now exist via the separate non-profit California Lawyers Association.

In developing the proposals for change the Robertson report considered that it should enable and support a vibrant, high quality legal services sector in Scotland which:

- upholds the rule of law
- provides access to justice
- protects the public and consumer interest has a high degree of public confidence and trust
- maximises the opportunity for the sector to increase its contribution to the Scottish economy

The Chair of the review also put forward the primary recommendation aimed at ensuring compliance with the Better Regulation Principles set out in the Regulatory Reform (Scotland) Act 2014, being:

- Proportionality
- Consistency
- Accountability
- Transparency
- Targeted

However, the Chair also considered the following additional points as crucial:

- Independence
- Prevention and improvement
- Cost
- Efficiency

The report also recommended that the complaints handling process should be based on well-established consumer principles:

The Consumer Principles

- **Access:** Can people get the goods, services or information they need?
- **Choice:** Can consumers affect the way goods and services are provided through the choices they make in the marketplace?
- **Information:** Is information available, is it easy to understand, and does it help consumers to make informed choices?
- **Quality and Safety:** Do goods and services meet acceptable standards?
- **Redress:** Is there a simple, cheap, quick and fair system for dealing with complaints and disputes if things go wrong?
- **Representation:** Are consumers' views properly represented in services where there is little or no choice? And is the process of decision-making transparent?
- **Fairness and Equity:** Are some, or all, consumers unfairly discriminated against?

The Scottish Government Response to the Independent Review

The Scottish Government response to the Robertson report was published in June 2019¹⁵. Our analysis of the report established that the primary recommendation largely polarised the views of those in the legal and consumer landscape. As a result the Scottish Government made the commitment to issue this consultation, intended to build consensus where possible on the way forward.

The Scottish Government response supports the introduction of a new framework for legal services regulation that encompasses the principles set out in the review but is clear that a strong independent legal profession is a cornerstone of the rule of law and modern democracy.

The response also set out that we would work with the Law Society of Scotland, the Faculty of Advocates and the Scottish Legal Complaints Commission to identify and

¹⁵ [Scottish Government response to the independent review by Esther A Robertson](#)

bring forward improvements to complaints under the existing legislative framework. A consultation seeking views on potential improvements to the system for legal complaints ran between December 2020 and February 2021¹⁶. Our response to that consultation advised that based on the responses to that consultation the Scottish Government believes that there is support to bring forward those proposals, albeit with consideration of further reforms set out in this paper. We will seek to introduce secondary legislation in year one of this parliamentary session to that effect, designed to bring about improvement to the legal complaints system in the interim ahead of wider reform¹⁷.

Next steps in reform

The responses to this consultation will be instrumental in assisting Scottish Ministers in their deliberations as to the form that any substantive reform will take. That will be used to develop primary legislation for introduction to the Scottish Parliament.

However, before such reforms may be undertaken, it will be necessary for the Scottish Government to develop a position on the primary recommendation of the Robertson report in order to set the context for who will take forward these actions, and how they will do so.

This consultation presents varying levels of potential reform of the regulatory landscape based on the recommendations in the Robertson report. It sets out different regulatory models that could be pursued, ranging from light-touch regulatory reform to a complete overhaul of the current regulatory system and introduction of a new single regulator, as recommended in the Robertson report.

This consultation includes alternative options to the primary recommendation of the Robertson report. These alternative options are aimed at achieving outcomes aligned to the principles set out in the report, of:

- supporting the constitutional principle of the rule of law
- promoting an independent legal profession and maintaining adherence to the professional principles
- improving access to justice including choice, accessibility and affordability
- protecting and promoting the public interest including the interests of users of legal services
- embedding a modern culture of prevention, quality assurance and compliance
- embedding better regulation principles throughout
- promoting innovation, diversity and competition in the provision of legal services

¹⁶ [Complaints against lawyers and legal firms in Scotland: consultation - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/complaints-against-lawyers-legal-firms-scotland-consultation-analysis/4/pdf)

¹⁷ [complaints-against-lawyers-legal-firms-scotland-consultation-analysis \(4\).pdf](https://www.gov.scot/publications/complaints-against-lawyers-legal-firms-scotland-consultation-analysis/4/pdf)

The current regulatory landscape

In the current Scottish landscape of legal service regulation, the following organisations have regulatory roles: the Law Society of Scotland, Faculty of Advocates and the Association of Commercial Attorneys also have representative roles for their members. The Scottish Legal Complaints Commission acts as a single gateway for all legal complaints relating to professionals regulated by those bodies.

In general terms, regulation includes setting education and entry requirements into the professions, along with setting and monitoring compliance of professional conduct standards. In general regulation is financed by the profession paying fees to their professional/regulatory bodies. In addition the complaints system, administered by the SLCC, is financed by a levy on members of the legal profession.

The Lord President of the Court of Session

The Lord President of the Court of Session is the head of the Judiciary in Scotland. The Lord President has responsibilities in relation to the regulation of the legal profession and has a regulatory function in relation to the Scottish Legal Complaints Commission. This role is set out in more detail in Part 2 B of this consultation.

The Law Society of Scotland

The Law Society of Scotland comprises largely of solicitors and solicitor-advocates – some paralegals choose to be regulated by the Law Society but it is not compulsory. The independent Regulatory Committee of the Law Society of Scotland is accountable to, but independent of the Law Society Council. The Committee was created as part of the Legal Services (Scotland) Act 2010 and exercises the Law Society Council's regulatory functions as set out in section 3F of the Solicitors (Scotland) Act 1980. Its core purpose is to ensure these functions are exercised independently, properly and with a view to achieving public confidence.

The Law Society of Scotland and the Scottish Solicitors' Discipline Tribunal (SSDT) were established by statute in 1949. The Solicitors (Scotland) Act 1980 underpins and is central to the regulation of the Solicitors' profession in Scotland. It is a consolidation Act, which brought together a number of pieces of legislation dating back to 1949. The 1980 Act itself has been subject to amendments introduced by various pieces of legislation.

The Solicitors (Scotland) Act 1980 sets out that the Law Society of Scotland has statutory responsibility for the promotion of the interests of the solicitor profession in Scotland and the interests of the public in relation to that profession. In carrying out its functions the Law Society must not only have regard to the interests of the solicitors' profession but also to the interests of the public in relation to that profession.

The Scottish Solicitors' Discipline Tribunal

The Scottish Solicitors' Discipline Tribunal is an independent body which mainly deals with serious disciplinary issues that arise within the Scottish legal profession.

As a formal judicial body, the Tribunal is constituted under the provisions of sections 50 – 54 and schedule 4 of the Solicitors (Scotland) Act 1980 as amended.

Complaints against solicitors in Scotland are channelled first through the Scottish Legal Complaints Commission who will refer conduct matters to the Law Society of Scotland. The Law Society will then carry out an initial investigation and can decide to prosecute more serious cases before the SSDT.

The Faculty of Advocates

The Faculty of Advocates is comprised of advocates with the responsibility for the regulation of advocates having been delegated by the Court of Session to the Faculty. Professional rules for advocates must be approved by the Lord President of the Court of Session and cannot be revoked unless the Lord President has given approval. The Lord President retains an important role in connection with the Faculty's disciplinary procedures. In addition to his responsibility of approving the Faculty's disciplinary rules, it is also incumbent upon the Lord President to appoint the Chair of the Faculty's Disciplinary Tribunal¹⁸.

The Faculty of Advocates Complaints Committee and Disciplinary Tribunal comprises both Members of Faculty and Lay Members. A panel of Lay members are nominated by Scottish Ministers¹⁹ and from which lay persons are drawn to make up a committee or tribunal. Complaints about the conduct of Members of Faculty are made in the first instance to the Scottish Legal Complaints Commission. If the SLCC considers that the complaint concerns the conduct rather than professional services of a Member of Faculty then it is remitted to the Faculty for investigation and determination. Such complaints are dealt with firstly by the Faculty Complaints Committee and then, where appropriate, the Faculty Disciplinary Tribunal.

The Association of Commercial Attorneys

In terms of sections 25 to 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, a body may apply to acquire and exercise rights to conduct litigation on behalf of the public and rights of audience. The Association of Commercial Attorneys are, to date, the only body to have done so. Any application for such rights must be made to the Scottish Ministers and the Lord President. It falls to the Lord President either to grant, or to refuse, the application.

The ACA is comprised of and responsible for the regulation of commercial attorneys. Members of the ACA must have a legal qualification and a professional or construction qualification. Members are required to have relevant construction and litigation experience as an Architect, Quantity Surveyor or Engineer. Members of the ACA are officers of the court and can appear in the Sheriff Court in matters relating to construction and building law. They are subject to the regulatory oversight of the Scottish Legal Complaints Commission in the same way as other legal professionals.

¹⁸ See Rule 96(a) of the Faculty of Advocates Disciplinary Rules 2019 – available at <http://www.advocates.org.uk/making-a-complaint/the-disciplinary-rules>.

¹⁹ *Ibid.* See Rule 96(c).

The Association of Commercial Attorneys scheme was approved in 2009²⁰.

The Scottish Legal Complaints Commission

The Scottish Legal Complaints Commission acts as a single gateway for all complaints against legal professionals in Scotland. It investigates and resolves complaints about inadequate professional service, refers complaints about the conduct of lawyers to the relevant professional organisation and has oversight of complaint handling across the profession. Serious disciplinary issues relating to the conduct of legal professionals may also be heard before their Discipline Tribunal, via the relevant professional regulatory body.

The SLCC is a neutral body and operates independently of the Scottish Government and of the legal profession. The SLCC is accountable to the Scottish Parliament and the Lord President. The SLCC requires to consult the legal profession each year as to the amount of the levy on the profession, which is used to fund the SLCC and the legal complaints process.

²⁰ [Act of Sederunt \(Sections 25 to 29 of the Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1990\) \(Association of Commercial Attorneys\) 2009](#)

Part 1: Strategic Change, Vision and key aspects of the regulatory model

A. Proposed Regulatory Model principles and objectives

The role of legal services are central to the protection of human rights and freedoms; they play a vital role in upholding the rule of law and providing access to justice.

Legal services also contribute to the social value of Scotland. There is significant diversity in the types of legal services people access where often individuals require such service in times of distress or vulnerability. For example, many will interact with legal services when buying a home, which may be a stressful experience for some. There are also a range of commercial matters supported by legal services, from the small business to the multi-national corporation.

Legal services support individual's wellbeing, promote their continued contribution to society and help to prevent the escalation of problems. Consequently the Scottish Government is of the view that legal services regulation should align and uphold Human Rights (PANEL) principles:

- **Participation:** People involved in decisions that affect their rights
- **Accountability:** Monitoring of how rights are being affected and remedies for when things go wrong
- **Non-discrimination:** People who face the biggest barriers to realising their rights should be prioritised and all forms of discrimination eliminated
- **Empowerment:** Everyone should understand their rights and be fully supported to participate and claim their rights
- **Legality:** adherence to domestic and international laws

The Robertson report sets out the key principles and objectives that should underpin a new regulatory model for legal services in Scotland.

The Scottish Government has carefully considered the Robertson report and has undertaken discussions with partners on the relevance of existing principles and objectives, such as consumer principles and the regulatory objectives contained in the 2010 Act. This collaborative approach is designed to bring about strategic change and a clear vision for the future regulatory structure.

There is significant read-across and the proposed objectives broaden out the existing principles and objectives that could be applied to the delivery of legal services. This is demonstrated by the following comparison of the principles and objectives set out in the current regulatory structure, to those that we would propose be applied, no matter which regulatory structure is developed as a result of this reform. These are:

- Protecting and promoting the public interest including the interests of users of legal services

Regulatory Objectives – Protecting and promoting the interests of consumers and the public interest generally

SLCC Consumer panel – access the services you need; free choice of a range of service providers; excellent legal and customer service; treated fairly by your legal services provider;

- Supporting the constitutional principle of the rule of law

Regulatory objectives – supporting the constitutional principle of the rule of law, and the interests of justice

- Promoting independent legal professions and maintaining adherence to the professional principles

Regulatory Objectives – promoting an independent, strong, varied and effective legal profession; promoting and maintaining adherence to professional principles

- Improving access to justice including choice, accessibility, affordability and understanding of services by service users

Regulatory objectives – promoting access to justice

Consumer panel – access the services you need; free choice of a range of service providers; excellent legal and customer service; treated fairly by your legal services provider; a say in the way that services are received.

- 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.
- Embedding the better regulation principles throughout its areas of responsibility (and additionally “agility”).
- Promoting innovation, diversity and competition in the provision of legal services

Regulatory objectives – promoting competition in the provision of legal services; encouraging equal opportunities....within the legal profession

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
- Supporting the constitutional principle of the rule of law
- Promoting independent legal professions and maintaining adherence to the professional principles
- 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.
- Embedding the better regulation principles throughout its areas of responsibility (additionally; agility, independence, prevention, improvement, cost consideration of cost, and efficiency).

