

CMA response to the Scottish Government consultation on legal services regulation in Scotland

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Introduction

1. The Competition and Markets Authority (CMA) is an independent non-ministerial UK Government Department and the UK's primary consumer and competition authority. We work to promote competition for the benefit of consumers. Our aim is to make markets work well for consumers, businesses and the economy by promoting competition.
2. Legal services are of significant public importance. They are an important foundation of a well-functioning society and an essential input to the economy. 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.
3. The CMA has significant experience working in the legal services sector across the UK, including our research report on the Scottish legal services sector in 2020 (the CMA Research Report),¹ our England and Wales market study in 2016² and our 2020 review of the implementation and impact of the market study recommendations³ (respectively, the CMA Market Study and CMA Review). We also responded in 2019 to Esther Roberton's independent review of legal services regulation in Scotland (the Roberton Report).^{4 5} Our consultation response builds on this experience and work to date.
4. In this response we have addressed the issues on which we have previously undertaken research and analysis, with the view that the previous work can be of use to the Scottish Government in reaching its decision. We have not answered every question posed in the consultation document.

Part 1: Strategic change, vision and key aspects of the regulatory model

5. Questions 1 to 3 of the consultation ask for views on various principles and objectives for a regulatory model. Drawing on our observations from both the

¹ CMA (2020), [Scottish legal services research](#).

² CMA (2016), [Legal services market study, England and Wales](#).

³ CMA (2020), [Review of the legal services market study in England and Wales](#).

⁴ CMA (2019), [Response to the report of the independent review of regulation of legal services in Scotland](#).

⁵ Roberton, E (2018), [Fit for the Future—Report of the Independent Review of Legal Services Regulation in Scotland](#).

CMA Market Study and the CMA Research Report, we have set out what we consider an optimal regulatory framework should look like.^{6 7} We have not commented on the relative importance of one principle or objective listed in the questions compared to another.

6. As further explained in the CMA's response to the Robertson Report,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, enforceable and consistent.⁹ These characteristics align with the better regulation principles set out in the Regulatory Reform (Scotland) Act 2014.¹⁰ The principles defined by the Act require regulation to be: transparent, accountable,¹¹ proportionate, consistent and targeted only where needed.¹² These principles guide the Scottish Regulators' Strategic Code of Practice published by the Scottish Government.¹³
7. The Robertson Report recommended that a regulatory framework be based on outcomes and principles, rather than prescriptive rules. As set out in our response to the Robertson Report, we welcome this recommendation.¹⁴ In that response, we explain that a principle-based regulatory system gives legal services providers the responsibility to decide how best to align their business decisions with the outcomes and the objectives specified in the framework. This creates a more flexible regulatory framework that can reflect changes in the market over time, encourage innovation and may reduce some of the compliance costs associated with overly burdensome and prescriptive rules.¹⁵
8. Furthermore, as set out in the CMA Research Report, effective regulation is necessary to ensure that the sector operates in the public interest, by maintaining the integrity and independence of a wider judicial system that is

⁶ CMA (2016), [Legal services market study, England and Wales](#), paragraphs 6.7-6.11.

⁷ CMA (2020), [Scottish legal services research](#) paragraphs 5.8-5.9.

⁸ CMA (2019), [Response to the report of the independent review of regulation of legal services in Scotland](#), paragraph 8.

⁹ CMA (2016), [Legal services market study, England and Wales](#), chapter 6.

¹⁰ Regulatory Reform (Scotland) Act 2014, [section 1\(6\)\(3\)](#).

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

¹² Scottish Government, [Better Regulation](#).

¹³ Scottish Government (2015), [Scottish Regulators' Strategic Code of Practice](#), paragraph 2.

¹⁴ CMA (2019), [Response to the report of the independent review of regulation of legal services in Scotland](#), paragraph 9.

