

# Regulation of Legal Services (Scotland) Bill

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## Policy Memorandum

### Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Regulation of Legal Services (Scotland) Bill, introduced in the Scottish Parliament on 20 April 2023.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 25–EN);
  - a Financial Memorandum (SP Bill 25–FM);
  - a Delegated Powers Memorandum (SP Bill 25–DPM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 25–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

### Policy objectives of the Bill

4. The Bill makes provision in relation to the regulation of legal services. It has five Parts.
  - Part 1 makes provision in respect of the objectives of legal services regulation and the professional principles which apply to persons providing legal services and those who regulate the provision of legal services in Scotland. Part 1 also introduces a two-category regulatory framework which imposes requirements on all legal services regulators and provides measures for Ministers to review regulatory performance in certain circumstances
  - Part 2 creates a requirement for legal businesses to be authorised by a category 1 regulator to provide legal services and for category 1 regulators to produce a regulatory scheme for the authorisation and regulation of legal businesses.

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- Part 3 makes provision for dealing with complaints in connection with legal services.
- Parts 4 and 5 make miscellaneous and general provisions.

5. The overarching policy objective of this Bill is to provide a modern, forward-looking regulatory framework for Scotland that will best promote competition, innovation, and the public and consumer interest in an efficient, effective, and efficient legal sector. The Bill will implement a number of key recommendations from the ‘Independent Review of Legal Services Regulation in Scotland’ by Esther Robertson (the Robertson report).<sup>1</sup>

6. This Bill delivers the Programme for Government commitment:

“The Bill will provide for a modern regulatory framework designed to promote competition and innovation while also improving the transparency and accountability of legal services regulation and the legal complaints system in Scotland.”

7. Firstly, the Bill will implement a modern, forward-looking model for legal services regulation which will build on the existing regulatory framework. This will provide for a proportionate approach that seeks to balance and deliver the key priorities of all stakeholders. The existing regulators will retain their regulatory functions with a greater statutory requirement to incorporate independence, transparency and accountability within their regulatory approaches.

8. Secondly, the Bill will reform legal services regulation in key areas:

- Greater protections to consumers through regulation of legal entities. Currently the regulation of legal services in Scotland largely focuses on the regulation of individual legal professionals, but the Bill introduces regulation of law firms as well as the solicitors who work at a law firm.
- Protection for the use of the title ‘lawyer’ where it is being used in the provision of legal services to the public, for payment.
- Reducing restrictions in respect of alternative business structures to encourage competition and innovation in the legal sector and support Scottish legal firms, to place them on an equal footing with counterparts within the UK and other jurisdictions.
- Changes to the way complaints about legal services are handled which will benefit both consumers and legal practitioners alike. These measures are intended to modernise the existing regulatory framework and provide a proportionate approach which supports growth and competitive provision in the legal services sector while improving the consumer journey and consumer choice for legal service users, by placing consumer interests at the heart of regulation. As part of this, the Bill will incorporate appropriate safeguards that deliver a balance between the independence of the legal profession with their duty to work in the public interest.

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<sup>1</sup> [Legal services regulation: independent report - gov.scot \(www.gov.scot\)](http://www.gov.scot)

## Background

### The current regulatory landscape

#### The Lord President of the Court of Session

9. The Lord President of the Court of Session is the head of the Judiciary in Scotland. The Lord President has responsibilities in relation to the regulation of the legal profession and has a regulatory function in relation to the Scottish Legal Complaints Commission ('the SLCC').<sup>2</sup>

10. The Lord President has oversight for prescribing the criteria and procedure for admission to the legal professions, the approval of changes to practice rules in relation to the legal professions and an overarching role in the regulatory framework.

#### The Law Society of Scotland ("Law Society")

11. The Law Society's membership comprises largely of solicitors and solicitor-advocates. The independent Regulatory Committee of the Law Society is accountable to, but independent of the Law Society's Council (its governing body). The establishment of an independent Regulatory Committee was a requirement of the Legal Services (Scotland) Act 2010 ("the 2010 Act") and exercises the Council's regulatory functions as set out in section 3F of the Solicitors (Scotland) Act 1980 ("the 1980 Act"). The Council must ensure its regulatory functions are exercised independently and properly, including with a view to achieving public confidence.

12. The 1980 Act sets out that the Law Society has statutory responsibility for the promotion of the interests of the solicitor profession in Scotland and the interests of the public in relation to that profession.

#### The Scottish Solicitors' Discipline Tribunal ("SSDT")

13. The SSDT is an independent body which deals with serious disciplinary issues that arise within the Scottish legal profession. As a formal judicial body, the SSDT is constituted under the provisions of the 1980 Act.<sup>3</sup> The Law Society is responsible for investigating cases of misconduct against solicitors and other legal professionals that it regulates and can decide to prosecute more serious cases of professional misconduct before the SSDT.

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<sup>2</sup> The SLCC must consult with the Lord President on appointing members and on rule changes to practice and procedure, see Schedule 1 section 2, and section 32. The Legal Profession and Legal Aid (Scotland) Act 2007 also sets out that the Lord President may, by written notice, remove the chairing member of the SLCC from office in certain circumstances, see Schedule 1 section 5 - [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(legislation.gov.uk\)](#).

<sup>3</sup> See sections 50 to 54 and schedule 2 - [Solicitors \(Scotland\) Act 1980 \(legislation.gov.uk\)](#).

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## The Faculty of Advocates (“Faculty”)

14. The Court of Session has delegated responsibility for the regulation of advocates to the Faculty. Professional rules for advocates must be approved by the Lord President and cannot be revoked unless the Lord President has given approval. The Lord President retains an important role in connection with the Faculty’s disciplinary procedures and also appoints the Chair of the Faculty’s Disciplinary Tribunal.<sup>4</sup>

15. The Faculty’s Complaints Committee, Investigating Committee and Disciplinary Tribunal comprise of members of the Faculty and lay members.<sup>5</sup> A panel of lay members are nominated by Scottish Ministers<sup>6</sup> and from which lay persons are drawn to make up a committee or tribunal. Complaints about the conduct of advocates are made in the first instance to the SLCC. If the SLCC considers that the complaint concerns the conduct rather than professional services of an advocate, then it is remitted to the Faculty for investigation. Such complaints are dealt with firstly by the Faculty’s Complaints Committee and then, where appropriate, the Investigating Committee and, where a complaint is upheld, the Disciplinary Tribunal.

## The Association of Commercial Attorneys (“ACA”)

16. A body may apply to acquire and exercise rights to conduct litigation on behalf of the public and rights of audience through the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990<sup>7</sup> (“the 1990 Act”). The ACA are, to date, the only body to have done so. Any application for such rights must be made to the Scottish Ministers and the Lord President.

17. The ACA is comprised of, and responsible for the regulation of, commercial attorneys. Members of the ACA must have a legal qualification and a professional or construction qualification. Members are required to have relevant construction and litigation experience as an architect, quantity surveyor or engineer. Members are officers of the court and can appear in the Sheriff Court in matters relating to construction and building law. They are subject to the regulatory oversight of the SLCC in the same way as other legal professionals. The ACA’s regulatory scheme was approved in 2009<sup>8</sup> and revised in 2019.<sup>9</sup>

## The Scottish Legal Complaints Commission

18. The SLCC is a non-departmental public body, with a Board appointed by Scottish Ministers (in consultation with the Lord President). The SLCC operates independently of

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<sup>4</sup> See Rule 96(a) of the Faculty of Advocates Disciplinary Rules 2019 – available at <http://www.advocates.org.uk/making-a-complaint/the-disciplinary-rules>.

<sup>5</sup> The Disciplinary Committee is also chaired by either a retired member of the Judicial Committee of the House of Lords or a Justice of the UK Supreme Court or a retired Senator of the College of Justice (or other appropriate person).

<sup>6</sup> *Ibid.* See Rules 94(a)(ii), 95(a) and 96(c).

<sup>7</sup> See sections 25 to 27 [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1990 \(legislation.gov.uk\)](#)

<sup>8</sup> [Act of Sederunt \(Sections 25 to 29 of the Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1990\) \(Association of Commercial Attorneys\) 2009](#)

<sup>9</sup> [Association of Commercial Attorneys: revised scheme - gov.scot \(www.gov.scot\)](#)

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the government, and the Scottish Ministers have no powers to intervene in operational or adjudicative matters.<sup>10</sup> The Scottish Ministers' main roles are the approval of board member appointments, approving the location of the organisation, sending the statement of accounts to the Auditor General, and laying the audited accounts in Parliament. The SLCC is required to consult the Scottish Ministers on the budget for the next financial year. The SLCC requires to consult the legal profession each year as to the amount of the levy on the profession, which is used to fund the SLCC and the legal complaints process.

19. The SLCC acts as a single gateway for all complaints against legal professionals in Scotland. It investigates and resolves complaints about inadequate professional services, remits complaints about the conduct of lawyers to the relevant professional organisation<sup>11</sup> ("RPO") (e.g. conduct complaints against solicitors are remitted to the Law Society) and has oversight of complaint handling across the profession.

## The current complaints system

### First tier complaints

20. The first stage in the legal complaints process requires any person who wishes to make a complaint, to raise the matter directly with the legal professional or legal firm the complaint relates to. This is described as a 'first-tier complaint' and is intended to allow the legal professional or legal firm an opportunity to resolve the matter with the complainer in the first instance.<sup>12</sup> If a complaint is not resolved at this stage, a complainer may then raise that matter with the SLCC.

### The Single Gateway

21. Under the 2007 Act, the SLCC is the gateway for all complaints against legal practitioners in Scotland. After assessing the eligibility of a complaint (for example whether a complaint is time-barred or is vexatious), the SLCC categorises it as either a services complaint or conduct complaint.<sup>13</sup> An example of a common services complaint

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<sup>10</sup> The SLCC is held to account by the Scottish Parliament under the terms of its founding Act, in that the Statement of Accounts of the SLCC is subject to audit by the Auditor General for Scotland and the audited statement is laid before Parliament in accordance with such directions as may be given by Scottish Ministers. The SLCC must also prepare an annual report on its functions and submit that report to the Scottish Ministers as soon as practicable after the end of each financial year.

<sup>11</sup> The RPOs are currently the Law Society, Faculty and ACA.

<sup>12</sup> The Commission is able to accept a complaint before it has been made to the legal professional/firm in certain circumstances as determined by its rules.

<sup>13</sup> 'Inadequate professional services' is defined at section 46 of the 2007 Act as "professional services which are in any respect not of the quality which could reasonably be expected of a competent legal professional. 'Unsatisfactory professional conduct' is defined at s46 of the 2007 Act as "conduct by a solicitor which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional services. 'Professional misconduct' is not defined in statute. However, the following test is applied by the Law Society (and the SSdT): "There are certain standards of conduct expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as being serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or

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may include poor communication which resulted in an avoidable delay, while a conduct complaint may relate to a legal professional breaching their professional rules by operating without instructions or failing to meet a court-mandated deadline. Inadequate professional services is defined at section 46 of the 2007 Act as “professional services which are in any respect not of the quality which could reasonably be expected of a competent legal professional”. There is also scope for a complaint to contain elements of both inadequate services and poor conduct.

22. Services complaints are then investigated and determined by the SLCC while conduct complaints are sent to the respective professional organisations for investigation and determination (i.e. the Law Society will investigate conduct complaints relating to solicitors).

## Who complaints can be raised against

23. The SLCC receives complaints against legal practitioners as defined in the 2007 Act. Currently complaints can only be received against those who are regulated by either the Law Society, the Faculty or the ACA. Complaints against individuals or bodies who are providing legal services but are unregulated cannot be considered by the SLCC (for example, will writing services provided by individuals who are not solicitors).

## Triage

24. The requirements on the SLCC to categorise a complaint as relating to services or conduct, and determine its eligibility, are set out in statute and must be carried out in a specified order, irrespective of the nature of the case. When the SLCC receives a complaint, and before it may investigate, it must first consider whether it has been made prematurely (i.e. before first-tier stage). If the complaint has not been made prematurely, the 2007 Act requires the SLCC to categorise it as either a ‘conduct’ or a ‘services’ complaint. Once the complaint has been categorised, the 2007 Act also places a duty on the SLCC to consider whether the complaint has been made timeously and whether it is ‘frivolous’, ‘vexatious’ or ‘totally without merit’ before it may be investigated.<sup>14</sup>

25. The 2007 Act also requires that written notices are issued to notify the parties to the complaint of each decision which has been made.<sup>15</sup> This means that at multiple stages of the complaint process a period of 28 days must elapse to allow time to appeal, before progressing to the next stage, or test, in the process.

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some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made”.

<sup>14</sup> [Eligibility \(scottishlegalcomplaints.org.uk\)](https://www.scottishlegalcomplaints.org.uk)

<sup>15</sup> In support of appeal rights, and to enable a complainer to make an informed decision on whether or not to appeal, the SLCC is required to provide detailed reasoning for their decisions taken at each stage of the process.

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26. This process can be time consuming for both the complainer and the legal practitioner. It also has the effect of potentially delaying a clearly serious complaint from being investigated swiftly as the SLCC must proceed through the initial stage, or tests, of assessing the complaint before an investigation can be commenced.

27. All of this takes place simply to assess if the case can be accepted by the SLCC as a complaint to be looked at, something which in many complaints bodies would be a low level administrative decision. As a comparison in respect of England and Wales, section 137(1) of the Legal Services Act 2007 states that a complaint is to be determined “by reference to what is, in the opinion of the ombudsman making the determination, fair and reasonable in all the circumstances of the case”.<sup>16</sup>

28. Services complaints are investigated by the SLCC, while complaints about conduct are passed to the relevant regulator to investigate (for example, the Law Society will investigate conduct complaints relating to solicitors). Where a complaint appears to contain elements of both poor conduct and inadequate services in respect of the same issue (referred to as a ‘hybrid issue complaint’) there is no provision in the 2007 Act to enable it to be progressed jointly in a way which would allow both elements to be investigated. In order to address this deficiency, the SLCC developed its own process to deal with hybrid issue complaints. However, a court found in a 2016 case<sup>17</sup> that the 2007 Act did not allow the SLCC to determine that a complaint is a hybrid issue complaint. The court further indicated that where there is any suggestion of a conduct issue within a complaint, then the complaint needed to be treated as a conduct issue complaint.

29. Where a complaint contains elements of both inadequate services and poor conduct, some argue that the requirement to treat the complaint as relating to conduct means that complainers miss the opportunity for the inadequate services element to be dealt with. Services complaints are progressed within a context of reparation to the complainer and can result in the complainer receiving compensation of up to £20,000 or rectification of the error or omission complained of. By contrast, conduct complaints focus on discipline of the legal practitioner who may be censured, fined or struck off. Compensation can be awarded but at a lesser level.

## Investigation of service complaints

30. Where the SLCC is investigating a services complaint, it may seek agreement between the parties to the complaint to settle the complaint, through a combination of conciliation or optional mediation. A settlement may be proposed to the parties and, if accepted by both, it will be resolved and not proceed to determination. If not accepted by either party, it will proceed to determination. This function must be carried out by a determination committee comprised of the SLCC’s legal and non-legal members. This decision is appealable to the Court of Session.

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<sup>16</sup> [Our approach to determining complaints \(legalombudsman.org.uk\)](https://www.legalombudsman.org.uk)

<sup>17</sup> Anderson Strathern LLP v Scottish Legal Complaints Commission 2016 SLT 967.