- Promoting innovation, diversity and competition in the provision of legal services

The Robertson report also sets out the following key outcomes to support the framework of a new regulatory model²¹:

- Enable access to justice including choice and diversity
- Uphold the rule of law and the proper administration of justice
- 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
- Enable future growth of legal services

The Scottish Government's view is that the model taken forward should deliver a regulatory framework which provides for:

- Support and promote sustainable legal services, which benefit consumers
- agile
- risk based
- efficient
- outcomes based
- a proactive focus continuous improvement and prevention of failures (which lead to complaints)
- proportionality
- an increased focus on independence and accountability

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

²¹ [Page 4, the Robertson report](#)

- Uphold the rule of law and the proper administration of justice
- 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
- Enable future growth of legal services

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

- Support and promote sustainable legal services, which benefit consumers

Answer

- agile

Answer

- risk based

Answer

- efficient

Answer

- outcomes based

Answer

- a proactive focus continuous improvement and prevention of failures (which lead to complaints)

Answer

- proportionality

Answer

- an increased focus on independence and accountability

Answer

Part 2: Regulatory models and landscape

A. The Potential Regulatory models

In seeking to build consensus, this paper contains additional alternative viable regulatory models to that proposed by the independent review and the resulting Robertson report.

The alternative models within this paper are aimed at delivering the outcomes aligned to the principles set out by the Robertson report, and as set out in Part 1 above, whilst also intending to meet the initial remit of the review.

The Scottish Government is of the view that the final regulatory model to be taken forward in primary legislation should deliver a regulatory framework which meets the following criteria:

- agile
- risk based
- efficient
- outcomes based

whilst also incorporating:

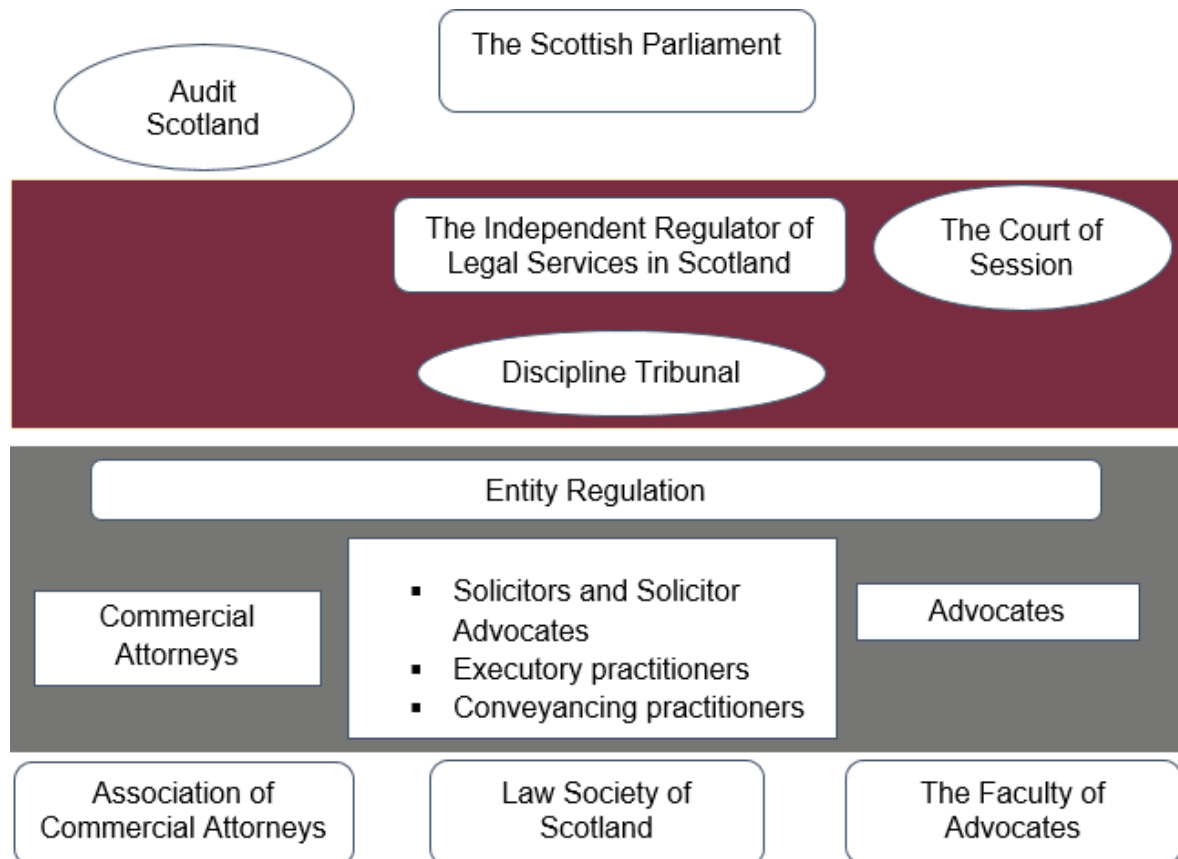
- a proactive focus continuous improvement and prevention of failures (which lead to complaints)
- proportionality
- and an increased focus on independence, accountability and transparency.

The Models

The first regulatory model and main focus of this consultation is that proposed by the independent review:

Option 1: Robertson Model

Design



This landscape model is the primary recommendation of the independent Robertson review and is seen by the report as the optimum model for delivering accountability, transparency and proportionality. It encompasses all legal professions.

The Robertson report sets out that despite the Scottish jurisdiction being small, our regulatory structure is complex, inefficient and comparatively expensive with five main regulatory bodies for around 12,000 legal professionals. The Robertson report proposes that this new model would be cost effective and efficient.

In the proposed new model, a single independent regulator would be responsible for entry, standards, monitoring, complaints and redress in respect of the legal profession. In addition lead on work to prevent failure which lead to complaints, though continuous improvement and quality assurance. This would not be a one size fits all model; the arrangements for each of the professional areas would be designed to be appropriate and proportionate to the business carried out by those professional groups, and the level of risk to the consumer. It would also have an approval function on education, which would be developed in collaboration with the professional bodies who would have a key role in the development and delivering continuous professional development of their members.

Role of regulator and complaints body

A new single regulator would be established, independent of Government and those regulated.

The regulator would regulate all providers of legal services and licence all entities providing legal services to the public and corporate entities. Lawyers who do not provide legal services directly to consumers, or who have additional governance structures, such as advocates and in-house lawyers, may not be subject to entity regulation.

The regulator would act not only as regulator but also as the complaints handler and disciplinary body for solicitors, advocates, commercial attorneys etc., including any new entrants to the market.

The regulator would be able to seek approval to act as a regulator in other jurisdictions. It would assess and make recommendations to the Scottish Government and Financial Conduct Authority around the potential of future regulation of Claims Management Companies in Scotland. It would seek to assume the role of regulator of Anti-Money Laundering as well as the role of incidental financial business regime.

It would act as single gateway for complaints and redress as well as establish an independent arm's length disciplinary tribunal, with sufficient safeguards to protect the independence of the tribunal.

Proposed regulator functions

- Hold the register of all legal professionals
- Set requirements for entry, education and training – working with professional bodies
- Quality assure CPD, evaluation and monitoring – working with professional bodies
- Develop codes of conduct and service standards – working with professional bodies
- Regulate entities
- Review the scope of 'reserved activities' in Scotland
- Consider data sharing with other organisations in the Justice sector on the health of the system and meeting of professional standards for the purposes of quality assurance
- Handle all legal complaints and appeals
- Establish a disciplinary tribunal
- Develop a formal procedure on whistleblowing
- Manage the Professional Indemnity Insurance scheme
- Manage a Client Protection Fund to protect consumers against loss of value through dishonesty

Governance and Accountability

The independent regulator would be accountable to the Scottish Parliament and the legal character of the body set out in legislation. This would ensure that it would be able to fulfil its governance objectives in a clear, consistent and comparable way, leading to a simplified and more transparent landscape and promoting greater accountability. In addition it would be subject to scrutiny by Audit Scotland.

The Scottish Parliament Corporate Body would appoint the non-legal Chair of the Board to the new independent regulator through a public appointments process. That Chair could only be removed by a two-thirds majority of the Scottish Parliament.

The Board would be made up of an equal number of legal and non-legal members. Members would be appointed through the public appointments process; legal members potentially by the Lord President and non-legal members potentially by Scottish Ministers or other means. The Chief Executive would be appointed by and accountable to the new regulator's Board.

The independent regulator would lay an annual report before the Scottish Parliament each year.

Consumer Voice

The regulator would be required to ensure that it embedded a consumer voice in the organisation to provide advice, represent the views of consumers and organise research. This may be through a consumer panel or by asking Consumer Scotland to consider the sector. Views on this are sought at question 10.

Courts and the Lord President of the Court of Session

The role of the Courts and the Lord President would require to be set out in legislation in respect of the regulation of legal services. This would define their regulatory role in a consolidated and transparent way. The Courts and Lord President would retain a role in respect of the admission of individuals to the legal profession. Part 2 B of this consultation seeks further views on their role in the framework.

The professional bodies

The regulator would be required to work with professional bodies such as the Law Society Scotland, the Faculty of Advocates and the Association of Commercial Attorneys as well as any new organisation representing other professional groups. The regulator would be required to consult those bodies on proposed regulatory changes.

The professional bodies would be membership organisations representing the interests of their members. They would have a statutory footing in line with sections 1 and 2 of the Legal Services (Scotland) Act 2010, however these would be described as professional objectives rather than regulatory objectives.

Professional bodies would have a role in providing CPD (approved by the regulator), provide professional services and guidance, issue publications, and be able to seek to influence law reform.

Key points

All legal professionals would be regulated by a new independent body which would be accountable to the Scottish Parliament. All complaints relating to legal professionals would be handled by that body, replacing the SLCC.

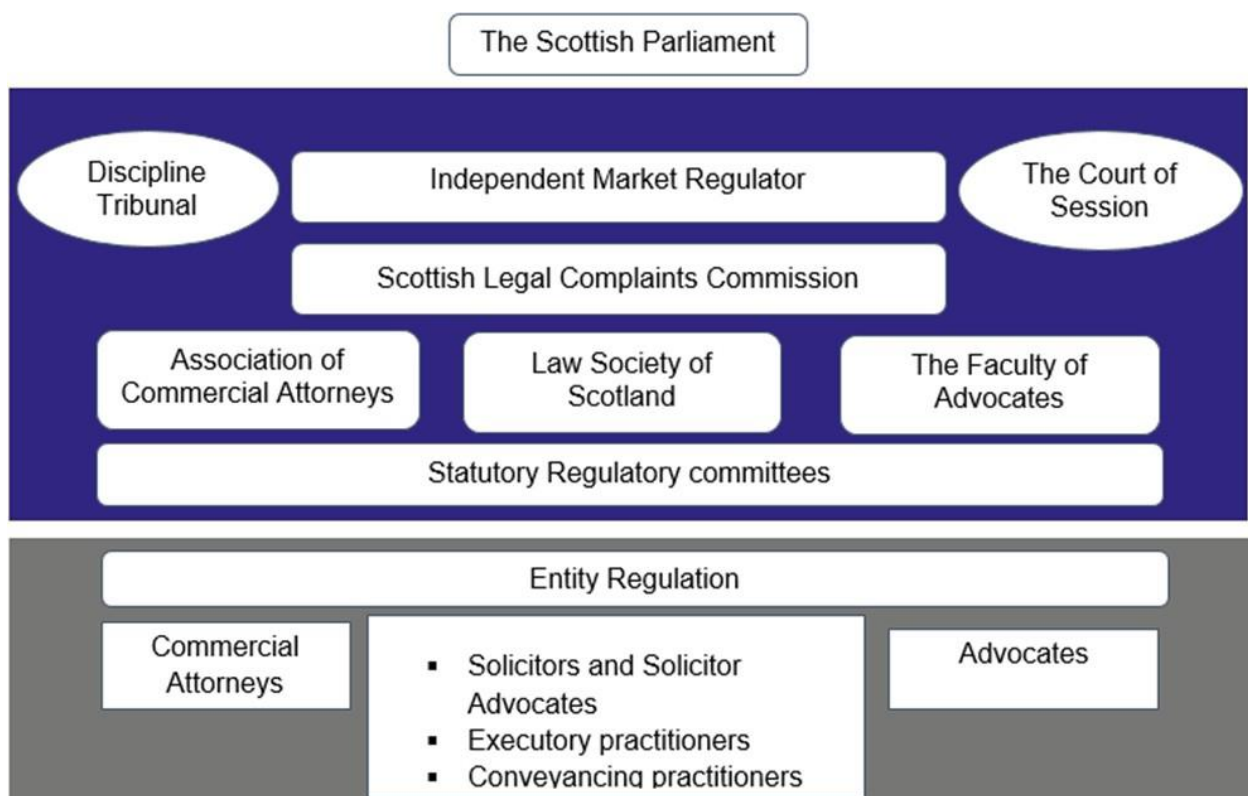
That new body would be funded through a levy on those it regulated, with the intention that the cost to the legal profession be no more than the current regulatory framework.