¹⁵ This is a model for regulation used in other sectors, such as in health and safety regulation. See also, for example, the advice given by the CMA's Digital Markets Taskforce in December 2020 to the UK Government on the potential design and implementation of pro-competitive measures for unlocking competition in digital markets and, in particular, Appendix C, in which the CMA sets out proposals for the implementation of a code of conduct to apply to firms with strategic market status. The CMA advises that the code should comprise objectives, principles and guidance in order to provide the right balance of certainty and flexibility. CMA (2020), [Appendix C: The SMS regime: the code of conduct](#), paragraph 12 et seq.

accessible to all, protecting consumers' rights, and ensuring adequate outcomes for consumers in terms of choice, price and quality.¹⁶

Part 2: Regulatory models and landscape

A: The potential regulatory models

9. Questions 4 to 6 in the consultation ask about regulatory model preferences. As explained in further detail in the CMA Research Report, we support the primary recommendation of the Robertson Report, for the introduction of a regulatory model in Scotland which ensures that the regulator is independent of the representative bodies.¹⁷ An arrangement that delivers full 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.
10. It also avoids the risk that regulatory decision-making may be compromised by the potentially opposing interests of the profession. This is because there is a fundamental tension between the aims of the roles of the regulator and the professional body. A representative body principally seeks to promote professional interests while a regulator seeks to protect the interests of consumers and the wider public. They therefore have distinctly different functions and incentives. Where these interests are opposed, there is clear potential for such tension to lead to conflicts of interest and sub-optimal regulatory outcomes.¹⁸
11. Accordingly we are supportive of option 1, the Robertson model, set out in the consultation paper and this aligns with recommendation 11 in the CMA Research Report.¹⁹
12. Option 3, the enhanced accountability and transparency model, in our view is not substantially different from the current arrangement. It therefore brings with it the risks associated with the current arrangement in which the main regulators of legal services providers are also representative bodies. As discussed in the CMA Research Report, this causes an inherent tension between their responsibility to regulate in the consumer interest and to

¹⁶ CMA (2020), [Scottish legal services research](#), paragraph 3.

¹⁷ CMA (2020), [Scottish legal services research](#), chapter 5.

¹⁸ CMA (2020), [Scottish legal services research](#), paragraphs 5.10-5.14.

¹⁹ CMA (2020), [Scottish legal services research](#).

represent the interest of their members effectively.²⁰ This gives rise to the potential for conflict which risks compromising public trust in the sector. In the CMA Research Report, we highlighted some of the concerns that have arisen in practice under the current arrangements.²¹

13. We note that option 3 proposals would involve the regulators that do not already have an independent regulatory committee creating one, as well as introducing measures to strengthen the terms of independence. However, for reasons explained further below (see section C), we consider that the use of an independent regulatory committee would not address our concerns regarding independence. Thus, option 3 would not deliver the changes needed to improve competition and consumer outcomes in the sector as outlined in the CMA Research Report.
14. We are not convinced that option 2, the market regulator model, would be effective at delivering the changes needed to improve competition and consumer outcomes. While we note that option 2 would be better than the status quo, it does not fully address the conflict of interest concerns that are central to effective regulation. In particular we are concerned that, notwithstanding the proposed introduction of statutory regulatory committees where relevant, the Law Society of Scotland (LSS) and the Faculty of Advocates (FoA) largely maintain their current functions in option 2. This does not preclude the potential for actual or perceived conflicts of interest for the reasons referred to in paragraph 10 above and set out in section C below.
15. The creation of an independent market regulator with responsibility for certain functions such as setting minimum entry, education and training standards and reviewing reserved activities/definition of legal services is an example of an improvement on the status quo. As we recognised in the CMA Market Study, the Legal Services Board (the LSB), in its role as oversight regulator, serves an important function to ensure that regulatory changes do not conflict with the regulatory objectives set out in the Legal Services Act 2007. We noted that this is particularly relevant in the context of ensuring that there is independence of regulation from the representative interests of the profession. However, we also noted that the LSB's role may lead to some unnecessary costs. Furthermore, we believed that there may be scope to ensure independence without the need for a separate oversight regulator.²²
16. We have concerns that additional bodies in a relatively small sector in Scotland may introduce unnecessary complexity and cost. The CMA Market

²⁰ CMA (2020), [Scottish legal services research](#), paragraphs 5.28-5.34.

