

Competition and Markets Authority's response to the report of the Independent Review of the Regulation of Legal Services in Scotland

The Competition and Markets Authority (CMA) is an independent non-ministerial UK government department, and the UK's primary consumer and competition authority. We work to promote competition for the benefit of consumers, both within and outside the UK. Our aim is to make markets work well for consumers, businesses and the economy by promoting competition. The CMA works closely with sector regulators, including those who regulate professional services, such as legal services. One of our strategic goals is to extend competition frontiers through using our powers to improve the way competition works. Competitive markets and an effective competition policy can play a major role in delivering productivity and growth in the UK economy.

The CMA has responsibility for:

- investigating mergers which could restrict competition;
- conducting market studies and investigations in markets where there may be competition and/or consumer problems;
- investigating where there may be breaches of UK or EU prohibitions against anti-competitive agreements and abuses of dominant positions;
- bringing criminal proceedings against individuals who commit the cartel offence; and
- enforcing consumer protection legislation to tackle practices and market conditions that make it difficult for consumers to exercise choice.

Introduction

1. The CMA welcomes the publication of the report of the Independent Review of the Regulation of Legal Services in Scotland (the 'Review').¹
2. The purpose of this document is to provide the Scottish Government with the CMA's views on the recommendations of the Review, with a focus on the Review's recommendations concerning the regulatory model in Scotland. This paper also responds to the recommendation that the Scottish Government should require the CMA to revisit the report (i.e. the *Legal Services Market Study*²) it undertook on the legal services sector in England and Wales³ in 2016 and test the relevance of its findings for the Scottish legal services sector.
3. As noted in our response to the Call for Evidence of the Review,⁴ the legal regulatory framework in Scotland shares certain characteristics with the current legal regulatory framework in England and Wales. Furthermore, based on discussion with relevant Scottish stakeholders,⁵ we consider that a number of the key findings of the Legal Services Market Study are likely to apply to Scotland, particularly in relation to our assessment of competition in legal services and the impact of the lack of transparency on consumers' purchasing behaviour.
4. Furthermore, we consider that some of the findings of the CMA's market study into the impact of current regulations and the regulatory framework on competition may also read across to Scotland. Of particular relevance is the work we did in identifying a set of overarching principles to guide the design of any new regulatory framework. These principles would be applicable if the Scottish government were to decide to follow the recommendations of the Review and reform the regulatory system for legal services in Scotland.
5. However, there are also differences between the regulatory frameworks in Scotland and in England and Wales which merit further analysis and, as set out in the next steps section (see section VI below), we have identified additional work

¹ See [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#).

² As noted in our response to the Call for Evidence of the Review (paragraphs 1 and 2), the CMA and its predecessor bodies have a long history of carrying out work in the legal services sector. The Legal Services Market Study focused on individual consumers and small businesses' experience of purchasing legal services in England and Wales. The study was launched in January 2016 and the final report was published in December 2016. See CMA (2016), [Legal Services Market Study](#). For a detailed overview of all the issues analysed in the market study, see the [statement of scope](#).

³ The CMA decided to limit the scope of the market study because of the differences in the regulatory framework between Scotland, Northern Ireland and England and Wales. Furthermore, we took into account the fact that Northern Ireland and Scotland were at different stages of regulatory reform from England and Wales.

⁴ See CMA (2018), [Competition and Markets Authority's response to the Independent Review of the Regulation of Legal Services in Scotland](#), paragraph 26.

⁵ During the course of the *Legal Services Market Study*, and after the publication of the final report, the CMA held roundtables with relevant stakeholders in Scotland, including the Law Society of Scotland, Faculty of Advocates, the Scottish Legal Complaints Commission, Citizens Advice Scotland, Which?, Association of Commercial Attorneys, SLCC Consumer Panel and representatives of the Scottish government.

that we propose the CMA conducts to support the Scottish Government's assessment and implementation of the Review's recommendations.

6. This paper is structured as follows:
 - (a) Section II provides the CMA's views on the recommendations of the Review aimed at introducing a new regulatory model for legal services in Scotland.
 - (b) Section III discusses the recommendations of the Review aimed at reforming the complaints procedure in Scotland.
 - (c) Section IV discusses how, in the CMA's view, complementing the reforms on the regulatory model with reforms aiming at increasing transparency in price, quality and service could further promote competition in the legal services sector in Scotland.
 - (d) Section V discusses how reforming the regulatory framework could promote innovation in the legal services sector in Scotland.
 - (e) Section VI discusses next steps, including areas of additional work by the CMA that would support the Review's recommendations.

Regulatory framework

Better Regulation Principles

Recommendation 4: There should be a new regulatory framework that is principles-based, sustainable and flexible. It should embed the Better Regulation Principles, with the public and consumer interest at its heart.

