

# **Legal Services Regulation Reform in Scotland:**

## **Consultation Analysis**

**Analysis of Responses  
Wellside Research Ltd.**

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# Executive Summary

## Introduction

In 2017, the Scottish Government commissioned an independent Review of the regulation of legal services in Scotland (known as the Robertson Review). The primary recommendation from this was:

“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.”

This represented a significant departure from the current model, and was a source of contention. The Scottish Government set out, therefore, to find some degree of consensus in order to move forward, one element of which was to run a public consultation exercise. The consultation document set out and sought views on three possible models for change - one based on the primary recommendation from the Robertson Review, and two alternatives (see Appendix A).

The consultation ran from 1 October to 24 December 2021, with written responses provided via Citizen Space (the Scottish Government’s online consultation portal) as well as letters/emails sent directly to the Scottish Government. A series of eight online focus group events were also conducted to gather feedback.

In total, 158 substantive responses were received to the public consultation. This included 101 individuals and 57 organisations, and represented both legal professionals and consumers, as well as organisations representing the interests of both. In addition, 32 people attended the focus groups, again representing both the legal profession and consumers.

## Key Findings

### Part 1: Strategic Change, Vision and Key Aspects of the Regulatory Model

A wide range of priorities, objectives and attributes for any potential future regulatory model were explored, with all receiving high levels of support. Across all options explored, between 79% and 99% of those who gave a rating indicated that the various features set out were either very or somewhat important.

### Part 2(A): The Potential Regulatory Models

Respondents were divided over their support for the Robertson Review’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. Given this division, the sample structure is important to consider when interpreting the results.

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 the bias and conflicts 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 Review 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. It was felt that Option 3 would be the most achievable and deliverable, while still providing the necessary regulatory updates.

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.

In order to embed the consumer voice within the regulatory framework, respondents were split in their views about how to achieve this. A quarter (25%) preferred a requirement for consumer expertise within regulatory committees, 15% supported a consumer panel, 11% felt that input should be sought from Consumer Scotland, and 49% agreed that a combination of methods would be best.

Over half (56%) agreed that Consumer Scotland should be given power to make a Super-Complaint in respect of the regulation of legal services in Scotland, while just under two thirds (62%) agreed that a baseline survey of legal services consumers in Scotland should be undertaken.

## **Part 2(B): The Role of the Lord President and the Court of Session**

Most respondents (84%) agreed that the legislative approach should make clear the role of the Lord President and the Court of Session in the regulatory framework in order to provide clarity, transparency and accountability. However, there was strong opposition to altering or removing the 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.

While there was little consensus over whether the Lord President's role should be consultative or one of consent, and whether the Lord President should have a role in the process of appointment of any new 'legal members' to relevant positions, nearly three quarters (71%) agreed that the Lord President should have a role in any new regulatory framework in arbitrating any disagreements between independent Regulatory Committees and the professional regulatory bodies.

## **Part 2(C): Regulatory Committees**

Around two thirds of respondents (67%) agreed that regulatory committees should be incorporated into any future regulatory framework, with those who disagree instead supporting Option 1, where regulatory committees would not be required. It was also generally agreed that regulators should be required by statute to ensure that Regulatory Committees are suitably resourced, although views were mixed as to whether official ring-fencing would be required or not.

Two thirds (66%) agreed that the regulatory functions of Regulatory Committees should be subject to Freedom of Information (FOI) legislation or requests. It was also widely felt that all bodies discharging statutory duties should be transparent and open in order to engender public confidence and trust.

### **Part 2(D): Fitness to Practice**

Most respondents agreed that the ‘fitness to practice’ requirements or regulations were appropriate and already worked well in Scotland. The main suggestions for change were more regular reviews of fitness to practice throughout an individual’s career, and continuous assessment by the regulator (especially in relation to good character).

Most respondents (94%) agreed that there should be a test to ensure that non-lawyer owners and managers of legal entities are fit and proper persons. It was suggested that this would provide fairness, transparency, and greater protections for the public.

### **Part 2(E): Legal Tech**

Most respondents agreed that:

- Legal Tech should be included within the definition of ‘legal services’ (79%);
- Those who facilitate and provide Legal Tech legal services should be included within the regulatory framework if they are not so already (69%);
- It may narrow the scope of regulation and reduce consumer protection if Legal Tech was not included (67%); and
- The inclusion of Legal Tech in a regulatory framework would assist in the strength, sustainability and flexibility of regulation of legal services (82%).

It was felt that the legal profession must move with technological innovation and that Legal Tech should be treated the same as other forms of service delivery. However, the definition and regulatory framework would need to be flexible enough to keep up with the fast-paced changes in this area. Many also felt that ‘Legal Tech’ needed to be more clearly defined.

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.

### **Part 2(F): Client Protection Fund (Guarantee Fund)**

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.

### **Part 3(A): Entry, Standards and Monitoring**

Most respondents (81%) agreed that any future regulatory model should incorporate a greater emphasis on quality assurance, prevention and continuous improvement than the current model provides. In particular, it was suggested that there was room to strengthen existing CPD requirements as well as to make the system more 'proactive'. Similarly, most respondents (81%) felt that the rules within the regulatory framework should be simplified with the aim of making them more proportionate and consumer friendly, however, many were concerned that simplification may inadvertently remove some of the nuance required to ensure there were no 'gaps' in the rules.

Views were mixed in relation to how best to provide quality assurance and continuous improvement - 12% supported incorporating peer review processes, 16% preferred a system of self-assessment for all legal professionals, and a further 45% thought that both of these methods should be incorporated into the regulatory model.

### **Part 3(B): Definition of Legal Services and Reserved Activities**

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. However, it was also noted that developing an appropriate definition could prove challenging.

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. 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.

### **Part 3(C): Titles**

Just under three quarters (72%) 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).

Just under three quarters agreed that the legislation should allow for the protection of other titles in relation to legal services as appropriate (72%), and that it should be for the regulator(s) to propose to the Scottish Government which titles to protect in future (73%). However, it was felt that such protections needed to be enabling and not restrictive or prescriptive.

### **Part 3(D): Business Structures**

Just over half (52%) agreed that the 51% majority stake rule for Licenced Legal Services Providers should be removed. Those who agreed felt this would be of significant benefit to smaller companies, would encourage competition and innovation within the sector, provide increased flexibility in corporate structures which could save money and benefit consumers. It was also argued that similar arrangements had been successful in other jurisdictions. Some stressed, however, that they did not support removing such a restriction entirely, but rather agreed with reducing the percentage stake which must be held by regulated professionals. Others were concerned that such a change may negatively impact on service and consumer confidence.

### **Part 3(E): Entity Regulation**

The majority of respondents (80%) agreed that entity regulation should be introduced. This was mainly for consumer protection as consumer expectations of legal services were that such services emanate from a 'firm' (or entity) rather than an individual solicitor. It was also argued that entities should be accountable for the failings of those whom they employ. However, there were concerns about how this might impact on third sector and not-for-profit organisations, and respondents also stressed that an 'entity' would need to be clearly defined.

Again, the majority of respondents (89%) agreed that all entities providing legal services to the public and corporate entities should be subject to a "fitness to be an entity" test.

Two thirds (66%) agreed that entity regulation should engage only those organisations who employ lawyers and provide legal services 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.

### **Part 3(F): Economic Contribution of Legal Services**

Over half (59%) agreed that a baseline study should be undertaken to identify the current quantum of the sector's contribution to the economy and to identify those niches in the global market where efforts could be targeted. It was generally felt that establishing a baseline would help with the development of plans for expansion within the global market. Others, however, questioned the need for a new study, indicating that data were already available and that any new study would be costly and result in little tangible benefit.

### **Part 4: Complaints and Redress**

Both consumers and the legal profession agreed that the current complaints process was not working and needed to be reformed. Most respondents (87%) agreed that there should be a single gateway for all legal complaints. It was argued this would make the process more efficient, bring clarity and transparency for both the profession and consumers, and make access simpler for consumers. However, there were mixed views as to whether a single gateway (with complaints filtered to the relevant professional bodies for investigation), or a single complaints organisation (who would deal with all complaints throughout) was preferred.

Over two thirds of respondents (70%) agreed that the professional regulatory bodies should maintain a role in conduct complaint handling, where a complaint is generated by an external

complainer. It was felt this was important to maintain the independence, reputation and standards of the profession. It was also argued that they would be best placed to assess such issues. Those who disagreed preferred such issues to be handled by an independent complaints body to maintain independence from the profession, and to remove the need to attribute a complaint as either 'service' or 'conduct'. Further, it was argued that, maintaining a system with different bodies involved in the complaints process was complex, confusing, slow, led to duplication in process, and potentially increased costs.

Around three quarters of respondents (76%) agreed that the professional regulatory bodies should maintain a role in conduct complaint handling, with regard to the investigation and prosecution of regulatory compliance issues. Again, it was argued that professional bodies were best placed/had the most experience to investigate conduct complaints; that professional bodies risked becoming irrelevant if removed from the process; and that the process needed to change not the organisations involved. Those who disagreed preferred to have a fully independent regulator investigating such complaints, noting that this would remove the confusion and complexity that exists in the current system. There were reasonably mixed views in relation to who respondents thought should investigate different types of complaints (i.e. unsatisfactory conduct, professional misconduct and service issues).

For those who preferred an independent body for each of the three issues, the reasons were that this would provide more independent and impartial investigation more suited to upholding consumer rights, that it would simplify and streamline the system and allow for hybrid-complaints. Meanwhile, those who preferred professional bodies to investigate all issues felt they were best placed to do so, with the need for independence from Government reiterated. For some, the type of body preferred to deal with each type of complaint varied by the nature of the issue, how serious they considered the matter, and who would be best placed to deal with it.

Most respondents (86%) agreed that there should be a level of redress for all legal complaints, regardless of regulatory activity. It was felt that all complaints should be investigated and redress available whatever the issue might be, and that this would ensure greater confidence and perceptions of fairness in the system.

A lower proportion (57%), however, agreed that there should be a single Discipline Tribunal for legal professionals, incorporated into the Scottish Courts and Tribunals Service (SCTS). Those who agreed argued this would avoid conflicts of interest and/or bias; provide consistency in decision making; be more cost efficient; provide transparency/clarity; make the process more streamlined; and remove duplication in roles/efforts. Those who disagreed felt that professional bodies should be responsible for addressing such issues; that it was not a proportionate reaction to the issues or number of cases involved; it would not be practical to have one tribunal dealing with both solicitors and advocates and this would result in losing specialist expertise; and it would increase court workloads and public costs.

Around half (51%) agreed that any future legal complaints model should incorporate the requirement for the complaints budget to require the approval of the Scottish Parliament. For those who agreed, this was felt to be a positive and sensible step which would provide public scrutiny, transparency and accountability, and would offer reassurance that the complaints system was being funded properly, fairly and efficiently. There was, however, resistance to the Scottish Parliament performing this role as it was felt this would, again, undermine the independence of the legal profession. Rather, some felt that another independent body should provide such scrutiny.

Finally, another list of principles and objectives were presented, with respondents asked to rate how important they felt each was for any future regulatory model. As at the outset, all most respondents indicated that all of the options listed were either very or somewhat important, although 42% indicated that 'Model 1: The levy for entities should be on a financial turnover basis' was either not important or should be removed.

## **Conclusion**

The majority of respondents tended to agree with most of the elements explored or proposed within the consultation, and most agreed that issues with the complaints process needed to be addressed, however, views remained polarised about the best way to achieve the necessary changes. Indeed, no clear consensus was reached with regards to which regulatory model would be preferred and welcomed by both consumers and the profession alike.

Throughout the consultation some respondents (typically, but not exclusively, those representing consumers) argued for radical changes to the regulatory framework in order to provide independence from the profession, instil greater consumer focus and consumer protection, remove the current perceptions of bias and conflicts of interest, provide greater transparency and accountability, and increase consumer trust/confidence. Conversely, others (this time typically, but not exclusively, those representing the legal profession) argued that the case for radical change had not been made, with respondents being concerned that the proposed changes would undermine the independence of the profession and introduce oversight and influence from Government/Parliament, undermine the rule of law, and result in increased costs which would ultimately push up costs for consumers and negatively impact on access to justice. Many in this group argued that the framework did not need to change, but rather legislative changes could be managed within the existing structures to achieve the necessary reform and modernisation.

# Introduction

## Background to the Research

Legal services in Scotland are outlined and legislated for via the Legal Services (Scotland) Act 2010<sup>1</sup>. This specifies that legal services include (a) the provision of legal advice or assistance in connection with (i) any contract, deed, writ, will or other legal document, (ii) the application of the law, or (iii) any form of resolution of legal disputes, or (b) the provision of legal representation in connection with (i) the application of the law, or (ii) any form of resolution of legal disputes. It does not include any judicial or quasi-judicial activities.

Following papers from the Law Society of Scotland in 2015<sup>2</sup> and the Scottish Legal Complaints Commission in 2016<sup>3</sup>, which set out proposals and priorities for reforming the Law Society's regulatory powers in relation to legal services, the then Scottish Government Minister for Community Safety and Legal Affairs commissioned an independent Review of the regulation of legal services in Scotland in April 2017<sup>4</sup> (known as the Robertson Review).

The Review made 40 recommendations, most of which were focussed on applied areas - including entry to the profession, standards and monitoring, entity regulation and complaints procedures. However, the primary recommendation was:

“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.”

This primary recommendation represented a significant departure from the current model, and was a source of contention. Some stakeholders considered this to be an overly radical move, while others felt it was logical. The Scottish Government's response to the review<sup>5</sup> recognised the differing views on this recommendation, and the implications this may have on the existing legal landscape in Scotland. The Scottish Government set out, therefore, to find some degree of consensus in order to move forward. A working group was formed, with key bodies who represent consumer interests, regulators and the legal profession, to discuss the issues, and a public consultation was conducted, the findings from which are presented here.

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<sup>1</sup> [Legal Services \(Scotland\) Act 2010 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>2</sup> [The Law Society of Scotland \(2015\) The Solicitors \(Scotland\) Act 1980: The Case for Change \(lawscot.org.uk\)](https://www.lawscot.org.uk)

<sup>3</sup> [Reimagine Regulation \(scottishlegalcomplaints.org.uk\)](https://www.scottishlegalcomplaints.org.uk)

<sup>4</sup> [Review of legal services regulation-independent report.pdf \(www.gov.scot\)](https://www.gov.scot)

<sup>5</sup> [Independent review of legal services regulation in Scotland: our response - gov.scot \(www.gov.scot\)](https://www.gov.scot)

## **The Public Consultation**

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

The consultation asked 55 questions, with several containing multiple sub-questions and/or consisting of both a closed and open element. As such, the consultation ultimately contained a total of 99 closed questions, and 50 open questions. The consultation was split into the following sections:

- Part 1: Strategic Change, Vision and key aspects of the regulatory model - Proposed Regulatory Model principles and objectives;
- Part 2: Regulatory models and landscape:
  - a) The Potential Regulatory models;
  - b) The Role of the Lord President and the Court of Session;
  - c) Regulatory Committees;
  - d) Fitness to Practice;
  - e) Legal Tech;
  - f) Client Protection Fund (Guarantee Fund);
- Part 3: Legal Services providers and structures:
  - a) Entry, Standards and Monitoring;
  - b) Definition of Legal Services and Reserved Activities;
  - c) Titles;
  - d) Business Structures;
  - e) Entity regulation;
  - f) Economic Contribution of Legal Services;
- Part 4: Complaints and Redress; and
- Part 5: Competition and Markets Authority Legal Services in Scotland Research report (although no questions were asked in relation to this part of the consultation document).

## **Respondent Profile**

A total of 149 responses were received to the written element of the consultation, however, upon data cleaning the following issues were identified:

- One respondent had submitted two separate responses. It was agreed with the Scottish Government that the most recently submitted response would be included in the data analysis and the first response was removed.

- One organisation conducted a survey of their members, where they were asked to complete a sample of the consultation questions. Their response consisted of the 11 individual responses they received rather than a composite organisational level response. The 11 responses were extracted and treated as separate responses for data analysis purposes. They were also categorised as individual rather than organisational responses.

As such, a total of **158 substantive responses** were included in the data analysis:

- 99 submitted via Citizen Space, the Scottish Government’s online consultation portal; and
- 59 submitted via email (this included both responses which followed the main consultation document structure and non-standard responses which did not follow the set questions but provided more free-text discussion of the issues).

Overall, **101 individuals** responded to the written consultation, and **57 organisations**. As part of the data cleaning, organisational responses were coded by sector, with 47 (82%) identified as representing the legal services profession, and 10 (18%) represented consumers. The number of respondents by organisational sector is outlined in the table below (note: this has not been disaggregated by profession/consumer categorisation due to the small numbers in some categories which might risk identifying respondents).

Table 1: Respondent Groups

	Number	Percent
Legal services provider	29	51%
Professional body	13	23%
Public body/sector	6	11%
Consumer body/panel	3	5%
Third sector	2	3%
Legal services regulatory body	1	2%
Other	3	5%
<b>Total</b>	<b>57</b>	<b>100%</b>

In addition to the written contributions, a number of online focus groups were held to elicit feedback. **Eight focus groups** were conducted and included 32 respondents in total. This included 10 individuals from a consumer perspective, seven representatives from consumer organisations or those who supported consumers, four lay people who contribute to the work of the Law Society of Scotland, and 11 individuals from the legal services profession (including its regulatory bodies). Two of the eight focus groups were organisation based, and so included only representatives from those organisations (both representing consumers), while the rest were mixed groups and contained representation from across the different respondent typologies. The Scottish Government facilitated these focus groups and prepared

written summaries which were provided to the research team for inclusion in the analysis and reporting below.

## **Caveats and Reporting Conventions**

While no campaign responses were received for this consultation, there was evidence of coordination of responses. Mostly, this was respondents supporting the Law Society of Scotland's organisational response - some had adopted part of the Law Society's qualitative responses at individual questions, others indicated their support for this on a question by question basis by referencing the Law Society's response rather than replicating it, and others did not respond to the set questions but provided a non-standard response which endorsed the entirety of the Law Society of Scotland's response and added some additional, more general information of their own. As responses were not identical, all such submissions were treated as unique and considered within the main data analysis, and are captured within the reporting below.

In addition, a few respondents advocated the responses from the Faculty of Advocates and the Scottish Law Agents' Society. Here, and for those who advocated the Law Society of Scotland's response, where respondents indicated that another organisation's response should be treated as their own, all data were replicated within the analysis dataset for these individuals (both qualitative and quantitative). However, where no such instruction was provided and respondents simply endorsed/supported another's response, the volume of those who supported the qualitative sentiments were noted at each question, but quantitative responses were not replicated in order to avoid misrepresenting respondents' views.

Findings are presented as they relate to each question in the consultation. Where individual respondents offered views at the open questions that differed from those submitted by organisations, or where views differed between the different organisational sectors, this is identified and outlined in the narrative of the report. Disaggregate analysis between individual and organisational views was, however, confounded by the overlap in respondent roles. For example, a large number of individual respondents replying on a personal level also worked in a professional capacity within the legal services sector. For example, the views of individual solicitors were not significantly different from law firms who had submitted an organisational response. Similarly, the views of those who responded as individuals in a consumer capacity were often similar to consumer-focussed organisations. As such, the differences between individuals and organisations were minimal, with differences tending to be driven more by their profession/consumer status.

As individuals were not asked to identify their interest in the consultation (i.e. as a legal professional or a consumer/member of the general public), it was not possible to categorise all individuals' status to perform disaggregate analysis at this level. Similarly, it was not possible to tell whether responses were more biased towards one respondent group or the other. However, the organisational responses did represent a higher number of respondents from the legal profession compared to consumers. As such, there is a risk that consumers' views may be under-represented within the consultation and analysis presented below.

Some respondents opted not to answer closed questions but did offer open-ended responses to the same question, meaning that there was not always a direct correlation between the number of people who supported/did not support a particular statement and the number of people who gave a qualifying comment. For fullness, all responses were included in the analysis, even where the closed component of the question had not been answered.

It should also be noted that some respondents indicated either a lack of information in the consultation document to allow them to provide informed responses, or difficulty in interpreting information, questions and response options provided. There was also considerable repetition between responses given at different questions. Such issues have been highlighted where relevant, and a few questions have been collapsed together in the analysis below to avoid significant levels of repetition at related questions.

The quantitative results presented throughout the report represent the proportions of those who responded to each question, not proportions of all consultation respondents. The per question sample sizes are noted either below each chart or (for multi-part questions) within the chart axis. Not all tables and charts add to 100% due to rounding.

Focus group questions generally followed the main consultation questions, although differences are noted in the narrative of the analysis where necessary. Not all questions or sections of the consultation were covered in the focus groups, and there were differences in the questions asked between groups. As such, some of the focus group results are based on small numbers of attendees rather than representing views common to all sessions.

There was evidence of some respondents participating in the consultation in multiple ways, i.e. submitting a consultation response and attending a focus group. In such cases, all input has been considered and included here for completeness, but this should be borne in mind when considering the results.

Finally, the findings here reflect only the views of those who chose to respond to this consultation. It should be noted that respondents to a consultation are a self-selecting group. The findings should not, therefore, be considered as representative of the views of the wider population.

# Part 1 Strategic Change, Vision and Key Aspects of the Regulatory Model

## Introduction

The consultation document set out a range of principles, objectives, key outcomes and criteria which the Scottish Government would seek to apply to any regulatory framework going forward. These were developed through consideration of the Robertson Report, existing principles and objectives contained in the Legal Services (Scotland) Act 2010, and discussion with partners. Respondents were asked to indicate how important they considered each to be for any future regulatory model.

## Question 1

**Q1. From the options listed, how important do you think each of the following principles and objectives are for any future regulatory model for legal services in Scotland?**

The figure below shows that most respondents felt that all the proposed principles and objectives were important for any future regulatory model.

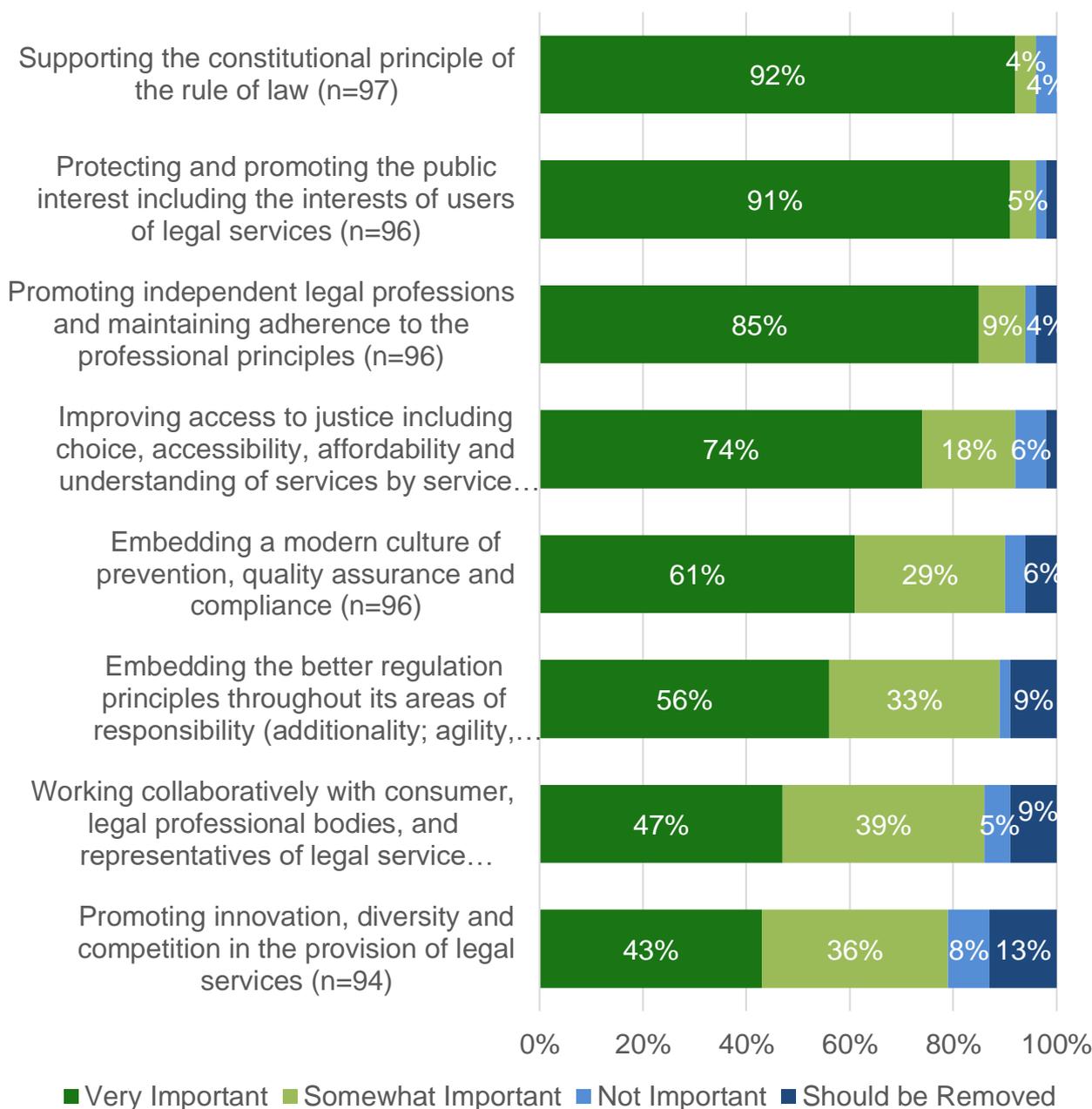
Those that were considered to be the most important included:

- Supporting the constitutional principle of the rule of law - 96% suggested this was important overall (92% felt it was very important);
- Protecting and promoting the public interest including the interests of users of legal services - 96% also felt this this was important overall (91% indicated this was very important); and
- Promoting independent legal professions and maintaining adherence to the professional principles - 94% felt this was important overall (85% stated this was very important).

Those elements which received the largest share of respondents who felt they should be removed, included:

- Promoting innovation, diversity and competition in the provision of legal services - 8% felt it was not important and a further 13% suggested this should be removed;
- Working collaboratively with consumer, legal professional bodies, and representatives of legal service providers as appropriate - 5% felt this was not important and a further 9% thought this should be removed; and
- Embedding the better regulation principles throughout its areas of responsibility (additionality; agility, independence, prevention, improvement, consideration of cost, and efficiency) - 2% indicated this was not important and a further 9% felt this should be removed.