²¹ CMA (2020), [Scottish legal services research](#).

²² CMA (2016), [Legal services market study, England and Wales](#), paragraphs 5.144.

Study found that the multiplicity of regulatory bodies might lead to unnecessary duplication of fixed costs, inconsistencies in regulation across regulators, competition between regulators that results in a ‘race to the bottom’ and a reduced ability to prioritise resources according to risk.²³ The potential inconsistencies, confusion, inefficiencies and costs involved with multiple front-line regulators and an oversight regulator are also noted by Professor Stephen Mayson in his report on England and Wales.²⁴ Furthermore, it is not clear how a market regulator sitting over the authorised regulators in option 2 of the consultation would improve transparency of decision making either.

17. Thus, although the introduction of an oversight regulator may go some way to addressing the concerns about independence, we do not consider that it is sufficient to achieve the objectives of properly protecting the public. We further note, in this context, that the existence of an oversight regulator (the LSB) did not prevent concerns regarding independence between representative and regulatory bodies arising in England and Wales at the time of the CMA Market Study in a context in which there was even further separation, in the form of a functionally separate regulatory arm alongside the relevant representative body,²⁵ than is being proposed under option 2.²⁶ In addition, it creates a more complex structure than may be needed to achieve the outcomes aligned to the principles set out by the Robertson Report.
18. As set out in the CMA Research Report, a fully independent model remains the option that most clearly and simply addresses these issues and is the best starting point around which to design an effective regulatory framework.²⁷
19. Question 12 in the consultation asks whether a baseline survey of legal services consumers in Scotland should be undertaken. In principle, carrying out research in the legal services sector would be useful. However, we are unclear of the purpose of the survey that is being proposed.

B: The role of the Lord President and the Court of Session

20. In response to question 13 in the consultation on the role of the Lord President and the Court of Session, we note the limited information available on the oversight activities undertaken by the Lord President and the basis for

²³ CMA (2016), [Legal services market study, England and Wales](#), paragraphs 5.133-5.134 and 5.138.

²⁴ Mayson, S (2020) [Final Report of the Independent Review of Legal Services Regulation](#), section 6.2.1.

²⁵ For example, the Solicitors Regulatory Authority which was established by the Law Society.

²⁶ We note in this context, that the LSB has overseen increased separation under strengthened governance rules since we raised those concerns. See paragraphs 5.67–5.74 of CMA (2020), [Review of the legal services market study in England and Wales](#) and paragraph 21 below.

²⁷ CMA (2020), [Scottish legal services research](#), paragraph 5.91

such oversight decisions.²⁸ We therefore agree with the principle of the Robertson Report that the role of the Lord President and the Court of Session in the regulatory framework should be made clearer. Without a clearer understanding of the role it is difficult to assess the scope of the role that should be played in the future regulatory landscape.

C: Regulatory committees

21. The CMA Research Report concluded that, under the current system of regulation, the potential overlap between regulatory and representative functions of the regulators was considerable.²⁹ This concern applies to both the LSS regulatory committee, the FoA and the Association of Commercial Attorneys (ACA). The current system provides the opportunity for actual and perceived conflicts of interest to arise. At the time of the CMA Market Study, we raised similar concerns in England and Wales, where a stricter form of partition was already in place with functional but not full structural separation within frontline regulators.³⁰ ³¹ The experience in England and Wales illustrates that any incomplete separation has the potential to create internal governance issues that could affect regulatory outcomes. In our view, a model with regulatory committees therefore does not address concerns regarding transparency and independence (as outlined above).
22. In response to questions 18 and 19 in the consultation, we do not recommend pursuing options where regulatory committees feature. We do not consider that any form of internal separation, as set out in options 2 and 3, would be able to deliver full independence because a regulatory committee that sits within a body that also carries out representative functions cannot alone resolve the intrinsic conflict of interest between representative and regulatory functions. As such, we fully support the proposals under option 1, the Robertson model, where existing regulatory committee functions would be absorbed into the new independent regulator. Full independence of the representative and regulatory functions would minimise any risk of conflict of interest, cement public trust and facilitate more transparent and effective engagement on regulatory matters.