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## Sanctions in respect of service complaints

31. The SLCC may impose the following sanctions where a service complaint has been upheld:

- Fees - a reduction or refund of fees (and VAT or other costs) charged by the legal practitioner.
- Compensation for loss, inconvenience or distress – compensation for complainers directly affected by the inadequate professional services.
- Putting it right - the firm carries out work, or takes other action, to correct what has gone wrong or take other action specified by the Commission.
- Competence – where the Commission feels a practitioner does not have enough competence in the law or legal practice, it can report the matter to the RPO.

## Compensation values<sup>18</sup>

32. In terms of compensation for inconvenience and loss, the most common compensation amounts are between £150-£500, while the average is between £1,000-£1,200. With regard to compensation for actual loss, the average amounts of compensation are higher than for inconvenience and distress. However, the SLCC compensates for inconvenience and distress ten times more than actual loss.

33. The total limit on the compensation payable to a complainer is £20,000 but it is very rare for the compensation to be £20,000.

## Investigation of conduct complaints

34. The regulators separately investigate conduct complaints. Conduct can be further considered as unsatisfactory professional conduct (UPC) or professional misconduct.<sup>19</sup> Matters relating to UPC are usually determined by a complaints committee of a regulator, while professional misconduct is usually considered by the relevant Discipline Tribunal. There is not a single set of rules which all regulators must follow, with separate rules for the Law Society,<sup>20</sup> Faculty,<sup>21</sup> and ACA.<sup>22</sup> Decisions in respect of UPC may be appealed to the relevant tribunal.

## Sanctions in respect of conduct complaints

35. Similarly, the rules around sanctions for each branch of the profession differ slightly based on their disciplinary rules and procedures. In general terms an upheld

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<sup>18</sup> Based on SLCC trends between 2016 and 2019 [Action we might take \(scottishlegalcomplaints.org.uk\)](https://www.scottishlegalcomplaints.org.uk)

<sup>19</sup> 'Inadequate professional services' is defined at section 46 of the 2007 Act as "professional services which are in any respect not of the quality which could reasonably be expected of a competent legal professional"

<sup>20</sup> [How we investigate conduct complaints | Law Society of Scotland \(lawsociety.org.uk\)](https://www.lawsociety.org.uk/how-we-investigate-conduct-complaints)

<sup>21</sup> [Faculty - disciplinary-rules-june-2019.pdf \(advocates.org.uk\)](https://www.advocates.org.uk/faculty-disciplinary-rules-june-2019.pdf)

<sup>22</sup> [Association of Commercial Attorneys: revised scheme - gov.scot \(www.gov.scot\)](https://www.gov.scot/Association-of-Commercial-Attorneys-revised-scheme)



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UPC complaint may result in a censure, a fine, an award of compensation to the complainer or an order to undergo training. The maximum compensation award in compensation cases in respect of solicitors is £5,000.<sup>23</sup> The Faculty discipline rules sets out that a maximum award of £15,000 may be made in compensation.<sup>24</sup>

## Handling complaints

36. While it is the responsibility of the regulators to investigate conduct complaints against their members, the SLCC has the power to investigate a complaint about how a regulator dealt with a conduct complaint. This is referred to as a handling complaint. Where a handling complaint is upheld, the SLCC may make certain recommendations which the regulator may comply with. If it fails to comply with the recommendations, the SLCC may direct it to comply. The SLCC may seek an order from the court where the regulator fails to comply with such a direction.<sup>25</sup>

## The current legislative framework

### The Solicitors (Scotland) Act 1980

37. The 1980 Act sets out legislative functions for the Law Society (which had been established by statute in 1949) in relation to promoting the interests of the solicitors' profession and the public in relation to that profession. Those functions include oversight of the admission of solicitors to the profession, keeping of the roll of solicitors and responsibility for producing rules as to professional practice, conduct and discipline.

38. The 2010 Act amended the 1980 Act to place a requirement on the Law Society to establish a regulatory committee to operate its regulatory functions independently of the Law Society's Council and other committees.

39. 'Incorporated practices',<sup>26</sup> a unique type of legal business structure in Scotland, was added to the regulatory responsibilities of the Law Society in 1985, unlike traditional partnerships or sole traders, it is a legal entity which can limit the liability of its owners. Responsibility for oversight of notaries public was transferred to the Law Society via the 1990 Act and further amendments in 2003 introduced regulation of conveyancing and executry services to the Law Society's functions.<sup>27</sup> The 2010 Act inserts provisions into the 1980 Act which provides for the Law Society to act as a statutory regulator for licensed legal services providers ("licensed providers"). The Law Society also regulates registered European lawyers and registered foreign lawyers. The Law Society is

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<sup>23</sup> Section 53 [Solicitors \(Scotland\) Act 1980 \(legislation.gov.uk\)](#)

<sup>24</sup> [disciplinary-rules-june-2019.pdf \(advocates.org.uk\)](#)

<sup>25</sup> See section 25 of the 2007 Act (and section 57E in relation to licensed providers). [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(legislation.gov.uk\)](#)

<sup>26</sup> These were added by virtue of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. An incorporated legal practice in Scotland is a unique type of legal business structure. An incorporated practice allows solicitors to form a practice that can offer a range of legal services to clients. In Scotland it must be registered with the Law Society of Scotland and be made up entirely of solicitors.

<sup>27</sup> The function of regulating conveyancing and executry services was inserted into the 1990 Act by the [Public Appointments and Public Bodies etc. \(Scotland\) Act 2003](#).

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required to manage the Guarantee Fund<sup>28</sup> which provides compensatory payments to consumers who have suffered loss in connection with the provision of legal services. The 1980 Act also provides the Law Society with the power to make rules for its members to hold professional indemnity insurance.

40. The 1980 Act established the SSDT which considers complaints against solicitors or incorporated practices relating to professional misconduct or the commission of certain offences.

### The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

41. Section 25 of the 1990 Act makes provision for any professional or other body to apply for the right for their members to conduct litigation and for rights of audience. To date, the ACA are the only body to have applied for rights under section 25.

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

42. Parts 1 and 2 of the 2007 Act establish the SLCC and provide the framework for how complaints against legal services practitioners are to be dealt with. The SLCC can consider complaints against 'practitioners' as defined at section 46(1) of the 2007 Act. Practitioners are: solicitors, advocates, conveyancing practitioners, executry practitioners, a firm of solicitors, an incorporated practice, a registered European or foreign lawyer and a person exercising a right to conduct litigation or a right of audience by virtue of section 27 of the 1990 Act.

43. The provisions relating to the SLCC's main complaint investigation function are found at sections 2 to 20. These provisions set out how the Commission is to determine whether a complaint can be taken forward and the process for determining whether it is a conduct or services complaint, the Commission's duty to investigate services complaints and the steps to be taken where the Commission upholds a complaint. Sections 21 and 22 provide that any decision of the SLCC respecting a complaint is appealable to the Court of Session<sup>29</sup> under certain specified grounds.

44. Sections 23 to 25 relate to the SLCC's power to investigate a handling complaint. Following such an investigation the SLCC may make certain recommendations to the RPO,<sup>30</sup> including that the conduct complaint be investigated further or reconsidered, that the RPO considers exercising its powers in relation to the practitioner concerned or that the RPO pay compensation of up to £5,000 to the person making the handling complaint.

45. It is open to the RPO to decide whether to comply with the recommendation made, but following a failure to comply the SLCC may direct the RPO to comply. If the RPO

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<sup>28</sup> Referred to in practice as the Client Protection Fund.

<sup>29</sup> Section 46 defines 'court' as meaning the Court of Session.

<sup>30</sup> Section 24(2) of the 2007 Act.

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continues not to comply, the Commission may petition the court for an order compelling the RPO to comply with the direction.<sup>31</sup>

46. Sections 27 to 31 relate to how the SLCC is financed. Section 27 allows the SLCC to set an annual general levy to be paid by all individual legal practitioners subject to its oversight.<sup>32</sup> Section 28 provides for a complaints levy to be paid by a practitioner against whom a services complaint is upheld.

47. Section 32 of the 2007 Act places a duty on the SLCC to make rules as to its practice and procedure.<sup>33</sup> Before making or varying the rules, the SLCC must consult with the Lord President, the Scottish Ministers, the RPOs and such groups of persons representing consumer interests as it considers appropriate.

48. The SLCC's duty to monitor trends in the way that practitioners have dealt with matters which lead to services or conduct complaints being submitted is provided for at sections 35 and 36 of the 2007 Act. Section 39 provides that the SLCC may monitor and make recommendations about the effectiveness of the Law Society's Guarantee Fund and professional indemnity arrangements, or any similar arrangements maintained by any RPO.

49. The SLCC may also issue guidance to RPOs or practitioners in relation to how they deal with complaints made to them about the professional conduct or services provided by them or their employees, by virtue of section 40 of the 2007 Act.

50. Sections 47 to 51 of the 2007 Act place duties on the RPOs to investigate conduct complaints and provide the relevant powers necessary for those investigations to be conducted and determined. Sections 53 to 57 amend the 1980 Act to introduce the power for the Law Society to investigate conduct cases raised against solicitors.

51. Sections 57A to 57G were inserted by the 2010 Act and make special provision as to the investigation by the SLCC of complaints about licensed providers.<sup>34</sup>

52. Section 57B introduces regulatory complaints, which relate to a failure by the licensed provider to have regard to the regulatory objectives or professional principles set out in the 2010 Act. The SLCC has the power, by virtue of section 57E, to

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<sup>31</sup> Section 25 of the 2007 Act.

<sup>32</sup> Section 27(1), this is practising advocates, conveyancing or executry practitioners, a person exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 of the 1990 Act, and practising solicitors.

<sup>33</sup> Schedule 3 sets out detail about what those rules must contain and some areas about which rules may be made.

<sup>34</sup> Licensed providers are legal entities, provided for in the 2010 Act, which do not have to be wholly owned by solicitors. Licensed providers must be licensed by an approved regulator which has authorisation from the Scottish Ministers to act as such. To date the Society is the only body to have authorisation as an approved regulator but its scheme is not yet operating and so there are no licensed providers operating in Scotland.

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investigate a complaint about how an approved regulator has handled a regulatory complaint.

## The Legal Services (Scotland) Act 2010

53. The 2010 Act provides for the establishment and regulation of licensed providers. These are business entities which provide legal services but can be majority-owned by non-solicitor investors. Part 2 of the 2010 Act sets out how regulators of licensed providers must be approved and authorised by the Scottish Ministers.

54. The definition of a licensed provider is set out at section 47, which provides that they are business entities providing legal services to the general public or otherwise for a fee, gain or reward, operating under a license issued by an approved regulator in accordance with their licensing rules. A licensed provider must also contain at least one solicitor who holds a valid practising certificate which is free of conditions, in accordance with subsection (2).

55. Section 49 provides that qualifying investors must hold at least a 51% stake in the total ownership or control of an entity in order for it to be eligible to be a licensed provider. Subsection (2) defines a 'qualifying investor' for the purposes of the ownership requirement as either a solicitor or an investor who is a member of another regulated profession. A regulated profession is defined at subsection (3) as "a profession the professional activities of whose members (and qualifications for membership of which) are, under statutory or administrative arrangements, regulated by a professional association".

56. Chapter 2 of Part 4 makes provision for the regulation of advocates to be carried out by the Court of Session, or by the Lord President or the Faculty on the Court of Session's behalf. The Court of Session currently delegates this function to the Faculty.

## Policy background

57. In December 2015, the Law Society submitted a paper entitled 'The Solicitors (Scotland) Act 1980 Case for Change' to Scottish Ministers,<sup>35</sup> which set out proposals for developing primary legislation that would deliver reforms to their regulatory powers. The stated intention behind those proposals was to support growth in the legal services sector, through a more modern and proportionate approach to regulation, and to strengthen consumer protection.

58. In 2016, the SLCC published a paper setting out its priorities for reform.<sup>36</sup> The SLCC raised concerns that the statute underpinning the legal complaints system is too restrictive and unable to act in a proportionate and risk-based way, adding undue cost and time for consumers and legal professionals. The SLCC sought that a 'framework'

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<sup>35</sup> [The Solicitors \(Scotland\) Act 1980. The case for change](#)

<sup>36</sup> [reimagine regulation SLCC priorities for a consultation on legal services regulation.pdf \(scottishlegalcomplaints.org.uk\)](#)

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Act be introduced, which would not prescribe administrative processes in primary legislation.

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

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

60. In October 2018, the Robertson report was published. The Robertson report made 40 recommendations intended to reform and modernise the current regulatory framework to ensure a proportionate approach, supporting growth and competitive provision in the legal services sector, whilst placing consumer interests at its heart.

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

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

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

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

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64. The Scottish Government response to the Robertson report was published in June 2019.<sup>37</sup> The analysis of the Robertson report established that while many of the recommendations were widely supported, the primary recommendation largely polarised the views of those in the legal and consumer landscape. As a result, the Scottish Government made the commitment to carry out a public consultation based on the recommendations made by the Robertson report, with the intention of seeking to build consensus on the way forward.

## The need for robust legal regulation and reform of the current regulatory landscape

65. The Robertson report set out that Scotland is home to a well-educated, well respected legal profession with a high degree of public trust, of which we can be very proud. However, there is significant potential for “market failure” in the provision of legal services whereby consumers either receive or perceive that they have received a poor service.<sup>38</sup> Consumers are less likely to make a well-informed purchasing decision when consuming legal services versus a typical purchasing decision, because:

- Consumers tend to use legal services infrequently and have limited ability to learn about legal products and service providers.
- Legal services, as well as the law itself, are complex.
- Legal services are often sought during traumatic or stressful circumstances.

66. In addition, the Robertson report identified the absence of a comprehensive baseline survey of consumers of legal services in Scotland. These conditions are not unique to the legal services industry (for example, medical and financial sectors also have to overcome many of these factors).

67. While the factors listed above have the potential to lead to poor outcomes for consumers, particularly in relation to the quality of the services they receive and the costs of those services, effective regulation can guard against these and protect consumer interests.

68. The role of legal services are central to the protection of human rights and freedoms, playing a vital role in upholding the rule of law and providing access to justice. Legal services also contribute to the social value of Scotland. There is a huge range of legal services available for people to access, often in times of distress or vulnerability. Legal services support individual's wellbeing, promote their continued contribution to society and help to prevent the escalation of problems. Legal services also support a range of commercial matters affecting many different types of organisations, from small businesses to multi-national corporations.

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<sup>37</sup> [Independent review of legal services regulation in Scotland: our response - gov.scot \(www.gov.scot\)](https://www.gov.scot/About/Review/Regulation-Legal-Services)

<sup>38</sup> Alongside the Robertson report, a report on legal services in Scotland was produced by Europe Economics that considers these issues in more detail: [www.gov.scot/About/Review/Regulation-Legal-Services](https://www.gov.scot/About/Review/Regulation-Legal-Services).

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69. In this regard, the 2010 Act sets out a regulatory objective of “protecting and promoting the public interest”. The ‘public interest’ means ‘objectives and actions for the collective benefit and good of current and future citizens in achieving and maintaining those fundamentals of society that are regarded by them as essential to their common security and well-being, and to their legitimate participation in society. There must be a public interest in ensuring that the basic needs of all citizens are satisfied’.<sup>39</sup>

70. Effective and proportionate regulation has an important role to play in ensuring that the legal profession in Scotland continues to be regarded as one of the best in the world and is able to grow and thrive, to meet the needs of Scotland’s citizens.