Chart 1: Responses to question 1



## Question 2

**Q2. From the options listed, how important do you think each of the following are in supporting the framework of any future regulation?**

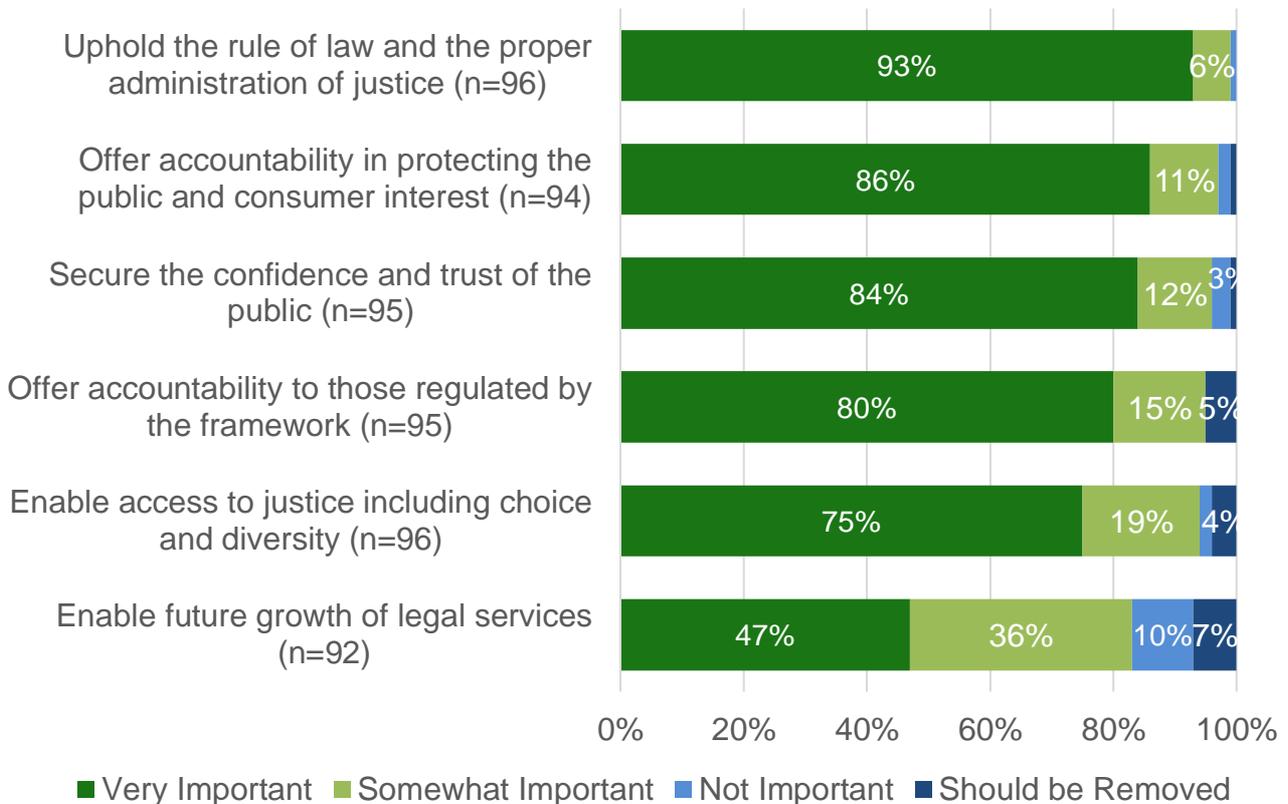
Again, most respondents agreed that all options presented would be important in supporting the framework of any future regulation.

As shown in the chart below, those elements which received the highest levels of support included:

- Uphold the rule of law and the proper administration of justice - 99% felt this was important to some degree (93% indicating this was very important);
- Offer accountability in protecting the public and consumer interest - 97% said this was important to some extent (86% said this was very important); and

- Secure the confidence and trust of the public - 96% felt this was important to some extent (84% indicated it was very important).

Chart 2: Responses to question 2



Only one element recorded over 10% who felt it was either not important or should be removed, namely:

- Enable future growth of legal services - 10% felt this was not important and a further 7% thought this should be removed.

### Question 3

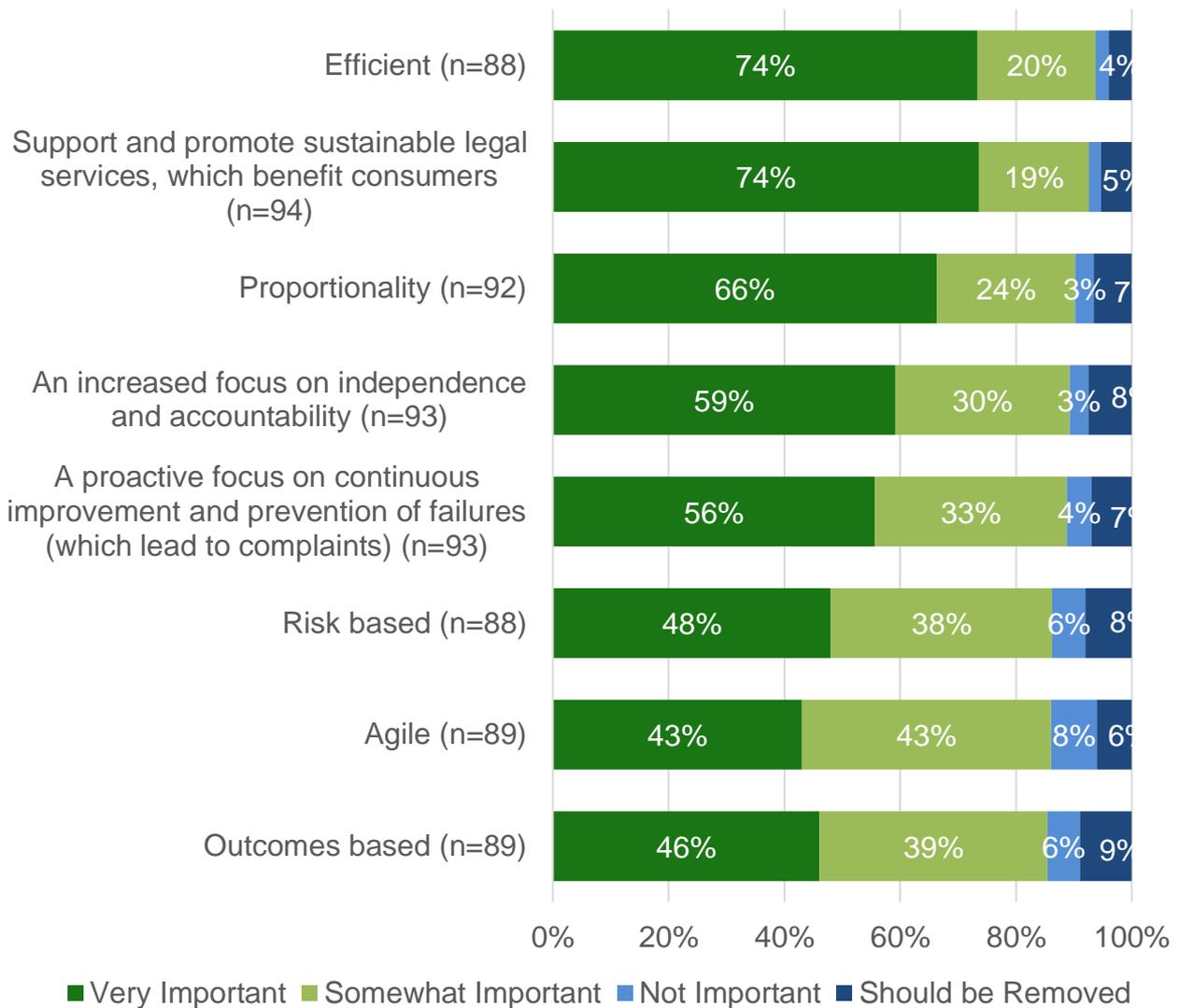
**Q3. From the options listed, how important do you think each of the following criteria is in a regulatory framework?**

As at both Q1 and Q2, most respondents again agreed that all options presented were important to some degree in a regulatory framework, with between 85% and 94% indicating they were either very or somewhat important.

As the chart below shows, those considered to be the most important were:

- Efficient - 94% thought this was important overall (74% felt this was very important); and
- Support and promote sustainable legal services, which benefit consumers - 93% indicated this was important overall (74% stated this was very important).

Chart 3: Responses to question 3



While representing only a minority of views, the following options generated the highest levels of respondents who felt they were either not important or should be removed:

- Risk based - 6% indicated this was not important and 8% said this should be removed;
- Agile - 8% stated this was not important and 6% said it should be removed; and
- Outcomes based - 6% said this was not important while 9% indicated it should be removed.

# Part 2(A) Regulatory Models and Landscape

## Introduction

The consultation paper set out three options for possible regulatory models, as well as details on how these would operate in practice (an extract summarising these is included at Appendix A). This included:

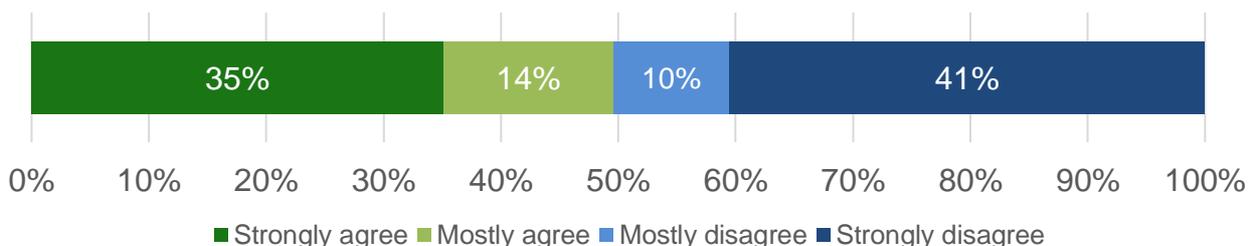
- **Option 1: the Robertson Model**, as recommended by the Robertson Report. This would introduce a single independent regulator that would be responsible for entry, standards, monitoring, complaints and redress in respect of the legal profession.
- **Option 2: a Market Regulator Model**. This would introduce an independent market regulator, who would oversee the work of the current ‘authorised regulators’, each having distinct roles and purpose.
- **Option 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.

Respondents were invited to identify their preferred option, as well as to consider which aspects of regulation should be incorporated within any future system, the extent to which professional bodies should have a statutory footing, and methods for representing consumers.

## Question 4

**Q4. The primary recommendation of the Robertson report was that “There should be a single regulator for all providers of legal services in Scotland. It should be independent of both government and those it regulates. It should be responsible for the whole system of regulation including entry, standards and monitoring, complaints and redress. Regulation should cover individuals, entities and activities and the single regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland.” To what extent do you agree or disagree with this recommendation?**

Chart 4: Responses to question 4



Base: 111

Of those who provided a rating to indicate their level of agreement with the primary recommendation in the Robertson report, responses were fairly evenly split between those who agreed (49%) and those who disagreed (51%). However, those who were opposed to

the recommendation were slightly more likely to strongly disagree, compared to those who strongly agreed.

## Reasons for Agreement

Those who agreed generally felt that an independent regulator would be welcome (and needed), bringing the sector up to date, into line with other professions/sectors and jurisdictions, providing clarity and allowing more focus on consumer rights/needs/experiences, and facilitating consistent regulation of the entire sector:

“One of the key lessons from reforms in England and Wales and in the United States and other jurisdictions is that multiple agencies involved in the regulation of legal services creates a barrier to effective reform. Anything other than a single legal regulator, acting under a clear public interest mandate from the legislature, is a concession towards professional interests over those of the public.”  
(Organisation, Legal Services Provider)

Several responding from the consumer perspective perceived the current model as self-regulation, allowing the legal profession to be “marking their own homework” and lacking independence. They felt it served/protected the interests of service providers rather than consumers, that the complaints process in particular took too long, was too complex, and that there was a lack of guidance and support for complainants:

“The focus is always on process rather than outcome and appears to me to be run by lawyers FOR lawyers. There appears to be no understanding of consumers. It's my belief that the culture (which is set from the top) is self-serving.” (Individual)

It was also suggested that having a system with multiple regulatory bodies made it confusing and difficult for complainants to know who to go to and what the process was, as well as being confusing for those looking to enter/support the sector:

“...the complexity in knowing which regulator to go to is high... multiple regulators means that there is significant work in understand[ing] which regulator regulates which law. A single place/'one-stop-shop' would enable efficiency and reduce complexity in helping those seeking advice on how to enter into the legal services market with innovative services.” (Organisation, Consumer Body/Panel)

The issue of independence of the regulator from the profession was a key issue for both those responding from a consumer perspective, and for some of those within the legal profession. It was felt there were conflicts of interest for the Law Society of Scotland, in particular, between representing solicitors and regulating the sector/ dealing with complaints and problems:

“It has been observed that the Relevant Professional Bodies' current dual role as both regulator and professional representative of their professions makes their independence difficult in relation to regulation.” (Consumer Organisation, Third Sector)

“It is our view that our regulator should be independent of those they regulate. It is our view that currently, The Law Society of Scotland

being both our representative body and our police breeds uncertainty and lack of trust within the membership. This dual role, that can only be described as conflicting, may well prevent members from seeking help, support or guidance, thus having a detrimental effect on either the firm or the individual in question. It is time for the regulation of solicitors to be updated.” (Organisation, Legal Services Provider)

“The Law Society of Scotland struggles hugely with its two part role as a representative body and a regulator... It often is conflicted whereby it should represent solicitors as well as regulate them. A new system is highly needed to resolve this inherent conflict. A new body for representing solicitors separate from the regulator would make the matters clearer, more accountable and less risky.”  
(Individual)

Several caveats or concerns were, however, offered in relation to the implementation of a single regulator model, including:

- Several felt that independence from Parliament, the government and political bias was important/needed (this need for political independence was also one of the main reasons given for disagreeing with the recommendation, as discussed below);
- Several respondents wanted an entirely newly staffed regulator rather than staff transferring from the Scottish Legal Complaints Commission (SLCC) and the Law Society of Scotland;
- A few were concerned about the costs that would be involved (again an issue explored in more detail by those who opposed the recommendation); and
- One respondent felt that any new regulator could face similar constraints as the SLCC (although they did not elaborate on the nature of those constraints).

### **Reasons for Disagreement**

Among those who disagreed with the primary recommendation, respondents generally felt that:

- The Robertson Review 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;
- 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; and/or
- Safeguards were already 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).

Even where respondents agreed that reform was required, they felt that this would be best achieved within the current framework and by reforming/updating the current systems and powers of the existing regulators, rather than “throwing the baby out with the bathwater”.

One of the main arguments against the provision of a single regulator was the perception that this would not be independent of the Scottish Government. It was felt to be of paramount importance that the legal profession and justice remained, and were seen to remain, independent of the Government, ministers and politics. Respondents argued that the Scottish Government/Parliament should have no influence upon any regulatory bodies or organisations and that they should not be involved in the appointment of its members or representatives. It was also argued that the legal profession needed to be able to challenge government where necessary, which necessitated independence of the two systems. However, it was felt that this was not the model being outlined in the consultation paper, despite the Robertson report's primary recommendation that "it should be independent of both government and those it regulates":

"The recommendation is for a separate regulator independent of Government but then goes on to say that the regulator would be accountable to Parliament and subject to scrutiny by national Audit. The regulator would be effectively an agent of the State, responsible to neither the public nor the professions, but to political will."  
(Individual)

"I believe this is a serious and potentially dangerous step away from the principle of the independence of the legal profession. It risks government appointees making the arrangements for who can and cannot become a lawyer, determining the requirements which are set down on the legal profession and, perhaps most seriously, controlling the process to remove a lawyer's right to practice."  
(Individual)

"It is of vital importance that the independence of all branches of the legal profession is maintained, with their accountability to the courts as well as their individual regulatory body ensuring the highest professional standards of entry and conduct. Changes risk undermining the rule of law, a bedrock of any modern democracy, providing stability to the citizen and the ability to challenge governments of the day. Lawyers need to challenge government and policy makers and should be entirely independent of them."  
(Individual)

Indeed, some respondents, including the Law Society of Scotland and those who supported their view, felt that such a change would risk undermining the rule of law, thus damaging Scotland's international reputation and credibility:

"It risks introducing a radical regulatory structure which is costly, undermines the rule of law and damages the international reputation of the Scottish legal sector to address a problem which is non-existent." (Organisation, Professional Body, Law Society of Scotland)

Another common argument against the creation of a single regulator was the perception that service operation costs would rise. A few felt that rising costs could not be easily borne by the profession, particularly following COVID-19 and the national insurance increases and money laundering levies, and felt that any additional financial pressures could lead to some legal

firms closing and make the local and high-street based services less attractive as a business proposition, thus negatively impacting consumer choice and access to justice:

“We are convinced it will not be cost neutral (we believe it will be considerably more expensive) and that the increased costs will fall to be met by the legal profession and, in the main, passed on to clients. There is no evidence in the consultation paper on costs and to leave a proper assessment to later in the process is not, in our view, acceptable.” (Organisation, Legal Services Provider)

Several were also resistant to, or uncertain around the success which a one-size-fits-all regulatory system would have. They noted that the different strands of the legal profession and different roles performed would be difficult to accommodate within a single regulator, with a few concerned that the regulator may not have the required skills and experience of all aspects of the sector to provide comprehensive and consistent coverage:

“Solicitors, advocates and commercial attorneys each perform a different and equally important function within the legal services sector and, as such, each is bound by different rules and requirements embedded through provisions stretching across many statutes. Collating all branches of the legal profession under the umbrella of one single super-regulator would be expensive, challenging to manage in a proportionate way and require significant and experienced resource.” (Organisation, Professional Body, Law Society of Scotland)

In relation to the regulation currently provided by the Faculty of Advocates, it was felt that the current system worked well, met all the desired criteria for regulation, and respondents argued that the status quo should be retained for most elements. However, it was felt that reforms to complaints handling involving advocates via the SLCC may be needed, with suggestions that all complaints should be dealt with directly by the Faculty.

## Question 5 and Question 6

**Q5. Of the three regulatory models described, which one would you prefer to see implemented?**  
**Q6. Of the three regulatory models described, please rank them in the order you would most like to see implemented?**

Chart 5: Responses to question 5

Q5. Of the three regulatory models described, which one would you prefer to see implemented? (Base: 119)

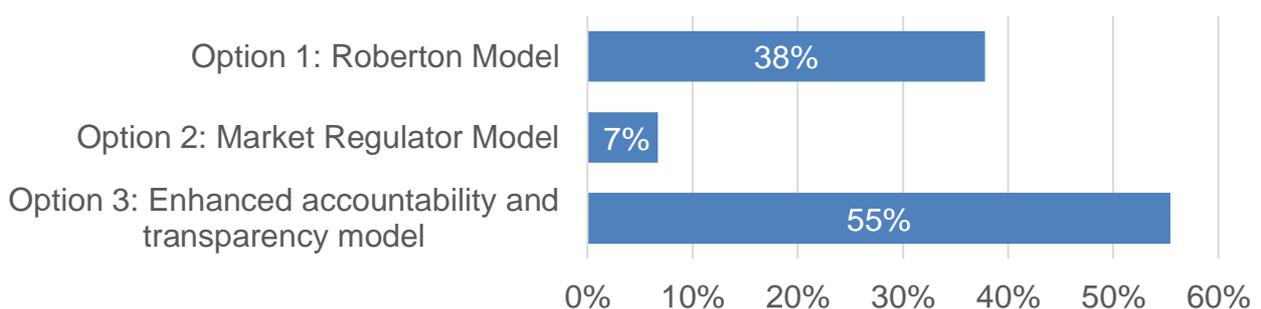
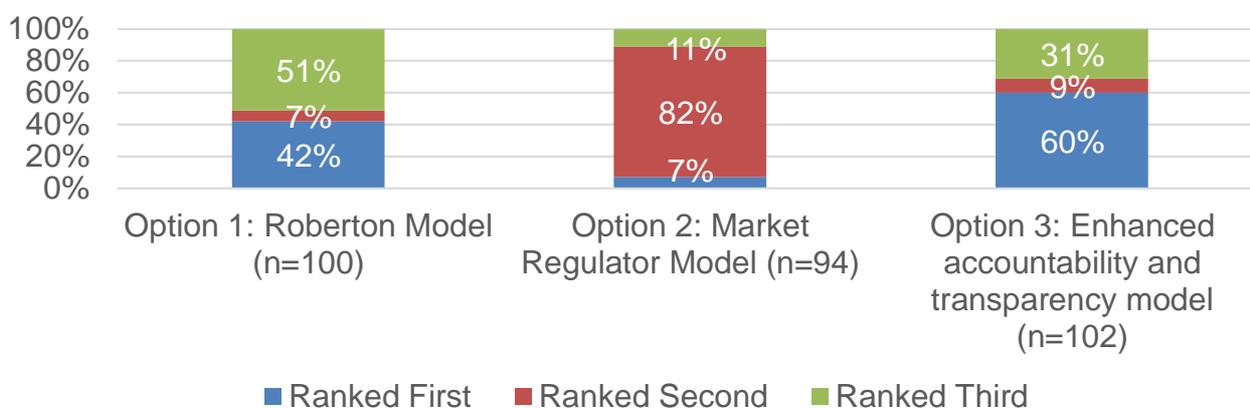


Chart 6: Responses to question 6

Q6. Of the three regulatory models described, please rank them in the order you would most like to see implemented?



Over half (55%, n=66) of the respondents who provided a quantitative response at Q5 indicated that Option 3 was their preferred model. Similarly, when asked to rank the three options at Q6, Option 3 was selected most often as the first choice (60%, n=61), Option 2 most often as the second choice (82%, n=77), and Option 1 most often as the third choice (51%, n=51) - although it should be noted that Option 1 was also chosen as the first choice by a large proportion (42%, n=42).

Of those who chose Option 1 as their first choice, most (69%, n=29) selected Option 2 as their second choice and Option 3 as their third choice. Conversely, most of those who selected Option 3 as their first choice, selected Option 2 as their second and Option 1 as their third (77%, n=47).

It should be noted that 22 respondents did not rank all three options at Q6, instead most only indicated their first choice. One respondent rated two options, possibly indicating that the third should not be adopted. These ratings are included in the chart above, resulting in the differing base rates for each option.

Often, those identified in third position (both Options 1 and 3) were said to be unworthy of further consideration and respondents were strongly against such a model being implemented. Further, several respondents who had ranked all three options indicated that they only supported their first choice and felt the other two should not be implemented. One suggested that a different rating scale might have been helpful at this question in order to gauge the level of support for each option, rather than ranking, as the strength of support for each could not be conveyed within the given response options.

A total of 109 respondents provided a qualitative response at Q5 to discuss the reasons for supporting one or other option. At Q6, 87 respondents provided a qualitative response to support their answers, however, a large proportion simply referred back to their earlier answers given at Q4 and Q5 rather than providing any new information. Indeed, the reasons given at Q5 and Q6 were largely consistent, both supporting and critiquing the three options, and covering the same issues. Therefore, all responses across Q5 and Q6 have been collated below.

### Support for Option 1

The reasons respondents gave for supporting Option 1 were largely in line with the comments provided above, namely that it would bring:

- Independence from the profession;
- Separation of the roles of regulation and representation of the profession to avoid conflicts of interest;
- Simplicity and clarity by being responsible for the whole system/sector;
- Public trust in the system;
- Greater transparency and accountability;
- Focus on consumer rights, particularly if the consumer voice is embedded in the regulator as planned; and
- More efficiency, providing consistency across the entire sector, and being proportionate for the size of the sector in Scotland:

“Option 1 is the only option that fully meets the requirement of establishing the independence of the regulatory function from the profession that it will be set up to regulate. This will allow the regulator to act in the public interest and be proactive in addressing emerging concerns and embracing new opportunities free from any conflicts of interest. Clearly establishing the independence of the body will also contribute to consumer trust and confidence in the system.” (Organisation, Consumer Body/Panel)

Several individuals were also keen to see the Law Society of Scotland and the SLCC removed from the regulatory and complaints landscape.

A few stressed the need for the reforms to be more radical in order to support real and meaningful changes, and argued that similar independent legal sector regulators had been introduced in a number of other democratic jurisdictions:

“The presence of lay members on a professional body regulation committee rarely manages to create the impetus to genuine reform. Only where legislation has created a new, independent legal sector regulator, as in Australia, Ireland, Singapore, South Africa or California, has there been an introduction of the radical thinking that the legal sector needs in order to address its systemic problems.” (Organisation, ‘Other’ sector representing the profession)

### **Limitations or Opposition to Option 1**

Across both Q5 and Q6, respondents also outlined their reasons for opposing Option 1. Again, the main criticism was that this model failed to protect the independence of the legal profession from Government/Parliament, and that it did not provide adherence to the rule of law.

Other reasons given, again in line with responses to Q4, included:

- The lack of evidence to support the need for such radical reforms;
- The perception that this model would have cost implications which would ultimately impact the consumer;

- That this model risked losing the goodwill and expertise of skilled and experienced volunteers who work on the Law Society of Scotland Regulatory Committees and support the Law Society of Scotland's work;
- That it risked damaging the legal sector's competitiveness;
- That no other jurisdiction in the world had implemented this regulatory model; and
- That it represented a disproportionate solution to address the issues identified by the Robertson Report, and represented a disproportionate system for the Scottish market.

## **Support for Option 2**

Although only a few respondents (7%, n=8) identified Option 2 as their preferred model, the majority of respondents (82%, n=77) ranked this as their middle preference. A few also stated that they felt this option merited further consideration.

Generally, the aspects of Option 2 which respondents supported included that it may:

- Provide a satisfactory degree of separation between the regulatory bodies/legal profession and the Scottish Government/Parliament;
- Bring a consumer focus and the consumer voice to the regulatory landscape and help to drive consumer confidence;
- Offer choice and accountability;
- Offer a single regulator who could provide an initial point of contact, particularly (but not exclusively) for complaints; and
- Be similar to the model in England and Wales, or Ireland, which were considered to work reasonably well (although others disagreed that the English and Welsh system worked well, as discussed below).

A few also felt that, while the current regulators were the most appropriate to regulate their respective professions, the oversight/market regulator would provide public confidence in the work of these regulatory bodies, and that their processes, actions and decisions were fair and just.

## **Limitations or Opposition to Option 2**

The limitations and reasons for opposition to Option 2 were similar to those outlined about Option 1 above.

Again, the key issues were that the market-regulator would be answerable to and/or influenced by the Scottish Government/Parliament and so would not provide adherence to the rule of law, while the individual regulatory bodies would not be independent from the profession. It was also commonly argued that Option 2 introduced additional bureaucratic layers to the system making it more complex and less transparent and efficient. It was felt that this would result in additional costs.