D: Fitness to practise

²⁸ CMA (2020), [Scottish legal services research](#), paragraph 18.

²⁹ CMA (2020), [Scottish legal services research](#), paragraphs 5.35-5.49.

³⁰ CMA (2020), [Review of the legal services market study in England and Wales](#), paragraphs 5.19-5.21.

³¹ It should be noted that, by the time of the CMA Review, there had been significant improvements made as a result of revisions to internal governance rules (IGRs) in England and Wales. Consequently, we recommended that an evaluation of the impact of the revised IGRs should be undertaken before deciding on whether any further action may still be appropriate to reinforce regulatory independence within the Legal Services Act 2007. See CMA (2020), [Review of the legal services market study in England and Wales](#), paragraph 5.120.

23. Questions 21 to 23 ask about fitness to practise. In the CMA Research Report, we discussed the 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.³² The CMA Research Report highlighted an example of such issues when it noted points raised by the Scottish Legal Complaints Commission (SLCC) regarding requirements on solicitors to have achieved three years of work experience. The CMA reflected that the LSS may wish to consider some exceptions, subject to appropriate safeguards to ensure fitness of ownership, to the experience rule to facilitate new entry, for example, by solicitors with other suitable experience that would equip them to run a firm and introduce innovation to do so.³³ This illustrates the importance of ensuring that the system strikes the right balance between providing consumers with protection while allowing sufficient flexibility to encourage growth and innovation in the sector.

E: Legal tech

24. The CMA Research Report noted the growth in the use of technology in legal services (such services often being referred to as “legal tech”) and highlighted the potential to transform how legal services are provided and the likely benefits in Scotland given the dispersed population in rural and remote areas and subsequent challenges around access.³⁴ The CMA Research Report also supported the view set out in the Robertson Report that the current regulatory system was not sufficiently able to support a forward-looking, dynamic and innovative legal services sector. This included understanding the role of technology in design and delivery of legal services.³⁵
25. Questions 25 to 28 in the consultation ask questions on the extent to which, and how, legal services regulation should incorporate legal tech. A regulatory model should be activity and risk-based, flexible, and proportionate and be able to respond to changes in the sector over time such as the development in new types of services and providers. While we recognise the significant potential for legal tech to create innovations and transform how legal services are provided, it can also create risk, particularly when legal tech providers are unregulated. In England and Wales there are signs that developments in legal tech have caused the unauthorised sector to grow and that that growth will

³² CMA (2020), [Scottish legal services research](#), paragraph 4.2.

³³ CMA (2020), [Scottish legal services research](#), paragraph 4.73.

³⁴ CMA (2020), [Scottish legal services research](#), paragraphs 4.25-4.35.

³⁵ CMA (2020), [Scottish legal services research](#), paragraphs 4.87-4.88.

continue in future, potentially accelerated by the trend towards greater remote service provision driven by the COVID-19 pandemic.³⁶