7. We welcome the recommendation that the new regulatory model should be principles-based, sustainable and flexible and based on the Better Regulation Principles.⁶
8. As noted above and in our response to the Call for Evidence of the Review,⁷ in the Legal Services Market Study we described the characteristics of an optimal regulatory framework for legal services.⁸ Specifically, we set out how the Better Regulation Framework adopted in England and Wales⁹ can be adapted to take

⁶ The Better Regulation framework identifies five principles as the basic test of whether regulation is fit for purpose. (i) proportionate; (ii) consistent; (iii) accountable; (iv) transparent; and (v) targeted only where needed. See Scottish Government, [Better Regulation](#).

⁷ See CMA (2018), [Competition and Markets Authority's response to the Independent Review of the Regulation of Legal Services in Scotland](#), Section D.

⁸ See CMA (2016), [Legal Services Market Study](#), Chapter 6.

⁹ See Department for Business, Energy & Industrial Strategy, [Better regulation framework](#).

into account the particular features of the legal services sector.¹⁰ In our view, an optimal regulatory framework that met the better regulation principles would have the following characteristics:

- **A clear overall objective:** regulation should have a clear primary objective to maximise benefits to consumers and society as a whole, balancing the impact of regulation in preserving wider externalities and protecting consumers with its impact on competition.
- **Independent:** regulation should operate independently from government and the legal professions.¹¹
- **Targeted:** regulation needs to respond appropriately to risks associated with a legal activity and allow for different activities to be regulated in different ways if they pose different risks. Regulation should be evidence-based and focused primarily on the activities that give rise to the most serious risks.
- **Flexible:** the framework should be sufficiently flexible to adapt to market changes, including changes in the degree of risk associated with a legal activity, technological changes, the emergence of new business models and change in consumers' characteristics or behaviour. The evidentiary bar that needs to be met in order to change regulation should be appropriately set, and should be based on the assumption that legal activities involve different levels of risk. Regulation should be systematically reviewed to ensure that rules and regulations are still necessary and effective. If this is not the case, regulation should be modified or eliminated.¹²
- **Proportionate:** regulation should be introduced only when its benefits outweigh the costs imposed on providers and regulators, and these benefits are likely to be passed on to consumers. In addition, costs should be identified and minimised.
- **Clear in scope and enforceable:** regulation should be clear in scope and should be easily enforceable.

¹⁰ These principles broadly align with those set out in the blueprint for regulatory reform and follow-up policy work undertaken by the Legal Service Board (LSB). See LSB (2013), [A blueprint for reforming legal services regulation](#); LSB (2015), [Legislative Options Beyond The Legal Services Act 2007](#) and LSB (2016), [A vision for legislative reform of the regulatory framework for legal services in England and Wales](#).

¹¹ In our view, the principle of accountability, in the context of legal services, is best met by a regulatory framework that is independent from both professional bodies and the government.

¹² This additional principle explicitly considers that the regulatory framework, in order to be properly targeted, should also ensure flexibility over time.

- **Consistent:** regulation should be consistent across the legal services sector, so that similar legal activities (i.e. activities carrying out the same level of risk) should be regulated in a similar way.
9. We also welcome the recommendation that the regulatory framework should be based on outcomes and principles, rather than prescriptive rules. In our view, a principles-based regulatory system gives legal services providers the responsibility to decide how best to align their business decisions with the outcomes and the objectives specified in the framework: this creates a more flexible regulatory framework that can reflect changes in the market over time, encourages innovation and may reduce some of the compliance costs associated with overly burdensome and prescriptive rules.

Regulatory structure

Recommendation 1: 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.

10. We welcome the recommendation to establish a regulator that is independent from the profession and government. As noted in our response to the Call for Evidence of the Review,¹³ we consider that independence of a regulator from the providers that it regulates is a key principle for any regulatory framework for securing the public interest.
11. An independent legal profession is important for securing public interest considerations such as supporting the rule of law, protecting the legal rights of individuals and ensuring access to justice so that individuals can participate equally in society. While it is important that representative bodies are able to provide input to regulatory decision-making, a lack of full independence may compromise the ability of regulation to meet these objectives. There is an inherent conflict of interest in effectively regulating a profession in the public interest, while also representing and lobbying for the profession's interests. In our view it is critical that this conflict of interest is properly addressed by a regulatory framework that ensures independence of the regulator from the providers that it regulates (as has been implemented in England and Wales following the Legal Services Act 2007).

¹³ See CMA (2018), [Competition and Markets Authority's response to the Independent Review of the Regulation of Legal Services in Scotland](#), paragraphs 28 to 30 and 48 to 51.