Other issues with Option 2 included:

- That it was a disproportionate change to address the perceived issues with the current system, and a disproportionate model compared to the size of the Scottish market;
- That it was similar to the system used in England and Wales, which was considered to have created numerous issues that would most likely be

replicated in Scotland (in direct opposition to those who thought this system worked well):

“There is no evidence to suggest that there is any current issue within the legal services market in Scotland. England is the only jurisdiction where a Market Regulator Model has been introduced following legislation in 2007, with little evidence to date to suggest that it has improved the position of consumers of legal services in that jurisdiction.” (Individual)

- That it did not separate regulation from representation;
- The need for new entrants to set up their own regulator could be prohibitive;
- That it was unlikely to go far enough to achieve the stated regulatory aims;
- That it was not well set out in the consultation document to make reliable assessments of this model, for example:
  - It contained inconsistencies, overlap of responsibilities, and a lack of detail;
  - There was a lack of evidence regarding the benefits this model would bring;
  - It lacked clarity over how disputes and conflicts between regulatory committees and the professional bodies would be handled/resolved; and
  - It lacked clarity over how the consumer voice would be incorporated.

Several other respondents noted that they had picked this as the middle option as they saw it as slightly favourable to their least preferred option. However, they still cautioned against the model, indicating it was unlikely to go far enough to address their concerns.

### **Support for Option 3**

The key reasons why respondents supported Option 3 included perceptions that it would:

- Maintain independence from the Scottish Government/Parliament, remain answerable to the Lord President and Court of Session, and maintain the rule of law:

“This ensures that the senior judges are responsible for the regulation and accountability of the different aspects of the legal system in Scotland. They are independent, knowledgeable, and have vast experience of assessing what is right and proper.”  
(Individual)

- Be cheaper/more cost effective than the alternative options, and any new system would be too costly;
- Allow improvement in the current regulatory system quickly, it would be the least disruptive and most deliverable option;
- There was nothing fundamentally wrong with the current regulatory structure, it was processes that needed to be updated, and this would be best achieved by the current bodies with their knowledge and expertise;

- Embed a consumer voice;
- Provide powers for regulators to apply to regulate legal services providers in other jurisdictions;
- Introduce powers to regulate at entity level, thus providing greater protection to consumers;
- Provide greater flexibility to introduce the powers for a more proactive regulatory regime; and
- Improve transparency and accountability around regulators.

However, the requirement for independent committees to have their remit set by, and to be accountable to, the Scottish Parliament, was unwelcome by respondents. Again, they argued that independence and separation was required, and that the Lord President and the Court of Session should remain the ultimate head of the system.

Some respondents did, however, agree that greater transparency was required in the current system and that the complaints process in particular needed to be addressed and reformed, although they did not feel that changes to the framework were required to achieve this. It was argued that new processes were needed, not new structures. Indeed, the Law Society of Scotland set out an Option 3+ scenario (detailed at Appendix A), which they and others would prefer. This reflected Option 3 and incorporated their proposed complaints model. It was argued that this would address key failings/issues in the current system, while retaining what works well:

“We believe that the Option 3 model, with the adoption of our proposed complaints model, is the only credible option which strikes the correct balance between working in the consumers’ best interests, promoting a strong legal sector, and providing a proportionate and appropriate complaints redress route... Option 3 allows for evolution and iterative improvement of the current regulatory framework. It would also allow for a more agile, responsive, and transparent regulatory regime, which would strengthen the focus on consumer protections and support the legal profession.” (Organisation, Professional Body, Law Society of Scotland)

### **Limitations or Opposition to Option 3**

Again, respondents also set out the perceived limitations or reasons for opposition to Option 3, the main ones being:

- 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;
- It could be prohibitive to new entrants to the market as they would have to set up their own regulator; and

- It was perceived that the disciplinary tribunal, complaints system and Court of Session would fall under the direct scrutiny of Parliament, which was again considered unsatisfactory for an independent profession.

## No Change

Finally, some respondents preferred the status quo to remain, and argued for no change. This was particularly the case for those discussing the Faculty of Advocates' role, although others spoke of this in more general terms across the profession. They highlighted that the legal profession was well regulated and well respected, and felt that there was no problem to be solved, therefore no change was required. However, as this was not offered as an option in the consultation paper, several of these respondents selected Option 3 as their preferred option, as the 'least worst' option from those presented (but stressed they would prefer no change, or argued that change would not bring about any real benefits), while several chose not to select any of the options on offer.

## Focus Group Responses

Focus group respondents were generally more supportive of the primary recommendation in the Robertson Report and of Option 1 as the preferred model for reform.

From a consumer perspective, and among some within the profession, it was felt that an independent regulator would be the preferred option, in order to simplify the system (creating a "one-stop-shop") and to provide reassurances over independence. However, many of the comments were related to complaints and complaint handling rather than to wider regulatory issues.

A few, largely from within the legal profession, however, had issues with the Robertson Report/Model. As above, one was concerned about independence and the appointment of a lay chair to an independent regulator. They felt that lay members were already heavily involved and that, while changes were needed to the complaints process, this did not warrant such significant changes, or additional bodies being introduced to the structure. Similarly, another felt that the current system worked well, but agreed that a new complaints system was needed. It was, again, suggested that the size of the Scottish legal profession did not warrant the cost of creating and maintaining an overarching regulator.

One respondent preferred Option 2, the Market Regulator approach, as it would retain and enhance the current system by providing greater oversight, however, another felt this simply added layers of bureaucracy.

One respondent preferred to maintain the status quo while amending the rules and standards applicable to the legal profession. They argued that without addressing these, it made no difference who the regulator was.

## Question 7 and Question 8

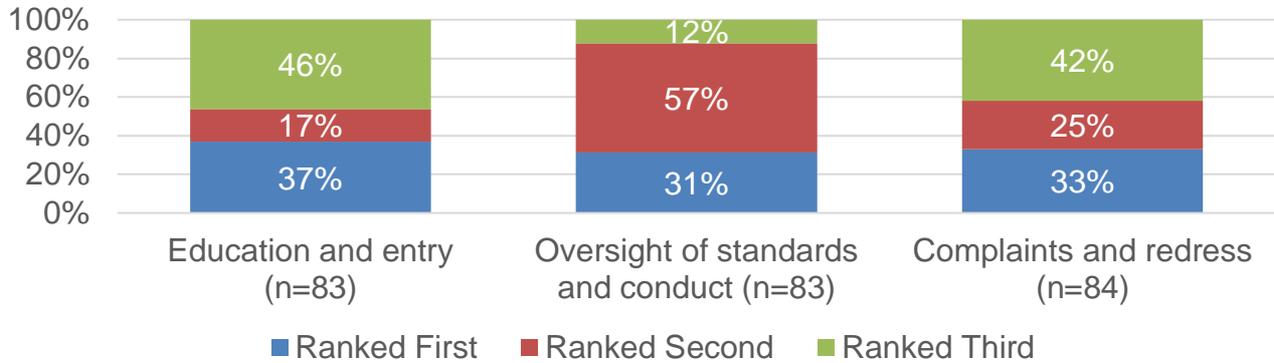
**Q7. Please rank in importance the aspects of regulation you would most like to see handled by professional regulatory bodies, through independent regulatory committees?**

**Q8. Of the three models described above, please rank in importance the aspects of regulation you would most like to see handled by a body independent of, and external to the professional regulatory bodies, and of government?**

Comments provided at these questions were again consistent, with many responses to Q8 simply referencing their answer at Q7, therefore the two questions were considered together for reporting purposes.

Chart 7: Responses to question 7

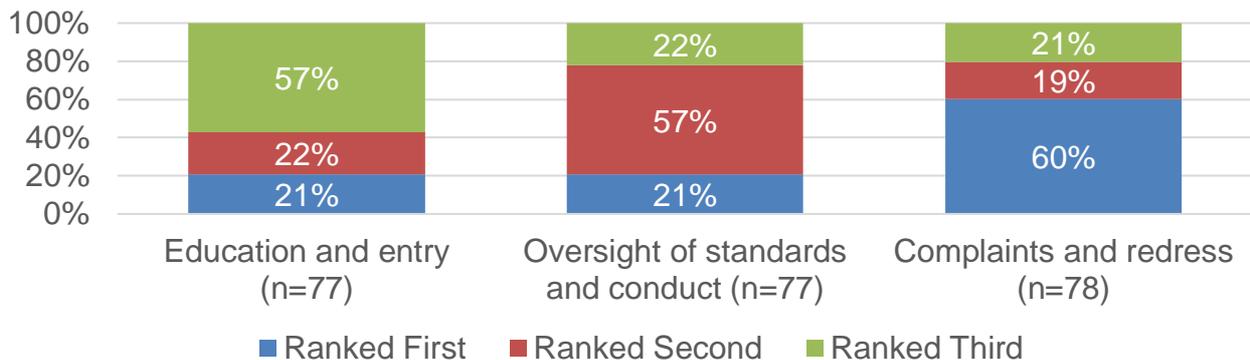
Q7. Please rank in importance the aspects of regulation you would most like to see handled by professional regulatory bodies, through independent regulatory committees?



Of those who ranked the three options at Q7, respondents were equally split in terms of their first choice, with around a third (31%-37%) selecting each option in the first position/as the most important issue. Just over half (57%, n=47) placed 'oversight of standards and conduct' in the second position, while 'education and entry' and 'complaints and redress' were largely placed in third position (46%, n=38 and 42%, n=35 respectively).

Chart 8: Responses to question 8

Q8. Of the three models described above, please rank in importance the aspects of regulation you would most like to see handled by a body independent of, and external to the professional regulatory bodies, and of government?



Compared to Q7, greater consistency was provided among how respondents ranked the three options at Q8. Of those who answered the question, 60% (n=47) placed 'complaints and redress' in first position/as most important, 57% (n=44) placed 'oversight of standards and conduct' in second position, and 57% (n=44) placed 'education and entry' in third position.

Caution is needed over the results presented at both Q7 and Q8, however, as the qualitative comments appeared to show various interpretations of the meaning of the questions and what respondents intended by their responses. For example, several respondents appeared to rank the options as simply those they felt were the most important to regulation/the area most in need of reform, irrespective of who would handle this. One respondent also

highlighted uncertainty regarding what each of the rankings would represent, particularly for options two and three, with different interpretations of this being possible (regarding who would be responsible for each element) - this was indeed borne out in the responses. For example, some respondents outlined whether a professional body, an independent committee of a professional body, or a new independent body should be responsible for each element.

A significant number of respondents also noted difficulty in responding to these questions. Some noted that they would prefer not to implement the regulatory model in each question, but could not illustrate that within the response options provided. Others felt that all elements were equally important within the regulatory framework. This was noted by both those who provided rankings, and many of those who did not rank the options but provided qualitative comments only:

“All of these elements carry equal importance in the overall regulatory regime and therefore it would not be appropriate to list them in preference order. As with the current model, we believe that any regulatory committee should have responsibility for all aspects of regulation, and none should be removed from the functions of the regulator.” (Organisation, Professional Body, Law Society of Scotland)

As outlined above, many respondents provided qualitative comments which outlined preferences between independent committees of professional bodies and a new independent regulatory body taking responsibility of each area. For example, it was often argued across both questions that the current professional bodies were best placed/equipped to lead on ‘education and entry’, while a body independent of the profession was needed to handle ‘complaints and redress’ - with some arguing for a fully independent body and others for independent regulatory committees:

“In order to maintain confidence with the public, complaints and redress should be completely impartial. Education and entry, subject to involvement of an independent body to ensure that there is actual evidence to support the standards being applied, and that no unnecessary barriers are being put in place that would distort competition, should be a matter that the professional regulatory body can adequately address.” (Organisation, Professional Body for the Legal Profession)

There was less agreement over who should be responsible for regulating ‘standards and conduct’. Some felt this should be retained by the professional bodies as there was currently no issue in this respect, to maintain independence of the legal profession from Government, and because ‘education and entry’ and ‘standards and conduct’ were closely linked and the professional bodies were best placed to oversee both elements. Others preferred this to be handled by an independent body due to conflict of interest issues for the professional bodies in trying to both promote and police their members, and because they felt that ‘standards and conduct’ was closely linked to ‘complaints and redress’, and therefore both required an independent body to oversee these:

“Key for confidence in the system will be independence of oversight of standards and conduct with same applying to consequent complaints and redress system.” (Individual)

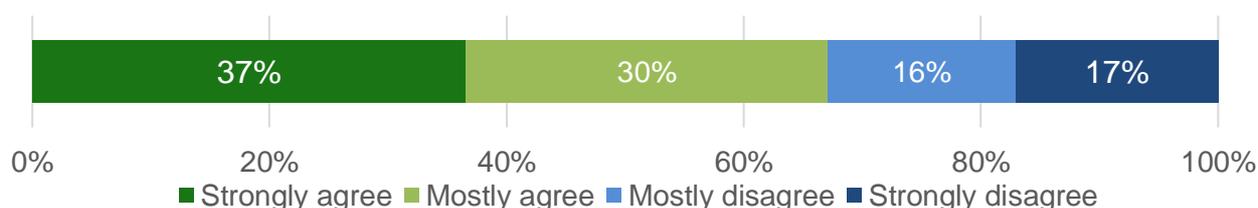
Several also indicated that ‘education and entry’ and ‘standards and conduct’ should be managed by the existing professional bodies and not a new/independent regulatory body. Again, this was considered important to maintain the independence of the profession from political influence:

“Education and entry to the profession, and standard and conduct of the profession should be a matter for an independent profession only.” (Individual)

## Question 9

**Q9. Under the Robertson Model, to what extent do you agree or disagree that the professional bodies should have a statutory footing?**

Chart 9: Responses to question 9



Base: 82

Of those who answered this question, around two thirds (67%, n=55) agreed that the professional bodies should have a statutory footing, while one third (33%, n=27) disagreed. Only one organisation disagreed with this proposal, all others either agreed or did not indicate their level of agreement/disagreement. As such, almost all of those who disagreed were individuals (n=26). A wide range of reasons were provided as to why professional bodies should have a statutory footing if the Robertson Model were to be implemented. This included, to provide and maintain:

- Legitimacy, authority, and credibility;
- Clarity and transparency;
- Accountability;
- Sufficient monitoring and effective governance;
- Public confidence;
- Checks and balances to the risk of any Government/Parliamentary/political interference; and
- Sector specific input to the regulation:

“Regulators should naturally have some distance with the professionals that they regulate. However, a relationship should definitely be formed between the two. It should only be fair that the professionals have some say in their regulation.” (Organisation, Consumer Body/Panel)

The issue of membership and member engagement was also discussed by several respondents (including the Law Society of Scotland and those who supported their response). It was noted that without regulatory functions or a statutory role, membership would become voluntary, resulting in a loss of income and impacting on the delivery of remaining functions. Indeed, a few noted that some in the profession may opt to become members of alternative bodies:

“It would no longer be necessary for representative bodies to have this [a statutory footing] and you might find for example solicitors looking to other representative bodies such as the Law Agents Society or the WS [Writers to the Signet] Society or local faculties to protect their interests rather than the Law Society of Scotland.”  
(Organisation, Legal Services Provider)

A few argued that those organisations/bodies which currently have a statutory footing should continue to do so, including professional bodies and the Lord President. Others suggested that any new regulatory framework would require a statutory footing and so both the new regulatory body and the role for other organisations would need to be set out clearly to avoid misinterpretation.

The Law Society of Scotland, supported by several other respondents, suggested that both primary and subordinate legislation could be used to provide flexibility in relation to the professional bodies’ functions:

“Although we agree that the relevant organisations should continue to have a statutory footing set out within primary legislation, the functions of those bodies should be set out within subordinate legislation, providing flexibility to amend both pro and reactively when necessary.” (Organisation, Professional Body, Law Society of Scotland)

Those who disagreed with providing a statutory footing for professional bodies commonly argued:

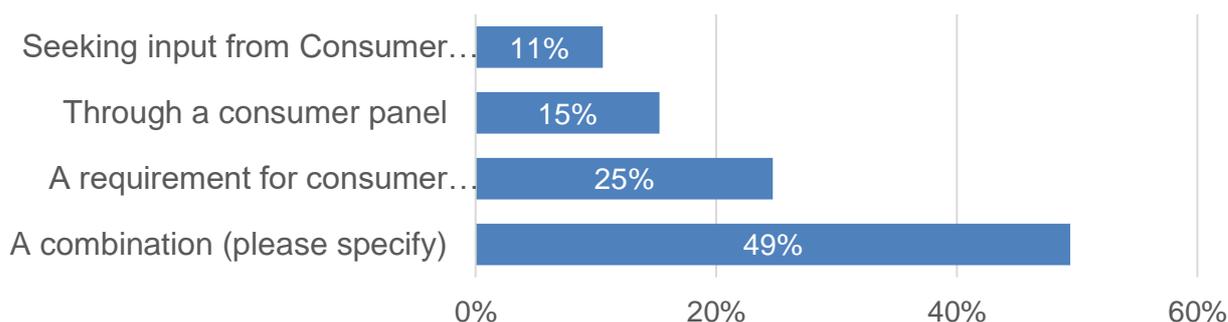
- There would be no need for this and/or that there was a lack of evidence regarding the basis for this;
- That too much legislation could make it difficult for the profession to react quickly or with agility to market factors (although as noted above, the Law Society of Scotland suggested that subordinate legislation could be used to provide the required flexibility); and
- That by becoming statutory bodies they may be liable to interference from government:

“I believe the work of professional bodies does not need to be further underpinned by a statutory footing. Bodies, particularly the Faculty of Advocates, have been able to carry out their roles with a high degree of public confidence - I do not believe this needs to change.” (Individual)

## Question 10

**Q10. Which of the following methods do you think the final regulatory model should utilise to embed a consumer voice?**

Chart 10: responses to question 10



Base: 85

Of those who chose an option from the list presented, nearly half (49%, n=42) agreed that a combination of methods would be best utilised to embed a consumer voice in the final regulatory model. A quarter (25%, n=21) preferred a requirement for consumer expertise within regulatory committees, 15% (n=13) felt this would best be achieved through a consumer panel, and 11% (n=9) indicated that input should be sought from Consumer Scotland.

### A Combined Approach

Of those who supported a combined approach, 38 provided comments to support their response. This included the Law Society of Scotland, with several others supporting their views without having provided a response at the closed question. A few others who also did not provide a response to the closed element of this question also expressed general support for a combined approach in their qualitative comments - up to eight additional respondents appeared to prefer this option.

A range of different models were outlined, with several advocating for input from both Consumer Scotland and a consumer panel, and others seeking a blended approach of all the options presented. Most also highlighted the need for a range of different consumer voices (both from consumer organisations and individuals) to be included in the process. They felt this would ensure the most reliable and balanced representation of consumer input. Many believed that the inclusion of consumers who had experienced the 'system' would be of significant benefit, not only to stakeholders, but also to the legal system as a whole, as well as the wider perception of it. A few also commented on the need for consumer input with the power to directly challenge regulators:

"Input is required from as many stakeholders as possible and particularly from consumers and end users. It is important that those who may need have limited or poor access to legal services are included." (Individual)

"A combination because it is [not] often that a single technique can provide a strong consumer voice. For instance, a consumer panel might not be enough on its own. And requirements themselves could leave differing levels of the consumer research techniques and input. Having a combination of input from a variety [of] sources (including research and consultations from Consumer Scotland and other similar bodies) will provide the required strong consumer voice." (Organisation, Consumer Body/Panel)

A few consumer based organisations also argued for the need for regular, widespread consultation and engagement activities to be undertaken:

“We would expect to see wide consultation and engagement with the general public and with consumer groups, including those representing vulnerable consumers, on a regular and ongoing basis.” (Organisation, Consumer Body/Panel)

### **Consumer Expertise Within Regulatory Committees**

Of those who favoured a requirement for consumer expertise within regulatory committees, only nine respondents provided further qualitative comments.

A few felt this was the most suitable way to achieve a meaningful consumer voice which could not be overlooked, while also calling for such representation to include a diverse set of views. A few also felt this was closest to the current system, which could be built upon to improve in this respect, and would therefore represent the least disruption. One respondent was also wary of giving a single organisation a voice over others:

“This provides a voice within an existing framework. I do not agree that a single consumer organisation should have any preferred status in the new process.” (Individual)

A few focus group attendees, who were asked about consumer representation, were conflicted over the use of consumers within regulatory committees. While they saw merit in this, and felt it was a situation to strive towards, they noted that it might be difficult and intimidating for lay persons and members of the public to join a system designed around the legal profession and to compete in discussions/ disagreements with legally trained professionals. It was argued that more support and resources were needed for lay people on such committees, and that ‘professional’ lay people might be more confident to actively participate.

### **A Consumer Panel**

Of those who felt that establishing an independent consumer panel would be the best option, only five respondents provided supporting comments. They felt that this would guarantee that representative consumer voices were heard:

“Consumers must be placed at the heart of any new regulatory model.” (Individual)

A consumer panel model was also supported by a few focus group respondents. It was suggested that this needed to include a broad representation from different consumer organisations as well as a wide range of consumers themselves - including vulnerable and hard to reach groups who may require more support or innovative methods to allow them to participate. It was also suggested that implementing this approach initially may allow lay persons to become familiar and comfortable with the regulatory system, thus supporting them to feel more confident to perhaps join regulatory committees at a later stage.

### **Input from Consumer Scotland**

Of those who supported the option to seek input from Consumer Scotland, just four respondents provided a qualitative comment. Two who had not selected a response at the closed question also outlined support for this option, including the Faculty of Advocates.

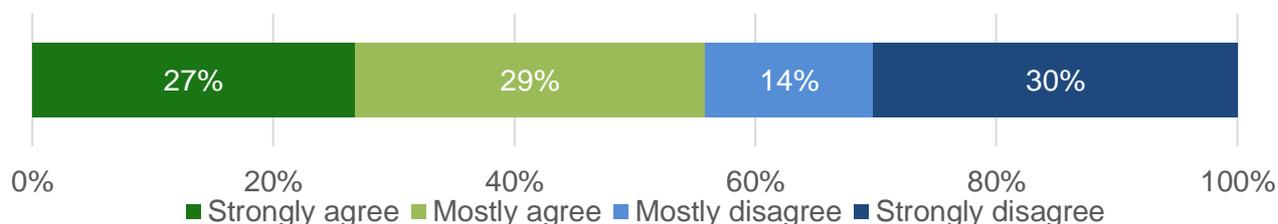
It was felt that this would be the most efficient, straightforward and practical approach. It was also felt to be appropriate since it would bring a consumer perspective and facilitate broader consumer consultations. Some felt that this would be preferable to the establishment of an independent Consumer Panel which one individual respondent labelled as potentially ‘tokenistic’.

It should be noted that a few respondents also indicated that they did not agree with any of the options proposed. Generally, reasons were not provided for this view, however, one respondent noted that a solicitor’s primary responsibility was to the court, and they were uncomfortable about giving too much influence to consumers and those unqualified in the sector. Similarly, another (who was supportive of having consumer representation within regulatory committees) argued that not all consumers should be treated the same within the regulation. They felt that a distinction was required between large corporate clients who interact regularly with legal services, or in-house solicitors instructing other private solicitors for example, and members of the general public who would have very limited experience of legal services.

## Question 11

**Q11. To what extent do you agree or disagree that Consumer Scotland should be give the power to make a Super-Complaint in respect of the regulation of legal services in Scotland?**

Chart 11: Responses to question 11



Base: 86

Of those who provided a rating, over half (56%, n=48) agreed that Consumer Scotland should be given power to make a Super-Complaint in respect of the regulation of legal services in Scotland, while 44% (n=38) disagreed<sup>6</sup>.

A few individuals indicated that they did not know what a ‘Super-Complaint’ was, while a few others thought that Consumer Scotland were already able to raise such complaints.

Those who agreed suggested this would bring a needed change to the complaints system, providing greater consumer protection:

“We support providing Consumer Scotland with the power to make a super complaint in respect of the regulation of legal services in Scotland as this will provide additional accountability in relation to consumer issues.” (Organisation, Consumer Body/Panel)

The main caveat from those who supported the proposal, and the primary reason for disagreeing, was around independence and representation within Consumer Scotland. It was again felt this might undermine the independence of the legal profession, with respondents raising concerns about potential bias:

“Could be hijacked for political purposes. Consumer Scotland is state funded and so state controlled.” (Individual)

<sup>6</sup> It should be noted that, at this question the presentation of the strongly agree and mostly agree options were reversed compared to all other questions of this nature in the consultation (i.e. mostly agree was presented as option 1 and strongly agree as option 2 on this occasion). This could have resulted in some respondents inadvertently not selecting their preferred option.

“But the power becomes a pistol to the head. It can threaten super action, to dynamite the regulator, whenever it wants. Could this be open to abuse?... Who then controls the controller and the super complainer?” (Individual)

The Law Society of Scotland and a number of others called for clarity around the issue that this proposal was trying to address, questioning both its proposed purpose and scope:

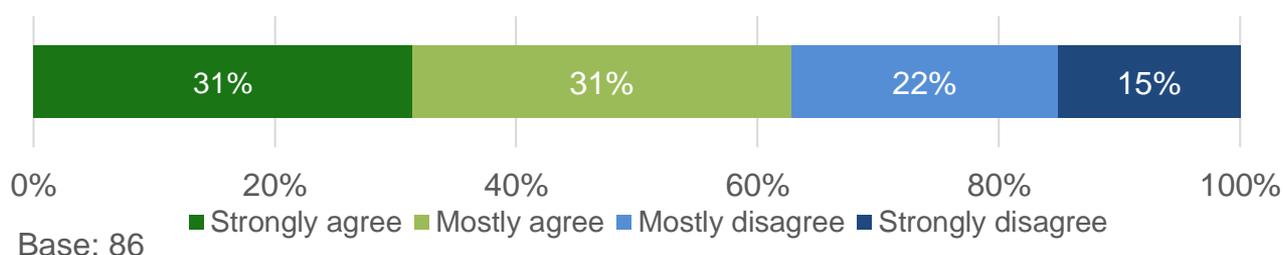
“...it is not clear as to the extent of the proposed power and what mischief it is intended to address. We would welcome clarification of this.” (Organisation, Professional Body, Law Society of Scotland)

Respondents from across the spectrum of responses (i.e. who agreed, disagreed and who did not provide a closed response) felt that not enough information or detail had been provided in the consultation around how this would work, who the complaint would be made to, the circumstances for such a complaint, etc. It was felt that more information was needed in this area.