The global regulatory fund may increase though the potential to regulate providers in other jurisdictions, along with the introduction of entity regulation and alternative business structures. In addition the intention would be that by reducing the complexity of the complaints system, as well as reduced duplicative administrative and support functions in relation to complaints (office accommodation, HR, finance, case management systems, IT, etc.) there may be potential for savings to the overall framework.

Current regulators, The Law Society of Scotland, The Faculty of Advocates, and The Association of Commercial Attorneys, would no longer have regulatory roles. Instead they would be invited to work with the new independent regulator as professional membership organisations.

Option 2: Market Regulator Model

Design



Role of a market regulator and authorised regulators

In this regulatory model, an independent market regulator would oversee the work of the 'authorised regulators', each having distinct roles and purpose.

a. Market regulator role

A market regulator under this regulatory model would have three main roles:

Monitor the supply of legal services – Authorise the regulators of legal professionals, and to have the ability to act and make recommendations to counter geographic or subject specific areas where services are reduced or in decline.

Monitor risks within the sector – Have a broad regulatory tool-kit to counter and mitigate potential risks.

Act as economic regulator – Act impartially, aiming to align and balance the interests of the sector with the interests of consumers and corporate entities.

Proposed market regulator functions

- Licence / authorise regulators of legal services
- Set minimum entry, education and training standards
- Lead and have oversight of quality assure CPD, evaluation and monitoring
- Review reserved activities / definition of legal services, and make recommendations based on changes in the market.
- Assess and make recommendations around any future ability to regulate Claims Management Companies in Scotland.
- Consider data sharing with other organisations in the Justice sector on the health of the system and meeting of professional standards for the purposes of quality assurance
- Undertake or commission research on the legal services market
- Develop a formal procedure on whistleblowing

b. Authorised regulators (current regulators) role

Current regulators would continue to regulate their respective professions as they largely do now, as well as licence entities providing legal services to the public and corporate entities. Lawyers who do not provide legal services directly to consumers, or who have additional governance structures, such as advocates and in-house lawyers, may not be subject to entity regulation. Authorised regulators would be able to seek approval to regulate in other jurisdictions.

In addition where authorised regulators have responsibility in respect of Anti-Money Laundering matters and the incidental financial business regime in conjunction with the Financial Conduct Authority, this would continue.

Potential functions of authorised regulators

- Hold a register of their members (Data shared with market regulator and complaints body in line with GDPR)

- Set entry, education and training standards for their respective professions
- Provide and comply with quality assurance, CPD, evaluation and monitoring, set by the market regulator
- Develop codes of conduct and service standards against criteria set out by market regulator
- Regulate entities
- Manage Professional Indemnity Insurance
- Manage a Client Protection Fund to protect consumers against loss of value through dishonesty

Governance and Accountability

a. Market Regulator role

An Independent Market Regulator would be accountable to the Scottish Parliament and the legal character set out in legislation. This would ensure that it would be able to fulfil its governance objectives within a clear, consistent and comparable way, leading to a simplified and more transparent landscape and promoting greater accountability.

Scottish Ministers would appoint the non-legal Chair of the Board for the Independent Market Regulator through a public appointments process. That Chair could only be removed by a two-thirds majority of the Scottish Parliament.

The Board would be made up of an equal number of legal and non-legal members. Members would be appointed through the public appointments process; legal members by the Lord President and non-legal members by Scottish Ministers or other means, shaped by this consultation. The Chief Executive would be appointed by and accountable to the Board.

b. Authorised regulators (current regulators) role

Each regulator would “host” an independent regulatory committee with functions set out in statute.

The Regulatory Committees would be strengthened in terms of their independence, and their ability to oversee regulatory functions. More detail is set out in Part 2 C of this consultation where views are sought on the role of Regulatory Committees in the framework.

Regulatory Committees would require to provide an annual report on the matters within their remit, to the market regulator, who would specify that remit.

Consumer Voice

The market regulator would be required to ensure that it embedded a consumer voice in the regulatory framework to provide advice, represent the views of consumers and organise research. This may be through a consumer panel or by asking Consumer Scotland to consider the sector. Views on this are sought at question 10.

Courts and the Lord President of the Court of Session

The role of the Courts and the Lord President would require to be set out in legislation in respect of the regulation of legal services. This would define their regulatory role in a consolidated and transparent way. The Courts and Lord President would retain a role in respect of the admission of individuals to the legal profession. Part 2 B of this consultation seeks further views on their role in the framework.

Complaints

The SLCC would remain in place. The complaints process would be informed by the responses to this consultation. The SLCC would have a complaints tool-kit available to it, allowing it to respond more proportionality and flexibility to the handling of complaints.

Key points

A new independent market regulator would be created which would sit over the current authorised regulators. It will be accountable to the Scottish Parliament.

The authorised regulators would retain many of their current functions. Each of the regulators would host an independent statutory regulatory committee which would be accountable to the independent market regulator, who in turn would be responsible for authorising each committee's regulatory functions.

A similar model currently operates in England and Wales by way of the Legal Services Board. The Legal Services Board is an oversight regulator and sits at the top of the regulatory system. It provides regulatory oversight of the "approved regulators" named in the Legal Services Act of 2007 as well as additional regulators added since that Act received Royal Assent. The work of the LSB is supported by a small team of 30 staff and nine Board members. It is thought that support proportionate to Scotland's legal profession under this model would require a very small staffing complement.

That new body would be funded through a levy on those it regulated with the costs intended to be no more than the current regulatory system in place in Scotland. The global regulatory fund may increase with the addition of entity regulation of alternative business structures, and associated levy income that would bring, plus the potential to regulate providers in other jurisdictions. There may be potential savings to the costs of the regulator in this model by reducing the complexity of the complaints system.

Difference to the primary recommendation of Option 1: Robertson model

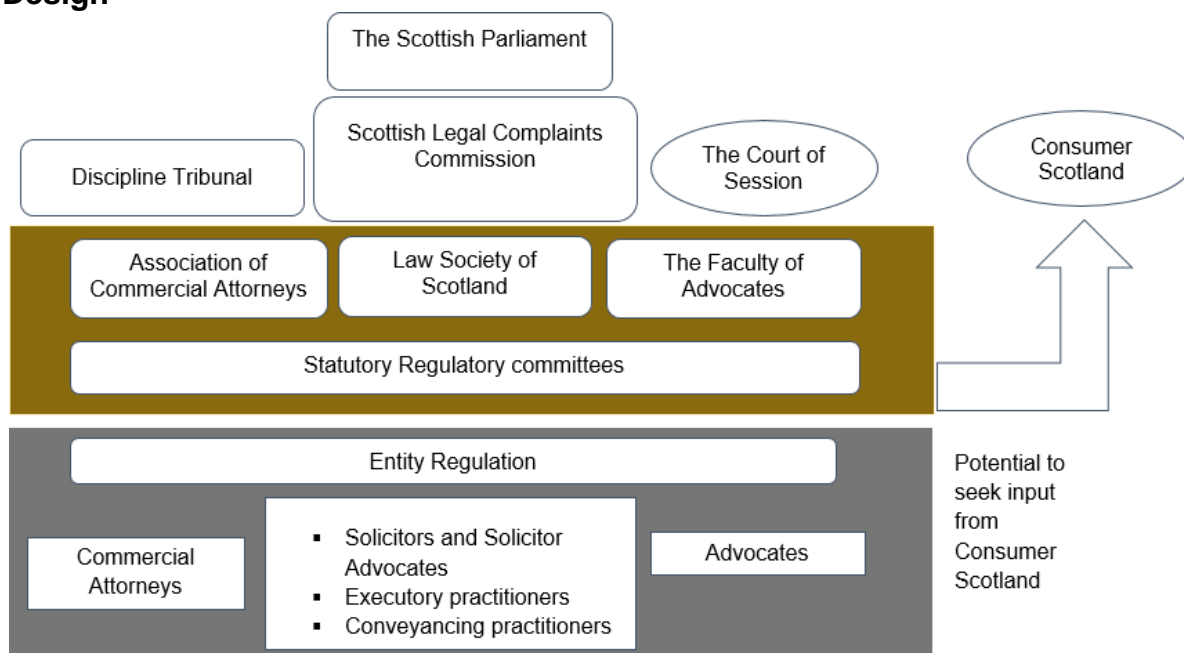
A new independent market regulator would be created. It would oversee the existing regulatory/complaints framework rather than replace it.

Independent statutory regulatory committees within each authorised regulator would regulate each profession, rather than a single new body under Option 1.

A reorganised SLCC would continue to handle and oversee legal complaints.

Option 3: Enhanced accountability and transparency model

Design



In this model, the current regulators would continue to regulate their respective professions. There would be a focus on enhanced accountability and transparency, and a simplification of the current framework.

Regulator(s)

This model would retain the current regulators: the Law Society of Scotland, Faculty of Advocates and Association of Commercial Attorneys. Legal complaints would continue to be handled by the SLCC.

Role of regulator

Those bodies would regulate their respective professionals as they do now. In addition licence entities providing legal services to the public and corporate entities. Lawyers who do not provide legal services directly to consumers, or who have additional governance structures, such as advocates and in-house lawyers, may not be subject to entity regulation. Regulators would be able to seek approval to regulate in other jurisdictions.

Where authorised regulators have responsibility in respect of Anti-Money Laundering and the incidental financial business regime in conjunction with the Financial Conduct Authority this would continue.

Proposed regulator functions

- Hold the register of their members
- Set entry, education and training standards
- Quality assure CPD, evaluation and monitoring
- Develop codes of conduct and service standards
- Regulate entities
- Manage Professional Indemnity Insurance
- Manage a Client Protection Fund to protect consumers against loss of value through dishonesty

Regulators would create a working group to:

- Assess and make recommendations to the Scottish Government and FCA, as to any future ability to regulate Claims Management Companies in Scotland
- Review reserved activities / definition of legal services, and make recommendations based on changes in the market.
- Consider data sharing with other organisations in the Justice sector on the health of the system and meeting of professional standards for the purposes of quality assurance
- Develop policy on whistleblowing

Governance and Accountability

Each regulator would “host” an independent regulatory committee with functions set out in statute.

The regulatory committees would be strengthened in terms of their independence, and their ability to oversee regulatory functions.

Regulators would have a statutory requirement to ensure that these regulatory committees are suitably resourced. Internal governance arrangements similar to those set out in section 27 of the 2010 Act are envisaged as being put in place.

Regulatory committees would provide an annual report to the Scottish Parliament on regulatory matters and have their remit approved by the Parliament. More detail is set out in Part 2 C of this consultation where views are sought on the role of regulatory committees in the framework.

Consumer Voice

The regulators would be required to ensure that they embed a consumer voice in their organisation to provide advice, represent the views of consumers and organise research. This may be through a joint consumer panel encompassing the sector, a requirement for consumer expertise within the regulatory committees, or by asking Consumer Scotland to consider the sector. Views on this are sought at question 10.

There is potential for Consumer Scotland to be a designated consumer body with power to raise a super-complaint in the legal sector in Scotland^{22, 23}.

Courts and the Lord President of the Court of Session

The role of the Courts and the Lord President would require to be set out in legislation in respect of the regulation of legal services. This would define their regulatory role in a consolidated and transparent way. The Courts and Lord President would retain a role in respect of the admission of individuals to the legal profession. Part 2 B of this consultation seeks further views on their role in the framework.

Complaints

The SLCC would remain in place. The complaints process would be informed by the responses to this consultation. The SLCC would have a complaints tool-kit available to it, allowing it to respond more proportionality and flexibility to the handling of complaints.

Key Points

No new organisation would be created – each of the current regulators would host an independent statutory regulatory committee which would be accountable to the Scottish Parliament. The SLCC would continue to handle legal services complaints.

The regulators and SLCC would be funded through a levy on those regulated with the costs intended to be no more than the current system. The global regulatory fund may increase with the addition of entity regulation of alternative business structures, and associated levy income that would bring, plus the potential to regulate providers in other jurisdictions. There may be potential savings to the costs of the regulator in this model by reducing the complexity of the complaints system.

Difference to the primary recommendation of Option 1: Robertson model

No new body would be created and the existing regulatory framework would remain with adjustments. Enhanced independent statutory regulatory committees within each professional body would regulate each profession, rather than a single new body.

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

²² This would however be dependent on legislative changes to the UK Enterprise Act 2002.

²³ [What are super-complaints? - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/what-are-super-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

Mostly agree

Mostly disagree

Strongly disagree

Please give reasons for your answer.

Roberton recommendations

The senators strongly disagree with this recommendation.

It is of paramount importance that the existing legal services regulatory regime, the principles which underpin it, and the potential implications of change are fully understood before recommendations proposing a change of regime are considered. It is not obvious to us that the authors of the Roberton report fully understood these issues when making their recommendations. The report’s failure to recognise the constitutional importance of the independence of the legal profession, its importance in helping secure the independence of the judiciary and thus, the rule of law, is gravely concerning. Any credible discussion of regulatory structures has to include detailed discussion of the current regulators, the Lord President and the Court of Session. The lack of understanding surrounding the Lord President and the Court’s role, and the fundamental democratic principles which underpin them, discredit the Roberton report’s recommendations considerably.