12. Preserving the profession’s independence from government is also a key consideration. Our experience in England and Wales suggests that this can still be achieved in a framework where regulators are separated from the providers that they regulate.
13. We note that not all stakeholders have welcomed the recommendation for a single independent regulator in Scotland. For example, the Law Society of Scotland has raised concerns. In its response to the findings and recommendations of the Review,¹⁴ it noted that *“we believe there is no robust evidence to justify this proposal and are concerned such a reform risks increasing costs for consumers and weakening professional standards”* and that *“the proposal raises serious concerns in terms of support for the rule of law and the independence of the legal profession. Implementing such a change could damage our global reputation. The leaders of some of Scotland’s largest law firms, who are involved in international transactions, have indicated to us that this is troubling them. Given that the first of the Better Regulation Taskforce’s five principles of better regulation is proportionality, we believe great care is needed to avoid the significant and unintended consequences which could arise from this kind of reform”*.
14. In relation to these concerns, we note that the question of whether regulatory and representative functions should be separated was considered in detail in England and Wales in the context of the Clementi Review of 2004. The Clementi Review concluded that the Law Society, Bar Council and other professional regulatory bodies should separate their regulatory and representative powers and that this would promote the public and consumer interest, competition, innovation and ensure transparency. Such a regulatory framework was subsequently implemented through the Legal Services Act 2007. To our knowledge, the types of concerns raised by the Law Society of Scotland above have not been a problem in England and Wales. While we have not reviewed the regulatory model in Scotland in detail, we are not aware at this point of substantial differences from the regulatory model in England and Wales that would imply independence of the regulator from the providers that it regulates was not warranted.
15. In the Legal Services Market Study, we analysed whether the regulatory framework in England and Wales, characterised by a multiplicity of frontline regulators (one for each profession¹⁵) was effective or should have been replaced with a model with fewer regulators.¹⁶ In particular, we undertook a qualitative assessment of the costs of having multiple regulators (e.g. unnecessary duplication of fixed costs, inconsistencies in regulation across regulators, competition between regulators that results in a ‘race to the bottom’, reduced

¹⁴ [Letter from the President of the Law Society of Scotland to the Minister for Community Safety](#), December 2018.

¹⁵ For a list of all approved regulators, see for instance, LSB, [Approved regulators](#).

¹⁶ See CMA (2016), [Legal Services Market Study](#), paragraphs 5.123 to 5.139.

ability to prioritise resources according to risk) and the benefits (i.e. specialism, competition between regulators that results in reduced regulatory costs and the development of more proportionate regulation).

16. We did not find evidence that the costs of a model with several regulators were having a significant impact on market outcomes. However, we considered that the assessment might change in the future – and a regulatory model with fewer regulators might be preferable - if regulation were to focus on risk to a greater extent. We recognise that, given the differences between the legal services market in Scotland and in England and Wales, the assessment might be different, for example due to the smaller size of the Scottish market relative to England and Wales.

Regulatory objectives

Recommendation 3: The definition of legal services, the regulatory objectives and the professional principles should be set out in primary legislation.

17. As noted in the Legal Services Market Study,¹⁷ we consider that regulation should have a clear primary objective to maximise benefits to consumers and society, balancing the impact of regulation in preserving wider externalities and protecting consumers with its impact on competition.
18. Regulation should focus on outcomes for consumers and society as a whole, taking account of the balance between wider public interests and consumer protection.¹⁸
19. In England and Wales, the Legal Services Act 2007 defines eight regulatory objectives for the Legal Service Board (LSB), the approved regulators and the Office for Legal Complaints. In the study, we noted that¹⁹ this list of objectives appears to be very broad, may impose excessive obligations on regulators or can be difficult to implement in practice. For instance, it may be difficult for regulators to have a direct influence in improving access to justice. Furthermore, we noted that, in the absence of an overarching objective or an explicit hierarchy of the objectives, it may be challenging for regulators to achieve the right balance between different objectives (such as balancing between public interest, consumer interest and competition). As such, we would advise the Scottish government to consider the extent to which having multiple objectives and regulators could impact on providers' ability to meet in practice these objectives.

¹⁷ See CMA (2016), [Legal Services Market Study](#), paragraphs 6.12 to 6.16.

¹⁸ LSB (2016), [A vision for legislative reform of the regulatory framework for legal services in England and Wales](#).

¹⁹ See CMA (2016), [Legal Services Market Study](#), paragraph 6.15.

20. While we agree that the overarching objective should be set out in primary legislation, we also note that, as discussed above, a regulatory framework for legal services should be sufficiently flexible to adapt to market changes. Therefore, it may be difficult for regulation to account for new market dynamics or new services if any changes to the definition of legal services require changes to primary legislation. As such, we would advise the Scottish government to consider whether and if so, how the need to set out definitions using primary legislation may reduce the framework's flexibility. We note that the Scottish Government published a '*Scottish regulators' strategic code of practice*' setting out how regulatory principles are to be applied. This code might represent a useful starting point for examining which elements of the framework should be statutory and what left to the regulator.²⁰

Reserved activities

Recommendation 28: 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.