71. Ensuring that Scotland is able to maximise the benefits that a strong and independent legal sector represents is a priority for the Scottish Government. It is widely agreed that there are some elements of the current regulatory regime that could be significantly improved. Current restrictions which may inhibit competition, the complex complaints system and increased transparency of regulation are key areas in this regard.

72. Reform of legal services regulation will seek to modernise the existing regulatory framework and provide a proportionate approach which supports growth and competitive provision in the legal services sector whilst placing consumer interests firmly at its heart, aligning with the principles of the Robertson report. This also links with the following Scottish Government National Performance Framework outcomes:<sup>40</sup>

- We grow up loved, safe and respected so that we realise our full potential.
- We live in communities that are inclusive, empowered, resilient and safe.
- We are creative and our vibrant and diverse cultures are expressed and enjoyed widely.
- We have a globally competitive, entrepreneurial, inclusive and sustainable economy.
- We are well educated, skilled and able to contribute to society.
- We have thriving and innovative businesses, with quality jobs and fair work for everyone.
- We respect, protect and fulfil human rights and live free from discrimination.
- We are open, connected and make a positive contribution internationally.
- We tackle poverty by sharing opportunities, wealth and power more equally.

73. Legal services reform also aligns with the aims set out in The Vision for Justice in Scotland document (2022),<sup>41</sup> which sets out Justice Priorities for this parliamentary session:

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<sup>39</sup> [Mayson, Legal services regulation and the public interest](#)

<sup>40</sup> [National Performance Framework | National Performance Framework](#)

<sup>41</sup> [The Vision for Justice in Scotland - gov.scot \(www.gov.scot\)](#)



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- We have a society in which people feel, and are, safer in their communities.
- We have effective, modern person-centred and trauma-informed approaches to justice in which everyone can have trust, including as victims, those accused of crimes and as individuals in civil disputes.
- We address the on-going impact of the COVID-19 pandemic and continue to renew and transform justice.

74. The legal sector contributes over £1 billion to the Scottish economy each year and is responsible for over 20,000 high value jobs. It is not only an economic generator in its own right but a profession that is critical to Scotland's other key sectors – Financial Services, Oil and Gas, Renewables, Science and Technology. Both the legal services sector and the Scottish Government are working together to ensure the sector makes its maximum possible impact in a competitive global market.

## Consultation

75. The public consultation set out three possible models for change – one based on the primary recommendation from the Robertson report, and two alternatives. All options focused on the way in which legal services are regulated in Scotland and the operation of the complaints process.

76. The independent consultation analysis reported that respondents were divided over their support for the Robertson report's primary recommendation, and which of the three regulatory options they preferred. Typically, although not exclusively, consumers and those representing them tended to agree with the primary recommendation, supporting Option 1, while those representing the legal profession largely disagreed with the primary recommendation and supported Option 3.

77. Those who supported Option 1: the Robertson Model, felt this provided a regulator who was independent of the profession, would be more consumer focused and provide greater protection for consumer rights, remove bias and conflict of interest which they perceived the current system as perpetuating, and ultimately improve public trust in the system. Those who supported Option 3: the Enhanced Accountability and Transparency Model, argued that the Robertson Model would introduce parliament/government influence into the legal profession thus removing its independence and undermining the rule of law, and would introduce an additional cost to the profession which would ultimately be passed onto consumers impacting on access to justice. They also felt that the Robertson report had failed to justify the need for such fundamental changes to the regulatory framework, instead arguing that the necessary changes could be adopted within the existing framework more quickly and cheaply.

78. It was felt by the respondents to the consultation who favoured the third option that Option 3 would be the most achievable and deliverable while still providing the necessary regulatory updates. They viewed that the Robertson report had not justified the need for such fundamental changes to the regulatory framework, instead arguing that the necessary changes could be adopted within the existing framework.

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79. While Option 2 emerged as the middle choice, it should be noted that most respondents were polarised in their preference for either Option 1 or Option 3, with respondents suggesting that any other option should be avoided. As such, proceeding with Option 2 as a perceived ‘middle ground’ could result in significant resistance from all sides as the perceived failings of their least preferred model would still be incorporated within Option 2.

80. The consultation sought views on these different options. The consultation was open for 12 weeks, running from 1 October to 24 December 2021. A series of eight online focus group events were also conducted to gather feedback.

81. The independent consultation analysis was published on 8 July 2022. A total of 158 substantive responses were included in the data analysis. Overall, 101 individuals and 57 organisations responded to the written consultation. In addition, views from the focus groups were included in the analysis.

82. The analysis highlighted that all respondents, regardless of affiliation, shared as a common aspiration, the need for any future model to be transparent, open to public scrutiny and efficient to ensure that justice remains accessible to all.

83. The responses to the consultation have been invaluable in supporting the Scottish Government in considering this reform.

84. A number of bodies and organisations were engaged in the development of the consultation proposals prior to publication of the consultation, throughout the 12-week consultation process and afterwards. These included:

- The Law Society of Scotland (the Law Society)
- The Scottish Legal Complaints Commission (SLCC)
- The Faculty of Advocates (the Faculty)
- The Association of Commercial Attorneys (ACA)
- Which?
- The Competition and Markets Authority (CMA)
- Citizens Advice Scotland (CAS)
- Scottish Legal Complaints Commission Consumer Panel (Consumer Panel)

85. The responses to the consultation may be broken down by organisational sector:

	<b>Number</b>	<b>Percent</b>
Legal services provider	29	51%
Professional body	13	23%
Public body/sector	6	11%
Consumer body/panel	3	5%

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Third sector	2	3%
Legal services regulatory body	1	2%
Other	3	5%
<b>Total</b>	<b>57</b>	<b>100%</b>

## Policy objectives of the Bill: Main provisions

### The regulatory objectives and professional principles

86. The Robertson report set out that the new model should be designed around the delivery of regulatory objectives and professional principles which should be set out in primary legislation.

87. The Scottish Government has carefully considered the Robertson report and has undertaken discussions with key stakeholders on the relevance of existing regulatory objectives and professional principles contained in the 2010 act. This collaborative approach is designed to bring about strategic change and a clear vision for the future regulatory structure.

88. The analysis of the consultation responses indicates support for the introduction of a modern set of regulatory objectives and professional principles that would apply to all branches of the legal profession, and which support an increased focus on quality, improvement and proportionate risk-based regulation, while also incorporating the Better Regulation Principles and Consumer Principles throughout its areas of responsibility.

### Bill provisions

89. Section 2 of the Bill sets out the regulatory objectives:

- to support the constitutional principle of the rule of law and the interests of justice,
- to protect and promote the interests of consumers and the wider public interest,
- to promote:
  - access to justice,
  - an independent, strong and diverse legal profession,
  - quality, innovation and competition in the provision of legal services,
  - effective communication between regulators, legal services providers and bodies that represent the interests of consumers, and
- for those regulating legal services to:

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- use and promote best practice in relation to assessing and improving of the quality of regulation and compliance with applicable legislation and rules,
- adhere to the regulatory principles described in the Act.
- promote and maintain adherence to the professional principles.

90. Section 3 of the Bill provides that regulatory authorities must exercise their regulatory functions in a manner which:

- is compatible with the regulatory objectives, and
- it considers most appropriate to meet those objectives.
- Incorporating the consumer principles, the Bill sets out that:
  - a consumer should have access to a range of legal services that are affordable and suited to the consumer's needs,
  - a consumer should receive sufficient information about the consumer's rights and the services that are available,
  - a consumer should be treated fairly at all times,
  - where services are not of a suitable standard, a consumer should be able to access a means of redress, and
  - the views of consumers should be understood and taken into account.

91. This section also provides that regulatory authorised must encourage equal opportunities. Incorporating the Better Regulation principles,<sup>42</sup> section 3 of the Bill requires that regulatory functions should be exercised in a way that is transparent, accountable, proportionate, consistent, targeted only at cases in which action is needed and in a way that contributes to achieving sustainable economic growth (except to the extent that it would be inconsistent with the exercise of such functions to do so).

92. Section 4 of the Bill sets out, as professional principles, that persons providing legal services should:

- support the proper administration of justice,
- act with independence (in the interests of justice),
- act with integrity,
- act in the best interests of their clients (and keep clients' affairs confidential),
- maintain good standards of work,
- where exercising a right of audience before any court or conducting litigation in relation to proceedings in any court, comply with such duties as are normally owed to the court by such persons,

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<sup>42</sup> The Better Regulation Principles require systems to be: • proportionate • consistent • accountable • transparent • targeted only where needed.

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- meet the person's obligations under any relevant professional rules,
- act in conformity with professional ethics.

93. The Bill makes provision for the Scottish Ministers to modify the regulatory objectives and the professional principles. Under section 5, Ministers may add, amend, or remove a regulatory objective or professional principle. Prior to making regulations under this section, the Scottish Ministers must consult the Lord President, each category 1 and 2 regulator, each approved regulator of licensed providers, the SLCC, the Consumer Panel and the CMA.

### Alternative approaches

94. An alternative approach may be to retain the current regulatory objectives and professional principles as set out within the 2010 Act. However, such an approach would not meet the policy intention to support an increased focus on quality and improvement, while also incorporating the Better Regulation Principles<sup>43</sup> and Consumer Principles throughout its areas of responsibility.

95. The Better Regulation Principles require systems to be proportionate, consistent, accountable, transparent, and targeted only where needed. In particular, better regulation does not mean disproportionately heavy regulation but right-touch regulation.

96. The Consumer Principles stem from the Consumer Bill of Rights pushed by John F Kennedy, in his 1962 speech to the US Congress he established four basic rights; the right to safety, the right to be informed, the right to choose, and the right to be heard. These rights formed the basis of the Consumer Principles, a set of tests used since then by consumer organisations across the world to assess whether goods or services are being provided in the consumer interest. Access; can people get the goods, services or information they need? Choice; can consumers affect the way goods and services are provided through the choices they make in the marketplace? Information; is information available, is it easy to understand, and does it help consumers to make informed choices? Quality; do goods and services meet acceptable standards? Redress; is there a simple, cheap, quick and fair system for dealing with complaints and disputes if things go wrong? Representation; are consumers' views properly represented in services where there is little or no choice? And is the process of decision-making transparent? Fairness and Equity; are some, or all, consumers unfairly discriminated against?

97. The Robertson report viewed that a new regulatory framework should embed the Better Regulation Principles and place the public and consumer interest at its heart. The Scottish Government view that the current regulatory objectives and professional principles should be amended to reflect this recommendation.

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<sup>43</sup> [Regulatory Reform \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://legislation.gov.uk)

## Consultation

98. The consultation found majority support for a modern set of regulatory objectives and professional principles:

- 99% of respondents agreed that the regulatory objectives should support the rule of law and the proper administration of justice.
- 97% of respondents agreed that regulation should offer accountability in protecting the public and consumer interest.
- 88% of respondents supported the proposal to embed the Better Regulation and Consumer Principles throughout the regulatory framework.
- 90% of respondents supported embedding a modern culture of prevention, quality assurance and compliance throughout the framework.
- 79% agree the objectives should promote innovation, diversity and competition in the provision of legal services.

## The legal services regulatory framework

99. The Scottish Government carefully considered the Robertson report following its publication in discussion with stakeholders. While it was clear that many of the report's recommendations were widely supported, views were polarised in respect of the primary recommendation of the report. Therefore, the Scottish Government committed to working collaboratively with stakeholders from the legal sector and those representing the consumer view to develop the consultation to consider options, and to seek to build consensus around reform.

100. As a result, the consultation presented three models of varying level of potential reform of the regulatory landscape based on the recommendations in the Robertson report. It set out different regulatory models that could be pursued, ranging from light-touch regulatory reform to a complete overhaul of the current regulatory system and introduction of a new single regulator, as recommended in the Robertson report. The additional models on which views were sought included:

- Model 1: the Robertson Model, as recommended by the Robertson report. This would introduce a single independent regulator that would be responsible for entry, standards, monitoring, complaints and redress in respect of the legal profession.
- Model 2: a Market Regulator Model. This would introduce an independent market regulator, who would oversee the work of the current 'authorised regulators', each having distinct roles and purpose.
- Model 3: an Enhanced Accountability and Transparency Model. In this model, the current regulators would continue to regulate their respective professions. There would be a focus on enhanced accountability and transparency, and a simplification of the current framework. The regulators would also be required to ensure that they embed a consumer voice in their

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organisation to provide advice, represent the views of consumers and organise research.

101. The responses to the consultation have been invaluable in terms of how the recommendations should be implemented and have shaped the measures set out within the Bill. However, the consultation analysis showed that views remain polarised over the primary recommendation.

102. In developing a position, the Scottish Government has engaged extensively with key stakeholders along with the public consultation exercise. This engagement has culminated in careful consideration of a wide range of views by Scottish Ministers.

103. This has led to the Scottish Government position which supports a Bill which will implement a modern, forward-looking model for legal services regulation While building on the existing framework. A two-category system for legal services regulators will provide a proportionate and risk-based approach. While the consultation set out three distinct models the measures in the Bill could be described as a fourth model, sitting between models 2 and 3.

104. The Robertson report recommended that the regulatory framework should be principles-based, sustainable and flexible and should embed the Better Regulation Principles, with the public and consumer interest at its heart. Also, that there should be a requirement on the regulator to lay an annual report before the Scottish Parliament incorporating information about their performance and budgets in respect of regulation.

105. The Bill retains and builds upon the current oversight role of the Lord President in the legal services regulatory framework, prioritising the continued independence of the legal profession. Key elements of the Lord President's role include:

- prescribing the criteria and procedure for admission to the legal professions,
- the approval of changes to practice rules in relation to the legal professions,
- overseeing the appointment of various governance roles in the regulatory framework,
- approval of measures proposed to be taken by the Scottish Ministers in relation to a category 1 or 2 regulator,
- a consultation role before the Scottish Ministers exercise regulation-making powers to make certain changes to the Bill of the 1980 Act,
- a power to revoke special rule changes made by a regulator in relation to a legal services provider.



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## Bill provisions

### Regulatory categories

106. Section 8 of the Bill makes provision for legal services regulators to be assigned as either a category 1 or category 2 regulator. The three existing regulators of legal services in Scotland are assigned by the Bill as:

- the Law Society is assigned to category 1,
- the Faculty is assigned to category 2,
- the Association of Commercial Attorneys is assigned to category 2.

107. Any new regulator that has an application for accreditation approved under Chapter 3 of the Bill will be assigned to either category 1 or category 2 by the Scottish Ministers. In adopting a risk-based and proportionate approach, consideration would require to be given to the following by Scottish Ministers when determining the appropriate category for new entrants to the sector:

- The type and range of legal services that are to be regulated,
- Whether the legal services are to be provided directly to members of the public,
- The number of legal services providers that the regulator regulates (or is likely to regulate).

### Category 1 regulators

108. Category 1 regulators would be those regulators with a significant membership or whose members provide largely consumer-facing services. Such regulators must exercise their regulatory functions independently of their other functions and properly in all respects (with a view to achieving public confidence). The Bill requires the regulators to review their status annually, other bodies that could be designated as category 1 could include existing or new regulators whose members provide legal services directly to the public and who may form legal firms.

