

Legal Services in Scotland

Research report

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Summary

1. A person's need for legal advice and support frequently arises when they are experiencing some of the most challenging times in their life, for example, bereavement, family separation or when purchasing a property. These moments rely on people being able to access and use legal services that are of high quality and good value. A well-functioning legal services sector is, therefore, critical to society. Furthermore, the sector makes an important contribution to the Scottish economy, estimated at up to £1.7bn per year.¹
2. There are indications that the sector in Scotland may not be delivering good outcomes for consumers. Consumer complaints are on the rise, with general disaffection about the process governing how they are handled. High street solicitor firms are facing challenging conditions. In addition, there are indications that consumers are not seeking legal services when they have a legal need (see Chapter 3). There are also concerns that regulation in Scotland has not adequately responded to new market pressures, affecting the sector's competitiveness with an influx of firms from England and Wales and an erosion of the use of Scots law (see Chapter 4).
3. Effective regulation is necessary to ensure the sector operates in the public interest, by maintaining the integrity and independence of a wider judicial system that is open to all, protecting consumers' rights, and ensuring adequate outcomes for consumers in terms of choice, price and quality. Strong competition can drive innovation and new business models to reflect consumers' changing needs, and make existing firms compete harder on price and quality, giving consumers greater choice.
4. In 2016 the Scottish Government – recognising the importance of legal services – commissioned an independent review into the regulatory framework in Scotland, led by Esther Robertson (the 'Robertson Review'). The resulting report,² published in 2018, proposes as its primary recommendation the introduction of a new independent regulator for Scottish legal services, offering the prospect of significant reform and the potential for the transformation of the existing legal services sector in Scotland.

¹ TheCityUK estimated that legal services contributed £1.7bn gross value added (GVA) in Scotland in 2017. See TheCityUK (2019), *Legal Excellence, Internationally Renowned: UK Legal Services 2019*, p25. This compares to a total GVA for Scotland estimated at £142bn in 2018 – see the [Office for National Statistics website](#).

² See Robertson, E (2018), *Fit for the Future—Report of the Independent Review of Legal Services Regulation in Scotland*.

5. The Competition and Markets Authority (CMA) responded to the Robertson Review in June 2019, launching this research project to further contribute to the debate on the future of the legal services sector in Scotland.³
6. The CMA's research into the Scottish legal services sector is focused on competition in consumer-facing legal services and has 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;
 - the impact of regulation on competition in the sector, particularly in relation to innovation and entry; and
 - the merits of the recommendation of the Robertson Review for a new regulatory framework in Scotland that is fully independent of the profession.
7. As set out in Chapter 3, 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.
8. In practice we found that providers do not have strong incentives to be transparent about their prices and quality, and this lack of accessible information increases search costs for consumers. For example, only 6% of the providers we surveyed publish prices on their websites (72% have no plans to do so and 18% do not have a website) and only 16% of those who have a website refer to third party ratings.
9. As a result, consumers face barriers to shopping around effectively and providers have limited incentives to compete vigorously. The lack of transparency, combined with the characteristics of legal services that make it difficult for consumers to assess quality of provision, therefore softens competition.
10. Our analysis supports the view that competition is not functioning well in this sector. We have considered a selection of legal services most commonly purchased by Scottish consumers and found that different solicitors charge significantly varied prices for essentially the same services. While the cost of

³ See [CMA response to the report of the Independent Review of the Regulation of Legal Services in Scotland](#), June 2019.

providing legal services naturally varies depending on the type and complexity of advice, we found that large differences persist even when we compare prices for specific scenarios on a like-for-like basis. For example, the price of a standard will may vary from around £100 to £200. The price for an undefended divorce may vary from around £300 to £925.⁴ Furthermore, providers may use different types of pricing, including hourly fees, which makes it more difficult for consumers to compare providers and shop around. This analysis suggests that consumers could make significant savings if they were provided with sufficient information to shop around effectively.⁵

11. As set out in Chapter 4, our research also found that there are features of the existing regulatory framework in Scotland that act as unnecessary restrictions on competition. In this regard, regulation in Scotland has not kept pace with more liberalised jurisdictions with potentially adverse implications for the sector's overall competitiveness and future growth:

- Despite legislative change in 2010 allowing for the introduction of alternative business structures (ABSs) with more flexible models than traditional solicitor-only partnerships, the change has yet to be implemented and consumers are therefore not benefiting from the additional potential for growth and innovation that this could foster by attracting external investment.
- The existing framework envisages a majority (minimum 51%) ownership of ABSs by solicitors or members of other regulated professions. Hence, when implemented this will still limit the attractiveness of ABSs to others who could provide valuable external funding and expertise, and/or offer economies of scale or scope that could reduce prices for consumers. It is also expected to perpetuate a competitive disadvantage for Scottish law firms relative to their counterparts in England and Wales where no minimum ownership requirement typically applies.
- The existing framework requires ABSs to be operated for commercial purposes, which prevents their use by non-profit organisations, for example, community interest groups which might wish to support consumers in rural areas where legal services provision may be limited.
- Advocates are also prohibited from forming partnerships or accepting instructions directly from consumers, unlike competing solicitor advocates which enjoy the flexibility and potential efficiencies arising from this – to

⁴ This is a comparison of the lower and upper quartile prices. See Chapter 3.

⁵ See paragraph 3.42.

the benefit of consumers and providers alike. Commercial attorneys also face barriers in competing effectively with other authorised professionals.

12. Some stakeholders have argued that many of these restrictions should remain in place because of risks to professional independence and access to justice. However, evidence from other jurisdictions suggests that these risks are low in practice. Maintaining the restrictions has limited the scope for growth and diversity in provision.
13. With regard to the primary recommendation of the Robertson Review, as set out in Chapter 5, the CMA supports the introduction of a regulatory model in Scotland which ensures that the regulator is independent of the representative bodies. An arrangement that delivers independence is, in our view, the best way to ensure that regulation can protect consumer interests, including by promoting competition among providers leading to improved choice and innovation, as well as wider public interest issues. It is furthermore consistent with better regulation principles, including the clear objectives and accountability that underpin best practice in regulation. It also avoids the risk that regulatory decision-making may be compromised by the potentially opposing interests of the profession.
14. Our research has identified a lack of transparency in the regulatory activities of the current institutions,⁶ as well as instances where conflicts between representative and regulatory roles are apparent, creating unnecessary risks to public confidence. A consumer survey carried out in 2019 for the Scottish Legal Complaints Commission (SLCC) found that only 19% of consumers felt that it was acceptable for an organisation to both regulate and represent legal services providers, and only 21% felt confident that their complaint could be dealt with fairly by such an organisation.⁷ These issues have arisen notwithstanding a degree of internal separation within the Law Society of Scotland (LSS), whereby regulatory duties are delegated to a Regulatory Committee reporting to the LSS Council.
15. The CMA notes that some of the concerns regarding the introduction of an independent regulator focus on the importance of the legal profession being independent of Government. We fully recognise the importance of maintaining independence of legal decision-making from Government involvement. However, in our view, maintaining this independence does not require regulation to be overseen by the existing professional bodies, or weaken the arguments for separating out the regulatory and representative functions. There are many successful examples of organisations established as public

⁶ See Chapter 5, paragraphs 5.35 to 5.42. This includes a lack of published information on regulatory decision-making, or how the regulatory budget is set and a detailed breakdown of regulatory costs.

⁷ See Chapter 5, paragraphs 5.58 to 5.59.

bodies that effectively operate independently of government while remaining open to public scrutiny and hence accountability.

16. Based on the above findings, the CMA has identified a number of measures aimed at facilitating competition and increasing the effectiveness of regulation, for the benefit of consumers. If followed, our recommendations would:

- empower consumers by improving the availability of information. These recommendations (see Chapter 3) aim to:
 - increase transparency of price, service and quality to enable consumers to shop around to get a better deal and secure good outcomes;
 - improve the information made available more generally to help consumers effectively identify their legal needs and navigate a sector that many find complex; and
 - improve access to regulatory and provider information across the sector to help consumers make more informed choices and offer opportunities for third parties to use this information to develop new innovative tools for consumers.
- reduce the adverse effects of regulation on competition, in particular on entry and innovation that can offer consumers increased choice and quality (see Chapter 4); and
- promote timely regulatory reform underpinned by the core principle of independence from the professions being regulated, to ensure a clear focus on the consumer interest (see Chapter 5).

Empowering consumers through better information

17. The CMA has observed low levels of transparency within the sector that prevent consumers from making informed choices. We welcome the new price transparency guidance published by the LSS, which will take effect in July 2020, as a positive step in encouraging change.⁸ However, we believe it will be challenging for the sector to voluntarily adapt to provide increased price transparency: our evidence suggests that there is a lack of intent or interest in providing prospective clients with such information. Providers do not appear to have a strong incentive to compete by giving consumers more information either on price or quality. We therefore expect that direct

⁸ See LSS (2020), [New guidance aims to improve price transparency in legal services](#). This guidance was due to come into effect on 1 April 2020, but in light of the coronavirus outbreak has been delayed and will come into effect on 1 July 2020.

regulatory intervention, in the form of mandatory rules, may be necessary in order to significantly improve upon the current low levels of information transparency. We recommend that the LSS Regulatory Committee closely monitors the impact of the guidance and adopts mandatory rules on a timely basis should this guidance prove ineffective upon review.

18. While price transparency is a necessary starting point to lower the barriers for consumers to engage, we recognise that other measures may be required to effectively empower consumers. Consumers need information on all relevant aspects of a service, including price, service and quality, in order to make fully informed choices. Information on quality can be more challenging to capture on a comparable basis given that perceptions of quality can have many, sometimes subjective, aspects. We have made recommendations regarding increasing transparency of price and service. However, alongside this, we recommend that the regulator should carry out further work to identify and promote the use of appropriate signals of quality in the sector.
19. Evidence from the Robertson Review that consumers lack awareness of, and are not confident in engaging with, legal services means that they are also likely to benefit from ready access to information that can help them navigate the sector and empower better decision-making. Some relevant information is already available from a variety of sources. We note, for example, the Scottish Government's ongoing work further to a review of legal aid,⁹ to develop online advice services such as mygov.scot to provide citizens with a one-stop shop for advice and information and signpost them to direct assistance if required. We recommend the continuation and extension of such work, to consider how the provision of information on consumer legal services more widely can be enhanced for maximum benefit to consumers.
20. Regulators also hold considerable amounts of information on providers and their services that may be relevant to consumers' understanding of the choice available and could help with the assessment of sectoral risks (for example, information on complaints). Government can play an important role in facilitating that relevant data held across regulators is made widely available in a consistent and compatible format.
21. The CMA notes the potential for the new Consumer Scotland body being established by the Scottish Government to assist in driving these information initiatives in the sector and recommends that consideration is given to the role Consumer Scotland can play in this regard.

⁹ See Scottish Government (2018), [Scottish Government Response to the Independent Review of Legal Aid in Scotland](#).

Recommendations to improve the information available to consumers

The CMA recommends that the LSS should:

- R1. Carry out a review of the impact of its existing price transparency guidance, including the impact on consumers, within a year of its introduction. If this review finds that the guidance has not resulted in effective changes in solicitors' approach to price and service transparency, we recommend that the LSS should adopt a set of mandatory rules as rapidly as possible thereafter.
- R2. Work with consumer bodies and its members to consider how providers can best strengthen transparency on levels of quality, in respect of both quality of service and quality of advice and set out a work programme to implement the preferred options on a timely basis.

The CMA recommends that the Scottish Government should:

- R3. Build on, and extend its ongoing work, in response to the legal aid review recommendations, to consider how access to information on a wider range of consumer legal services can be enhanced and how such information can be presented most effectively and communicated to maximise consumer use. This could include measures to identify and make widely available, where relevant in a standardised format, regulatory data that is of potential benefit to consumers.
- R4. Assess the potential for Consumer Scotland, once established, to take on a more active role in driving, delivering and monitoring such information initiatives and ensuring these are inclusive of all consumers.

The impact of regulation on competition

- 22. While regulation is important to protect consumer interests, it should be proportionate to avoid unnecessary costs being passed on to consumers and to minimise any adverse impact on competition to the detriment of consumers.
- 23. The CMA's recommendations focus on the removal of unnecessary regulatory restrictions on how Scottish legal providers operate. Such restrictions may have an adverse effect on growth, innovation and providers' ability to compete on an equal footing, both individually and as a jurisdiction. In turn, this can reduce choice, price and quality for consumers who benefit from a vibrant and competitive legal services sector in Scotland.
- 24. These recommendations are targeted at a number of entities. This reflects the nature of the regulation of the legal sector in Scotland, where several entities have different roles to play in effecting regulatory changes. For example, the implementation of ABSs will require certain actions by various entities

including the LSS, the Lord President (who has independent oversight of the judiciary) and the Scottish Government at different times.

Recommendations to reduce the impact of regulation on competition

The CMA recommends that:

- R5. The LSS should implement the existing provisions for ABSs in the Legal Services (Scotland) Act 2010, as soon it is authorised by the Scottish Government to do so.
- R6. The Scottish Government should, at the earliest possible opportunity, amend existing legislation to:
 - (a) further liberalise the ABS regime in Scotland by removing the requirement for solicitors or other regulated professionals to hold majority ownership in an ABS and the requirement for ABSs to be operated for a fee, gain or reward; and
 - (b) facilitate the effective implementation of ABSs by clarifying a number of the existing provisions relating to ABSs in the Legal Services (Scotland) Act 2010.
- R7. The Faculty of Advocates (FoA) should, as soon as possible, remove restrictions on advocates forming partnerships or accepting instructions directly from consumers should they choose to do so.
- R8. Further steps should be taken by the Lord President's office to promote a level playing field for legal professionals by reducing remaining barriers faced by commercial attorneys.
- R9. The regulators should work with the necessary bodies – including the Scottish Government and/or the Lord President where relevant – to promptly seek any consents required by legislation to achieve R5 or R7.
- R10. The Scottish Government should take steps necessary to facilitate or enable the recommendations above, working with the regulators and professions as necessary to achieve this. We believe our recommendations will benefit consumers and the public interest; accordingly we would similarly encourage the Court of Session and the Lord President to support them.

Wider regulatory reform

- 25. As noted above, the CMA supports the Robertson Review's proposal for a regulatory framework that is independent of those it regulates.
- 26. This could be accomplished in a variety of ways depending on the desired scope of regulation (for example, activity-based or entity regulation). It would

be for the Scottish Government to consider the merits of the various options to design an effective regulatory framework subject to the better regulation principles it has set out.¹⁰ The CMA has previously proposed a set of overarching principles consistent with better regulation principles to guide the design of any new regulatory framework,¹¹ which the Scottish Government may also wish to consider for this purpose. The CMA considers that these principles should be embedded at all levels of the regulatory framework, from the regulator(s) through to any oversight function, to allow for consistency and full accountability throughout the system. The CMA also considers that the regulator(s) within this framework should be subject to equivalent standards of scrutiny as other Scottish regulators and to the Scottish regulators' strategic code of practice.¹²

Recommendations for regulatory reform

The CMA welcomes the Scottish Government's commitment to consult on independent regulation and other aspects of the Robertson Review recommendations.

R11. The CMA recommends that the Scottish Government should, subject to consultation and as soon as parliamentary timescales allow, enact legislation to introduce independence from representative interests in the regulation of Scottish legal services. Furthermore, any revised regulatory framework should be established on the basis of better regulation principles.

27. The CMA recommends that its proposals, as set out above, should be taken forward as soon as practical in the interests of achieving timely (and to an extent, overdue) improvements to consumer outcomes in the Scottish legal services sector.
28. The CMA is grateful for the input and interest of those who have taken the time to engage with its research.

¹⁰ See Scottish Government, [Better Regulation](#).

¹¹ See CMA (2016), [Legal Services Market Study](#), paragraph 6.10.

¹² See Scottish Government (2015), [Scottish regulators' strategic code of practice](#).

1. Introduction

- 1.1 On 17 June 2019, the CMA launched a research project into certain aspects of legal services in Scotland, to examine whether competition is working well for consumers and the impact of the current legal services regulatory framework on competition.
- 1.2 This research follows the publication in October 2018 of the report of the Independent Review of the Regulation of Legal Services in Scotland, led by Esther Roberton (the ‘Roberton Review’).¹³ The Scottish Government intends to consult on the future of the legal services regulatory framework for Scotland.¹⁴ The CMA’s research aims to support the Scottish Government by providing additional evidence to inform this consultation. The CMA has also separately responded to the recommendations in the Roberton Review (the ‘CMA Response’).¹⁵
- 1.3 The legal sector contributes up to £1.7 billion to the Scottish economy each year¹⁶ and well-functioning legal services are critical to the interests of consumers and businesses, who often face legal needs at important moments in their lives that can have significant monetary and personal consequences.
- 1.4 However, there are concerns that consumers are currently not being well-served by certain characteristics of the Scottish legal services sector. Consumer complaints are on the rise,¹⁷ with general disaffection about the process governing how they are handled. High street solicitor firms are facing challenging conditions. In addition, there are indications that consumers are not seeking legal services when they have a legal need.¹⁸ There are also concerns that regulation in Scotland has not adequately responded to new market pressures – for example, due to the delay to the introduction of ABSs affecting the sector’s competitiveness.
- 1.5 The CMA (and its predecessor the Office of Fair Trading (OFT)) have regularly sought to promote competition in legal services. In Scotland, this has included a report by the OFT on legal services in Scotland (the ‘OFT

¹³ See Roberton, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#).

¹⁴ See [Scottish Government response to the Independent review of legal services regulation in Scotland](#).

¹⁵ See [CMA response to Review](#).

¹⁶ TheCityUK estimated that legal services contributed £1.7bn gross value added (GVA) in Scotland in 2017. See TheCityUK (2019), [Legal Excellence, Internationally Renowned: UK Legal Services 2019](#), p25. This compares to a total GVA for Scotland estimated at £142bn in 2018 – see the [Office for National Statistics website](#).

¹⁷ For example, the SLCC received 1,009 complaints in 2014/15, rising to 1,326 complaints in 2018/19. See corresponding SLCC annual reports available from the [SLCC website](#).

¹⁸ For example, according to the [2017/18 Scottish Crime and Justice Survey](#), among those who had experienced civil law problems in the last three years: ‘Just over two fifths (42%) had resolved the problem, while just over a third (34%) were still trying to resolve the problem. One in ten had tried to resolve the problem but had to give up (11%) and a similar proportion (11%) were not planning to do anything.’

Response')¹⁹ responding to a super-complaint by Which? in 2007 (the 'Which? super-complaint').²⁰ The CMA also responded to the Scottish Government's consultation on a new regulatory scheme for ABSs in 2016 and,²¹ more recently, advised the Scottish Government on changes to the rules governing how Scottish solicitors can gain extended rights of audience (civil and criminal) in the higher courts.²² We have also responded to a Scottish Parliament petition on restrictions that affect commercial attorneys.²³

- 1.6 In 2016, the CMA carried out a market study into legal services in England and Wales (the 'Legal Services Market Study').²⁴ While the scope of the market study did not include Scotland, the CMA consulted closely with Scottish stakeholders before, during, and after the Legal Services Market Study and stated its intention to use the outcome of the market study to inform any future consideration of similar issues in Scotland and Northern Ireland.²⁵ In the meantime, the Scottish Government announced the Robertson Review. In light of the potential for change this might introduce, the CMA decided to await the outcome of the Robertson Review before determining its next steps.
- 1.7 The Robertson Review made a number of recommendations, among these a recommendation for a single independent regulator of legal services in Scotland, and a recommendation that the Scottish Government should require the CMA to revisit its Legal Services Market Study and test the relevance of those findings for the Scottish legal services sector. The CMA's research was conceived in response to these recommendations.
- 1.8 In scoping its research, the CMA considered the extent to which it was appropriate to build on the key themes of its work in the Legal Services Market Study. As noted in the CMA's response to the Call for Evidence of the Robertson Review,²⁶ the legal regulatory framework in Scotland shares certain characteristics with the current legal regulatory framework in England and Wales. Taking this and discussions with relevant Scottish stakeholders into

¹⁹ See OFT (2007), [Response to Which?'s super-complaint: 'Restrictions on business structures and direct access in the Scottish legal profession'](#).

²⁰ See Which? (2007), [Super-complaint: Restrictions on business structures and direct access in the Scottish legal profession](#).

²¹ See CMA (2016), [CMA response on Scottish Alternative Business Structures](#).

²² This was set out in a letter from the CMA to the Scottish Government, dated 17 September 2018.

²³ See Scottish Parliament, [Petition PE01724: Equal rights for Commercial Attorneys and Party Litigants in the legal system](#).

²⁴ 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](#).

²⁵ 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 Scotland and Northern Ireland were at different stages of regulatory reform from England and Wales.

²⁶ See [Competition and Markets Authority's response to the call for evidence for the Independent Review of the Regulation of Legal Services in Scotland](#).

account,²⁷ we consider that a number of the key issues considered in the Legal Services Market Study are likely to be relevant in Scotland, in particular:

- that the characteristics of legal services, alongside a lack of transparency on price and quality, may inhibit the ability of consumers to engage properly when choosing a provider; and
- the potential for regulations and the regulatory framework to have an adverse impact on competition.

1.9 However, there are also differences between the regulatory frameworks in Scotland and in England and Wales which must be taken into consideration in assessing the extent to which such issues may apply in Scotland.

1.10 In scoping its research, the CMA also took into account the fact that many of the recommendations of the Robertson Review (in particular recommendations for the reform of the complaints handling process) have been broadly welcomed. However, its publication has generated considerable debate, particularly concerning the merits of independent regulation within the specific context of the Scottish legal services sector.

1.11 The CMA therefore announced on 17 June 2019 its intention to carry out new research to:²⁸

- test its hypothesis of an existing lack of transparency in price and quality which has adverse effects on competition for legal services in Scotland, to the detriment of consumers; and
- contribute to the ongoing discourse regarding the future of legal services regulation in Scotland, by examining:
 - the effects of the existing regulatory framework on competition; and
 - the merits of independent regulation.

1.12 The next section describes the scope of the CMA's research in greater detail.

²⁷ During the course of the CMA (2016), [Legal Services Market Study](#), and after the publication of the final report, the CMA held roundtables with relevant stakeholders in Scotland, including the LSS, the FoA, the SLCC, Citizens Advice Scotland, Which?, the Association of Commercial Attorneys, the SLCC Consumer Panel and representatives of the Scottish Government.

²⁸ See the [CMA's press release announcing this research](#) in June 2019.

The scope of the research

1.13 The CMA's research:

- has focused on the experience of individual consumers²⁹ of purchasing legal services in Scotland; and
- when considering competition, has focused primarily on the legal services provided by solicitors as, in Scotland, consumers are able to choose and instruct a solicitor directly whereas advocates are instructed on behalf of consumers via solicitors. Solicitor firms therefore interact directly with consumers while advocates, for the most part, do not.³⁰

1.14 The research comprised three main work strands, examining:

- whether there is evidence of a lack of competition among solicitor firms in Scotland. This part of the research focused on solicitor firms' commercial strategies³¹ (ie the extent to which firms make pricing and quality transparent online, the level of price dispersion, pricing strategies and customer acquisition strategies);³²
- the impact of the current legal services regulatory framework in Scotland on competition, particularly in relation to innovation and entry. Our

²⁹ While our research has not focused on small businesses, we consider that many of the issues facing consumers may similarly apply to small businesses. This view was shared by the Federation of Small Businesses (FSB) in Scotland during discussions for this research, consistent with the views of the FSB in England and Wales that small businesses tend to act in a similar way to individual consumers when purchasing legal services and hence experience similar problems in engaging with the legal services sector. See CMA (2016), [Legal Services Market Study](#), paragraph 3.24. This contrasts with medium-sized and large businesses, which are more likely to be repeat purchasers of legal services and to have access to expert advice (including in-house legal advice) which would enable them to navigate the legal services sector with greater effectiveness.

³⁰ The research also excludes criminal legal services from scope. This is because we found there to be factors that distinguish criminal legal services from legal services in the areas of civil law such that the themes that we considered were less relevant to criminal legal services. In particular, in criminal legal services, there are certain prescribed processes in place that guarantee advice and representation for defendants in criminal proceedings. Furthermore, the degree of legal aid provision available for criminal as opposed to civil legal services following recent reforms, means that some of the issues that we have considered do not have the same relevance to criminal law services.

³¹ The CMA also considered undertaking consumer research in Scotland. However, it was of the view, based on discussions with Scottish stakeholders, that consumers in Scotland were likely to face many of the issues already identified by the CMA's research with consumers in England and Wales carried out for the [Legal Services Market Study](#). The CMA therefore prioritised research with legal services providers, which it considered would more reliably meet its needs. It replicated a piece of research carried out by the Legal Services Board (LSB) that had been influential in the Market Study in helping to diagnose that competition was not working well for consumers. The CMA considered that this approach had advantages over a piece of consumer research as it could, like consumer research, be effective in confirming the existence of features that were likely to have an adverse effect on competition (eg a lack of transparency) but in addition it could more precisely assess the likely effects (price dispersion) and allow some comparison to similar findings in England and Wales based on the research by the LSB. Accordingly, the CMA considered that carrying out similar research in Scotland would be the most effective means of informing its assessment.

³² The CMA based this research on the LSB research referred to in the footnote above. In the Legal Services Market Study, the LSB research supported the CMA's finding that competition was not working well because consumers did not have access to the sort of information to enable them to shop around in a way that would drive competition and that the lack of competition might explain why there were large differences in the prices charged by providers for the same services.

research considered whether existing regulation creates barriers to competition, and the possible benefits of implementing a regulatory scheme for ABSs in Scotland; and

- the merits of independent regulation and whether the current institutional arrangement – where the bodies regulating the professions are also those representing and lobbying for them – dampens competition in legal services in Scotland. This strand of work considered 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.

- 1.15 As described above, the CMA's research has focused on certain aspects of competition in the sector and, insofar as the recommendations of the Robertson Review are concerned, has been limited to exploring the case for transferring the regulatory function from the existing professional bodies in Scotland to a separate independent regulator.
- 1.16 The CMA has previously set out its views on other aspects of the Robertson Review in the CMA Response, including: its recommendations for the development of a clear definition of legal services; regulatory objectives and the professional principles to be set out in primary legislation; the introduction of entity regulation; and the protection of the title of 'lawyer'.
- 1.17 Many of these matters, and the details of any new regulatory scheme that may be brought in (such as the appropriate number of regulators and how any new regulator would be funded and appointed) are contingent on the decision regarding the Robertson Review's central recommendation of a single independent regulator and will therefore need to be carefully considered by the Scottish Government alongside this. As such, the CMA's research has not focused on these other elements. The CMA notes the commitment of the Scottish Government to consult on the recommendations of the Robertson Review³³ and welcomes the opportunity for further engagement on these other matters within this process.
- 1.18 In addition, the CMA's research has not focused on the recommendation of the Robertson Review to reform the current framework for complaints and redress in respect of legal services in Scotland. This recommendation has received widespread public support. The current legal complaints and redress process has been identified as a priority area for improvement by the Scottish Government and the regulatory community (including the LSS, the FoA and the SLCC) is already working with the Scottish Government to identify and consider improvements that may be made to the legal complaints system in

³³ See [Scottish Government response to the Independent review of legal services regulation in Scotland](#).

the interim without the requirement for primary legislative change.³⁴ The CMA is supportive of the recommendation. However, given the focus of others on this area, the CMA has excluded the matter of complaints and redress reform from the scope of its research.

The evidence-gathering process

1.19 The findings of the CMA's research, as summarised in this document, are based in large part on the information we have received from a wide range of interested parties throughout the research – including approved regulators and representative bodies, consumer organisations, government bodies, self-regulatory bodies, trade associations, and providers of legal services (for a full list of the stakeholders we have met, see Appendix A).

1.20 In addition to this, the CMA gathered evidence through the following methods:

- commissioning a survey of Scottish solicitor firms, in order to better understand their commercial strategies. The survey was conducted during autumn 2019 by the market research agency IFF Research Ltd, on behalf of the CMA. The survey focused on the legal services identified by research commissioned for the Robertson Review as most commonly used by Scottish consumers, namely: housing, property and neighbours; wills (including estate administration); and family.³⁵ It collected, for these services, data on the price and quality information provided to consumers, the extent to which prices tend to vary and the nature of competition; and obtained views on regulation in the sector. All solicitor firms in Scotland offering the relevant legal services were contacted regarding the survey;³⁶
- examining a sample of provider websites for selected legal services to complement the CMA's survey findings on the current level of price and service transparency; and
- drawing together and evaluating existing research, reports, surveys and databases on the supply of legal services to consumers in Scotland. In particular, our research has drawn extensively on the Robertson Review and the studies it commissioned as well as the CMA's Legal Services Market Study.

³⁴ See [Scottish Government response to the Independent review of legal services regulation in Scotland](#).

³⁵ See Europe Economics (2018), [The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence](#), p36.

³⁶ The survey received 160 responses, equivalent to a response rate of 18.1%, which is favourable by comparison to similar surveys.

1.21 The CMA is grateful for the input and interest of those who have taken the time to engage with the CMA in its research.

The purpose and structure of this paper

1.22 The purpose of this paper is to outline:

- our research findings; and
- our recommendations in relation to regulation and competition in legal services in Scotland.

1.23 The paper is structured as follows:

- Chapter 2 summarises the Scottish legal services sector and explains how these services are regulated.
- Chapter 3 considers the consumer experience of Scottish legal services and sets out the CMA's findings on price and quality transparency and price dispersion, and the implications for competition in the sector.
- Chapter 4 discusses the CMA's findings on the impact of the current legal services regulatory framework in Scotland on competition, in particular on innovation and the entry of new business models.
- Chapter 5 discusses the merits of the Robertson Review's recommendation for independent regulation of legal services in Scotland, taking into account evidence on whether the current institutional arrangement dampens competition.

2. The legal services sector in Scotland

Overview

- 2.1 Legal services are of public importance. They are an important foundation of a well-functioning society and an essential input to the economy as a whole. Consumers often use legal services providers at critical moments in their lives. The advice they receive in these situations can have major personal and financial consequences, which may not be possible to reverse or remedy. These factors distinguish legal services from many other services that are purchased by consumers and increase the importance of a well-functioning legal services sector.
- 2.2 Effective regulation is critical to this outcome given that certain key characteristics of the legal services sector – notably an inherent asymmetry of information between providers and consumers which can often hinder consumers from making fully informed purchasing decisions, and the potential for a service to negatively impact unrelated third parties³⁷ – would otherwise give rise to a material risk of market failure.
- 2.3 In addition, wider public interest issues are commonly regarded as justifying specific regulations within the legal services sector. These considerations include a fundamental public interest in supporting the rule of law;³⁸ protecting the legal rights of individuals; enshrining the independence of the legal profession; and ensuring access to justice so that individuals may participate equally in society.³⁹
- 2.4 This chapter provides a high-level overview of the structure, regulation and participants of the legal services sector in Scotland as context for our research, drawing on previous publications, notably the Robertson Review and the report by Europe Economics for the Robertson Review (‘the Europe Economics Report’).⁴⁰ The chapter covers:

³⁷ This is referred to as a ‘negative externality’. For instance, a child may suffer as a result of incompetent advocacy in the context of a family dispute, or the intended beneficiaries of a will may be disadvantaged if it is poorly drafted. Another negative impact that may arise from the poor representation of clients by lawyers is the lessening of the efficiency and effectiveness of the justice system.