Recommendation 29: 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.

21. In the Legal Services Market Study,²¹ the CMA assessed the impact of reservation of certain legal activities on competition and consumer protection in England and Wales.
22. The CMA's market study found that, in England and Wales, certain reserved legal activities are poorly aligned with the risks of providing legal services to consumers. For instance, consumer protection and public interest concerns appear to be less strong in relation to probate activities, reserved instrument activities and administration of oaths. As a result of the lack of targeted regulation, the least risky reserved legal activities are likely to be over-regulated. This has the potential to exclude low-cost and high-quality unauthorised providers from the sector. By contrast, other high-risk activities, for instance those involving handling of clients' money (for instance, estate administration), are unreserved and thus in principle are under-regulated, so that consumers might not receive sufficient protection when using unauthorised providers.²²

²⁰ See Scottish Government (2015), [Scottish regulators' strategic code of practice](#).

²¹ See CMA (2016), [Legal Services Market Study](#), paragraphs 5.56 to 5.88 and Annex G.

²² See CMA (2016), [Legal Services Market Study](#), paragraphs 5.72 to 5.78.

23. More generally, we consider that regulation - including reservation - should be appropriately targeted according to the risk of an activity and able to balance effectively its impact in preserving wider benefits and protecting consumers with its impact on competition. An optimal regulatory framework should not try to regulate all legal activities uniformly, but should have a targeted approach, where different activities are regulated differently according to the risk(s) they pose rather than regulating solely based on of the professional title of the provider undertaking it.²³
24. When establishing whether regulation should be introduced (for instance, whether to reserve a legal activity) to ensure additional protection above a minimal level, it would be essential to balance the benefits of increased protection with its costs (direct and indirect, for instance in the form of reduced competition) that are likely to be passed on to consumers in the form of higher prices. Furthermore, the framework should be flexible and have mechanisms in place such that regulation can be introduced (or removed) when, on balance, there is evidence that regulatory costs are likely to be lower (or greater) than the benefits of additional protections (i.e. protecting consumers).

Proportionality

Recommendation 19: The regulator should work with the professional bodies (The Faculty of Advocates, The Law Society of Scotland and The Association of Commercial Attorneys) to simplify existing codes of conduct and service standards including making them more consumer friendly, comparable and proportionate.

25. We are supportive of a regulator that seeks to ensure that regulation is consumer friendly, comparable and proportionate.
26. As noted in the Legal Services Market Study,²⁴ we consider that, in most markets, including legal services, effective competition is the best way of ensuring consumer protection. When regulation is needed,²⁵ there is a trade-off between protecting consumers from poor-quality provision and securing the public interest on the one hand, and allowing access to a range of lower-cost alternative providers on the other. Failures in making an appropriate trade-off between these two considerations can lead to regulations that can dampen competition, restrict entry and inhibit innovation in the market.

²³ See CMA (2016), [Legal Services Market Study](#), paragraphs 6.20 to 6.25.

²⁴ See CMA (2016), [Legal Services Market Study](#), paragraph 6.7.

²⁵ See CMA (2015), [Competition impact assessment guidelines](#) – in particular, paragraphs 3.20–3.23.

27. Regulation imposes costs on providers, which are ultimately likely to be passed on to consumers in the form of higher prices. Therefore, regulation should be proportionate, in the sense that:
- (a) It should be introduced only in circumstances where there is clear evidence of a market failure and only on the basis of an impact assessment that balances the benefits of regulation with these costs.
 - (b) It has mechanisms in place such that rules are removed when, on balance, there is evidence that regulatory costs are likely to be greater than the benefits of additional protections. As noted above, regulation needs to prioritise the most significant risks.
 - (c) It does not impose undue restrictions on entry by new providers or business models, provided that the potential entrants satisfy the requirements imposed by regulation, if any.

Entity regulation

Recommendation 21: 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.

Recommendation 22: The model for entity regulation should be enabling, flexible and should apply to any organisation which employs at least one legal professional.

28. We are supportive of including an element of entity regulation in the regulatory framework for authorised providers, similar to the one currently in place in England and Wales. In particular, we would advise the Scottish government to strike the right balance between individual and entity regulation. Individual-based regulation is appropriate when high risks are identified that can only be addressed by ensuring that the individual is competent to provide the service and should be personally responsible for it. When such high risks do not materialise, entity-based regulation (where entities can set the necessary obligations on their employees) appears in general to be more proportionate.
29. However, we consider that requiring all legal professionals licensed through the regulator to be licensed through an entity might impose excessive and disproportionate regulatory costs, which might be passed on to consumer in the form of higher prices. Also, it is not clear at this stage which categories would be included in the definition of “legal professionals”.