Independence of the judiciary

The doctrine of the separation of state powers requires that the judiciary remains independent of the legislature and executive. The “single independent regulator” as proposed by the Roberton report, accountable as it would be to the Scottish Parliament and Audit Scotland, would remove the power of the Court of Session to regulate the legal profession. It would serve only to harm the independence of the legal profession, and in turn impinge upon the independence of the judiciary. A system in which a profession is answerable to parliament is inherently against independence. Political regulation is simply not appropriate under any circumstances. It is no exaggeration to say that the recommendations proposed by the Roberton report present a clear threat to the separation of powers and consequently, the rule of law.

In the current scheme of regulation, the legal profession does not regulate itself. The independence of the legal profession is, in fact, protected by the various functions and responsibilities which are conferred upon the Lord President. These functions and responsibilities are set out in greater detail in the paper annexed to this response. The current framework has been specifically designed to respect the need for lawyers to be able to protect the fundamental rights and freedoms of individual citizens, without fear of interference from or persecution by the state. The scheme proposed in the Roberton Report offers no such protection. Instead, it proposes to hand over the regulatory reins to the Scottish Parliament. The dangers of transferring ultimate regulatory power to a body politic, cannot be overstated

Recently, we have seen attacks on lawyers by politicians who have, on multiple occasions, publically criticised “lefty activist lawyers” for “hamstringing” the justice system by challenging the Government in court. This type of incident is extremely concerning and was widely condemned by the legal profession (see the Dean of Faculty’s open letter to the Prime Minister [here](#)). It perfectly illustrates why neither political nor government regulation is an appropriate model for regulation of the legal profession. It is of critical constitutional importance that there is an independent legal profession capable and willing to stand up for the citizen against the government of the day. An immigration lawyer, for example, must be free to act against the government without fear of disciplinary action, and as the government comprises the majority in the legislature, the two are inextricably connected. This is what sets the legal profession apart from other professions, few of which (if any) have a similar link to parliament as that which is proposed here for the legal profession. There is no obvious benefit to the legal profession being accountable to the legislature; it is a wholly disproportionate and inappropriate interference with the separation of powers.

It may be suggested that an abuse of power by the state could never occur in Scotland. However, recent events have served as a reminder that an independent legal profession and judiciary, protects the rule of law and democracy as we know it in Scotland. In November 2021, the European Court of Justice announced that it will fine Poland £1million per day for its decision to ignore the ECJ’S ruling on Poland’s judicial reforms, which the ECJ ruled do not guarantee judicial independence. The situation in Poland, which has arisen following several legislative reforms aimed at restructuring the judiciary and courts system, serves as a timely reminder of the need for constant vigilance in the protection of the rule of law. That principle, which protects the rights and freedoms of individual citizens, is itself protected by the independence of the judiciary and legal profession. Hence, the independence of the legal profession must be protected; the rule of law and democracy itself depend upon it.

The Court of Session

It is estimated that several hundreds of cases directly involving the Scottish Ministers are heard in the Court of Session each year. The process of Judicial Review exists to allow citizens to challenge executive power, safe in the knowledge that an independent judiciary will hear the case without fear or favour. High profile litigations involving the Scottish Government are routinely heard in the Court of Session. For example:

- the prorogation of parliament case;
- the challenge to minimum alcohol unit pricing;
- the tenant farmers dispute cases;
- the cases involving a senior Scottish Minister;
- the Rangers cases;
- the challenge to the named persons scheme; and
- the challenge to the Menie Links Windfarm construction.

Inevitably, these cases are particularly politically sensitive and independence from government is critical. Without the independence that the current regulatory system provides, would the lawyers involved have been free to provide the same independent legal advice to all parties? An independent single regulator, accountable to the Scottish Parliament, could not provide anything resembling the same level of protection to the public, which flows from having a robustly independent legal profession available to them.

It is also worth considering the difficult position that Scottish Government lawyers, and the

Crown, would be placed in if the Robertson recommendations were to be implemented.

Ethical Issues

It is not infrequent for ethical issues to come before the court. For this reason, it is essential that the court must have control over those appearing in front of it. Conduct in court must be able to be dealt with by the court immediately and the power to reprimand must be available. Without the ability to enforce the rules, the court's power is curbed significantly. It is paramount that the court retain the power to help correct the behaviour of those who have fallen short. Recent examples of cases involving ethical or conduct issues include Nyiam¹, Macdonald², Lundy³ and Donegan.⁴

The judges of the Court of Session and High Court of Justiciary take their role in protecting the public from the risks posed by falling standards very seriously. Reference is made to the Court's practice of making observations as to standards and conduct within its judgments at page 17 of the annexed paper. Anything which inhibits the court's role in this regard risks eroding the authority of the Court of Session.

The case for change

A new regulatory regime for the 21st century was put in place by the Scottish Parliament as recently as 2010 in the form of the Legal Services (Scotland) Act 2010. Other models of legal services regulation were discounted by the Scottish Government in favour of the existing regime. A frequent change of regulatory regime is not conducive to Scottish businesses flourishing; the disruption caused to the operation of business by a change in regulatory regime should not be underestimated. It is perplexing that the Scottish Government is now reconsidering the regime which it put in place only just over a decade ago. We observe that the themes of competition, proportionate regulation and consumer interest are already clearly identified as key objectives under the 2010 Act. There appears to have been no examination or evaluation of the effectiveness of that legislation. We find it surprising that such radical changes for reform are predicated on such little assessment of the existing regulatory system.

It is not clear to us in what way the current regulatory framework is considered to be defective. The consultation paper seeks to summarise the evidence base used in the Robertson report on pages 10-11 of the summary consultation. It states, "The Robertson report recognised that Scotland is home to a well-educated, well respected legal profession with a high degree of public trust, of which the Chair believes we can be proud. The Robertson report found little evidence of significant wrong-doing in the current model, instead that complaints are increasing and the complaints system is in need of reform." We acknowledge that there appears a desire to improve transparency in the system and the complaints handling process. However, the evidence base relied upon in the Robertson report to justify the proposal for such a fundamental change to the regulation of legal services in Scotland is unclear. It appears to us that the Robertson report conflates a need to reform the system for handling consumer complaints, with a need to overhaul the entire system of legal regulation. There is a very real danger presented to the rule of law by the Robertson recommendations and overhauling the entire regulatory system, in order to improve transparency and the complaints process. These aims can be achieved by other, more proportionate means without any change to the existing regulatory regime. There is

¹ 2021 HCJAC 44, paragraphs 9-11

² 2020 HCJAC 21

³ 2018 HCJAC 03, paragraphs 52 onwards

⁴ 2019 HCJAC 10, paragraphs 54 onwards

no evidence base to support reform on this scale.

The Competition and Markets Authority

We note the Competition and Market Authority's report into the Scottish legal services sector, published in March 2020, which is referred to in the consultation document. It is of note that the report did not address the regulatory role of the court to any meaningful degree. In the report, the CMA acknowledge that concerns regarding regulatory independence and whether the current system best protects consumers have been raised previously, notably at the time of the Legal Services (Scotland) Act 2010, when it was decided not to move to a new independent regulatory framework. Instead, it was decided that measures promoting a degree of separation between the representative and regulatory functions of the Law Society of Scotland would be introduced by the 2010 Act. These measures are listed at paragraph 5.16 of the report. It appears to us that these measures have been almost entirely overlooked by the CMA in their examination of the independence of the legal profession in Scotland.

The report seeks to rely on evidence from a Scottish Legal Complaints Commission survey in 2019 to provide evidence of a conflict of interests between representative and regulatory roles which create an unnecessary risk to public confidence. However, this survey cannot be viewed in isolation. In December 2021 the Law Society commissioned an independent poll of Scottish adults on their views of solicitors and experience of using them. The final results recorded that 93% of people who had used a Scottish solicitor in the last five years had been satisfied with the service they received, and 84% of people agreed Scottish solicitors are trustworthy. In 2018 the Law Society conducted a survey of its members to explore their perceptions of the Society. The results were positive about the nature of the current system. A conclusive 95% of members expressed agreement that the LSS should continue to be responsible for representation, support and regulation. The views of the profession cannot be wholly discounted.

There appears to be a misrepresentation in the CMA's report in regard to the statistical basis for their recommendations, and whether the professions agree with their proposals. As the evidence base is mixed, it is difficult to understand how the CMA have reasonably concluded that there is a legitimate case for wholesale change of the existing regulatory regime in the way proposed. As the CMA report states at paragraph 5.98, proportionality is a key tenet of policy decision making. The widespread changes proposed by Robertson and the CMA in regard to an independent market regulator are undoubtedly disproportionate to the evidence based relied upon to justify the proposals.

There is simply no rationale for a departure from the current system in favour of introducing a system which would involve the removal of the power of the Court of Session to regulate the legal profession and its replacement by oversight of the legal profession by the legislature, beyond assertions that it will somehow improve accountability. This perceived benefit must be weighed against the real threat to the independence of the judiciary and the rule of law.

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.

Each of the three options for regulation proposed in this consultation document would be an unwarranted interference by the government and parliament with the judiciary. Under each of the three options, the power to regulate the legal profession would be removed from the Court and transferred to a body responsible to parliament. This is an unacceptable encroachment on the independence of the judiciary and would result in a vastly weakened doctrine of the separation of powers.

At present the regulator of the legal profession is the judiciary in the form of the Lord President. The Lord President is a regulator who is independent from government and parliament and independent from those he regulates. Limited self-regulation by the professional bodies is controlled by the Lord President as the ultimate regulator. It is not necessary to remove the Lord President as regulator in order to reform the legal services market. Issues such as competition, Alternative Business Structures and the reduction or removal of the professional bodies' limited ability to self-regulate can all be addressed without fundamental change to the Lord President's role as regulator. Improvements to these aspects of the system can be achieved without the need to overhaul the entire regulatory framework.

Of grave concern is that at present, none of three alternative models presented has a clearly defined role for either the Lord President or the Court of Session. The regulatory and supervisory roles of the Lord President and the Court are it seems, at best, vastly underappreciated. In the absence of this fundamental information regarding the current regulator of the legal profession, the merits of the three models provided cannot be fully assessed.

As stated in answer to Question 4, it is unclear to us what defect a change to the regulatory system is seeking to fix. Overall, in the absence of evidence to the contrary, the existing regime appears to work well and, in our view, fundamental change to the regulatory structure is unnecessary. We acknowledge that it is desirable to improve transparency in the system and the complaints process. However, we are of the opinion that improvements to these aspects of the system can be achieved without the need to overhaul the entire regulatory framework.

Option 1

Our answer to Question 4 and our annexed paper set out the dangers of Option 1, the Robertson model, in detail.

Option 2

In relation to Option 2, the Market Regulator model, this model does not strike us as suitable for the Scottish legal system.

Similar to the Robertson model, the most unsatisfactory element of a Market Regulator model is the removal of regulation from the Court of Session and its encroachment on the independence of the legal profession. As the Market Regulator would be accountable to the Scottish Parliament, independence of the legal profession, and therefore the judiciary, is diminished. The Scottish legal profession is unique and any misunderstood weakness of "self-regulation", must be balanced

against the potential costs of increased state intervention. The existing regulatory regime operates effectively and maintains the necessary separation of state powers. A move to a Market Regulator model would weaken this separation and ultimately weaken the Scottish legal profession.

Furthermore, it is not clear to us how such a model would achieve the stated aim of the Scottish Government to separate regulation from representation in the legal sector to increase trust in the sector and result in better regulation.

The proposal for Option 2 is likened to the approach taken to the regulation of legal services in England and Wales, where the Legal Services Board acts as a Market Regulator. Effectively, the Legal Services Board, brought into existence by the Legal Services Act 2007 reforms, acts as a super-regulator. The position is not too dissimilar in Scotland.

In Scotland, the Legal Services (Scotland) Act 2010 brought forward reforms to separate regulatory and representative functions in the legal profession. The Law Society divided its committees into those with regulatory and representative functions, with the regulatory committees consisting of non-lawyers and having independence. For advocates, the 2010 Act specifically set out in legislation what was already the common law position: the Faculty does not regulate itself but is regulated by the Court of Session. Indeed, the Faculty of Advocates has no power to admit or remove a person from the public office of advocate and this can only be done by the court.

Although on a superficial view the current system might look like professions regulating themselves, the correct analysis is that the existing structure is not dissimilar to the current English structure. The regulatory functions of the Law Society and Faculty are supervised by a super-regulator – the Court.

Option 3

Of the three models proposed, Option 3, the enhanced accountability and transparency model, has the most potential to provide a satisfactory solution. This model offers the most protection to the role of the Lord President and the Court. It also avoids unnecessary wholesale change to the regulation of legal services in Scotland less than a decade after the Legal Services (Scotland) Act 2010. Overall, it appears to be the least disruptive option provided. The requirement for independent committees, whose remit is set by and will be accountable to the Scottish Parliament, is most unwelcome. It is essential that the regulatory committees are accountable to, report to, and have their remit set by, the Lord President and not parliament. Please see our answer to Question 4 for further information on the dangers of making the legal profession accountable to parliament.