³⁸ The rule of law is an essential component of democracy. As described by the former President of the Supreme Court of the United Kingdom, Lord Neuberger, in 2013: ‘At its most basic, the expression connotes a system under which the relationship between the government and citizens, and between citizen and citizen, is governed by laws which are followed and applied.’ See Evans, M (2018), [Rethinking Legal Aid: An Independent Strategic Review](#), p11.

³⁹ These may be alternatively characterised as ‘positive externalities’ or the provision of ‘public goods’. See Van den Bergh, R (2008), [Towards Better Regulation of the Legal Professions in the European Union](#), Rotterdam Institute of Law and Economics (RILE) Working Paper Series, p5.

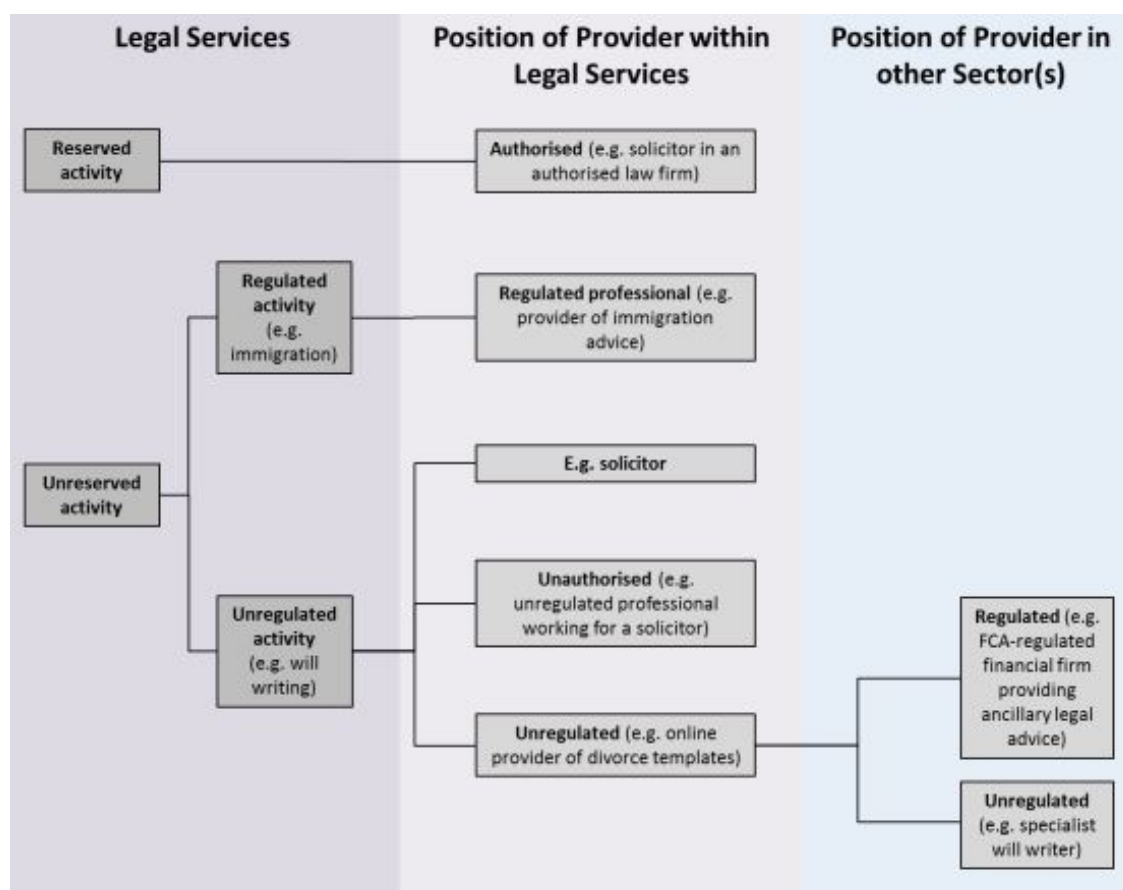
⁴⁰ See Europe Economics (2018), [The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence](#).

- the provision of legal services in Scotland, distinguishing between reserved and unreserved services;
- the regulation of reserved legal services in Scotland; and
- the legal services providers available to consumers in Scotland.

Legal services in Scotland

2.5 Legal services, as set out in Section 3 of the Legal Services (Scotland) Act 2010, are services that provide legal advice, assistance or representation in connection with legal documents, the application of the law, or the resolution of legal disputes.⁴¹ There are at least 25,000 legal services professionals in Scotland,⁴² providing both reserved and unreserved legal services as described further below and summarised in the following figure from the Europe Economics Report (Figure 2.1).

Figure 2.1 Mapping of legal services to legal service professionals.



Source: Europe Economics (2018), *The Regulated and Unregulated Legal Services Market in Scotland: A review of Evidence*, p16.

⁴¹ See *Legal Services (Scotland) Act 2010*, section 3.

⁴² See Europe Economics (2018), *The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence*, p41.

Reserved legal services

- 2.6 Certain legal services are reserved to professionals who are authorised to carry out those services based on the qualification they hold. The main reserved legal services are set out in Section 32 of the Solicitors (Scotland) Act 1980.⁴³ It is an offence for an unqualified person to prepare writs relating to heritable or moveable estate, writs relating to actions or proceedings in any court,⁴⁴ or papers relating to applications to grant confirmation in favour of executors.
- 2.7 The Europe Economics Report estimated that there are approximately 12,000 authorised legal service professionals in Scotland.⁴⁵ Authorised legal professionals comprise:
- **solicitors**, who perform a range of services including providing advice, dispute resolution and administering the law. They have rights of audience in the Sheriff Court and can instruct advocates and solicitor advocates on behalf of their clients. It is estimated that there are 12,200 practising solicitors in Scotland, comprising around 1,100 firms in 2019⁴⁶ (see also paragraphs 2.37 to 2.39);
 - **advocates** and **solicitor advocates**, who have extended rights of audience to appear before the Supreme Courts in addition to the Sheriff Court. There are around 450 practising advocates and around 350 practising solicitor advocates⁴⁷ (see also paragraphs 2.40 to 2.44); and

⁴³ The Solicitors (Scotland) Act 1980 is the core legislation governing the regulation of the solicitors' profession in Scotland. It brings together several pieces of legislation dating back to 1949. This Act has been amended by various pieces of legislation in 1990, 2003, and notably in 2007 and 2010. See [Solicitors \(Scotland\) Act 1980, section 32](#).

⁴⁴ The UK Supreme Court is Scotland's highest civil court. It hears appeals from the Inner House of the Court of Session. Below the UK Supreme Court in the hierarchy of Scottish civil courts sits the Court of Session. It is divided into the Outer House, which hears certain cases at first instance, and the Inner House, which is primarily the appeal court for both the Outer House and Sheriff Appeal Courts. The Sheriff Appeal Court is the national appeal court for civil appeals from local Sheriff Courts. Sheriff Courts are the courts of first instance for cases with monetary value below £100,000 and certain other types of cases.

The High Court of Justiciary is Scotland's supreme criminal court (other than for criminal appeals which relate to human rights or devolution issues, which are heard by the UK Supreme Court). It hears certain serious criminal cases at first instance and also hears appeals from its own instance cases, the Sheriff Appeal Court and the local Sheriff Courts in respect of solemn matters (ie more serious cases which a judge and jury have dealt with). The Sheriff Appeal Court is the national appeal court for criminal appeals from local Sheriff Courts and Justice of the Peace Courts in respect of summary matters (ie less serious cases which a judge has dealt with alone). Sheriff Courts and the Justice of the Peace Courts are the courts of first instance for most criminal cases in Scotland, with less serious cases being heard by the Justice of Peace Courts.

⁴⁵ See Europe Economics (2018), [The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence](#), p41.

⁴⁶ 2020 data provided by the LSS.

⁴⁷ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p14.

- other professionals, namely **commercial attorneys**,⁴⁸ **conveyancing practitioners**,⁴⁹ **executry practitioners**⁵⁰ and **notaries public**.⁵¹ These groups are small in number and there is no evidence of growth or other alternative professionals looking to join the sector.

2.8 Authorised providers are subject to statutory regulation within the sector as detailed further in paragraphs 2.17 to 2.31. In addition, some may also be members of voluntary associations such as the Society of Solicitor Advocates and thereby also subject to their codes of conduct. These voluntary associations are typically in place to ensure professional standards are maintained and furthered as appropriate, and/or to represent member interests.

Unreserved legal services

2.9 Unreserved legal services refer to services not set out in the 1980 Act as reserved. Solicitors can deliver both reserved and unreserved legal services.

2.10 Unreserved legal services may also be delivered by unauthorised professionals, which include:

- those providing commercial services (such as claim management companies, DIY will services and online divorce providers, as well as paralegals who operate under the supervision of authorised professionals); and
- those who operate in the not-for-profit sector (such as trade unions, law centres and Citizens' Advice advisors). The not-for-profit sector supports those who are seeking legal advice. This is either in the form of services or initial advice to help a consumer understand their legal need and options.

2.11 The Europe Economics Report found that there is limited information on the size of the unauthorised sector in Scotland. However, it estimated that there are at least 13,000 unauthorised legal service professionals in Scotland.⁵² A high majority of these are paralegals, who effectively operate within the

⁴⁸ Commercial attorneys are specialists in the construction industry, such as qualified engineers, architects and surveyors, with additional legal qualifications. They have rights of audience on construction law matters in the Sheriff Court in relation to small claims and summary cause procedures. Commercial attorneys are a new authorised profession having been introduced in 2009.

⁴⁹ Conveyancing practitioners are specialists in property law and can carry out the legal side of buying or selling a property. The first conveyancing practitioners were authorised in 1997.

⁵⁰ Executry practitioners are appointed to put into effect the terms of a will. The first executry practitioners were authorised in 1997.

⁵¹ Notaries public are specialists in the preparation and certification of documents. To operate as a notary public a person must hold a current practising certificate from the LSS, therefore the role is restricted to solicitors.

⁵² See Europe Economics (2018), [*The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence*](#), p5.

authorised sector as they are supervised by authorised providers.⁵³ Of the remaining unauthorised professionals, most are believed to operate within the non-profit sector.

- 2.12 Unreserved legal services may be regulated or unregulated. Professionals performing the following unreserved legal services are subject to additional regulation, regardless of whether they have an authorised status as a solicitor or are unauthorised providers. These are immigration (regulated by the Office of the Immigration Services Commissioner) and insolvency work (regulated by the Association of Certified Chartered Accountants; Institute of Chartered Accountants in Scotland; and the Insolvency Practitioners Association).
- 2.13 Unauthorised providers delivering unreserved unregulated legal services may also be subject to statutory regulation. This could include a provider:
- regulated by another sector in which it operates, such as a financial advisor offering wills as part of a wider service offering. The Financial Conduct Authority (FCA) regulates financial firms providing ancillary legal advice, for example; and
 - unregulated but working for a regulated professional, such as a paralegal working for a solicitor.
- 2.14 Where an unauthorised provider is not subject to statutory regulation either by virtue of the type of activity undertaken or the sector in which it operates, it may still be subject to voluntary industry standards or oversight by voluntary professional associations, for example, as a member of the Scottish Society of Will Writers.
- 2.15 There is uncertainty about the extent of the role unauthorised providers play in the unreserved sector,⁵⁴ with concerns raised that consumers are often unaware of the differences between authorised providers (who are regulated) and unauthorised providers (who may not be regulated),⁵⁵ particularly in relation to consumer protections such as complaint procedures or insurance.⁵⁶ In 2016, the LSS conducted research that showed that 63% of

⁵³ The 2018 Europe Economics Report estimated there were under 10,000 paralegals; approximately 3,000 Citizens Advice advisors; and approximately 60 specialist will writers. See Europe Economics (2018), [The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence](#)

⁵⁴ Limited information exists in this regard. However, the CMA has heard anecdotal evidence from a stakeholder that there has been some growth in unauthorised providers providing unregulated activities. It has been argued that this growth is because of new types of innovative business structures emerging, for example online providers of divorce templates and claims management companies.

⁵⁵ See, for example, LSS (2018), [The Case for Change: Revisited](#), including paragraphs 88 to 97 and paragraphs 104 to 111.

⁵⁶ Consumers using authorised providers benefit from additional regulatory protections specific to legal services as well as the consumer protections that apply more widely across services. For example, they can participate in

consumers did not recognise the difference between a solicitor and a lawyer.⁵⁷ As a result, it was argued that consumers' perception is that a 'lawyer' is a solicitor or other legal professional who is appropriately qualified and regulated, whereas this may not always be the case.⁵⁸

- 2.16 These issues are not covered in this report. The CMA's research has not focused on the unauthorised legal sector in Scotland given the limited information available on its size and nature, as noted in the Europe Economics Report. It is not possible therefore to draw firm conclusions on the main issues under debate, such as the potential for unauthorised providers to offer additional choice for consumers or the potential for harms to arise from differences in consumer protection. However, in principle, the CMA considers that unauthorised providers increase the range of options available to consumers, particularly those who may be unable or lack confidence to engage with authorised providers, and can therefore contribute to a dynamic and competitive legal services sector, although it is vital that consumers have sufficient information about these providers to compare what they can offer relative to authorised providers (including information about the level of consumer protection that they offer) and to shop around effectively.

The regulation of the authorised legal sector in Scotland

- 2.17 This section provides an overview of the regulatory framework which applies to authorised legal providers in Scotland. Within this, the main regulators also act as the representative bodies for the main legal professions.
- 2.18 The following figure from the Europe Economics Report (Figure 2.2) provides a clear illustration of the regulatory landscape.⁵⁹ In summary, there are:
- Three statutory bodies (the LSS; FoA; and Association of Commercial Attorneys (ACA)) that regulate the population of authorised providers in Scotland. Alongside their regulatory role, these bodies are also, respectively, the representative bodies for solicitors, advocates and commercial attorneys in Scotland.

a defined complaints process under the SLCC and must obtain professional indemnity insurance that will safeguard compensation for their customers in the event of serious issues arising with the service received.

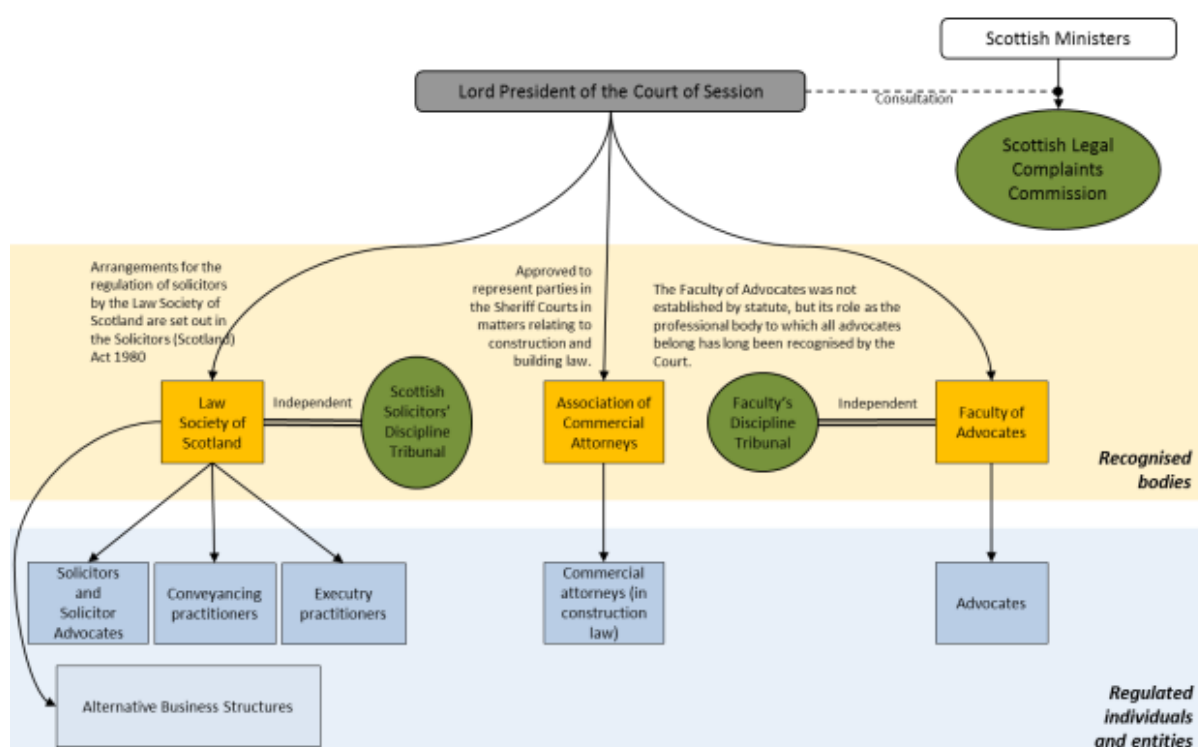
⁵⁷ 'Solicitor' is a protected title that only appropriately qualified professionals registered with and regulated by the LSS can use. 'Lawyer', on the other hand, is not a protected title.

⁵⁸ See LSS (2018), *The Case for Change: Revisited*, p29.

⁵⁹ See Europe Economics (2018), *The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence*, p16.

- Two statutory disciplinary tribunals (the Scottish Solicitors' Discipline Tribunal and the Faculty's Discipline Tribunal).^{60 61}
- An independent statutory complaints body (the SLCC) that acts as a single point of contact for all complaints against authorised providers operating in Scotland.⁶²
- These bodies are subject to oversight by the Lord President of the Court of Session as the head of the judiciary in Scotland.

Figure 2.2 Regulatory structure in Scotland.



Source: Europe Economics (2018), *The Regulated and Unregulated Legal Services Market in Scotland: A review of Evidence*, p28.

⁶⁰ The independent Scottish Solicitors Discipline Tribunal is empowered to adjudicate on complaints about professional misconduct and the provision of inadequate professional services by solicitors. It has a range of disciplinary powers under section 53 of the Solicitors (Scotland) Act 1980. See [Solicitors \(Scotland\) Act 1980](#).

⁶¹ The FoA has a statute responsibility, under Section 33 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, for investigating complaints of professional misconduct or inadequate professional service. Like solicitors, advocates have an independent Faculty's Discipline Tribunal to adjudicate on complaints and it has a range of disciplinary powers. See [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1990](#).

⁶² The SLCC began operations in October 2008 and is funded through a levy on authorised legal professionals. It acts as a single point of contact for all complaints against authorised professionals operating in Scotland. Complaints can relate to reserved or unreserved legal services. The SLCC investigates complaints about the quality of service, but complaints relating to professional conduct will be passed to the relevant regulator (such as the LSS or the FoA) to investigate. There is also the possibility for cases to be referred to the Scottish Solicitors' Discipline Tribunal or the Faculty's Discipline Tribunal, which would mean a complaint goes through three statutory bodies before getting resolved.

- 2.19 The following paragraphs provide more detail, with a focus on the regulation of solicitors, solicitor advocates and advocates as these comprise the vast majority of authorised legal services providers in Scotland.

The Lord President of the Court of Session

- 2.20 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 SLCC.
- 2.21 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 the Scottish Solicitors' Disciplinary Tribunal.⁶³ 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;⁶⁴ and has a role in arbitrating any disagreements between the LSS's Council and Regulatory Committee.⁶⁵
- 2.22 Advocates hold a public office. The Court of Session is responsible for admitting persons to (and removing persons from) the office of Advocate, prescribing criteria and procedure for such admission or removal, and the regulation of the professional practice, conduct and discipline of advocates.⁶⁶ The setting of criteria for admission or removal from office, and the regulation of advocates, have been delegated to the FoA.⁶⁷ The Lord President retains a role in approving the FoA's professional and disciplinary rules,⁶⁸ and in appointing the chair of the Disciplinary Tribunal.⁶⁹
- 2.23 The Lord President also has a regulatory function in relation to the SLCC.⁷⁰ The SLCC must consult with the Lord President on appointing members, and on rule changes to practice and procedure.

⁶³ See [Solicitors \(Scotland\) Act 1980](#).

⁶⁴ See [Solicitors \(Scotland\) Act 1980, section 34](#).

⁶⁵ See [Solicitors \(Scotland\) Act 1980, section 3 D\(3\)b](#).

⁶⁶ See [Legal Services \(Scotland\) Act 2010, section 120](#).

⁶⁷ The Act of Sederunt (Regulation of Advocates) 2011 makes provision for the FoA to take responsibility for prescribing rules that set the criteria for admission to and removal from the office of advocate, and for the professional practice, conduct and discipline of advocates. See [Act of Sederunt \(Regulation of Advocates\) 2011](#).

⁶⁸ See [Legal Services \(Scotland\) Act 2010, section 121](#).

⁶⁹ See the [FoA Disciplinary Rules 2019](#).

⁷⁰ See [Solicitors \(Scotland\) Act 1980](#).

The Law Society of Scotland

- 2.24 The LSS is the largest regulator of legal services in Scotland, with responsibility for the regulation of solicitors, solicitor advocates, conveyancing and executry practitioners and notaries public.⁷¹ The LSS has been approved as a regulator for ABSs, but has not yet been authorised to act by the Scottish Government for this purpose, hence no ABSs have yet been established.
- 2.25 The current legislative framework for Scottish solicitors is primarily the Solicitors (Scotland) Act 1980. The 1980 Act sets out the objectives of the LSS and the remit of its Council. These are to promote the interests of the solicitors' profession in Scotland and the interests of the public in relation to that profession. The Council is the decision-making body. It has the power to delegate its functions to committees, sub-committees and the Society's executive.
- 2.26 The majority of the LSS' regulatory activities relate to the regulation of solicitors since this is the largest group of authorised professionals in Scotland. The LSS sets out standards of service and conduct that all solicitors must meet. As authorised professionals, solicitors provide reserved legal services and are also regulated with respect to any unreserved legal services they choose to conduct.
- 2.27 The regulatory function of the LSS is delegated by the Council to its Regulatory Committee.⁷² Its core purpose is to ensure these functions are exercised independently. Key elements of the Regulatory Committee's remit include ensuring:
- professional standards are set by way of making relevant and appropriate rules and guidance;
 - internal processes, policies and procedures are effective, appropriate and proportionate for making regulatory decisions to protect the public and the profession; and
 - where rules, policies, process or procedural changes are not in the authority of the Regulatory Committee, recommendations are made to the appropriate governance group in the Society, meeting of members or the Lord President.⁷³

⁷¹ The LSS has regulated conveyancing and executry practitioners since 2003. Before that, these practitioners were regulated by the Scottish Government.

⁷² The Regulatory Committee was established by the [Legal Services \(Scotland\) Act 2010](#).

⁷³ See LSS (2019), [Roberton Report: Fit for the Future: Response of the Regulatory Committee of the LSS](#), p2.

- 2.28 The rules are set by the Regulatory Committee and the administration of regulation is undertaken by officers of the LSS under an Executive Director of Regulation.

The Faculty of Advocates

- 2.29 The FoA is the regulator responsible for the regulation of advocates. The FoA carries out its regulatory responsibilities under powers delegated to it by the Court of Session under the Legal Services (Scotland) Act 2010, as described in paragraph 2.22.
- 2.30 The FoA is led by elected office-bearers and an elected Council. The FoA's Council is made up of elected practising and non-practising members. Much of the FoA's work is undertaken by member committees established for a particular purpose.⁷⁴

The Association of Commercial Attorneys

- 2.31 The ACA was established in 2009 and regulates the entry, practice and conduct of commercial attorneys.

Legal services providers

- 2.32 The choice of legal services provider available to consumers depends on their legal need. As described in paragraphs 2.6 to 2.8, for reserved legal services the choice is limited to authorised professionals. Since only a few services are reserved, the majority of legal provision falls outside of reserved areas.⁷⁵ That said, services that are of importance to consumers, such as purchasing a house or appearing in court, do involve some reserved legal services. While consumers of unreserved services have a greater choice of provider in principle, as there is no legal restriction on who may provide such services,⁷⁶ evidence suggests that consumers typically use authorised providers even for unreserved legal services.⁷⁷ For example, from a survey commissioned by Europe Economics, around 90% of consumers wanting a will used a solicitor as opposed to a non-solicitor provider.⁷⁸

⁷⁴ See FoA (2018), [Response by the FoA to Independent Review of the Regulation of Legal Services Call for Evidence](#), pp4-23.

⁷⁵ See Europe Economics (2018), [The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence](#), p22.

⁷⁶ This is the case except in a regulated sector such as immigration.

⁷⁷ See Europe Economics (2018), [The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence](#), p37.

⁷⁸ See Europe Economics (2018), [The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence](#), p39.

- 2.33 As outlined in paragraph 2.7, the main types of authorised providers are solicitors and advocates. The majority of legal services providers are solicitors, with approximately 12,200 solicitors⁷⁹ and around 800 advocates and solicitor advocates registered in Scotland.⁸⁰ This reflects the fact that advocacy services are required only in specific circumstances.⁸¹
- 2.34 Authorised providers are accessed by consumers via different channels. For advocacy services, consumers can only instruct advocates indirectly via a solicitor, or they can instruct a solicitor advocate directly. For non-advocacy services, consumers can approach a solicitor directly. They can also receive legal advice provided as part of a wider service offered through intermediaries. A common example of this would be during a house purchase, where a mortgage broker might refer a consumer to a solicitor on their panel. Moreover, consumers may be referred onwards for legal services via the not-for-profit sector.
- 2.35 The choice available to consumers can also be affected if they use legal aid. Legal aid is financial support made available by the government to consumers who are otherwise unable to afford legal services. Many solicitor firms are registered to provide legal aid, although they have discretion as to whether they will accept a legal aid case.⁸²
- 2.36 More detail on the availability and choice of providers for consumers is set out below.

Solicitors

- 2.37 Solicitors make up the vast majority of the authorised legal sector in Scotland. In 2019, there were around 1,100 solicitor firms.⁸³ ⁸⁴ This sector is characterised by many small practices, with 49% of firms being sole practitioners and a further 35% of firms having two or three partners only.⁸⁵

⁷⁹ 2020 data provided by the LSS to the CMA.

⁸⁰ There were 441 advocates and 346 solicitor advocates as of August 2017. See Europe Economics (2018), *The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence*, pp17-18.

⁸¹ Only the Court of Session, the High Court of Justiciary or the Supreme Court of the UK require an advocate and these courts only deal with a smaller number of more serious or complex cases.

⁸² The Scottish Legal Aid Board website states there are 952 Legal Aid registered solicitors. See *Scottish Legal Aid Board website*.

⁸³ Data provided by the LSS to the CMA.

⁸⁴ This represents around two-thirds of solicitors, with the remainder working in-house, for practices not regulated by the LSS, outside the UK or not working. See estimates of in-house provision cited in Europe Economics (2018), *The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence*, p19. Further, according to a 2019 report by TheCityUK, similar to England and Wales, Scotland has seen an increase in the number and proportion of solicitors working in-house, with 31% of the profession working in-house in 2019, up from 22% in 2010. See TheCityUK (2019). *Legal Excellence, Internationally Renowned: UK Legal Services 2019*, p6.

⁸⁵ CMA analysis of data at October 2019, provided by the LSS.

- 2.38 The number of law firms in Scotland has been subject to a small but steady decline in recent times, falling by around 6% between 2013 and 2019, according to the LSS' records.⁸⁶ This has mainly been driven by a reduction in the number of smaller firms, with a reduction in firms with five or fewer partners from around 1,100 to 1,000 firms and an increase from 8 to over 15 firms with more than 50 partners. The LSS told us that there has been significant merger and acquisition activity in the sector over recent years which has caused this.⁸⁷
- 2.39 Solicitors tend to operate in urban areas, as shown in the map of solicitors' locations provided in Appendix B. Nearly half (44%) of the solicitor firms are based in either Edinburgh, Glasgow or Aberdeen according to the CMA's analysis of the LSS' public records.⁸⁸ Only 78 solicitor firms (6%) are located within a rural area (using the Scottish Government's broadest definition) and another 172 firms (13%) are located in small towns across Scotland.⁸⁹ Considering the number of firms within each local area, 135 (47%) postal towns have three or fewer solicitors and 64 (22%) only have a single solicitor.⁹⁰ Some island communities have no solicitor firms: for example, the closest firm to Islay (population 3228 in 2011) appears to be Lochgilphead (57 miles and a ferry journey away). The low number of firms covering rural Scotland appears to suggest lower levels of competition with fewer options available to consumers for many rural towns or areas than in urban areas. This is similar to other services offered in remote and rural parts of Scotland.

Advocates and solicitor advocates

- 2.40 Advocates operate as sole traders. The FoA's code of conduct prevents advocates from forming companies with other advocates.⁹¹ Advocates may, however, operate alongside others within 'stables'. Each stable typically represents a group of advocates who have similar skills or experience and can help to promote its members, to assist them to find work.
- 2.41 As mentioned in paragraph 2.7, advocates and solicitor advocates have the widest rights of audience in the courts (for example, only advocates or

⁸⁶ The number of practising Scottish solicitors has, however, increased. According to the LSS, this figure has risen from 11,000 in summer 2014 to 12,200 in spring 2020.

⁸⁷ Professor Lorne Crerar's recent article in the [LSS Journal](#) also noted that the past decade has seen a significant increase in the number of English-headquartered law firms trading in Scotland, some of which have absorbed other Scottish-headquartered law firms.

⁸⁸ Based on public records from the LSS' ['Find a Solicitor'](#) website accessed by the CMA on 14 August 2019.

⁸⁹ The broadest definition of rural is any location with a population of less than 3,000. Small towns are defined as settlements of between 3,000 and 10,000 inhabitants. See Scottish Government (2016), [Scottish Government Urban Rural Classification](#), p4.

⁹⁰ The postal town is the town specified in the postal address of firms in the LSS' records.

⁹¹ This is set out under [rule 1.2.1 in the FoA's Guide to Conduct, 5th edition](#).

solicitor advocates can represent clients at the Supreme Court).⁹² A consumer cannot directly instruct an advocate: instead, they must use a solicitor to instruct an advocate on their behalf.⁹³ Advocates are also subject to a so-called 'cab rank' rule which means that they are obliged to accept any case brought to them for a reasonable fee, in the interest of ensuring equitable access to justice.⁹⁴

- 2.42 Solicitor advocates are a form of legal professional and operate as a solicitor but with the extended access rights that an advocate has. They may offer an alternative to advocates for consumers needing representation in the higher courts. This can be beneficial for consumers who wish to directly select and engage with their representative and allows informed consumers to be represented without incurring the costs of engaging both a solicitor and an advocate.⁹⁵ The presence of solicitor advocates also allows consumers to use a single firm if they require the use of an advocate, provided the firm has a solicitor advocate on staff. Solicitor advocates are also not subject to the sole-practitioner limitation on advocates as they can enter partnerships or law firms in the same way as solicitors.
- 2.43 There are currently around 450 practising advocates in Scotland.⁹⁶ While this remains comparable to 2014 levels, the most recent new pupil intake has offset a slight decline in the number of existing advocates over time according to our discussions with the FoA.
- 2.44 The lack of growth may be due in part to the rise of solicitor advocates (which now number around 350) as some solicitors who might otherwise have transitioned to be an advocate may have opted to become solicitor advocates instead. However, it also reflects a decline in the work available to advocates in the past decade. Our discussions with the FoA suggested that advocates and solicitor advocates handled around 2,000 civil litigation cases a year in 2016, down from around 20,000 litigation cases a year in the 1980s. Further, evidence from the Scottish Crime and Justice Survey (SCJS) suggests that

⁹² Commercial attorneys may conduct commercial litigation in the Sheriff Court and the Court of Session. This is set out in the [Association of Commercial Attorneys: revised scheme](#). Solicitors can represent clients in the Sheriff Courts.