30. As noted in the Legal Services Market Study, regulation by title extends regulation (and its associated costs) to all activities undertaken by authorised providers, including those which carry a low level of risk.²⁶ As a consequence, authorised providers may be subject to excessive regulatory costs. Examples of such costs include PII and run-off insurance. This lack of proportionality in regulatory costs is likely to place authorised providers at a competitive disadvantage relative to unauthorised providers when both undertake the same, low-risk, unreserved activity and may also lead to higher prices for consumers.
31. Furthermore, as noted in the Legal Services Market Study,²⁷ requiring authorised professionals to be licensed through an entity restricts the entities within which certain professional titles can be employed. This would be the case particularly for solicitors, who will be restricted from working in unauthorised firms, even when carrying out only unreserved legal activities.
32. We consider that a lack of access to regulated titles may restrict the ability of unauthorised firms to compete given the impact that these titles have on consumer decision-making and trust, as set out in the previous section.
33. Another more direct consequence of the restriction is that unauthorised firms may be less able to harness the expertise of solicitors. This may directly affect the services that unauthorised firms can offer and reduce their ability to compete. This is relevant as unauthorised firms may employ different innovative business models or may be able to offer the same services that solicitors offer in relation to unreserved legal activities more cheaply than authorised firms. As a result, we consider the restriction may unnecessarily reduce the availability of lower cost options in the market.
34. In this context it is worth noting that, in the Legal Services Market Study, we assessed²⁸ the SRA's then proposal to allow solicitors to provide unreserved legal activities to the public while working in unauthorised firms.²⁹ We expressed our support for the SRA's reform as we considered it capable of improving the ability of unauthorised providers to compete in two ways:
 - (a) Through the impact that these titles have on consumer decision-making and trust. This means that consumers may be more willing to use unauthorised

²⁶ The scope of regulation in legal services is determined by regulated professional titles and the reservation of certain activities to providers with these titles. In addition, certain regulated professional titles, in particular solicitors, can only provide legal activities from within entities that have also been authorised to carry out reserved legal activities. See CMA (2016), [Legal Services Market Study](#), paragraphs 2.17 to 2.27.

²⁷ See CMA (2016), [Legal Services Market Study](#), paragraphs 5.100 to 5.104.

²⁸ See CMA (2016), [Legal Services Market Study](#), paragraphs 5.105 to 5.116.

²⁹ The new SRA Standards and Regulations will come into force in November 2019.

providers which employ practising solicitors, in situations where they might benefit from using them; and

- (b) Through the ability of unauthorised firms to harness the expertise of solicitors in innovative and lower costs business models.
35. This is likely to have a positive impact on consumers by generating greater competitive pressure on price, stimulating new entry by innovative providers and creating new routes and choice for consumers to access advice from qualified solicitors.
36. However, at the same time, we highlighted the potential risks of the measure. In particular, there might be risks to consumer protection if the change led to consumers using providers which offered lesser regulatory protection on an uninformed basis. As we explained in our market study, provided that appropriate measures to mitigate against the consumer protection risks are put in place, the consumer protection risks should be outweighed by the benefits to competition.
37. Therefore, we would advise the Scottish Government to introduce entity regulation only in circumstances where there is clear evidence of a market failure and only on the basis of an impact assessment that balances the benefits of regulation with these costs, including the impact of regulation on authorised providers' ability of to be employed in unauthorised firms.

Title regulation

Recommendation 20: The title “lawyer” should be a protected term, in the same way as “solicitor”, where only those able to demonstrate recognised legal qualifications, and who are regulated, are permitted to provide legal services.

38. Professional titles have the potential to affect consumer decision-making. Given their inability to observe quality directly, consumers may choose to rely on title when navigating the market as an indicator of quality. While title can be a useful and practical way for consumers to ensure at least a minimum level of quality, it may distort competition if it results in consumers avoiding unauthorised providers completely, regardless of the level of quality and consumer protection these providers may offer and the value for money that could be obtained by the consumer. This consumer behaviour may result in a barrier to entry for unauthorised providers.