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

Please give reasons for your answer

Please see our answer to question 4 and 5 respectively for the dangers presented by overhauling the existing regulatory regime in favour of any of the options presented. For the avoidance of doubt, we are firmly of the view that there is no requirement to change the existing regulatory regime. For the reasons set out in Question 5, out of the three options proposed, Option 3 is the least disruptive model of regulation and the model most likely to safeguard the role of Lord President and Court of Session as regulators and protect the rule of law.

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

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

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

Please give reasons for your answer.

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.

Please see our answer to question 4 for our views on the dangers of implementing the Robertson model.

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
- Through a consumer panel
- A requirement for consumer expertise within regulatory committees
- A combination (please specify)

Please give reasons for your answer.

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?

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

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

Please give reasons for your answer.

B. The Role of the Lord President and the Court of Session

The Lord President of the Court of Session is the head of the Judiciary in Scotland. The Lord President has responsibilities in relation to the regulation of the legal professions and has a regulatory function in relation to the Scottish Legal Complaints Commission.

Section 34 of the Solicitors (Scotland) Act 1980 provides an overarching role for the Lord President in the regulation of solicitors and in relation to professional practice rules, conduct and discipline. The Lord President is responsible for the approval of regulatory changes, predominantly changes in practice rules. Rule changes cannot take effect unless approved by the Lord President after considering any objections the Lord President thinks relevant.

The Lord President must also approve all regulations relating to admission into the profession and can give direction to the keeping of the roll of solicitors; and has a role in arbitrating any disagreements between the Law Society of Scotland's Council and its independent Regulatory Committee.

In addition the Legal Services (Scotland) Act 2010 sets out aspects of regulation in relation to advocates²⁴.

²⁴ [Part 4, Chapter 2 of the Legal Services \(Scotland\) Act 2010.](#)

Advocates hold a public office to which they are admitted by the Court of Session. As is set out in the 2010 Act, only the Court of Session has the power to admit an individual to, or remove that individual from, the office of Advocate.

The 2010 Act provides that the Court of Session is responsible for prescribing the criteria and procedure for admission to (and removal from) office, and for regulating the professional practice, conduct and discipline of advocates. Those responsibilities are exercisable on the Court's behalf by the Lord President or the Faculty of Advocates in accordance with such provisions as the Court may make. Professional rules are, if made by the Faculty, of no effect unless and until they are approved by the Lord President. They cannot be revoked unless the Lord President has approved this action is to be taken.

Under the current regime, responsibility for the regulation of advocates is delegated by the Court to the Faculty of Advocates by the Act of Sederunt (Regulation of Advocates) 2011²⁵. It is open to the Court to make different provision for the regulation of advocates. The Lord President retains a role in connection with the Faculty's disciplinary procedures. In addition to his responsibility of approving the Faculty's disciplinary rules, it is also incumbent upon him to appoint the Chair to the Disciplinary Tribunal as set out by Section 96 of the Faculty of Advocates Disciplinary Rules 2019²⁶.

The Lord President has a regulatory function in relation to the SLCC. The SLCC must consult with the Lord President on appointing members and on rule changes to practice and procedure. The Legal Profession and Legal Aid (Scotland) Act 2007 also sets out that the Lord President may, by written notice, remove the chairing member of the SLCC from office in certain circumstances²⁷.

The Robertson report does not make specific recommendations in respect of the role of the Lord President but instead states that the legislative approach should make clear what role the Lord President and the Court have in the regulatory framework.

The responses to this consultation will shape Ministers' view as to the extent of both of these roles. If certain regulatory functions carried out by the Lord President were to cease they would require to transfer to another body. It is therefore possible that in the future the regulatory role of the Lord President may be different to the present role depending on the eventual model that is put in place following this consultation and any resulting reforms. It could vary from a solely consultative role, become something else or remain largely as it currently is.

The position in other jurisdictions

To illustrate the position in other jurisdictions the following examples set out regulatory models that provide for increased independence from the legal profession, whilst retaining the safeguards that the Court currently provides in Scotland. Firstly, independence is maintained through a degree of separation from the Judiciary in

²⁵ [Act of Sederunt \(Regulation of Advocates\) 2011.](#)

²⁶ [Faculty of Advocates Disciplinary Rules 2019.](#)

²⁷ Legal Profession and Legal Aid (Scotland) Act 2007, paragraph 5(3) of schedule 1.

England and Wales, while secondly, in California, there is direct oversight by the Supreme Court.

England and Wales

In England and Wales, the Legal Services Board is an independent body responsible for overseeing the regulation of legal professionals. It is a non-departmental public body sponsored by the Ministry of Justice, created through the Legal Services Act 2007. The Legal Services Board is politically and financially independent of the Government. Costs are covered entirely by a levy on the approved regulators of the legal professions. Its overriding mandate is to ensure that regulation in the legal services sector is carried out in the public interest and that the interests of consumers are placed at the heart of the system. The Ministry of Justice is a ministerial department of the British Government headed by the Secretary of State for Justice and Lord Chancellor (a combined position).

The Lord Chancellor is a member of the UK Cabinet and, by law, is responsible for the efficient functioning and independence of the Courts. In 2005, there were a number of changes to the legal system in England and Wales and to the office of the Lord Chancellor. Formerly, the Lord Chancellor was also the presiding officer of the House of Lords, the head of the Judiciary in England and Wales and the presiding Judge of the Chancery Division of the High Court of Justice. However, the Constitutional Reform Act 2005 transferred these roles from the Lord Chancellor to the Lord Speaker, the Lord Chief Justice and the Chancellor of the High Court respectively.

The Lord Chief Justice of England and Wales is the Head of the Judiciary of England and Wales and the President of the Courts of England and Wales. The Legal Services Act 2007 sets out the role of the Lord Chief Justice in the regulatory framework. The Lord Chief Justice must give consent to the fees to be charged by relevant authorised persons in respect of the administration of an oath or the taking of an affidavit, as prescribed by the Lord Chancellor. Before appointing or removing an ordinary board member to the Legal Services Board, the Lord Chancellor must consult the Lord Chief Justice about the process for appointment of the member and about the person selected for appointment. The Legal Services Board must consult the Lord Chief Justice on applications to become an approved regulator, applications around designation of approved regulators as licensing authorities, and around the cancellation of designation as an approved regulator or to remove their licensing authority. The Lord Chief Justice must be consulted on the rules governing decisions by the Legal Services Board, alteration of reserved legal activities, and directions or interventions to approved regulators around procedure.

Schedule 4 of the Legal Services Act 2007 sets the approved regulators overseen by the Legal Services Board. The following extract sets out the position with regard to a few of the authorised regulators:

Profession	Representative body	Regulatory body	Reserved legal activities regulated
Solicitors	Law Society of England and Wales	Solicitors Regulation Authority	The exercise of right of audience

			The conduct of litigation Reserved instrument activities Probate activities The administration of oaths
Barristers	General Council of the Bar	Bar Standards Board	The exercise of right of audience The conduct of litigation Reserved instrument activities Probate activities The administration of oaths
Notaries	Notaries Society	Master of the Faculties	Reserved instrument activities Probate activities Notarial Activities The administration of oaths

United States of America - State of California

As mentioned in the background to this consultation, the State Bar of California is California's official attorney licensing agency. It is responsible for managing the admission of lawyers to the practice of law, investigating complaints of professional misconduct, prescribing appropriate discipline, accepting attorney-member fees and financially distributing sums paid through attorney trust accounts to fund non-profit legal entities.

Unlike the position in England and Wales, the State Bar of California it is directly responsible to the Supreme Court of California. Its Trustees are appointed by the Supreme Court, the California Legislature and Governor of California. All attorney admissions and disbarments are issued as recommendations of the State Bar, which are then routinely ratified by the Supreme Court.

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.

There are numerous functions and responsibilities which are conferred on the Lord President in the pursuit of the preservation of the independence of the legal profession. The Lord President's role is not easily summarised as his duties and powers are spread across a multitude of legislative provisions covering all aspects of the professions, in addition to those which stem from common law. A number of duties relating to his role as Head of the Scottish Judiciary, as well as specific functions and responsibilities that he has in relation to practitioners, in addition to functions performed by the Court of Session in that regard are set out at pages 7-17 of our annexed paper. This list provides an overview of the array of powers held by the Lord President and the Court of Session which are currently in legislation. The list should not be taken to be exhaustive. The position in common law, that is the law derived from judicial decisions rather than legislation, is even more complex as both the Lord President and the Court of Session perform roles which have been developed by case law which cannot be easily codified in legislation. For example, the Court of Session has powers, both inherent and statutory, to regulate the conduct of proceedings before it, the Sheriff Appeal Court and the Sheriffs Courts. The Court of Session acts as an arbiter of standards and judges regularly make observations as to standard and conduct within its judgments as referenced in our response to question 4. Attempting to capture the entirety of the Lord President and the Court of Session's role in a new regulatory framework will be an extremely challenging task.

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

Mostly agree

Mostly disagree

Strongly disagree

Please give reasons for your answer.

Please see our answer to Question 4 and our annexed paper for a detailed explanation of why the role of the Lord President and the Court of Session in the regulatory framework is fundamental to safeguarding the independence of the legal profession, and in turn the judiciary.

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?

- **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

Under the existing regulatory framework, the Lord President has a role regulatory role in relation to the three functions listed. At the very least, this role is a 'consent' role. In reality, in relation to each of the functions listed, extensive input from the Lord President may be given. It is unclear to us for what purpose this would be changed. For the Lord President's role to be downgraded from having the power to make regulatory decisions in these areas, to merely being consulted on them, is concerning. This would alter to the Lord President's role significantly and place the Court in a similar position as a constitutional monarch. The proposal to change any of the three functions would diminish the role of the Lord President and his authority, and in turn diminish the authority of the Court. It would constitute the removal of powers of the Court of Session and their transfer to a body answerable to parliament.

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?

Strongly agree

Mostly agree

Mostly disagree

Strongly disagree

Please give reasons for your answer.

Currently, the Lord President has a role in arbitrating any disagreements between the Law Society of Scotland's Council, and its independent Regulatory Committee. We are of the opinion that the Lord President should continue to carry out this role in any new regulatory framework.

The consultation does not fully address the relationship between the proposed Faculty Regulatory Committee and the Court. The relationship between the Faculty and the Court is more nuanced than the relationship between the Law Society and the Court. At present the Faculty of Advocates is regulated by the court and not by Faculty committees. Any self-regulation by the Faculty is controlled by the court and is very limited. If the reforms remove the regulatory function from the Court, and replace it with an independent committee of the Faculty, this would work against the Scottish Government's aim of separating the regulatory functions of professional bodies. It would increase, rather than reduce, the self-regulation of the Faculty. For the first time, advocates would be regulated by a Faculty committee rather than the court. Further that committee would be answerable to Parliament rather than the court.

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.

C. Regulatory Committees

The Legal Services (Scotland) Act 2010²⁸ amended the 1980 Act to establish the Regulatory Committee of the Law Society of Scotland. It is both independent of, and accountable to, the Council of the Law Society of Scotland. The Regulatory models set out under Options 2 and 3 in Part 2 A of this consultation, would require the Faculty and ACA to establish similar committees, as would any new regulatory entrants to the market.

The remit of such a Regulatory Committee would be to set, maintain and enforce standards in the interests of the public and the profession.

One of the stated purposes of the current Law Society Regulatory Committee as set out in section 3B(2)(b) of the 1980 Act²⁹ is to achieve public confidence.

Section 3D of the 1980 Act also sets out how lack of agreement between the Regulatory Committee and the Law Society Council is to be dealt with. These issues are to go to arbitration and the outcome of that arbitration is binding³⁰. This function may be retained for Regulatory Committees in a future legal services regulatory framework. Views are sought on this at Question 16, in relation to the role of the Lord President.

At least 50% of the Law Society's Regulatory Committee membership³¹ must be non-legal members and the Chair of the Committee is appointed by that committee and must be drawn from the non-legal members.

Proposed new model for Regulatory Committees

Under model Option 1, the Robertson model, the existing Regulatory Committee functions would be absorbed into the new independent regulator.

Under model Options 2 and 3, the existing remit of Regulatory Committees would remain. However the Regulatory Committees would be fully independent of their host regulator with each regulator requiring to establish committees similar to that currently required of the Law Society of Scotland. Regulatory Committees would be required to lay an annual work plan and an annual report before the Market Regulator or Scottish Parliament (depending on the model option in operation). That plan and report would set out the regulatory business carried out in the previous year, the regulatory health of the legal profession and the strategic priorities for the year ahead. The Regulatory Committees would consult the host regulator and the Lord President on their work.

The terms of the working relationship between host regulator and the Regulatory Committee would be agreed through a Memorandum of Understanding (MOU) for periods of up to 5 years at a time and these MOUs would be published by the host regulator for the information of members and the public.

²⁸ See section 133 of the 2010 Act which inserts sections 3B – 3G into the 1980 Act.

²⁹ As amended by section 133(2) of the [Legal Services \(Scotland\) Act 2010](#).