## Question 12

**Q12. To what extent do you agree or disagree that a baseline survey of legal services consumers in Scotland should be undertaken?**

Chart 12: Responses to question 12



Just under two thirds (62%, n=53) of those who identified their level of agreement, agreed that a baseline survey of legal services consumers in Scotland should be undertaken, compared to 37% (n=32) who disagreed.

The most common qualitative response to this question, supported by the Law Society and others, was a call for clarity as to the scope and objective of such a survey. Many respondents felt that a survey would be beneficial to establish benchmarks against which change could be measured. However, there was a general feeling that an all-encompassing, fair and reliable survey would be difficult, time consuming and expensive to conduct.

Of those who agreed that a baseline survey should be undertaken, a number believed that consumers were already content with existing services, highlighting that previous/existing surveys showed high levels of satisfaction. It was also felt that a baseline survey would help to identify if and where change was needed:

“The Law Society already does this and the results are generally very positive.” (Individual)

“With surveys before, the vast majority of clients have been shown to be satisfied with their own lawyer. Changes should not be introduced as a consequence of the disenchantment of a small vocal

minority. I think such a survey might be helpful to identify if there is truly a mood for change.” (Individual)

Among those who disagreed, it was argued that the cost of such a large survey may be prohibitive, and that the results could be questioned for the following reasons:

- They would become outdated quickly given the nature of the sector;
- Perceptions that surveys are often only completed by those wishing to air their grievances;
- Key consumer groups would be unlikely to participate, e.g. hard to reach voices, accused in criminal proceedings, etc.;
- Consumers would not know/understand all the legal aspects or court rules, etc. to be able to comment in an informed manner; and
- It would be difficult to ensure the results did not conflate the outcome of an individual’s case with the service provided:

“...would be very expensive and unless rigidly controlled, would probably provide little useful information. Legal services are frequently provided in highly charged contentious circumstances, in which one party is often disappointed by the outcome and obtaining objective useful data would be often very difficult.” (Individual)

“It’s always useful to have a baseline to measure outcomes against, but I’d be concerned as to how a survey of this kind would avoid consumers conflating dissatisfaction with the outcome of a legal process.” (Individual)

It was argued that if a survey were to be conducted then significant care would need to be taken to ensure unbiased sampling of all demographics and to ensure a robust sample size was achieved to provide meaningful results.

# Part 2(B) The Role of the Lord President and the Court of Session

## Introduction

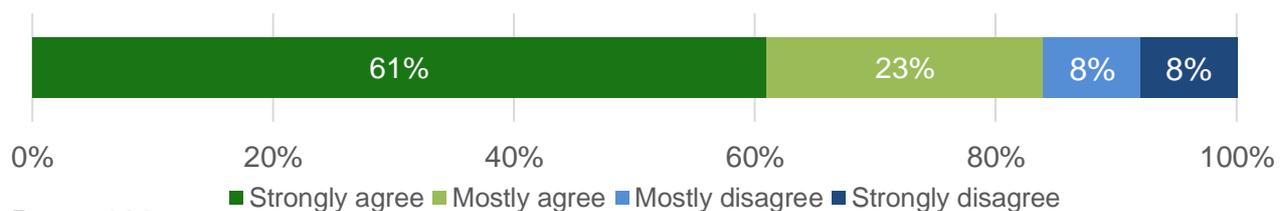
The consultation document set out the current roles and responsibilities of the Lord President and the Court of Session in relation to regulating the legal services profession in Scotland, particularly in relation to solicitors, advocates and the SLCC.

While the Robertson report did not make specific recommendations in respect of the role of the Lord President, it stated that the legislative approach should make clear what role the Lord President and the Court of Session would have in the regulatory framework. As such, the consultation sought views on the nature of the roles which the Lord President and Court of Session should have in any new framework.

## Question 13

**Q13. To what extent do you agree or disagree with the Robertson report, that the legislative approach should make clear the role of the Lord President and the Court of Session in the regulatory framework?**

Chart 13: Responses to question 13



Of those who provided a response to the closed element of the question, most (84%, n=84) agreed that the legislative approach should make clear the role of the Lord President and the Court of Session in the regulatory framework.

Among those who provided a qualitative comment to this question however, there appeared to be some confusion around what was being asked. Several respondents interpreted the question to suggest that the role of the Lord President and Court of Session may change or that regulatory functions may be transferred elsewhere, with respondents noting strong opposition to any proposals which sought to alter or remove the role of the Lord President and the Court of Session:

“...the role of the Lord President under the present system is crucial and any steps proposed which weaken the role of the Lord President undermine the rule of law.” (Organisation, Professional Body for the Legal Profession)

Others interpreted the question to mean that no changes to the role were being proposed, but that the role would simply be more clearly set out in the regulatory framework. In these circumstances, respondents supported such a move, primarily on the basis that it would maintain the status quo and possibly increase clarity, transparency and accountability (which would be in both the public and professional interest):

“All aspects of the regulatory system must be clear and transparent, including the role of the Lord President and the Court of Session.”  
(Consumer Organisation, Third Sector)

A strong theme to emerge among both those who said that they ‘agreed’ and ‘disagreed’ with the proposal was the need for the role to remain independent from government and political influence, to protect and promote the rule of law and preserve the independence of the courts and legal profession. The main caveats or reservations linked to this question were that:

- The role of the Lord President would be too difficult to define on a statutory basis/that strict definition could be too restrictive;
- Any change may be interpreted as a move away from the principle of the independence of the judiciary and legal profession; and
- The current arrangement was sufficient:

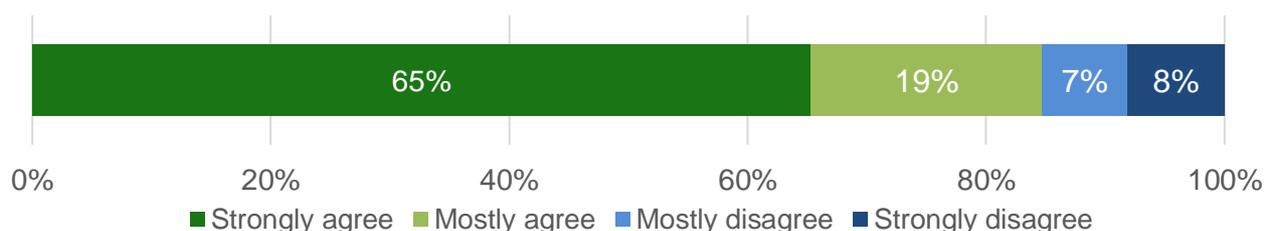
“...both the Lord President and the Court of Session perform roles which have been developed by case law which cannot be easily codified in legislation...Attempting to capture the entirety of the Lord President and the Court of Session’s role in a new regulatory framework will be an extremely challenging task.” (Organisation, Professional Body for the Legal Profession)

Only two respondents hinted that they perceived the oversight role of the Lord President to be inappropriate or unnecessary. Overall, the dominant view was that clarification and affirmation of the role in statute would be beneficial and that transparency in roles, functions and powers would build further confidence into any revised framework.

## Question 14

**Q14. To what extent do you agree or disagree that the role of the Lord President and Court of Session in the regulatory framework in Scotland is important in safeguarding the independence of the legal profession?**

Chart 14: Responses to question 14



Base: 98

Consistent with responses provided to Q13, the majority of respondents who provided a response agreed (84%, n=83) that the role of the Lord President and Court of Session in the regulatory framework in Scotland was important in safeguarding the independence of the legal profession. A large number viewed the role as essential in ensuring competence, integrity as well as neutrality, and indicated that this would maintain the status quo.

Again, independence from government was cited by several as essential, i.e. a profession regulated by politicians or persons appointed by politicians would not be independent in any way:

“A regulatory body for legal services which is answerable to Scottish Parliament has the potential to undermine the separation of powers in our constitutional arrangements and endanger the rule of law, where the courts and professions independence of itself is an important safeguard.” (Individual)

Comments were also made that the roles currently fulfilled by the Lord President and Court of Session worked well with them sitting at the top of a very well-respected judiciary, with clear impartiality. The role of the Lord President and Court of Session were also described as reinforcing the doctrine of the separation of powers, long recognised as a supporting pillar of the rule of law:

“The roles of the Lord President and Court of Session are essential for the protection of the independence of the legal profession from the Scottish Government and Parliament. That is entirely consistent with the essential preservation of a separation of powers.”  
(Organisation, Legal Services Provider)

A small number caveated their support by suggesting that there may be some instances where oversight by a party who is not involved in the legal system may be more appropriate. For example, it was suggested that a distinction could be drawn between ‘public good’ and ‘consumer protection’ legal services, with the former regulated by judges and the latter possibly regulated by a non-judicial body:

“In the main, we are of the opinion that Lord President and Court of Session do have a role to play in safeguarding the independence of the legal profession, however there are some instances where oversight by a party who is not involved in the courts as a practitioner, or judge, may be beneficial.” (Organisation, Professional Body for the Legal Profession)

Another comment included the importance of any regulator staying in touch with the general public to foster confidence and acceptance in the system. Very few respondents who disagreed qualified their answers, with the main reasons being that the legal profession did not deserve the privilege of safeguarding or independence, that the role should be fulfilled by the elected Scottish Parliament and that there should be separation of powers so that the legal profession does not regulate itself.

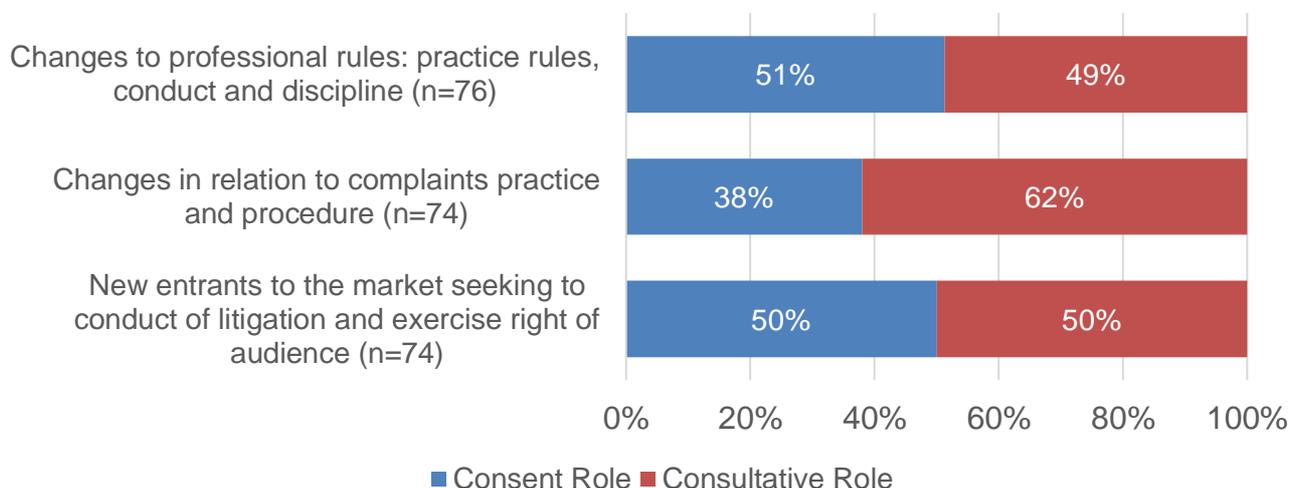
Four respondents expressed views that there was insufficient information in the public domain to allow an informed response to this question to be made and/or noted that they did not understand the question or were not knowledgeable enough to answer.

Only one focus group provided views on this question and attendees largely agreed that the Lord President’s role should remain as this provided helpful oversight and independence.

## Question 15

**Q15. Should the Lord President and Court of Session have a ‘consultative’ role, or ‘consent’ role with regard to the following potential changes to the operation of any new regulatory framework?**

Chart 15: Responses to question 15



Less than half of all respondents provided a response to the closed element of this question. Of those who did, views were split relatively evenly in relation to ‘changes in professional rules’ and ‘new entrants to the market’ between those who preferred a consent role (51%, n=39 and 50%, n=37 respectively) and those who preferred a consultative role (49%, n=37 and 50%, n=37 respectively). In relation to changes to ‘complaints practice and procedure’, however, more respondents preferred a consultative role (62%, n=46) to a consent role (38%, n=28) for the Lord President and the Court of Session.

Among those who supported a ‘consultative’ role for all three operations, the main view was that this would potentially be ‘fairer’ for complainants and those seeking entry to the system, with concerns that a consent role gave too much power to one party and/or could be easily biased:

“The consent role could constrain progress and innovation and be biased in favour of the courts.” (Individual)

“Our particular reason for having a ‘consultative’ role following potential changes to the operation of any new regulatory framework would be to ensure that standards being applied were consistent, and evidence based, and that there was no resistance to new entrants simply because of traditions.” (Organisation, Professional Body for the Legal Profession)

Others suggested that the consultative role would be less cumbersome than the current role, and viewed that there was scope for a more simplified, flexible and responsive system. Those who supported a ‘consent’ role for changes to professional rules, changes in relation to complaints, practice and procedure and new entrants to the market also provided additional comments that this was necessary to prevent political interference on all levels. It was also seen as ensuring clarity regarding power, preserving the status quo and reducing potential for dispute in any alternative model:

“...the Lord President and the Court of Session have a direct and vital interest in the conduct of matters in court and in the conduct of those who practice before them and who hold public office...For that role to be fulfilled in a meaningful way, it is necessary for the Lord President to be able to intervene where necessary. It can be expected that that power will be exercised judiciously. Limiting the role to a consultative one places too much distance between the Court and the regulator and runs the risk of creating an unhealthy and counter-productive divergence of view.” (Organisation, Professional Body, Faculty of Advocates)

Among this cohort, it was felt that nothing would be gained from reducing the position of the Lord President and the Court of Session to a consultative role for any of the stipulated operations.

Only a small number supported a ‘consent’ role for professional rule, practice and procedure matters but supported a ‘consultative’ role in relation to complaints:

“We think that there's the strongest case for consent in relation to the third entry here, due to the litigation and right of audience component. We consider that the second entry is more suited to a consultative role, as it doesn't clearly relate to the role or functions of the Lord President or the courts. With the first entry (changes to professional rules), the position is perhaps more nuanced, as some aspects of this, relating to, for example, court rules, practice and conduct, are most appropriately dealt with by a consent role, whereas others may be more suited to a consultative role.”  
(Organisation, Third Sector Legal Profession)

Similarly, a very small number expressed that there should be a consultative role for professional rules and complaints, but a consent role for new entrants to the market. It was suggested that this may provide a more appropriate balance and help remove some of the Lord President's power and influence, in particular in relation to business practice.

Other, more general comments included that the current model should be maintained but that more flexibility could be built in, i.e. be made more consultative than consensual as required, if matters require a more agile response.

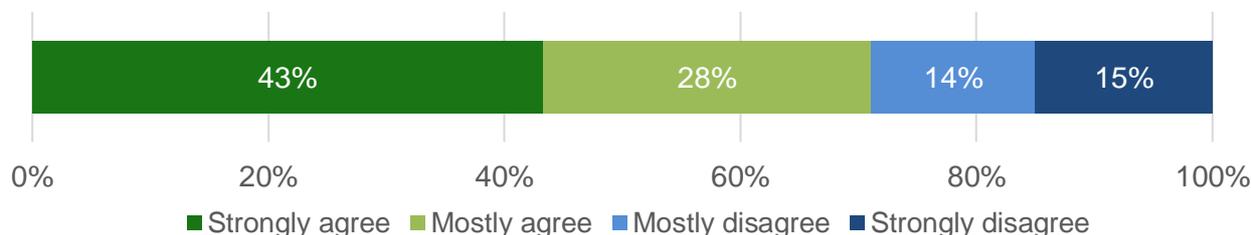
Again, a small number of respondents stated that they believed there should be no role for the Lord President and Court of Session in relation to any of these matters (and expressed that these roles should instead be fulfilled by government or an alternative independent body).

One focus group also provided comments, specific to the Lord President's role in relation to new entries to the market. They suggested that this role should be removed from the Lord President as they felt there were times where conflicts of interest arose and that it might make it more difficult for new entrants to the legal system. Instead, they argued that an independent ombudsman could look at whether or not a case had been made for a new body to enter the market, then the Lord President could give views on what standards might be required.

## Question 16

**Q16. To what extent do you agree or disagree that the Lord President should have a role in any new regulatory framework in arbitrating any disagreements between independent Regulatory Committees and the professional regulatory bodies?**

Chart 16: Responses to question 16



Base: 94

Nearly three quarters (71%, n=67) of those who responded agreed to some extent that the Lord President should have a role in any new regulatory framework in arbitrating any disagreements between independent Regulatory Committees and the professional regulatory bodies.

Among those who agreed with this proposal, the main reason given was that it was essential (especially for public confidence) to have an independent arbiter in cases of dispute to maintain independence of the system (and that the Lord President was the only individual who had the necessary trust, political independence and expertise to discharge such a function). Again, it would maintain the status quo:

“Currently the Lord President has an independent role in resolving such disputes and in our view it is difficult to think of a more appropriate means of arbitrating in relation to any such disagreements.” (Organisation, Legal Services Provider)

“...recognising that there needs to be a process should a regulatory dispute arise, we believe that, as the Lord President is independent of both the Regulatory Committee and the Council, then the current process, and the role of the Lord President within this, remains the most appropriate one.” (Organisation, Professional Body, Law Society of Scotland)

Supporters of this proposal also made comments that this represented the most effective, efficient, economical and consumer friendly approach to arbitration.

The only caveats among supporters were that the exact nature of this role going forward would depend on the precise regulatory framework chosen, that the involvement of the Lord President was unlikely to be needed (based on historical evidence), and that the role may only be necessary for critical or serious matters (rather than minor procedural issues).

Those who did not support the proposal again stressed that the Lord President could never be seen as truly independent, and that this function did not represent a good use of the Lord President’s time (especially if it could be fulfilled by a different professional arbitrator):

“Unless there is an issue that becomes a matter for judicial review, I believe that the Lord President should not become involved in such disagreements... judicial involvement runs the risk of external perception that the regulatory framework is still under the control of

lawyers. It also risks compromising the perception of judicial independence and the operational independence of the structural elements of the regulatory framework.” (Individual)

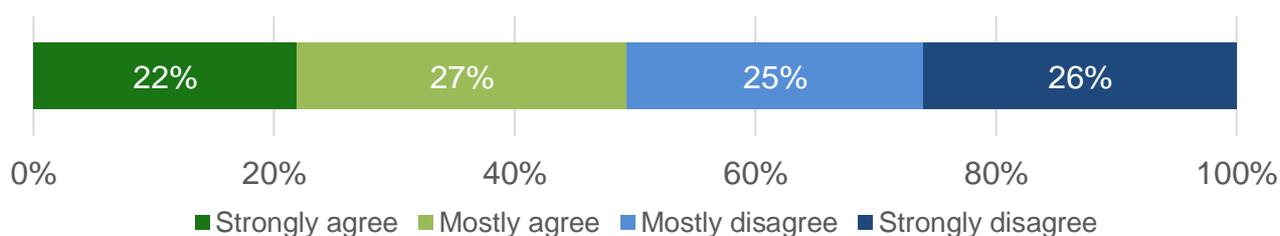
A small number reiterated that they did not support Regulatory Committees per se but that, if they remained, it should not be necessary for any arbitration role to exist within the system. One respondent expressed a view that if the Regulatory Committee and Professional Bodies disagree on a regulatory matter, the views of the Regulatory Committee should take precedence.

Two respondents indicated that further clarification was needed as to what was being proposed/the justification for any change and another suggested that the consultation did not fully address the relationship between the proposed Faculty Regulatory Committee and the Court. Several others indicated that they felt unable to comment at this question.

## Question 17

**Q17. To what extent do you agree or disagree that the Lord President should have a role in the process of appointment of any new ‘legal members’ to relevant positions, such as regulatory committees, in any new regulatory framework?**

Chart 17: Responses to question 17



Base: 73

Views were relatively evenly split between those who agreed (49%, n=36) and those who disagreed (51%, n=37) that the Lord President should have a role in the process of appointment of any new ‘legal members’ to relevant positions, such as regulatory committees, in any new regulatory framework.

Among those who agreed with this proposal, the main reasons given in support were that there was a fundamental court interest in the process and the Lord President was the most suitably qualified to make assessments regarding appointments. The need to uphold judicial independence was again cited, and concerns regarding bias were dismissed by this cohort. It was also again stressed that maintenance of the status quo was desirable:

“The Lord President currently exercises functions in relation to membership of the SLCC. There is a value in having a check on appointments performed by an office holder who is both independent and well-informed. It is consistent with the Lord President’s role within the legal system as a whole that he should have this nature of involvement in appointments.” (Organisation, Professional Body, Faculty of Advocates)

The main caveats were, again, carefully managing any communications with the public to ensure that they had confidence in the impartiality of the Lord President in fulfilling such a role under any new framework, as well as views that the exact nature and exercise of this role would depend on the precise regulatory framework chosen. The role needed to be

carefully defined, it was suggested (i.e. consultative or consensual) and there may be scope for a collaborative exercise wherein relevant regulatory committees have a role in recommending appointments, to be agreed with the Lord President (who would have final oversight):

“We believe it is appropriate that the Lord President is consulted on the appointment of any new 'legal members' to relevant positions, such as regulatory committees, in any new regulatory framework. The Lord President may have relevant insight or views into the appropriateness of a particular individual, or on the collective legal composition of any board or committee, which may well prove helpful to the individual or body carrying out the appointments process. However... in achieving a clear and transparent regulatory system, it is important that the way in which that is sought, and whether it is comment or consent being sought, needs to be set out clearly and transparently, so that everyone involved knows what to expect, how decisions will be made, and by whom.” (Consumer Organisation, Public Body/Sector)

“I don't think it's for the Lord President to recruit, interview and appoint. I think the regulator should, through a nominations process, bring forward to the Lord President recommendations to appointment along with information about the process followed. The Lord President should have the power of veto.” (Individual)

A more collaborative approach was seen as bringing with it more transparency and confidence for outside observers while retaining the profession's confidence in the system:

“If what is being considered here is that the Lord President should have a consent role for the appointment of legal members following recommendation by the LSS [Law Society of Scotland] Council then we would agree that that maintains the independence of such appointments, but reflects the sense and importance of retaining the Council's obligation to recommend appointees.” (Organisation, Legal Services Provider)

Those who disagreed again suggested that they felt the Lord President lacked the required independence for this role and that others may be better equipped in this respect (e.g. the Law Society of Scotland):

“...I would strongly disagree that the Lord President should play any role in the appointment of any members - legal or lay - to any positions in a new regulatory framework. I do not regard this as a judicial function: appointments should be made in accordance with an open and transparent public appointments process.” (Individual)

Appointments to any regulatory committees should instead be carried out through the public appointments process, it was felt, to ensure transparency. Having this role fulfilled by someone other than the Lord President was viewed by such respondents as mitigating or removing potential for complaints regarding “jobs for the boys” or cronyism.

Other comments made by just one respondent each included that:

- The Lord President had more pressing/important duties than appointing members to such positions;
- It should be for each of the legal professions to nominate legal members to relevant positions, such as regulatory committees, in any new regulatory framework;
- The interests of solicitors should be represented as well as advocates;
- It was not appropriate for the Lord President to have the power to remove the (lay) chair of the SLCC, or the chair of any other or any future independent regulatory body; and
- That there may be cases where it was appropriate for someone other than the Lord President to have final veto.

Again, several respondents indicated that they found this question ambiguous and therefore felt unable to provide a reliable or informed view. In particular, the question referred to the Lord President having a 'role in the process' but failed to expand on what that precise role would be, and some questioned whether this would be consultative or one of consent of appointment.

# Part 2(C) Regulatory Committees

## Introduction

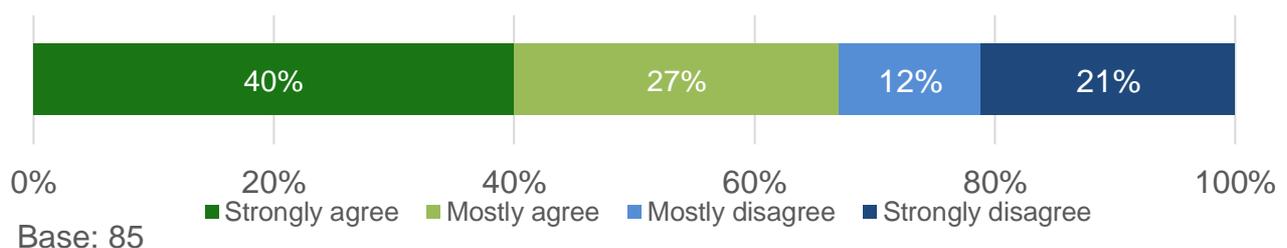
The consultation document set out how the current Regulatory Committees accountable to the Law Society of Scotland operate. It was noted that under Option 1 (the Robertson Model), the existing Regulatory Committee functions would be absorbed into the new independent regulator, however, the document set out details of how these would operate under Options 2 and 3 (the Market Regulator Model and the Enhanced Accountability and Transparency Model).

Feedback was sought on the use of Regulatory Committees, as well as views on whether statute should ensure they are suitably resourced and whether they should be subject to Freedom of Information legislation.

## Question 18

**Q18. To what extent do you agree or disagree that regulatory committees, as described in the consultation, should be incorporated into any future regulatory framework?**

Chart 18: Responses to question 18



Of those who answered the closed element of this question, around two thirds (67%, n=57) agreed that regulatory committees should be incorporated into any future regulatory framework.