⁹³ Advocates may be instructed by solicitors and other persons authorised to conduct litigation in Scotland. Under the FoA's Direct Access Rules, advocates may also accept instructions (except in relation to court proceedings) directly from members of a variety of other professional organisations and other designated bodies. See the [FoA website](#).

⁹⁴ This is set out under [rule 8.3.1 in the FoA's Guide to Conduct, 5th edition](#).

⁹⁵ The FoA argued in its [response to the Call for Evidence](#) of the Robertson Review that solicitor advocates could also act to reduce the choice available to consumers by allowing solicitors to refer clients to solicitor advocates within the same firm rather than those in the independent referral bar. However, in [its response, the Society of Solicitor Advocates](#) strongly disagreed with this view, noting, for example, that professional rules require that clients must be properly advised of the choice of representation for matters requiring rights of audience.

⁹⁶ See Europe Economics (2018), [The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence](#).

pursuant to a number of court reforms aimed at improving the efficiency, effectiveness and accessibility of the civil justice system, a significant amount of business has moved out of the Court of Session, often to sheriff courts.⁹⁷

⁹⁷ See [SCJS 2017-18](#). This notes the Court of Session saw initiated cases decreasing by 48% since 2015-16.

3. Competition in legal services: consumer characteristics and provider strategies

3.1 Effective competition is important to ensuring that consumers are well served. While consumer engagement generally makes competition work more effectively, it is imperative that providers are transparent on information such as price and quality so that consumers can engage meaningfully and make informed purchasing decisions. Information transparency is of particular importance in the legal services sector, as its complexity and other characteristics may undermine effective consumer engagement, as we discuss below.

3.2 This chapter focuses on the current state of the legal services sector in Scotland, and the characteristics that might prevent competition from functioning effectively. As noted in paragraph 1.13, this analysis has focused on the legal services provided by solicitors, as consumers choose and interact with solicitor firms directly whereas advocates in Scotland are instructed on behalf of consumers by solicitors.⁹⁸

- First, we consider the consumer experience of Scottish legal services and the challenges consumers face which may prevent them from obtaining good outcomes.
- Second, we explore providers' commercial strategies and how they respond to these consumer characteristics.
- Third, we examine evidence on the level of transparency of information and present our analysis of the level of price dispersion observed in the sector.
- Finally, we consider what the evidence tells us about how competition is working in the legal services sector in Scotland.

Consumer experience

3.3 This section focuses on the experiences of consumers in purchasing legal services.⁹⁹ As discussed below, the legal services sector is characterised by information asymmetry between providers and consumers. Consumers tend to have limited knowledge and awareness of legal services and legal services

⁹⁸ For advocacy services, the expertise and experience of the instructing solicitor alleviates many of the challenges consumers face in engaging with the sector as outlined in this chapter. However, the requirement to use an instructing solicitor also leads to some disadvantages which are discussed further in Chapter 4.

⁹⁹ While our report focuses on consumer issues, we expect that many of these will apply equally to small businesses, particularly those 'micro' businesses with fewer than 10 employees, as they tend to have similar characteristics as individual consumers.

providers. Moreover, consumers only use legal services infrequently, and when they do so they are often in a vulnerable position. The challenges consumers face can be exacerbated if providers do not provide adequate information to allow consumers to make a genuine choice, imposing barriers to consumer engagement that may prevent them from obtaining good outcomes, and potentially resulting in consumers not seeking legal services when they have a legal need.

Consumer barriers

Limited knowledge and awareness of legal services and legal service providers

- 3.4 The legal services sector is complex. Legal services providers require expert knowledge and skills and consumers of legal services typically are unable to judge quality before, and potentially after, they choose to buy legal services. This creates an information asymmetry between providers and consumers. This may reduce consumers' understanding and awareness of the legal services they obtain, as well as what options they have in choosing legal services providers. For example, research by the LSS notes that consumers do not understand the differences between regulated and unregulated providers, or between the terms 'lawyer' and 'solicitor'.¹⁰⁰ Consumers may also be unaware that the UK comprises three legal jurisdictions.¹⁰¹
- 3.5 The complexity of legal terminology – 'legalese' – and dialogue and process may undermine the ability of consumers to engage with providers effectively. For example, the Robertson Review noted that consumers find legal advice to be jargonistic and difficult to understand, which creates a power imbalance in the solicitor-client relationship.¹⁰² This is further supported by SLCC data, which shows that the most common consumer complaints (26%) were about 'Failure [of solicitors] to communicate effectively'.¹⁰³
- 3.6 Furthermore, information on price or quality about providers is typically hard to access and difficult to interpret. Evidence from our discussions with a stakeholder highlighted that information on price was often provided to consumers as part of a long and complex letter of engagement. Similarly, the user research commissioned by the Robertson Review noted that consumers

¹⁰⁰ See LSS (2018), [The case for change: revisited](#), p29.

¹⁰¹ This was raised as an issue in the Scottish stakeholder meetings held in the course of the CMA's Legal Services Market Study, with stakeholders noting the difficulty in ensuring that when consumers were researching legal services they were provided with information on the relevant legal system. See CMA (2016), [Legal Services Market Study](#), p263, paragraphs 7.167-7.168.

¹⁰² See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p24; and Dhruv Sharma, Marianne O'Loughlin (2018), [Independent review of the regulation of legal services: user research report](#), p6.

¹⁰³ See [SLCC Annual Report 2017-18](#), p21.

may have ‘unrealistic expectations and a lack of clarity around fees’ when they use solicitors.¹⁰⁴ We consider information transparency in further detail from paragraph 3.29 below.

Infrequency of purchase

- 3.7 Most consumers are only occasional users of legal services. The Europe Economics Report cited evidence indicating that a third of Scottish adults surveyed had used a legal service in the previous three years.¹⁰⁵ Similarly, a 2010 Scottish Government review of four surveys on legal services consumers showed only around 25% of respondents experienced a legal issue over the five years covered.¹⁰⁶ While there is some variance between their reported prevalence, they both show general infrequent legal need. The infrequency of purchase means consumers have reduced opportunities to learn from past experiences of engaging with the sector. This is likely to make it harder for them to understand legal issues or compare providers meaningfully.

Vulnerability of consumers when purchasing legal services

- 3.8 Legal services are often ‘distress purchases’ involving a high emotional burden on consumers. For example, consumers may engage with a solicitor to manage the administration of an estate following a bereavement, or to obtain a divorce. The urgency they may face in handling these situations often means they have to source legal advice quickly. The Robertson Review’s consumer research found that people felt under pressure to resolve their legal issue at multiple stages of the legal process.¹⁰⁷ This, together with limited past experience and a lack of meaningful and easy to understand information on price and quality of solicitors, mean that consumers are often not able to compare between solicitors effectively, even if they are capable of making sophisticated choices in other circumstances.

Conclusion on consumer barriers

- 3.9 In summary, there are significant barriers for consumers in choosing legal services providers, shopping around for better services, and gauging the value of the service they are receiving. This is due to the complexity of the

¹⁰⁴ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p24.

¹⁰⁵ See Europe Economics (2018), [The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence](#), p6.

¹⁰⁶ [The Experience of Civil Law problems in Scotland 1997-2004](#) (2010), collated evidence from a mix of national surveys, Civil disputes in Scotland (1996/7) and Paths to justice (1998), and local surveys, Microcosm study (2001) and Assessing need for legal advice in Scotland (2004).

¹⁰⁷ See Dhruv Sharma, Marianne O’Loughlin (2018), [Independent Review of the regulation of Legal Services: User Research report](#), p6.

legal sector which, coupled with the limited past experience that consumers tend to have, worsens the asymmetry of information between providers and consumers. Consumers particularly face challenges as these purchases are often made by consumers in a vulnerable position. Our concern is that these inherent challenges are exacerbated by the lack of information given to consumers by legal service providers, and ultimately this leads to weak competition and poor outcomes for consumers.

Consumer outcomes: Unmet need for legal services and low engagement

3.10 The barriers to consumer engagement set out above may result in consumers not seeking legal services when they have a legal need, either because they choose not to seek legal advice or because it may not be apparent to them that an issue they face could benefit from the advice of a legal services provider. This is illustrated by the following evidence regarding Scottish consumers:

- The Scottish Government's review of survey evidence¹⁰⁸ suggests that between 21% and 31% of individual consumers with a civil law problem tried to fix the problem themselves, and between 3% and 9% did nothing about their problems.
- The 2017/18 SCJS shows that 11% of consumers had given up trying to solve their problem and a further 11% were not planning to do anything to resolve their problem.¹⁰⁹

3.11 The Scottish Government's review of survey evidence indicates that cost and inconvenience as well as time and stress are factors in people's decisions not to seek legal advice. Low income or lack of employment increases the risk of inaction. Many consumers also reported awareness of local solicitors but did not want to put the effort into addressing their situation.¹¹⁰

3.12 Legal aid allows for a mitigation of financial difficulties in certain, but not all, circumstances.¹¹¹ In 2018/19, 94% of civil case applications were granted at least partial aid.¹¹²

¹⁰⁸ See Scottish Government (2010), [The Experience of Civil Law problems in Scotland 1997-2004](#).

¹⁰⁹ See [SCJS 2017-18](#). This is similar to evidence from England and Wales, which showed 40% of people handling their own issues with 16% doing nothing and a further 15% using informal help.

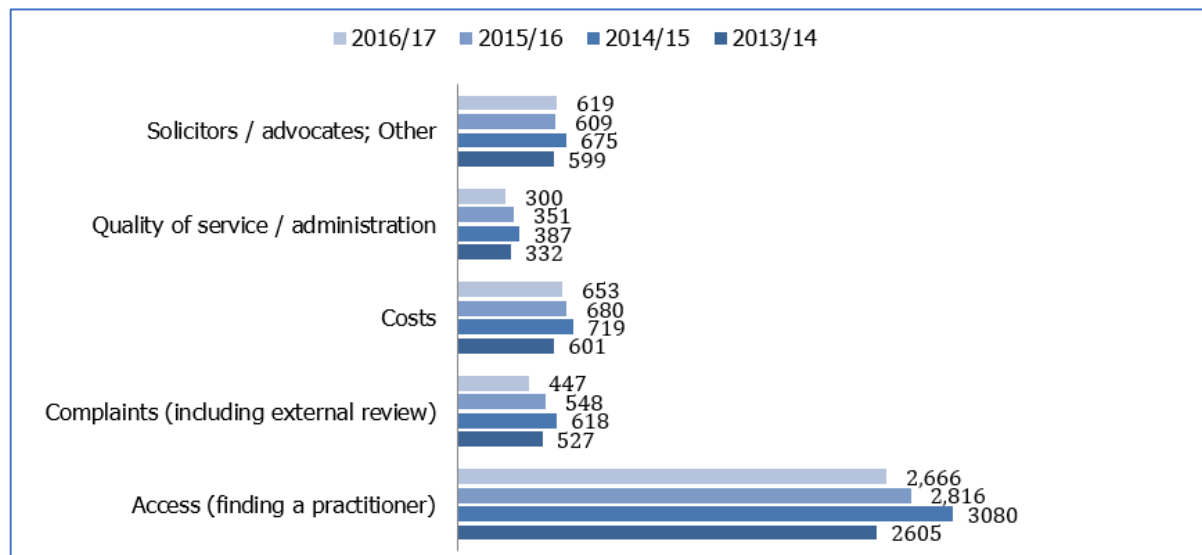
¹¹⁰ See Scottish Government (2010), [The Experience of Civil Law problems in Scotland 1997-2004](#), pp34-35.

¹¹¹ Legal aid will cover advice, assistance and a representation for individuals who are unable to afford to pay for legal costs themselves. Applications are considered on applicants' financial situation, if there is legal basis for the case, the likelihood to succeed and cost of the case as well as other sources of help available.

¹¹² See Scottish legal aid board (2019), [Scottish legal aid board annual report 2018 2019 Appendix 1 key statistics](#), pp2-3.

3.13 Many consumers do wish to access a solicitor but find it difficult to find a provider. Citizens Advice Scotland (CAS) found that the majority of the issues regarding solicitors or advocates for which it was approached were about finding a provider, as shown in Figure 3.1.¹¹³

Figure 3.1 All solicitor/advocate issues raised with citizens advice bureaux in Scotland.



Source: Citizens Advice Scotland (2018), [Independent review of the regulation of legal services: Call for evidence](#).

3.14 Research by Which? further illustrates that consumers' engagement with the sector is low: only 18% of the Scottish consumers it surveyed had shopped around when using legal services.¹¹⁴ This is slightly lower than the 22% of consumers in England and Wales who shopped around in the CMA's survey undertaken for the Legal Services Market Study.¹¹⁵

3.15 Even when consumers engage with a provider, they may find the experience unsatisfactory. The lack of knowledge and experience makes it harder for consumers to know if they are receiving services that meet their needs and expectations. For example, the SLCC has received consumer complaints against solicitors regarding their 'Failure to advise adequately' (27% of all complaints), 'Failure to act in the best interests of [the consumer]' (16%) and 'Failure to follow instructions' (6%).¹¹⁶ More generally, the number of

¹¹³ See [CAS response to the independent review of the regulation of legal services call for evidence](#), Figure 1. This figure outlines the types of advice that their clients were seeking relating to solicitors/advocates. Note that multiple issues may be raised for a solicitor.

¹¹⁴ See [Which? submission to the Robertson Review](#), annex 2, summarising contact with its supporters in Scotland in March 2018 to ask for their experiences of the Scottish legal system. Of 522 respondents to the question 'Did you compare providers and shop around?', 404 answered 'No'.

¹¹⁵ See CMA (2016), [Legal Services Market Study](#), p73.

¹¹⁶ See [SLCC Annual Report 2017-18](#), p22.

complaints has been rising.¹¹⁷ For example, the SLCC received 1,009 complaints in 2014/15, rising to 1,326 complaints in 2018/19.¹¹⁸

- 3.16 The challenges that consumers face in engaging with the sector mean that providers have limited incentives to compete vigorously for their custom, including by being transparent about their service offering. How providers respond in the face of this, and the implications for competition, are discussed in the next sections.

Overview of providers' commercial strategies

- 3.17 The evidence in the previous section showed that consumers are particularly vulnerable due to the complexity of legal services coupled with a lack of knowledge and experience in the legal services sector. This section focuses on how legal services providers operate. We have gathered information on a range of indicators to understand:

- how solicitors attract clients; and
- how solicitors set prices.

- 3.18 To support our assessment, the CMA commissioned a survey of Scottish solicitor firms to understand their commercial strategies.¹¹⁹ The survey focused on the three areas of legal services most commonly used by Scottish consumers: housing, property and neighbours (ie conveyancing for the purposes of the survey); wills (including estate administration); and family.¹²⁰ The survey contacted all 882 solicitor firms in Scotland practising in at least one of those three areas. We received responses from 160 firms.¹²¹ Details of the survey responses, together with a technical annex detailing the questions and methodology, are published alongside this report.¹²²

- 3.19 In addition, the CMA undertook a limited review of solicitors' websites to provide additional evidence based on publicly available information.

¹¹⁷ See Robertson, E (2018), *Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland*, p30.

¹¹⁸ See the corresponding SLCC annual reports available from the [SLCC website](#).

¹¹⁹ The survey focuses on solicitors because, as set out in paragraph 2.41, advocates are typically instructed through solicitors, so their services are not directly purchased by consumers.

¹²⁰ See Europe Economics (2018), *The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence*, p36.

¹²¹ This represents a response rate of 18.1%, which is favourable by comparison to similar surveys.

¹²² See the [CMA website](#).

How solicitors attract clients

3.20 Our solicitor survey indicates that ‘reputation’ and ‘word of mouth’ are the main ways through which Scottish solicitors attract their clients.¹²³

- A significant proportion of solicitor firms (49% of the firms surveyed) see word of mouth as the most important way of attracting new business.¹²⁴
- A significant proportion of solicitor firms (50%) also see their reputation or the reputation of individual solicitors within the firm as the most important factor in winning business.¹²⁵
- A smaller proportion of firms (35%) see repeat business as a way they typically attract business.¹²⁶ This is likely due to the infrequency of demand for legal services, implying that repeat business is not a major element of new work for a firm.

3.21 The geographic location of a solicitor firm is another important attribute of customer choice. Our solicitor survey shows that most customers use local solicitor firms: 94% of firms say at least half of their customers live within 20 miles of the firm.¹²⁷ In rural areas of Scotland, there are fewer local legal providers, as can be seen in Appendix B.¹²⁸ Our analysis shows that there are 47 solicitor offices in remote and very remote rural areas. These areas account for 6% of Scotland’s population so there are approximately 15 solicitor offices per 100,000 population. Furthermore, in accessible rural areas there are only 31 solicitor offices.¹²⁹ These areas account for 11% of Scotland’s population so there are approximately 5 solicitor offices per 100,000 population, although these areas are within 30 minutes of urban areas. This is compared with the rest of Scotland which has 1,216 solicitor

¹²³ This is also consistent with previous research in the [Legal Services Market Study](#), which found that consumers consequently tend to rely on word of mouth to find solicitors, such as recommendations of friends, family and colleagues, and may be less willing to switch away from providers they have previously used or to search beyond the first provider who diagnoses their needs.

¹²⁴ Question D2 of our survey asked, ‘What are the ways that your firm typically attracts customers?’ Question D2a asked, ‘How would you rank those elements [as given in question D2] in terms of their significance in attracting customers?’

¹²⁵ Question D1 of our survey asked, ‘Which elements do you believe are important for winning clients?’ Question D1a asked, ‘How would you rank those elements [as given in question D1] in terms of their significance to winning clients?’

¹²⁶ Question D1 of our survey asked, ‘Which elements do you believe are important for winning clients?’ Question D1a asked, ‘How would you rank those elements [as given in question D1] in terms of their significance to winning clients?’

¹²⁷ Question B2 of our survey asked, ‘Thinking about your firm’s typical customers, approximately what proportion come from the local area compared to outside of the local area? (The ‘local area’ is defined as within a 20-mile radius of your location(s) so think about what is generally the case for your whole firm at all locations).’

¹²⁸ This is based on CMA analysis of solicitor office locations identified from the LSS’ public records available through the ‘[Find a Solicitor](#)’ service on the LSS website. The CMA matched these locations to the [Scottish Government’s Urban Rural Classification](#). See Appendix B for more details.

¹²⁹ Accessible rural areas have a population of less than 3,000 but are within a 30-minute drive of a population centre with a population of 10,000 or more.

offices, or 27 per 100,000 population.¹³⁰ These figures give only an impression of the comparable lack of availability of services in rural areas, and may mask particular ‘not-spots’ where no or limited choice of providers is available. We conclude that rural consumers are likely to find it harder to contact multiple solicitors and so are more restricted in shopping around.

- 3.22 We note that the criteria that solicitors consider important in attracting customers do not always coincide with consumer preferences. While the Robertson Review highlights ‘cost’ as one of the most important factors shaping consumer choice,¹³¹ it is consistently seen by solicitors as a less significant element in winning business.¹³² Our solicitor survey shows that only 4% of solicitors identified price as the most important factor in winning business, and only 16% identified it as the second most important factor.¹³³ The opposing views between consumers and providers illustrate the need for greater price transparency in the sector to facilitate consumer choice as discussed further in paragraphs 3.29 to 3.37. Enabling consumers to make more informed and effective choices would, in turn, incentivise and facilitate increased competition on price.

How providers set prices

- 3.23 In certain cases, legal services providers face uncertainties which may limit the scope for setting an upfront price for certain types of legal services. For example, the duration and the complexity of work may vary across different legal services and between cases.
- 3.24 Solicitors use different pricing methods to reflect such uncertainties. For relatively routine services such as the purchase of a house, a solicitor often charges a fixed fee. For services requiring variable levels of work, solicitors typically use an hourly fee structure where the final charge reflects the number of hours that the solicitor works.
- 3.25 The most common types of fees for legal services, as shown in our survey, are hourly rates and fixed fees. Our survey asked solicitors how they would price legal services for six scenarios, with two scenarios for each of the three

¹³⁰ See Scottish Government (2018), *Rural Scotland: key facts 2018*.

¹³¹ See Robertson, E (2018), *Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland*, p25.

¹³² Question D1 of our survey asked, ‘Which elements do you believe are important for winning clients?’ Question D1a asked, ‘How would you rank those elements [as given in question D1] in terms of their significance to winning clients?’

¹³³ Question D1a of our survey asked, ‘How would you rank those elements [as given in question D1] in terms of their significance to winning clients, with 1 being the most significant? Please rank your top 3 only.’ Where question D1 of our survey asked, ‘Which elements do you believe are important for winning clients?’

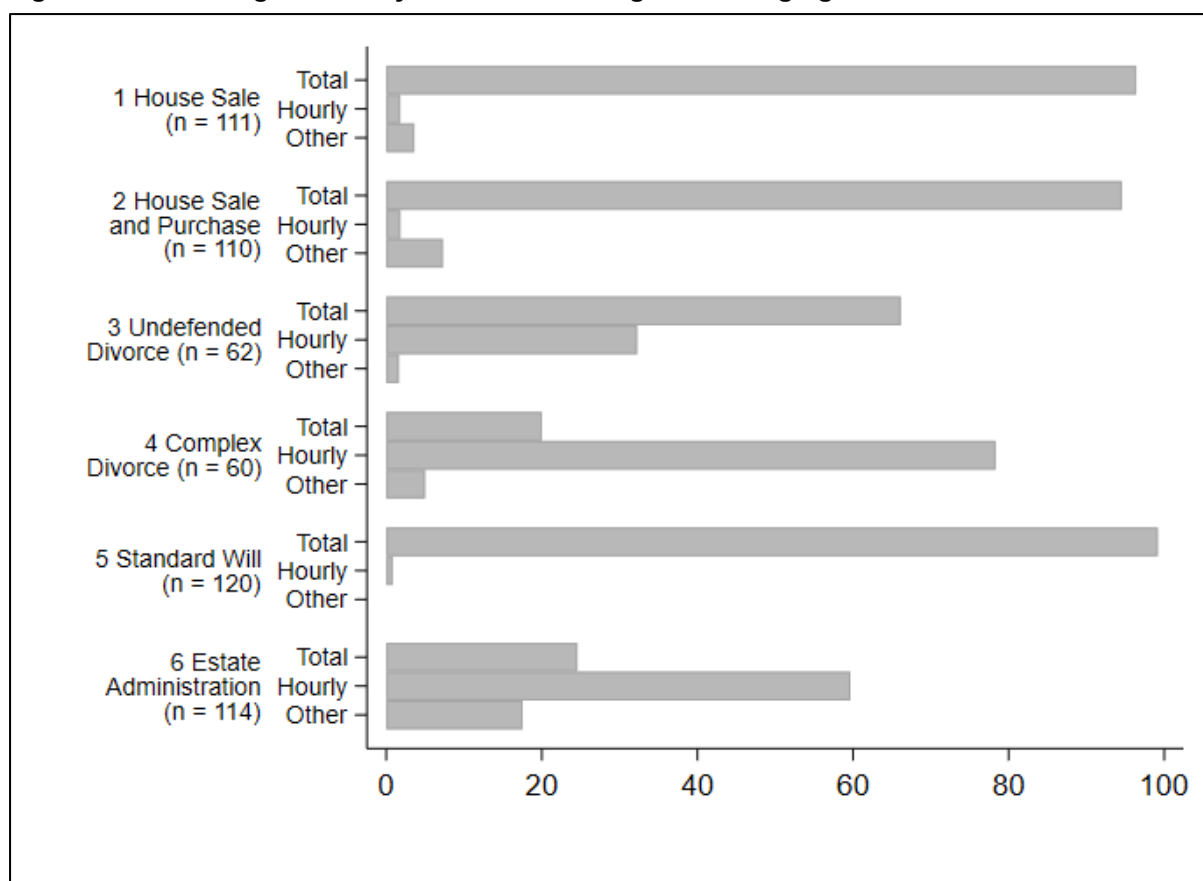
areas of law (conveyancing, family and wills (including estate administration)) that the survey focused on:

- The conveyancing scenarios related to:
 - the sale of a house; and
 - the sale and purchase of a house.
- The family law scenarios related to:
 - an undefended divorce requiring a full legal service; and
 - a more complex divorce involving disagreement over assets and requiring mediation and advisory services.
- The wills/estate administration scenarios related to:
 - the provision of a standard will; and
 - the provision of estate administration services.

3.26 The responses, shown in Figure 3.2, indicate that conveyancing and standard wills in particular are typically charged on a total cost basis (either a fixed fee or an estimate of final cost), while complex divorces or estate administration are mostly charged on an hourly fee basis.¹³⁴ Other pricing structures such as bespoke prices, or a fixed percentage of the sale or estate value, are much less common with only few solicitors indicating they typically use them.

¹³⁴ The results of the survey are also reflective of the results in England and Wales where fixed fees were also common for wills and conveyancing. See CMA (2016), [Legal Services Market Study](#), p64.

Figure 3.2 Percentage of surveyed solicitors using each charging method.



Source: CMA Scottish solicitor survey.

Percentages might not sum to 100 as respondents could choose more than one option.

'Total' refers to the answers 'Estimated Costs' and 'Fixed costs'.

'Other' refers to the answers 'Fixed percentages', 'Outlay', 'Independent assessment', and 'Other'.

3.27 Conveyancing firms which also operate an estate agency may charge consumers a bundled fee for both services. In response to our conveyancing scenarios, around 45% of firms with an estate agency stated they usually included estate agency fees within their quote. An additional 27% said that they sometimes included estate agency fees within their quote.

3.28 Consumers in Scotland prefer consistent pricing models with the final price presented upfront.¹³⁵ However, the different pricing structures that firms provide make it more difficult for consumers to understand legal services. Hourly fees in particular add uncertainty for consumers when they are shopping around as it makes the final price difficult to judge and comparing providers more difficult. The bundling of conveyancing with estate agency fees may also serve to complicate a simple comparison of fees between providers.

¹³⁵ See Robertson, E (2018), *Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland*, p25.

Level of information transparency and price dispersion

3.29 This section sets out our analysis of the solicitor survey in respect of:

- the degree of transparency in information about price;
- the degree of price dispersion across solicitors for similar services provided; and
- the degree of transparency in information about quality.

Degree of transparency in information about price

3.30 We find that there is generally limited transparency in price information provided by solicitors in Scotland.

3.31 First, only a minority of Scottish solicitor firms display prices of services.¹³⁶ Of the 160 solicitor firms who responded to the CMA's survey, only 6% said they currently advertise prices on their website and a further 4% said they intended to do so in the future.¹³⁷ 72% of firms said they had no plans to advertise prices on their website and 18% said that they had no website.¹³⁸ Further, only 16% of all solicitor firms responded that they had used any other method to advertise price, such as print and television methods of advertising.¹³⁹

3.32 Second, it is apparent that price is not seen as an important parameter of competition by solicitor firms in Scotland. Only 3% of solicitor firms mentioned price transparency when asked what is important for winning clients.¹⁴⁰ Moreover, only 22% of solicitor firms mentioned that price level was important for winning business, which is not in line with consumer preference as noted in paragraph 3.21.¹⁴¹

3.33 Consistent with the CMA's findings above about a lack of price transparency in the sector, some stakeholders also noted similar concerns. For example, the SLCC considered that transparency is important to consumers, not only in respect of the costs to be charged by the solicitor but also the total costs the consumer will bear, which includes outlays such as search fees. It noted that many of the complaints it receives relate to 'hidden fees' (such as court fees and registration fees) that are applied on top of solicitors' fees and should be

¹³⁶ Responses to our survey included displaying prices on their website, in newspapers, on television or the radio, in their own firm brochures, in their office or directly to a consumer.

¹³⁷ Question C1 of our survey asked, 'Does your firm display their prices on their website?'

¹³⁸ Question C1 of our survey asked, 'Does your firm display their prices on their website?'

¹³⁹ Question C2 of our survey asked, 'Does your firm display prices to prospective clients in any other way prior to enquiry?'

¹⁴⁰ Question D1 of our survey asked, 'Which elements do you believe are important for winning clients?'

¹⁴¹ Question D1 of our survey asked, 'Which elements do you believe are important for winning clients?'

made clear to consumers. It also highlighted particular issues with the transparency of conveyancing fees, which are often combined with estate agency fees (as noted in paragraph 3.27 above), making it more difficult for consumers to compare the legal and estate agency components of the cost across providers on a like-for-like basis.

3.34 In addition to the solicitor survey, the CMA undertook a review of the information published by solicitors online for potential clients. This review looked at 60 solicitor firms split evenly across conveyancing and employment law as well as available price comparison websites (known as digital comparison tools or DCTs) and online directories.¹⁴² This review generally corroborates our survey findings. We found that:

- some solicitor firms (12 of 60 reviewed, ie 20%) did not have a webpage or had a basic web presence with no information on it, and very few solicitor firms (four of 60 reviewed, ie 6%) published price information of any type;
- there are only a limited number of DCTs operating for Scottish legal providers. We reviewed four DCTs and found limited options of solicitors listed on these sites, with the same solicitors quoted for different locations; and
- other online resources include the online directory of solicitors operated by the LSS ('Find a Solicitor')¹⁴³ which only provides a directory of solicitor firms and their areas of practice.

3.35 The lack of information available online, together with the limited meaningful uptake on DCTs by firms, means that consumers have limited readily accessible information to compare prices. To do so they must instead contact and discuss their case with each solicitor directly, which increases search costs. This appears to confirm further the finding from our solicitor survey that firms do not consider price to be an important parameter of competition, as set out in paragraph 3.32 above.

3.36 For consumers to shop around effectively, it is important that they have access to information about the prices of multiple providers, based on which they can choose a specific solicitor. We note that the LSS has required, since 2005, that all solicitors provide a letter of engagement prior to being instructed which includes an estimate of price.¹⁴⁴ The rules that impose this requirement

¹⁴² Solicitors were selected at random from the LSS' database of firms and law practiced. Where duplicate firms were selected a new firm was drawn. The final review encompasses 4% of conveyancing law solicitor firms and 8% of employment law solicitor firms. The review recorded any information on the website of pricing and quality information.

¹⁴³ See LSS, '[Find a Solicitor](#)'.

¹⁴⁴ See [LSS Rules and Guidance](#).

specify that either a total cost or the basis on which the fee is to be charged must be provided to the client.¹⁴⁵ However, during stakeholder engagement, concern was raised that such letters were not assisting consumers in shopping around and comparing prices of multiple providers before engagement, as the letter is issued only after the solicitor has been instructed.¹⁴⁶

- 3.37 From the evidence above, we can see that providers do not typically make price information available to consumers in an accessible manner. The limited information made available by providers exacerbates the complexity of legal services and poses a significant barrier for consumers to shop around, especially in light of their limited experience and knowledge of the legal sector.