³⁰ As amended by section 133(2) of the [2010 Act](#).

³¹ Section 3C of the 1980 Act as amended by section 133(2) of the 2010 Act.

Appointments

Appointments to each Regulatory Committee would follow the current public appointments process in seeking increased independence.

Members of the Regulatory Committee would not be permitted to also be members of the host regulator's governance structure, for example Law Society Council members or Faculty office-bearers could not sit on their corresponding Regulatory Committees.

Interaction with Committees

A formal process for allocating issues to Regulatory Committees and the reporting process would form part of the MOUs which the Regulatory Committee, as the overarching committee, would have oversight of. This would ensure that the Regulatory Committee is fully engaged with and aware of the range of work undertaken by the regulators and their various committees and can consider whether there is a regulatory aspect to that work.

Administrative support

The Regulatory Committee would be supported by a staff who are involved in delivering the regulatory role and functions. These staff should not be involved in work to support, for example, the Law Society Council, this would provide for the independence of staff working for the Regulatory Committee, and ensure there is clear separation in the work of the Committee with a view to achieving public confidence.

Transparency and Accountability

The 'Freedom of Information International Review: Scope of Bodies Included'³² suggests that bodies who exercise administrative authority, including professional licensing and standard setting organisations, could be an area where the law could be extended to be subject to Freedom of Information. There may be potential for regulatory functions to be subject to requests under the Freedom of Information (Scotland) Act 2002.

The separation of regulatory and representative functions in England and Wales

The Legal Services Board (LSB) confirmed in July 2020 that the requirement for all nine approved regulators which it oversees to separate their regulatory and representative functions had been achieved³³.

³² [Freedom of Information International Review: Scope of Bodies Included](#)

³³ <https://www.legalservicesboard.org.uk/news/legal-services-board-announces-enhanced-independence-for-legal-regulators>

The requirement for the separation between regulatory and representative bodies was outlined in the LSB's revised internal governance rules (IGRs) in July 2019³⁴ and accompanying statutory guidance³⁵. Approved regulators and regulatory bodies were given a maximum of 12 months to comply.

As a result of the new IGRs, the Institute of Chartered Accountants in England and Wales (ICAEW) has separated its legal services regulatory and representative functions formally for the first time. This was not required before the new IGRs came into effect.

In addition, the Law Society of England and Wales will establish the Solicitors Regulation Authority (SRA) as a separate company within the Law Society Group. This means that the SRA will join other regulatory bodies in being distinct legal entities.

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.

It is our view that the regulatory committee of the Law Society of Scotland functions well. Please see our answer to Question 16 above in relation to the creation of the similar regulatory committee for the Faculty of Advocates. The approach taken in all three models for independent regulatory committees to be accountable to the Scottish Parliament is undesirable. A system in which the legal profession is answerable to parliament is inherently against independence. Political regulation is simply not appropriate under any circumstances. There is no obvious benefit to the legal profession being accountable to the legislature; it is a wholly disproportionate and inappropriate interference with the separation of powers. No good reason has been given for removing the power of the court to regulate the legal profession.

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?

- ☐ **Strongly agree**
- ☐ **Mostly agree**
- ☐ **Mostly disagree**
- ☐ **Strongly disagree**

Please give reasons for your answer.

³⁴ <https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/IGR-2019.pdf>

³⁵ <https://legalservicesboard.org.uk/wp-content/uploads/2019/07/IGR-Guidance-July-2019.pdf>

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?

- ☐ **Strongly agree**
- ☐ **Mostly agree**
- ☐ **Mostly disagree**
- ☐ **Strongly disagree**

Please give reasons for your answer.

D. Fitness to Practice

The Robertson report highlighted that currently Part 2 of the Admission as Solicitor (Scotland) Regulations 2011 sets out that someone may only be admitted to the Law Society of Scotland if “he is a fit and proper person to be a solicitor” and holds appropriate qualifications. There are a number of stages in a solicitor’s career where they will be required to satisfy the fit and proper criteria:

- application for an Entrance Certificate
- admission to the Roll of Solicitors for the first time
- application for Restoration to the Roll of Solicitors at any time
- application for a Practising Certificate having not held one for 12 months or more

The Law Society of Scotland guidance³⁶ sets out the indicators of whether a person is considered ‘fit and proper’ to be a solicitor and this includes such factors as personal integrity, lawful behaviour and financial probity.

The Faculty of Advocates Admission Regulations³⁷ set out that a Solicitor who produces a certificate from the Law Society of Scotland to the effect that he has been actively engaged in practice as a Solicitor in Scotland for at least three years prior to the presentation of his Petition, and that he is a fit and proper person to be admitted to the Faculty, shall be exempt from certain other entry requirements as an advocate.

Before any person can become an inrant to the Faculty they must produce a certificate disclosing:

- any prior criminal convictions or outstanding criminal proceedings
- any complaints of professional misconduct or negligence which have been upheld against him or which are outstanding, and

³⁶ <https://www.lawscot.org.uk/media/367851/fitness-and-properness-guidance.pdf>

³⁷ <http://www.advocates.org.uk/media/2363/regulations-as-to-intrants.pdf>

- whether he has ever been declared bankrupt, or sequestrated or signed a Trust Deed for creditors, and the circumstances thereof

The applicant must also provide a reference regarding their fitness to hold the public office of advocate.

Any applicant found to be unfit to hold the office of advocate may be removed from the Roll of intrants by the Dean of the Faculty, subject to consultation with the Lord President and the Lord Justice-Clerk.

Separately, when considering the matter of ABS in England and Wales, the LSB's 'Alternative business structures: approaches to licensing' consultation paper in 2009 sets out that the Legal Services Act 2007 outlines that non-lawyer owners and managers of an Alternative Business Structure must be fit and proper according to the relevant fitness to practice requirements³⁸.

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

Answer

- frequency of career points where the criteria must be satisfied

Answer

- transparency and fairness in decision making

Answer

Question 22

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

Please give reasons for your answer.

³⁸ [Paragraph 10 - https://www.legalservicesboard.org.uk/what_we_do/consultations/2009/pdf/consultation_181009.pdf](https://www.legalservicesboard.org.uk/what_we_do/consultations/2009/pdf/consultation_181009.pdf)

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

Please give reasons for your answer.

In our opinion, in the interest of a properly regulated profession, non-lawyers and managers of legal entities should be subject to a fit and proper persons test as part of the fitness for practice framework.

E. Legal Tech

The Robertson report highlighted that there are opportunities in the greater use of legal technology in the application of legal services in Scotland; the report's example referring to increasing access to justice³⁹. The review and report warned against the creation of barriers to new legal services founded on legal tech through over specification of regulation in legislation.

The regulatory sandbox concept originated in the United Kingdom as one element of Project Innovate, a program of the Financial Conduct Authority (FCA). Project Innovate was developed by the FCA to foster competition and growth in financial services by supporting both small and large businesses that are developing products and services that could genuinely improve consumers' experience and outcomes⁴⁰.

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.

A recent example of technology supporting legal services came about as a result of the Covid-19 global pandemic. In the Coronavirus (Scotland) (No.2) Act 2020⁴¹, the usual requirement for the physical presence of Scottish notaries public, solicitors and advocates was removed in specific circumstances for example where a document is to be signed in the presence of a notary public. This allowed for other methods such as live video connection to be utilised during the course of the pandemic when physical distancing was required but also to facilitate the continuing provision of some notary public services when they otherwise would have had to cease during this emergency period.

³⁹ [Page 40, the Robertson report](#)

⁴⁰ <https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf>

⁴¹ See schedule 4 paragraph 9 of the Coronavirus (Scotland) (No.2) Act 2020.

Question 24

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

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

Please give reasons for your answer.

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

Please give reasons for your answer.

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.

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

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?

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

Please give reasons for your answer.

The relaxation of the substantive law of Scotland to deal with the coronavirus emergency was effected by primary legislation. Regulators should not be given the power to relax substantive law, which should remain the responsibility of parliament.

F. Client Protection Fund (Guarantee Fund)

The Client Protection Fund is the operating name of the Scottish Solicitors' Guarantee Fund and is a statutory Fund⁴² to “make grants in order to compensate persons who suffer a pecuniary loss by reason of dishonesty” on the part of a solicitor, an employee of a solicitor, a registered foreign lawyer or a conveyancing/executory partner or employee.

The Fund is paid for entirely by solicitor firms without the use of taxpayer money from government.

The Client Protection Fund only provides protection to clients who use solicitors within legal firms or are sole practitioners regulated by the Law Society. It also includes circumstances where the solicitor or lawyer has since died or, after the dishonesty has taken place, has been struck off or suspended from practice.

The Client Protection Fund is a fund of last resort and in most cases will only compensate those who have exhausted all other options to recover their losses, including through civil proceedings. Unrecovered losses not notified within a year of coming to a client's attention will not normally be considered other than in exceptional cases.

Awards from the Fund are discretionary and are taken by the Law Society of Scotland's Regulatory Committee which is overseen by the SLCC. Consideration of applications and any awards are underpinned by rules and certain criteria and are limited to £1.25million.

The Robertson report suggested that the future operation of the Client Protection Fund should be transferred from the Law Society to the recommended new independent regulator.

⁴² See section 43 and Schedule 43 of the Solicitors (Scotland) Act 1980; and the Law Society Guidelines at <https://www.lawscot.org.uk/for-the-public/client-protection/client-protection-fund/>.

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.

Question 30

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

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

Please give reasons for your answer.

Part 3 – Legal Services providers and structures

A. Entry, Standards and Monitoring

Entry to the legal profession

The regulatory model to be taken forward in legislation following this consultation will determine where the responsibility for entry, standards and monitoring of the legal profession will lie. However the Scottish Government agrees with the Robertson report that, regardless of the model pursued, the regulatory framework should incorporate a greater emphasis on quality assurance, prevention of failure, which usually lead to consumer complaints, and continuous improvement for the benefit of the legal profession and consumers. The regulatory framework should be flexible in adapting to failure and therefore able to reduce complaints. There is also potential to link quality assurance and continuous improvement in the legal profession to interact more closely with the legal complaints system currently managed by the SLCC.

The Robertson report set out that it should be for the regulator(s), professional bodies and educational institutions to work together to set the educational requirements for entry into the various legal professions in Scotland. This is an area where Scotland has a strong reputation in terms of the level of law graduates entering the legal profession, however in doing so there should also be an emphasis on promoting diversity in the profession.

The Scottish Government recognises the work of the Joint Standing Committee for Legal Education in Scotland in acting as a facilitator to promote the interests of legal education, academic training and legal professional training up to the level of legal professional qualification and beyond.

Standards

The Law Society of Scotland currently operates for professionals:

- the code of conduct and service for individual professionals (practice rules including accounts rules which are approved by the Lord President)
- guidance which is not mandatory to follow but non-observance could be used in a disciplinary case

The Robertson report set out that other professions such as the Institute of Chartered Accountants of Scotland have significantly shortened their rules in recent years⁴³. The Solicitors Regulation Authority, the regulatory body in England and Wales, has updated the rules for solicitors' regulation to more concise principles and conduct standards for solicitors⁴⁴.

⁴³ <https://www.icas.com/professional-resources/insolvency/latest-developments/preparing-for-the-scottish-insolvency-rules-2018>

⁴⁴ [SRA | SRA Handbook | Solicitors Regulation Authority](#)

The Robertson report's view was that the regulator should have responsibility for setting standards and in doing so should drive a preventative/quality improvement focus, including simplification and better overall cohesiveness of the rules making them more consumer friendly, comparable and proportionate framework. The reform proposed by this consultation presents an opportunity for Scottish regulators to simplify their rules with a similar aim of reducing them in length and to make rules more proportionate and consumer friendly.

Monitoring

In terms of quality assurance and continuous improvement for legal professionals, there are examples at home and abroad where the regulatory framework in Scotland may borrow. There may be merit in considering extending the system of peer review beyond legally aided work, whereby an evaluation of a professional's work is undertaken by others working in the same field on a recurrent basis. The aim behind quality assurance in this respect is to obtain objective evidence that public money is being well spent, however it has become clear that the true purpose of peer review is not solely to assure the public and the government that quality standards are being maintained, but also that quality standards are being continuously improved.

In Finland, the legal aid evaluation system consists of five evaluation areas containing a total of 36 evaluation statements. Some of the statements are assessed by the clients, some by the attorneys, some by both. The quality statements are based on the Code of Conduct for Lawyers developed by the Finnish Bar Association. This code indicates what can be expected of a good lawyer.⁴⁵

The Robertson report set out that in New South Wales in Australia a system of self-assessment, helped firms, especially small firms, address areas of poor performance that could have led to more serious problems if not identified and was welcomed by those firms. The senior members of a legal provider were required to consider their own customer service and complaints handling process, as a result complaints fell by two thirds.

The Robertson report made the recommendation that the regulator should hold a register of those it regulates, and any lawyer, solicitor, solicitor advocate, advocate, or commercial attorney who wishes to provide legal services must be admitted to the register. The Law Society of Scotland and Faculty of Advocates currently hold a roll of those they regulate.