26. In the CMA Review, we considered this development of legal tech in England and Wales in the context of whether existing regulation was having an impact on innovation and whether the concerns about high regulatory costs that we identified in the CMA Market Study might be deterring entry and innovation.³⁷ We identified some examples of innovation as a result of legal tech. However, we had concerns that there may be some barriers to innovation, including some regulatory barriers.³⁸
27. At the same time, we acknowledged the regulatory challenges posed by the fast-changing and sometimes complex nature of legal tech. In particular, we highlighted the need for regulators to strike an appropriate balance: on the one hand they have a duty to manage potential risks and on the other they need to facilitate entry and innovation. We considered that it was unclear whether the regulatory framework in England and Wales could strike that right balance.³⁹ This is a theme that Professor Stephen Mayson also picked up on in his report. He concluded that the scope of a definition should be broad to protect consumers, while the focus should then be targeted to place only proportionate regulatory burdens on providers.⁴⁰
28. We therefore recommend that the Scottish Government should not just focus on the narrow question of whether legal tech should be included within the definition of ‘legal services’ – an exercise that might be challenging in itself to accomplish as legal tech is evolving – but also carry out work proactively to consider how to achieve the right balance between facilitating innovation and protecting consumers through regulatory requirements.⁴¹
29. By way of example, in the CMA Review, in addition to making the case for wholesale reform of the regulatory framework, we considered various options for shorter-term steps which deliver reform in stages, where these are consistent with a long-term strategy of moving towards a more risk-based

³⁶ CMA (2020), [Review of the legal services market study in England and Wales](#), paragraph 5.76.

³⁷ CMA (2020), [Review of the legal services market study in England and Wales](#), paragraphs 5.55-5.61.

³⁸ CMA (2020), [Review of the legal services market study in England and Wales](#), paragraph 5.60.

³⁹ CMA (2020), [Review of the legal services market study in England and Wales](#), paragraph 5.61.

⁴⁰ Mayson, S (2020), [Final Report of the Independent Review of Legal Services Regulation](#), section 4.6.1.

⁴¹ For example, the LSB in England and Wales identified fostering innovation and supporting responsible technology as two of the priorities for the sector in 2021-24. The LSB have acknowledged the constant change in technology and the need for regulators to keep arrangements under review. As such they have set out a work plan to assist with this, such as undertaking a research programme to track the level of innovation and use of technology. See LSB (2021), [Reshaping Legal Services, A sector-wide strategy](#).

approach. Of particular relevance to the legal tech sector, we made various proposals for a mandatory public register for unauthorised providers.⁴²

30. Again, we recommend that the Scottish Government consider what different options there might be to addressing the issue of legal tech both within the current regulatory framework and through the reform of that framework.

Part 3: Legal services providers and structures

A: Entry, standards and monitoring

31. Questions 31 to 33 ask about quality assurance. Regulation in legal services is designed to provide consumer protection in this sector and to secure public interest benefits such as the fundamental public interest in supporting the rule of law. However, as with any such system of regulation, there is a trade-off between protecting consumers from poor-quality provision and securing the public interest on the one hand, and allowing access to a range of lower-cost alternative providers on the other. Failures in making an appropriate trade-off between these two considerations can lead to regulations that can dampen competition, restrict entry and inhibit innovation in the market. Thus, legal services regulation 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.
32. As such, in response to question 32, we are supportive of a regulator that seeks to ensure that regulation is consumer friendly and proportionate.⁴³ The Scottish Government should have these principles in mind in assessing the case for providing for quality assurance and continuous improvement.

B: Definition of ‘legal services’ and ‘reserved activities’

33. In response to question 34 in the consultation, careful consideration is needed when defining ‘legal services’.⁴⁴ A balanced approach should be taken that is not so narrow as to fail to capture a sufficient range of legal services and providers that are a risk to consumers, but equally, not so wide that it imposes disproportionate and unnecessary obligations on providers.⁴⁵
34. Question 35 in the consultation asks whether a definition of legal services should be set out in primary legislation. A regulatory framework for legal services should be sufficiently flexible to adapt to market changes. It may be

⁴² CMA (2020), [Review of the legal services market study in England and Wales](#), paragraphs 5.84-5.107.

⁴³ CMA (2019), [Response to the report of the independent review of regulation of legal services in Scotland](#), paragraphs 25-27.

⁴⁴ CMA (2020), [Review of the legal services market study in England and Wales](#).