As with other questions, however, there appeared to be some overlap in responses given by those who 'agreed' and 'disagreed', with respondents from both cohorts simply noting that they viewed the existing model as adequate (with the regulatory committee of the Law Society of Scotland functioning well) and/or that they would not wish to see any change introduced. Some strongly resisted any 'new' committees on this basis:

"Faculty strongly disagrees that regulatory committees, as described above, should be incorporated into any future regulatory framework... Faculty's position has long been that there is no justification for the imposition of additional layers of regulatory complexity, with attendant, and unnecessary, bureaucracy and cost... Given that the creation of an independent Regulatory Committee will entail additional complexity, bureaucracy and cost, it is a proposal with which Faculty strongly disagrees." (Professional Body, Faculty of Advocates)

Several others simply commented that regulatory committees, as described in the consultation, should be incorporated into any future regulatory framework (regardless of the

chosen model), to provide necessary oversight and assist with openness, transparency and fairness (again mirroring the current position which was seen by several as not being flawed):

“We strongly agree that a regulatory committee should be embedded within the regulatory and statutory framework as is currently the case with the Society’s Regulatory Committee under the provision of the 1980 Act.” (Organisation, Professional Body, Law Society of Scotland)

Most of those who disagreed did so on the basis that they preferred Option 1 set out in the consultation:

“We do not consider that any form of internal separation, as set out in options 2 and 3, would be able to deliver full independence because a regulatory committee that sits within a body that also carries out representative functions cannot alone resolve the intrinsic conflict of interest between representative and regulatory functions. As such, we fully support the proposals under Option 1, the Robertson Model... Full independence of the representative and regulatory functions would minimise any risk of conflict of interest, cement public trust and facilitate more transparent and effective engagement on regulatory matters.” (Consumer Organisation, Public Body/Sector)

Some who disagreed also commented, however, that if Options 2 or 3 from the consultation were taken forward then such committees would be essential:

“...if model 2 or 3 is preferred, then we believe it is vital that it is independent regulatory committees, as described in the consultation paper, who are responsible for any regulatory activity discharged by the professional bodies. This ensures greater independence and accountability.” (Consumer Organisation, Public Body/Sector)

Other comments made by just one or two respondents each included that:

- The statute should require publication of a clear scheme indicating how the independence of the regulatory committee is supported through governance, budget, staffing, and decision making, in order to be transparent to all;
- Any regulatory model should not become too cumbersome as a more complex design would likely require further adjustment in the future, as its shortcomings become clear; and
- Updating the existing regulatory model rather than replacing it may be more appropriate.

A small number of respondents expressed views that they did not welcome any of the three models for independent regulatory committees to be accountable to the Scottish Parliament, as this was seen as inherently undermining independence:

“A system in which the legal profession is answerable to Parliament is inherently against independence. Political regulation is simply not appropriate under any circumstances. There is no obvious benefit to the legal profession being accountable to the legislature; it is a wholly disproportionate and inappropriate interference with the

separation of powers. No good reason has been given for removing the power of the court to regulate the legal profession.”

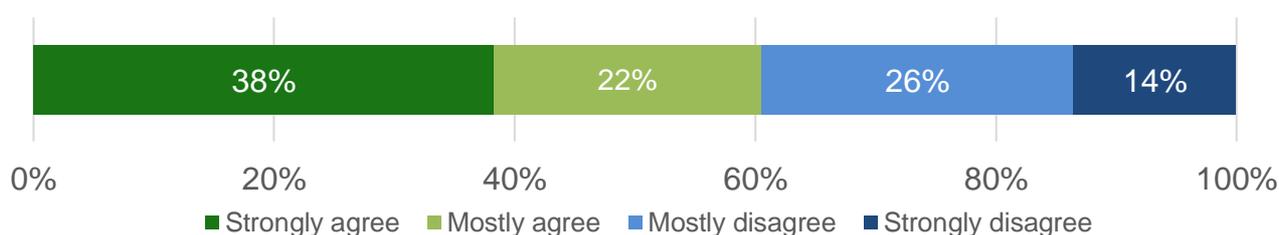
(Organisation, Professional Body for the Legal Profession)

Again, a small number of respondents suggested that the question lacked specification and that there was insufficient detail in the consultation to allow them to provide a meaningful response. They urged greater detail around what was intended and further consultation on this point.

## Question 19

**Q19. To what extent do you agree or disagree that regulators should be required by statute to ensure that Regulatory Committees are suitably resourced, with a certain quota of persons being exclusively ring-fenced for dealing with regulation?**

Chart 19: Responses to question 19



Base: 81

Of those who provided a rating, 60% (n=49) generally agreed that regulators should be required by statute to ensure that Regulatory Committees are suitably resourced, with a certain quota of persons being exclusively ring-fenced for dealing with regulation. However, a significant minority (40%, n=32) disagreed with this.

A large number of respondents simply stated that it was self-evident that all regulatory committees should always be sufficiently resourced to allow them to run effectively and efficiently. Whether ‘ring-fencing’ was required to achieve this was, however, disputed with some viewing this as unnecessarily prescriptive:

“There should be a duty to suitably resource the committees, but it may not be necessary to have exclusive ring-fencing of persons to deal with regulation.” (Organisation, Third Sector Legal Profession)

Whilst several did not like the notion of ‘ring-fencing’ (or did not feel the term or intention had been clearly enough specified), there was consensus around ensuring that enough staff are employed to effectively support the policy and administrative work of the regulatory committees, along with reassurances that staff would not be diverted or “pulled away” into alternative areas of other work. Even among those who did not support regulatory committees, there were some who suggested that, if they did form part of the regulatory framework, they should be suitably resourced and legally and structurally ring-fenced to provide a meaningful contribution and operate independently:

“...in order to operate independently, they must be suitably resourced. In order to discharge their regulatory duties, they will, at times, have priorities which are not shared by the representative body. They must be able to discharge their duties, in line with their statutory objectives, even when the representative body does not share their priorities. To do that, they need to have dedicated

resources they can deploy at will.” (Consumer Organisation, Public Body/Sector)

The main sentiment expressed by those who did not agree with this proposal were that more information was required to explain if/why such ring-fencing was necessary, and exactly what its bounds would be (including clearly setting out if/ how the principle would apply to, and impact on, staff at different levels and carrying out multiple different roles):

“To move in this direction there would need to be evidence of a problem.” (Individual)

“The suggestion to ring-fence persons does not reflect the reality that many colleagues perform work related functions that cut across both the regulation and support roles of the Society (for example, IT and HR colleagues). If staff were to be ring-fenced, this may require additional resource and associated cost. Ring-fencing resource would also reduce the benefits and holistic approach of professional body regulation. By reducing contact between regulatory and other staff, sector expertise and insight would be lost and mutual trust between regulator and regulated eroded.” (Organisation, Professional Body, Law Society of Scotland)

Other concerns among those who did not agree with ring-fencing included that this may drive up costs for the profession, may be operationally difficult to implement, and may be contrary to the intended spirit of the proposed new regulatory approach, i.e. it would be counter to “flexible and permissive legislation” and may obstruct “a more proactive and proportionate approach to regulation”. Having this provision enacted by statute was seen as inflexible.

Other more general comments included that that ring-fencing may demonstrate publicly the significance of a regulatory committee and its independence, that it would be preferable to have a combination of professionally qualified and lay members on committees to ensure appropriate checks and balances and that any quotas should be proportionate to the size of the organisation:

“Without this requirement, there could be a concern that regulatory matters were not given sufficient priority leading to a lack of confidence in the process. We would suggest, however, that the quota should be proportionate to the size of the organisation.”  
(Organisation, Professional Body for the Legal Profession)

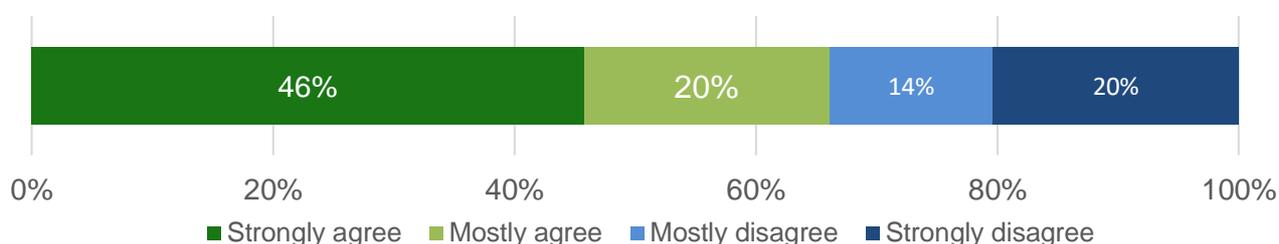
Again, some respondents were unsure how to interpret the question or felt unequipped to respond, and one respondent suggested that the question was disingenuous, and should be split to ask separately about availability of resourcing and the necessity of ring-fencing. In the same vein, another indicated that a more appropriate response option would have been ‘neither agree nor disagree’:

“It goes without saying that committees should be properly resourced, but we question if statutory intervention is necessary. We don’t have the knowledge to comment on the quota part of the question.” (Organisation, Legal Services Provider)

## Question 20

**Q20. To what extent do you agree or disagree that regulatory functions of Regulatory Committees should be subject to Freedom of Information legislation or requests?**

Chart 20: Responses to question 20



Base: 88

Two thirds (66%, n=58) agreed that the regulatory functions of Regulatory Committees should be subject to Freedom of Information (FOI) legislation or requests, compared to 34% (n=30) who disagreed.

Among those who agreed with this proposal, the main views expressed were that all matters of public interest and all bodies discharging statutory duties should be transparent and open in order to engender public confidence and trust. Others supported the proposal on the basis that it would provide an added layer of security to the regulatory process. A view was also put forward that it would not make sense for some parts of the regulatory system to be subject to lesser statutory duties than others, since all regulation is conducted in the public interest.

The main caveat to support was that suitable safeguards (and opportunities for redaction) would need to be in place to protect any individuals and particularly any sensitive information involved, i.e. a need for transparency without releasing sensitive information. Protection for vulnerable adults involved in the system was cited as an example of where FOI exemptions may be appropriate:

“This would maintain confidence in the regulatory functions of Regulatory Committees, however, it would need safeguards to prevent any inappropriate abuse of the process.” (Organisation, Professional Body for the Legal Profession)

Some also raised concerns that the FOI process may add to the financial and administrative burden of committees, and that any increase may be disproportionate to the benefits gained (i.e. being subject to FOI may be more likely to increase cost and administration than increase transparency and scrutiny).

Among those who did not agree with the proposal, the main view was that this was not in line with normal practice for other non-public regulators and that Regulatory Committees would not be defined as ‘public authorities’. Other arguments against the proposal included that much of the information that would come before committees was highly confidential/sensitive in nature and that there was potential for FOIs to prejudice committees from fulfilling their roles/inhibit decision making:

“Much of the work of the Regulatory Committee and its sub-committees would be subject to exemption as sharing this information would prejudice, prevent or seriously impair the committee from fulfilling its public interest role.” (Organisation, Professional Body, Law Society of Scotland)

Some who disagreed again did so on the basis of the likely costs/burdens it may incur:

“...bringing such an independent Regulatory Committee within the scope of the Freedom of Information regime would add even greater costs to an already disproportionate proposal. Faculty does not believe any public interest would outweigh the burden that including such a Committee within the FOI regime would entail.”

(Organisation, Professional Body, Faculty of Advocates)

“...the reality is that very little could be provided in any case on request and the costs and resource that would be required to process these requests would be disproportionate.” (Organisation, Professional Body, Law Society of Scotland)

Three alternative suggestions were made to help uphold the required transparency, these being that:

- General FOI should not apply but that the complainer and complainant should both be entitled to full disclosure of any information from those committees relevant to them;
- Consideration could be given to a requirement for Regulatory Committees' annual reports to be laid before the Scottish Parliament; and
- Consideration might be given to an obligation to publish the papers and minutes of the Regulatory Committee's meetings.

Two respondents explained that they were 'unsure' with regards to this proposal and a small number again questioned the rational and evidence underpinning the proposal.

# Part 2(D) Fitness to Practice

## Introduction

Part 2 of the Admission as Solicitor (Scotland) Regulations 2011 sets out that someone may only be admitted to the Law Society of Scotland if they are “a fit and proper person to be a solicitor” and holds appropriate qualifications. The Law Society of Scotland guidance sets out the indicators of whether a person is considered ‘fit and proper’ to be a solicitor, and includes such factors as personal integrity, lawful behaviour and financial probity.

Similarly, the Faculty of Advocates requires applicants to provide a reference regarding their fitness to hold the public office of advocate, as well as a certificate disclosing:

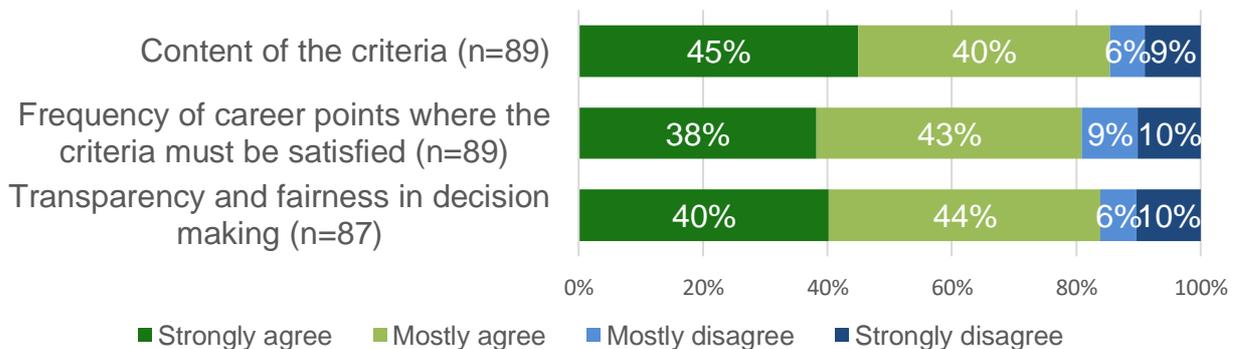
- Any prior criminal convictions or outstanding criminal proceedings;
- Any complaints of professional misconduct or negligence which have been upheld against them or which are outstanding; and
- Whether they have ever been declared bankrupt, or sequestrated or signed a Trust Deed for creditors, and the circumstances thereof.

The consultation document sought feedback on whether the current ‘fitness to practice’ system was working well, what changes could be made, and whether there should be a test to ensure that non-lawyer owners and managers of legal entities are fit and proper persons.

## Question 21

**Q21. To what extent do you agree or disagree that the following aspects of ‘fitness to practice’ requirements or regulations are appropriate and working well in Scotland?**

Chart 21: Responses to question 21



Of the respondents that provided a response, most agreed that all three elements of the ‘fitness to practice’ requirements or regulations were appropriate and working well in Scotland:

- Content of the criteria: 85% (n=76) agreed this was appropriate and working well;
- Frequency of career points where the criteria must be satisfied: 81% (n=72) agreed this was appropriate and working well; and
- Transparency and fairness in decision making: 84% (n=73) agreed this was appropriate and working well.

## Question 22

**Q22. Are there any changes you would make to each aspect as set out in the previous question?**

Very few respondents specified any changes that they would make in relation to the aspects set out in Q21, and several simply commented that they perceived the current fitness to practice rules worked well in Scotland to preserve the professional respect and trust of the public in the profession. Others stressed the importance of those in the legal profession being of the utmost integrity to ensure public confidence but added nothing more specific.

### Content of Criteria

In relation to the content of criteria, just a few suggestions were put forward by one or two respondents each, including that:

- The barrier to entry via diploma should be removed or alternative routes provided (as entry into the profession via diploma was considered to be too high and too costly);
- The definition of ‘solicitor’ needed to be reviewed as part of the broad enablement of the regulation of the legal profession;
- Criminal convictions should be considered on a case-by-case basis rather than as a blanket rule (although it was recognised that this may lack transparency and clarity);
- Changing the requirement to disclose any convictions to a period of within 2 weeks of conviction, and a reconsideration of fitness and properness within a further 2 weeks;
- Any upheld complaint should be followed by a separate consideration of fitness and properness to act;
- Behaviour constituting stalking and harassment, inappropriate online communication, coercive control and domestic abuse related offences, and any civil or criminal protective orders granted in relation to any such behaviour should be considered in background checks; and
- Evidence of repeated complaints against a solicitor or advocate, whether or not upheld, should be taken into account.

One respondent suggested that it may be appropriate for there to be some exemptions to the criteria which may allow individuals with relevant experience, other than in Law, to enter the profession. It was suggested that this would be in the interests of opening up competition and innovation, and giving consumers access to a more diverse range of providers:

“...the LSS [Law Society of Scotland] may wish to consider some exceptions, subject to appropriate safeguards to ensure fitness of ownership, to the experience rule to facilitate new entry, for example, by solicitors with other suitable experience that would equip them to run a firm and introduce innovation to do so... This illustrates the importance of ensuring that the system strikes the right balance between providing consumers with protection while allowing sufficient flexibility to encourage growth and innovation in the sector.” (Consumer Organisation, Public Body/Sector)

Similarly, another suggested that any criteria that focused too narrowly on professional accreditation could be damaging to the sector:

“...where fitness to practice is assessed only by reference to a professional title, rather than on the competence and integrity of an individual in relation to the legal services activity being carried out, it is focusing on a limiting condition. Economic growth of the legal services sector will be constrained, access to legal advice and assistance is limited, the regulatory framework retains complexity and cost, and the opportunities for risk-based and proportionate regulation cannot be fully realised.” (Individual)

## **Frequency of Review**

Again, very few specific suggestions were made in relation to frequency of review, with most open-ended comments in this regard suggesting that more regular reviews of fitness to practice throughout an individual’s career or continuous assessment by the regulator (especially in relation to good character) might be beneficial.

A small number of respondents suggested that Continuing Professional Development (CPD) should feature more strongly as a requirement for practice and/or be more robustly implemented and monitored than at present. Another expressed the view that the initial and continuing competence of a practitioner was as important as the award of professional qualifications/titles:

“I feel that not enough regard is given to continuing professional development. The public should demand a process which ensures that members of the professions are up to date in the disciplines in which they profess and are up to the standards required.”  
(Individual)

“...fitness to practice is really governed by the CPD regime and the majority of that regime currently involves doing twenty hours of education per year...That probably needs to be re-visited - should there be a continuing professional competence regime that might look like other professions? Is there evidence that that is necessary?” (Individual)

Importantly, a small number of respondents also commented that they perceived current CPD requirements to be sufficient.

One respondent also suggested that more could be done with regard to the testing of fitness during the qualification period (i.e. for the LL.B. and Diploma in Legal Practice):

“There appears to be an ever increasing of number of law graduates without question of their potential fitness to practice.” (Organisation, Legal Services Provider)

## **Transparency and Fairness**

Again, there were few specific comments made in relation to transparency and fairness (other than the points noted above in relation to potential for narrowing the market if criteria were too rigid). Other comments from just one or two respondents each included that:

- There should be a specific duty to self-report serious criminal convictions; and

- Where fitness to practice is not beyond doubt, the regulator should have the power to suspend or remove an individual's right to practice, or impose additional conditions (such as supervision, or medical or similar certification) on the continuing right of the individual to work within the regulated sector.

Two respondents raised concerns linked to mental health and wellbeing. One suggested that there should be a duty of candour to disclose to the regulator any changes to fitness to practice that might be linked to physical or mental illness, alcohol or drug dependency, or pending criminal or disciplinary charges. The other suggested that specific protocols be developed to deal with such cases:

“...we would note the absence within the current legal regulation model of a ‘health procedure’ which allows failings by a practitioner, perhaps due to mental health issues, to be dealt with in a specialised way, rather than through the use of conduct and service complaints (which tackle symptoms, but not cause, and do not fully recognise the vulnerability of the practitioner). There are examples of this type of approach in other sectors and jurisdiction that might provide helpful models for this.” (Consumer Organisation, Public Body/Sector)

A small number of respondents again suggested that both this question and the linked preceding question were unclear, asking two separate things under one umbrella (i.e. for judgements in relation to both appropriateness and whether the system was working well). Specifically, there was no scope to indicate if the system was perceived to be ‘appropriate’ but not ‘working well’.

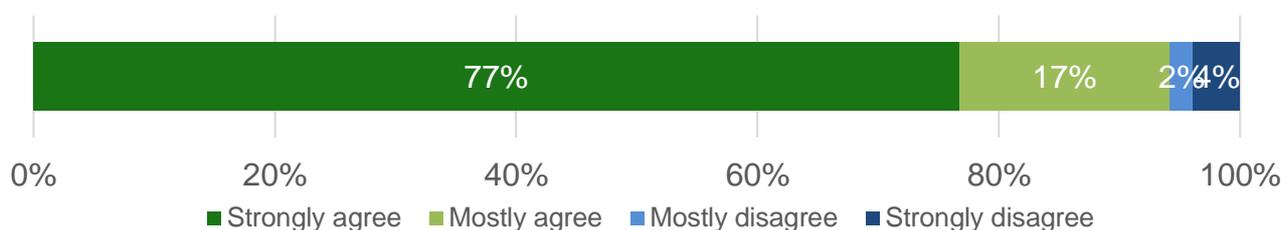
One respondent suggested that the notion of ‘fitness to practice’ requirement or regulations was unclear as they did not believe there was a ‘fitness to practice’ regime currently operating for legal services, beyond the requirements for initial entry into the profession, financial inspections and the complaints process. This same respondent did, however, perceive that a genuine fitness to practice regime would be a helpful addition to the regulatory landscape in Scotland.

Observations were also made that the reference to ‘exemptions’ had been overstated and reference to ‘admissions’ had been misrepresented in the consultation paper. It was also noted that issues linked to peer review had been omitted from the consultation, but that the introduction of a system of quality monitoring of peer review may not be proportionate. Again, a small number of respondents noted that they felt unqualified in this area and/or that insufficient information was provided in the consultation to allow them to provide an informed view.

## Question 23

**Q23. To what extent do you agree or disagree that there should be a test to ensure that non-lawyer owners and managers of legal entities are fit and proper persons?**

Chart 23: Responses to question 23



Base: 103

Most of the respondents who provided a rating agreed (94%, n=97) that there should be a test to ensure that non-lawyer owners and managers of legal entities are fit and proper persons. Only 6% (n=6) disagreed with this.

Those who agreed indicated that this measure would be in the interests of fairness and transparency (i.e. making standards for non-lawyer owners and managers equitable with lawyers). It would also help prevent unfit persons from operating in the sector (protecting the public) and ensure standards of accountability, integrity and probity, it was suggested. Such a test may also help to minimise the risks of criminal enterprise by such parties, it was felt. Caveats to support included that this may be costly and administratively challenging and that it must be targeted and proportionate:

“If non-lawyers are able to participate in the owning and managing of legal entities, then they, like lawyers, should be subject to a fit and proper person test.” (Organisation, Third Sector for the Profession)

“A law firm should be a professional, trusted and respected business. The public must have faith that any owner/manager of a legal entity, (whether they be a lawyer, or non-lawyer), should pass a stringent fit and proper test.” (Individual)

Other comments made by those in support included that the regulator should be able to sanction non-lawyer owners and managers, the possibility of publishing details of those found unfit to practice, and similar tests being used as those already employed by the Financial Conduct Authority when individuals apply to be an authorised person for the provision of financial services. It was also noted that this mirrored the requirements relating to non-solicitor investors within a licensed legal services provider under the Legal Services (Scotland) Act 2010.

Very few respondents who disagreed with this proposal gave additional comments. Among those who did, the main views were that professional standards are higher than those that operate in business generally and this could therefore be unfair (or that lower standards may be relevant), and that professional standards were of more relevance to the individual professionals/practitioners than employers/ business owners. Two respondents expressed views that non-lawyer owners should not be permitted, and that the legal profession in Scotland should not be further commercialised. Finally, one respondent suggested that this question appeared to assume that non-solicitor ownership of solicitors' practices currently operates in Scotland but felt that this was not the case, and therefore felt that the consultation was misinformed/ flawed in this regard.

# Part 2(E) Legal Tech

## Introduction

The consultation document noted that the Robertson report highlighted that there were opportunities in the greater use of legal technology in the application of legal services in Scotland, and warned against the creation of barriers to new legal services founded on legal tech through over specification of regulation in legislation.

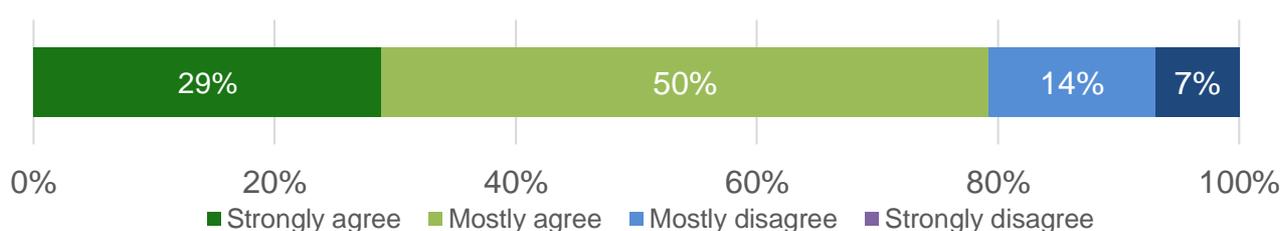
The consultation also outlined the regulatory sandbox concept, indicating that these typically involve temporary relaxations or adjustments of regulatory requirements to provide a “safe space” for start-ups or established companies to test new technology-based services in a live environment for a limited 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.

Feedback was sought on incorporating Legal Tech within any new regulatory framework.

## Question 24

**Q24. To what extent do you agree or disagree that Legal Tech should be included within the definition of ‘legal services’?**

Chart 24: Responses to question 24



Of those who responded to the closed element of this question, most (79%, n=69) agreed that Legal Tech should be included within the definition of ‘legal services’.

A common thread to responses (from both those who agreed and disagreed) was that Legal Tech needed to be more clearly defined before being included in the definition of ‘legal services’. In particular, it was felt that the consultation oversimplified the concept of Legal Tech without distinguishing between technology as a tool for delivery and legal services in themselves:

“The consultation attempts to oversimplify what is a complicated area. ‘Legal Tech’ is a tool for delivery of legal services and not a legal service itself. Therefore, it would be difficult to include a general provision in legislation to regulate Legal Tech. However, in relation to the services delivered, we believe that the provision of any reserved legal services delivered through the platform of Legal Tech should be included within the definition of legal services.”

(Organisation, Legal Services Provider)

Indeed, some respondents interpreted Legal Tech to mean the removal of qualified solicitors from the process of law and people having an option of ‘DIY’ law (including artificial intelligence (AI) options). This was seen as problematic by some i.e. unqualified people operating independently, but others welcomed a product which would allow the public to have access to opportunities to do things for themselves. Others interpreted Legal Tech to mean

online or remote services delivered by qualified solicitors using appropriate technology. A useful distinction was made by one respondent between lawtech (technologically enabled provision of legal services) and legaltech (technology which supports legal service providers, e.g. back office functions). There was a general consensus that technologies aimed at legal service providers to facilitate the practice of law were less in need of regulation than technologies aimed at consumers/businesses designed to either connect them to legal service providers, or to minimise or remove the need to use a legal service provider at all (with regulation of the users of the technology in the former being sufficient). The overriding sentiment, however, was that Legal Tech should have been more clearly set out in the consultation.