109. Section 9 of the Bill sets out that where a category 1 regulator has functions other than regulatory functions it must establish an independent regulatory committee to discharge its regulatory functions. The category 1 regulator must ensure that the committee is adequately funded and resourced to be able to carry out its functions. The regulatory committee must determine its own structure, governance arrangements and priorities.

110. Section 10 specifies the composition and membership of regulatory committees and sets out that they must be comprised of legal and lay members, and convened by a lay member. At least 50% of the members of a regulatory committee (and any sub-committee of it) of a category 1 regulator are to be lay members.

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111. Section 14 sets out that a category 1 regulator must establish and maintain a fund for the purpose of making grants to compensate persons who suffer financial loss by reason of dishonesty by a legal services provider regulated by the regulator (or a provider it regulated at the time the dishonesty occurred). It is for the category 1 regulator or, where applicable, its regulatory committee, to determine whether to make payments from the fund. Where a category 1 regulator has a regulatory committee, the fund must be under the management and control of that committee.

112. Section 18 sets out that each category 1 and category 2 regulator must have rules concerning professional indemnity insurance for the legal services providers it regulates against any kind of professional liability.

113. Section 13 requires a category 1 regulator (or, where applicable, its regulatory committee) to prepare a report on the exercise of its regulatory functions as soon as practicable after the end of each reporting year. The report must include information demonstrating how it is complying with the regulatory objectives including, in particular, how compliance is ensured in the handling of complaints, information as to how the regulator (or its committee) is carrying out its regulatory functions, a statement on the strategic priorities of the regulator (or its committee) for the next reporting year in relation to its regulatory functions, a copy of the regulator's (or its committee's) annual accounts (insofar as they are relevant to the carrying out of regulatory functions), and other key information as specified at subsection 2. When preparing an annual report, a category 1 regulator, or where applicable, its regulatory committee must consult the Lord President, and the Consumer Panel. A copy of each annual report prepared under this section must be sent to Scottish Ministers who will publish the report and lay a copy of it before the Scottish Parliament.

114. The Bill provides that the work of regulatory committees would become subject to FOI requirements in exercising administrative regulatory authority. This stems from the 'Freedom of Information International Review: Scope of Bodies Included',<sup>44</sup> which suggests that bodies who exercise administrative authority, including professional licensing and standard setting organisations, could be an area where the law could be extended to be subject to Freedom of Information (FOI) requirements. Responses to the 'Consultation on Freedom of Information extension of coverage' supported extending the coverage of FOI to the Law Society, and bodies who have regulatory bodies.<sup>45</sup> In its post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002, the Scottish Parliament Public Audit and Post-legislative Scrutiny Committee recognised that FOI has brought important benefits in terms of greater transparency and accountability.<sup>46</sup> This aligns with a number of other professional regulators subject to FOI legislation, such as the General Teaching Council for Scotland, the General Medical Council and the Scottish Social Services Council.

115. Section 11 of the Bill sets out that a member of a regulatory committee of a category 1 regulator must not be, or have been for at least two years, involved in the

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<sup>44</sup> [Freedom of Information International Review: Scope of Bodies Included](#)

<sup>45</sup> [Consultation on Freedom of Information extension of coverage : Consultation Analysis \(www.gov.scot\)](#)

<sup>46</sup> [Post-legislative scrutiny: Freedom of Information \(Scotland\) Act 2002 \(azureedge.net\)](#)

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governance of the regulator or the exercise of its non-regulatory functions. However, the Bill does not prevent the sharing of services including information technology, equipment, administration, human resources, finance and corporate services, office space and facilities, between a category 1 regulator and its regulatory committee.

116. The Bill provides at section 9 that, except where provided for in an enactment, the governing body and regulatory committee of a category 1 regulator are to agree arrangements for resolving any disputes that may arise between them. Any disagreement between the Law Society Council and the regulatory committee is subject to arbitration.<sup>47</sup>

### Category 2 regulators

117. Category 2 regulators would be those regulators whose membership is less consumer-facing or more specialist in nature in terms of the legal work undertaken, and whose membership is comparably less in number such as advocates and commercial attorneys. Therefore, the Bill places the Faculty and ACA as category 2 regulators.

118. There are around 450 advocates in Scotland. In general terms advocates do not provide legal services directly to the public, rather receive instruction through a solicitor. Advocates also do not enter into partnership with other legal professionals. In contrast their counterparts in England and Wales, barristers may take direct instruction, and may enter into partnerships. If advocates moved to operate in this way then they may align more closely with category 1.

119. There are around five commercial attorneys in Scotland. Commercial attorneys hold rights of audience and rights to conduct litigation in respect of construction law. If there was a significant increase in their number or their rights were extended then they may align more with category 1.

120. In this category, it would be considered disproportionate to the size and lack of direct consumer contact for such regulators to establish and then delegate its regulatory function to a regulatory committee. The Bill imposes requirements on category 2 regulators at section 15, such as a duty to exercise regulatory functions independently of other functions, ensuring that sufficient resources are allocated to the exercise of its regulatory functions and regular reviews of how effectively it is exercising its regulatory functions.

121. Category 2 regulators will also require to produce an annual report at section 16 which will include key information such as how the regulator is complying with the regulatory objectives, information as to how the regulator is carrying out its regulatory functions and a summary of the costs incurred by the regulator in carrying out its regulatory functions. The report must be published electronically, most likely on its website. As described above, category 2 regulators will also need to ensure relevant professional indemnity insurance arrangements are in place.

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<sup>47</sup> Section 3D of the 1980 Act [Solicitors \(Scotland\) Act 1980 \(legislation.gov.uk\)](https://legislation.gov.uk)

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## Regulatory functions

122. The Bill at section 7 provides that regulatory functions mean the functions of regulating legal services providers in relation to any matter of professional practice, conduct or discipline, including, in particular:

- setting standards for admission or authorisation and ongoing training of its providers,
- handling complaints about its providers,
- making regulatory rules,
- complying with the requirements imposed on the regulator by the Bill (for example, in relation to keeping a register of members).

123. Section 17 provides that both category 1 and 2 regulators must establish and maintain a register of its members who are authorised to provide legal services (for example, in terms of solicitors this means practising solicitors). The register may also contain the details of a regulator's members who are not currently authorised (e.g. non-practising members). The register is to be accessible to the public, free of charge.

## The Scottish Legal Services Commission

124. The Bill at section 51, reconstitutes the SLCC as the Scottish Legal Services Commission ("the Commission"). This organisation will retain its core function as the single gateway for all complaints about the provision of legal services in Scotland. It will continue to investigate and resolve complaints about inadequate professional services. It will also continue to refer complaints about the conduct of legal professionals to the RPOs and have oversight of complaint handling across the legal profession.<sup>48</sup> Its role in monitoring trends in legal complaints<sup>49</sup> will continue, and it will have an increased oversight role of how legal practitioners deal with complaints, and how the legal services regulators handle conduct complaints.<sup>50</sup>

125. Furthermore, at section 65 of the Bill, the Commission will have a new role in monitoring complaints relating to the provision of unregulated legal services. The Commission will be required to set rules regarding the process for complaints about unregulated legal services providers. It is expected that the Commission will set a narrow scope in the types of complaints it will investigate to begin with, and expand this over time as it develops a greater understanding of the unregulated sector.

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<sup>48</sup> Section 17 of the [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(legislation.gov.uk\)](https://legislation.gov.uk), sets out the SLCC's powers to examine documents and demand explanations in connection with conduct or services complaints.

<sup>49</sup> Forwarding complaints, advice, monitoring [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(legislation.gov.uk\)](https://legislation.gov.uk)

<sup>50</sup> In respect of complaint handling, the Commission would have a similar role to that of the Legal Services Board in England and Wales: [Legal Services Board complaints handling](#)

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## Consumer Panel

126. Currently the SLCC is required to establish an independent advisory panel, known as the 'Consumer Panel'.<sup>51</sup> The role of the Consumer Panel is to make recommendations to the SLCC for improvements to its practice and procedures, to make suggestions to the SLCC of topics for research connected to consumers, and to express views on such matters relevant to the SLCC's functions as the SLCC directs. The Bill, at section 75, will extend the role the advisory panel to matters relating to legal services regulation in Scotland more broadly, with the policy intention of placing consumer interests at the heart of legal services regulation.

## Alternative approaches

127. The Scottish Government response to the Robertson report was published in June 2019. Analysis of the Robertson report established that while many of the recommendations were widely supported, the primary recommendation largely polarised the views of those in the legal and consumer landscape. As a result, the Scottish Government made the commitment to issue a public consultation based on the recombination's made by the Robertson report, with the intention of seeking to build consensus on the way forward.

128. The Scottish Government worked collaboratively with stakeholders from the legal and the consumer perspective to design the consultation. In seeking to build agreement around proposals for reform the consultation contained two alternative viable models of regulation, in addition to the first model proposed by the Robertson report. The additional models on which views were sought included:

- Model 1: the Robertson Model, as recommended by the Robertson report. This would introduce a single independent regulator that would be responsible for entry, standards, monitoring, complaints and redress in respect of the legal profession.
- Model 2: a Market Regulator Model. This would introduce an independent market regulator, who would oversee the work of the current 'authorised regulators', each having distinct roles and purpose.
- Model 3: an Enhanced Accountability and Transparency Model. In this model, the current regulators would continue to regulate their respective professions. There would be a focus on enhanced accountability and transparency, and a simplification of the current framework. The regulators would also be required to ensure that they embed a consumer voice in their organisation to provide advice, represent the views of consumers and organise research.

129. The Bill seeks to provide for a proportionate approach that seeks to balance and deliver the key priorities of stakeholders and is shaped by the responses to the consultation.

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<sup>51</sup> Schedule 1 Paragraph 11A [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(legislation.gov.uk\)](https://legislation.gov.uk)

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## Consultation

130. The consultation showed strong support for retaining the overarching role of the Lord President and the Court of Session, with the majority of respondents stressing that their role in the regulatory framework was important in safeguarding the independence of the legal profession.

131. The analysis of the consultation responses shows that views were evenly split between support and opposition to the primary recommendation. However, there are many areas where there is broad agreement between stakeholders. The analysis highlighted that all respondents, regardless of affiliation, shared as a common aspiration, the need for any future model to be transparent, open to public scrutiny and efficient to ensure that justice remains accessible to all.

132. In respect of Model 1, those who agreed generally felt that an independent regulator would be welcome and bring the sector up to date and into line with other professions, providing clarity and allowing more focus on consumer rights and needs, while facilitating consistent regulation of the entire sector. However among those who disagreed with the primary recommendation, respondents generally felt that the Robertson report did not provide evidence of the “mischief” (i.e. problems, shortcomings or issues) which the proposals sought to address or to support the need for such fundamental reform, legal services were already heavily regulated and the current system of regulation worked well and did not need to be amended, and the current regulatory bodies had good knowledge and understanding of how each branch of the legal profession worked and the challenges they faced, they operated in the public interest, and they did a good job with safeguards in place to provide reassurances over impartiality (e.g. having non-solicitors as part of the Law Society’s Regulatory Committee and being under a statutory duty to work in the public interest). Some viewed the primary recommendation as a threat to the independence of the legal profession.

133. The key reasons why respondents supported Model 3 included perceptions that it would maintain the independence of the legal profession, be more cost effective than the alternative options, allow improvement in the current regulatory system with the least disruption, and improve the transparency and accountability of regulators. However, among those who disagreed, views included that it would not provide independence from the profession and would continue to put the interests of service providers above consumers. It would continue to perpetuate tensions and conflicts of interest for organisations between their role as regulator and their role as representatives of the profession. It was too similar to the current system so would not deliver the necessary changes or required levels of improvement and it could be prohibitive to new entrants to the market as they would have to set up their own regulator.

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134. While views are evenly split over models 1 and 3, model 2 was selected by the majority of respondents as their second choice. However, several respondents noted that they had picked this as the middle option as they saw it as slightly favourable to their least preferred option and cautioned against model 2, indicating it was unlikely to go far enough to address their concerns. The Scottish Government is mindful of the cost implications of establishing an additional body within the regulatory framework that would require to be funded by the profession. These were significant factors in not pursuing option 2.

## Standards, monitoring & reporting

135. A key policy intention of the Bill is to improve the transparency and accountability of legal services regulation by imposing a duty on regulators to publish information about how they adhere to the regulatory objectives and the cost of regulating the legal profession.

136. The importance of the independence of the legal profession is enshrined in the Bill as a regulatory objective - the promotion of an independent, strong and diverse legal profession. There is also a need for regulation to operate in the public interest and for the needs of consumers to be protected. Therefore the Bill, at sections 19 and 20, allows for the Scottish Ministers to intervene in the event of concerns being raised that a regulator is failing to exercise their regulatory functions in a way that is compatible with the regulatory objectives or in the public interest.

## Bill provisions

137. The Bill gives the Scottish Ministers the power to review a category 1 or 2 regulator's exercise of their regulatory function where requested to do so by the Scottish Parliament, the CMA or Consumer Scotland. This process builds on provision which already exists in the 2010 Act<sup>52</sup> in relation to the approved regulators of licensed providers. Following any review, Scottish Ministers must publish a report detailing their findings and recommendations and, where there is evidence of a regulator failing to regulate in the public interest or meet the regulatory objectives, may take the following measures:

- setting performance targets,
- directing that action be taken,
- publishing a statement of censure,
- imposing a financial penalty,
- making changes to, or removing some or all of the regulator's regulatory functions.

138. In determining what action is appropriate, the Scottish Ministers would have regard to the effect that a measure or combination of measures would have on the

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<sup>52</sup> See sections 37 and 38 of the 2010 Act [Legal Services \(Scotland\) Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk)



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regulator's observance of the regulatory objectives. Prior to imposing any of the measures, there are specified notification and consultation requirements which must be adhered to in the 2010 Act that would be mirrored. The Bill also requires the Lord President's agreement for the taking of all the measures except that of imposing a financial penalty.

139. The Bill gives the Scottish Ministers the power to make regulations specifying other measures which may be taken in relation to category 1 and 2 regulators, and to make provision about the procedure to be followed in taking measures. This will include notification and consultation requirements that mirror those already in the 2010 Act.

### Alternative approaches

140. An alternative approach may include creating an oversight regulator of legal services in Scotland to monitor the performance of the regulators. However as set out in respect of the regulatory framework, this approach would create great additional cost to the legal profession who fund the regulatory framework, and ultimately to consumers who use legal services, and therefore would not be proportionate for Scotland.

141. An alternative approach may be to provide for no mechanism to intervene should a regulator fail to regulate in the public interest or meet the regulatory objectives, however this would not meet the policy intention which seeks to increase transparency and accountability in the sector. The Legal Services Board (LSB) in England and Wales is the oversight regulator for legal services regulators.<sup>53</sup> At Part 4 of the Legal Services Act 2007 the LSB has a similar function to monitor the performance of the legal services regulators, with the ability to take comparable measures.

142. The new provisions in the Bill at sections 19 and 20 build upon the current position in respect of sections 37 and 38 of the 2010 Act in which Scottish Ministers may monitor the performance of approved regulators. The approach in the Bill builds on the model of co-regulation and seeks to provide an appropriate mechanism to make improvements should they be required or appropriate. The measures incorporate appropriate safeguards which protect the independence of the legal profession while reinforcing the duty to operate in the public interest.

### Consultation

143. 97% of respondents to the consultation agreed that legal services regulation should offer accountability in protecting the public and consumer interest. The Bill seeks to provide a proportionate level of oversight across the existing structures.