⁴⁵ Mayson, S (2020), [Final Report of the Independent Review of Legal Services Regulation](#), section 4.6.1.

difficult for regulation to account for new market dynamics or new services if any future changes to the definition of legal services require changes to primary legislation. Because of this, in our response to the Robertson Report, we advised the Scottish Government to consider whether, and if so how, the need to set out definitions using primary legislation may reduce the framework's flexibility.⁴⁶ We note that the Scottish Regulators' Strategic Code of Practice sets out how regulatory principles are to be applied. This code might represent a useful starting point for examining which elements of the framework should be statutory and what left to the regulator.

35. The consultation asks, under question 36, about extending or removing activities 'reserved' to solicitors. In general, we would be cautious about extending reservation except where there is a clear justification to do so given its potential impact on competition and cost.⁴⁷ However, we are supportive of reservation being removed from those less risky activities for which it may not be justified – particularly if accompanied by some alternative form of risk-based regulation to avoid creating new regulatory gaps.
36. Question 37 asks whether the regulator should be given the power to propose to Scottish Government which activities to reserve to legal professionals in future. We consider that a regulator should have the ability to introduce or remove regulation directly in legal service areas which it considers pose the highest risk to consumers.⁴⁸ This is to facilitate a regulatory system that is flexible, proportionate, focused, and risk-based. As such, we are supportive of this principle being applied to Scotland in future where there is an independent regulator where these decisions can be proposed without the potential for actual or perceived conflicts of interest.

C. Titles

37. Professional titles have the potential to affect consumer decision-making. Given the inherent difficulties that consumers of legal services face in observing quality directly, consumers may choose to rely on such titles when navigating the market as an indicator of quality. Although professional titles can be a useful and practical way to provide consumers with an indication of at least a minimum level of quality, it may limit the scope for competition (and therefore affordability) if it results in consumers avoiding unauthorised providers completely, regardless of the level of quality and consumer

⁴⁶ CMA (2019), [Response to the report of the independent review of regulation of legal services in Scotland](#).

⁴⁷ CMA (2020), [Review of the legal services market study in England and Wales](#).

⁴⁸ CMA (2016), [Legal services market study, England and Wales](#), paragraph 52.

protection these providers may offer and the value for money that could be obtained by the consumer.⁴⁹

38. In response to questions 38 and 39 in the consultation, it is our view, as noted in our response to the Robertson Report, that we have not seen compelling evidence of the detriment suffered by consumers because ‘lawyer’, ‘advocate’ or other titles are not currently protected.⁵⁰ Furthermore, as noted above, regulation should be proportionate and targeted to risk. Therefore, we would advise that additional evidence of such detriment is gathered before introducing additional regulation to protect titles further.

D: Business structures

39. Provisions for Alternative Business Structures (ABSs) were introduced in the Legal Services (Scotland) Act 2010. ABSs allow for greater flexibility and choice in the provision of legal services in Scotland. We believe the introduction of ABSs may benefit users of legal services across Scotland, with regard to both affordability and service quality.
40. The CMA Research Report made several recommendations regarding ABSs.⁵¹ One such recommendation was that the LSS should implement the existing provisions for ABSs in the 2010 Act as soon as the Scottish Government authorised it to do so. This was alongside recommendations to the Scottish Government to amend the existing legislation to liberalise the ABS regime further and to facilitate effective implementation of the scheme.
41. In response to question 42 of the consultation, we strongly support the view that the 51/49 ownership threshold under the existing legislation is a barrier which may limit entry and participation in the ABS scheme.^{52 53} We believe 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.
42. While this consultation document only focuses on the ownership threshold, we also believe the ABS scheme should be further expanded to the benefit of Scottish consumers by:

⁴⁹ CMA (2016), [Legal services market study, England and Wales](#), paragraphs 5.89-5.119.

⁵⁰ CMA (2019), [Response to the report of the independent review of regulation of legal services in Scotland](#).