Degree of price dispersion across solicitors

- 3.38 The lack of available price information and the impact that has on consumers' ability to shop around is likely to reduce the incentives for firms to keep prices low to attract customers, and therefore lowers the competitive pressure faced by firms. The focus of our survey was to gather evidence to assess whether the dispersion in price levels charged by different solicitors indicated a lack of competition in the sector. Our survey followed closely the methodology of a similar survey carried out by the Legal Services Board (LSB) for England and Wales,¹⁴⁷ adapted to fit the Scottish legal sector where appropriate.¹⁴⁸
- 3.39 The survey asked solicitors to quote prices for six scenarios as described in paragraph 3.25, with two scenarios in each of conveyancing, family, and wills (including estate administration), which are the most demanded services by Scottish consumers.¹⁴⁹ All respondents were asked to quote against the same scenarios; control for service differentiation was ensured to a large extent by using tightly specified descriptions.¹⁵⁰ The scenarios were also designed to illustrate differences in the complexity of the services.

¹⁴⁵ Including any VAT and outlays that may be incurred. See [LSS Rules and Guidance, Rule 4.2 \(b\)](#).

¹⁴⁶ Based on CMA discussions with the SLCC and with another stakeholder.

¹⁴⁷ See LSB (2017), [Prices of Individual Consumer Legal Services 2017](#).

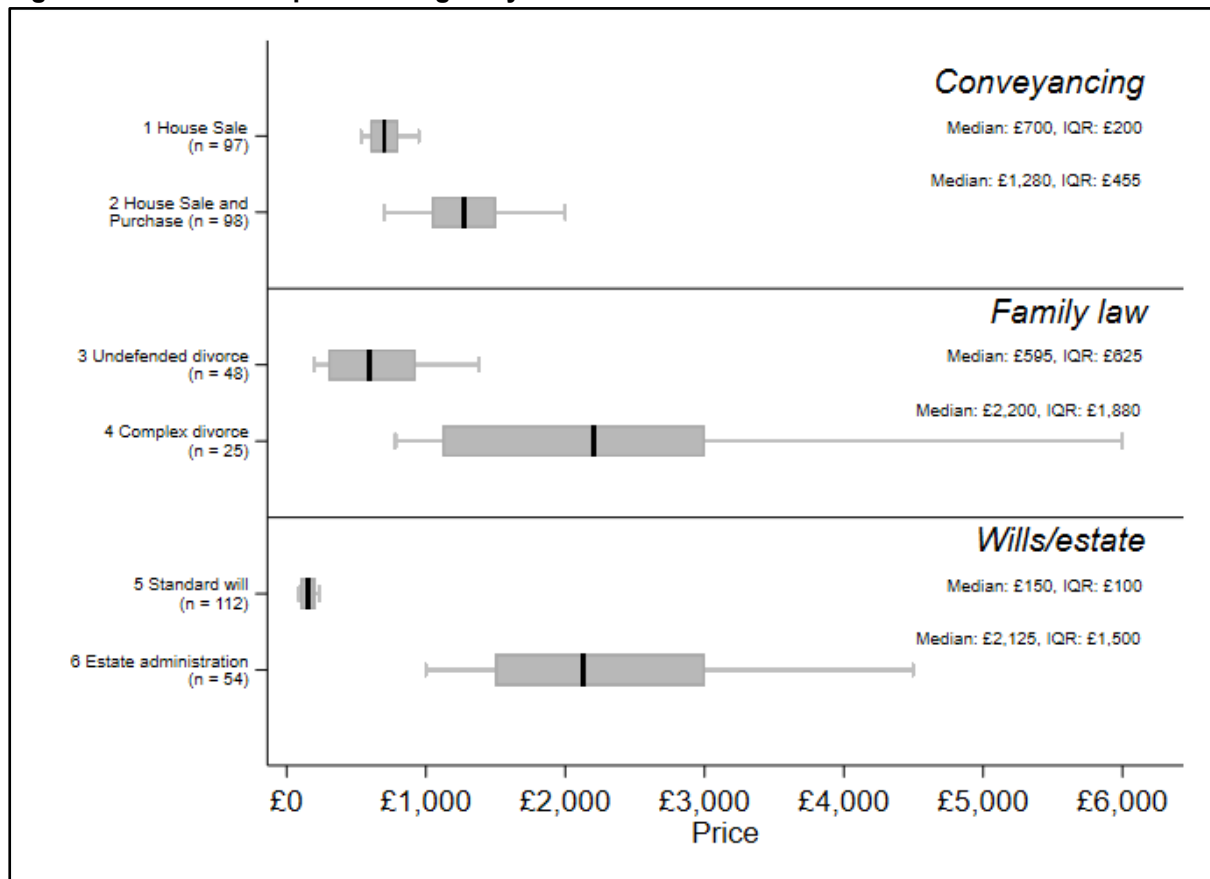
¹⁴⁸ See the survey technical annex published on the [CMA website](#) for details of the survey approach and questions (sections G-J).

¹⁴⁹ See Europe Economics (2018), [The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence](#), p36.

¹⁵⁰ To ensure that the scenarios were representative of typical legal work in these areas in Scotland, the CMA provided the scenarios to some regulatory bodies for review.

3.40 Our analysis is summarised in Figure 3.3.¹⁵¹ Looking at the inter-quartile range (IQR), ie the difference between the upper and lower quartiles, gives an idea of the range in price that a consumer might typically encounter.

Figure 3.3 Variation in prices charged by different solicitors in Scotland for the same service



Source: CMA Scottish solicitor survey

Prices calculated from the fixed rate, or from the hourly rate multiplied by the solicitor's estimate of hours required for each given scenario.

3.41 Looking first at the overall IQR in Figure 3.3 we see that:

- simpler scenarios tend to have a smaller price dispersion, although it is still substantial. For example, the price of the 'standard will' scenario may vary by £100 from around £100 to £200 (see the fifth bar). The price for the 'house sale' scenario may vary by around £200 from around £600 to £800 (see the first bar); and
- the more complex scenarios have a much wider dispersion. For example, the price for the 'complex divorce' scenario may vary by around £1,880 from around £1,120 to £3,000 (see the fourth bar). The price for the 'estate

¹⁵¹ This figure shows the median price (the central dark line), the 75th percentile price (right line of the box), the 25th percentile price (left line of the box), the 90th percentile price (outside line on the right), and the 10th percentile price (outside line on the left). Each scenario is represented by a box plot which follows this structure. We refer to the 75th percentile as the 'upper quartile' and the 25th percentile as the 'lower quartile'.

administration' scenario may vary by around £1,500 from around £1,500 to £3,000 (see the sixth bar).

- 3.42 We next look at what a consumer might typically be able to save were they to compare between providers. The difference between the median price and the lower quartile provides a sense of the potential savings.¹⁵² For example, a consumer might save 14% or £100 in the 'house sale' scenario and 33% or £50 in the 'standard will' scenario by shopping around to identify a low-cost option. Consumers shopping around for more complex scenarios could save even more. For example, a consumer might save 49% or £1,080 by shopping around in the 'complex divorce' scenario and 29% or £625 in the 'estate administration' scenario.
- 3.43 We recognise that price dispersion for complex services is in part driven by uncertainty about the number of hours a piece of work might require. For example, the estimated amount of work required for the 'complex divorce' scenario ranges between 10 and 12 hours, while the corresponding estimate for the 'estate administration' scenario ranges between 8 and 15 hours. The higher uncertainty and lack of information on hours makes it harder for consumers to shop around and find more efficient firms. This explains why, for more complex services, it is particularly important that the price is accompanied by a clear description of what is included in the service to be provided for that price and the basis on which the final price will be calculated.
- 3.44 There is also likely to be variation in price that arises from differences between cases such as added complexity or where consumers request certain services. This is controlled for in our survey through our defined scenarios, but can add to variation in costs when a consumer is searching for services.
- 3.45 In principle, the quality of service offered by providers might also provide another explanation for the variation in price for different providers. However, as discussed in the next section there is limited information on quality available to consumers that would allow them to make this distinction. The variation in prices that can be observed in our survey is very large and we consider this is unlikely to be explained solely by quality.
- 3.46 In summary, while uncertainties around the time required to provide a service or differences in quality may explain some of the price dispersion observed, the considerable extent of the dispersion suggests that there are other factors also in play. This is consistent with a wider lack of competition in the sector,

¹⁵² The lower quartile price is an illustration of a lower price that a consumer might find when shopping around. This is the same approach the CMA used in the Legal Services Market Study. See CMA (2016), [Legal Services Market Study](#), p89.

as would be expected due to the characteristics we have observed that impede consumer engagement and encourage a lack of transparency.

- 3.47 We find that the degree of price dispersion across solicitors in Scotland is broadly comparable to that observed in England and Wales from the CMA's Legal Services Market Study.^{153 154} As shown in Table 3.1, the largest differences are in the price range of the 'undefended divorce' scenario and the 'estate administration' scenario.

Table 3.1 Comparison of median price and IQR between Scotland, and England and Wales.

| Scenario | Median price – Scotland (£) | Median price – England and Wales (£) | IQR – Scotland (£) | IQR – England and Wales (£) |
|---------------------------------|-----------------------------|--------------------------------------|--------------------|-----------------------------|
| Conveyancing– Sale | 700 | 603 | 200 (29%) | 200 (33%) |
| Conveyancing– Sale and purchase | 1,280 | 1,250 | 455 (36%) | 500 (40%) |
| Undefended divorce | 595 | 600 | 625 (105%) | 300 (50%) |
| Complex divorce | 2,200 | 2,000 | 1,880 (85%) | 1,750 (88%) |
| Standard Will | 150 | 150 | 100 (66%) | 100 (66%) |
| Estate administration | 2,125 | 1,500 | 1,500 (71%) | 1,600 (105%) |

Source: CMA survey of Scottish solicitor firms. CMA (2016), [Legal Services Market Study final report](#).

- 3.48 We consider that the similarity in price dispersion across most scenarios shows comparability between the situation in Scotland and England and Wales. Generally, the median prices for Scotland are also comparable to those found for similar scenarios in England and Wales. However, we have placed less weight on comparison of these price levels, given differences in the legal systems in Scotland compared with England and Wales.
- 3.49 In conclusion, the large dispersion of prices for the commonly used Scottish legal services we examined support the view that there is a lack of price competition in the sector. This in part reflects the lack of accessible price information available to consumers, and the fact that providers do not have an incentive to depart from the status quo where they enjoy a degree of information asymmetry over consumers. We consider that regulatory intervention is required to address this asymmetry. While we recognise that information transparency alone does not remove all barriers for consumers to

¹⁵³ The CMA and LSB will be working to provide an update to the survey on legal service costs in England and Wales which will be published in the first half of 2020. This will allow for evidence on the impact of the reforms in England and Wales on price.

¹⁵⁴ There are some differences between the scenarios to account for differences between Scottish and English law as well as differences in typical cases. However, the scenarios are broadly comparable between the two surveys.

engage given the inherent complexity of the legal sector, it is an important starting point for increasing the competitive pressure on providers.

Transparency of information about quality

- 3.50 Other than price, quality is an important attribute for consumers when they choose legal services providers. This refers to both the quality of service and quality of advice. Quality of service relates to the experience that clients receive from their provider such as responsiveness; having convenient office hours; communicating with clients in layman's terms; and offering alternatives to face-to-face meetings, for example communicating via email. Quality of advice refers specifically to the technical quality of the legal advice. It is often difficult for consumers to judge the quality of advice and they may link the quality of the advice with the outcome of their case.
- 3.51 The importance of quality of service for Scottish consumers is reflected in SLCC data. For example, 60% of complaints have a service element.¹⁵⁵ In particular, complaints such as 'Failure to communicate effectively', 'Delay' and 'Appointments not kept', form around 40% of service complaints.
- 3.52 We find that limited information on quality is available to consumers to assist in their choice of legal services providers in Scotland. Our solicitor survey shows that while 82% of Scottish solicitor firms have a website, of these:¹⁵⁶
- only 16% include third-party business listings such as Google or Facebook on their site which allow for ratings and reviews to be added by consumers;
 - only 34% publish reviews of previous clients on their sites; and
 - while most solicitors (61% of firms) display some form of accreditation, it is often not clear to consumers what these mean for the quality of advice.
- 3.53 Our web sweep also supported this finding: only nine of the 60 solicitor firms we looked at displayed clients' testimonials. In any event, we note that these reviews may be selected by the solicitors and so may not provide independent information to consumers.
- 3.54 Other online information on quality is available to consumers, for example, listing services with ratings and reviews such as solicitor.info, although low

¹⁵⁵ See [SLCC Annual Report 2017-18](#), p26.

¹⁵⁶ Responses in this paragraph are based on Question C3 of our survey. This asked, 'What information do you provide or publish on your website relating to the quality of your service?'

usage by consumers means that they have limited information on quality of service.

- 3.55 Further, the limited information made available tends to refer mainly to quality of service. This may reflect the fact that, as noted above, it is difficult for the quality of a provider's advice to be adequately judged and communicated to consumers. Other indicators such as accreditations indicate a minimum standard but may only be relevant for a particular type of legal service and the minimum standard may not be communicated clearly which means that consumers are often unaware of them. There are currently no public measures in Scotland that provide a robust indicator of quality of advice.
- 3.56 Currently there are some forms of routine peer review in the sector aimed at ensuring a minimum level of quality of legal advice. For example, solicitors who are registered with the Legal Aid Board must have a selection of their cases reviewed by independent reviewers to maintain their status on the register and thus to undertake legal aid work. However, as is typical for such reviews within the sector, the Scottish Legal Aid Board does not publicise its findings, which means consumers cannot use this information as a basis to choose a provider.
- 3.57 In the absence of accessible information about quality of providers and limited knowledge about the legal services sector generally (as discussed in paragraphs 3.4 to 3.6), personal recommendations from others appear to be the main source of information about quality used by consumers. Our solicitor survey shows that 48% of Scottish solicitor firms consider the reputation of the firm as the most significant element for winning clients.¹⁵⁷ ¹⁵⁸ As these experiences and recommendations tend to be limited to individual experiences rather than reviews of what is offered across the sector, they are unlikely to be effective in driving competition on quality.¹⁵⁹

Conclusions and recommendations on transparency and competition

- 3.58 In summary, we note several factors which are likely to limit the ability of Scottish consumers to engage with legal services providers effectively. Consumers typically have limited knowledge and experience of legal services, which often involve complex issues. Moreover, consumers often demand legal

¹⁵⁷ Question D1 of our survey asked, 'Which elements do you believe are important for winning clients?' Question D1a asked, 'How would you rank those elements [as given in question D1] in terms of their significance to winning clients?'

¹⁵⁸ This is in line with research commissioned by the Solicitors Regulation Authority (SRA) in England and Wales on [Consumer attitudes towards the purchase of legal services](#) for consumers in England and Wales who typically assess providers through their personal experiences and recommendations from family and friends.

¹⁵⁹ See Legal Services Consumer Panel (2010), [Quality in Legal Services](#), p8.

services at points of distress which further reduces consumers' ability to shop around. These factors make it difficult for consumers to engage effectively with the sector and contribute to unmet legal need.

- 3.59 In addition, we find that there is a general lack of transparency of information about price and quality in the Scottish legal services sector, which impedes consumers' ability to engage with legal services providers meaningfully. As a consequence, consumers do not shop around and pricing pressures on firms are reduced. This seems to be supported by the substantial price dispersion observed, as explained in paragraphs 3.38 to 3.49 above.
- 3.60 We consider that providers have little incentive to change the status quo as they enjoy a degree of information asymmetry over consumers. To redress the balance, our view is that regulatory intervention is required to ensure that providers improve transparency of information about price, service and quality for consumers to make informed choices. Informed consumers generate a virtuous cycle for competition because providers need to improve the value and quality of their offering to win custom.
- 3.61 While information transparency on price and service is a necessary starting point to lower the barriers for consumers to engage, we also recognise that other measures may be required to effectively empower consumers. These include clearer communication of quality signals of providers, facilitation of ready access to information for consumers to navigate the legal sector, and improved access to regulatory data including data for use by intermediaries and comparison sites.
- 3.62 Our recommendations are detailed below.

Require providers to publish information on price and service

- 3.63 Consumers should be able to obtain an indicative cost for a case in any area of law. This should take the form of usable indicators of price or the charging model that can assist in comparisons between providers. Consumers should be able to identify this information without having to discuss the details of their case with a provider, ideally through a website. Consumers should also know the details of the service they would receive for the indicative price.
- 3.64 The form in which such indicators of costs can most effectively be provided may vary by type of service. Firms should be required to provide a minimum level of information on the price for a service. Where the process is standardised, such as the purchase or sale of a house, including the price of any additional services and outlays, it may be that a fixed price can be provided. However, where a case is complex and not easily priced without

understanding the details of a case, there are a variety of ways in which information about price can be given. These could include the provision of a guideline price for a scenario to allow consumers to readily compare prices (provided that details of the scenario being quoted for are clear); the provision of an online quote calculator that uses a questionnaire to generate an indicative price; or the use of a menu approach setting the price of the core basic service with an indication of the relevant factors that may determine the overall cost.

- 3.65 Recent guidance on voluntary price transparency from the LSS is a welcome measure. We note the LSS' reasons for issuing guidance rather than rules, including that it considered that guidance more proportionate at this time and that it would allow easier amendment.¹⁶⁰ We also note the LSS' position that although the guidance is not compulsory, solicitors would have to justify their reason for not following it in the event of a relevant complaint.¹⁶¹
- 3.66 Nonetheless, we consider that price transparency should be introduced by way of mandatory rules for solicitors. Effective price transparency requires a significant level of disclosure across the sector which, on a voluntary basis, is unlikely without significant pressure or incentives for providers to change their behaviour. Furthermore, we consider that the stronger sanctions that could apply in the event of a rule breach are more likely to act as a more effective driver of change than relying on guidance.
- 3.67 For price transparency to be effective, consumers must also understand what services they are purchasing to allow effective comparison between services and to achieve an understanding of value for money. Thus, the information provided should reflect real consumer behaviour by considering the different stages involved in delivering a service. For example, it should provide an indication of the likely timing, as well as information on the price, of any additional non-legal services offered by a solicitor firm separately, such as the provision of estate agency services. Where relevant, we consider it would be best practice for a price to be specified for each distinct service offered, as well as for a combination of services where a package discount may apply.
- 3.68 Thus, any rules on price transparency that are introduced should also be accompanied by rules that ensure transparency of service quality. However, care will also need to be taken that such rules, whilst allowing consumers to

¹⁶⁰ See [LSS Price Transparency Q&A](#), paragraph 2: 'the committee thought the introduction of rules at this time would be disproportionate and overly prescriptive and decided guidance was the preferred and proportionate route to increase transparency around pricing structures. It also allows the effectiveness of the guidance to be reviewed over time and any amendments that may be needed following review, can be made more easily.'

¹⁶¹ See [LSS Price Transparency Q&A](#), paragraph 3: 'Guidance does not have the same status as a rule and it is not compulsory to follow Guidance. However, while not a practice rule, all solicitors are encouraged to follow the guidance as a matter of best practice. In the event of a complaint being raised in relation to the guidance, a solicitor would have to justify their reason for not following it.'

compare providers more easily, do not restrict the flexibility for individual suppliers to offer new services.

- 3.69 Our recommendation therefore (**Recommendation 1**) is for the LSS to carry out an assessment of the impact that the existing guidance has had within a year of its introduction. This should examine whether the guidance has driven any change in solicitors' approach to providing relevant pricing and service information, and whether it has resulted in changes in consumer behaviour. Assuming that it has not driven the sort of change in transparency that we would like to see, we recommend that the LSS adopts a set of mandatory rules.

Develop ways for quality to be communicated in the sector

- 3.70 Consumers should also have information on the quality of a firm's service and advice when purchasing legal services. This is important to enable consumers to judge the value of a firm's offering. Many consumers rely on personal recommendations. However, these are based on subjective experience and since they often come from one-off purchasers of legal services, they are not based on a review of what the whole sector has to offer.
- 3.71 We therefore recommend (**Recommendation 2**) that the regulator should look to identify appropriate signals of quality in the sector. For example, it could encourage providers to engage with independent review and rating platforms and consumers should be passed details of where to leave reviews and feedback. Consideration could be given to the publication of legal aid quality assessments as proposed in 2018 by an independent strategic review of legal aid in Scotland (the 'Legal Aid Strategic Review'),¹⁶² or the publication of greater information on complaints levels against firms as suggested by the SLCC.¹⁶³ Additionally, indicators of quality of advice such as quality marks or findings of adverse conduct should be communicated clearly to consumers. In this context it is worth noting that work is being carried out in England and Wales on quality indicators as there is recognition that less progress has been made in providing consumers with such indicators.¹⁶⁴ We recommend that the

¹⁶² See Evans, M. (2018), [Rethinking Legal Aid: an independent strategic review](#), p36. This recommends that all quality assurance reviews and reports of solicitors and other legal services providers providing legal aid should be published.

¹⁶³ See SLCC (2016), [#Reimagine Regulation – Priorities for a consultation on legal services regulation](#), p11.

¹⁶⁴ The Legal Services Consumer Panel has published a research paper looking at quality indicators in other sectors (see Legal Services Consumer Panel (2010), [Quality in Legal Services](#)) and the LSB has recently committed to undertake more work in this area, including convening a meeting of regulatory bodies to explore a range of possible options which may lead to further work in 2020-21, as set out in its [Draft Business Plan 2020/21](#). Also see, for example, the work undertaken by the [Legal Services Consumer Panel](#) and guidance from the [SRA](#), [Bar Standards Board](#) (BSB) and [Council of Licensed Conveyancers](#) on how to engage with online reviews.

regulator look to this further work in considering how to enhance transparency in the Scottish legal services sector.

Improve the information made available to help consumers navigate the legal services sector

- 3.72 Alongside greater transparency of information on price, service and quality, evidence from the Robertson Review shows that consumers lack awareness of, and are not confident in, engaging with legal services. We consider that sector regulators, third sector providers and government can play an important role to facilitate ready access to information that can help consumers navigate the sector and empower better decision-making.
- 3.73 Clear and comprehensive reputable information should be made available to help consumers understand whether they have a legal need and, if so, what services they require, who can provide those services, the differences between different types of authorised and unauthorised providers, and how to engage. Additionally, regulators should be transparent with any information they hold on the sector and firms, including surveys, research, or complaints.
- 3.74 Some relevant information is already available from a variety of sources including the ‘mygov.scot’ website,¹⁶⁵ LSS, Which? and CAS. One approach might be to develop a central information portal or hub (similar to the Legal Choices website in England and Wales) that consolidates the relevant information, can build a unique and recognisable brand and can more readily be signposted by relevant bodies.¹⁶⁶ However, while it is important to harness the ability of technology to efficiently disseminate information, care must also be taken to ensure that those who benefit less from technological solutions are not excluded from the information they need to engage effectively with the sector.¹⁶⁷

¹⁶⁵ As set out on page 86 of the Legal Aid Strategic Review, the mygov.scot website was launched in September, 2015, with the ambition to be a one-stop online gateway for citizens and businesses to access information on all public services, designed around the needs of users. See Evans, M. (2018), *Rethinking Legal Aid: an independent strategic review*, p86.

¹⁶⁶ The value of a central hub focused on Scottish consumers is supported by previous discussions with Scottish stakeholders in which they noted the difficulty in ensuring that when individuals and small businesses were researching legal services they were provided with information on the relevant legal system. In light of that, we identified that there may be a need for the regulators in England and Wales to work with their counterparts in Scotland and Northern Ireland to better signpost to relevant materials, or at a minimum to make clear to which jurisdiction information relates. See CMA (2016), *Legal Services Market Study*, paragraphs 7.167-7.168.

¹⁶⁷ The Legal Aid Strategic review highlighted other international examples of online information provision such as Community Legal Education Ontario (CLEO) and British Columbia’s Ask JES (Justice Education Society), noting various innovations to introduce more interactive means of communication and deliver information via apps. It recommended that there should be ‘an active public policy to promote a ‘channel shift’ for signposting, referrals, advice and information from the current default of face-to-face and telephone to on-line, while ensuring that face-to-face remains for vulnerable groups or those who struggle to access digital technology.’ See Evans, M. (2018), *Rethinking Legal Aid: an independent strategic review*, p36.

- 3.75 The Legal Aid Strategic Review endorsed the value of developing an information hub using a mixture of technology and other tools to deliver such information more effectively while ensuring information provision remains inclusive. Consumer research carried out for the Legal Aid Strategic Review found that participants were ‘in favour of an online source of information and support which they can trust, which is well researched and comes from an official source or trusted brand. [...] People suggested a mix of face-to-face, telephone and web-based support for both advice and information.’¹⁶⁸ In addition, the Legal Aid Strategic Review recommended that targeted legal education and information programmes should be put in place, to improve consumers’ ability to deal with justiciable problems,¹⁶⁹ and that there should be competitively procured investment in ‘just in time’ legal information and advice online platforms.¹⁷⁰
- 3.76 The Scottish Government has responded to the Legal Aid Strategic Review by beginning the process of developing Scottish Government online advice services such as mygov.scot, to provide citizens with a one-stop shop for advice and information and signpost them to direct assistance if required. This will include pro formas which will empower members of the public to resolve issues on their own and links to third sector advice services and law centres. The Scottish Government is also continuing to work with third sector partners and support them to improve their online presence and capabilities.¹⁷¹
- 3.77 These developments are welcomed by the CMA. We note that mygov.scot is primarily a portal for public services advice and information. We recommend the continuation and extension of such work by the Scottish Government alongside regulators and the third sector, to consider how relevant information on privately-funded legal services as well as legal aid services can be enhanced and most effectively presented and communicated to maximise consumer use. **(Recommendation 3).**
- 3.78 The CMA also notes the potential for the new Consumer Scotland body being established by the Scottish Government to assist in driving these efforts in the sector and recommends **(Recommendation 4)** that the Scottish Government should also assess the role Consumer Scotland can play in this regard.

Improved access to regulatory and other sectoral data

- 3.79 Regulators also hold considerable amounts of information on providers and their services that may be relevant to consumers’ understanding of the choice

¹⁶⁸ See Evans, M. (2018), *Rethinking Legal Aid: an independent strategic review*, p86.

¹⁶⁹ See Evans, M. (2018), *Rethinking Legal Aid: an independent strategic review*, p36.

¹⁷⁰ See Evans, M. (2018), *Rethinking Legal Aid: an independent strategic review*, p90.

¹⁷¹ See Scottish Government (2018), *Scottish Government Response to the Independent Review of Legal Aid in Scotland*, p8.

available (such as information on the complaints lodged against each provider), which could also allow consumers to evaluate the risk a provider poses,¹⁷² as well as other data regarding the provider they regulate, such as the areas of law they provide services in and basic contact details. Such information, to the extent it is published, is only available on a fragmented basis, hence preventing the benefits from it being fully realised.¹⁷³

Government can play an important role in facilitating that data held across regulators is made widely available in a consistent and compatible format. For example, this could include facilitating that such information is: published on a regular basis and in a standardised format (potentially as part of a single 'digital register' across authorised professionals); or made available under an 'open data' licence.

- 3.80 Such data could also be used by intermediaries such as comparison sites. While few comparison sites currently exist in Scotland, these and other types of intermediaries can play an important role in helping consumers access, assess and use sector data. Making regulatory and price/service/quality data more readily available may have the additional benefit of attracting further entry by such intermediaries. We note that the likelihood of this will also depend on other factors that may affect the commercial viability of legal services for such intermediaries.¹⁷⁴ Nonetheless, we consider that there may be value in the regulator taking additional steps to encourage intermediaries as much as possible, for example by requiring all firms to provide representative prices for common scenarios agreed across the sector to digital comparison tools on request. Intermediaries have particular potential with commoditised work such as wills or house purchases, as these services are more standardised.

¹⁷² The SLCC also highlighted opportunities for more effective data sharing across regulators that could assist them in managing risks for consumers. See SLCC (2018), [Reimagine Regulation – a roadmap for improvement](#).

¹⁷³ The Robertson Review noted the SLCC's views as footnoted above. It recommended that 'the regulator should work with the Scottish Government to consider how data should best be shared to ensure consumers are protected from harm and enable the regulator to adopt a risk-based approach to intervene where systemic issues are identified'. See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), Recommendation 31, p53.

¹⁷⁴ The Legal Services Market Study, for example, found that comparison site operators faced a number of significant challenges with operating in the legal services sector in England and Wales. Some of the reasons cited for not entering the legal services sector included the one-off nature of most transactions and the presence of offline intermediaries in the high-volume legal services areas (for example, estate agents in conveyancing). See CMA (2016), [Legal Services Market Study](#), paragraph 3.158.

4. Impact of regulation

- 4.1 This chapter considers the impact of the current regulatory framework described in Chapter 2 on competition within the legal services sector in Scotland, in particular for entry and innovation.¹⁷⁵
- 4.2 As set out in Chapter 1, one purpose of sector-specific regulation in legal services is to provide consumer protection.¹⁷⁶ However, as with any system of regulation,¹⁷⁷ there is a trade-off between protecting consumers through restricting who can serve them and how they can be served, and opening access to a more diverse range of providers. Failure in making an appropriate trade-off between these two considerations can lead to regulations that can dampen competition, with adverse effects on the choice, price and quality available to consumers.¹⁷⁸
- 4.3 The regulatory framework comprises the underlying statute that gives rise to regulatory obligations in law, as well as regulations and practices imposed by regulators to meet these obligations. This research focuses primarily on the latter aspect, relating to how regulators are implementing their regulatory duties. As such, the concerns that the CMA has identified are capable of being addressed promptly by regulators. However, where applicable, the CMA has also commented on how some of the concerns observed may result from the underlying legislation, which may be remedied by the Scottish Government.
- 4.4 The regulatory framework can affect competition in two main ways: by influencing how providers engage with consumers, or by raising barriers to competition among providers or would-be providers. Chapter 3 addressed how providers engage with consumers. It described the importance of enabling consumers to drive competition through informed choices and how the lack of transparency in the provision of information on legal services in Scotland hinders this; it highlighted a potential need for regulation in order to drive an increase in information provision to address these issues.

¹⁷⁵ As set out in Chapter 1 (paragraph 1.18), this report does not cover other aspects of the regulatory framework that the Robertson Review has recommended merit further review, such as: the definition of legal services; regulatory objectives or reserved activities; entity and title regulation; and more generally our views on how the better regulation principles can be taken into account in the design of a regulatory framework. Our views on these matters are set out in more detail in the [CMA Response](#).

¹⁷⁶ See Decker, C and Yarrow, G (2010), for the LSB, [Understanding the economic rationale for legal services regulation](#), p2.

¹⁷⁷ See CMA (2015), [Competition impact assessment guidelines](#), paragraphs 3.20–3.23.

¹⁷⁸ See CMA (2020), [Regulation and Competition - A Review of the Evidence](#). This paper summarises existing evidence about the impact of regulation on competition in the UK across a range of sectors, both in terms of the academic research and the way in which regulation is designed and implemented in practice. Some of the findings in that report reflect the findings in this research, both in assessing the impact of regulation and the potential benefits or challenges that legislative change may bring.

4.5 This chapter now turns to regulatory barriers to competition among providers, with a particular focus on the impact of regulation on entry and innovation which can improve choice, price and quality for consumers. The following sections:

- describe how the regulatory framework in Scotland has developed in response to concerns regarding restrictions on competition;
- set out the outcomes observed in relation to entry and innovation; and
- examine the regulatory barriers that may be affecting competition, or otherwise leading to adverse outcomes, for consumers of legal services in Scotland.