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<sup>53</sup> The LSB is accountable to the UK Parliament through the Lord Chancellor and is sponsored by the Ministry of Justice

## Definition of legal services / reserved activity

### Definition of legal services

144. The Robertson report recommended that a definition of legal services should be set out in primary legislation but did not set out a proposed definition. The 2010 Act defines legal services for the purposes of that Act as:

“Legal advice or assistance in connection with legal documents such as a contract, deed, writ or will, as well as legal advice or assistance and/or legal representation in connection with applying the law or seeking a legal dispute resolution.”<sup>54</sup>

145. The consultation analysis shows that most respondents (88%) agreed that there should be a definition of legal services. It was felt this would provide greater clarity, transparency, accountability, and consumer protection.

146. It is the policy intention that the definition of legal services in the Bill will provide clarity that regulation applies to the provision of legal services generally and not just those activities reserved under the 1980 Act (reserved legal activity is explored in more detail below). This will apply to existing legal services regulators and those regulators which gain approval in the future, as detailed in previous instructions. For the avoidance of doubt, it is not intended that currently unregulated providers of legal services should be brought within the scope of legal services regulation.

### Bill provisions

147. The Bill defines legal services at section 6 as services which consist of (at least one of):

- the provision of legal advice or assistance in connection with
  - any contract, deed, writ, will or other legal document,
  - the application of the law, or
  - any form of resolution of legal disputes, (“legal disputes” includes disputes as to any matter of fact the resolution of which is relevant to determining the nature of any person’s legal rights or obligations).
- the provision of legal representation in connection with—
  - the application of the law, or
  - any form of resolution of legal disputes.

148. Legal services do not include—

- judicial activities,

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<sup>54</sup> Section 3(1) of the Legal Services (Scotland) Act 2010 [Legal Services \(Scotland\) Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk)

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- any other activity of a judicial nature,
- any activity of a quasi-judicial nature (for example, acting as a mediator).

### Reserved activity

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

- Reserved legal services are defined in the 1980 Act as a set of legal activities which can only be provided by specified legal professionals, such as solicitors and advocates.
- Unreserved legal services are not specifically defined in the legislation. Rather it is a term that refers to all other areas of legal services which are not reserved, i.e. not restricted to specified legal professionals.

### Reserved legal services

150. The reserved legal services are defined in sections 32 and 57 of the 1980 Act. According to section 32 it is an offence for unqualified persons to provide the following legal services<sup>55</sup> (with some exceptions):

- Any writ relating to heritable or moveable estate (i.e. documents of property title to immovable and movable assets).
- Any writ relating to any action or proceedings in any court (i.e. documents that initiate or support court actions).
- Any papers on which to found or oppose an application for a grant of confirmation in favour of executors (i.e. documents relating to the administration of a deceased person's estate).
- Section 57 of the 1980 Act provides that notaries public must be qualified solicitors (i.e. authorised), and that they are responsible for the administration of oaths, and witnessing and authenticating the execution of certain types of document.

151. The Law Society have noted that where a firm is regulated by them, they are regulated to the extent of all legal services, whether or not the service provided is reserved under section 32 of the 1980 Act. This is important in respect of entity regulation, which introduces regulation of the legal sector at an entity or law firm level rather than solely at the individual level (i.e. individual solicitors, advocates, etc) as currently exists.

### Unreserved legal services

152. Unreserved legal services have no formal definition in legislation. The term is used to refer to legal services that are not reserved by legislation to specified legal professionals. As a result, unreserved legal services can be provided by both regulated

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<sup>55</sup> The Scottish Parliament has powers to reserve certain other acts to be done only by a solicitor.

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and unregulated legal professionals. However, some unreserved legal services are regulated by a statute other than the 1980 Act. Examples include:

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

153. The European Economics report: The Regulated and Unregulated Legal Services Market in Scotland - A Review of the Evidence<sup>56</sup> found that unreserved services account for the majority of legal services provided in Scotland. Unreserved legal services in Scotland include: accident and injury; employment; family; money and debt; social welfare; wills; and consumer and civil rights. It is important to recognise that some aspects of the legal services listed above are reserved. For example if, in any of the above areas, the legal issue in question proceeded to court litigation then this would be a reserved activity and would need to be undertaken by the relevant authorised professional (e.g. a solicitor or advocate).

154. Research by the Legal Services Board in England and Wales on unregulated legal services<sup>57</sup> set out that the sector is large, complex, and diverse and may account for up to 9% of the total market for individual consumers. The most common areas of law covered include injury, conveyancing, and will-writing, where the market share is likely to be much higher. The sector may account for up to 39% of the total market for small businesses, most commonly covering tax, trading, and employee issues. The Legal Services Board report unregulated providers are twice as likely to introduce new or improved services successfully compared to other providers, they also appear to be more transparent about the cost of services and unregulated providers are generally cheaper with lower upfront costs, although price models vary depending on the service. Will-writing is typically charged on a fixed price basis. However, those using unregulated providers do not have access to redress through the Legal Ombudsman.<sup>58</sup> Consumers complaining to Citizens Advice about unregulated providers cited higher than expected costs, unreasonable delays, and poor advice.

## Confirmation agents and will writers

155. The Robertson report recommended that here should be no substantial change at this stage to bring more activities within the scope of those activities “reserved” to solicitors or to remove activities i.e. will writing should not be reserved. Around three

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<sup>56</sup> [Review of the Regulation of Legal Services \(nrscotland.gov.uk\)](https://www.nrscotland.gov.uk)

<sup>57</sup> [LSB research on unregulated legal services reveals potential consumer benefits and detriments - The Legal Services Board](#)

<sup>58</sup> The equivalent of the SLCC in England and Wales.

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quarters of respondents (76%) agreed that there should be no substantial change at this stage to bring more activities within the scope of those activities ‘reserved’ to solicitors or to remove activities.

## Bill provisions

156. The 2010 Act proposed a new scheme for the regulation of confirmation agents and will writers requiring them to be members of an approving body. The approving body would be certified by the Scottish Ministers and would be responsible for regulating the activities of its members. The 2010 Act also introduced the ability of the SLCC to take complaints relating to the services provided by confirmation agents and will writers. Most of these provisions have not been brought into effect and the proposed regulatory system for confirmation agents and will writers is not in operation. The Bill will repeal the provisions relating to confirmation agents and will writers in the 2010 Act. New provisions in the Bill allowing for complaints against unregulated legal services practitioners, including confirmation agents and will writers, will allow a level of protection for consumers who receive poor services in relation to these areas.

## Alternative approaches

157. The alternative approaches considered included providing no provision for the definition of legal services, however this would not meet the policy intention to provide for consistency and clarity with regard to the measures within the Bill. For example, measures in the Bill such as those that relate to title regulation and entity regulation require a definition of legal services to operate effectively.

158. In addition, in respect of confirmation agents and will writers, this might include enacting those relevant provisions within the 2010 Act. However as set out below, the consultation indicates little support for bringing more activities within the scope of reserved activities, but does provide a proportionate and risk based approach to offering a route to redress to those who use such services, and this is explored in the complaints section of this memorandum.

159. The approach in the Bill seeks to align with the Better Regulation and Consumer principles in providing right-touch regulation through a balance of retaining the current scope of reserved activity, but with a route to redress regardless of regulated activity.

160. The Robertson Report recommended that:

- the definition of legal services should be set out in primary legislation,
- there should be no substantial change at this stage to bring more activities within the scope of those activities “reserved” to solicitors or to remove activities i.e. will writing should not be reserved,
- it should be for the regulator to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated.

## Consultation

161. Most respondents agreed that there should be a definition of legal services (88%), and that this definition should be set out in primary legislation (82%). It was felt this would provide greater clarity, transparency, accountability and consumer protection. Around three-quarters of respondents (76%) agreed that there should be no substantial change at this stage to bring more activities within the scope of those activities 'reserved' to solicitors or to remove activities, increasing competition in the sector was a key reason for this view. Similarly, just under three-quarters (72%) agreed that it should be for the regulator(s) to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated. Some feared changing the activities currently noted as reserved would impact on the third and not-for-profit sectors, restrict access to justice for those who cannot afford a solicitor, and restrict consumer choice.

## Business structures

### Licensed legal service providers (alternative business structures)

162. The 2010 Act made provision to remove certain restrictions which previously prevented solicitors from entering into business relationships with other regulated professionals i.e. non-solicitor professionals such as accountants. The 2010 Act therefore allowed investment in business entities providing legal services by both solicitors and non-solicitors, with the aim of greater flexibility and reduced barriers to competition. Such businesses are often referred to as alternative business structures (ABS), though in Scotland the legislation refers to them as licensed legal service providers ('licensed providers').

163. Licensed providers must be regulated by an approved regulator. Under the 2010 Act, a professional or other body can become an approved regulator by way of a two-stage process. The first stage is to obtain approval and the second to obtain authorisation both by application to the Scottish Ministers. If an application for approval is granted by the Scottish Ministers (with the agreement of the Lord President), then the body can call itself an approved regulator. It is only after successfully being granted authorisation to act by the Scottish Ministers that the approved regulator can begin to exercise its regulatory functions in relation to licensed providers. The 2010 Act limits the number of approved regulators which may exist at one time to three.

164. The policy intention is to promote access to justice through allowing for:

- employee and community ownership of legal firms as licensed legal services providers,
- outside investment into legal entities as licensed providers, to address concerns that Scottish firms are at a competitive disadvantage compared to other jurisdictions.

165. This is intended to make it easier for legal professionals to go into partnership with other types of professionals such as accountants to provide shared services, and

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benefit the sector, drive competition and innovation, and provide consumers with greater choice.

166. Section 49 of the 2010 Act sets out that an entity is eligible to be a licensed provider only if the qualifying investors in it (taken together) have at least a 51% stake in the total ownership or control of the entity.<sup>59</sup> A licensed provider defined in section 47 of the 2010 Act as a business entity which provides (or offers to provide) legal services to the public for a fee, gain or reward and is licensed to do so.

167. The CMA market research report on legal services in Scotland set out that there is limited empirical information available on the impact of alternative business structures, though there has been recent evidence from England and Wales that the ABS framework there differs in some respects to the framework in Scotland and is less restrictive.<sup>60</sup> The CMA report highlights that in England and Wales the legislation allows for the ownership of an ABS to be completely open, subject to meeting certain suitability requirements, and that ABS are available to the non-profit sector. Since they were introduced in England and Wales in 2007, almost 1,300 have been established. The CMA view that the adoption of alternative business structures 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. It has also been reported that the Solicitors Regulation Authority in England and Wales view that there is little evidence that non-lawyer ownership has increased professional risk.<sup>61</sup>

168. The Bill at sections 77 and 79 will seek to liberalise licensed providers by removing restrictions which currently require such firms to operate for ‘fee, gain or reward’, and to have a minimum ownership of 51% by regulated professionals. Instead, regulated professionals would require to have at least a 10% stake in the total ownership or control of the entity. This will allow greater flexibility to address concerns that Scottish legal firms are at a competitive disadvantage compared to other jurisdictions.

## Charities

169. Charities cannot directly employ solicitors for the provision of reserved legal services to its clients. The 1980 Act allows law centres and citizens advice bodies to employ solicitors who can operate on their behalf in relation to some reserved legal activities and proceedings in court, but this right is not extended to charities.

170. In practice law centres often provide legal representation to clients in court by pairing with a law firm or by setting up their own firm which can then be authorised by the Law Society as an incorporated practice. The current situation in Scotland is considered unnecessarily complicated and restrictive in terms of how third sector

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<sup>59</sup> [The professions which currently qualify as ‘regulated professions’ under the Act are set out in the Licensed Legal Services \(Specification of Regulated Professions\) \(Scotland\) Regulations 2012.](#)

<sup>60</sup> [Competition and Markets Authority, Research report - Legal services in Scotland \(publishing.service.gov.uk\)](#)

<sup>61</sup> [Law firm ownership “completely irrelevant” to risk, says SRA director - Legal Futures](#)

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organisations are able to provide reserved legal services. This may also have a negative impact on those seeking advice as they are passed from organisation to organisation and have to repeat to each the issue affecting them. The policy intention is to allow third sector organisations to directly employ solicitors to provide advice and representation to clients (without having to go through a separate legal firm). As a comparison there is no restriction on not-for-profit organisations carrying on reserved legal services in England and Wales.

171. The policy intention is to allow third sector organisations to be able to directly employ legal professionals to undertake reserved legal services such as court proceedings, in addition to allowing non-profit organisations to apply to become licensed legal services providers.

### Bill provisions

172. The Bill will provide charities the same exemption as that which applies to a law centre or a citizens advice body under section 26(2) of the 1980 Act. At section 81 of the Bill, it is intended to allow charities to use solicitors as agents in the provision of all legal services listed in section 26(1), including reserved legal services, in the same way as law centres and citizens advice bodies.

### Alternative approaches

173. An alternative approach may include retaining the 51% regulated professional ownership requirements, decreasing that amount to another value other than 10%, or removing the requirement entirely. In addition, retaining some requirement to act for profit (fee, gain or reward). In respect of restrictions around the employment of solicitors, the alternative approach would be to retain the status quo.

174. The proposed approach seeks to balance the interests of those who support retaining a requirement for regulated professionals to have a majority ownership in licenced providers, and those who seek the requirement removed. The intention is to remove barriers to competition and promote access to justice.

### Consultation

175. There was a clear divergence of views for this proposal. Of those who indicated their level of agreement to removing regulated professional ownership requirements, just over half (52%) agreed that the 51% majority stake rule for licensed providers should be removed, compared to 48% who disagreed. Some respondents drew comparisons between Scotland and other countries, claiming significant evidence of success via ABS.

### Rights to litigate & rights of audience

176. In terms of sections 25 to 27 of the 1990 Act, a body may apply to acquire and exercise rights to conduct litigation on behalf of the public and rights of audience before



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Scottish courts. The ACA are, to date, the only body to have done so. Any application for such rights must be made to the Scottish Ministers and the Lord President.

177. The policy intention is to provide for a modern, forward-looking legal services regulation framework for Scotland that will best promote competition and innovation. The Bill will repeal the provisions in the 1990 Act and introduce new modern equivalent provisions. As well as continuing to allow a body to apply for rights to conduct litigation and rights of audience, a body will be able to apply for the rights to authorise its members to provide other types of legal services. This is intended to act as a route for new regulators to enter the legal sector in the future. However, this will not prevent legal services providers who are unregulated from continuing to offer unreserved legal services.

## Bill provisions

178. Chapter 3 of Part 1 of the Bill provides for new regulators to enter the market and for their members to acquire rights to provide legal services. While much of this is a restatement of material from the 1990 Act, the rights to provide legal services are broader.

179. Under section 25 of the Bill, a body may apply to the Lord President and the Scottish Ministers for the purpose of the body being accredited to authorise and regulate persons to exercise acquired rights. Those rights include the right to conduct litigation on behalf of members of the public, rights of audience, and the right to provide other types of legal services. The application must, among other things, include a draft regulatory scheme.

180. Section 33 of the Bill allows an accredited regulator to review its regulatory scheme and propose revisions in light of the review, and the body must do so at the request of the Lord President and the Scottish Ministers. Scottish Ministers may also make provision to establish a new body with a view to it becoming a regulator or amend the regulatory functions of a category 1 or 2 regulator. This may be done with a view to regulating the authorised providers of a discontinuing regulator, which is a regulator which has made an application to surrender its rights, or which is subject to the revocation of acquired rights. The intention is to allow for continuity of regulation in the event that a category 1 or 2 regulator is no longer able to function as a regulator for the reasons outlined above.