39. In the Legal Services Market Study, we assessed whether the focus of regulation on title (such as ‘solicitor’, ‘barrister’) in legal services has an adverse impact on competition.³⁰
40. With reference to the protection of the term ‘lawyer’ we note that the Review’s recommendation may address a legitimate concern if consumers assume that the term ‘lawyer’ means that the provider is subject to regulation and might end up choosing unauthorised providers unwittingly. However, it is not clear this is necessarily the case. We also note that regulating the term ‘lawyer’ could have an unintended negative consequence on competition if makes it harder for unauthorised providers to advertise and promote their services.
41. We found that, in England and Wales, consumers often rely on titles as important indicators of quality. However, they do so without a clear understanding of the significance of these titles in terms of regulatory protection. This means that consumers may avoid using unauthorised providers even in situations where they might benefit from using them.
42. In our view, the Review report does not provide compelling evidence of the detriment suffered by consumer because ‘lawyer’ is not currently protected. Furthermore, as noted above, regulation should be proportionate and targeted to risk. Therefore, we would advise the Scottish Government to gather additional evidence of such detriment before introducing additional regulation to protect the title ‘lawyer’.

Complaints procedure

Recommendations 32-35:

- a. The legislation should require the regulator to develop a complaint 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.
- b. There should be a single gateway for complaints and a single investigation, where conduct concerns can be directed at any stage through a separate process and on to a single disciplinary tribunal where appropriate.
- c. The regulator should be required to develop appropriate sanctions and establish rules for proportionate compensation.
- d. The regulator should be required to develop a simple process of appeals which are only available at the end of the complaints process.

³⁰ See CMA (2016), [Legal Services Market Study](#), paragraphs 5.89 to 5.119.

43. We welcome the simplification of the complaint handling process envisaged by the Review and consider it appropriate in principle. A simplified process would allow consumers to be able to access redress more quickly should things go wrong and would increase consumers trust in the system.
44. We understand that, in the model envisaged by the Review, the regulator would also act as Ombudsman and handle the complaint process (in relation to both service standards and conduct). This is different from England and Wales, where complaints related to service standards regarding authorised providers are handled by an independent body (e.g. the Legal Ombudsman), while complaints on conduct are handled by authorised providers' respective regulators.
45. While we do not have a view on whether the regulator should be in charge of complaints or whether a separate body should be responsible for that, we consider it is important that consumer complaints should be handled by an independent body in order to preserve impartiality and independence from the profession.
46. The CMA's study did not find evidence that the complaints handling process was an issue in England and Wales. By contrast, the CMA's study analysed the extent to which existing regulations and the redress mechanism in England and Wales are sufficient to protect consumers of legal services if things go wrong.
47. It found that many consumers of legal services were unaware of the regulatory status of their legal services provider and the implications of that status for consumer protection. Customers of unauthorised providers do not benefit from the redress mechanisms enjoyed by customers of authorised providers ("consumer protection gap"). Instead, they have to rely on public consumer law enforcement bodies or take private action themselves through the courts (which is a more costly, difficult and time-consuming means of obtaining redress for consumers).
48. While appropriate considerations are given to Recommendations 21 and 22 (e.g. introducing entity regulation), we invite the Scottish Government to keep under review the role of unauthorised providers to understand whether the consumer protection gap is an issue in Scotland. As noted in our response to the Review, we found that there is a lack of evidence on the unauthorised part of the sector in England and Wales and made recommendations to the Ministry of Justice to gather additional evidence.³¹ To the extent that the Scottish Government encounters the same difficulties that the CMA encountered in gathering evidence,

³¹ We observe that there is limited evidence on quality of advice generally and evidence that compares authorised and unauthorised providers directly is even rarer. Many data sources do not distinguish issues by types of providers. More generally, no public body is responsible for capturing relevant information on the unauthorised part of the sector in a comprehensive way.

it may wish to consider similar recommendations to ensure that additional evidence about unauthorised providers could be gathered in the future.

The role of information in driving competition in the legal service sector

49. The CMA notes the Review has not made any recommendations aimed at increasing price, quality and service transparency in the Scottish legal services market.
50. While we appreciate that the remit of the Review was to identify the best framework to promote competition, we consider that competition could be further promoted by complementing the recommendations on the regulatory framework and the complaints system with reforms aimed at increasing transparency in the market. We consider that promoting transparency in the legal service market is an objective that can be pursued independently from changes to the regulatory model (as indeed has occurred in England and Wales).
51. In a well-functioning legal services market, consumers need to be engaged with the market and providers need to make available accurate information on price, service and quality to allow consumers to make informed purchasing decisions. If this competitive process works well it can lead, for example, to lower prices, higher quality, and greater innovation.
52. As noted in our response to the Call for Evidence of the Review, the CMA's Legal Services Market Study analysed the extent to which consumers in England and Wales can access, assess and act on information about legal services so that they can make informed purchasing decisions and thereby drive competition for the supply of legal services.
53. We found that competition in the legal services sector in England and Wales for individual consumers and small businesses was not working well, mainly because a lack of information on price, service and quality weakened the ability of consumers to drive competition through making informed purchasing decisions.
54. The CMA made various recommendations to frontline regulators for England and Wales to improve the standards of transparency of their respective regulated communities to help consumers (i) to understand the price and service they will

receive, what redress is available and the regulatory status of their provider and (ii) to compare providers³².