Regulatory responsiveness to competition concerns

4.6 There have been longstanding concerns that certain features of legal services regulation may impede competition and that regulatory reform has not adequately addressed this, hence limiting entry and innovation.

4.7 In 2002 the Scottish Parliament's Justice Committee concluded an inquiry into the regulation of the legal profession which recommended regulatory reform.¹⁷⁹ This was followed in 2006 by publication of a report by the Scottish Executive's research working group on legal services in Scotland, which identified issues around governance and regulation affecting competition in the sector.¹⁸⁰ Following this, Which? raised a formal super-complaint to the OFT in May 2007.¹⁸¹ This included concerns that restrictions imposed on providers of legal services in Scotland by existing regulation inhibit lawyers in private practice from adopting alternative business structures and prevent consumers from obtaining direct access to advocates.

4.8 An alternative business structure (ABS) is a term used to describe organisational models that, in general, have in common the following key features that differentiate them from traditional law firms:

- they allow for anyone who is able to meet certain regulatory requirements to hold ownership or investment interests in legal services firms, although

¹⁷⁹ See Scottish Parliament (2002), *Justice 1 Committee Report on Regulation of the Legal Profession Inquiry*, in particular the Executive Summary.

¹⁸⁰ See Scottish Executive (2006), *Report by the Research Working Group on the Legal Services Market in Scotland*, in particular paragraphs 2.54 and Chapter 3.

¹⁸¹ See Which? (2007), *Super-complaint: Restrictions on business structures and direct access in the Scottish legal profession*.

the degree of permitted ownership interest varies across jurisdictions;¹⁸² and

- they can allow different types of legal professionals to work together (legal disciplinary practices) and/or for legal professionals to work in partnership with certain non-legal professionals (multi-disciplinary practices).

4.9 In its response to the Which? super-complaint,¹⁸³ the OFT supported greater liberalisation of the sector. It recommended that the following be relaxed or lifted:

- restrictions on organisational structure that prevented non-solicitor ownership and required advocates to operate as sole traders; and
- restrictions on consumers' direct access to advocates.

4.10 The OFT's recommendations led to some of the measures set out in the Legal Services (Scotland) Act 2010.¹⁸⁴ However, several of these recommendations have not been implemented.

- One of the key provisions of this Act enabled the introduction of licensed providers that could be partially owned by non-solicitors. Such licensed providers would, in effect, be ABSs. These ABS provisions have not yet been implemented in Scotland.¹⁸⁵ No regulatory scheme has yet been published and put in place to allow applications from firms. The delay in establishing an effective ABS scheme in Scotland is seen by stakeholders as one of the key issues hampering entry and innovation. These issues are examined in detail in paragraphs 4.36 to 4.64.
- Other recommendations, to encourage greater organisational flexibility for advocates, and to allow consumers to access advocates directly, were ultimately not adopted. This is discussed in paragraphs 4.65 to 4.70 and paragraphs 4.75 to 4.81.

4.11 As indicated in Chapter 2, most stakeholders now agree that regulatory reform is necessary. Discussions about the shape of reform have included consideration of whether previous attempts to promote competition and new entry have been successful, with concerns being expressed about the lack of

¹⁸² See paragraphs 4.46-4.51 for a comparison of jurisdictions.

¹⁸³ See OFT (2007), *Response to Which?'s super-complaint: 'Restrictions on business structures and direct access in the Scottish legal profession'*.

¹⁸⁴ See the *Legal Services (Scotland) Act 2010*.

¹⁸⁵ See Robertson, E (2018), *Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland*, p20.

progress. The next sections consider evidence on the outcomes observed and the impact that regulation may have had in this regard.

Evidence of outcomes in relation to entry and innovation

Entry

- 4.12 This research has focused on entry into the authorised legal sector since, as noted by the Europe Economics Report (see paragraph 2.16),¹⁸⁶ there is limited information available on the unauthorised legal sector.
- 4.13 As described in Chapter 2, solicitors and advocates are the most established providers of legal services and comprise the vast majority of authorised legal professionals in Scotland. The size of the authorised sector has in general been steady, though with some recent decline in the number of small solicitor firms accompanied by an increase in the number of solicitors in-house. The CMA has heard anecdotal evidence that solicitor firms are facing challenging conditions on the high street, particularly in rural areas.¹⁸⁷
- 4.14 There has been limited evidence of new entry by alternatives to solicitors and advocates, with the exception of solicitor advocates which, at around 350, are now close in number to advocates (around 450).¹⁸⁸
- 4.15 The other authorised professions received their authorisations more recently and their numbers are much smaller. Conveyancing practitioners and executry practitioners were authorised in 1997 and there were only eight conveyancing and executry practitioners combined in 2019.¹⁸⁹ Commercial attorneys were established in 2009 and there are fewer than 10 practising currently.¹⁹⁰ This contrasts with trends in England and Wales, where alternative authorised providers appear to be more common and operate in greater numbers and types. For example, in 2018 there were 1,368 licensed conveyancers in England and Wales.¹⁹¹

Innovation

- 4.16 Innovation is often a sign of competition working well. Innovation can bring significant benefits to consumers, ranging from increased choice of providers and services to easier access and higher quality of service. These are

¹⁸⁶ See Europe Economics (2018), [The Regulated and Unregulated Legal Services Market in Scotland: A Review of Evidence](#).

¹⁸⁷ CMA discussions with the LSS.

¹⁸⁸ See paragraphs 2.37 to 2.44.

¹⁸⁹ Data provided to the CMA by the LSS.

¹⁹⁰ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p12-14.

¹⁹¹ See LSB (2019), [Market structure dashboard](#).

outcomes which pro-competitive regulation should look to facilitate and support.

- 4.17 The CMA has therefore sought to assess the extent of innovation within the Scottish legal services sector, focusing on the emergence of innovative new business models changing how services are provided, or technological advances.

Evidence of innovation in service provision

- 4.18 The legal services sector in Scotland has broadly been regarded by the stakeholders with whom we have consulted as somewhat resistant to change¹⁹² and as having an intrinsically conservative culture.¹⁹³ The SLCC highlighted opening hours as an example of resistance to change, explaining that very few solicitor firms open outside traditional office hours, which limits consumers' access to legal services. Another stakeholder commented that the sector gives the impression that it is slow to innovate.
- 4.19 These views, coupled with the continued lack of ABSs, which offer the potential for new and different business models, suggest a still largely traditional sector focused on solicitor-led provision where (as noted in paragraphs 4.13 to 4.15), the choice of alternatives is limited and (as discussed in Chapter 3) firms have not found new ways to engage more effectively with consumers.
- 4.20 Despite this, we have identified some instances of business models which differ from the traditional partnership norm that offer benefits to consumers.
- 4.21 Stakeholders explained that some organisations have found ways to offer a mix of services to consumers notwithstanding the lack of ABSs, or to generate cost efficiencies that may ultimately drive down prices to consumers (although, as described later in paragraphs 4.53 and 4.54, sometimes this could only be achieved using less efficient ways or different structures to mimic the effect of ABSs). Examples of different offerings include:
- an integrated, multi-disciplinary approach to the delivery of services.¹⁹⁴ This might include, for example, a combination of legal, property and taxation advice, allowing a one-stop shop service convenient to

¹⁹² CMA discussions with Harper Macleod and with the SLCC.

¹⁹³ CMA discussions with the ACA and with the SLCC.

¹⁹⁴ For example, law firm Turcan Connell provides a range of professional advice, including legal and tax services, under one roof.

consumers; or law centres where solicitors may work alongside other advisers to provide free legal advice.

- Inksters has launched Plug & Play Law, a hub-and-spoke model where senior lawyers work as a collective in dispersed locations ('spokes'), with enhanced technology and back-office support located in a central 'hub'.¹⁹⁵ In this system, solicitors work as consultants, benefiting from being able to work remotely and flexibly without traditional business overheads and without the start-up costs for a practice which the CMA was informed can be substantial.

4.22 Other firms have innovated to offer more choice to consumers who may have more limited geographic access to providers. For example, Inksters sends travelling staff to provide 'pop-up' law surgeries in remote rural areas of Scotland.¹⁹⁶

4.23 Other innovations include the establishment of referral networks which member firms can draw on to improve the quality and breadth of service they provide to their customers. Such networks can also support rural provision in situations where local firms may not have the specialist knowledge to tackle all of the cases brought to them. For example:

- HM Connect is a legal referral network with over 360 member firms. Member solicitors can tap into the expertise of their peers to deliver a more effective and/or wider service to clients, while retaining the client relationship.¹⁹⁷
- Compensate Personal Injury Network helps firms of solicitors draw on a wider network of expertise in providing services to personal injury clients.¹⁹⁸

4.24 Overall, however, while there are several innovative models in use across the Scottish legal services sector, these appear to be employed in a small minority of cases compared to the overall size of the sector. Furthermore, there was a view that ABSs would have been a better means to encourage some of these innovations.¹⁹⁹

¹⁹⁵ See the [Inksters website](#).

¹⁹⁶ See the [Inksters website](#), including references to 'flying solicitors' services.

¹⁹⁷ See the [Harper Macleod website](#).

¹⁹⁸ See the [Digby Brown website](#).

¹⁹⁹ See paragraph 4.54.

Evidence of innovation in the use of legal technology

- 4.25 In common with other sectors, the use of technology is a growth area for legal services, with such services often referred to as ‘legal tech’. Many commentators have recognised the significant potential for legal tech to transform how legal services are provided²⁰⁰ and consider that there are opportunities for the UK to play a leading role in this.²⁰¹
- 4.26 The use of technology is likely to be particularly beneficial in Scotland given the dispersed population in rural and remote areas and subsequent challenges around access to services. Technology has the potential to provide an important bridge to such areas²⁰² and while it is not a solution for all, it is nonetheless a significant part of the solution. This makes it particularly important to consider any impact regulation may have on innovation, so that consumers can benefit from modern ways of working as technology continues to improve the options available to them.
- 4.27 While there is a high level of interest and focus on legal tech in Scotland, the Robertson Review found that ‘there is significant potential for online legal services which currently remains significantly underdeveloped’.²⁰³
- 4.28 Consistent with this, our research has indicated that legal tech in Scotland remains at an early stage of development. While some tech innovations are ongoing in Scotland, the instances of such innovations we have identified are limited in number and they mostly focus on improving case management for providers rather than on consumer-focused services.²⁰⁴ This suggests that in Scotland, there is some way to go to fully capitalise on the considerable opportunities for legal tech foreseen globally as noted in paragraph 4.25, and while Robertson saw substantial potential for Scotland to lead the way in legal tech investment and innovation, current progress has not yet fulfilled this.

²⁰⁰ Prominent academics in this area, such as Professor Richard Susskind OBE, have made contributions to this debate which illustrate how technology will transform the profession. See, for example, this 2019 article from [Legal Futures](#) publication.

²⁰¹ See Law Society (2019), [Lawtech: a comparative analysis of legal technology in the UK and in other jurisdictions](#). This paper identified the strong growth potential for legal tech across the UK. Its findings suggest significant opportunities for the legal tech sector in that investment in UK legal tech is likely to increase, with London becoming a hub for legal tech.

²⁰² These opportunities are recognised by governments across the UK, which have committed to deliver improvements in the availability of high-speed broadband to all areas. See, for example, articles on policy for [Scotland](#), [Wales](#), [Northern Ireland](#) and [the UK as a whole](#).

²⁰³ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p40.

²⁰⁴ These include, for example, technical innovations aimed at improving firms’ internal processes, such as contract assimilation, information sharing and scanning technologies (eg firms such as Altis, Amicus, Juralio and Miso), and firms offering more services online, such as divorces or wills.

- 4.29 By comparison, the CMA's 2016 Legal Services Market Study in England and Wales²⁰⁵ found that while the overall level of innovation at the time did not appear particularly high, there were some examples of innovation in the delivery of legal services including online service delivery, the unbundling of services and greater use of technology. Levels of innovation appeared to be affected by the nature of the legal service with less complex, more commoditised, higher volume, and more competitive areas of law appearing to be more amenable to innovation. There was also some evidence that, all other things being equal, ABSs were more likely to introduce new legal services.²⁰⁶ However, the Legal Services Market Study noted that some stakeholders believed there would be significant change in the future and, indeed, in the three years since, there has been some evidence of further growth in innovation across the UK since with optimism for further development.²⁰⁷ UK investment in legal tech increased threefold in 2019 and the Ministry of Justice (MoJ) announced £2 million in funding to support the digital transformation of the UK legal sector until March 2022.²⁰⁸
- 4.30 The CMA has identified a number of factors that are thought to be inhibiting growth in legal tech thus far in Scotland:
- Legal tech is considered to be expensive to invest in and develop.
 - The availability of investment may therefore be an important factor. A sector expert believed that advances in legal tech were restricted because there were not enough firms with the resources or risk appetite to invest in legal tech. In this context, the absence of an operational ABS scheme in Scotland is relevant and has limited access to the external finance often needed to invest in innovative technological solutions.²⁰⁹ The SLCC also noted that limited incentives to invest within the traditional partnership structure²¹⁰ may contribute to a lag in IT innovation.

²⁰⁵ See CMA (2016), [Legal Services Market Study](#), in particular paragraphs 3.197 to 3.211. Paragraph 3.200 also noted suggestions from several stakeholders that innovation may be more prevalent in larger law firms serving corporate clients, which was an area outside the scope of the CMA's market study.

²⁰⁶ Enterprise Research Centre (2015), [Innovation in legal services](#), a report for the SRA and the LSB. This research standardised for a range of factors that may have an impact on firms' likelihood of choosing to become ABSs, such as firm size, age and area of law. There remains the possibility that some unobserved characteristic of firms, such as an open culture, is making them both more innovative and more likely to become ABSs.

²⁰⁷ See footnote 202 and paragraph 4.49.

²⁰⁸ See [MoJ Press Release - June 2019](#).

²⁰⁹ CMA discussions with Harper Macleod and with the LSS. Similarly, the SLCC felt that the benefits of ABSs included access to investment capital that could help to fund entry costs and innovations such as legal tech.

²¹⁰ The SLCC considered that partnership structures may disincentivise capital investment, as debt is held at a personal level against partners and contributions to innovation may be difficult to capture when allocating a share of profits.

- A sector expert also noted that legal tech innovation is limited because of the scale of the sector in Scotland. The LSS considered this particularly acute for consumer legal services, where lower profitability and more limited efficiencies of scale are thought to dampen incentives to drive innovation compared to providers of legal services to businesses.
 - Inherent conservatism in the sector and resistance to change (see paragraph 4.18) were cited by some stakeholders²¹¹ as reasons why legal tech innovation may have been restricted in Scotland.
 - Work by LawScotTech, a new initiative set up by the LSS to stimulate legal technology innovation in Scotland,²¹² has also identified a number of practical and technical barriers to growth, including the need for educational opportunities to help develop legal tech skills and challenges around data standards.²¹³ The LSS considers the absence of common data standards as an impediment to firms adopting legal tech, and often a hurdle for legal tech providers. The LSS identifies the need to collaborate with other sectors and jurisdictions as essential to opening up opportunities for legal tech in Scotland.
- 4.31 To encourage the growth of legal tech, as part of the aforementioned LawScotTech initiative, the LSS recently launched a scheme for Accredited Legal Technologists in autumn 2019.²¹⁴ Initially this was test-launched to solicitors and accredited paralegals and was subsequently widened in late 2019 out to people from all backgrounds globally who meet the criteria for accreditation.
- 4.32 Accreditations can be a useful means of signalling quality and expertise that may help overcome difficulties in identifying and choosing between suitable providers that could inhibit the use of legal tech. However, for such schemes to be effective in raising quality without creating barriers to competition in legal tech, care should be taken to ensure they validate appropriate training or skills and are available to all,²¹⁵ particularly as much of the relevant expertise may lie with technology experts outside the legal sector. The CMA would therefore encourage that widespread availability for this new accreditation is maintained

²¹¹ CMA discussions with the ACA and with the SLCC.

²¹² LawScotTech is described in more detail on the [LSS website](#).

²¹³ See the [LSS website](#).

²¹⁴ See the Accredited Legal Technologist page on the [LSS website](#).

²¹⁵ The CMA Legal Services Market Study, in particular paragraphs 3.121 and 3.122, found that while the use of quality marks by intermediaries can be beneficial in driving higher quality standards, the use of an accreditation scheme as a requirement for access to a particular part of the sector can create an issue for competition, for example where the scheme is only open to one type of provider. See CMA (2016), [Legal Services Market Study](#).

and the criteria for assessment kept under review as additional experience of administering this accreditation is gained.

Impact of regulation

- 4.33 As described in the previous section, the overall picture appears to be of limited dynamic growth and entry in the sector. Although we have identified some examples of innovative business models that could benefit consumers, these appear limited to a few firms. We have heard views that the sector has not fully embraced the opportunities for legal tech, in part due to the size of the investment required and the small size of the sector.
- 4.34 We have also identified concerns about the role of regulation in inhibiting entry and innovation (in particular, due to the continuing lack of ABSs) or otherwise distorting competition and consumer outcomes.
- 4.35 The following paragraphs set out further detail of the concerns raised.

The lack of ABSs

- 4.36 As noted in the CMA's response to the Scottish Government regarding the Robertson Review,²¹⁶ ABSs have the potential to stimulate competition and innovation. This was recognised by the Scottish Government, which made provision for ABSs in the Legal Services (Scotland) Act 2010. The continued absence of ABSs in Scotland thus represents a regulatory barrier to competition.
- 4.37 There are several potential benefits of ABSs. The use of such structures could enable firms to access external capital and to achieve efficiencies by exploiting economies of scale, to develop brands and to offer greater convenience for consumers seeking a one-stop shop. 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. Furthermore, the involvement of non-legally qualified practitioners in management could facilitate the entry of more 'business-oriented' firms with a longer-term perspective. New entry and investment capital could also allow partners in small firms who wish to retire opportunities to do so without closing the firm, by transferring ownership.
- 4.38 In light of the potential benefits of ABSs in opening up the sector to more dynamic, efficient and innovative service provision, the continuing lack of ABSs in Scotland despite the presence of enabling legislation since 2010 has

²¹⁶ See [CMA response to Robertson Review](#), paragraph 65.

been a matter of concern to the CMA, which has previously expressed its view that ABSs should be introduced in Scotland without undue delay.²¹⁷

- 4.39 As part of its research the CMA has therefore considered the current status of ABSs in Scotland and the impact of the lack of ABSs to date, looking to the experience in other jurisdictions as illustration, as well as views from the sector.

Current provisions for ABS in Scotland

- 4.40 In Scotland, ABS provisions are enacted via the Legal Services (Scotland) Act 2010 and subsequent parliamentary amendments up to 2012. This legislation requires a licensed provider (which is the term used for an ABS in the 2010 Act) to:

- have within it a practising solicitor (with a valid practising certificate that is free from conditions);²¹⁸
- have at least a 51% majority stake in the ownership or control of the entity held by solicitors and/or members of other regulated professions (such as accountants, surveyors etc);²¹⁹ and
- be operated for a fee, gain or reward.²²⁰

- 4.41 In order to implement the ABS provisions of the Act, the Scottish Government must approve at least one regulator (up to a maximum of three) and its regulatory scheme for ABSs. The LSS has been approved as a regulator but has yet to be authorised by the Scottish Government although dialogue continues between them for this purpose. Hence no ABSs have yet been licensed.

- 4.42 The delay in authorisation appears to reflect two factors. First, the statutory process for regulatory approval of an ABS scheme (which includes a requirement to consult with the Lord President) may be overly bureaucratic. The LSS submitted its first proposal for a regulatory scheme to the Scottish Government in 2012 and there remains no scheme in operation at the time of this report.

- 4.43 Second, the LSS considers that the legislation in certain respects presents challenges for a scheme which will now produce additional regulatory

²¹⁷ See [CMA response to Robertson Review](#), paragraph 64.

²¹⁸ See the [Legal Services \(Scotland\) Act 2010, section 47](#).

²¹⁹ See the [Legal Services \(Scotland\) Act 2010, section 49](#). The regulated professions were determined by the Scottish Government after consultation and confirmed in legislation and include various types of accountants, architects, actuaries and surveyors.

²²⁰ See the [Legal Services \(Scotland\) Act 2010, section 47\(1\)\(ii\)](#).

burdens, but these cannot be tackled practically without changes to the legislation. Examples of provisions in the legislation which raise practical challenges include:

- Every time there is a rule change, the scheme has to be further amended and submitted to the Scottish Government for approval and consultation.
- All investors are subject to a fit and proper test.²²¹ This may potentially require the LSS to carry out such checks on all shareholders if the investor were to be a corporate body.

4.44 The LSS acknowledged that firms were concerned about the potential for additional regulatory costs in operating as an ABS.

4.45 The CMA is required to provide advice to the Scottish Government upon consultation in relation to a proposed ABS scheme. In considering the scheme put forward in 2016, the CMA noted its understanding that differences in the relevant primary legislation pertaining to licensed providers and traditional solicitor firms will result in certain differences in the regulatory requirements being imposed between these different business models, and called for a future review to assess the impact of these regulatory differences on the take-up of the scheme or on licensed providers' ability to compete in the Scottish legal sector.²²² The CMA's view is that such differences should still be considered should the opportunity arise for further amendments to the primary legislation.

Experience in other jurisdictions

4.46 Various forms of ABSs exist in several jurisdictions, for example England and Wales, Australia, Denmark, Germany, Italy, the Netherlands, Poland, Spain and certain areas of the US and of Canada.²²³

²²¹ In England and Wales, the SRA carries out similar checks on prospective operators of ABSs, however checks are applied only to owners with a restricted interest (ie either material or controlling). See [SRA website](#) and [Schedule 13 of the Legal Services Act 2007](#).

²²² See [CMA response on Scottish Alternative Business Structures](#).

²²³ See CMA (2016), [Legal Services Market Study](#), Appendix I, paragraphs 8 to 11. Further, some provinces of Canada (Quebec and Ontario) have allowed non-lawyer ownership and/or multidisciplinary practices for a long time. In Quebec, lawyers can practise and share profits with other professionals. In Ontario, lawyers may practise and share profits with paralegals—who are also regulated. There have been calls for further change within the sector, notably a 2014 report by the Canadian Bar Association which (though only advisory to the law societies which regulate legal services in each province and territory) recommended that lawyers be allowed to practise in ABS. The recommendations were made for broadly similar reasons to those proposed in the UK, namely to encourage the introduction of external private capital, encourage investment in innovative processes and technologies and provide more entrepreneurship that will enable the delivery of legal services better, faster, and cheaper across national and provincial borders. See Slaw (2015), [Transforming the Delivery of Legal Services – a year later](#).

- The extent of permissible non-solicitor ownership varies by jurisdiction. While in England and Wales, as in Australia, ABSs can be owned entirely by non-lawyers (see paragraph 4.47), in other European jurisdictions, the maximum non-lawyer ownership is set at levels ranging from 10% to 33%.²²⁴
 - There is also some variation in the degree to which lawyers are allowed to partner with other types of professionals in order to form multi-disciplinary practices, with different jurisdictions restricting participation to different types of professionals.²²⁵
- 4.47 Limited empirical information is available on the impact of ABSs, though there has been recent evidence from the experience in England and Wales. The ABS framework in England and Wales differs in some respects to the framework in Scotland and is less restrictive in these respects. In contrast to provisions in Scotland (see paragraph 4.40), in England and Wales the legislation allows for the ownership of an ABS to be completely open, subject to meeting certain suitability requirements and, for ABSs regulated by the SRA, provided the ABS is managed by a solicitor;²²⁶ ABSs are available to the non-profit sector; and there is no maximum number of permissible regulators.
- 4.48 Since ABSs were introduced in England and Wales in 2007,²²⁷ almost 1,300 ABSs have been established.²²⁸ These include non-profit ABSs.²²⁹ The CMA's Legal Services Market Study²³⁰ noted that there had been some examples of innovations in business models and service delivery introduced by ABSs as well as some examples of ABSs accessing external investment. While ABSs may not have had a significant impact on competition at the time and while many ABSs did not differ from traditional firms, the CMA identified significant potential in the ABS model and also recognised that it might be too early to appreciate the full impact of the ABS regime.

²²⁴ See CMA (2016), [Legal Services Market Study](#), Appendix I, paragraph 9. In Italy this percentage is 33%; in Spain, 25%; and in Denmark, 10%.

²²⁵ See CMA (2016), [Legal Services Market Study](#), Appendix I, paragraph 10.

²²⁶ For barristers in England and Wales, the BSB has applied a discretionary 25% limit to non-barrister ownership – see the [BSB's authorisation rules](#) (rS83 or rS84). ABS owners should also satisfy 'suitability criteria'. The BSB's [policy statement](#) (paragraph 14) notes that the percentage of ownership is a factor that 'would tend to indicate that it may be/not be appropriate for the BSB to regulate an entity'.

²²⁷ 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.

²²⁸ See IRN Research (2019), [The UK Legal Services Market 2019](#).

²²⁹ See for example, Legalfutures (2013), [Legal advice charity becomes first not-for-profit to set up an ABS](#).

²³⁰ See CMA (2016), [Legal Services Market Study](#), paragraph 3.208.

- 4.49 There is also other evidence that ABSs are growing. A more recent research report by TheCityUK²³¹ attributed innovation in the UK legal sector to the ABS structure that allows investment, ownership and management by non-lawyers. It noted that opening up the sector to non-lawyers has helped law firms secure external funding, citing research that identified £510m of external investment in the UK legal sector.²³² This additional funding illustrates how ABS firms have been able to contribute to legal tech growth. In addition, the report highlighted the entry of the Big Four accounting firms – KPMG, Deloitte, Ernst & Young and PwC – into legal services as having the potential to shake up the established order of the sector.
- 4.50 Furthermore, the risks identified before the ABS regime was implemented in England and Wales have not materialised.²³³ Before their introduction, the primary concern was that ABSs might pose an increased risk to consumers, chiefly due to the potential conflict of interests between non-lawyer owners and the consumers of legal services.²³⁴ However, these have so far proved unfounded. The Legal Services Consumer Panel's *2014 Consumer Impact Report*, concluded that 'the predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised' and 'there have been no major disciplinary failings by ABS firms or unusual levels of complaints in the Legal Ombudsman's published data'.²³⁵
- 4.51 The adoption of ABSs in other jurisdictions illustrates that they have an important role to play in breaking down the regulatory restrictions on business models, with little apparent downside. The experience of England and Wales, for example, has highlighted how ABSs have been able to encourage innovation and represent an important step in the right direction.

Views on ABSs in Scotland

- 4.52 Our research also explored views in the Scottish legal services sector about ABSs. Stakeholders expressed consensus around the potential benefits of ABSs. They saw many aspects of ABSs as beneficial, in line with the benefits described in paragraph 4.37.
- 4.53 In light of the long delay in implementing ABSs, these opportunities have not yet been realised and firms have had to turn to different options. The LSS told us that in light of the long implementation delay, some parties who had been

²³¹ See TheCityUK (2019), [Legal excellence, internationally renowned UK Legal Services](#).

²³² See Arden Partners (2016), [Strategic research on investment in the UK legal sector](#).

²³³ See CMA (2016), [Legal Services Market Study](#), paragraph 5.32.

²³⁴ See [SRA response to MoJ Consultation on Legal Services](#) (2016). In this respect, the SRA has stated that: 'In considering the outcomes and decisions that arose from SRA investigations into reported issues, there is no evidence at this time that ABS firms present any elevated level of risk'.

²³⁵ See Legal Service Consumer Panel (2014), [Consumer Impact Report](#), p15.

interested in using ABSs have found other solutions or structures, particularly where the activity involved is not a reserved area of work which could lead to the activity being unregulated. Some firms have circumvented the issues that ABS has thrown up by creating different forms of business structures which have allowed them to attract external capital and professions into the business.

4.54 However, these alternative solutions were seen as involving costs associated with the regulatory delay.

- The SLCC noted that, in practice, firms have found ways of working around the lack of ABSs. However, it felt that the efforts firms have had to make to circumvent these issues and the less efficient alternatives employed illustrated the drawbacks of ABSs not having yet been implemented. For example:
 - The SLCC observed that law centres and other social enterprises currently have to partner with a senior solicitor in order to provide legal services, but this exposes the senior solicitor to more significant risk than if they were part of the enterprise and hence had greater control over the work it carried out. Similarly, by passing on its legal work, the law centre risks losing access to its client files if it exits the partnership. The SLCC considered that social enterprises (many of whom are currently registered in England and Wales) were interested in operating in Scotland, but that the difficulties of doing so in the absence of ABSs may have inhibited their entry.
 - The SLCC described how some firms have set up more complex corporate structures or compensation arrangements to circumvent the lack of ABSs. For example, by partitioning their non-solicitor staff into a separate entity servicing their regulated legal staff or using performance-related pay to create attractive incentives for non-solicitor staff. Similarly, the LSS highlighted that some structures have been created where the reserved area work is carried out by a solicitor business whilst there is another business carrying out non reserved area work.
- Several stakeholders commented that much of the interest in ABSs had originated from larger Scottish law firms that have since been taken over by firms headquartered in England and Wales who already benefit from access to ABSs.

- 4.55 Some stakeholders considered that the lack of ABSs in Scotland has impeded entry, growth and innovation in the sector.²³⁶ It was felt that the wider access to funding and organisational flexibility offered by ABSs would have helped with start-up costs, and enabled a more diverse offering for consumers and investment in important, but expensive, legal tech. Some saw the potentially less efficient efforts made to accommodate the lack of ABSs, as described above, as evidence of the difficulties resulting from their absence. Nevertheless, they considered that ABSs could still play an important role in potentially increasing the entry of innovative business models and improving outcomes for end consumers (see paragraph 4.30). Likewise, the LSS felt that there was still room for optimism that ABSs could be a success in drawing in external investment and encouraging innovation. Further, the CMA notes that those firms that have had to find alternative less efficient models will still have the option to set up as ABSs once they are introduced.
- 4.56 Harper Macleod considered that ABSs would be particularly useful to high street and rural firms of solicitors which are facing challenges with legal aid, recruitment and succession planning. Many firms might benefit from the new opportunities for funding and new business streams that ABSs could present. The SLCC also noted opportunities for solicitors in rural communities to gain cost efficiencies from sharing office space with other professionals in ABSs. Harper Macleod acknowledged that some small firms were originally against ABSs but considered that many now see it as a way to keep the business sustainable and (by attracting new entry) enabling a route to exit which is currently a major issue for many partnerships where solicitors are seeking to retire.
- 4.57 Additionally, views were expressed (as highlighted by Robertson)²³⁷ that the continuing lack of ABSs was adversely affecting the wider competitiveness of the Scottish legal services sector.
- One provider considered that its inability to offer a share in equity impeded its commercial flexibility to attract and retain top non-solicitor talent. It considered that firms in England and Wales have an advantage in recruitment due to this ability, alongside better access to external funding allowing them to pay higher salaries.²³⁸

²³⁶ CMA discussions with Harper Macleod, the SLCC and a sector expert.

²³⁷ See Robertson, E (2018), *Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland*, p28: 'Many Scottish solicitors, and the Law Society of Scotland, believe that the restrictions on Scottish solicitors' business structures will increasingly inhibit the ability of that profession to compete in the UK and international markets. English solicitors have the ability to operate in an alternative business structure environment.'

²³⁸ CMA discussions with Harper Macleod.