181. The Bill maintains the Lord President's approval role in terms of who may litigate and appear before the Courts, as such persons are effectively officers of the Court when discharging such functions.

## Alternative approaches

182. An alternative approach may be to do nothing, and retain the current provision within the 1990 Act through which rights of audience and rights to litigate may be acquired. However, this would not achieve the policy intention to provide a modern

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process for applying for rights of audience and rights of litigation, and which link to the measures within the Bill, such as a risk-based and proportionate approach to placing duties on regulators to be more transparent and accountable through the requirements placed on category 1 and 2 regulators.

183. Another approach may be to remove any mechanism for a body to acquire and exercise rights to conduct litigation on behalf of the public and rights of audience before Scottish courts, this would restrict those rights to those who currently hold them, such as solicitors and advocates. This would limit the potential to foster diversity and competition within the legal services market in Scotland.

## Consultation

184. 79% of respondents to the consultation supported promoting innovation, diversity and competition in the provision of legal services. In respect of the question on fitness to practice, the consultation analysis reported a view by some that the diploma is a barrier to entry and should be removed or alternative routes should be provided (as entry into the profession via diploma was considered to be too high and too costly). This provision could provide a mechanism for a body which adopts an apprentice-style approach to legal qualification to apply for rights of audience and rights to litigate. For example, in England and Wales the Chartered Institute of Legal Executives provides a route for its members to practice law through an apprenticeship.<sup>62</sup>

## Entity regulation

### Authorisation of legal businesses

185. Consumers often presume and expect that their legal services providers are regulated at an entity level, which is not necessarily the case. From the perspective of the client, their contract is with the legal firm and the client places expectations on that entity. However, the current legal framework for the regulation of the legal profession in Scotland places the emphasis on regulating the individual solicitor rather than the law firm they are employed by.

186. The Robertson report set out that entity regulation should be introduced, and all legal professionals licensed through the regulator should also have to be licensed through an entity.

187. The policy intention is that authorisation of legal firms will provide for regulation that centres on the public interest and protection of the consumer, and will provide for benefits, including:

- affording better protection to the consumer as, usually, the client contracts with the entity and not the individual solicitor,
- meeting the expectations of the consumer, who may already believe the legal service provider is regulated,

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<sup>62</sup> [Apprenticeships in Legal Services \(cilex.org.uk\)](https://www.cilex.org.uk)

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- bringing consistency, with all entities having to meet the same high standards,
- supporting adherence to professional standards by providing the opportunity for a greater collation of data, which would enable the regulator and the legal profession to identify and address deficiencies early, taking the necessary preventative action.

## Bill provisions

188. Part 2 of the Bill will require legal businesses which provide legal services to the general public for a fee, to be authorised to do so by the category 1 regulator that is responsible for the regulation of the owner's legal business. Employers of in-house solicitors will not require to be regulated at an entity level, though their solicitor employees will continue to be regulated on an individual basis through the current system of regulation.

189. Entity regulation will not seek to replace or dilute regulation at individual level. To ensure the strongest of consumer protections, a 'hybrid' approach will be introduced. Regulating legal businesses as well as individual solicitors through a hybrid approach will provide more efficient and effective regulation – both from the consumer and the solicitor perspective, by providing proportionate and appropriately targeted regulation.

190. Legal businesses will require to be authorised if they meet the following criteria:

- they are a legal business, owned wholly by solicitors or other individuals regulated by a category 1 regulator,
- they provide legal services, as defined by the Bill, to the public,
- they operate for profit (fee, reward or gain).

191. Currently the cost of regulation is centred around the practicing certificate fee paid by individual legal practitioners. The Bill will allow category 1 regulators to introduce a fee structure similar to that currently in place in England and Wales overseen by the Solicitors Regulation Authority,<sup>63</sup> which takes a hybrid approach to individual fees and that of legal firm's turnover. This provides a fairer system for financing the regulation of legal services.

## Alternative approaches

192. The alternative approach would entail making no change at this time to implement entity regulation. However, that would not meet the policy intention of taking a risk-based approach to regulation, which places consumer interests at its heart. This would also fail to keep pace with counterparts in England and Wales where entity regulation has been a feature since the Legal Services Act 2007 came into force. That Act provides for authorisation (and as a result regulation) of legal entities in England and Wales. Authorisation is linked to the ability of a legal entity to carry out activities

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<sup>63</sup> [SRA | Fee policy 2022/23 | Solicitors Regulation Authority](#)

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which are ‘reserved’ and cannot be carried out by those other than authorised persons, with some provision for exemptions.

193. Authorised persons are defined at section 18(1) of that Act as a person who has the authority to carry out reserved legal activities. ‘Person’ is defined at section 207 as including “a body of persons (corporate or unincorporated)”. Section 20(6) provides that approved regulators may authorise persons to carry out specific reserved legal activities.

## Consultation

194. The majority of respondents (80%) agreed that entity regulation should be introduced. This was mainly for consumer protection given that consumer expectations of legal services are that such services emanate from a “firm” (or entity) rather than from an individual solicitor.

195. Two-thirds (66%) agreed that entity regulation should engage only those organisations who employ lawyers and provide legal services directly to the public for profit. It was felt this was proportionate as there was no need to introduce entity regulation on large organisations who employ in-house lawyers for advice (but not to advise clients) - however, it was noted that individuals should still be regulated. There were, however, mixed views on not-for-profit organisations, with some agreeing that they should not be subject to entity regulation to ensure that free legal advice could still be provided, whereas others felt that any organisation providing legal services to consumers should be subject to entity regulation, including non-profit organisations. It was argued that including “entities” in regulation would require clear understandings and definitions of what constitutes an “entity”. Some were also concerned about ‘throwing the baby out with the bathwater’ by replacing rather than supplementing individual regulation with entity regulation.

## Title regulation

196. The Scottish Government’s Digital Transformation Service (DTS) were commissioned by the Robertson review to conduct a consumer study on Scottish users of legal services.<sup>64</sup> The Robertson review set out that the findings of that study reinforced the perception that people are confused about whether the solicitor they are using is a regulated provider as well as being confused more generally about the titles of “solicitor” and “lawyer.”

197. Legal services are regulated because of their vital importance in supporting the rule of law and access to justice. That places a regulatory burden on them to ensure they meet the required standards, but also delivers certain privileges in terms of market access. As such, it is a criminal offence for any person to pretend, wilfully and falsely, to be a “solicitor”. There are no such restrictions around the use of the term “lawyer” or “advocate”. The expectation of the consumer is that anyone who refers to themselves

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<sup>64</sup> [Consumer study on Scottish users of legal services](#)

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as a “lawyer” should be suitably qualified and regulated. This is reflected in Law Society public polling, which indicates that 86% of respondents believe that there should be restrictions on who can call themselves, or advertise as, a lawyer.<sup>65</sup>

198. While noting the support for like-for-like protection for both titles, the consultation shows that there are notable and legitimate reasons to take the title of ‘lawyer’ while not being included on the roll of solicitors or subject to regulation. Like-for-like protection may have unintended consequences, by preventing legal academics and religious lawyers from using the title for example. The policy intention is not to prevent academics or religious lawyers from using the title to describe themselves.

## Bill provisions

199. The Bill at section 82 sets out that any person who is not on a register held by a category 1 or 2 legal services regulator (as required by this Bill), commits an offence if they use the title of lawyer with intent to deceive in connection with providing (or offering to provide) legal services to the public for a fee, gain or reward. Similarly, the Bill creates an offence at section 83 for any person to pretending, with intent to deceive, to be regulated by a category 1 or 2 regulator, in connection with providing legal services to the public for a fee, gain or reward.

200. In terms of equivalent protection for the title of ‘advocate’ it is recognised that the title is commonly used in other professional sectors and its use cannot be restricted to the legal profession. As such, the Bill sets out at section 84 that a person who is not a practicing or non-practicing member of the Faculty, commits an offence if they pretend, with intent to deceive, that they are a member of the Faculty.

201. A person who commits an offence under these sections is liable on summary conviction to a fine not exceeding level 4 on the standard scale, this is currently set at £2,500.

## Alternative approaches

202. The alternative approach would be to retain the status quo in which there is no extension of legal professional title regulation in Scotland. However, this would not meet the policy objective, as there would remain confusion about the use of legal titles, limiting the consumer protection measures in this Bill.

## Consultation

203. The CMA view that professional titles have the potential to affect consumer decision-making, and consumers may choose to rely on such titles when navigating the market as an indicator of quality. The CMA advise that although professional titles can be a useful and practical way to provide consumers with an indication of at least a

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<sup>65</sup> Savanta ComRes interviewed 1,000 Scottish adults online between 26 October and 10 November 2021. Data weighted to be representative of key demographics including age, gender and region. See: [Law Society of Scotland – Solicitors polling - Savanta](#)

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minimum level of quality, it may limit the scope for competition (and therefore affordability) if it results in consumers avoiding unregulated providers completely.

204. However, in contrast 72% of respondents agreed that there should be a change to allow the title 'lawyer' to be given the same protection as 'solicitor'. This was considered important to protect the consumer, who may not understand the distinction between the two. Similarly, over two-thirds of respondents (70%) agreed that the title 'advocate' should have the same protections as 'solicitor'. However, protecting this title was seen as more challenging and risked creating unintended consequences due to the use of advocate roles in other sectors (e.g. social work, mental health, and the third sector), as well as the more general use of the term 'advocate' in the English language (e.g. to advocate/support an issue).

## Legal tech

### Regulatory waivers (special rule changes)

205. Technology and innovation can benefit the legal sector and consumers. It can provide easier, more intuitive access to services, as well as supporting the future of the economy. As in other sectors it is increasingly a source of challenge and new opportunity, and as such should be given proportionate regulatory scrutiny.

206. The Robertson report recommended flexible regulation which would help to realise the potential benefit of legal technology, particularly to Scotland's dispersed rural population groups. The report set out that regulation should not put up artificial barriers to new services.

207. Individual legal practitioners and businesses are responsible and accountable for the technology that they use, and are subject to rules and oversight of their respective regulator. The policy intention is to allow for the use of regulatory sandboxes, to promote the use of technology and innovation in the legal sector. A regulatory sandbox is a regulatory approach that allows live, time-bound testing of innovations under a regulator's oversight. Novel financial products, technologies, and business models can be tested under a set of rules, supervision requirements, and appropriate safeguards.

### Bill provisions

208. The Bill at sections 21 to 24 set out that a regulator (or an approved regulator for licensed providers) may, on the application of a legal services provider who is subject to rules of the regulator, direct that a rule or rules do not apply or may be modified to the legal services provider. Such waivers (or in the language used in the Bill, directions of special rule changes) would not be able to be granted in respect of conduct or discipline rules, or the rules relating to the handling of complaints.

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209. Any direction would require to be intimated to the Lord President, the Scottish Ministers and published on the regulator's website.<sup>66</sup> As the Bill requires that the Lord President be informed of any waiver, and also provides that the Lord President may revoke any waiver viewed not appropriate, this will allow an agile approach while also requiring the regulators to be mindful of the Lord President's oversight. In practice the policy intention is that regulators will be able to grant minor waivers easily and with flexibility, however they will require to factor in discussion with the Lord President's office in respect of waivers that could be more complex or attract more risk.

## Alternative approaches

210. The alternative approach would be to retain the current position in which there are limited measures open to legal services regulators to promote innovation and competition within the legal services sector, contrary to the policy objectives of this Bill.

211. The Robertson report recommended flexible regulation which would help to realise the potential benefit of legal technology. The report states: "Regulation should not put up artificial barriers to new services". The measure is intended to give regulators the ability to relax their regulatory rules with a view to running small and tightly controlled trials, with the possibility of wider regulatory change if it proves to be a success and it is for the benefit of consumers or the legal sector as a whole in the longer term.

212. The consultation also outlined the regulatory sandbox concept, indicating that these typically involve temporary relaxations or adjustments of regulatory requirements to provide a "safe space" for start-ups or established companies to test new technology-based services in a live environment for a limited time, without having to undergo a full authorisation and licensing process. It was noted that this had been helpful in maintaining certain services during the COVID-19 pandemic. The role of the Lord President provides a safeguard against the use of any regulatory wavers that would be inappropriate.

## Consultation

213. There was less agreement around whether the Scottish regulatory framework should allow for the use of regulatory sandboxes to promote innovation - 56% agreed it should. While this approach may support innovation, it was felt important that measures and safeguards be put in place to ensure it was fit for purpose. Indeed, the key concerns among those against the use of sandboxes were that it could leave the legal system open to abuse, that unregulated providers may be unreliable/cause public harm, and that consumers should be protected against any 'testing' on live cases.

214. The Scottish Government response to the consultation analysis set out that regulators should have flexibility in their regulatory powers to promote the use of Sandboxes to promote innovation in the provision of legal services.<sup>67</sup>

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<sup>66</sup> The Solicitors Regulation Authority register of waivers provides an example of what this may look like [SRA | Register of waivers | Solicitors Regulation Authority](#)

<sup>67</sup> [Scottish Government Response to the findings of the consultation analysis report \(www.gov.scot\)](#)

## Client protection fund (Guarantee Fund) & professional indemnity insurance (Master Policy)

215. The Client Protection Fund is the operating name of the Scottish Solicitors' Guarantee Fund. It exists to protect clients who have lost money because of the dishonesty of a solicitor or a member of their staff. The fund is paid for entirely by solicitor firms without the use of taxpayer money from Government. The Client Protection Fund is a fund of last resort and in most cases will only compensate those who have tried all other options to recover their losses.

216. The Master Policy is the compulsory professional indemnity insurance arrangement which covers all Scottish solicitors working in private practice. The Law Society arranges the Master Policy. Claims are handled by the Master Policy insurers. The insurance provides cover of up to £2 million for any one claim.

217. As set out earlier in this memorandum the Bill will require all category 1 regulators to introduce and maintain equivalent compensation fund and professional indemnity arrangements. This builds on the existing position and is intended to provide a risk-based approach to consumer protection by ensuring each existing or new category 1 regulatory has both in place. Category 2 regulators would require professional indemnity insurance as a minimum requirement.

### Bill provisions

218. As part of the requirement to set up a compensation fund, the Bill at section 14 will require a category 1 regulator to produce compensation rules which provide detail and structure as to how the compensation fund will operate. In a similar manner to the terms of section 25 of the 2010 Act, compensation rules should detail:

- the monetary amount to be contained in the fund,
- how the fund is to be administered,
- the criteria for qualifying for payment from the fund,
- procedure for making claims for payment and how such claims are to be determined,
- provision for the making of contributions to the fund by regulated members,
- how the fund will be dealt with in the event that the statutory regulator ceases to operate.

219. The 2007 Act places a duty on the SLCC to monitor the effectiveness of the Guarantee Fund and professional indemnity arrangements provided for in the 1980 Act and equivalent compensation funds and arrangements operated by the RPO and make recommendations.



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## Ability of Commission to set minimum standards

220. The Bill will continue to allow the Commission to monitor the effectiveness of the compensation funds maintained by relevant legal services regulators and consult on any improvements it considers appropriate. Section 70 of the Bill sets out that the Commission will be able to issue guidance which may set minimum standards in respect of the operation and effectiveness of the compensation funds. This would replace the power to make recommendations under the 2007 Act. Regulators would be under a duty to comply with any minimum standards set by the Commission. Where the Commission and the regulators do not agree the Bill requires both parties to consider arbitration. If the dispute is not submitted to arbitration, the Commission may direct that the regulator take such steps as it considers appropriate.