55. In response to the CMA's recommendations, all the regulators have developed proposals to increase transparency. Several legal services regulators, including the Solicitor Regulation Authority (SRA), CILEx Regulation, The Bar Standard Board (BSB) and the Council Licensed Conveyancers (CLC) have introduced³³ new rules requiring providers to publish information on prices and services to help people shop around more effectively.³⁴
56. Other regulators, including the Institute of Chartered Accountants in England and Wales (ICAEW) and Intellectual Property Regulation Board (IPReg), have opted, at least initially, for introducing guidance (rather than introduce mandatory requirements) to explain to the providers they regulate how to provide clear information on prices and services to consumers at the pre-engagement stage. We recognise that, for regulators dealing with a small number of providers, introducing guidance rather than rules is likely to be a proportionate approach. Indeed, these regulators are planning to review the adequacy of taking a voluntary approach and, if there is insufficient impact, they will consider the introduction of mandatory requirements.³⁵
57. The CMA's recommendation to increase transparency through regulatory intervention was appropriate, in our view, in the light of the lack of sufficient incentive for providers in the sector as a whole to make information on prices and services readily available to customers. While we are aware of the role that guidance and practice notes can play in both assisting providers to achieve best practice in a range of areas of practice management, we considered that the scale of the information deficit in England and Wales was such that regulatory intervention was necessary.

³² Other recommendations to frontline regulators include: (i) promoting the use of independent feedback platforms to help consumers to understand the quality of service offered by competing providers; (ii) making data more accessible to comparison tools and other intermediaries, and (iii) developing *Legal Choices* as a consumer education hub.

³³ See SRA, [Price Transparency](#), December 2018; CILEx Regulation, [CILEx Regulation Transparency Rules](#), November 2018; CLC, [New transparency rules arrive allowing homebuyers to compare conveyancing service and costs](#), December 2018; BSB, [BSB agrees new transparency rules for the Bar](#), February 2019. For the full list of regulators' action plans, see LSB, [Increasing Market Transparency for Consumers](#).

³⁴ In May 2019, the Master of Faculties which regulates notaries, submitted an application to the LSB to seek approval of changes to regulatory arrangements to introduce transparency measures.

³⁵ See ICAEW, [ICAEW Probate Action Plan](#), and IPReg, [CMA – Implementation](#). In particular, ICEAW has indicated that it will to review the adequacy of taking a voluntary approach in January 2020 and if there is insufficient uptake it will consider if it is necessary to roll out the transparency principles on a mandated basis through compulsory regulations. See ICAEW, [Best practice guide to price and service transparency](#), March 2019. IPReg plans to re-visit the adequacy of taking a voluntary approach in 2020 or 2021. See IPReg, [Draft Guidance - Improving Information for Consumers and Small Businesses](#), December 2018.

58. As noted above, the findings and the CMA's recommendations on transparency focus on consumers of legal services in England and Wales. While the same evidence base does not currently exist in Scotland, in discussion with us, key stakeholders in Scotland suggested that similar issues were likely to be applicable in Scotland.³⁶
59. In this respect, we welcome the consultation on price transparency³⁷ launched by the Law Society of Scotland in response to issues raised in our report. The consultation aimed at stimulating discussion within the Scottish legal profession and among other stakeholders on the benefits and challenges of price transparency on consumers and competition in the legal services sector.
60. If it is the case that many of the findings noted above in relation to price transparency are likely to apply to Scotland as well, it is also likely to be the case that, for competition to work in the Scottish legal sector, individual consumers and small businesses should be able to access, assess and act on information on the price, service and the quality of the services provided by legal services providers. Furthermore, it is also likely that solutions to the lack of transparency issues would be similar to those identified in England and Wales.
61. As such, we would advise the Scottish government to have regard to the CMA's recommendations on improving transparency and build on the work undertaken by the regulators in England and Wales to mandate increased transparency.
62. If the Scottish government were minded to carry out a piece of consumer research in relation to Scottish legal services, the CMA could partner with other bodies to provide assistance based on its experience of conducting similar research in England and Wales. However, we are less persuaded of the value of replicating the consumer survey that we conducted in England and Wales. The CMA's experience in England and Wales suggested that this research was particularly valuable in understanding the extent of the issues around transparency, while we would expect a consumer survey undertaken in Scotland to yield similar results to England and Wales. As set out in more detail in Section VI, we consider instead that there may be value in carrying out research along similar lines as that commissioned or undertaken by various bodies in England and Wales (for instance, the LSB), particularly in relation to suppliers' commercial strategies (i.e. the extent to which suppliers make pricing and quality transparent online, level of price dispersion, pricing strategies and customer acquisition strategies).