- Professor Lorne Crerar, in his January 2020 paper, *Roberton and the case for change*,²³⁹ made the point that Scottish firms were unable to operate on a level playing field with English-based firms as a result of ABSs not yet being in place in Scotland. Professor Crerar noted that ‘the usage of Scots law as the governing law when choice exists has significantly declined’, in part as ‘a consequence of emerging legal services providers from other jurisdictions, and the significant decline in the number of major Scottish law firms with headquarters in Scotland’. He went on to argue that for such remaining firms ‘adjustments must be made to put them on a level playing field of opportunity with other law firms trading in Scotland and headquartered in England or elsewhere. Now, with profits in the legal sector reportedly falling and with firms being advised to ensure they have systems in place to maximise their efficiency, the CMA’s suggestion of a regulatory regime for ABSs should be immediately introduced.’

- 4.58 These concerns have the potential to worsen outcomes for consumers by dampening the ability of providers to compete on equal terms or reducing the quality of service provision in Scotland. There may also be adverse effects for the Scottish legal sector and the Scottish economy more generally if this has an impact on the demand for Scots law, as noted above.²⁴⁰
- 4.59 In summary, the CMA’s research identified concerns that the continuing lack of ABSs in Scotland has held back entry and innovation that may have impacted the competitiveness of Scottish law firms, to the detriment of consumers. This therefore reinforces the CMA’s starting point that it would be beneficial for ABSs to be introduced in Scotland and that this should occur as soon as possible.

Scope for improving the current ABS scheme

- 4.60 The quickest way to achieve this is to implement the scheme in its current form. However, as outlined in paragraphs 4.42 to 4.44, there appear to be aspects of the current legislation that may create practical difficulties. Consideration should therefore also be given to future legislative amendment to address such concerns and enhance the impact of the scheme in the longer term. Additionally, other aspects of the legislation or the ability to use

²³⁹ See Crerar, L (2020), [Roberton and the case for change](#).

²⁴⁰ Evidence from the Scottish Young Lawyers’ Association likewise suggests some concerns about the attractiveness of the Scottish legal sector, although it is not possible to ascertain the impact of regulatory differences or trends in the use of Scots law in shaping these views. A recent [survey](#) of its members to identify issues with retaining junior lawyers within the profession in Scotland found that over 65% of respondents have considered practising law outside of Scotland, with 40% actively considering this or would consider this in the future.

ABSs in Scotland that the CMA considers would be beneficial to amend are described below.

- 4.61 First, the nature of the ABS scheme contemplated in Scotland, whereby at least 51% of an ABS must be owned by solicitors or other regulated professionals, was a particular matter for concern to some stakeholders.
- The SLCC felt that this restriction would make ABSs in Scotland commercially unattractive.
 - The LSS noted that it has been contacted by firms who have indicated that the 51% ownership restriction is a barrier to their entry in Scotland.
 - Robertson also felt that the 51% restriction ‘does not fully enable Scottish firms to compete with non-domestic competitors and puts them at a disadvantage with regard to sourcing capital’.²⁴¹
- 4.62 The CMA has already stated its concerns that this feature may constrain the effectiveness of ABSs and recommended that the Scottish Government carry out a review of this risk.²⁴² The CMA notes, for example, the parallels with the ABS experience in Australia, where a similar provision was reviewed by the Australian Government in 1998, found to be anti-competitive and removed.²⁴³
- 4.63 In light of the views expressed by stakeholders, the CMA remains concerned about the 51/49% ownership rule and is now of the view that it should be amended by legislation as soon as possible to widen the potential effectiveness of the scheme. The CMA believes that any risks to the operation of ABSs from a relaxation of this ownership rule are minimal, as demonstrated by the experience in England and Wales. Furthermore, this would allow the introduction of genuinely novel business models, as opposed to adding an additional non-solicitor partner to an existing firm.

²⁴¹ See Robertson, E (2018), *Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland*, p38.

²⁴² In our 2016 *advice to the Scottish Government on the establishment of the Licensed Providers Regulatory Scheme* (ABS), the CMA noted that one significant way in which the Scottish framework differs from that in England and Wales is the requirement for 51% ownership by solicitors or other regulated professionals. We advised that a review could assess whether this potentially constrains the innovation and efficiencies the ABS scheme aimed to enable. The CMA also indicated that we would be happy to assist the Scottish Government in considering the consumer benefits of this and other aspects of the framework, based on our experience both relating to our earlier work in Scotland and the Legal Services Market Study.

²⁴³ See Law Society of Ontario (2012), *Alternative business structures: Australia*. In Australia, from 1990, law firms were able to form multidisciplinary partnerships as long as lawyers retained at least 51% of the net income. But in 1998, the Australian government decided to review legislation regarding competition in every jurisdiction and determine whether barriers existed. The 51% rule in New South Wales was found to be anti-competitive and removed. While there are nuances between this case and the current 51/49 ABS ownership rule in Scotland, this would seem to support the view that the current Scottish position also has significant potential to be anti-competitive.

- 4.64 Second, the LSS noted that while some charitable bodies have had an interest in becoming ABSs, the legislation requires ABSs to be operated for a fee, gain or reward, which prevents its adoption by the non-profit sector including law centres.²⁴⁴ The Robertson Review similarly highlighted ‘possibilities around employee and community ownership which are now beginning to be considered as potential solutions where high street firms may be struggling’, while the SLCC noted possible interest from social enterprises (see paragraph 4.54). The CMA considers that such possibilities should be facilitated by removing the requirement on the use of ABSs for commercial purposes. The CMA notes that such restrictions do not apply in England and Wales, where the take-up of ABSs by non-profit organisations suggests that there are likely to be similar opportunities for the non-profit sector in Scotland to benefit from ABSs absent this restriction.²⁴⁵
- 4.65 Third, the CMA notes that FoA rules prevent advocates from benefitting from ABSs. The OFT considered, in its response to the 2007 Which? super-complaint, that advocates should be able to enter into partnership with others as this would allow for efficiencies and streamlining of processes which may result in reduced costs to clients. In Scotland, this could mean advocates working alongside other advocates as well as solicitors (legal disciplinary practices). It could also mean advocates working alongside non-lawyers (multi-disciplinary practices).
- 4.66 The FoA does not agree with the OFT’s assessment (in its response to the Which? super complaint, July 2007)²⁴⁶ that advocates should be able to enter into legal partnerships with other professionals, such as solicitors. In its written evidence to the Scottish Parliament on the Legal Services (Scotland) Bill in 2009,²⁴⁷ the OFT recommended that ‘the Bill should apply not only to ABS but to traditional forms of practice and to all legal professionals, including advocates.’ The CMA supports the OFT’s position on this issue and believes the lifting of this restriction would allow for efficiencies and streamlining of processes, which may result in reduced costs and increased choice for consumers.²⁴⁸

²⁴⁴ See the [Legal Services \(Scotland\) Act 2010, sections 47 and 48](#).

²⁴⁵ See Legalfutures (2013), [Legal advice charity becomes first not-for-profit to set up an ABS](#), and McMorrow (2016), [UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US](#), page 703, for examples.

²⁴⁶ See OFT (2007), [Response to Which?’s super-complaint: ‘Restrictions on business structures and direct access in the Scottish legal profession’](#), Section 3.

²⁴⁷ See OFT (2009), [Written Response to the Scottish Parliament](#), paragraph 4.

²⁴⁸ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p21.

- 4.67 However, the FoA sees ABSs as ‘fundamentally incompatible with maintenance of the independent referral bar.’²⁴⁹ It considers that advocates operating in partnership or other legal forms alongside others would face conflicts of interest that would hamper the effective operation of the cab rank rule which maximises choice and access to justice.²⁵⁰ The FoA noted the use of ABSs by barristers in England and Wales, but believed this model was not appropriate in Scotland given the much smaller overall size of the Scottish sector which makes it critical to maintain widespread access to members of the Bar.²⁵¹
- 4.68 As regards the potential for efficiencies, as noted in the Robertson Review, the FoA ‘cite Faculty Services Ltd (the company which provides professional services and to which over 90% of advocates contribute a fixed percentage of their income) and shared facilities such as the Advocates’ Library as examples of streamlined processes already available to advocates’.²⁵²
- 4.69 In England and Wales, the Bar Standards Board (BSB) has introduced a scheme which allows barristers to participate in multi-disciplinary practices as ‘BSB Licensed Bodies’, a form of ABS.²⁵³ While take-up of that scheme has been limited,²⁵⁴ there is no evidence of any negative effects. Furthermore, the CMA notes the adoption of ABSs by advocates in a number of other jurisdictions of varying sizes (see paragraphs 4.46 to 4.51) and that this experience does not suggest that this has negatively impacted the independence or availability of the referral bar where one exists.
- 4.70 For these reasons, the CMA recommends that the FoA should consider amending its rules to allow a similar model in Scotland. While only some advocates may choose to enter into ABSs, it should be for individual advocates to determine whether this is right for them and does not justify a blanket prohibition which should only be enforced on the basis of clear risks.

Other regulatory restrictions on competition

- 4.71 Our research has also considered other regulatory factors aside from the lack of ABSs that may be restricting competition among legal service professionals, in particular:

²⁴⁹ See [Response by the FoA to Independent Review of the Regulation of Legal Services – Call for Evidence](#), paragraph 66.

²⁵⁰ See [Response by the FoA to Independent Review of the Regulation of Legal Services – Call for Evidence](#), for example, p2 and paragraph 33.

²⁵¹ See [Response by the FoA to Independent Review of the Regulation of Legal Services – Call for Evidence](#), paragraph 76.

²⁵² See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p21.

²⁵³ See [BSB entities](#).

²⁵⁴ See The Law Society Gazette (2018), [Barristers slow to take up ABS option – BSB](#).

- other restrictions that may have inhibited entry and expansion, including restrictions on direct access to advocates; and
- concerns from some stakeholders regarding regulatory costs that may distort competition.

Regulatory factors inhibiting entry and expansion

4.72 As described in paragraphs 4.13 to 4.15, there has been limited new entry into the sector. There is some evidence that the growth of alternative types of providers has been restricted because of regulatory constraints.

- For example, no new conveyancing practitioners can register as the approval board was abolished by the Scottish Government when regulation moved to the LSS in 2003.²⁵⁵
- We also note the submission of a petition to the Scottish Parliament in July 2019, calling for the Scottish Government to carry out a review to ensure there are equal rights for all legal professionals, including commercial attorneys who have more recently entered the authorised legal sector.²⁵⁶ The CMA was asked for views on the petition and its response reflected the importance of creating a level playing field for legal professionals. The CMA also called for further steps to be taken to reduce remaining barriers faced by commercial attorneys to ensure their ability to compete effectively with other authorised providers.²⁵⁷ These included:
 - ensuring clear communication of the role played by commercial attorneys. For example, the CMA understands that Form 04 (which a party receives when a sheriff court action has been raised against them) refers only to consulting a solicitor to handle the resulting construction litigation; and
 - keeping under review the requirement that ACA members cannot wear gowns, to understand if it might have an impact on their ability to compete effectively with solicitors.

4.73 In respect of growing the solicitor profession and solicitor firms, the SLCC also highlighted that solicitors cannot act as the principal of a firm or go into partnership until they have completed three years of work experience. The

²⁵⁵ Further background on the reasons behind this decision can be found in: Scottish Parliament (2002), [Justice 1 Committee, 11th Report 2002, Report on Regulation of the Legal Profession Inquiry, Volume 1: Report and evidence, paragraphs 235 – 260.](#)

²⁵⁶ See Scottish Parliament, [Petition PE01724: Equal rights for Commercial Attorneys and Party Litigants in the legal system.](#)

²⁵⁷ See Scottish Parliament, [Petition PE01724: Equal rights for Commercial Attorneys and Party Litigants in the legal system.](#)

SLCC considered that some exceptions for mature students might be reasonable and could encourage further entry. It noted that mature students represent 20% of law graduates and may have experience from outside the sector that would equip them to run a firm and introduce innovation. This is a matter that the LSS may wish to consider further, subject to appropriate safeguards to ensure fitness of ownership.

4.74 Another area where competition may be impeded by regulation relates to advocacy services. Here, advocates compete with solicitor advocates who are a faster growing segment, for demand that has been diminishing (see paragraph 2.44). The CMA considers competition between these types of providers to be beneficial, with each providing a different but valuable offering to consumers. However, each is regulated by different regulators and some concerns have been noted regarding regulatory differences:

- The FoA expressed some concerns that solicitor advocates face less extensive training requirements.²⁵⁸ While it is not for the CMA to consider the merits of the respective training, from a competition perspective training sufficient to safeguard appropriate levels of quality without unduly raising barriers to entry or costs would be of primary concern.
- The CMA notes that, unlike solicitor advocates, advocates cannot form potentially more efficient partnerships with others due to regulatory requirements to act as sole traders which, as discussed in paragraphs 4.65 to 4.70, do not appear warranted.
- While the FoA is opposed to such partnerships, it notes that the protection of limited liability that solicitor advocates receive through these and other organisational structures may give them a competitive advantage over advocates. In this regard it considers the possibility of advocates providing legal services by way of a private limited company vehicle (with a single member/director) may merit further investigation.²⁵⁹ The CMA is in favour of further consideration of relaxing such restrictions alongside restrictions on advocates participating in ABSs.
- Further (as detailed in the next paragraphs), advocates do not have the same degree of access to consumers who need their services.

²⁵⁸ The requirements for solicitors to qualify as solicitor advocates are set by the LSS and additional fees apply (see [LSS website](#)). Relevant experience of court work as an admitted solicitor for five years is required, with additional costs to practise that vary for civil and criminal law. For example (see [LSS website](#)), to practise as a solicitor advocate in civil law, the additional fees are around £3,500, with training carried out over three months.

²⁵⁹ See [FoA response to the Call for Evidence](#), paragraphs 72-79.

- 4.75 Presently, as outlined in Chapter 2, it remains the case that advocates are typically instructed by solicitors and (unlike solicitor advocates) cannot take on individual members of the public as clients directly. In the OFT's response to the Which? super-complaint in 2007, it called for a greater liberalisation of the sector, including recommending that regulatory restrictions to direct access to advocates were lifted.²⁶⁰
- 4.76 As discussed in Chapter 3, certain characteristics of legal services can make it difficult for consumers to directly identify suitable providers. Having a solicitor (who will have repeat experience of selecting and instructing advocates) as an intermediary therefore often makes it easier for consumers to obtain suitable advocacy services. However, it can also create unnecessary costs for consumers who might be capable of instructing an advocate without going through a solicitor.²⁶¹
- 4.77 Solicitor advocates now offer an alternative for consumers who can potentially benefit from efficiencies in the combination of the two functions and the convenience of direct liaison with the individual advocating for them. However, such consumers would have a wider choice if they could also access advocates directly and advocates would likewise benefit from wider access to demand.
- 4.78 In Scotland, the FoA has clearly stated its view that direct access to advocates by members of the public is neither necessary nor desirable in the interests of justice, raising concerns about increased costs of handling work and potential conflicts when engaging with consumers.²⁶² It does not consider that its members (or consumers) are disadvantaged in this respect, noting that certain other types of direct access are available (see paragraph 4.80), that advocates can opt to work as solicitor advocates and that advocates have discretion to accept instructions to appear in court without an instructing solicitor being present (a relatively recent development intended to promote the efficient and cost-effective delivery of services).
- 4.79 However, the CMA is not aware of any evidence to suggest that such arrangements expose advocates to conflicts and tensions when engaging with clients that would be any greater than those faced and successfully managed by other professionals, including solicitors or solicitor advocates. Further, it would be possible for any increases in cost to be passed on to consumers but

²⁶⁰ See OFT (2007), [Response to Which?'s super-complaint: 'Restrictions on business structures and direct access in the Scottish legal profession'](#).

²⁶¹ See Which? (2007) [Super-complaint: Restrictions on business structures and direct access in the Scottish legal profession](#).

²⁶² Further information on the Faculty of Advocate's concerns can be found in FoA (2018), [Response by the FoA to Independent Review of the Regulation of Legal Services Call for Evidence](#). See for example p2, p10 and paragraphs 58-60.

offset by the savings consumers may make from requiring the services of only one legal representative, with the potential for competition for consumers to drive down such costs over time.

4.80 The CMA also notes that:

- Advocates currently provide direct access to members of specified professional bodies, through providing advice (not litigation) on professional roles – for example, providing advice to a doctor on a liability claim.²⁶³ According to the FoA, this is only a very small part of their work although such work has grown slightly in recent years. It is not clear to the CMA why this should be permitted while access by consumers is prohibited.
- Direct access by consumers is available in other jurisdictions without obvious detriment. For example, consumers in England and Wales can directly access barristers to conduct litigation, and this option has seen uptake, albeit limited.²⁶⁴ Consumers who are sufficiently informed to choose a suitable advocate directly, can benefit from direct access in terms of a potentially wider choice (than might be available via referral by a particular solicitor) and lower cost.

4.81 Hence, it does not seem necessary to prevent advocates who wish to work directly with consumers from having the choice to do so which, even if only of potentially limited effect as suggested by the experience in England and Wales, must be beneficial in widening the options available to consumers. It could allow advocates to compete more vigorously with solicitor advocates for business.

Regulatory costs that may impact competition

4.82 Legal services regulation imposes regulatory costs on authorised providers that have the potential to adversely affect competition.

4.83 Unnecessary costs may create barriers to entry, expansion or innovation in the sector, particularly if the costs fall disproportionately on new entrants or on smaller providers, or do not appropriately target risks. For example:

- solicitors in Scottish legal practices pay a fee for professional indemnity cover, also known as the Master Policy. This splits the costs of a single policy amongst all firms, based on a variety of factors. However, one

²⁶³ See [FoA website](#).

²⁶⁴ At the time of the [Legal Services Market Study](#) there had been a low uptake rate for such direct access. Reasons behind this included low levels of awareness among consumers and barristers deciding not to undertake this type of work because of the administrative burdens.

stakeholder considered that this may be unfair as certain services (such as conveyancing) tend to generate a higher proportion of claims which is not fully reflected in the loading of the premium to those firms.²⁶⁵ Another stakeholder believed this approach may disadvantage small firms.

- The FoA considered that the levy paid by advocates towards the SLCC's costs did not adequately reflect the much smaller proportion of complaints generated by advocates relative to solicitors.²⁶⁶

4.84 More generally, excessive regulatory costs are undesirable in that they are often passed on to the consumer, hence raising the prices consumers pay. Some stakeholders noted concerns that some regulatory costs may be disproportionate or unnecessary, with 63% of respondents to the CMA's solicitor survey identifying excessively costly regulation as a disbenefit of operating in a regulated industry.²⁶⁷ Examples given in discussions with stakeholders included, for solicitors, the requirement to contribute to a Client Protection Fund²⁶⁸ and the bundling of costs for membership activities with regulatory fees. Other concerns related to the length of training (typically around seven years including, for advocates, a period of unpaid pupillage or 'devilling'),²⁶⁹ with suggestions that there may be scope to increase the diversity of routes to qualification.²⁷⁰

4.85 While the CMA has considered the concerns raised about costs, it is not possible to draw any firm conclusions without a detailed analysis requiring cost and benchmark data that are not readily available and is in any case beyond the scope of this research. However, these may be matters that regulators may wish to consider further, for example by reviewing the Master Policy. In this context, the CMA notes ongoing initiatives to consider the

²⁶⁵ CMA discussions with the SLCC. Data published by the SLCC for 2018/19 show that the bulk of complaints are focused on certain segments such as conveyancing (29%), litigation (26%) and will and trusts (19%).

Historical trends reflect a similar story. See SLCC (2019), [Annual report 2018-19](#).

²⁶⁶ Data published by the SLCC for 2018/19 show that 97% of complaints relate to solicitors. See SLCC (2019), [Annual report 2018-19](#).

²⁶⁷ CMA survey. Question E4 asked: 'Thinking about regulation, what are the disbenefit(s) to your firm by operating in a regulated industry?' The top 3 responses were: 'Overly burdensome guidelines and rules' (66%); 'Excessively costly regulation' (63%); and 'Unequally enforced/unlevel playing field' (40%). (This does not add to 100% as respondents were allowed to select more than one response.)

²⁶⁸ The Client Protection Fund, known publicly as the Scottish Solicitor Guarantee Scheme, protects clients who have lost money because of dishonesty of a solicitor or a member of their staff and is paid entirely by solicitor firms. See [LSS website](#).

²⁶⁹ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p16.

²⁷⁰ CMA discussions with stakeholders. See also the Scottish Parliament Justice Committee [Inquiry into Professional Legal Education](#) announced in 2018. An evidence session in summer 2018 focused on whether existing routes to qualifying as a solicitor in Scotland could be improved, in particular to remove barriers to entry to the profession for those from more disadvantaged backgrounds. Its [final report](#) made a number of recommendations aimed at removing such barriers.

regulatory cost burden²⁷¹ and diversify entry.²⁷² The CMA expects regulators of Scottish legal services, as a matter of regulatory best practice, to continue to keep under review measures to ensure that regulatory costs are proportionate and reasonable.

Conclusions on the impact of regulation

- 4.86 The CMA has considered the evidence on the impact regulation may have on competition in the sector, in particular in relation to entry and innovation that could benefit the choice and quality of services available to consumers.
- 4.87 The Robertson Review concluded that ‘the current regulatory system is not sufficiently able to support a forward-looking, dynamic and innovative legal services sector of the future. This includes understanding the role of technology in design and delivery of legal services’.²⁷³
- 4.88 The CMA’s research supports this view, suggesting that regulation has not sufficiently kept pace with the needs of the Scottish legal services sector and with other jurisdictions. The impression is of a sector that remains largely traditional, focused on solicitor provision, and slow to change. There has been a decline in the number of smaller law firms available to consumers and more solicitors are moving in-house. Entry and innovation have been limited and regulatory opportunities to stimulate change by facilitating greater competition have not been taken to match the freedoms seen in some other jurisdictions. There are signs this may be affecting the competitiveness of Scotland as a legal jurisdiction, with indications of a decline in the number of Scottish-headquartered law firms and in the use of Scots law.²⁷⁴
- 4.89 The CMA’s research has focused on the effect of the continued lack of ABSs in Scotland and considered other regulatory restrictions that may distort competition among providers.
- 4.90 On ABSs, the support of Which?, the OFT and the CMA for ABSs over many years, allied with the successful and increasing introduction of similar models

²⁷¹ The LSS undertook research in 2019 to gain a better understanding of the costs of regulatory compliance. Findings of this were not available in time for this report.

²⁷² See, for example, the [LSS website](#). Further, an online diploma in professional legal practice is now available and has been accredited by the LSS. The LSS is also developing an apprenticeship scheme and has established the Lawscot Foundation, which provides bursaries and mentoring support to students from less advantaged backgrounds. For advocates, scholarships are available to offset the costs of devilling for some candidates. The Faculty scholarships aim to increase diversity within the profession. Scholarship funds are raised from a 0.1% levy on members’ earnings. Scholarships are for up to £10,000. Of the 26 individuals expected to undertake a devilling year in 2019/20, ten have received a scholarship from the Faculty.

²⁷³ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p31.

²⁷⁴ Professor Lorne Crerar’s recent piece in the [LSS Journal](#) reflected on this issue at length. Prof. Crerar noted ‘aspects of the review are not just well grounded on best regulatory principles but are necessary to facilitate and support the preservation of Scots law in a modern, evolving Scottish society’.

in a number of legal jurisdictions, continue to back a case that was, indeed, accepted by the Scottish Government and legal sector as far back as 2010 when legislative provisions enabling ABSs were introduced. The ability to implement ABSs already exists, even if some features of the existing scheme appear problematic. Further, our research identified that there remains a broad consensus across stakeholders of the general merits of ABSs in targeting sector growth and innovation to the benefit of consumers.

- 4.91 Our findings therefore suggest that there is no obvious reason to delay the implementation of ABSs in Scotland. Indeed, the lengthy delay that has occurred may have harmed the competitiveness of the wider Scottish legal sector; and further delay will only exacerbate such adverse effects. We recognise that there should be a degree of realism about the extent to which ABSs are likely to transform the sector. However, ABSs can introduce a valuable level of flexibility to the way the sector functions; and individual providers should have the freedom to choose whether to use such models.
- 4.92 Given the clear case for progressing ABSs, the CMA would recommend they are introduced as soon as possible, as provided for in the Legal Services (Scotland) Act 2010. Notwithstanding the imperfections in this legislation that have become apparent in the intervening period, the CMA considers it preferable that it is promptly introduced in its current form to ensure providers are able to benefit from an at least partial lessening of operational restrictions as soon as possible, although we are supportive of the prospect of legislative improvements at a later stage.
- 4.93 In particular, the CMA agrees with the views of the SLCC and others that the 51/49 ownership threshold under the existing legislation is a barrier which may limit entry and participation in the ABS scheme as contemplated. The CMA would support legislative amendments that would remove this restriction and restrictions on the non-profit use of ABSs, as well as any clarificatory amendments that may ease the implementation issues that have been identified while developing a regulatory scheme.
- 4.94 The CMA therefore recommends that:
- the LSS should implement the existing provisions for ABSs in the Legal Services (Scotland) Act 2010, as soon it is authorised by the Scottish Government to do so (**Recommendation 5**); and
 - the Scottish Government should, at the earliest possible opportunity, amend existing legislation (**Recommendation 6**) to:
 - further liberalise the ABS regime in Scotland by removing the requirement for solicitors or other specified regulated professionals to

hold a majority in an ABS, as well as the requirement for an ABS to be operated for a fee, gain or reward; and

- facilitate the effective implementation of ABSs by amending a number of the existing provisions relating to ABSs in the Legal Services (Scotland) 2010 Act.

4.95 Likewise, the CMA considers that other restrictions on competition should be removed where there is no clear case to retain these. In particular, the CMA recommends that:

- The FoA should remove, as soon as possible, restrictions on advocates forming partnerships (whether with other advocates or in ABSs with other legal and/or non-legal professionals) or accepting instructions directly from consumers should they choose to do so (**Recommendation 7**).
- Further steps should be taken by the Lord President's office to promote a level playing field for legal professionals by reducing remaining barriers faced by commercial attorneys (**Recommendation 8**).

4.96 The CMA notes that within the existing regulatory framework, various entities have roles to play in effecting regulatory changes. It therefore also recommends that:

- the regulators should work with the necessary bodies – including the Scottish Government and/or the Lord President where relevant – to promptly seek any consents required by legislation to achieve Recommendations 5 or 7 (**Recommendation 9**); and
- the Scottish Government should take steps necessary to facilitate or enable the recommendations above, working with the regulators and professions as necessary to achieve this (**Recommendation 10**).

4.97 The CMA believes its recommendations will benefit consumers and the public interest; accordingly it would similarly encourage the Court of Session and/or the Lord President to support them.

5. Independence

Introduction

5.1 The primary recommendation of the Robertson Review was that:

‘There should be a single regulator for all providers of legal services in Scotland. It should be independent of both government and those it regulates. It should be responsible for the whole system of regulation including entry, standards and monitoring, complaints and redress. Regulation should cover individuals, entities and activities and the single regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland.’²⁷⁵

5.2 The CMA supported this recommendation for independent regulation when it responded to the findings of the Robertson Review in June 2019.²⁷⁶ In our response, which builds on our assessment in the Legal Services Market Study, we stated that we consider it a key principle of better regulation that a regulator should be independent of those whom it regulates.

5.3 The Robertson Review’s recommendation would reshape the existing regulatory landscape for the provision of legal services in Scotland, where it has long been the case that the regulatory function is undertaken by the bodies who also represent the main authorised legal providers subject to regulation – notably the LSS (representing solicitors and solicitor advocates) and the FoA (representing advocates).²⁷⁷

5.4 As acknowledged by the Robertson Review, and illustrated by the responses it has elicited, a range of views exist as to how problematic, in practice, the lack of regulatory independence is in the Scottish legal services sector²⁷⁸ – and therefore whether the recommendation is sufficiently justified. This reflects debate on the degree of influence it is appropriate for representative bodies to have on regulation, the extent of the benefits of independent regulation and the potential costs of regulatory reform.

5.5 In order to add constructively to this debate, this chapter presents an assessment of the merits of independent regulation in Scotland – taking into

²⁷⁵ See Robertson, E (2018) [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p4.

²⁷⁶ See the [CMA Response](#), paragraph 10, p5.

²⁷⁷ The ACA is another regulatory body, regulating commercial attorneys.

²⁷⁸ This is similar to the evidence we received in our [Legal Services Market Study](#): ‘we received mixed views on the extent to which regulatory independence is in practice a problem under the current arrangements whereby a number of approved regulators have established separate regulatory arms.’ See paragraph 5.146, p192.

account the principles that apply for effective regulation and informed by our discussions with a wide range of organisations and individuals in the course of our research.

- 5.6 We note that the focus of this chapter is on the merits of regulatory independence, in the sense that regulation should be independent of those it regulates. This is distinct from the objective that legal services should operate independently of government in order to uphold the principle that every person is subject to the law, including lawmakers. Often referred to as the ‘rule of law’, this principle, in the context of the judiciary, ensures that the legal sector can make decisions in the public interest free from actual, or perceived, interference from government institutions.²⁷⁹
- 5.7 We do not question the importance of maintaining independence of legal decision-making from Government involvement. However, in our view, maintaining this independence does not require regulation to be overseen by the existing professional bodies or weaken the arguments for separating out the regulatory and representative functions. There are many successful examples of organisations established as public bodies that effectively operate independently of government while remaining open to public scrutiny and hence accountability.²⁸⁰

Better Regulation Principles

- 5.8 The CMA considers that an optimal regulatory framework would have the following characteristics: it would have a clear overall objective, and be independent, targeted, flexible, proportionate and clear in scope, and enforceable.²⁸¹
- 5.9 These characteristics align with the better regulation principles set out in the Regulatory Reform (Scotland) Act 2014.²⁸² The principles defined by the Act require regulation to be: transparent, accountable,²⁸³ proportionate, consistent

²⁷⁹ See also footnote 38.

²⁸⁰ As illustration, there are many instances of bodies (the CMA included) that are funded by the public purse but have a remit to act independently of government. Obligations laid on bodies by government (such as reporting obligations) can be for information only, to ensure transparency and accountability; and a public appointments processes can provide assurance that appropriate criteria to avoid bias are being observed. There is also a recognition that government can provide some strategic direction with interfering with independence. The SLCC is an example of a body that already operates independently both of the profession and of government. The current system in England and Wales, whereby the LSB reports to Parliament, also illustrates that a regulator can operate in such a system whilst maintaining the primacy of the rule of law. The LSB is accountable to Parliament through the Lord Chancellor and is sponsored by the MoJ. See [LSB Annual Report and Accounts 2016/17](#).

²⁸¹ See CMA (2016), [Legal Services Market Study](#), Chapter 6.

²⁸² See [Regulatory Reform \(Scotland\) Act 2014, s1\(6\)\(3\)](#).