## Professional indemnity

221. Section 44 of the 1980 Act sets out detailed provision on what the Law Society's professional indemnity rules must and may contain. It is the policy intention that these rules are not altered in relation to the Law Society other than to reflect the introduction of entity regulation. All category 1 and 2 regulators, including any new regulator of either category, would be required to adhere to the same rules in terms of its own professional indemnity obligations.

222. As set out earlier in this memorandum the Bill will require that a regulator's practice rules must include rules concerning indemnity for its members against any class of professional liability. The new provision would require all new and existing statutory regulators to have rules which require members to keep sufficient arrangements for professional indemnity. The role of the Commission in monitoring and making recommendations about the effectiveness of indemnity insurance will remain unchanged.

## Alternative approaches

223. The alternative approach would include no change to the compensation fund and the professional indemnity insurance requirements. This would present a risk that any new regulator would not be required to provide such consumer protection safeguards.

224. Other alternatives may include a central fund for all legal services regulators, which would likely require to sit with the Commission as an independent body. However the Bill seeks to balance the interests between a wholly independent fund and improving and expanding the existing arrangements by providing an increased and independent oversight role for the Commission.

## Consultation

225. Over three quarters of respondents (79%) agreed that the Client Protection Fund worked well. While many suggested that no changes were required to this, others did offer suggestions, including: moving the management of the fund to an independent body; that greater transparency was needed and the fund should have similar

considerations to those of the Master Policy professional indemnity arrangements; tightening the limit of an award to remain at £1 million per claim; for awards to be increased; speeding up the administration of rewards and that the 1980 Act was too restrictive on awarding consumers monetary losses, with a need for greater flexibility in the legislation whilst moving to limit numbers of claims so as not to exhaust the fund.

## The legal complaints system

226. The SLCC was created in 2008 to introduce greater independence in the complaints handling process for legal services, following a consultation carried out by the Scottish Government in 2005. In the 15 years since it has been operating, concerns have been raised about the inflexibility and complexity of the legislative framework which can result in complaints taking too long to be determined and being passed through multiple bodies before being properly considered.

227. The SLCC's creation was itself a response to criticism that the complaints system was not consumer friendly enough, resulting from the Scottish Parliament's Justice 1 Committee's Report in 2002 on Regulation of the Legal Profession Inquiry. It is also important to recognise complaints processes as a form of human rights remedy.

228. In 2016, the SLCC published a paper setting out its priorities for reform.<sup>68</sup> The SLCC raised concerns that the statute underpinning the legal complaints system is too restrictive and unable to act in a proportionate and risk-based way, which adds undue cost and time for consumers and legal professionals. The SLCC set out that a framework should be introduced, which should not prescribe administrative processes for the legal complaints system in primary legislation.

229. The Robertson report identified a "clear unanimity" that the current process for complaints and redress is "not fit for purpose". The Robertson report states "The current legal complaints system is too complicated, both from the consumer and solicitor's perspective. There are too many duplicated layers of investigation, and the process takes too long. There is a need for clarity and reform." It goes on to identify that the level of detail in the Commission's legislative framework "has limited the ability of the Commission to respond to a complaint proportionally". Difficulties in determining whether a complaint relates to services, to conduct or both have also been identified as leading to confusion and delays in the process. It made the recommendation:

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

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<sup>68</sup> [reimagine regulation SBCC priorities for a consultation on legal services regulation.pdf \(scottishlegalcomplaints.org.uk\)](https://www.scottishlegalcomplaints.org.uk/reimagine-regulation-sbcc-priorities-for-a-consultation-on-legal-services-regulation.pdf)

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230. The handling of complaints is one of the most important parts of any regulatory system. It is crucial that users of legal services have access to an efficient, effective and fair process for dealing with their complaint. Equally, legal professionals rely on a complaints system which is efficient, effective and can resolve complaints in an impartial manner.

231. Many of those who have been involved in the current Scottish legal complaints process introduced by the 2007 Act, including the SLCC itself, have expressed frustration with the process, partly in terms of the length of time needed to reach a conclusion to a complaint as well as the structure of the process.

232. In addition to the views of Esther Robertson, in its response to the review's call for evidence,<sup>69</sup> Citizens Advice Scotland highlighted the "relative slowness of complaints resolution". Similarly, lawyers have reported their frustration with the time taken to resolve complaints and the overall cost of the complaints handling system.

233. There is therefore a compelling case for the consideration of amendments to the current regulatory framework for dealing with complaints that would seek to improve the way in which the legal services complaints system operates.

234. The policy intention is to establish a new legislative framework which will allow the SLCC to design its own flexible and responsive complaints system. It is intended to create a system which is proportionate in terms of how complaints are processed. The Bill will reconstitute the SLCC as the Scottish Legal Services Commission (the Commission). Its core functions will be retained and developed. It will have oversight of complaint handling of the regulators, as it does now.<sup>70</sup> It will continue to have a role in monitoring trends in legal complaints.<sup>71</sup>

235. In addition, the Bill seeks to promote collaboration between the Commission and the legal services regulators in respect of improving the complaints system based on trends in complaints. The Bill places a greater duty on consultation between the Commission and regulators in relation to the complaints system.

236. As set out at section 69 of the Bill, the Commission will have an ability to set minimum standards in relation to regulators' complaints handling, and oversight of first tier complaint handling, and be able to direct legal practitioners as to minimum standards in complaints handling. It is envisaged that this would follow the model set by the Scottish Public Service Ombudsman.<sup>72</sup> This is explored further below in respect of the Commission's monitoring function.

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<sup>69</sup> Call for Evidence, 2018. Responses available at: [www.gov.scot/About/Review/Regulation-Legal-Services/RegulationLegalServices/Responses-to-Call-for-Evidence](http://www.gov.scot/About/Review/Regulation-Legal-Services/RegulationLegalServices/Responses-to-Call-for-Evidence)

<sup>70</sup> Section 17 of the [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(legislation.gov.uk\)](http://legislation.gov.uk), sets out the SLCC's powers to examine documents and demand explanations in connection with conduct or services complaints.

<sup>71</sup> Forwarding complaints, advice, monitoring - [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(legislation.gov.uk\)](http://legislation.gov.uk)

<sup>72</sup> [How to handle complaints | Scottish Public Services Ombudsman](http://www.spso.gov.uk)

237. Where the Commission is setting minimum standards there will be a duty on the Commission to consult with the regulators in advance to give them an opportunity to provide comment and require the Commission to have regard to the views of the regulators. The policy intention is to incorporate greater quality assurance and continuous improvement in terms of the impact of regulatory performance and handling of conduct complaints on consumers based on trends in complaints raised.<sup>73</sup> In any case where the Commission and a regulator find themselves in dispute, the Bill requires both parties to consider whether the dispute should be submitted to arbitration.

238. The legislation surrounding legal complaints will be simplified to allow the Commission to take a proportionate and risk-based approach to complaint handling, in consultation with the Lord President, the Scottish Ministers, regulators, the Consumer Panel and groups representing the interests of the legal profession as appropriate. The Commission will be required to adhere to the regulatory objectives and act as a neutral body, balancing the interests of consumers and legal services providers.

239. As set out earlier in this memorandum, legal services are regulated because of their vital importance in supporting the rule of law and access to justice. That places a regulatory burden on them to ensure they meet the required standards, but also delivers certain privileges in terms of market access. The view of the Scottish Parliament in establishing the SLCC, was that it would be appropriate for the legal complaints system to be funded by those it oversees. This is a common feature of regulatory frameworks in other professions and jurisdictions. This is the case in respect of the Legal Ombudsman in England and Wales. The policy intention is to retain the current funding model in which the legal complaints system is funded by a levy on the legal profession. However, with the introduction of entity regulation the Commission will be able to introduce a fairer system, through a levy on both individual legal practitioners and legal businesses, based on their financial turnover, and licenced providers. The Commission will also continue be able to recover expenses in discharging in functions.<sup>74</sup>

## First tier complaints

240. The Bill will retain the position that before a complaint is eligible to be considered for investigation, the complainer must have communicated their complaint to the legal practitioner or firm to give them an opportunity to resolve the matter.

## Single gateway

241. The Bill will largely retain the position that the Commission will act as the single gateway for complaints about legal professionals in Scotland from legal consumers.

242. The Commission will be able to initiate a complaint in its own name where it becomes aware of a public interest issue. It would have a duty to inform the relevant regulator when doing so.

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<sup>73</sup> Strengthening S40 of the Legal Profession and Legal Aid (Scotland) Act 2007.

<sup>74</sup> Particularly relevant in respect of unregulated providers.

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## Exceptions to the single gateway

243. The Bill will allow regulators to investigate conduct or regulatory complaints which arise from their regulatory monitoring without first sending them to the Commission. 'Regulatory complaints' will allow regulators to investigate where an authorised legal business fails to have regard to the regulatory objectives, adhere to the professional principles or comply with regulator's rules. Where this is the case, there will be a duty to inform the Commission of the nature of the investigation, allowing the Commission to take a view on any consumer detriment which would require further consideration as a services complaint. The policy intention is to address concerns that the current process where a regulator must raise a conduct concern with the SLCC, only for it to be remitted back to the regulator, adds undue expense and time.

## Triage and investigation

244. The current framework for determining whether a complaint is eligible for investigation, and the process for investigation, is considered to be overly prescriptive and cumbersome, resulting in unreasonable delays in a complaint passing through the initial stages before an investigation begins.

245. The policy intention is to provide a framework in which complaints may be dealt with in a proportionate way. The Bill will give the Commission the flexibility to develop their own system for the consideration and investigation of complaints, while providing safeguards by requiring rules to be developed in relation to certain, key areas. For example, the Bill allows the Commission to set its own eligibility criteria for complaints but requires that there are rules as to what those criteria are and how a complaint should be considered against the eligibility criteria.

246. The Bill introduces an internal review system for complaints decisions by the Commission and requires that rules are established about how reviews will be carried out and the grounds on which an application for review will be considered eligible.

247. The Bill removes provisions which require the Commission to provide written notification of various decisions to the parties to a complaint, but requires that the Commission create its own rules as to how parties will be notified as a complaint progresses.

248. The Bill also maintains existing requirements for the Commission to set rules as to, for example, the requirement for the complainer to waive any right to confidentiality before a complaint is progressed and when the Commission may decide when a hearing may be held in relation to a complaint. It has been argued by consumers that the failure in the 2007 Act to allow a complaint to be investigated as containing both services and conduct elements results in a missed opportunity for complainers to achieve restitution where the practitioner's conduct becomes the focus of the complaint.

249. The Bill will retain services and conduct complaints but while the Commission will continue to remit any conduct element of a complaint to the regulator, it will be able to

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investigate any services element contained within the same complaint. The policy intention is that a services complaint offers consumer redress and, where appropriate, offers compensation to address any form of loss. Conduct complaints are intended to address any poor behaviour of legal practitioners. It is considered that this will be a more flexible approach to how complaints are separated. It will be for the Commission to establish its own rules as to how complaints are analysed to determine whether they relate to services, conduct or both. This will allow a complaint to be investigated as both a services and conduct complaint, addressing concerns around hybrid issue complaints.

250. Where a complaint is being investigated by the Commission and a regulator at the same time, the Bill will place a duty on both bodies to cooperate and liaise with each other on a continuous basis for the purpose of the investigation of the complaint, and where either concludes their investigation, a duty on that body to notify the other of the outcome of the investigation.

## Sanctions

251. The Bill will not change the current sanctions available for services or conduct complaints, with the exception of compensation in conduct cases, and the amount of value of fine that the SSDT may impose. This is reflective of the views highlighted in the consultation analysis.

252. The Bill will remove the ability to make an award of compensation in conduct complaints. The policy intention is that a services complaint offers consumer redress and, where appropriate, offers compensation to address any form of loss. Conduct complaints are intended to address any poor behaviour of legal practitioners. As the Bill provides for hybrid issues complaints (those containing elements of both inadequate services and poor conduct) this will ensure that by removing compensation in conduct cases there will be no consumer detriment.

253. Currently the SSDT may impose a maximum financial penalty of £10,000. To provide a comparison, the Solicitors Disciplinary Tribunal in England and Wales may impose an unlimited financial penalty. The crisis in Ukraine shone a light on the exposure of professional services sectors to economic crime. The legal services sector was assessed in HMT's National Risk Assessment of money laundering and terrorist financing<sup>75</sup> (2020) as being at high risk of abuse for money laundering purposes. The sector is exposed to further-reaching risks such as fraud or breaches of sanctions legislation. To address concerns that the SSDT does not hold sufficient deterrents against economic crime the Scottish Government worked with the UK Government to seek to amend the financial sanction available to the SSDT. The Economic Crime and Corporate Transparency Bill amends the value of fine that the SSDT may impose.<sup>76</sup> However, as the scope of the Bill is limited to economic crime only, so is the amendment to the SSDT. This Bill will broaden the financial sanction available to the SSDT to allow it to impose an unlimited fine in all of the cases it considers, in line with its equivalent in England and Wales.

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<sup>75</sup> [National risk assessment of money laundering and terrorist financing 2020](#)

<sup>76</sup> [Section 182 of the Economic Crime and Corporate Transparency Bill](#)

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## Handling complaints

254. While it is the responsibility of the regulators to investigate conduct complaints against their members, the Commission has the power to investigate concerns about how the regulator dealt with a conduct complaint. This is referred to as a handling complaint. The Bill will extend the Commission's power to investigate handling complaints to include the regulator's handling of a regulatory complaint in respect of complaints about authorised legal businesses.

## Regulatory complaints

255. The Bill will extend regulatory complaints (currently only available in relation to licensed providers) to include authorised legal businesses. This is designed to tie in with the ability of a category 1 regulator to review the performance of a legal business where concerns are identified.

## Appeals

256. The current ability to appeal any decision of the SLCC at any stage can cause long delays in the time it takes to process a complaint. The consultation analysis highlights that the majority (79%) of respondents support a simplified and more accessible appeals process for legal complaints. The analysis found that the Court of Session is considered to be too expensive, for both consumers and legal professionals, limiting accessibility.

257. It is the intention that the Commission be the final arbiter in respect of service issue complaints. This is in keeping with the policy intention in the 2007 Act as introduced.<sup>77</sup> Appeals about services complaints would be considered by a Review Committee of the Commission comprised of legal and non-legal members.

258. The Bill will introduce a new process for complaints relating to services, moving away from the current process in which there is an ability to appeal all decisions of the Commission to the Court of Session, and which is viewed as adding significant cost and delay to the current system.

259. In cases where a decision of the Commission is required, there would be an initial decision made by the Commission following investigation, with the ability to have that decision reviewed by a committee of the Commission, comprised of publicly appointed legal and non-legal members. The intention is to make the appeals system for complaints more affordable and accessible. This is similar to the position in respect of other ombudsmen for services complaints including the Legal Ombudsman (for England & Wales), the Financial Ombudsman Service and the Scottish Public Services Ombudsman. However, as with other public bodies, decisions would remain open to judicial review.