⁵¹ CMA (2020), [Scottish legal services research](#).

⁵² CMA (2020), [Scottish legal services research](#).

⁵³ CMA (2016), [Response on Scottish Alternative Business Structures](#).

- (a) Removing the requirement for an ABS to operate for a fee, gain or reward. This prevents its adoption by the non-profit sector, including law centres. As noted in the CMA Research Report, there is anecdotal evidence of interest in this and 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.⁵⁴
- (b) Removing the restrictions on advocates forming partnerships (whether with other advocates or in ABSs with legal and/or non-legal professionals) or accepting instructions directly from consumers should they choose to do so. As set out in the CMA Research Report, we believe lifting this restriction would allow for efficiencies and streamlining of processes, which may result in reduced costs and increased choice for consumers.⁵⁵

E: Entity regulation

- 43. Question 43 asks for views on entity regulation. In our response to the Robertson Report, we set out our support for including an element of entity regulation in the regulatory framework for authorised providers, similar to the one currently in place in England and Wales.⁵⁶ A balance between individual and entity regulation is needed.
- 44. Individual-based regulation is appropriate when high risks are identified that can only be addressed by ensuring that the individual is competent to provide the service and should be personally responsible for it. When such high risks do not materialise, entity-based regulation (where entities can set the necessary obligations on their employees) appear in general to be more proportionate. However, we consider that requiring all legal professionals licensed through the regulator to be licensed through an entity might impose excessive and disproportionate regulatory costs, which might be passed on to consumers in the form of higher prices.
- 45. Therefore, we would advise entity regulation only in circumstances where there is clear evidence of a market failure and only on the basis of an impact assessment that balances the benefits of regulation with these costs, including the impact of regulation on authorised providers' ability to be employed in unauthorised firms.

Part 4: Complaints and redress

⁵⁴ CMA (2020), [Scottish legal services research](#), paragraphs 4.60-4.70.

⁵⁵ CMA (2020), [Scottish legal services research](#), paragraphs 4.65-4.70.

⁵⁶ CMA (2019), [Response to the report of the independent review of regulation of legal services in Scotland](#).

46. The CMA's work to date has not focused on the framework for complaints and redress of legal services in Scotland. The current legal complaints and redress process has been identified as a priority area for improvement by the Scottish Government. The regulatory community (including the LSS, the FoA and the SLCC) is already working with the Scottish Government to identify, consider and implement improvements that may be made to the legal complaints system in the interim without the requirement for primary legislative change.
47. The CMA is supportive of the Robertson Report recommendation to reform the current complaints and redress framework. However, given the focus of others in this area and that the CMA has not considered this area in detail in the past, we are not best placed to provide a detailed assessment of the framework.

Conclusion

48. We welcome the opportunity to respond to the Scottish Government's consultation on legal services regulation reform. It is our view that Scottish consumers would benefit significantly from regulatory reform in Scottish legal services. Our response builds on the Robertson Report call for reform and the findings of the CMA Research Report. Our priority, aligned with the main recommendation of the Robertson Report, is for a regulatory system to be introduced that delivers full independence (option 1 in this consultation). This is the best way to ensure that regulation can protect consumer interest, and promote competition among providers leading to improved choice and innovation, as well as wider public interest issues.
49. The current arrangement and proposed models (options 2 and 3 in the consultation), where regulation is carried out by bodies that represent the sector's professional interest, fall short of the full independence that is necessary. This would not be consistent with better regulation principles and puts at risk public confidence in the sector. A lack of transparency in regulatory activities as well as actual and perceived conflicts of interest between representative and regulatory roles risk undermining the system.
50. We are aware that this consultation is happening in a busy landscape for legal services, with the Scottish Government and regulators at the centre of many of these discussions and changes. It will be important that these developments be considered alongside the wider discussion of regulatory reform. We look forward to continuing to engage constructively with the Scottish Government and the wider legal services regulatory community on these important issues.