²⁸³ 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.

and targeted only where needed.²⁸⁴ These principles guide the regulators' code of practice published by the Scottish Government.²⁸⁵

- 5.10 As noted in the Robertson Review, it 'is evident that models in other professions where there is a clear split between the roles of the regulator and the professional body or bodies deliver best practice in regulation'²⁸⁶ – citing, for example, the medical profession.
- 5.11 This conclusion derives from the fundamental tension between the aims of these roles. A representative body principally seeks to promote professional interests whilst a regulator seeks to protect the interests of consumers and the wider public. They therefore have distinctly different functions and incentives. Regulatory objectives to maintain appropriate standards, protect consumers and open up the sector to competition and innovation do not necessarily align with members' interests.
- 5.12 Where these interests are opposed, there is clear potential for such tension to lead to sub-optimal regulatory outcomes. For example, a professional body regulating the sector is likely to be less open to new business models that may increase competition from outside the profession. It may also focus on regulating quality by setting a high bar to entry. While this benefits consumers by protecting quality, too high a bar may unduly deter competition that is also beneficial to consumers and may raise costs that are passed on to consumers in the form of higher prices. A professional body is likely to find it challenging to strike an appropriate balance between the two objectives.²⁸⁷
- 5.13 Additionally, where the same entity both represents and regulates those in the sector, this can lead to a lack of transparency about the nature of its activities. For example, it may not be clear for a particular matter which function is being exercised, what costs attach, the views of the regulator (as distinct from the views of the representative body), or the influence of the profession on the decision-making process. Such a lack of transparency has the following adverse effects:
- it further compounds the impact of any conflicts of interests that arise between a body's regulatory and representative functions, by creating

²⁸⁴ See Scottish Government, [Better Regulation](#).

²⁸⁵ See [The Scottish Regulators' Code of Practice](#), paragraph 2. The code reiterates the need for regulation to have sufficient regard to the adverse impact on consumers and communities and to protect public health and safety.

²⁸⁶ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p32.

²⁸⁷ The Robertson Review noted that: 'Encouraging and supporting open competition within that dual role [providing both regulatory and representative functions] is also challenging; regulatory bodies should be expected to encourage open competition, subject to maintaining standards, and that is a complex area for bodies which perform both representative and regulatory functions', See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p32.

uncertainty regarding the extent to which such conflicts are, in practice, affecting regulatory outcomes; and

- it prevents others from effectively holding a regulator accountable for the performance of its regulatory objectives – thus failing to meet key elements of the better regulation principles outlined in paragraph 5.9, which promote transparency and accountability to consumers and the public.

5.14 The CMA takes the view, like Robertson,²⁸⁸ that a regulatory framework in which the regulatory and representative roles operate wholly independently of each other is the best approach to ensure:

- a clear regulatory role and objectives, leading to greater transparency and accountability;
- consistent standards across entry requirements, ethics, monitoring, complaints and redress, set in a way that is targeted and proportionate to the consumer interest;
- more open competition; and
- increased public trust in the sector.

The structure of the regulatory framework in Scotland

5.15 In Scotland, the main regulators of legal services providers are also representative bodies. As discussed above, this causes an inherent tension between their responsibility to regulate in the consumer interest and to effectively represent the interest of their members. Further, as outlined below,²⁸⁹ such potential for conflict risks compromising public trust in the sector. In this section, we explore in further detail the scope for tensions to arise in the current regulatory framework. In the section that follows, we evaluate the evidence showing the impact of a lack of regulatory independence in Scotland.

5.16 Concerns about the arrangement in Scotland have previously been recognised, leading in 2010²⁹⁰ to the introduction of measures to promote a

²⁸⁸ Robertson considered that in principle such an approach would represent best practice and be consistent with internationally recognised better regulation principles and standards. See Robertson, E (2018), *Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland*, p32.

²⁸⁹ See paragraph 5.58, which outlines the results from a consumer survey undertaken by the SLCC.

²⁹⁰ See *Legal Services (Scotland) Act 2010, provision 133(3A, B, C)*.

degree of separation between the representative and regulatory functions of the LSS.

- Within the LSS, the regulation of solicitors is overseen by the Regulatory Committee, which is a committee of the Council of the LSS that exercises the Council's regulatory functions as set out in Section 3F of the Solicitors (Scotland) Act 1980.²⁹¹ The Regulatory Committee is required to have equal lay and professional representation and its chair must be a lay person selected by the members of the Committee.
- The Regulatory Committee's remit is to set, maintain and enforce standards in the interests of the public and the profession. Within the LSS, only the Regulatory Committee has the power to propose (subject to the approval of the Lord President)²⁹² amendments to the rules by which members and practising solicitors must abide. While the Council is consulted on proposed rule changes, their views are advisory and not binding on the Regulatory Committee. The SLCC is also consulted on rule changes where relevant.²⁹³
- The Legal Services (Scotland) Act 2010 includes a provision which provides some statutory safeguards against undue interference from the Council in the Regulatory Committee's work.²⁹⁴

5.17 While these measures are welcome in promoting impartiality, in practice certain limitations on the degree of actual independence, and transparency, of decision making by the Regulatory Committee remain.²⁹⁵

- Appointments to the Committee are made by the LSS Council.²⁹⁶
- Funding is provided via the Council and the process for setting and approving the funds for regulatory work lacks transparency.

²⁹¹ See [Solicitors \(Scotland\) Act 1980, section 3F](#).

²⁹² See [Solicitors \(Scotland\) Act 1980, section 34](#).

²⁹³ See CMA correspondence with the LSS. Also see the [LSS website](#), 'The Regulatory Committee is responsible for the oversight of all the Society's regulatory functions and consists of five solicitor and five non-solicitor members. It must be chaired by a non-solicitor member, with the Committee responsible for choosing its chairperson. The Regulatory Committee's remit is to set, maintain and enforce standards in the interests of the public and the profession'.

²⁹⁴ See [Legal Services \(Scotland\) Act 2010, s133\(2\)\(3\)](#). This stipulates that: 'the Council must not – exercise their regulatory functions through any other means [than a regulatory committee] or interfere unduly in the regulatory committee's business'.

²⁹⁵ This is discussed in more detail at paragraphs 5.35-5.42, which set out concerns about the transparency of the regulatory decision-making process.

²⁹⁶ See [Legal Services \(Scotland\) Act 2010, provision 133\(3A, B and C\)](#).

- The Committee remains accountable to the Council.²⁹⁷ For example, ‘the Regulatory Committee must make regular reports to the Council on regulatory matters’.²⁹⁸ Such an arrangement, with members being able to sit on both the Committee and Council simultaneously,²⁹⁹ appears to give the Council a monitoring function and strong influence.³⁰⁰
- While solicitor rules are set by the Regulatory Committee, the actual administration of these rules is carried out by officers of the LSS under an Executive Director of Regulation answerable to the CEO.

5.18 Given the significant involvement of the profession at different stages of the regulatory process (and on the Regulatory Committee), we conclude that the potential for overlap between regulatory and representative functions is not eliminated and remains considerable. The current regulatory structure of the LSS thus provides opportunities for both actual and perceived conflicts of interest to arise.

5.19 Moreover, in principle it is not clear that any form of internal separation would be able to deliver proper independence because separation alone cannot resolve the intrinsic conflict of interest between representative and regulatory functions. For example, in England and Wales, where a stricter form of partition is already in place with functional but not full structural separation within the frontline regulators, problems still arise.

- Conflicts of interest remain, for example, in funding, where the Law Society (which represents the solicitor profession) remains responsible for funding the Solicitors Regulation Authority (SRA) which was established to be a functionally separate regulatory arm within the organisation.
- The LSB (which oversees the frontline regulators) has also previously found breaches of internal governance rules by the Law Society and Bar Council (which represents advocates),³⁰¹ leading to the issuance of revised internal governance rules and statutory guidance effective July

²⁹⁷ As stated in the [Regulatory Committee response to the Robertson Review](#), ‘the Regulatory Committee is accountable to, yet is independent of, the Law Society Council.’, p2

²⁹⁸ See [The Constitution of the LSS](#), paragraph 23, p11.

²⁹⁹ See the [LSS website](#), ‘[Council members must] serve on one committee or working party throughout each three year term as a Council member’.

³⁰⁰ See the [Regulatory Committee response to The Robertson Review](#), ‘In its short life there have been numerous instances where the committee has taken a different view from its sub committees and/or the Law Society Council. This has led to debate, revision and adjustment of positions within the Society (including our own), as all perspectives are considered’, p2.

³⁰¹ For example, in England and Wales, investigations by the LSB have [found the Law Society and Bar Council to have breached internal governance rules](#).

2019 aimed at enhancing the separation and independence of regulatory functions within the current legislative framework.³⁰²

- 5.20 The above experiences illustrate that any incomplete separation will still create internal governance issues that could affect regulatory outcomes. In England and Wales this led to a recommendation by the CMA for the MoJ to undertake the review of the independence of regulators that it had planned to carry out. In its response to the Legal Services Market Study,³⁰³ the MoJ set out its view that it was not the right time for a review.³⁰⁴ In the meantime, an independent review of the legal services regulatory framework in England and Wales, led by Professor Stephen Mayson, is ongoing.³⁰⁵ The interim report of this independent review (the 'IRLSR Interim Report') noted that, in respect of England and Wales: 'the nature of the separation and independence of regulatory functions from representative activities remains unsatisfactory... [making] the desirable cooperation and collaboration between regulatory and representative functions problematic to achieve.'³⁰⁶
- 5.21 Similar concerns apply to the regulation of advocates as carried out by the FoA. The FoA has regulatory responsibilities which are delegated to it by the Court of Session and operates numerous sub-committees that deal with different elements of regulation. The FoA issues a professional conduct guide which members are expected to adhere to³⁰⁷ and in relation to matters of discipline in respect of the conduct of advocates, issues a set of Disciplinary Rules.³⁰⁸ As the functions of the FoA are performed by both lay persons and advocates, the profession is closely involved in all aspects of its work and there do not appear to be specific safeguards against its views dominating on regulatory matters, for example, to allow for lay opinions to have primacy in the event of conflicting views on such issues. Moreover, there appears to be a distinct lack of transparency about the mechanisms of regulation within the FoA, for example in respect of governance and how decisions are made.

³⁰² It is also intended that the revised internal governance rules and guidance will provide more clarity to decrease the number of independence-related disputes and making the rules readily enforceable for speedier resolution of issues. See [LSB decision on revised IGR and supporting Guidance following November 2018 and May 2019 consultations](#).

³⁰³ See [MoJ response to the Legal Services Market Study](#).

³⁰⁴ This was on the basis that the LSB was carrying out work on the Internal Governance Rules between the SRA and the Law Society and wanted to see what more could be done within the existing framework.

³⁰⁵ The Centre for Ethics and Law in the UCL Faculty of Laws is undertaking a review of the current regulatory framework for legal services, led by Honorary Professor Stephen Mayson. The independent review is intended in part to explore the longer-term and related issues raised by the CMA's Legal Services Market Study and its recommendations. See the website of the [Independent Review of Legal Services Regulation](#).

³⁰⁶ See the [IRLSR Interim Report](#), p15.

³⁰⁷ See FoA [Guide to the Professional Conduct of Advocates](#).

³⁰⁸ See FoA [Disciplinary Rules 2019](#).

Assessing the current regulatory framework

- 5.22 This section sets out the CMA's assessment of the impact of the current lack of regulatory independence in Scotland.
- 5.23 As part of our research, the CMA discussed the need for independent regulation with stakeholders. There were mixed views from stakeholders as to whether the current system adequately delivers effective regulation in the Scottish legal services sector and whether an independent regulator would improve sector outcomes. These views appeared largely aligned with expected motivations towards change, in that those affiliated with the professions were more in favour of regulation remaining with the profession than others. Generally, consumer bodies were in favour of introducing a greater degree of regulatory independence, while a consumer survey commissioned by the SLCC (see paragraph 5.58) also showed strong support among the public for independent regulation. As to be expected, the regulatory bodies were largely against an independent regulator or unconvinced of the extent of its benefits, and individual law firms offered a range of perspectives, but there was agreement that some change was needed.
- 5.24 Those who did identify advantages of independent regulation considered that this had the potential to benefit both consumers and providers themselves.
- Stakeholders noted that it would provide greater certainty through increased transparency and accountability both to legal services providers and consumers, as it can be difficult to distinguish between regulatory and representative activities within the current model.
 - They noted that independent regulation could benefit competition which could, in turn, enhance consumer choice.
 - It was also noted that independent regulation would improve public trust in the legal sector, with an acknowledgment that the current system is perceived by consumers as biased towards providers.
- 5.25 To illustrate these benefits, stakeholders identified various instances where regulatory and representative interests are in conflict, highlighting examples where regulatory outcomes in the public interest may have been compromised as a result of such conflicts.
- 5.26 In this section, we first explore the concerns expressed by stakeholders regarding the current regulatory structure and then articulate the rationale for the introduction of independent regulation.

5.27 We then consider the views put to us in support of retaining the existing regulatory structure.

Evidence supporting the need for independent regulation

5.28 The following paragraphs set out the evidence gathered from stakeholders regarding concerns with the existing system in which representative bodies also regulate their members. These concerns focused on:

- competing, hence unclear, organisational objectives;
- a lack of transparency and accountability;
- examples of conflicts arising;
- the impact on regulatory effectiveness; and
- the impact on public perception and trust.

Competing objectives

5.29 Removing the representative functions would enable an independent regulator to benefit from clearer and more focused objectives, which (as set out in paragraph 5.8) the CMA considers to be a core feature of good practice allowing for effective regulation.

5.30 Where regulatory and representative functions are combined in a single body, it is unclear how that body can successfully meet the competing objectives of both functions, or how it should prioritise when these objectives clash.

5.31 As an illustration, the LSS as a combined regulator and representative body has statutory regulatory objectives to, among other matters:³⁰⁹

- protect and promote the interests of consumers, and the public interest generally;
- promote competition in the provision of legal services;
- promote an independent, strong, varied and effective legal profession.

5.32 Among these objectives, there is arguably a tension between the consumer and competition objectives and the objective to promote the legal profession when the LSS' representative duties are considered. It is not clear how the

³⁰⁹ See [Legal Services \(Scotland\) Act 2010, s1](#).

LSS is intended to balance these objectives in cases where a change might be good for consumers but less good for the profession.³¹⁰ It is also not clear whether the LSS is meant to be protecting legal professionals in general, or its own members in particular. The Regulatory Committee, for instance, has indicated to the CMA that although there are occasions where consideration of competition may feature as part of a wider piece of work, for example the recent price transparency guidance³¹¹ and plans to monitor its impact, it is not the Committee's function to identify or tackle any perceived barrier to competition in the wider Scottish legal sector.

5.33 A representative body is, by its nature, more likely to take into account the interests of the profession in reconciling the above tensions than a regulatory body. Indeed, this appears to be reflected in the LSS' approach to its regulatory functions.

- The SLCC, for example, noted that the LSS' outreach on regulatory issues tends to focus on gathering and communicating the views of the profession and the LSS carries out very little research on consumer issues.³¹² The Robertson Review also noted the general lack of consumer research in the sector.³¹³ Which? has also highlighted concerns that the LSS does not consult as comprehensively as it should. The LSS' activities thus appear to take limited account of consumer concerns.
- A similar example noted by the CMA pertains to the price transparency guidance recently issued by the LSS. It is not clear from its description of the consultation it carried out whether the LSS had consulted with any consumer bodies on a draft version of the guidance apart from the Society of Chief Officers of Trading Standards (SCOTS).³¹⁴ The LSS has indicated to the CMA its intentions to conduct a formal review in one year's time. It is

³¹⁰ Similar issues are observed in relation to the objects of the LSS as specified in s1(2) of the Solicitors (Scotland) Act 1980. These objects include both the promotion of (a) the interests of the solicitors' profession in Scotland; and (b) the interests of the public in relation to that profession. See [Solicitors \(Scotland\) Act 1980](#).

³¹¹ See LSS (2020), [New guidance aims to improve price transparency in legal services](#).

³¹² The [SLCC press release](#) for its consumer survey noted that the fact research like this has not been done previously 'perhaps emphasises the need for a move from the self-regulatory model where lawyers are regularly consulted and allowed to vote on many issues, but the public's interest is often forgotten, with no major research in the last couple of decades'.

³¹³ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p11. The CMA also notes that this lack of research appears longstanding: as far back as 2006, the Scottish Executive Working Group observed, in particular, 'a lack of evidence on the likely effects of a change in policy or practice on specific issues, including the likely effects on consumers'. See Scottish Executive (2006), [Report by the Research Working Group on the Legal Services Market in Scotland](#), paragraph 4.

³¹⁴ See [LSS Price Transparency Q&A](#), 'The Law Society carried out a consultation with its members on price transparency in 2018. The Regulatory Committee also sought views from members of the Society's policy sub-committees, who work across a wide range of legal practice areas, and stakeholder organisations, including the Society of Chief Officers of Trading Standards in Scotland in developing the guidance and accompanying pricing examples.', paragraph 4.

unclear to the CMA how its review will take into account consumer feedback.

- Further, the CMA notes that many of the LSS publications that may be relevant to the wider public in light of its wider regulatory function (such as its annual plan) appear to be aimed at its members rather than drafted to reflect its broader responsibilities.³¹⁵

5.34 Similar regulatory objectives, and thus similar concerns, apply to the FoA. Indeed, given that advocates do not interact directly with consumers, there is even less evidence of a consumer focus in its engagement and published materials.

Lack of transparency and accountability

5.35 As noted in paragraph 5.17, there are concerns about a lack of transparency in the carrying out of regulatory functions and how decisions are made by the LSS and FoA. These concerns are described in more detail in the following paragraphs.

5.36 First, a number of stakeholders³¹⁶ noted that there is little transparency regarding the regulatory activities undertaken and their prioritisation. The CMA notes for example:

- the LSS Regulatory Committee does not publish a standalone annual plan explaining and justifying its intended activities and outcomes. Although some detail is provided within the wider LSS annual plan, such information is limited and as noted in paragraph 5.33, the LSS annual plan itself appears to be targeted at members rather than consumers or the wider public in line with its regulatory objectives;³¹⁷
- the FoA exhibits a similar lack of transparency. Whilst it publishes a copy of the disciplinary rules for advocates on its website, there is no reference to annual regulatory priorities or details of its regulatory work; and
- for both regulators, there is limited information on how funding for regulatory activities is allocated and how such activities are prioritised relative to other needs relating to representation.

³¹⁵ See [LSS Annual Plan](#)

³¹⁶ CMA discussions with Harper Macleod, with the SLCC and with a sector expert.

³¹⁷ See the [LSS Annual plan 2019/20](#).

- 5.37 This lack of transparency on the organisation's activities makes it difficult to judge how well regulatory objectives are being met, for example in terms of factoring in the consumer voice and interest.
- 5.38 Similar concerns were raised about cost transparency. While the dual functions of the LSS and the FoA may allow for some cost synergies, it is difficult to distinguish the standalone costs of regulation. While the LSS does publish some direct costs of regulation in its annual accounts,³¹⁸ it can be challenging to allocate shared costs to different functions within an organisation. By contrast, the FoA does not appear to disclose any such information. The following observations have been made about a lack of cost transparency:
- the Robertson Review sought to quantify regulatory costs and found that comprehensive information on the total cost of the current system is not publicly available;³¹⁹ and
 - a number of stakeholders³²⁰ concurred that it is difficult to understand what the actual costs of regulation currently are, compared to the costs of representation. Some said that it is often unclear how resource is prioritised between regulatory and representative functions or what regulatory enforcement and promotion the LSS has undertaken. An example given was that the cost of prosecution of conduct complaints against solicitors is not separately itemised in the LSS' accounts, so cannot be accurately assessed or challenged.³²¹
- 5.39 The regulatory decision-making process is also opaque. While minutes of the LSS Council meetings are published, the LSS Regulatory Committee and the FoA do not publish similar minutes. Further, the Regulatory Committee exercises its regulatory function through delegated powers to individual regulatory sub-committees and it is those committees that make decisions and recommendations.³²² Consultation responses are also not regularly published. For example, the views submitted to the LSS' 2018 consultation³²³ on price transparency were not communicated, which makes it difficult to properly assess the appropriateness of the guidance issued as a result of this work.

³¹⁸ See [LSS Accounts 2018](#). This states regulation accounted for 25% (£2,850,000) of the LSS' operating expenditure in 2018, however regulatory activities are not broken down in this report.

³¹⁹ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p47. This was also because of the different reporting systems and periods used by the different regulators.

³²⁰ CMA discussions with stakeholders, including the SLCC and Harper Macleod.

³²¹ CMA discussions with Harper Macleod.

³²² CMA correspondence with the LSS.

³²³ See [LSS Price Transparency consultation](#).

5.40 Additionally, limited information is available on the oversight activities undertaken by the Lord President and the basis for such oversight decisions. For example:

- solicitor rules can only take effect if approved by the Lord President after considering any objections the Lord President thinks relevant. It is unclear how this discretion is applied in practice and these objections are not disclosed to public scrutiny. Similarly, the FoA's rules are of no effect unless approved by the Lord President (and may not be revoked without the Lord President's approval); however, the basis on which such approval decisions are made is likewise unclear.

5.41 Moreover, the CMA notes that, unlike other regulators, neither the LSS, nor the FoA, is subject to the Freedom of Information (Scotland) Act 2002, even though there is a clear public interest component in their activities.

5.42 In summary, there appears to be a lack of detailed information on regulatory activities, costs and governance, which prevents each regulator from being effectively held to account and challenged in regard to the fulfilment of its regulatory duties. Splitting the regulatory and representative functions into separate organisations would create the scope for greater clarity on the operations and performance relevant to each function and make it easier to hold the regulator to account.

Actual conflicts of interest that may adversely impact the public interest

5.43 As discussed in paragraphs 5.11 and 5.12, the interests of the regulator and representative bodies may often be opposed. When a regulator is also responsible for representative functions, it is necessarily conflicted when determining its priorities in situations where no outcome is possible that will fully serve the interests of both its functions. An example of this is the provision of legal aid services, where consumer and provider interests must be balanced, given that a higher cap on legal aid pricing benefits providers but reduces the number of consumers who can benefit. Such conflicts can lead to regulatory outcomes that are suboptimal for the consumer, or even if adequately managed to avoid such outcomes, can create a perception of potential bias that is harmful to public confidence and hence adversely impacts public engagement with the sector.

5.44 Our research has identified various practical instances where a potential for conflict arose in the sector, with concerns about the extent of influence of the representative function on issues that would have an impact on consumers. Some of the stakeholders we engaged with during our research noted that the

current structure creates difficulty in determining whose interests are being addressed in such instances and may hinder effective regulation.

5.45 Some of these examples related to the regulatory position taken on various market-opening measures. As noted in paragraphs 5.11 and 5.12, a body with dual representative and regulatory functions may face tensions in advocating for pro-competitive measures. The failure to introduce ABSs in Scotland to date was an example raised:

- Some stakeholders noted that there had been substantial objections when the question of ABSs was first introduced, and that the LSS did not initially appear supportive of the reforms as it was concerned about the impact of widening choice and competition in the sector.
- Furthermore, as set out in Chapter 4, the FoA has consistently and prominently opposed the ABS model extending to advocates, despite a lack of evidence that its introduction in other jurisdictions has been detrimental in this regard.

5.46 In some cases, the underlying conflict of interest has exposed the depth of the division between the two functions. For example, the SLCC highlighted that the regulatory and representative arms of the LSS have been publicly split on their views regarding the Scottish Solicitors' Discipline Tribunal consultation on the appropriate standard of proof in conduct complaints cases, with the Regulatory Committee arguing for a lower bar to successful prosecution while the LSS Council sought to preserve the status quo. Whilst this demonstrates that there are issues that the Regulatory Committee is seeking reform on, the SLCC deemed the internal split of views problematic. It was not clear that the Council supported both the response of the Regulatory Committee (the LSS acting as regulator) and the membership view (the LSS acting as a representative and trade body), rather the Council, as a senior organ of the governance structure, appeared to 'trump' the regulatory function with the representative one. The SLCC felt that not only did this demonstrate the conflicts of interest that can arise when a regulator is also responsible for representing the profession, but also that it is difficult to engage with a body which is internally split. Furthermore, the SLCC noted that this particular internal division may have disadvantaged consumers by holding back a change to the standard of proof. Such a change would benefit consumers as it would increase the proportion of conduct charges that are taken forward to prosecution and in some cases significantly reduce the length of time required for a successful prosecution.

5.47 Our research also noted some concerns around the LSS' wider activities in its role as a representative body. Some stakeholders noted examples of how these activities may conflict with the LSS' role as a regulator:

- A sector expert noted that the LSS accredits the firms that provide training while also being a training provider itself; and
- A stakeholder highlighted that the LSS often promotes certain providers of commercial services to the sector and some of the commercial suppliers provide services that relate to regulatory compliance and that is an uncomfortable dynamic.

5.48 The SLCC gave examples of conflicts of interest that led more directly to adverse outcomes for consumers.

- The SLCC highlighted recent changes to the Master Policy insurance scheme as an example of decisions that prioritise the interests of the profession over consumers. The changes allowed members to opt for a high excess in exchange for lower premiums, which could put their ability to compensate consumers in the event of a claim at risk. As such, this would pose a significant risk to consumer redress. The SLCC considered that this change reflects organisational conflicts in how the LSS achieves its regulatory objectives: although the SLCC views the Master Policy as an important consumer protection, hence regulatory, matter, it is dealt with by the LSS in its representative capacity.
- The SLCC noted that the LSS does not allow others to access the regulatory data it collects, some of which could be useful in monitoring the sector and alerting consumers or other relevant bodies to potential risks. Thus, the LSS may withhold information in order to protect the privacy of members, or to benefit commercially from exclusive access to such information, when it could be in the public interest for it to be disclosed.
- The SLCC also cited the case of Ross Harper & Co,³²⁴ where serious financial concerns could not be publicised to consumers in a timely manner due to a statutory restriction requiring the consent of the provider to publication.³²⁵ The SLCC explained that the LSS had lobbied for this restriction at the time the Act was introduced in order to preserve its members' reputations even where complaints were upheld. This example

³²⁴ Ross Harper and Co was shut down in 2012. Four partners were struck off and two more censured.

³²⁵ Section 13 of the Legal Profession and Legal Aid (Scotland) Act 2007 prevents the SLCC from publishing names of firms or practitioners when publishing reports of decisions made unless permission is given by the firm or practitioner. While there is an exception to this in the legislation if an individual case is 'exceptional', the SLCC explained this criterion is not readily satisfied as in practice it would more usually be possible to observe an exceptional pattern of complaints than for an isolated case to exhibit truly exceptional features. See [Legal Profession and Legal Aid \(Scotland\) Act 2007](#).

demonstrates the tensions the LSS faces in seeking to protect both consumers and its members under its dual regulatory and representative functions, as the protection of one may often be at the expense of the other.

5.49 Concerns regarding potential conflicts in handling conduct complaints under the current structure have also been raised:

- As noted in paragraph 5.46, the LSS Council and the Regulatory Committee had conflicting views about what the standard of proof for conduct complaints should be. The current requirement for proof to be ‘beyond reasonable doubt’ puts the interests of the profession before those of the consumer because it has the potential to result in fewer successful prosecutions leading to greater risk to consumers.
- Harper Macleod noted that under the current regulatory system, tier 1 conduct complaints are prosecuted by peers of the solicitor facing the complaint who, as competitors of the subject of the complaint, cannot therefore be considered wholly impartial.
- The FoA noted that the small size of the Bar in Scotland may cause advocates to be concerned about the potential for conflicts when assessing a complaint against a fellow member. The FoA believed it may be useful for the Council to provide guidance on this in order to avoid potential delays in settling such cases.

Impact on regulatory effectiveness

5.50 The preceding section illustrated instances where a lack of independence has affected the regulators’ regulatory incentives and may have prevented or limited change that could benefit consumers.

5.51 These concerns are not new. 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 as recommended by Which? and supported by the OFT.³²⁶ Indeed, as described in Chapter 4, when opportunities have been presented for modernisation and

³²⁶ The Which? super-complaint recommended that a new body be established to put consumer interest at the heart of regulation. The OFT supported the notion that regulation should be separate to both the profession and the Government. See Which? (2007), [Super-complaint: Restrictions on business structures and direct access in the Scottish legal profession](#).

ensuring more consumer-focused regulation, limited progress has been made in the Scottish legal services sector.

- 5.52 It was suggested by some stakeholders that an independent regulator would have been more willing to drive forward competition-focused measures such as the use of ABSs,³²⁷ place greater importance on the consumer perspective³²⁸ and, in general, be more open to change and innovation. The SLCC, for example, has previously noted that the emphasis in the current system on professional regulation (of individuals) has held regulators back from focusing on consumer needs and the market-wide regulation that would best serve such needs.³²⁹
- 5.53 This view is in line with the findings set out in Chapter 4, that a profession-driven approach and regulation which lacks a wider market focus may be holding back the competitiveness of the sector to the detriment of consumers, providers and the wider Scottish economy to which the legal sector is an important contributor. Professor Crerar, for instance, has stated that to remedy a decline in Scots law all providers of legal services in Scotland should be ‘operating on a level playing field, with the regulator being independent of all the participants. It simply cannot be the Law Society of Scotland, which is also representative of but one of those providers – “solicitors”. [...] It does not mean that the Law Society of Scotland is not an exemplary regulator, but rather that the world of legal services has changed [...] and we must adapt our regulatory regime to cope’.³³⁰
- 5.54 While Chapter 4 focused on the impact of regulation on competition, opportunities to improve regulatory effectiveness in relation to consumer protection also exist and might be more likely to be pursued by an independent regulator.
- The SLCC identified opportunities to use data (including complaints data and market intelligence) more effectively to assess and manage risk; and opportunities to better target regulation to activity risk. It noted, for example, that conveyancing accounted for 29% of complaints in 2014/15 and well over 70% of items paid or reserved on the Master Policy in 2015 and is an element of the cost of the Client Guarantee Fund.³³¹ While there may be a range of factors driving these outcomes, the data suggests that

³²⁷ See paragraph 5.45.

³²⁸ See paragraph 5.33.

³²⁹ See SLCC (2016), [#Reimagine Regulation – Priorities for a consultation on legal services regulation](#), p9.

³³⁰ See Crerar, L (2020), [Robertson and the case for change](#).

³³¹ See SLCC (2016), [#Reimagine Regulation – priorities for a consultation on legal services regulation](#), pp7, 10-11.

regulation could usefully be targeted at these services to improve outcomes for consumers.

- The Robertson Review likewise noted that an independent regulator could establish a risk-based approach and a culture of encouraging providers to see complaints as an opportunity to learn and improve.³³²

- 5.55 The CMA notes that it may be easier for an independent regulator to take an approach that differentiates between providers on the basis of different risks, compared to the current position where the LSS can be expected to face pressures to represent the interests of all of its members on an equitable basis.
- 5.56 On an operational level, a dual regulatory and representative function can also dilute regulatory effectiveness by causing confusion for consumers and providers alike, as neither can be sure whose interests are being represented or prioritised at any given time.³³³ This makes it difficult for parties to engage effectively with the body in question, since it is unclear what its perspective will be and how any information exchanged will be communicated and used within the organisation. In particular, the effect on consumers is considered in more detail below.

Impact on public perception and trust

- 5.57 The CMA's research considered the impact of a lack of independent regulation on public trust in the objectivity of the justice system, taking into account evidence from a consumer survey commissioned by the SLCC and stakeholders' views.
- 5.58 The SLCC has conducted a consumer survey with the aim of understanding consumers' perspectives about how legal services are regulated:³³⁴
- Most consumers (61% of those responding to the SLCC survey) felt that it was unacceptable for an organisation to both regulate and represent legal services providers.³³⁵ Only 19% of consumers felt this was acceptable.³³⁶
 - Consumers were concerned that a representative body might not handle complaints impartially:

³³² See Robertson, E (2018), *Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland*, pp42-43.