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**

⁴⁵ [Sharon and Paterson, UNODC Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes \(2019\)](#)

- **Mostly disagree**
- **Strongly disagree**

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?

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

Please give reasons for your answer.

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.

B. Definition of Legal Services and Reserved Activities

Recommendation 3 of the Robertson report set out that a definition of legal services should be set out in primary legislation.

The Legal Services (Scotland) Act 2010 defines legal services as legal advice or assistance in connection with legal documents such as a contract, deed, writ or will, as well as legal advice or assistance and/or legal representation in connection with applying the law or seeking a legal dispute resolution⁴⁶. However, this definition applies only in relation to the 2010 Act and not to the legal profession in Scotland more broadly.

⁴⁶ Section 3(1) of the Legal Services (Scotland) Act 2010.

Legal services can be classified as either reserved or unreserved. This has important implications for who can provide such services:

- Reserved Legal services are defined in legislation as a set of legal activities that can only be provided by authorised legal professionals working in an authorised legal firm.
- Unreserved Legal services are not specifically defined in the legislation. Rather it is a term that refers to all other areas of legal service not reserved, i.e. not restricted to authorised legal professionals.

Reserved legal services

The reserved legal services are defined in Sections 32 and 57 of the Solicitors (Scotland) Act 1980. According to Section 32 it is an offence for unqualified persons to provide the following legal services⁴⁷ (with some exceptions, such as expectation of payment being a factor):

- Any writ relating to heritable or moveable estate (i.e. documents of property title to immovable and movable assets).
- Any writ relating to any action or proceedings in any court (i.e. documents that initiate or support court actions).
- Any papers on which to found or oppose an application for a grant of confirmation in favour of executors (i.e. documents that confirm (or not) the heir's property right to a deceased person's estate).
- Section 57 of the Act provides that notaries public must be qualified solicitors (i.e. authorised), and that notaries are responsible for the administration of oaths, and witnessing and authenticating the execution of certain types of document.

The Legal Services (Scotland) Act 2010 changed the list of reserved legal activities by making any will or other testamentary writing a reserved legal service, and removing obtaining confirmation in favour of executors as a reserved service⁴⁸. These changes are yet to come into force.

The Law Society of Scotland have noted that where a firm is regulated by the Law Society, they are regulated to the extent of all legal services, whether or not the service provided is reserved under section 32 of the 1980 Act⁴⁹.

Unreserved legal services

⁴⁷The Scottish Parliament has powers to reserve certain other acts to be done only by a solicitor.

⁴⁸ Legal Services (Scotland) Act 2010, section 118(2)(a)(i).

⁴⁹ Other work can be reserved to solicitors in other legislation, for example Employment Rights Act 1996, section 203(3)(c) – relevant advisor is lawyer or trade union official.

Unreserved legal services have no formal definition in the legislation. The term is used to refer to legal services that are not reserved by legislation to authorised legal professionals. Therefore, unreserved legal services can be provided by both authorised and unauthorised professionals.

However, some unreserved legal services are regulated by a statute other than the Solicitors (Scotland) Act 1980. These are:

- Immigration advice and services, which it is a criminal offence to provide anywhere in the UK unless regulated by the Office of the Immigration Services Commissioner, covered by the Immigration and Asylum Act 1999 or registered with certain professional bodies.
- Insolvency practices, as according to the Insolvency Act 1986 certain recognised professional bodies (e.g. the Insolvency Practitioners Association) are responsible for authorising their members to act as insolvency practitioners. Aside from the above, unreserved legal services are not regulated by any statutes.

The European Economics report: The Regulated and Unregulated Legal Services Market in Scotland - A Review of the Evidence found:

“Our understanding from the evidence gathered for this study is that unreserved services account for the majority of legal services provided in Scotland. Indeed, as reserved services are largely individual ‘acts’, essentially all legal services will have an unreserved element, with reserved acts being performed within these. Our fieldwork suggests that key areas of unreserved legal services in Scotland include: accident and injury; employment; family; money and debt; social welfare health benefits; wills⁵⁰; and consumer and civil rights⁵¹.

It is important to recognise that some aspects of the legal services listed above are reserved. For example if, in any of the above areas, the legal issue in question proceeded to court litigation then this would be a reserved activity and would need to be undertaken by the relevant authorised professional (e.g. a solicitor or advocate).

Examples of the unreserved services that could be provided within these areas are⁵²:

- Accident and injury: assisting consumers seeking compensation for personal injury at work, clinical negligence etc.
- Employment: advice and assistance in relation to matters in employment tribunals (contractual issues, dismissals etc.).

⁵⁰ As explained earlier, this is currently an unreserved legal service, but this would change if the Legal Service (Scotland) 2010 Act is fully commenced. See Legal Services (Scotland) Act 2010, section 118(2)(a)(i), for details.

⁵¹ Adapted from Legal Services Board (2016a)

⁵² Adapted from Legal Services Board (2016a)

- Family: preparation of divorce documents, clean break agreements, prenuptial agreements, and cohabitation agreements.
- Money and debt: legal advice in relation to debt, including advice on insolvency proceedings.
- Wills: will writing, DIY will kits and products, and estate administration.”

The main statutory definition for those legal services reserved to solicitors at Section 32 of the Solicitors (Scotland) Act 1980 provides that:

“...any unqualified person (including a body corporate) who draws or prepares— (a) any writ relating to heritable or moveable estate; or (b) any writ relating to any [action or proceedings in any court] ; or (c) any papers on which to found or oppose an application for a grant of confirmation in favour of executors, shall be guilty of an offence...”

The Robertson report recommended that:

- The definition of legal services, the regulatory objectives and the professional principles should be set out in primary legislation.
- 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 i.e. will writing should not be reserved. Entities licensed by the regulator should be able to undertake confirmation as an activity.
- It should be for the regulator to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated.

Question 34

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

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

Please give reasons for your answer.

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.

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?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

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?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

C. Titles

The Scottish Government’s Digital Transformation Service (DTS) were commissioned by the Robertson review to conduct a consumer study on Scottish users of legal services⁵³.

The review set out that the findings of that study reinforced the perception that people are confused about whether the solicitor they are using is a regulated

⁵³ [Consumer study on Scottish users of legal services](#)

provider as well as being confused more generally about the titles of “solicitor” and “lawyer.”

The Law Society of Scotland in its Revised Case for Change⁵⁴ stated:

“The term ‘solicitor’ is a protected title in Scotland and the rest of the UK. It is a criminal offence for any person to pretend, wilfully and falsely, to be a solicitor. There are, however, no such restrictions around the use of the term ‘lawyer’. As a result, any person, regardless of qualification, experience or regulation, can legitimately refer to themselves as a ‘lawyer’”.

Only persons who hold a practicing certificate from the Law Society of Scotland, and provide services as a solicitor are covered by protections such as professional indemnity insurance, oversight of the regulatory framework, and a path to redress through the Scottish Legal Complaints Commission. The practicing certificate provides assurance around knowledge, qualifications and authorisation. Individuals may currently refer to themselves as a lawyer without a practicing certificate, therefore such services may not provide for the same protections. Consumer may not appreciate that there may be a difference between an individual referring to themselves as a lawyer, as opposed to a solicitor as all solicitors are lawyers. However all of those referring to themselves as lawyers may not be solicitors. The Law Society of Scotland and some consumer groups believe both titles should be protected and as such the Robertson report recommend this.

The title of “advocate” is not protected, however members of the Faculty of Advocates practicing as advocates are regulated by the Faculty, as delegated by the Office of the Lord President and the Court of Session. In response the Faculty of Advocates have previously suggested that the title ‘advocate’ should also be protected for the same reasons as lawyer might be. This is a point the Robertson report addressed and deemed as not necessary as it is already in common use in other areas such as mental health. The Robertson report also found no evidence of public confusion as it did with the title of lawyer. This may be in part due to the way in which advocates are instructed, usually through a solicitor and rarely directly by members of the public.

However the titles of ‘lawyer’ could be protected, with potential within the legislation to allow for the protection of other titles as appropriate.

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’?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

The word 'lawyer' is a generic term that does not carry with it any assurance that the person is a member of a regulated profession. For example, a Professor of Law at a Scottish University, an ecclesiastical lawyer with expertise in the Acts of the General Assembly of the Church of Scotland and a Canon lawyer with expertise in the law of the Roman Catholic Church are all undoubtedly lawyers and entitled to be described as such even if they are not an advocate, solicitor or commercial attorney. In our opinion, "lawyer" should not therefore be a protected title.

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'?

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

Please give reasons for your answer.

As a matter of principle, if you are a member of a regulated profession, your title should be protected. Applying that principle, the title of 'advocate' should be protected in the same way that the title of 'solicitor' is.

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?

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

Please give reasons for your answer.

In any new legislative regime, consideration should be given to providing protection for other titles such as members of the Association of Commercial Attorneys.

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?

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

Please give reasons for your answer.

D. Business Structures

The Review of the Regulatory Framework for Legal Services in England and Wales in 2004 (the “Clementi Review”), and the Legal Services Act 2007 sought to liberalise and regulate the market for legal services to encourage more competition.

As a result English and Welsh solicitors and barristers are able to operate in a variety of business structures that their Scottish counterparts are not.

In response in Scotland the Legal Services (Scotland) Act 2010 aimed to allow the creation of Alternative Business Structures. One of the main aims of the 2010 Act was to remove restrictions which previously prevented solicitors entering into business relationships with non-solicitors, allowing investment by both non-solicitors and external ownership.

Consumer bodies argue that these restrictions currently on legal business structures in Scotland inhibit competition and innovation in the legal services market. Many Scottish solicitors, and the Law Society of Scotland, believe that the restrictions on Scottish solicitors' business structures will increasingly inhibit the ability of the profession to compete in the UK and international markets. English solicitors have the ability to operate in an alternative business structure environment.

The 2010 Act provides for new legal entities to be known as Licensed Legal Services Providers which can comprise solicitors and/or other regulated professionals i.e. non-solicitor professionals such as accountants. Regulated professionals will require to hold at least a 51% majority stake in the business. These Licensed Legal Services Providers will be regulated by an Approved Regulator (the 2010 Act allows for a maximum of 3 Approved Regulators).

The Scheme under the 2010 Act that would allow these alternative business structures to operate is not yet in place in Scotland. The Scottish Government is working closely with the Law Society to put the final arrangements in place that would allow the Law Society to begin regulating such legal providers as soon as practicable.

It is anticipated that the introduction of alternative business structures to the legal services market in Scotland will provide clients with wider access to legal services whilst still being able to expect similar standards of service, advice and consumer protection as if they were engaging a solicitor only firm.

A competitive business environment has a vital role in a strong economy, stimulating investment, innovation and driving up standards. Increased competition allows Scottish firms to compete more easily at a UK and international level, and offers benefits to consumers such as lower prices, more innovative services, and wider choice.

However, the nature of legal services is such that the market cannot be the only regulating mechanism, and they must be appropriately regulated in the public and consumer interest.

The current framework has evolved from a partnership model which has historically proved effective, however the last two decades have seen many changes in the legal sector, driven largely by advances in technology. With the UK having exited the EU in January 2020, there is likely to be a further divergence of UK- EU competition law which could impact legal services to an unknown extent.

Scottish commercial firms operate in a UK and international market therefore the ability to obtain external investment is key to ensuring that they can thrive against competitors.

The Law Society of Scotland seeks a new, flexible regulatory framework and view the present legal framework surrounding the Scottish legal profession as a patchwork of inconsistent and increasingly outdated legislation; it views the Legal Services (Scotland) Act 2010 as effectively unworkable.

The 51% majority stake rule for Licenced Legal Services Providers presents other difficulties in that there are threats to the sustainability of small firms and how, if this requirement was removed from the legislation, this could allow scope for further possibilities around employee and community ownership which are now beginning to be considered as potential solutions where high street firms may be struggling. Removing or reducing restrictions may allow for:

- employee and community ownership of legal firms,
- outside investment into legal firms,
- and which could allow charities to directly employ legal professionals to undertake what is currently reserved activity, such as court proceedings.

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.

E. Entity regulation

The Robertson report set out that entity regulation should be introduced, which is enabling and flexible, to support more innovative business models and assist with regulating presently unregulated individuals, and to provide more transparency and greater risk based regulatory oversight. A broad description of what may be described as an entity should be set out in legislation to allow the regulator to adapt this description over time without the need for further legislation.

The Robertson review made the following recommendations:

The regulator should license all entities providing legal services to the public and corporate entities, subject to a “fitness to be an entity” test that the regulator should determine including protections such as

professional indemnity insurance. All legal professionals licensed through the regulator would also have to be licensed through an entity. This would not include Advocates and in-house professionals.

The model for entity regulation should be enabling, flexible and should apply to any organisation which employs at least one legal professional.

The regulator should introduce proportionate arrangements including fees for licensing different types of entities and including not for profit organisations.

Question 43

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

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

Please give reasons for your answer.

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

Please give reasons for your answer.

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?

- **Strongly agree**

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

Please give reasons for your answer.