Definitions aside, a large number of respondents agreed with this proposal on the basis that the legal profession must move with technological innovation and not get 'left behind'. Legal Tech provided new opportunities, innovation and competition with increased accessibility, and this should not be stifled, it was felt. Including Legal Tech in the definition therefore seemed apt, although others cautioned that technology and IT was a fast-moving area and, therefore, continuous monitoring/ review would be needed to ensure that Legal Tech was appropriate for inclusion in the definition:

“[Organisation] strongly agrees that Legal Tech should fall within the remit of legal services regulation in order to safeguard consumer protection when engaging with these services, but equally to inspire innovation and value creation in the market... There has also been a growing narrative and wealth of evidence to suggest that regulation can play a key role in stimulating innovation when developed collaboratively.” (Organisation, Professional Body for the Legal Profession)

Similarly, there was a concern that if Legal Tech was included in the definition, it must be regulated in the same way as traditional services, so that there was no discrepancy/lack of equity between the two. It was considered important to avoid a situation of an unlevel playing field with traditional legal services being more highly regulated than new or innovative services, which could be confusing for consumers:

“Legal Tech is also an example of where a single regulator, with market regulation responsibilities, is likely to be more effective. A regulator of one professional group may be able to regulate Legal Tech for that group, but not for any other provision of legal service. This risks multiple regimes for the regulation of Legal Tech developing aligned to professional groups and not public needs, with the potential to lead to gaps or duplication, or to stifle innovation.” (Consumer Organisation, Public Body/Sector)

Protecting customers from risk was a main reason given by many for including Legal Tech under the legal services definition:

“Use of Legal Tech is growing, and it has the potential to benefit consumers by providing more accessible, cheaper and varied legal services. However, it also poses a different kind of consumer risk. It should therefore be included within the definition. This will also help to future proof the definition.” (Organisation, Consumer Body/Panel)

“I have dealt with a number of clients that have had issues with Legal Tech and no method to hold any person accountable. As more consumers turn to online sources of information in the first instance, this area needs to be considered as a priority.” (Individual)

For several, ensuring integrity of services was paramount, therefore making regulation essential irrespective of mode of delivery:

“It should be treated like other legal services, so long as what is being provided constitutes legal services.” (Organisation, Third Sector in the Legal Profession)

“Legal Tech is provision of legal services and should be regulated as such. If the lawyers need to be regulated then so should the providers of Legal Tech, more so probably if they are non-lawyers.” (Individual)

A key reservation for some (both who agreed and disagreed with the proposal overall), however, was how joint service provision would be managed:

“...our business structure and the LSS [Law Society of Scotland] Practice Rules 2011 mean we are not allowed to share fees with others who are unqualified persons. This prevents us providing services to clients where they have asked for a different type of service, such as joint legal/financial services or innovative HR services. This restricts our ability to fully explore the potential of AI and other client services. Many innovative solutions result from collaborative working with others. Any new regulatory regime should allow for modern and different approaches to providing services without requiring organisations like ours to make fundamental changes to our business structure.” (Organisation, Legal Services Provider)

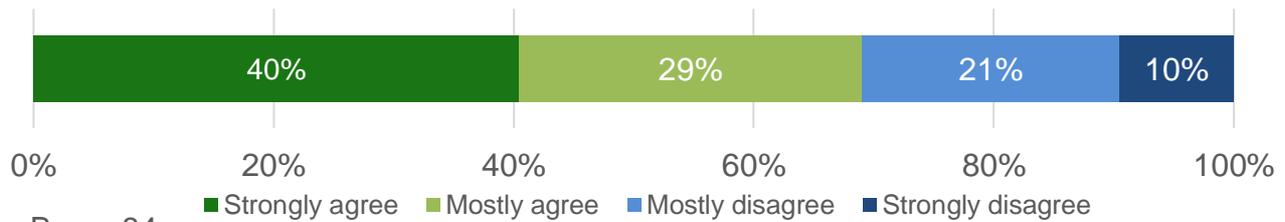
Other comments made by just one or two respondents each included that:

- Regulation of Legal Tech should not be excessive such that it distorts innovation and competition;
- Moves towards digitisation should be monitored to ensure that services do not become inaccessible and/or that sufficient safeguards must be in place to ensure that no-one is excluded from accessing the justice system; and
- Inclusion of Legal Tech in the definition of legal services was a matter for judicial determination.

## Question 25

**Q25. To what extent do you agree or disagree that those who facilitate and provide Legal Tech legal services should be included within the regulatory framework if they are not so already. If so, how might this operate if the source is outside our jurisdiction?**

Chart 25: Responses to question 25



Just over two thirds (69%, n=58) of respondents agreed and 31% (n=26) disagreed that those who facilitate and provide Legal Tech legal services should be included within the regulatory framework if they are not so already.

Consistent with responses to Q24, several respondents stressed that this would depend on what was defined as Legal Tech services. This aside, there was general consensus, in principle, that those who facilitate and provide Legal Tech services should be included in the regulatory framework, especially where the Legal Tech solution is in a reserved area:

“We consider that anyone providing legal services, using Legal Tech or otherwise, should be regulated if they provide those services direct to the consumer or the services they provide are not in-house.” (Organisation, Legal Services Provider)

Three focus groups also commented on regulation around legal tech, and generally agreed that this should be regulated. They noted the use of online forms and information from other jurisdictions causing difficulties for consumers, with little/no accountability for the organisations behind this. One suggested that, where information or forms are made available online, a warning should be included making it clear these are for information only, and that clear signposting was necessary for consumers to get appropriate advice, including clearly stating the bodies that regulate the service and how to complain.

Very few respondents answered the second part of this question, however, or put forward ideas for how this proposal might operate if the source was outside of Scotland. General comments included that the system should mirror the current approach to regulating other business units outside of Scotland and that any regulation would need to be able to accommodate and respond to services being offered online by providers outwith Scotland (and which would not automatically be regulated under Scots Law). There were suggestions that anyone offering a service within Scotland should be asked to commit to being regulated under Scots Law as a stipulation of being able to operate and/or have to request a licence to operate:

“As regards how it might operate if the source is outside our jurisdiction, the provider should be required to submit to our jurisdiction, otherwise they should not be permitted to operate here.” (Organisation, Third Sector in the Legal Profession)

“Scots law is unique in many ways, so any automated legal services must be tailored to our legal system and not used here if designed for other jurisdictions.” (Individual)

“If the source is outside the Scottish jurisdiction then there should be consideration to licensing them in some way to operate within the

jurisdiction - to do anything less present a risk to the consumer.”  
(Individual)

One suggestion was made that providers should be required to have a physical presence in the jurisdiction and/or require formal registration to operate (including payment of a fee). The framework would also need to be sufficiently agile to respond to fast changing technological developments, it was stressed:

“A regulatory model should be activity and risk-based, flexible, and proportionate and be able to respond to changes in the sector over time, such as the development in new types of services and providers. While we recognise the significant potential for Legal Tech to create innovations and transform how legal services are provided, it can also create risk, particularly when Legal Tech providers are unregulated.” (Consumer Organisation, Public Body/Sector)

Linked to this was the view that, if this proposal was implemented, it again should not be used to stifle innovation:

“...the Scottish Government should not just focus on the narrow question of whether Legal Tech should be included within the definition of ‘legal services’ - an exercise that might be challenging in itself to accomplish as Legal Tech is evolving - but also carry out work proactively to consider how to achieve the right balance between facilitating innovation and protecting consumers through regulatory requirements... we recommend that the Scottish Government consider what different options there might be to addressing the issue of Legal Tech both within the current regulatory framework and through the reform of that framework.” (Consumer Organisation, Public Body/Sector)

Overall, where supported, this proposal was seen as offering greater consumer protection and creating a level playing field, in competition terms, between legal services providers delivering directly to clients and those delivering online, i.e. all legal services should be treated equally:

“In order to facilitate consumer choice and improve access, while providing appropriate levels of consumer protection, it is appropriate that all legal services providers are brought within the regulatory framework. That will ensure they can provide services to consumers and that any consumer detriment is able to be addressed through the regulatory and complaints system.” (Organisation, Consumer Body/Panel)

Those who did not agree with this proposal did so mainly on the basis that, if Legal Tech services were currently outside of the framework, it was because they were not offering reserved legal services and/or were not qualified solicitors (and so should not be subject to their regulations):

“Legal Tech services which do not offer reserved legal services are, by definition, outside of the regulatory framework.” (Organisation, Legal Services Provider)

Again, for those who interpreted Legal Tech to mean technology to facilitate service delivery, rather than services in their own right, regulation of the users of the technology was again seen as sufficient. As such, the need to define Legal Tech before deciding this issue was stressed:

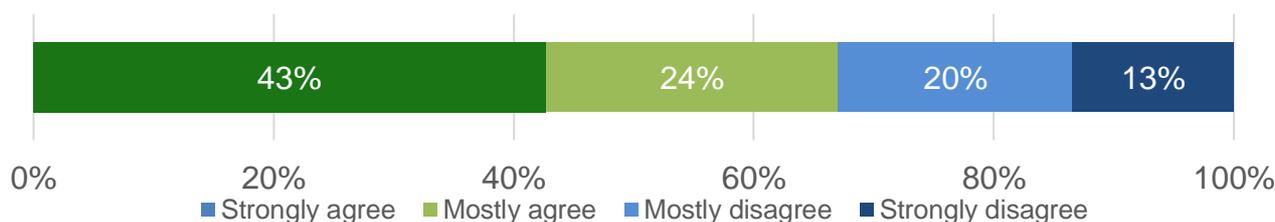
“Most providers of Legal Tech are not providing legal services, they are just providing technology for use by others who are providing legal services. However, if a tech company were using tech to provide legal services directly to the public themselves that would be another matter and require them to be regulated to provide the services in question. But it would be the provision of legal services that would require the regulation not necessarily the tech that lies behind that.” (Organisation, Legal Services Provider)

One respondent also felt that this was a matter for judicial determination, while another suggested that it would be for the Regulator to consider how this might operate if the source was outside its jurisdiction. A small number of others indicated that they were not sufficiently knowledgeable to give a reliable response.

## Question 26

**Q26. To what extent do you agree or disagree that, not including Legal Tech may narrow the scope of regulation, and reduce protection of consumers?**

Chart 26: Responses to question 26



Base: 82

Of those who provided a rating at this question, around two thirds (67%, n=55) agreed and one third (33%, n=27) disagreed that it may narrow the scope of regulation and reduce consumer protection if Legal Tech is not included.

Many respondents cross-referenced their earlier responses to Q24 and Q25 rather than providing new or different views for this question. Those who agreed did so on the basis that there was a strong likelihood that consumer protection would fail if unregulated, and that Legal Tech should be treated the same as other forms of service delivery (i.e. consumers must be protected at all levels):

“Faculty strongly agrees that not including Legal Tech firms who were purporting to provide regulated legal services would narrow the scope of regulation and reduce protection of consumers. The method of delivery of legal services should not be the touchstone of whether it ought to be regulated or not.” (Organisation, Professional Body, Faculty of Advocates)

Those who disagreed mainly did so again on the basis that this was a moot point (since Legal Tech per se should not be within the scope of regulation and/or had not been sufficiently well defined in the consultation). Others again perceived that it was the responsibility of the members of the profession using the technology to ensure that it

provided an acceptable service to the consumer (i.e. meeting acceptable standards of conduct and service), and that they would be accountable to the consumer and the regulator if it was not:

“Legal professionals who are currently regulated are required to ensure that any Legal Tech which they use is compliant. Entity regulation would regulate the use of Legal Tech in the delivery of legal services.” (Organisation, Legal Services Provider)

Others provided slightly more nuanced views that it would depend on the service being provided and to whom it was being provided i.e. if it was being provided direct to a consumer there may be an argument that the service should be regulated if harm can be a consequence of error or inadequate service.

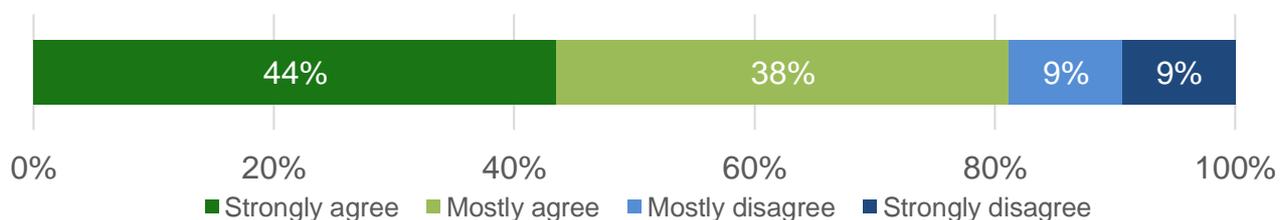
Overall, there was little unique feedback to this question that had not already been provided above, the exceptions being:

- A suggestion that an analysis of current providers of legal services who are not regulated should be undertaken, including advice platforms (to help inform the definition of Legal Tech and determine if it should be included in the regulatory framework or not);
- That regulators should pay close attention to what was being provided and ensure that guidance for the use and procurement of certain Legal Tech is competent, where there is an identified risk to the consumer;
- That regulation of Legal Tech may exert unnecessary and disproportionate commercial pressure on the market; and
- Introducing entity regulation would be an effective and proportionate way to regulate the use of Legal Tech in the delivery of legal services.

## Question 27

**Q27. To what extent do you agree or disagree that the inclusion of Legal Tech in a regulatory framework assists in the strength, sustainability and flexibility of regulation of legal services?**

Chart 27: Responses to question 27



Base: 85

Most (82%, n=69) of those who provided a response agreed that the inclusion of Legal Tech in a regulatory framework assists in the strength, sustainability and flexibility of regulation of legal services.

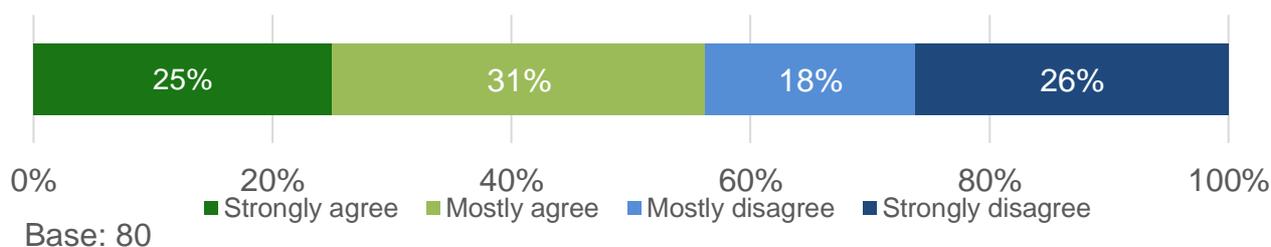
Again, there was very little new qualitative feedback given, with several respondents simply cross-referencing the earlier comments. Overall, those who agreed felt that inclusion of Legal Tech in a regulatory framework was necessary to ensure that it was inclusive and representative (i.e. of the increasing shift/developments being made with this mode of delivery) and to respond to the changing legal services landscape (although no respondent

specifically commented on how it would improve ‘strength’, ‘sustainability’ and ‘flexibility’ and some questioned if/how this could be achieved by simply including it in the framework). Those who disagreed, again, mainly did so on the basis that fair competition and commercial interests may be negatively impacted by such a move.

## Question 28

**Q28. To what extent do you agree or disagree that the Scottish regulatory framework should allow for the use of Regulatory Sandboxes to promote innovation?**

Chart 28: Responses to question 28



Of those who provided a rating, over half (56%, n=45) agreed that the Scottish regulatory framework should allow for the use of Regulatory Sandboxes to promote innovation. However, a significant minority (44%, n=35) disagreed.

While the majority of respondents supported this proposal within the qualitative comments provided, many also caveated their response by indicating that they had little experience or evidence on which to provide an informed view. Those who did have experience were complimentary, particularly with regards to Sandboxes providing a safe space for those experimenting while also having the right oversight to protect consumers. Several respondents commented more generally that they were in favour of innovation and saw Sandboxes as an example of this:

“We agree that the regulatory framework should allow for regulatory sandboxes to promote technological innovation in the delivery of legal services. Technology is increasingly being used to assist with the efficiency, quality, speed of delivery and availability of legal services and innovation is key to this. Legislative barriers to such innovation should be avoided where possible.” (Organisation, Legal Services Provider)

“...we would welcome additional, permissive regulatory powers which would enable Legal Tech innovation in the delivery of legal services.” (Organisation, Professional Body, Law Society of Scotland)

Views were put forward, however, that while this approach may support innovation, it was important that measures be put in place to ensure it was fit for purpose, including, for example, pilots, monitoring and evaluation (with sufficient safeguards in place):

“If the Scottish regulatory framework did propose to allow for the use of Regulatory Sandboxes to promote innovation, then we believe that measures put in place through this would need to be rigorously tested through trials, monitoring, and then further consultation before being considered for implementation permanently. However, we can

see a case for allowing innovative measures to be trialed and regulators may need some additional flexibilities to accommodate this, in common with practice in other sectors.” (Consumer Organisation, Public Body/Sector)

“...there needs to be an agreed framework around how this works and the right checks and balances in place. There needs to be an ability for a regulator to say no to a sandbox approach where it has concerns.” (Individual)

Two respondents also highlighted that increased public awareness/understanding of Sandboxes was essential to ensure total transparency:

“It’s vital that where this type of approach is used, there is clear and transparent information for consumers about the implications of using a legal service which is part of it.” (Organisation, Consumer Body/Panel)

“The unregulated nature of these services would not necessarily be clear to consumers and therefore neither will the implications and consequences for them of using such a legal service. Any such measures must be thoroughly tested and publicly consulted on before being implemented with any degree of permanence.” (Consumer Organisation, Third Sector)

Flexibility was also a common theme to several responses, i.e. that Regulatory Sandboxes would give regulators room to be responsive and relax the rules when it was appropriate to do so:

“Flexibility which allows for testing in a more responsive and agile way than having to review the whole regulatory framework would benefit everyone involved.” (Individual)

Among those who did not agree with this proposal, the main reason was that this may leave the legal system open to abuse, that unregulated providers may be unreliable/cause public harm and that any ‘testing’ or ‘piloting’ should never be allowed with genuine, live cases (and that all providers of legal services must be accountable at all times):

“Tech companies and such like must complete testing and evaluation outwith the profession... Clients’ business and family concerns should not be used as ‘test beds’ for companies to test new technology enriching themselves in that process.” (Individual)

“I do not feel that live testing should be fostered onto the general public without proper scrutiny.” (Individual)

A minority commented that the notion of a Regulatory Sandbox was jargonistic and that its creation was unnecessary in the current climate. Two respondents perceived Sandboxes to present an unfair advantage to some providers over others. One respondent suggested that Sections 25 to 29 of the Law Reform (Miscellaneous Provision) Scotland Act 1990 may offer a safer alternative for consumers than allowing temporary relaxations or adjustments of regulatory requirements. Another suggested that regulators should not be given the power to relax substantive law, which should remain the responsibility of Parliament.

# Part 2(F) Client Protection Fund

## Introduction

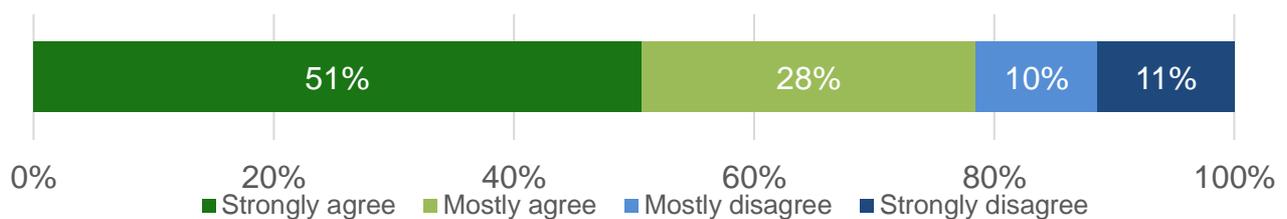
The Client Protection Fund (CPF) is the operating name of the Scottish Solicitors' Guarantee Fund and is a statutory Fund to “make grants in order to compensate persons who suffer a pecuniary loss by reason of dishonesty” on the part of a solicitor, an employee of a solicitor, a registered foreign lawyer or a conveyancing/ executory partner or employee. It is a fund of last resort and in most cases will only compensate those who have exhausted all other options to recover their losses, including through civil proceedings. The Fund is paid for entirely by solicitor firms without the use of taxpayer money from government.

The Robertson Report suggested that the future operation of the Client Protection Fund should be transferred from the Law Society of Scotland to the recommended new independent regulator. Therefore, the consultation document sought feedback on the fund and any suggested changes that might be needed to it.

## Question 29

**Q29. To what extent do you agree or disagree that the Client Protection Fund works well?**

Chart 29: Responses to question 29



Base: 79

Of those who indicated their level of agreement, over three quarters (79%, n=62) agreed that the Client Protection Fund (CPF) worked well, compared to 21% (n=17) who disagreed.

The Law Society for Scotland provided an answer for many when it said:

“[The CPF] is a level of consumer protection of which we are immensely proud and has, over the past 10 years alone, paid around £6 million to help 480 consumers of legal services who might otherwise have faced undue hardship through the rare but serious dishonest actions of a solicitor... It is a significant consumer protection... and with the Society’s Master Policy provides a safety net of protection unequalled within UK legal services.” (Organisation, Professional Body, Law Society of Scotland)

Besides offering consumer protection, respondents felt that it regulated client monies and focused on financial dishonesty. There were, however, mixed reactions as to whether it should be regulated by an independent body or remain under the auspices of the Law Society of Scotland. One individual noted, in favour of the status quo that:

“This is a matter which must be left entirely to the legal profession i.e. to the individuals whose contributions constitute the fund through the offices of the professional body and under supervision of the Lord President.” (Individual)

A further respondent commented that independence was not undermined by being regulated by the profession itself:

“The fund is administered by a sub-committee of the Regulatory Committee of the Law Society of Scotland and... 50% of that sub-committee are lay members who are not part of the legal profession, suggesting that there is ample opportunity for consumer interests to be represented through lay involvement... [which] also helps to ensure that consumers are protected.” (Organisation, Legal Service Provider)

However, whilst supporting the status quo, several suggested that the CPF required greater transparency and should have similar considerations to those of the Master Policy professional indemnity arrangements. This latter issue was raised more by those who disagreed that the CPF works well currently. One commented that the CPF should be treated as an insurance risk, alongside the Master Policy:

“Abolish this [CPF] fund which is an open-ended discretionary fund and replace it with a power to the new Regulator to recover from the personal assets of the solicitors in the firm involved. This is an insurable risk. Why not cover it with insurance?” (Individual)

A few voiced concerns over perceptions that the CPF was underutilised and potentially offered too little too late, with clients losing out in their attempts at redress:

“[We are] aware that there are some circumstances in which clients have struggled to achieve redress. For example, where former firms no longer exist, or where fee rebates awarded by the SLCC have not been able to be recovered. [We] would wish to see a system where all redress awarded is capable of being obtained... where firms no longer exist, practitioners are bankrupt or deceased and so on. This is essential for maintaining consumer confidence in any complaints system... we believe it is essential that this scheme, together with the Master Policy, provides wrap-around protection to consumers.” (Consumer Organisation, Public Body/Sector)

In terms of the burden on solicitors to pay into the Fund, one respondent argued for payments to be made proportionate to salary:

“At the moment, all solicitors pay the same... Why should a legal aid lawyer earning £26,000 have to pay the same as a corporate lawyer earning £120,000?” (Organisation, Legal Service Provider)

## Question 30

### Q30. What, if any, changes should be made to the Fund?

Whilst several respondents felt that the system worked well currently and needed no changes, (and bearing in mind the changes suggested above in answer to Q29), several respondents argued for a tightening of the limit of an award to remain at £1 million per claim. A few respondents argued for awards to be increased and others that the administering of

rewards needed to be speeded up. The 1980 Act was deemed to be restrictive on awarding consumers monetary losses, and the Law Society of Scotland suggested there needed to be greater flexibility in legislation whilst moving to limit numbers of claims so as not to exhaust the fund:

“There is currently no limit on the number of claims that can be made by a single claimant on the same solicitor. This poses the potential risk of the fund being exhausted by an institutional or corporate claimant, for example a lender, to the possible detriment of other claimants, such as the individual consumer. Likewise, there is currently no value limit on claims against one solicitor by multiple claimants; again, this poses the risk of exhausting the fund. To ensure that the CPF continues to be fit for purpose and reflective of the policy intent behind its creation, any new permissive legislative framework must provide greater flexibility in its operation.”  
(Organisation, Professional Body, Law Society of Scotland)

Finally, one respondent suggested doing a renewal risk assessment of professional legal service providers every five years, and another that the Fund should help compensate clients for incompetence, administrative failures or sudden death of a professional, as well as for monetary loss.

# Part 3(A) Entry, Standards and Monitoring

## Introduction

The Scottish Government seeks to develop a regulatory framework that incorporates a greater emphasis on quality assurance, prevention of failure, which usually leads to consumer complaints, and continuous improvement for the benefit of the legal profession and consumers. The Robertson Report recommended that:

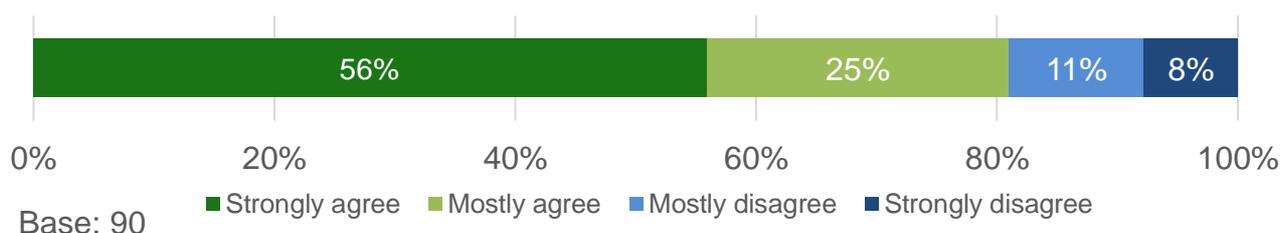
- It should be for the regulator(s), professional bodies and educational institutions to work together to set the educational requirements for entry into the various legal professions in Scotland;
- The regulator should have responsibility for setting standards and in doing so should drive a preventative/quality improvement focus, including simplification and better overall cohesiveness of the rules, making them more consumer friendly, comparable and proportionate; and
- The regulator should hold a register of those it regulates, and any lawyer, solicitor, solicitor advocate, advocate, or commercial attorney who wishes to provide legal services must be admitted to the register.

The consultation document sought feedback on the need to incorporate a greater emphasis on quality assurance, prevention and continuous improvement; whether the rules should be simplified to make them more proportionate and consumer friendly; and how to provide quality assurance and continuous improvement.