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<sup>77</sup> [Legal Profession and Legal Aid Scotland Bill | Scottish Parliament Website](#)

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260. There will remain safeguards built into the Commission’s structure to ensure its complaints process is fair and independent. For example, the Commission retains the power to hold public hearings as part of its investigative process and review decisions on complaints will be considered by Commission members who are independently appointed and will not have been involved in any preceding aspect of the complaint. In providing appropriate oversight of the Commission, it must consult with the Lord President on appointing members and on rule changes to practice and procedure. The 2007 Act also sets out that the Lord President may, by written notice, remove the chairing member of the Commission from office in certain circumstances. These checks and balances will remain in the new framework.

261. In complaints relating to professional conduct, the relevant regulator and discipline tribunals will retain oversight with the current routes of appeal remaining.

262. The change to the appeals process in relation to services complaints means a change to the structure of the Commission, to introduce the requirement for a review committee, to take the place of the determination committee made up of publicly appointed members.

<b>Currently, under the 2007 Act:</b>	<b>The policy intention is to create a new system:</b>
<p>A case investigator will examine the case and work with the parties involved. A settlement may be proposed to the complainer and practitioner (s9(2)). If accepted by both, the complaint will not proceed to determination. If not accepted, it will proceed to determination.</p>	<p>A case investigator will examine the case and work with the parties involved. A settlement may be proposed to the complainer and practitioner. If accepted by both, the complaint will not proceed to determination. If settlement is rejected, a determination will be made. This function can be delegated to a member of Commission staff.</p>
<p>The Commission will make a determination (s9(1)). This function must be carried out by a determination committee (para 13(2)(d) of schedule 1).</p>	<p>If the initial decision is rejected by either the complainer or the practitioner, it may be appealed to the Review Committee. The Review Committee will be made up of Commission members and its decision is final.</p>
<p>The complainer or practitioner may appeal to the Court of Session.</p>	<p>The complainer or practitioner may seek a judicial review.</p>



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## Commission's monitoring function

263. The Commission has a number of current powers to issue guidance or make recommendations to regulators and practitioners in relation to the handling of complaints, trends in practice which lead to the making of complaints and the effectiveness of the compensation funds and professional indemnity operated by regulators. Where the Commission is able to make recommendations, there is no requirement on the regulator or practitioner to comply with any recommendation made.

264. The Bill will extend the Commission's current powers to set minimum standards in terms of how complaints are handled, both before they have reached the Commission (first tier complaints) and once they've been remitted to regulators.

265. The policy intention is that the Commission will retain oversight of complaint handling of regulators, as it does now.<sup>78</sup> It will continue to have a role in monitoring trends in legal complaints.<sup>79</sup> In addition, the Commission will have a role in setting minimum standards as to how legal practitioners deal with complaints, and how the legal services regulators handle complaints<sup>80</sup> in consultation with legal practitioners and regulators.

266. The trends in legal complaints demonstrate that the majority of legal complaints relate to service, the most common complaint being about communication.<sup>81</sup> This suggests that a greater focus on continuous improvement and prevention of failure, based on trends in the types of legal complaints raised, may have the potential to inform better practices that are designed to better serve consumers of legal services and reduce the number of complaints raised.

267. The SLCC currently publishes guidance to legal professionals aimed at improving their complaints process.<sup>82</sup> A recent SLCC audit<sup>83</sup> of the Law Society's conduct complaint investigation timescales reported that the majority of complaints investigations take longer than the Law Society's published average timescale of 12 months to complete. The report concluded that delays in the investigation of conduct complaints carry a number of risks, including public protection issues associated with solicitors continuing to practice whilst under investigation, and complainers concluding that their complaint is not being taken seriously, which may impact public confidence in the complaints process. This analysis, in conjunction with support for independent regulation from consumers and those representing them, is the basis for strengthening

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<sup>78</sup> Section 17 of the [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(legislation.gov.uk\)](https://legislation.gov.uk), sets out the SLCC's powers to examine documents and demand explanations in connection with conduct or services complaints.

<sup>79</sup> Forwarding complaints, advice, monitoring - [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(legislation.gov.uk\)](https://legislation.gov.uk)

<sup>80</sup> In respect of complaint handling, the Commission would have a similar role to that of the Legal Services Board in England and Wales: [Legal Services Board complaints handling](https://www.lsb.org.uk)

<sup>81</sup> [SLCC Annual Report \(scottishlegalcomplaints.org.uk\)](https://www.scottishlegalcomplaints.org.uk)

<sup>82</sup> [Improve your complaints process - statutory guidance \(scottishlegalcomplaints.org.uk\)](https://www.scottishlegalcomplaints.org.uk)

<sup>83</sup> [SLCC makes recommendations for improvement to Law Society complaint handling timescales \(scottishlegalcomplaints.org.uk\)](https://www.scottishlegalcomplaints.org.uk)

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the independent oversight functions of the Commission, in terms of setting minimum standards for complaint handling.

## Tribunals

268. The Bill will place a requirement on each relevant tribunal or equivalent upper chamber to publish judgments about professional misconduct findings in a transparent way and with the intention of increasing public confidence.

## Complaints about unregulated or unreserved legal services

269. As set out in respect of the definition of legal services, not all legal services are regulated. As the European Economics report<sup>84</sup> found, unreserved or unregulated legal services account for the majority of legal services provided in Scotland. While many of these services are anticipated to be provided by regulated legal professionals, research by the Legal Services Board in England and Wales on unregulated legal services<sup>85</sup> set out that the sector is large, complex, and diverse and may account for up to 9% of the total market for individual consumers. The most common areas of law covered include injury, conveyancing, and will-writing, where the market share is likely to be much higher.

270. Certain legal services are not regulated as they may be provided to an equal standard by unregulated providers, offering increased competition within the market and increased choice to consumers.

271. The SLCC can receive complaints against legal services practitioners as defined in the 2007 Act. The result in the current legal landscape is that complaints can only be received against those who are regulated by either the Law Society, the Faculty or the ACA. Complaints against individuals or bodies who are providing legal services but are unregulated cannot be considered by the Commission.

272. As set out earlier in this memorandum, a policy intention of this Bill is to provide oversight of all legal services and allow a proportionate and risk-based approach to unregulated legal services. The Bill will provide the Commission with the ability to monitor unregulated legal services and set rules about investigation such complaints.

273. The Commission would have a duty to set up a voluntary register of unregulated legal services providers which would offer a 'kitemark' (or recognition that those legal service providers were part of a consumer redress scheme) to those providers who wished to join, allowing consumers to make an informed choice when selecting legal services. 86% of respondents to the consultation indicated that there should be a level of redress for all legal complaints, regardless of regulated activity.

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<sup>84</sup> [Review of the Regulation of Legal Services \(nrscotland.gov.uk\)](https://www.nrscotland.gov.uk/research-and-analysis/review-of-the-regulation-of-legal-services)

<sup>85</sup> [LSB research on unregulated legal services reveals potential consumer benefits and detriments - The Legal Services Board](https://www.lsb.org.uk/research-and-analysis/lsb-research-on-unregulated-legal-services-reveals-potential-consumer-benefits-and-detriments)

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274. It is the policy intention that the Commission be able to investigate services complaints against individuals and bodies which are providing legal services in Scotland, whether or not they are regulated and have a recognised right to practice as one of the individuals or bodies currently defined as a practitioner in the 2007 Act. It will not be possible to raise a conduct complaint against an individual or body which is not regulated. This is because unregulated providers will not be part of a regulatory body and are unlikely to have a set of conduct rules which they must adhere to.

275. The Bill will allow the Commission to investigate complaints about the provision of legal services to the public, for a fee, gain or reward, by those individuals and bodies which are not members of a relevant regulator or an approved regulator. The Commission would be required to produce rules as to how the eligibility of such complaints will be assessed. Where there is a failure to provide information and documents within a timescale provided by the Commission, the Commission will be able to apply to the court for an order requiring compliance. The sanctions currently available to the Commission would apply to unregulated legal services providers.

276. The Commission will be required to set rules regarding the process for complaints about unregulated legal services providers. It is expected to set a narrow scope in the types of complaints it will investigate to begin with and expand this over time as it develops a greater understanding of the unregulated sector.

### Alternative approaches

277. An alternative approach may include the removal of the single gateway for legal complaints. This would expand the role of the legal services regulators in complaint handling. Legal service regulators would require to establish a system for reviewing the eligibility and category of complaints. Investigating complaints about conduct and passing complaints about service to the Commission. However this may result in a duplication of roles, and result in confusion for consumers about who their point of contact is.

278. An opposing position would be to remove the role of professional regulatory bodies in complaints handling and expanding the role of the Commission to investigation of both services and conduct complaints. However, this approach may limit the ability for learning from complaints to improve education, training and continued professional development.

279. In respect of the appeals process, an alternative approach may include retaining the ability to appeal all decisions of the Commission to the Court of Session. This would not achieve the policy intention of simplifying the appeals process, and has shown to add significant cost and delay to the current system.

280. The alternative approach in respect of unregulated legal services would be to retain the status quo, limiting complaints to those about regulated legal services.

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281. All of these options would not achieve the policy intention of seeking to provide a proportionate and risk-based approach to legal complaint handling, providing a level of redress to all legal services in Scotland.

## Consultation

282. The consultation analysis shows that most respondents (87%) agreed that the single gateway for all legal complaints should be retained. It was argued that a single gateway for all legal complaints is efficient, brings clarity and transparency to the process for both the profession and consumers, and makes access simpler for consumers.

283. Several respondents from the legal profession, including the Law Society and those who supported their response, also suggested that, in addition to a consumer complaints process, there would be merit in facilitating the regulator or professional bodies to refer matters for investigation themselves, and for these to be facilitated in an efficient and timely manner. The Bill makes provision to allow regulators to initiate legal complaints in their own name without the requirement to first go through the single gateway in cases where the complaint is identified by the regulator. The policy intention is that this saves time and resource, by preventing complaints from unnecessarily being delayed. The regulators will have a duty to inform the Commission and take into account the impact of such complaints on any clients who may be affected.

284. 70% of respondents agreed that the professional regulatory bodies should maintain a role in conduct complaint handling, where a complaint is generated by an external complainer. The key reasons given included: to uphold the reputation and standards of the profession as well as providing reassurances to the public; they were best placed to assess such issues due to having direct experience of this aspect of the profession and to maintain the independence of the profession.

285. The consultation analysis shows that most respondents (86%) agreed that there should be a level of redress for all legal complaints, regardless of regulatory activity. Some organisations felt that consumers would be unlikely to know which areas were regulated and would expect that the complaints and redress process would be applicable for all issues, therefore the system needed to take account of this.

286. 79% of respondents viewed that the appeals process for legal complaints should be simplified, with no ability to appeal to the Court of Session, except in the most serious cases.

## Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

### Equal opportunities

287. The Bill reiterates the encouragement of equal opportunities within the legal profession is one of the regulatory objectives. This is intended to encourage the bodies in the regulatory framework to work individually and together to identify and address barriers to equality within the profession, and also in the complaints system.

288. Access to justice is also retained as a regulatory objective. There are a range of areas where the current legal services market may not be operating effectively, including family law, employment and social welfare law. These areas of law have a differential impact on groups such as women and economically disadvantaged people.

289. People often seek legal services at a time of distress or vulnerability when they face legal challenges that affect their livelihood or personal life. Such people may include those who are buying a home, dealing with a loved one's estate following a bereavement, facing a family dispute, discrimination, or criminal charges. Access to legal services at such times is critical for individuals to protect their rights and receive justice. Legal issues are often emotionally charged, especially when they involve family disputes or criminal charges. For vulnerable individuals, such as victims of domestic violence, the emotional toll can be significant. Accessing legal services at such times can be frightening and intimidating, further compounding the emotional strain on the individual.

290. The Robertson report set out that people in Scotland are entitled to have access to a wide range of high-quality legal services, provided in a variety of innovative ways. They need a regulatory system that is as concerned with learning from mistakes and improving performance and standards as it is with dealing with failure. They, and legal services providers, need a swift, efficient and effective means of dealing with complaints and providing redress, and the legal services sector needs a regulatory framework that supports and enables it to thrive and grow. The measures within in the Bill and explored in this memorandum seek to deliver those outcomes.

### Human rights

291. The Scottish Government is satisfied that the provisions in the Bill are consistent with the European Convention on Human Rights (ECHR). The provisions of the Bill have been developed taking account the requirements of the ECHR.

292. In particular, the Government has considered the effect of the provisions of the Bill in relation to Article 6 of the ECHR (right to a fair trial). The Bill makes changes to the functions of the Commission in relation to the determination of certain types of

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complaints and how such determinations are subject to review. Taking account of the changes being made, parties involved in the complaints process will continue to have access to a system which meets the requirements of Article 6.

293. In addition, the Government has considered the effect of the provisions of the Bill in relation to Article 8 of the ECHR (right to respect for private and family life), in respect of the duty on legal services regulators to publish a register of their members, the requirement on regulators to provide a practitioner's contact details to the Commission and a duty on disciplinary tribunals to publish their findings. These requirements can be justified and are proportionate on the basis of the public interest in the proper regulation and accountability of legal services and protection of the rights of those accessing legal services.

294. The Government has also considered the effect of the provisions of the Bill in relation to Article 1 of Protocol 1 of the ECHR in respect of the changes being made to the way levies are imposed on members of the legal profession to fund the Commission.

## Island communities

295. The Scottish Government is satisfied that the Bill has no differential effect upon island or rural communities. The provisions in the Bill are intended to benefit all communities across Scotland, regardless of location. While there are specific considerations for island communities in relation to some of the provisions, these are likely to be able to be addressed at a local level. No markedly different or unique impacts were identified for island communities. A partial Islands Community Impact Assessment has been carried out, which addresses the impacts of the Bill in line with available evidence and consultation input.

## Local government

296. The Bill does not have an impact on local government. While local authorities employ solicitors it is not anticipated that they would be affected as a result of the measures within the Bill. For example, title regulation does not limit the use of in-house legal professionals from referring to themselves as lawyers, and entity regulation does not apply to in-house.

## Sustainable development

297. The Bill is expected to have a positive social impact. The regulatory objectives include the promotion of the public interest, access to justice, an independent, strong and diverse legal profession, quality, and innovation and competition in the provision of legal services.

298. The legal sector contributes over £1 billion to the Scottish economy each year and is responsible for over 20,000 high value jobs. It is also critical to Scotland's other

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key sectors supporting Financial Services, Oil and Gas, Renewables, Science and Technology.

299. The provisions in the Bill seek to support investment into the legal profession and set out as a regulatory objective that regulatory functions should be exercised in a way that contribute to achieving sustainable economic growth

## Crown consent

300. It is the Scottish Government's view that the Bill as introduced does not require Crown consent. Crown consent is required, and must be signified during the Bill's passage, where the Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign, the Prince and Steward of Scotland or the Duke of Cornwall. The Scottish Government's view is that this Bill does none of these things.

301. For the source of the requirement for Crown consent, see paragraph 7 of schedule 3 of the Scotland Act 1998,<sup>86</sup> and rule 9.11 of the Parliament's Standing Orders.<sup>87</sup> For further information about the considerations that go into determining whether Crown consent is required for a Bill see *Erskine May*,<sup>88</sup> the guide to procedure in the UK Parliament.

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<sup>86</sup> [Paragraph 7 of schedule 3 of the Scotland Act 1998](#)

<sup>87</sup> [Standing Orders of the Scottish Parliament](#)

<sup>88</sup> [Crown consent](#)





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# Regulation of Legal Services (Scotland) Bill

## Policy Memorandum

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