It strikes us that there is a clear danger of overlapping regulatory regimes presented by the multiple forms of regulation for individual lawyers suggested above.

The Court has an inherent supervisory jurisdiction over officers of the court. To date, this inherent jurisdiction has been applied to natural persons who are members of the Law Society rather than corporate personalities. However, in June 2021 the Supreme Court heard the case of *Harcus Sinclair LLP v Your Lawyers Ltd*.⁵ in the Supreme Court which considered whether the English court's jurisdiction extended past solicitors' to LLPs.

The Supreme Court took the view that it was open to it to develop the inherent jurisdiction of the court to treat a solicitor's undertaking as extending to an undertaking given by an incorporated law firm. The most powerful argument in favour of extending the principle is that the court's protection should be equally available across all types of service providers. A functional approach, applied to all authorised providers of solicitor services, may now be more apt than the current status-based approach, which applies only to solicitors as officers of the court.

With 'considerable reluctance', the Supreme Court decided that this was not an appropriate juncture to make a decision on the extension without input from professional and regulatory bodies. It was also acknowledged that this issue would be better dealt with by legislation following consultation, than by the courts. The Supreme Court expressed their hope that the UK Parliament will consider the lacuna in relation to undertakings given by solicitors working for incorporated law firms in England.

In Scotland, the Court of Session's inherent supervisory extends to natural persons who are officers of the court. This includes all officers of the court, regardless of whether they appear in court or not. Should entity regulation exist in Scotland in future, the court's inherent supervisory jurisdiction should not be removed. The difficulties of overlapping regimes in such scenarios should be addressed and avoided.

F. Economic Contribution of Legal Services

The Robertson report made two recommendations in relation to the economic contribution of legal services:

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.

Government should then work with the sector to bring all the key players together to develop and implement a strategy to maximise the

⁵ 2019 EWCA Civ 335

potential for growth and the contribution that would make to our economy.

The Scottish Government recognises the value of Legal Professionals and will continue to work with and involve them closely in policy delivery. To fulfil that Scottish Ministers actively engage in constructive dialogue with the legal profession. The legal sector in Scotland is worth over £1.5 billion to the Scottish economy each year and is responsible for over 20,000 high value jobs. Not only an economic generator in its own right, but a profession who play a key role in the infrastructure supporting Scotland's growing sectors; Financial Services, Oil and Gas, Renewables and Bioscience. Scotland has a strong track record of international collaboration in these fields.

The Scottish Government was pleased to support the launch of Scottish Legal International in 2018, an initiative led by a consortium of Scottish law firms working in partnership with Scottish Development International to promote the country's legal sector worldwide. Scotland has much to offer, but the importance of collaboration with our European and international partners cannot be overstated.

We will continue to build on the existing strong links we have within Europe to demonstrate Scotland's desire to continue to work together on justice issues for the benefit of our citizens.

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.

Part 4: Complaints and Redress

A. Complaints Principles and Objectives

The Robertson report advised that there a clear unanimity on the view of the legal complaints and redress process. It found a strongly held view that the current complaints system is not fit for purpose. Reflecting on the review's call for evidence the report set out:

“There was agreement amongst stakeholders that there is an urgent need for clarity and reform. The responses reflect a feeling of a lack of transparency, for some consumers a lack of power and a lack of trust and accountability of those bodies involved in dealing with complaints.”

The Scottish Legal Complaints Commission was created in 2008 to provide an independent gateway for all complaints about solicitors, advocates and commercial attorneys. Its creation was itself a response to criticism that the complaints system was not consumer friendly enough, resulting from The Scottish Parliament's Justice 1 Committee's Report in 2002 on Regulation of the Legal Profession Inquiry. It is also important to recognise complaints processes as a form of human rights remedy.

The Robertson report expressed a view that there is too much detail in legislation on the processes in which the Scottish Legal Complaints Commission is required to follow. This has limited the ability of the SLCC to respond to complaints proportionally, and that the legislation restricts opportunities to make significant improvements to the process. It made the recommendation:

The legislation should require the regulator to develop a complaints handling process for those it regulates. This process should be based on well-established consumer principles and provide appropriate and speedy resolution for all parties. This should include the option of early dispute resolution learning from the Scottish Legal Complaints Commission's positive experience of mediation services.

The Robertson report sets out:

“Too much of the Scottish budget for regulation of legal services is given over to complaints. For example, the Scottish Legal Complaints Commission (budget reports) have spent £1.382 million between 2009 and 2017 on appeals which is very high given the small constituency covered by the complaints system of around 12,000 professionals. To put this into perspective in 2017 alone the Scottish Legal Complaints Commission spent £166,000 on appeals. The equivalent figure in England and Wales was £30,000 to cover 200,000 legal professionals.”

In addition the report sets out that a quality improvement approach should be at the foundation of any new legal services complaints system. Discussion in this area also support that flexibility and proportionality as key, whilst taking into account the better regulation and consumer principles.

The complaints system under model Option 1 is clearly set out in the Robertson report, where the complaints system would be adapted to the regulatory framework, and so there is scope to consider what key components it should comprise depending on the model ultimately taken forward. There is much read-across from the proposed regulatory principles and objectives set out in Part 1 of this consultation paper that could also underpin the principles and objectives of any future complaints system. However these would be influenced by the regulatory framework in place, and the number of organisations involved in the complaints process. The following sets out key aspects that would likely apply regardless of the regulatory model option chosen:

- 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. 3rd party complaints would be permitted.
- 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 1s 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.

- Enable early consensual resolution, which would include mediation as a key process which should be built upon.
- Provide prompt resolution, proportionate to the complexity of the complaint.
- The levy for entities should be on a financial turnover basis.
- A simplified process of appeals, but whilst adhering to ECHR. (There would be no appeal of decisions on service issues outwith the complaints body, in line with other professional appeal processes. There would be no appeal in terms of the amount of compensation awarded, again similar to other professions.)

Depending of the model option followed, additional aspects may apply:

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

B. Redress

As stated above, the Robertson report found that there is too much detail in legislation on the processes that the Scottish Legal Complaints Commission must follow. This has limited the ability of the SLCC to respond to a complaint proportionally. It also found that the legislation restricts opportunity to make any significant improvement to the complaints process, and that from a consumer perspective, a complaint is a complaint and may have elements of both service and conduct. The report set out that it is unhelpful to be required to make such a distinction early in the complaints process. In many jurisdictions, a complaint is subject to a single investigation and any conduct concerns are directed through the relevant process and, if necessary, investigated in parallel. The report recommended:

The regulator should be required to develop appropriate sanctions and establish rules for proportionate compensation.

The regulator should be required to develop a simple process of appeals which are only available at the end of the complaints process.

In terms of this reform, the future complaints process is, to a great extent, dependent on the regulatory model option taken forward. However the principles and objectives above follow from discussions with stakeholders where there is agreement on many but perhaps not all of these points. They are aimed at reducing the complexity and cost of the complaints system to the benefit of the legal profession and consumers.

The intention of embedding a modern culture of prevention and continuous quality improvement in the complaints process is to seek to reduce the number of complaints raised. In seeking to resolve complaints promptly, and in proportion to the complexity of the facts and circumstances of the case, the aim would be to reduce complexity whilst also embedding the Better Regulation and Consumer Principles throughout the process.

Removing the ability to (a) appeal a final decision of the complaints body, and (b) the amount of the compensation award, whilst also retaining the ability to appeal complaints of misconduct to the Court of Session, may have the effect of reducing a costly aspect of the current legal complaints system whilst ensuring compliance with the rights protected by the European Convention on Human Rights.

C. Discipline Tribunal

This reform presents the opportunity to consider the positioning of the Disciplinary Tribunals within the regulatory framework. The Robertson report recommended:

The regulator should establish an independent arm's length tribunal dealing with conduct cases referred by the regulator. This should cover all legal professional individuals and entities providing legal services.

Taking into account the view of the Robertson report that the landscape is cluttered, the Tribunals might benefit from being merged into one Tribunal, and incorporated into the Scottish Courts and Tribunals Service. This would serve to promote transparency in regard to this aspect of complaints handling and provide for an enhanced mechanism for the collection of financial penalties.

In addition, the maximum fine amount that the SSDT can impose is limited to £10,000⁵⁵. This potential reform provides an opportunity to assess the sanctions currently available to the Tribunals and whether these should be amended.

D. Complaints Budget

The 2007 Act sets out that the SLCC must lay an annual budget before the Scottish Parliament in April each year, following consultation with each of the relevant professional organisations and their members. The Act requires that the budget must be reasonably sufficient to cover expenditure for the year. The SLCC proposed no increase in levies for 2021-22 largely as a result of the Covid-19 pandemic.

The SLCC operates independently of both the Scottish Government and the legal profession and, as such, neither have the powers to interfere with the operation of

⁵⁵ Section 53 of the Solicitor's Scotland Act 1980 provides for the powers of the SSDT and subsection (2)(c) provides that, subject to subsection (3ZA), the Tribunal can impose on a solicitor (or incorporated practice) a fine not exceeding £10,000. There are certain powers to amend the limit in section 53 in relation to the maximum amount of the fine to change the limit of the Tribunal.

the SLCC. It is for the SLCC to determine both the annual general levy and the complaints levy to be paid by the legal profession, in accordance with the 2007 Act.

The cost of the complaints system has been a source of tension with the legal profession. There is potential in this period of reform to incorporate increased accountability in terms of the scrutiny of the budget for dealing with legal complaints going forward. This is an aspect that some in the legal profession have already called for⁵⁶. The budget could be subject to the approval of the Scottish Parliament.

Question 47

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

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

Please give reasons for your answer.

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?

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

Please give reasons for your answer.

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?

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

⁵⁶ [SLAS calls for change in law to prevent SLCC from approving its own budget - Scottish Legal News](#)

Please give reasons for your answer.

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**
- **Unsatisfactory conduct**
- **Professional misconduct**

Please give reasons for your answer.

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?

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

Please give reasons for your answer.

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?

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

Please give reasons for your answer.

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?

- Strongly agree
- Mostly agree
- Mostly disagree
- Strongly disagree

Please give reasons for your answer.

Question 54

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

Options

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.

Answer

- Provide access to justice.

Answer

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

Answer

- 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.

Answer

- 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).

Answer

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

Answer

- 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.

Answer

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

Answer

- 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.

Answer

- 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.

Answer

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

Answer

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

Answer

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

Answer

- 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.

Answer

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

Answer**Model Options 2 and 3**

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

Answer

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

Answer

Part 5: Competition and Markets Authority Legal Services in Scotland Research report

In response to the recommendation of the Robertson report that: “The Scottish Government should require the Competition and Markets Authority to revisit the report it undertook on the legal services sector in England and Wales in 2016 and test the relevance of its findings for the Scottish legal services sector” in June 2019, the Competition and Markets Authority announced that it would undertake research into certain aspects of the Scottish legal services market to support the Scottish Government’s response to the Robertson review.

The CMA published its Legal Services in Scotland Research report⁵⁷ in March 2020. The CMA report makes 11 recommendations aimed at the Scottish Government, the Law Society of Scotland, the Faculty of Advocates, and the Lord President.

The CMA research is focused on competition in consumer-facing legal services and considered:

- whether there is evidence of a lack of competition in the sector, based on observed levels of price dispersion and transparency of price and quality (recommendations to improve the information available to consumers);
- the impact of regulation on competition in the sector, particularly in relation to innovation and entry (recommendations to reduce the impact of regulation on competition); and
- the merits of the recommendation of the Robertson review for a new regulatory framework in Scotland that is fully independent of the profession (wider regulatory reform).

The CMA echo the Robertson report setting out that the characteristics of legal services, including their complexity, mean that consumers face challenges in identifying their legal needs and judging the quality of service being offered. Consumers typically search out legal services infrequently and often in circumstances where they are under time pressure or in distress. As a result, consumers are reliant on clear, timely information about price and quality of providers in order to exercise genuine choice.

The Scottish Government is currently considering the recommendations made by the CMA research report. Whilst not all of the CMA recommendations are for the Scottish Government to address, we will respond to the CMA recommendations in our response to this consultation as views are sought on many of those recommendations within this consultation paper.

⁵⁷ CMA’s Legal Services in Scotland Research Report 2020 – available at: https://assets.publishing.service.gov.uk/media/5e78cc9b86650c296f6eda63/SLS_report_final_version_PDF_---.pdf.

Responding to this consultation

We are inviting responses to this consultation by 24 December 2021.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/justice/legal-services-regulation-reform-in-scotland>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 24 December 2021.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

Access to Justice Unit
Scottish Government
Justice Directorate
St Andrew's House
Edinburgh
EH1 3DG

Or by email to: LegalServicesRegulationReform@gov.scot

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or at:

LegalServicesRegulationReform@gov.scot

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.



Respondent Information Form

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- ☐ Individual
- ☐ Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email Address

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

- ☐ Publish response with name
- ☐ Publish response only (without name)
- ☐ Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

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
- ☐ No



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Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80201-407-5 (web only)

Published by The Scottish Government, October 2021

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS924726 (10/21)

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