## Question 31

**Q31. To what extent do you agree or disagree that any future regulatory model should incorporate a greater emphasis on quality assurance, prevention and continuous improvement than the current model provides?**

Chart 31: Responses to question 31



Of those who provided a rating, most (81%, n=73) agreed that any future regulatory model should incorporate a greater emphasis on quality assurance, prevention and continuous improvement than the current model provides. In particular, consistent with comments made elsewhere in the consultation, it was suggested that there was room to strengthen existing CPD requirements as well as to make the system more 'proactive' than the current 'reactive approach':

"In many areas the current model primarily focuses on the passive setting of standards, and intervention when things have already gone wrong. The new model should focus on creating a culture of quality assurance, prevention and improvement in the sector, which reduces the need for post-event action." (Consumer Organisation, Public Body/Sector)

“A greater emphasis on quality assurance, prevention and continuous improvement should help to reduce the number of complaints through offering identification of problems with practitioners at a much earlier stage. This means that either the practitioner is supported to address and rectify any issues or other remedial action, including, removal from practice should the issues continue, can be taken in early course by the regulator.” (Consumer Organisation, Third Sector)

The main caveats were, again, that any updating of the existing model to provide ‘greater’ emphasis must be proportionate and not increase the costs to providers such that they cannot operate (especially for smaller operators and those offering mainly Legal Aid services):

“Whilst quality assurance is welcome, it is important to remember that with legal aid revenues so low, adding further burdens, will only lead to a reduction in service delivery, and further withdrawal of solicitors from the legal aid market.” (Organisation, Legal Services Provider)

One respondent also queried if these factors should be prioritised and suggested that there were other elements of the system that should be strengthened with greater urgency, including, for example, improving access to justice.

Others observed that including ‘greater emphasis’ in any revised model would not necessarily guarantee compliance with any new standards, and that peer review may also function well to meet the desired outcomes around service improvement and public protection:

“Currently, not all solicitors are regularly subject to peer review. It may be worth considering whether the peer review arrangements which exist in relation to legal aid could be extended more widely across the sector.” (Consumer Organisation, Public Body/Sector)

One respondent also commented that wider issues linked to professionals taking on work for which they were unqualified/ill-equipped may still not be mitigated by strengthening the model alone:

“Greater emphasis is required in identifying and supporting the kind of professional services by individuals and entities which they themselves have the capacity to provide.” (Individual)

Among those who disagreed, the main reasons given were that there was no evidence/insufficient foundation for a need to change the current model (which was perceived as already placing appropriate emphasis on quality assurance, prevention and continuous improvement) and that the scope of the proposal was too ambitious (i.e. the regulator should deal with complaints only):

“Consistent with my view that the approach to regulation should pursue the minimum necessary intervention... there is a danger that the emphasis suggested in this question would inevitably lead to a higher level of required standards. This would add complexity and cost to the regulatory model, to the overall detriment of both

providers and consumers for whom proportionate, targeted and cost-effective regulation is then less likely.” (Individual)

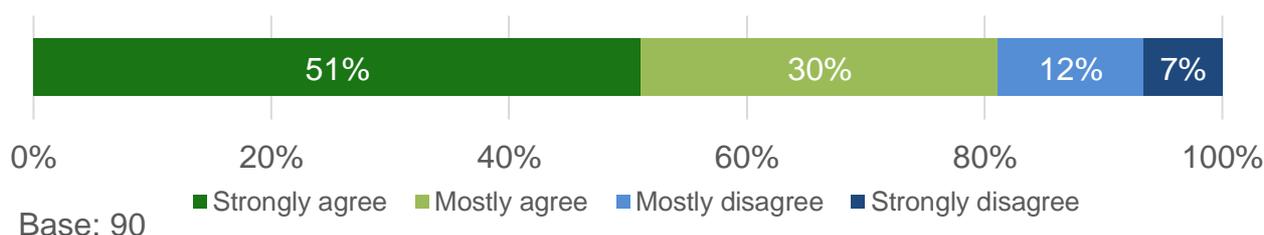
Importantly, while this idea was supported in principle and seen by many as self-evident in ensuring high quality service provision, one respondent noted that agreement should not be taken as support for the Robertson Model in general.

Two focus groups were asked about quality assurance, but the question was worded differently to the main consultation document. They were asked if ‘quality improvement [needed to be] built into the system so lessons can be learned and so rules can reflect where there are weaknesses?’ Respondents provided mixed views. One attendee wanted to see greater communication and promotion of the good work done by certain bodies or regulatory committees, another wanted a significant change to the rules to address the issues with complaints, while another called for greater powers to ensure lessons were learned and changes made. Some also called for greater engagement, training and meaningful partnership working around specific issues (for example, domestic abuse), as well as better feedback loops to learn from what worked well and what was not impactful.

## Question 32

**Q32. To what extent do you agree or disagree that the rules within the regulatory framework should be simplified with the aim of making them more proportionate and consumer friendly?**

Chart 32: Responses to question 32



Similar to the results at Q31, most (81%, n=73) respondents agreed that the rules within the regulatory framework should be simplified with the aim of making them more proportionate and consumer friendly.

In open ended comments, many simply cross-referenced their support for a stronger system as set out in Q31, or stated that any improvements to make frameworks more consumer friendly were welcome (especially if this meant writing things in Plain English and removing unnecessary legal jargon):

“Fundamentally, the easiest way to make the regulatory framework more consumer friendly is to deliver a clear, simple and transparent system that regulates in the public interest, taking into account consumer views.” (Consumer Organisation, Public Body/Sector)

“We continue to believe that the perceived complexity, language used and the length of time to deal with complaints in the current system need to be addressed to ensure it is accessible for all consumers.” (Consumer Organisation, Public Body/Sector)

A strong theme among both those who agreed and disagreed, however, was that simplification may inadvertently remove some of the nuance required to ensure there were no

'gaps' in the rules. Keeping the guidance 'tight' and technically precise was seen as more important than making it easy for the public to understand:

"The regulations are, in some cases, relatively simple and in others, quite complex. Complexity is caused by the subject matter and it is always a risk that in 'simplifying' for the sake of simplifying, interpretation and application becomes vague and unnecessarily difficult." (Individual)

"We can understand the value of making the rules more consumer friendly; however, the rules are directed towards solicitors and often deal with highly complicated matters, so it may not always be possible or straightforward to make them entirely consumer friendly." (Organisation, Third Sector for the Profession)

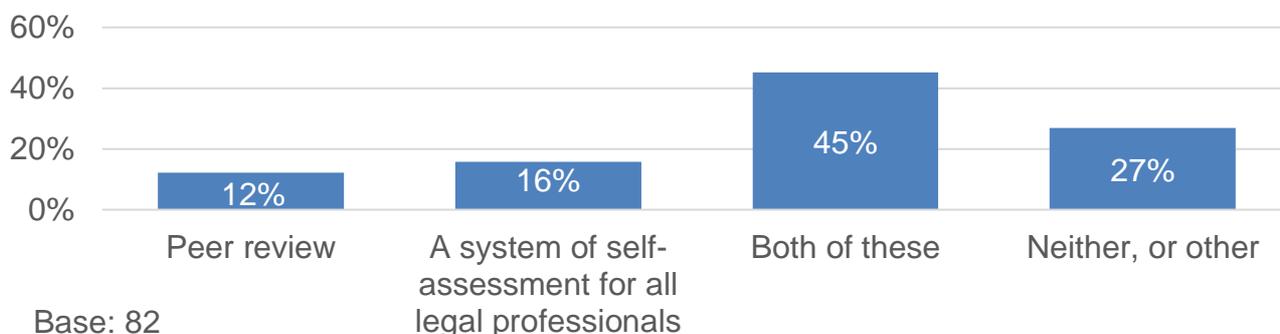
Making the complaints system easier to understand was specifically mentioned by a small number of respondents. One respondent expressed cynicism that proportionality and accessibility could ever be achieved, and another stressed that being 'consumer focused' was perhaps more important than being 'consumer friendly'.

Those who disagreed again mainly did so on the basis that the current system already worked well, was sufficiently accessible and comprehensible, and was kept regularly under review. Several others, again, stressed that they saw no need for change to the status quo.

### Question 33

**Q33. Which of the following do you think the regulatory model should incorporate to provide quality assurance and continuous improvement?**

Chart 33: Responses to question 33



Of the respondents who selected an option at the closed element of this question, 12% (n=10) thought that the regulatory model should adopt a peer review method to provide quality assurance and continuous improvement, 16% (n=13) preferred a system of self-assessment for all legal professionals, and a further 45% (n=37) thought that both of these methods should be incorporated. Just over a quarter of respondents (27%, n=22) indicated that neither of these options were suitable and/or felt that another method would be more appropriate.

Among the small number who favoured **peer review**, the main reason given was that this would maintain the present approach (which was seen as working well):

"Faculty already has in place a Quality Assurance (QA) programme, which is designed to ensure a minimum standard of performance in core advocacy skills by way of five-yearly individual, peer-review

assessments of all, including the most senior, practising advocates.”  
(Organisation, Professional Body, Faculty of Advocates)

Peer review was also seen as being less open to abuse than self-assessment. Among those who supported **self-assessment** the main reason was that this was already the favoured practice of many legal professionals, and was again seen as working well, especially from a business perspective. It was also described as being easier to implement operationally than peer review, as being more objective (and less influenced by/dependent on the opinions and experience of the reviewer), and as being more practical.

Among those who favoured a **combination of both**, this was seen as offering the most robust approach as well as maintaining the status quo:

“The current model incorporates elements of both peer review and self-assessment. We are not aware of any data to suggest that the current system does not work effectively. We accept that either peer review on its own, or self-assessment on its own, could be open to abuse and consequently we favour the inclusion of both, as currently is the case.” (Organisation, Legal Services Provider)

Having peer review and self-assessment system backed up by the regulator undertaking spot-checks was, however, suggested:

“Peer review and self-assessment are useful but independent, external scrutiny by the regulator is vital.” (Consumer Organisation, Third Sector)

Those who supported **neither or other** expressed cynicism that either peer review or self-assessment were effective, and/or perceived that both options represented the legal profession “marking their own homework”. For this cohort, consumer feedback/experience was stressed as essential to a robust regulatory model.

A small number again questioned if any change to the current system was needed and others cautioned against any moves which would make the system overly complex or “hyper-critical.” One respondent suggested this matter should be for the regulator to decide, while others simply suggested a flexible and responsive approach was needed:

“We would want to see the regulator develop a toolbox of methods and approaches, including these and others, as different tools will be effective in different situations and with different groups.” (Consumer Organisation, Public Body/Sector)

Other comments (made by just one or two respondents each) included that:

- More detail on this matter should have been included in the consultation to allow more informed responses (including an assessment of the cost/benefits associated with different approaches);
- Improvements could be achieved without statutory intervention; and
- Any moves to strengthen and simplify the current model would be welcomed.

Again, focus group attendees were asked about these options in a different way - specifically whether “self-assessment/peer review could have potential to ensure lessons are learned if there are [repeated] complaints?” One attendee agreed that a system of peer review was required because they felt the rules were not strict enough and there were no checks to ensure practitioners operated in an up-to-date manner once they began practicing. However,

it was stressed that checks needed to be proportionate to the size of the profession. Others agreed that some mechanism was needed to monitor the number of complaints received by firms in order to identify any persistent issues. Even low level complaints, when submitted repeatedly, could point to a problem which may need to be addressed, such as a need for improved communication or training. Some form of audit of complaints which have been handled in-house was also required, it was suggested.

# Part 3(B) Definition of Legal Services and Reserved Activities

## Introduction

The Robertson Report recommended that:

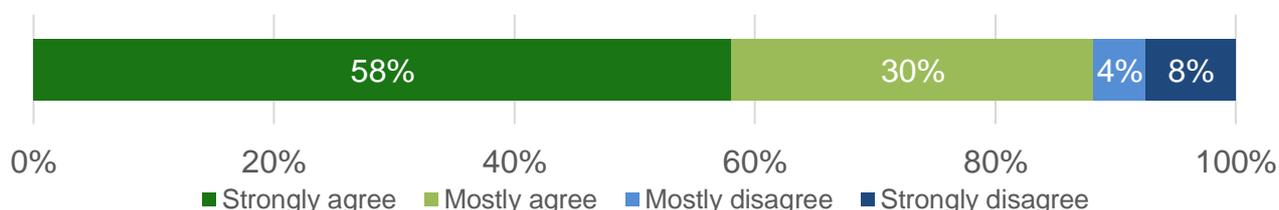
- The definition of legal services, the regulatory objectives and the professional principles should be set out in primary legislation;
- There should be no substantial change at this stage to bring more activities within the scope of those activities “reserved” to solicitors or to remove activities i.e. will writing should not be reserved. Entities licensed by the regulator should be able to undertake confirmation as an activity; and
- 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.

The consultation document sought feedback on each of these elements.

## Question 34

**Q34. To what extent do you agree or disagree that there should be a definition of legal services?**

Chart 34: Responses to question 34



Base: 93

Most respondents (88%, n=82) who provided a rating agreed that there should be a definition of legal services, while 12% (n=11) disagreed.

Those who agreed that a definition of legal services was needed argued that this would provide greater clarity, transparency and consumer protection. However, several caveated that such a definition (and thus regulation) would be difficult to achieve, with one legal service provider noting that legal services can be informal and unpaid as well as professional and paid, and can involve ‘considerable overlap’ between legal, tax and financial advice, for example; “you cannot regulate what you cannot define” (Individual). It was also felt that the current (2010) Act was out of date, too loose, and needed to be wider to incorporate all legal services/providers as well as the rapidly developing services:

“The current definition is out of date... is very narrow (section 32 of the Solicitors (Scotland) Act 1980) and great areas of actual ‘legal practice’ carried out by Scottish solicitors do not fall within that definition.” (Individual)

“Legal services are constantly developing and any definition must not be so prescriptive to exclude development of new innovative services.” (Individual)

Similarly, some respondents felt that, provided the definition was flexible and wide enough, this could help to address issues with the currently unregulated sector, allowing them to be brought under regulation and providing a ‘level playing field’:

“We note that there is currently thinking underway in England and Wales about how to bring the ‘unregulated’ market into the definition of legal services, and therefore under some form of regulation (e.g. redress available from the Legal Ombudsman). In his review of regulation in England and Wales, Professor Stephen Mayson noted that ‘the regulatory framework should better reflect the legitimate needs and expectations of the more than 90% of the population who face a legal issue and for whom it is not currently designed’.” (Consumer Organisation, Public Body/Sector)

A few also felt such a revised definition would avoid unqualified or disqualified people from practising.

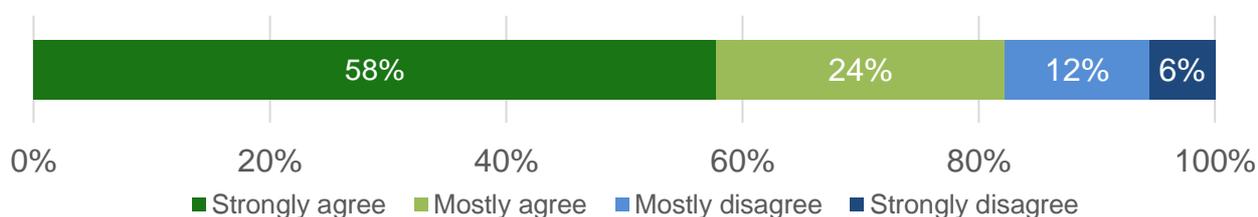
Those who disagreed with, or were non-committal about, developing a definition argued that the English concept of ‘reserved practice’ should be used for qualified lawyers or the ‘paid-for’ sector only, and that to be too flexible in definition would be ‘pointless’:

“Given the constantly evolving nature of legal services, it is unlikely that a precise definition would have the necessary capacity to evolve and a vague definition is unlikely to add to legal certainty. Defining reserved an/or regulated activities is a much more sensible approach.” (Individual)

## Question 35

**Q35. To what extent do you agree or disagree that the definition of legal services should be set out in primary legislation?**

Chart 35: Responses to question 35



Base: 90

Again, most respondents who provided a rating agreed (82%, n=74) that the definition of legal services should be set out in primary legislation.

Again, the majority of responses (and mainly from organisations) were in favour of primary legislation to change the definition, largely because this would provide clarity, transparency and accountability. It was stressed that anyone providing services needed to be regulated:

“Setting out the definition within primary legislation would assist in the regulation of the currently unregulated legal services market by

making it a requirement that any person providing services as defined within the legislation would be required to be regulated.”  
(Organisation, Professional Body, Law Society of Scotland)

As the existing definition was in primary legislation, there was seen to be no reason to deviate from this, were a newer, more future-oriented legal services framework developed. However, it was again argued that the legislation needed to be broad and flexible enough so as not present a barrier to new market entrants, or stifle or constrain either service providers or any regulatory body. The Scottish Regulators’ Strategic Code of Practice was seen by one organisation as a good example:

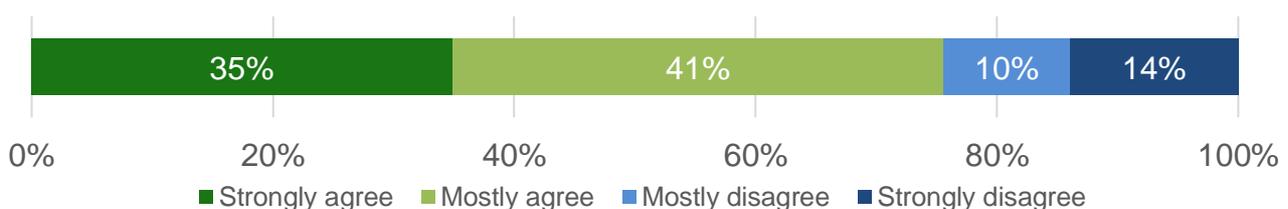
“A regulatory framework for legal services should be sufficiently flexible to adapt to market changes. It may be difficult for regulation to account for new market dynamics or new services if any future changes to the definition of legal services require changes to primary legislation... the Scottish Regulators’ Strategic Code of Practice sets out how regulatory principles are to be applied. This code might represent a useful starting point for examining which elements of the framework should be statutory and what left to the regulator.” (Consumer Organisation, Public Body/Sector)

A few who disagreed with the definition being in primary legislation argued that such legislation was not as flexible as secondary legislation for fast-moving developments, that primary legislation would not improve accessibility, and that ‘legal services’ were impossible to define coherently.

## Question 36

**Q36. To what extent do you agree or disagree that there should be no substantial change at this stage to bring more activities within the scope of those activities “reserved” to solicitors or to remove activities?**

Chart 36: Responses to question 36



Base: 86

Of those who provided a rating, around three quarters (76%, n=65) 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.

Respondents tended to agree that there was no need for more activities to be ‘reserved’ to solicitors, other than to ensure that the 2010 legislation - which included the writing of wills and other testamentary documents - was fully enacted. Some feared changing the activities currently noted as reserved would delay changes to the primary legislation, impact on the third and not-for-profit sectors, restrict access to justice for those who cannot afford a solicitor, and restrict consumer choice. However, some respondents gave the caveat that ‘reserved activities’ needed first to be defined and better understood.

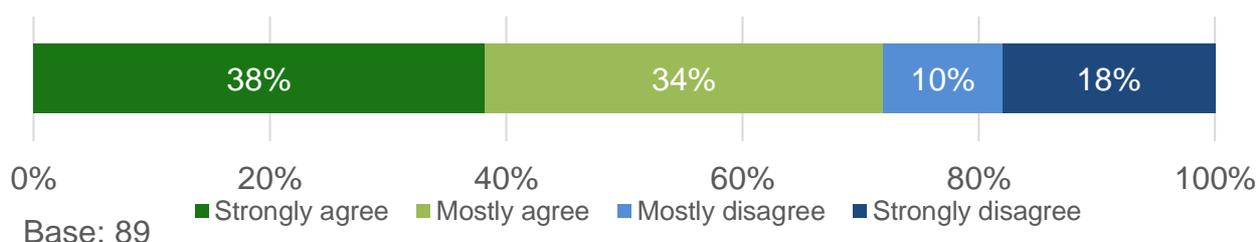
Of those who disagreed and wanted to change the number of reserved activities, several argued that there was a need for more activities to become reserved in order to tackle the risk associated with unregulated sectors, while others felt there was a need to reduce the number of reserved activities and encourage more competition. A few also felt that the system more generally needed to change, not least to reduce the risks to consumers, as one individual commented:

“I would prefer to see either a reduction of the reserved activities to reflect only the public good activities of conducting litigation and exercising rights of audience or, better still, a fundamental shift to regulation based on risk to the public interest, with the power for the regulator to require before-the-event authorisation only for the highest-risk activities.” (Individual)

## Question 37

**Q37. To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated?**

Chart 37: Responses to question 37



Just under three quarters (72%, n=64) 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.

Several noted that this proposal would only work if the regulators were independent, or indicated that they would only support such powers for an independent regulator (under Option 1: the Robertson Model). Indeed, one respondent highlighted that this proposal would work in Options 1 and 2, but they were unclear how this could be achieved in Option 3, where the regulators would only have responsibility for their own branch of the profession. Others felt that the profession should be involved or consulted on such matters, either as regulators or in conjunction with an independent regulator. Most, however, agreed that the regulator would be best placed to identify and react to trends and areas of concern and to recommend how these may be addressed and rectified. It was also felt that the proposal would protect the public/consumer:

“The regulator should be best placed to recommend any necessary changes and so should have the power, through primary legislation, to propose any changes to those activities which are currently reserved. As we have said, it is a matter of concern that only a relatively small proportion of legal services require to be undertaken by a qualified and regulated legal professional. The unregulated provision of legal services seems to us to be of significant risk to the consumer.” (Organisation, Legal Services Provider)

It was felt by one respondent, however, that there was a need to balance the benefits to consumers with the cost of regulation, given that regulators were best placed to identify and resolve the concerns of consumers.

Those who disagreed with the proposal tended to argue that the regulator would have too narrow a focus (through the lens of the consumer) to make such decisions. Rather it was felt that a wider set of stakeholders, and particularly those in the profession, should be involved in driving such decision. One respondent felt this should be decided on merit, i.e. driven by the number of complaints around a particular issue.

It was also felt that the legal profession should not be privileged “over other competent providers of legal services who should be equally capable of achieving regulated authorisation” (Individual), and that **all** legal services should be regulated. More generally, the Law Society of Scotland highlighted confusion within the consultation document between ‘unreserved’ and ‘unregulated’ activities, and stressed that the distinction between these was crucial. They also expressed disappointment that the consultation did not appear to tackle the issue of unregulated service providers, an area which they (and others) noted as problematic for the sector and consumers, and considered this to be a missed opportunity:

“We are disappointed to note that the consultation does not appear to directly address the issue of unregulated service providers, nor the risks associated with the delivery of legal services by unregulated providers. The ‘unregulated legal sector’ is not defined within legislation.” (Organisation, Professional Body, Law Society of Scotland)

# Section 3(C) Titles

## Introduction

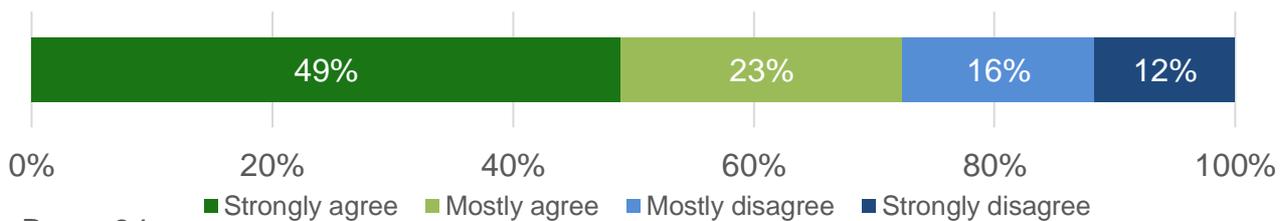
The consultation document outlined the confusion which the general public/ consumers have around the titles of ‘solicitor’ and ‘lawyer’. It also highlighted that, while ‘solicitor’ was a protected title, meaning it is a criminal offence for anyone not meeting the criteria to use it, there is no equivalent protection for advocates. While the Robertson Review found there was no requirement to provide such protection for advocates, the Faculty of Advocates have argued for such protection.

As such, the consultation sought feedback on the need to provide protection for various titles and the power which any regulator should have over deciding which titles should be protected.

## Question 38

**Q38. To what extent do you agree or disagree that there should be a change such that the title ‘lawyer’ would be given the same protections around it as the title ‘solicitor’?**

Chart 38: Responses to question 38



Of those who rated their level of agreement/disagreement, just under three quarters (72%, n=68) agreed that there should be a change to allow the title ‘lawyer’ to be given the same protection as ‘solicitor’. According to the Law Society of Scotland, 86% of the public in a recent poll “believe that there should be restrictions on who can call themselves, or advertise as, a lawyer”. For the protection of the consumer, who may not understand the distinction between ‘lawyer’ and ‘solicitor’, it was generally felt that lawyers should be legally regulated through a protected title. It was also felt this would aid clarity and transparency:

“We are persuaded that the term ‘lawyer’ should also be protected on the basis that many consumers do not appreciate that this is not a protected term and therefore that they may not be dealing with a qualified solicitor or a qualified advocate. The possible distinction between those terms and the qualifications of those using them should be highlighted more prominently.” (Organisation, Legal Services Provider)

“Although we recognise that some lawyers may have qualifications, knowledge, and adequate legal services, many may not and, crucially, they may not be regulated or be subject to any kind of code of practice. They are therefore unlikely to offer consumer protections, such as professional indemnity insurance cover or any complaint or redress process, potentially leaving the consumer exposed should something go wrong. Nor will the consumer benefit

from the protection offered by the Client Protection Fund.”  
(Organisation, Public Body, Law Society of Scotland)

Other reasons for agreeing with this proposal were:

- To prevent a so-called ‘lawyer’ from providing services that only a ‘solicitor’ is qualified to provide;
- That the public needed to be able to make informed choices, not least in using currently unregulated services; and
- That the Chartered Institute of Legal Executives (CILEX) lawyer approach had recently and successfully been adopted in England and Wales.