³³³ For example, the split opinion of the LSS on the matter of standard of proof discussed in paragraph 5.46.

³³⁴ See SLCC Consumer Survey [press release](#).

³³⁵ Unpublished further analysis from the SLCC Consumer Survey.

³³⁶ See SLCC Consumer Survey [press release](#).

- 55% of consumers felt that they would be worried about raising a complaint against a lawyer.³³⁷ Many raised concerns about impartiality and fairness when asked about what worried them in such a system.
- Overall, only 21% of consumers felt confident that their complaint could be dealt with fairly by an organisation that both represented and regulated solicitors.³³⁸

5.59 These findings support the views expressed to the CMA that the existing regulatory framework does not inspire confidence in the integrity of the legal system and may deter consumers from seeking redress when things go wrong.

5.60 The SLCC told us that the survey findings above are consistent with the feedback it receives from consumers about the involvement of the representative bodies in the complaints process. Consumers often perceive the interaction between the SLCC and the LSS and FoA in categorising their complaint as indicative of a bias towards the professions when handling complaints.

5.61 Likewise, other stakeholders have highlighted concerns about the public perception of the fairness and independence of regulatory decisions which they regard to be a key issue with the current regulatory system.

- One sector expert noted in particular the inherent importance that a regulatory system is perceived as independent and fair by everyone, both consumers and solicitors, and considered that the current model did not provide this.
- The SLCC Consumer Panel stated concerns about the dual role of professional bodies in regulating and representing their members. It reflected that it is not possible to exercise both roles impartially and noted consumer feedback that this can cause mistrust on the part of complainants.³³⁹
- Some stakeholders who were in favour of independent regulation in the sector,³⁴⁰ noted that independent regulation would facilitate greater transparency, allowing consumers to feel more confident about raising complaints against legal services providers and obtaining redress.

³³⁷ Unpublished further analysis from the SLCC Consumer Survey.

³³⁸ See SLCC Consumer Survey [press release](#).

³³⁹ See [SLCC Consumer Panel response to the Call for Evidence](#).

³⁴⁰ CMA discussions with ACA, with Which? and with the SLCC.

Concerns raised about regulatory independence

- 5.62 While a clear case for regulatory independence in the Scottish legal sector has been made by stakeholders, there has also been opposition to the idea of regulatory change that would lead to independent regulation from institutions such as the LSS and the FoA, as well as concerns from some providers.
- 5.63 The FoA questioned whether the current regulatory structure leads to significant consumer detriment.³⁴¹ The LSS considered that there has been no clear and researched evidence produced by any review or otherwise to show that the current regulatory structure in Scotland has produced any consumer detriment. However, paragraphs 5.93 to 5.126 have already set out the evidence the CMA has identified of issues in the current system that are contrary to consumer interests and harmful to public confidence.
- 5.64 The remaining arguments put forward by the LSS and/or the FoA against a new independent regulator focus on:
- a loss of professional insight and expertise within the regulatory function that is claimed would adversely affect quality outcomes, notably impacting education and training standards;³⁴²
 - the potential costs of an independent regulator compared to the current regulatory costs;³⁴³ and
 - the availability of less disruptive alternatives. The LSS considers that the delegation of its regulatory powers to a separate Regulatory Committee ensures appropriate independence and that there is scope to further strengthen the existing system rather than replace it.³⁴⁴
- 5.65 The following section assesses the views from providers and the concerns of the regulators in more detail.

Providers views'

- 5.66 Alongside the views of the main professional bodies, our research has considered providers' views on independent regulation. In the main, the providers we met acknowledged conflicts arising from the existing system and concerns about the impact on consumer trust. However, survey data

³⁴¹ See [FoA response to the Call for Evidence](#), paragraph 52, p24.

³⁴² CMA discussions with the FoA. See also [Regulatory Committee response to the Robertson Review](#), p5.

³⁴³ See [Regulatory Committee response to the Robertson Review](#), p5.

³⁴⁴ See [Regulatory Committee response to the Robertson Review](#), p2, pp13-14.

suggested that there is also – perhaps unsurprisingly – some doubt among the wider provider population regarding reform.

- 5.67 The LSS conducted a survey of its members in 2018³⁴⁵ to explore their perceptions of the Society. The results were positive about the nature of the current system, with 95% of members expressing agreement³⁴⁶ that the LSS should continue to be responsible for representation, support and regulation. However, around a half of members (47%) also felt that the system of regulating the legal profession is outdated and needs to be modernised and 37% disagreed that they were optimistic about the future of the solicitor profession in Scotland.³⁴⁷
- 5.68 As discussed in Chapter 3, the CMA commissioned a survey of solicitors, which also captured some views on the regulation of legal service. Solicitors acknowledged a range of benefits from operating in a regulated industry, with the main ones being higher professional standards and greater consumer trust.³⁴⁸
- 5.69 However, when asked about the introduction of a new independent regulator, views were more divided:
- Roughly half (52%) of the solicitors surveyed believed that independence would not provide any benefit to their business.
 - Only 10% considered that it would be mostly or extremely beneficial.³⁴⁹
 - Around a third of all solicitors asked considered that independent regulation would reduce potential or perceived conflicts of interests.³⁵⁰ A similar proportion considered that there would be a reduction in actual conflicts of interest.³⁵¹

³⁴⁵ See [Ipsos MORI research on behalf of the LSS](#), slide 11.

³⁴⁶ The highest disagree responses came from rural (11%) and legal aid (9%) members.

³⁴⁷ See [Ipsos MORI research on behalf of the LSS](#), slide 19.

³⁴⁸ CMA survey. Question E3 asked: 'And thinking about regulation, what benefit(s) does your firm gain by operating in a regulated industry?' The top 3 responses were: 'Raises professional standards' (78%); 'More consumer trust' (74%) and 'Level playing field' (51%). (This does not add to 100% as respondents were allowed to select more than one response.)

³⁴⁹ CMA survey. Question F1 asked: 'Overall, how beneficial or not do you feel that being regulated by an independent regulator would be to your business?'

³⁵⁰ CMA survey. Question F2 asked: 'How do you think the following would be affected by the introduction of a new independent regulator? Potential/perceived conflicts of interest'.

³⁵¹ CMA survey. Question F2 asked: 'How do you think the following would be affected by the introduction of a new independent regulator? Actual conflicts of interest'.

- 49% considered that innovation would in fact decrease under a new independent regulator, though a substantial proportion (31%) felt there would be no impact and 11% thought innovation would increase.³⁵²

5.70 The evidence above suggests that – as expected given that it would reduce the influence of the profession – solicitors appear to be sceptical of the impact of independent regulation, including on conflicts of interest. Their views may also be influenced by sensitivity to the costs of regulation: in the CMA survey of solicitor firms, around two-thirds of respondents indicated ‘overly burdensome guidelines and rules’ and ‘excessively costly regulation’ as the major disbenefits of regulation.³⁵³ In line with the views of their representative body, the majority (81%) of respondents considered that regulatory costs would be higher under the introduction of a new independent regulator³⁵⁴ and this may have influenced their assessment of the potential benefits.

5.71 There is thus a contrast between the views of providers and the views of the public, who bear the consequences of such conflicts of interest. The SLCC survey clearly demonstrates that consumers feel it is unacceptable for a body to both regulate and represent the profession. Consumers’ concerns regarding complaints revealed a lack of trust in the current system of regulation and a strong consensus that independent regulation would better serve their interests. In light of the importance placed by the profession on public trust as a benefit of regulation,³⁵⁵ it appears anomalous to retain a system that does not appear to deliver this.

Concerns regarding a potential loss of expertise

5.72 It has been suggested³⁵⁶ that the expertise of the profession provides critical insights to help inform appropriate regulatory decision-making and could not be replicated by an independent regulator, with particular impact in terms of the provision of training and the setting of standards for entry into the professions in Scotland.

5.73 Similar issues were considered in the course of previous reforms in the sector. The value of professional expertise was cited by the Scottish Government after its consultation in 2008 as a reason to keep regulation

³⁵² CMA survey. Question F2 asked: ‘How do you think the following would be affected by the introduction of a new independent regulator? Innovation’. 9% of respondents answered that they did not know.

³⁵³ CMA survey. Question E4 asked: ‘Thinking about regulation, what are the disbenefit(s) to your firm by operating in a regulated industry?’ The top 3 responses were: ‘Overly burdensome guidelines and rules’ (66%); ‘Excessively costly regulation’ (63%); and ‘Unequally enforced/unlevel playing field’ (40%). (This does not add to 100% as respondents were allowed to select more than one response.)

³⁵⁴ CMA survey. Question F2 asked: ‘How do you think the following would be affected by the introduction of a new independent regulator? Regulatory costs’.

³⁵⁵ See paragraph 5.133.

³⁵⁶ CMA discussions with the FoA. See also [Regulatory Committee response to the Robertson Review](#), p5.

within the remit of the LSS and the FoA,³⁵⁷ albeit with additional checks and balances³⁵⁸ – despite noting that the combination of roles makes it harder to demonstrate that regulatory decisions are taken purely in the public interest.³⁵⁹ Since that time, however, developments in regulatory trends towards greater independence and the experiences of other jurisdictions and sectors in this regard mean that there is merit in reconsidering this view.

- 5.74 We recognise that practical knowledge and operational insights can help design and target regulation efficiently. However, we are not persuaded that these are excluded by an independent regulatory model. As envisaged by the Robertson Review, an independent regulator could still draw on the expertise of the representative bodies and would also be expected to recruit appropriate professional expertise to its Board.^{360 361}
- 5.75 The LSS Council and the LSS Regulatory Committee also expressed concerns that the reduction of expertise available to regulators would be exacerbated by a loss of motivation among legal professionals to feed into the regulatory process and/or maintain commitment to regulatory standards.³⁶² The latter cited the General Medical Council (GMC) as an independent regulator which it considers to have struggled to effectively regulate due to lack of member support.³⁶³
- 5.76 However, the CMA notes that a healthy tension between regulator and the regulated is to be expected and need not be counterproductive. Key to this may be how effectively the representative bodies can encourage constructive engagement by its members in the common interest of ensuring compliance that would safeguard public confidence in the legal profession as well as

³⁵⁷ During the Inquiry, the then Scottish Executive noted 'The view is that any conflict is more apparent than actual and that, in practice, the duality that is imposed on the role of the Society enhances that role and allows the consumer to benefit from a different and wider approach by the Society'. See [Scottish Parliament \(2002\) Justice 1 Committee, 11th Report 2002, Report on Regulation of the Legal Profession Inquiry, Volume 1: Report and evidence, column 3003](#).

³⁵⁸ In its consultation on the regulation of legal services in 2008, the Scottish Government noted that it did not believe the approach for England and Wales was right in Scotland both because of the smaller market size and its view that the regulatory framework in Scotland was not as complex as England. It was considered whether the LSS should focus solely on one function, but the loss of the considerable regulatory experience of the profession was deemed as a risk in the creation of a new public body. However, it was considered that to regulate ABSs while retaining its dual function, the LSS would need to move towards a clearer separation of the regulatory function. See [Scottish Government Consultation on legal services](#), paragraphs 2.15, 2.16, 7.22 and 7.23.

³⁵⁹ See [Scottish Government Consultation on legal services](#), paragraph 7.18.

³⁶⁰ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), for example, recommendations 7, 11, 17 and 19. These include recommendations for an equal number of both professional and non-legal members on the Board, and foresaw for example that the LSS and other representative bodies would retain significant input into the setting of standards and delivering training, pp51-52.

³⁶¹ Harper Macleod also expressed a view that representative bodies should work closely with the independent regulator.

³⁶² [LSS Council letter to Minister for Community Safety](#).

³⁶³ See [Response of the Regulatory Committee to the Robertson Report](#), p5.

maintain open dialogue with the regulator to allow for the professional perspective to be taken into account.

- 5.77 Indeed, the CMA considers that a degree of scepticism and challenge on both sides would be beneficial in promoting healthy discourse. As noted by stakeholders, the relinquishment of its regulatory duties could potentially allow representative bodies greater freedom to champion more vigorously its members' perspectives, enabling more effective and open debate than may currently exist for fear of perceived conflict, on critical matters of regulation.³⁶⁴
- 5.78 In a similar vein, while the IRLSR Interim Report recognised the potential for buy in to be lost due to a lack of engagement with the representative bodies, it also stressed that 'incomplete separation can lead to a strained, stifled or absent dialogue ... [inhibiting] a mutually beneficial discussion and collaboration'.³⁶⁵
- 5.79 Further, although expertise has been argued to be particularly important in the setting of entry standards, professional involvement in this area may have unintended consequences for competition.
- Practising legal professionals have, as noted above, an incentive to uphold barriers to entry for new entrants to preserve the reputation of the industry.³⁶⁶ Indeed, Professor Mayson observed that professions tend to raise standards of competence and quality above those necessary to protect consumers.³⁶⁷
 - The role of a regulator to ensure entry standards are limited to what is necessary, in the interests of greater entry and wider choice, thus intuitively runs somewhat counter to the role of the profession.³⁶⁸ Ultimately, however, both roles are complementary in seeking positive outcomes for consumers, albeit via different means. Keeping the roles distinct can therefore help to ensure an appropriate balance is found.

³⁶⁴ During stakeholder discussions, a sector expert noted that in other professions where representative and regulatory functions are separated, such as in medicine where the General Medical Council acts as the regulator and the British Medical Association is the representative body, bodies are more vocal in representation of their members. Indeed, Harper Macleod suggested that the LSS' focus on its representative function is also compromised due to its regulatory obligations and that as such, complete separation would benefit both the regulation and representation of the legal services sector.

³⁶⁵ See the [IRLSR Interim Report](#), pp16-17.

³⁶⁶ Professor Paterson has also noted that incentives to restrict entry also exist where money is tight, with examples in other jurisdictions of admission standards allegedly being used to restrict the number of entrants. See [Professor Paterson's response to the Robertson Call for Evidence](#), p8.

³⁶⁷ See the [IRLSR Interim Report](#), p16.

³⁶⁸ Professor Mayson notes his view that 'regulators are wrong to assume they as regulators must necessarily be the guardians of the professions. A regulator's true role as a gatekeeper and guarantor of minimum standards does not inevitably equip them to be the best judge of what a profession might legitimately aspire to or wish to achieve'. See the [IRLSR Interim Report](#), pp16-17.

Concerns regarding a potential increase in regulatory costs

5.80 Both the LSS and the FoA considered that the creation of an independent regulator would increase the costs of regulation, which in turn would have an impact on the cost of legal services for consumers.³⁶⁹

- They pointed to the current high levels of voluntary contribution, particularly in relation to training and education,³⁷⁰ which they considered would reduce under an independent regulator as members may not be as willing to give up their time for free.
- The FoA considered that the current regulatory structure, including the independent referral bar, is the most 'efficient and cost-effective method' for advocates.³⁷¹ In this regard it has highlighted to the CMA the small number of complaints it receives.
- The LSS Regulatory Committee raised concerns about the costs of setting up a new regulator and considered that there would be increased monitoring and enforcement costs under an independent regulator.³⁷²

5.81 As the Robertson Review noted, the current cost of regulation for all legal professionals is difficult to calculate accurately, reflecting the complexity of the current regulatory landscape.³⁷³ This makes it difficult to ascertain whether the current regulatory structure is operating efficiently. The Robertson Review made clear in its recommendations that 'the global cost of the new regulatory system should not be more than the cost of the current system'.³⁷⁴

5.82 The CMA takes the view that an assessment of the true costs of a regulatory framework should include both the cost of its administration and the cost to consumers of requirements that drive up prices or limit choice or quality. In this respect, any increase in administrative costs should be balanced against the potential for significant gains for consumers from independent regulation that is more focused on their needs and facilitates competition supportive of this. An independent regulator may also choose to undertake more monitoring and enforcement which could benefit consumers, particularly in cases where there may have been possible under-enforcement by the non-independent

³⁶⁹ CMA discussions with the FoA. See also, for example the [Regulatory Committee response to the Robertson Review](#), p5, the [Law Society Council letter to the Minister for Community Safety](#) following the Robertson Review and [The LSS response to the Robertson Review's call for evidence](#).

³⁷⁰ [The LSS response to the Robertson Review's call for evidence](#) also noted that the LSS has over five hundred volunteer members, both solicitor and non-solicitor and that some committee conveners and all committee members, provide their time without remuneration. See p3.

³⁷¹ See [FoA's response to the Call for Evidence](#), paragraphs 52 & 53, p24.

³⁷² See [Regulatory Committee response to the Robertson Review](#), p5.

³⁷³ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p47.

³⁷⁴ See Robertson, E (2018), [Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland](#), p47.

regulator. The ACA expressed similar views, noting that the benefit to the consumer from the introduction of independent regulation that can be expected to improve consumer confidence and price transparency, outweighed cost implications.

- 5.83 Moreover, the CMA notes the potential for some administrative costs to reduce under an independent regulatory framework more closely aligned to better regulation principles, meaning the overall costs the sector incurs may not, on balance, substantially alter.
- Notably, the current cost of regulation and the value this offers for members has been questioned. Separation of the regulatory and representative functions would encourage greater transparency. In turn, this would increase accountability and create greater incentives to drive down regulatory costs through more targeted and proportionate oversight.
 - The costs of complaints, which represent a significant part of regulatory costs, might also reduce if an independent regulator is successful in improving outcomes in the sector.
- 5.84 Further, while there may be incentives for voluntary contributions to drop off, the profession would retain incentives to continue volunteering some of this input, both to mitigate any cost implications and to ensure the perspective of the profession was recognised.
- 5.85 In summary, the CMA considers that costs cannot be reviewed in isolation as it is the net cost-benefit impact that is relevant for the assessment of any regulatory change. Furthermore, changes to the regulatory structure are not solely to minimise regulatory costs, but to maximise good outcomes for consumers and the wider sector. More effective regulation, which may necessitate increased regulatory monitoring and enforcement, benefits the consumer interest and hence may justify additional regulatory costs that are outweighed by such benefits. It also offers the potential for improved cost efficiencies.

Views on the possibility of alternative solutions

- 5.86 The LSS Regulatory Committee noted that it is considering improvements within the existing framework.³⁷⁵ For example, it has outlined the potential to create an appointment process akin to the public appointments process to ensure actual and perceived independence, and a consumer reference group to give insight on the consumer perspective – as well as the potential to

³⁷⁵ See [Response of the Regulatory Committee to the Robertson Report](#), pp13–14.

engage with Consumer Scotland in future to gain a consumer perspective on regulatory reform.³⁷⁶ It has recently introduced a requirement that any recommended rule change must be accompanied by an impact assessment, including a consideration of the impact on members and consumers. It also highlighted the possibility of running an information and awareness raising campaign to raise the profile of the Regulatory Committee and its public interest role.³⁷⁷

- 5.87 While the CMA welcomes these as improvements over the current system they do not, in the CMA's view, satisfactorily eliminate the central difficulty of effectively balancing dual objectives while doing justice to both. Indeed paragraphs 5.19 to 5.20 highlighted that the hybrid model that has been adopted in England and Wales has problems that are related to the fact that the representative and regulatory functions are not fully separated. Stronger consumer input would provide some opportunity for regulatory functions to improve, but only if such perspectives are given due weight in the final decision-making process and there is increased transparency to demonstrate this. However, the risk of inherent tension between regulatory and representative duties that can affect decision making would still remain. The SLCC has reached a similar view, noting that partial separation raises its own issues, for example on practical matters of effectively managing different parts of the organisation under different requirements or avoiding accidental conflicts or information flows; and would still run the risk of being perceived as conflicted by consumers.
- 5.88 The LSS Regulatory Committee has also noted a diversity of models for the regulation of legal services globally and has recommended a comparative evaluation before determining the most appropriate outcome for the needs of Scotland.³⁷⁸
- 5.89 The CMA is aware of various models in place, ranging from self-regulation through to the Robertson Review's proposal for a fully independent regulator. The trend, as Robertson observed in her Review, has been towards greater independence of regulation, with pure self-regulation now increasingly rare and widely acknowledged to raise a number of concerns incompatible with regulatory best practice.
- 5.90 Various permutations of regulatory separation are possible:
- Separate regulatory and representative bodies exist in other sectors such as the medical profession, where the responsibilities for regulation lie with

³⁷⁶ See [Response of the Regulatory Committee to the Robertson Report](#), p8.

³⁷⁷ See [Response of the Regulatory Committee to the Robertson Report](#), p14.

³⁷⁸ See [Regulatory Committee response to the Robertson Review](#), p4.

the GMC, representation with the British Medical Association (BMA) and training and standards with the 23 medical Royal Colleges.

- A range of hybrid models also exist in other legal jurisdictions, involving partial separation to a greater extent than in Scotland; and/or introducing additional regulatory bodies such as a legal ombudsman for complaints handling (as in New South Wales) or oversight bodies (as in England and Wales, where the LSB is the oversight regulator).
- The IRLSR Interim Report considered potential alternative models in England and Wales. However, each of the models considered in that report has distinct and separate bodies for regulatory and representative functions, but with different options as to which functions are allocated to which bodies. Such options may depend on whether the regulatory role is foreseen as primarily economic (with a focus on competition and consumer harm) or includes responsibility for regulating title. This, in turn, is tied in with considerations of the best approach to navigate the complex interplay between entity, individual and title regulation.

5.91 The CMA supports the introduction of a regulatory model in Scotland which provides for the separation of regulatory and representative functions. The CMA is aware that the Scottish Government is considering a number of options for regulatory models. However, in any given model, potential weaknesses will unavoidably persist where the profession has regulatory responsibility. The recommendation for a fully independent model therefore remains the option that the CMA considers most clearly and simply addresses these issues and is the best starting point around which to design an effective regulatory framework. Further, to the extent that different bodies may play a part in regulatory decision-making, it is important for all such bodies to be required to adhere to better regulation principles, including transparency and accountability, as the regulatory model will, as a whole, otherwise fail to function in a manner consistent with best regulatory practice.

Conclusions on the merits of independent regulation

5.92 An important objective of regulation should be to protect consumer interests, including by promoting competition among providers leading to improved choice and innovation, as well as wider public interest issues. This drives the need for regulation that is independent of providers and their professional bodies. Indeed there will sometimes be a divergence between the interests of consumers (and the wider public) and the interests of the profession, so it is important that decisions are ultimately made in consumers' interests or in the

interests of the rule of law, even if the regulator draws on the expertise of the profession.

- 5.93 When regulatory and representative functions are carried out by one body, tensions can arise which may jeopardise regulatory effectiveness.
- 5.94 The CMA's research has found that aspects of the current model of co-regulation are clearly not operating in consumers' best interests and that it may be affecting the pace of change. This may be because there is no strong voice empowered and incentivised to drive change in favour of consumers. In addition, in a number of areas it is not clear that consumers' interests have been prioritised; and there is a lack of transparency that is detrimental to consumer trust and public confidence that there is genuine accountability. Moreover, there is evidence that consumers, and some providers, perceive there to be a conflict of interests between regulatory and representative functions that is likely to undermine public confidence in the legal services sector.
- 5.95 An independent regulator would better serve the interests of consumers:
- It would allow for clearer objectives, leading to greater transparency and greater accountability.
 - A broader perspective external to the profession would facilitate more effective regulation focused on wider sectoral outcomes and perspectives. It could also encourage more proportionate and targeted regulation – an approach that is more challenging for a representative body which faces obligations to support the interests of all its members equally.
 - Further, an independent regulator would enable regulation to be designed in a more flexible manner, allowing a new regulator to respond to changes in the sector without the need for further primary legislation. Such an approach requires a degree of trust in the objective judgment of the regulator which would be compromised absent its independence from the profession.
- 5.96 An independent regulatory framework would thus more closely align, and should be established on the basis of, better regulation principles, with the regulator(s) within this framework subject to equivalent standards of scrutiny as other Scottish regulators and to the Scottish regulators' strategic code of practice. The CMA considers that these principles should be embedded at all levels of the regulatory framework, from the regulator(s) through to any oversight function, to allow for consistency and full accountability throughout the system.

- 5.97 We note the Robertson Review's expectations that the new regulatory model should deliver a risk-based regulatory regime, securing the confidence and trust of the public, and allowing for future growth of the legal profession whilst upholding the rule of law.³⁷⁹
- 5.98 We recognise the concerns raised regarding the proportionality of reform and acknowledge that in the context of the small size of the Scottish sector these are understandable. Proportionality is a key tenet of policy decision making: the benefits and costs of reform will need to be balanced by the Scottish Government pursuant to appropriate consultation. However, the key objective will be to optimise outcomes relative to costs. Any assessment of the case for reform must therefore consider the current costs of potential regulatory under-performance both for Scottish consumers and the wider Scottish economy, and the longer-term cost savings that might be realised from a more streamlined, accountable and efficient regulatory framework, alongside any initial set-up and transitional costs.
- 5.99 Further, in terms of desired outcomes, the CMA considers that a fully independent regulator would, more than any other model, clearly and comprehensively address adverse consequences from the unavoidable conflict of interest between (on one side) regulation in the public interest that fosters the widening of choice and competition and (on the other side) representation of the narrower interests of a profession. The CMA has not seen any persuasive evidence to counter the view that a well-designed and effectively operated independent framework could continue to champion the rule of law while valuing and being inclusive of the unique insights the profession can contribute.
- 5.100 As such, the CMA welcomes the Scottish Government's commitment to consult on independent regulation and other aspects of the recommendations of the Robertson Review. The CMA recommends that the Scottish Government should, subject to this consultation and as soon as parliamentary timescales allow, enact legislation to introduce independence from representative interests in the regulation of Scottish legal services. Furthermore, any revised regulatory framework should be established on the basis of better regulation principles. **(Recommendation 11)**.

³⁷⁹ See Robertson, E (2018), *Fit for the Future – Report of the Independent Review of Legal Services Regulation in Scotland*, p4.

Appendix A: Stakeholder engagement

The table below lists the organisations and individuals in the sector with which the CMA has held meetings in the course of this research. The CMA has also corresponded with a number of other parties and received views from a small number of individual consumers, for this research.

| <i>Type of organisation</i> | <i>Organisation</i> |
|--|---|
| Legal services regulators and statutory bodies | Association of Commercial Attorneys Faculty of Advocates Law Society of Scotland Law Society of Scotland Regulatory Committee Scottish Legal Complaints Commission Scottish Legal Complaints Commission Consumer Panel |
| Trade associations | Federation of Small Businesses |
| Self-regulatory bodies | Society of Will Writers |
| Consumer bodies | Citizens Advice Scotland Which? |
| Government bodies | Minister for Community Safety, Ash Denham MSP Scottish Government |
| Legal service providers | Govan Law Centre Harper Macleod LLP |
| Academics/relevant expertise | Alan Paterson David Flint Esther Robertson Stephen Mayson |

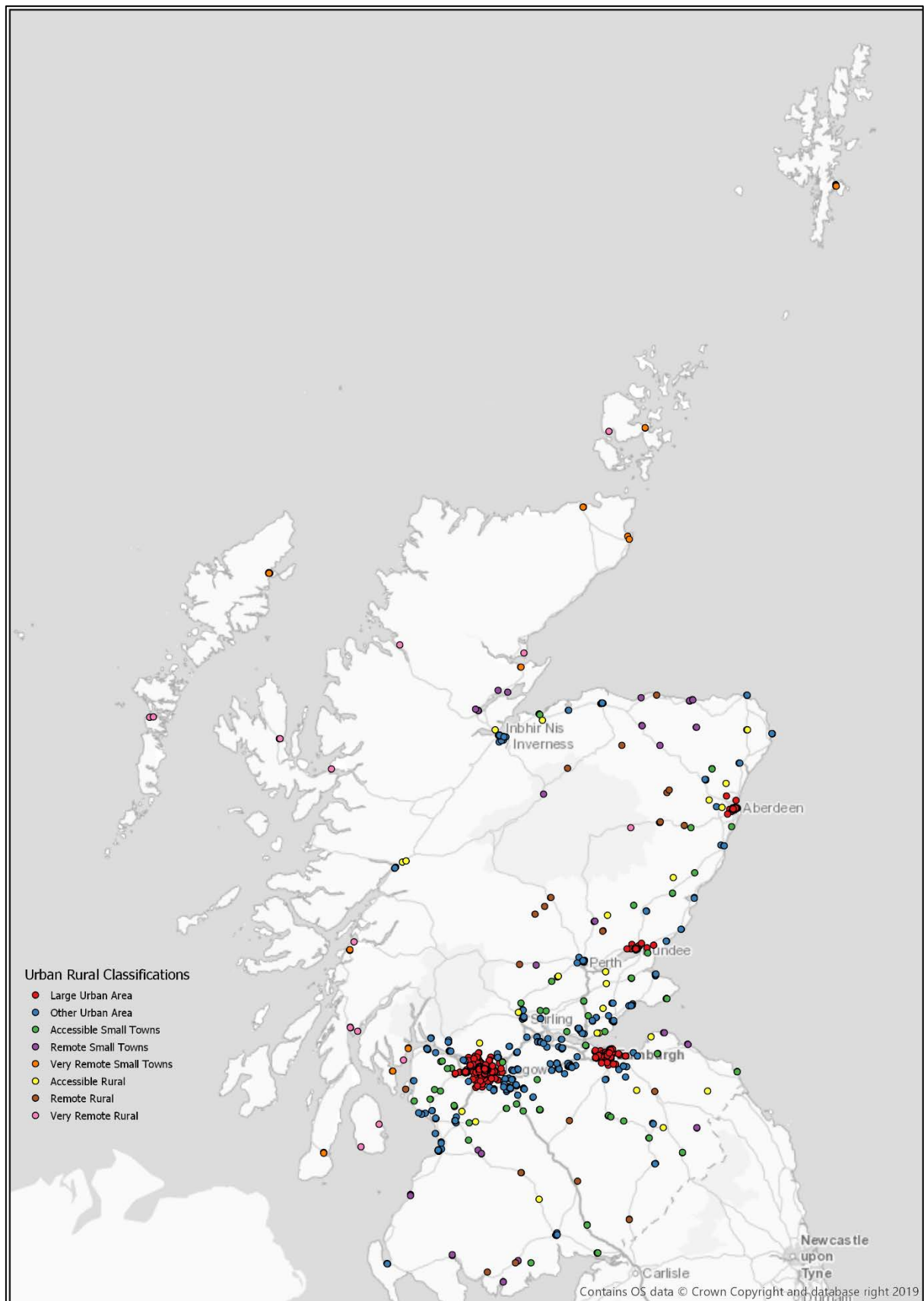
Appendix B: Map of solicitor offices in Scotland

This appendix presents a map of the locations of solicitor offices by postcode across Scotland. It shows that solicitor offices are primarily concentrated in urban areas.

Solicitor office locations were identified by the CMA using the LSS' public records available through the 'Find a Solicitor' service on its website. All solicitor offices in Scotland were included and any located outside of Scotland were removed. Each office was assigned a rurality classification in accordance with the Scottish Government's UrbanRural 8-fold classification system.

Where there were multiple offices in a single postcode, these are represented as a single point for that postcode. Hence the number of points displayed on the map may understate the actual number of solicitors, especially in urban areas which have a higher density of solicitor offices.

Map of solicitor offices in Scotland



Source: CMA analysis of data accessed from the LSS website on 14 August 2019.

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