³⁶ The importance of information in driving competition in the legal services sector has also been noted by the Scottish Legal Complaints Commission Consumer Panel in its report [Consumer principles](#) (2017).

³⁷ See The Law Society of Scotland, [Price transparency – promoting consumer choice](#), May 2018.

The role of innovation in driving competition in the legal service sector

63. We note that the Review did not recommend the Scottish Government to approve the regulatory scheme required to license and monitor Scottish ABSs.³⁸ We understand that this is because, in the light of the Review recommendation to move to entity regulation, there may not be any need for separate ABSs schemes.
64. Notwithstanding this, we consider that, while the Scottish Government considers whether to accept the recommendation of the Review about introducing entity regulation, the proposed scheme should be approved to provide in the *interim*, to give an opportunity for those firms or individuals wishing to take advantage of an ABS. We recognise that there may be aspects of the current regime in Scotland that are not as effective as they could be at encouraging new models to be developed; nonetheless, our view (reflected in the CMA's response to the Scottish Government's consultation³⁹) is that the Law Society's regulatory scheme for ABSs should proceed without due delay for the reasons set out below.
65. As noted in the response to the Call for Evidence of the Review, the introduction of the ABS regime in England and Wales has represented an attempt to lower regulatory barriers to entry and stimulate competition and innovation.⁴⁰ It was recognised that such innovation could be achieved by enabling ABSs to access external capital and to achieve efficiencies by exploiting economies of scale, develop brands and offer greater convenience for consumers seeking a one-stop shop. Furthermore, the ABS structure could allow practices to retain high-performing non-solicitor employees or attract outside talent by rewarding them with a direct stake in the firm. Finally, the involvement of non-lawyers in management could facilitate the entry of more 'business-oriented' firms with a longer-term perspective. Since the introduction of the regime in England and Wales,⁴¹ almost 1,300 ABSs have been established.⁴²
66. In the response to the Call for Evidence of the Review, we also noted that, although we the overall levels of innovation have not been as high as expected, the ABS regime may need more time to deliver.⁴³ We have also observed that

³⁸ In responding to the Which? super-complaint, the OFT advocated that restrictions on ABSs in Scotland should be removed so as to benefit consumers in Scotland. See [Which? super-complaint: Scottish legal profession](#).

³⁹ CMA (2016), [CMA response on Scottish Alternative Business Structures](#).

⁴⁰ See CMA (2018), [Competition and Markets Authority's response to the Independent Review of the Regulation of Legal Services in Scotland](#), Section E.

⁴¹ The Legal Service Act 2007 gave the LSB powers to authorise the approved regulators to issue licences for the operation of an ABS and established certain minimum requirements for applicants for such licences. ABSs are subjected to similar ongoing regulatory requirements as other business entities.

⁴² IRN Research (2019), [The UK Legal Services Market 2019](#). See also Legal Futures, [Consumer law firms optimistic but fee pressure looms](#), February 2019.

⁴³ See CMA (2018), [Competition and Markets Authority's response to the Independent Review of the Regulation of Legal Services in Scotland](#), Section E.

ABSs are not the sole source of innovation within the sector. In particular, a number of unauthorised providers have sought to adopt innovative business models and technologies – including firms that have made a conscious choice not to become ABSs in order to do this. Finally, we noted that the concerns about the risks associated with ABS regime structures did not materialise in practice and few practical issues have emerged as a result of this alternative model.

Next steps

67. In this section, we highlight areas of additional discretionary work that would support the Scottish Government’s assessment and implementation of the recommendations of the Review (possibly in partnership with other relevant bodies in Scotland).
68. We are envisaging that the CMA’s work could cover the following areas:
- (a) Research on legal services providers’ commercial strategies. This could build on the research undertaken by various bodies in England and Wales, including the LSB,⁴⁴ extending it to the Scottish market. The aim would be to identify whether there is evidence of a lack of competition among legal services providers in Scotland, similar to the CMA’s previous findings in England and Wales;
 - (b) The benefits of independent regulation of legal services in Scotland, particularly focusing on competition and innovation in the sector. This piece of work would consider the extent to which the experience in England and Wales (including the implementation of the Legal Services Act 2007) is relevant to Scotland, and whether there is any evidence of issues that have arisen in Scotland because of the current lack of formal separation between regulators and representative bodies; and
 - (c) The impact of the current legal services regulatory framework in Scotland on innovation, including how regulatory costs may affect competition. This piece of work would consider the impact of regulatory costs on entry and innovation and the possible benefits of implementing the regulatory scheme for ABSs in Scotland.
69. We remain open to discuss with Scottish Government whether there are other areas that the CMA should consider including in this proposed work.

⁴⁴ See LSB, [Prices of Individual Consumer Legal Services](#), 2016 and 2018.