For those who disagreed with offering lawyers similar (but not the same) protection as solicitors, it suggested that:

- It would be difficult to differentiate academic lawyers and non-practising lawyers from practising lawyers;
- The current system was not causing problems;
- Defining or regulating lawyers may stifle diversity in practice; and
- Legally qualified but unregistered people should be able to call themselves lawyers:

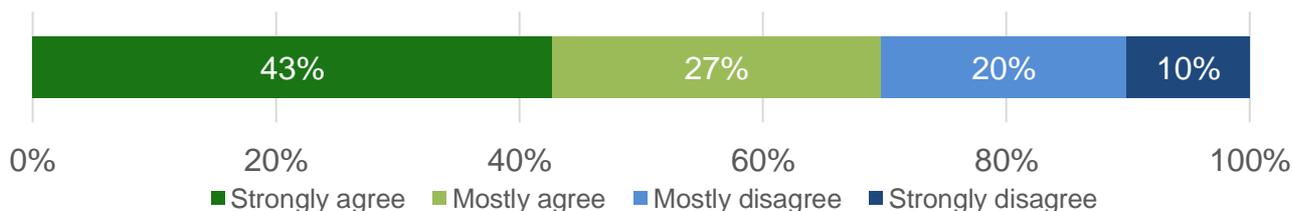
“[T]here is an issue with limiting the use of the title to those who are register with one of the three bodies (Law Society of Scotland, Faculty of Advocates, Association of Commercial Attorneys). The reason being that there are many people who are legally qualified who are not able to register with these associations but have a legitimate reason to call themselves a lawyer, e.g. a legal scholar or a legal graduate working in-house for an organisation.” (Individual)

Five focus groups discussed this issue, with attendees divided regarding whether they thought the title ‘lawyer’ should be protected or not. Some felt this should be protected in order to provide consumers with confidence and protection around the qualifications and authority of the lawyer, while others did not think the term needed to be protected, but rather that the public needed to be better educated about the differences between solicitors and lawyers.

## Question 39

**Q39. To what extent do you agree or disagree that the title ‘advocate’ should have the same protections around it as the title ‘solicitor’?**

Chart 39: Responses to question 39



Over two thirds (70%, n=62) of respondents agreed that the title ‘advocate’ should have the same protections as ‘solicitor’.

Within their qualitative responses, many indicated that their reasons for supporting or not supporting this proposal were the same as provided at Q38 above.

Of those who did provide reasons, many respondents suggested that if 'lawyer' and 'solicitor' were protected titles, then 'advocate' should also be, although clarification was needed as to whether 'advocate' was intended to refer only to members of the Faculty of Advocates or also to membership of the Law Society of Scotland (i.e. a solicitor advocate). It was also suggested that providing such protection would again ensure clarity and consumer protection around the service/product provided.

While the Faculty of Advocates agreed with the need for protection, they, along with other respondents, pointed out that the term 'advocate' had many usages, not just legal. For example, there were recognised advocate roles in the social work, domestic violence and mental health fields, advocates in 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). Therefore, providing protections for this title may cause confusion or unintended consequences, and so alternatives may be required:

“Subject to exceptions for usage in the everyday, non-legal sense where there is no implication that legal qualification is being claimed. E.g. an activist may be described as "an advocate for change" and this should not be inadvertently criminalised.” (Individual)

“An alternative method of achieving the goal of avoiding any confusion or misrepresentation to the public, would be to make it an offence for a person to hold him/herself out as a practicing Member of Faculty where that is not in fact the case.” (Organisation, Professional Body, Faculty of Advocates)

For those who disagreed, again the issue of the more general or wider use of the term/title was cited, with respondents suggesting that this would make it difficult and/or inappropriate to protect in such a way. It was felt that other sectors should not be restricted or penalised as a result of attempts to create protections within the legal services sector:

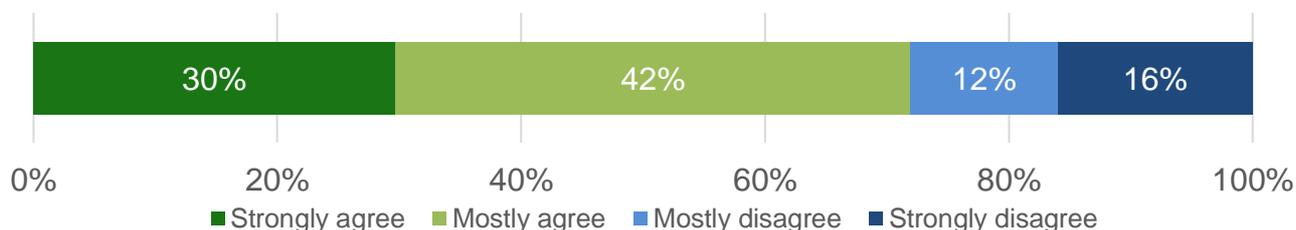
“The term advocate is used increasingly in the third sector by organisations representing individuals in both non judicial settings and quasi-judicial settings. Any protection afforded should not penalise those individuals or prevent them from describing themselves as advocates.” (Individual)

One pointed out that advocates are only accessed via a solicitor and would not be directly approached by the public in any case.

## Question 40

**Q40. To what extent do you agree or disagree that the legislation should allow for the protection of other titles in relation to legal services as appropriate?**

Chart 40: Responses to question 40



Base: 88

Of those who provided a rating, just under three quarters (72%, n=63) agreed that the legislation should allow for the protection of other titles in relation to legal services as appropriate.

Most respondents generally agreed that protection should be afforded to legal service providers with other titles (such as paralegals and legal executives), not least to protect the public from potential malpractice or from being misled:

“Anyone professing a title should have some degree of qualification and regulation to protect the consumer.” (Individual)

However, a few respondents stressed that the regulation and protection of titles needed to be responsive to the market, and should not act as a restriction, either on entry to the market, competition, or for access to justice:

“...the protection of titles will require to be a responsive piece of the legislation; changes will be required to match the way the market changes in this regard.” (Organisation, Legal Services Provider)

“We believe that this would assist in protecting the public and avoiding confusion with unregulated providers of legal services. However, care should be taken to ensure that it does not restrict access to justice and fair competition.” (Organisation, Professional Body for the Legal Profession)

The Law Society of Scotland, whose response was endorsed by several others, argued that any changes to protected titles should be ‘enabling’, and not ‘prescriptive’:

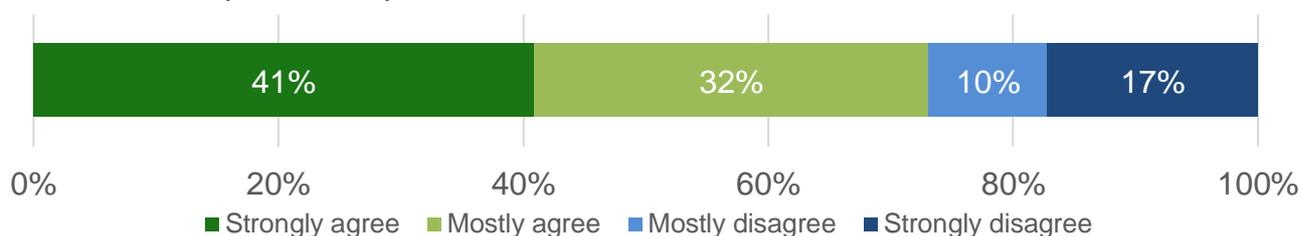
“This would allow a proportionate and reactive approach to be taken to the protection of other titles being used in the provision of legal services directly to consumers and would address the risk of non-regulated providers using increasingly imaginative professional titles to circumvent any legislative prohibitions in place and resultant consumer protections.” (Organisation, Professional Body, Law Society of Scotland)

Of those who disagreed, it was typically argued that there were no other titles which required such protection, and that there was no problem at present that needed fixing. It was also suggested that extending the reach too far, in terms of legal definitions, was not helpful, could become confusing, and would not bring any particular benefits for consumers.

## Question 41

**Q41. To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which titles to protect?**

Chart 41: Responses to question 41



Base: 93

Around three quarters (73%, n=68) of respondents agreed that it should be for the regulator(s) to propose to the Scottish Government which titles to protect in future. Those who agreed generally felt that the regulator would be best placed to identify issues and make decisions in this respect:

“The regulator is best placed to make this decision looking across the whole legal sector, balancing the cost of regulation with the benefits to consumers.” (Organisation, Consumer Body/Panel)

“The regulator should be best placed to recognise if an unregulated title is being used which may create consumer risk.” (Organisation, Legal Services Provider)

However, a few provisos were outlined, namely:

- That the regulator would need to be independent/there should be no political interference; and
- That consultation should take place not only with the Scottish Government but also with other relevant parties in the legal profession.

This would ensure consumer protection and would allow the regulator to monitor the situation in a constantly changing environment. One respondent, however, commented that this proposal would not work in respect of Option 3 in the consultation, where regulators would only have responsibility for their own branch of the profession.

Those who strongly disagreed with the proposal argued that it should be for the profession to suggest/decide, and that the government should not be limited in relation to who can provide advice:

“The Scottish Government should take views from all interested parties on such matters and not just from the regulator(s).”  
(Organisation, Legal Services Provider)

# Part 3(D) Business Structures

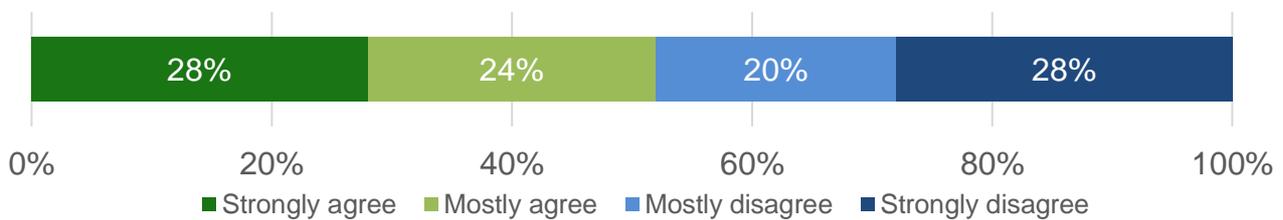
## Introduction

The consultation document set out the current legislation around the acceptable business structures and ownership rules for legal service providers. Currently 51% (i.e. a majority stake) of the business must be held by regulated professionals. This differs from the model in England and Wales, where solicitors and barristers are able to operate in a variety of business structures that their Scottish counterparts are not - thus impacting the latter's ability to be competitive and sustainable. The consultation set out the possible benefits of removing the 51% majority stake rule and sought feedback on this.

## Question 42

**Q42. To what extent do you agree or disagree that the 51% majority stake rule for Licenced Legal Services Providers should be removed?**

Chart 42: Responses to question 42



Base: 75

There was a clear divergence of views for this question. Of those who indicated their level of agreement, just over half (52%, n=39) agreed that the 51% majority stake rule for Licenced Legal Services Providers should be removed, compared to 48% (n=36) who disagreed.

### Reasons for Agreement

Of those who agreed, many suggested that removal of the 51% majority stake rule would be of significant benefit to smaller companies in Scotland:

“There is evidential support for the argument that a relaxation of ownership rules helps to sustain the supply of legal services in rural areas and to make previously small or solo practices more viable.”  
(Organisation, Profession, Other)

A few respondents also commented that the existing limit was unnecessary:

“There is no evidence that the public interest or consumer protection requires a limit on ‘non-lawyer’ involvement. The assertion (usually by lawyers) that those who are not lawyers will inevitably and somehow interfere with or influence the independence of those who are is simply not proven.” (Individual)

Amongst organisations there was a commonly held belief that the change would encourage competition and innovation within the sector:

“By relaxing this requirement, it will likely encourage more cost efficient, innovative businesses which complement the provision of

reserved activities with new technologies to enter the market.”  
(Organisation, Consumer Body/Panel)

“Allowing ABS [Alternative Business Structures] without overly restrictive authorisation processes or overly tight requirements will unleash that innovation and bring it within the regulatory system... A lesson from England and Wales is that this innovation will spur a significant increase in multi-disciplinary practice.” (Organisation, Legal Service Provider)

Some respondents drew comparisons between Scotland and other countries, claiming significant evidence of success via Alternative Business Structures:

“There is now a long track record of the successful operation of ABSs in England and Wales without such restrictions.”  
(Organisation, Legal Service Provider)

“We believe that any risks to the operation of ABSs from a relaxation of this ownership rule are minimal, as demonstrated by the experience in England and Wales.” (Consumer Organisation, Public Body/Sector)

Some respondents also felt that increased flexibility in corporate structure could save money and benefit end users:

“Lifting this restriction would allow for efficiencies and streamlining of processes, which may result in reduced costs and increased choice for consumers.” (Consumer Organisation, Public Body/Sector)

## **Reasons for Disagreement**

Many respondents disagreed with the removal of the 51% majority stake rule, but called for a reduction in stake percentage rather than removing such a requirement outright:

“...consideration should be given to reducing the 51% majority.”  
(Organisation, Law Society of Scotland)

One respondent was concerned that their response to this question might be misunderstood. It is possible that these same sentiments were felt by others faced with the only options to ‘agree’ or ‘disagree’:

“For avoidance of doubt, I think it should be removed and replaced with a much lower figure. However, I’m concerned that a response to say agree removed will be interpreted as being in favour of no limit.” (Individual)

Indeed, many of those who disagreed remained in favour of some kind of restriction/regulation:

“The question for the Scottish Government is not ‘should this happen?’ it is ‘should we regulate this?’” (Organisation, Legal Service Provider)

Some respondents felt that there was currently no need to change this rule, while others felt there was not enough evidence to necessitate change:

“The reality is that there is no evidence... that this is an issue. The current legislation allows the percentage to be changed by regulation and it would be prudent to leave things as they are at this stage to await evidence that this is providing a barrier to entry to the legal services market.” (Individual)

Many of the comments from individual respondents who disagreed showed concerns that implementing this change may negatively impact on service and consumer confidence:

“I believe it is important for the profession and consumer confidence that the 51% rule continues to apply.” (Individual)

“Law firms should be owned and controlled by qualified lawyers to protect the public.” (Individual)

“Trust in the legal profession may be diluted if non-lawyers are allowed to control law firms.” (Individual)

Four focus groups were also asked to comment on the 51% share business structure. Several attendees were against reducing this ownership share due to concerns over the impact which greater corporate ownership might bring, with others who were neutral about the proposed reduction also expressing the same concerns about how this would work and the potential pitfalls. For example, respondents were worried that solicitors may find themselves experiencing conflicts of interest or being compromised, and/or that this may impact the types of business they are able to do. It was also felt there was a risk of unintended consequences from reductions in the ownership share, as well as difficulties in how this would work together with entity regulation.

# Part 3(E) Entity Regulation

## Introduction

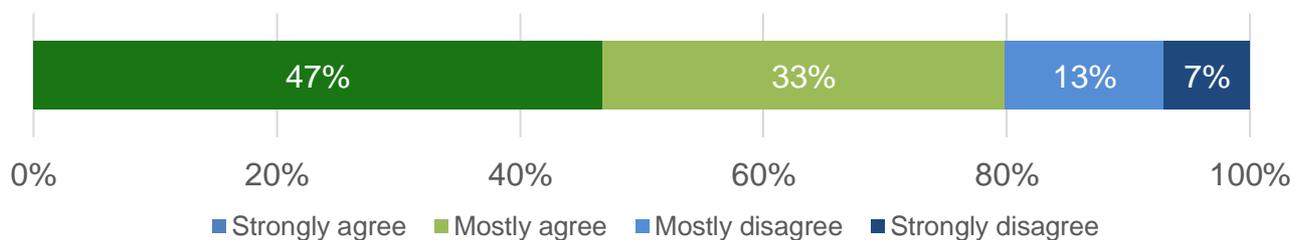
The Robertson Report set out that entity regulation should be introduced, which is enabling and flexible, to support more innovative business models and assist with regulating presently unregulated individuals, and to provide more transparency and greater risk based regulatory oversight. A broad description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

The consultation sought views on entity regulation and how this might operate.

## Question 43

**Q43. To what extent do you agree or disagree that entity regulation should be introduced?**

Chart 43: Responses to question 43



Base: 84

The majority of respondents (80%, n=67) 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, etc:

"...consumers often believe they are contracting with a law firm, rather than an individual... They expect the firm to deliver an adequate service, and to take responsibility for anything which does not go to plan, regardless of who carries out the work. From a consumer perspective, entity regulation makes sense."

(Organisation, Consumer Body/Panel)

Many respondents commented on the fact that if individuals are regulated, so too should entities be, for fairness, credibility and consistency. Entities should be accountable for the failings of those legal service providers whom they employ, it was felt:

"... there are... elements of organizational culture or incentives that operate to shape the behaviour of staff (whether lawyers or not)... it is important therefore for regulators to be able to address their attention to entity-level requirements and concerns, and to be able to hold certain key individuals to account for entity-level failures or contravention as well as for purely person ones." (Individual)

There were several mentions of business culture being important, particularly where non-regulated individuals within a firm take decisions or have an input (for example non-lawyer owners). Respondents argued that regulation needed to cover all legal service activities, regardless of who has input, and therefore, entity regulation was required:

“The current individual regulation model is out of date and needs to change to allow, for example, a regulator to take action about business culture. The model for ABS and traditional legal services businesses in terms of entity regulation should be the same and that means review of the 2010 ABS provisions.” (Individual)

“The current powers of the [Law Society of Scotland] to regulate entities, under the 1980 Act, are mainly restricted to the obligation to undergo financial inspections and the requirement for firms to have professional indemnity in place... Entity regulation [recognises] that many of the decisions are not taken by an individual solicitor and often increasingly by individuals who are not currently regulated, for example, paralegals. Entity regulation also recognises the increasing diversity and innovation in legal practice in terms of individuals providing legal services, legal technology and new business models.” (Organisation, Professional Body, Law Society of Scotland)

However, amongst those who agreed with the proposal, or who were non-committal, there were concerns about Third Sector and not-for-profit organisations (with Women’s Aid and Citizens’ Advice Bureaux being typical examples), who may offer free advice and be on limited budgets. It was also noted that such organisations might also be regulated via other bodies/sectors or mechanisms. Thus 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:

“... we must emphasise that entity regulation should not in any way replace or dilute the regulation of the individual... To ensure a coherent approach to hybrid regulation, it would therefore be appropriate that regulation rests with a single body. If there were to be separate regulators for entities and individual solicitors, this would create additional levels of complexity in the regulation framework and confusion amongst consumers” (Organisation, Professional Body, Law Society of Scotland)

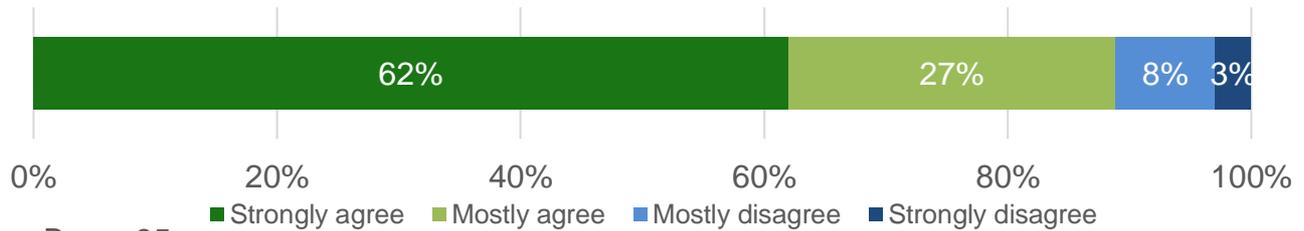
Few disagreed with the proposal, with most supporting the concerns voiced by the Law Society of Scotland above, namely that the proposal may be “cumbersome and unworkable” (Individual) and needed more justification.

Four focus groups were also asked about entity regulation, with most attendees agreeing that this was appropriate and needed. It was argued that firms should have some responsibility/accountability for their solicitors and be subject to some form of regulation, particularly around quality assurance and complaints. A few did caution around how this would be implemented, however, with costs noted to present a challenge to single operators/small firms, and issues around how this should be handled for the in-house sector. A few others were generally against the idea of entity regulation as they felt that such a system, of joint several liability, would be unfair and difficult to enforce in disputes that went to court.

## Question 44

**Q44. To what extent do you agree or disagree that all entities providing legal services to the public and corporate entities should be subject to a “fitness to be an entity” test?**

Chart 44: Responses to question 44



Again, the majority of respondents (89%, n=76) agreed that all entities providing legal services to the public and corporate entities should be subject to a “fitness to be an entity” test. It was felt this would give consumer confidence and protection, as well as consistency in practice:

“This would ensure that each entity satisfies the necessary conditions to be able to provide legal services, bringing consistency and avoiding any disparity and associated issues that may arise by having differing regulatory requirements. This in turn would provide consumer confidence.” (Organisation, Professional Body, Law Society of Scotland)

However, given the confusion over what constitutes an ‘entity’, as noted in Q43, two respondents were critical of the words ‘entity’ and ‘test’:

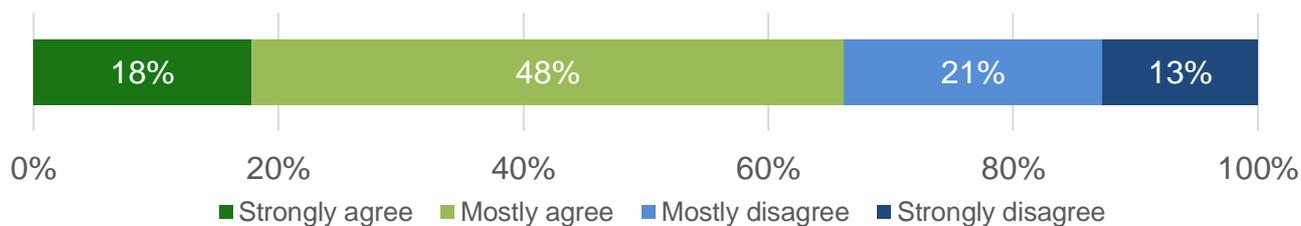
“Please get rid of this word 'entity'. It has no meaning... Specify the types of business structures that are recognised, accepted, permitted. Be clear. This just confuses everyone and especially consumers.” (Individual)

“It is difficult to see what such a test might mean, as well as how to reflect in an appropriate and timely way the inevitable (and possibly frequent and short-notice) organisational changes in ownership, investment, leadership, management and staff.” (Individual)

## Question 45

**Q45. To what extent do you agree or disagree that, as all lawyers providing legal services will be regulated - entity regulation should engage only those organisations who employ lawyers where those organisations are providing legal services for a profit - with the exclusion that when that legal service is in the context of an organisation whose main purpose is not to provide a legal service (for example banking) then regulation would remain at the level of an individual lawyer only and no entity regulation would apply?**

Chart 45: Responses to question 45



Base: 79

Although the reaction to this proposal was more mixed compared to Q43 and Q44, two thirds (66%, n=52) agreed that entity regulation should engage only those organisations who employ lawyers and provide legal services for a profit. It was felt this was a proportionate measure as there was no need to introduce entity regulation for large organisations who employ their own in-house lawyers for advice (but do not advise clients) - however, it was noted that individuals should still be regulated.

There were mixed views, however, around whether not-for-profit organisations should fall within the entity regulation requirements. Some felt they should not need entity regulation in order to ensure that free legal advice could still be provided by the third sector and not-for-profit groups:

“This seems an appropriate but proportionate response to the potential risk to consumers. Many people who access free advice and support on legal matters from third sector and not-for-profit groups would be unlikely to seek it elsewhere. We would be concerned about any changes that could affect people’s ability to receive free advice and support.” (Organisation, Consumer Body/Panel)

Others felt that any organisations which provided legal services to consumers should be subject to entity regulation, including non-profit organisations. It was felt that this was needed to provide consistent standards and consumer confidence, and bearing in mind the often vulnerable status of their client group. However, it was also acknowledged that any cost implications or licencing fees would need to be proportionate:

“We do believe that all organisations providing legal services directly to consumers should be regulated at entity level and be licensed to provide those services, including non-profit providers. This would provide a harmonious level of entity regulation which would further promote consumer confidence and ensure consistent quality and standards are applied. Those consumers who access non-profit legal services are often the most vulnerable and it is therefore crucial that they are afforded the same level of protection, and can expect the same level of service and standards, as those able to access for-profit providers. However, we do recognise the limited resource of many non-profit providers and the significant need to provide access to justice for all and the important role these providers play in that. We therefore believe that, in bringing forward proposals for the licensing of entities, a proportionate approach is taken to any licensing fee to be introduced and applicable to non-profit providers. More flexible, permissive regulation.” (Organisation, Professional Body, Law Society of Scotland)

A few felt that this was a decision for the regulator to take.

Whilst it was stressed by some that legal services offered in-house should remain regulated only at the individual level, others criticized the consultation document for using the example of banking as an organisation 'whose main purpose is not to provide a legal service' or to operate for no profit. Several respondents felt that this sector should be included in entity regulation:

"Banks provide arguably legal services in winding up estates, why should the relevant part of the organisation providing that service escape regulation?" (Individual)

"... banks employ banks of 'lawyers' to represent them and their interests so entity regulation should apply." (Individual)

Those against the proposal tended to argue that either any organisation who offered legal services, whether for profit or not, and regardless of sector, should be subject to the same regulation, or that defining in- and out-of-scope entities would be difficult or that entity regulation would be unworkable in practice, and that individual level regulation was sufficient:

"If you provide legal services at all - you should be regulated."  
(Individual)

# Part 3(F) Economic Contribution of Legal Services

## Introduction

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

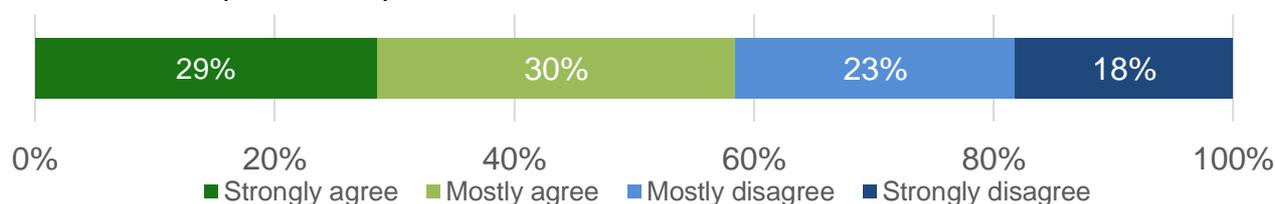
- The Scottish Government should commission or facilitate a baseline study to identify the current quantum of the sector’s contribution to the economy and to identify those niches in the global market where the sector might target its efforts; and
- Government should then work with the sector to bring all the key players together to develop and implement a strategy to maximise the potential for growth and the contribution that would make to the economy.

The consultation sought feedback on the first of these recommendations.

## Question 46

**Q46. To what extent do you agree or disagree that the Scottish Government should commission or facilitate a baseline study to identify the current quantum of the sector’s contribution to the economy and to identify those niches in the global market where we might target our efforts?**

Chart 46: Responses to question 46



Base: 77

Of those who provided a rating, over half (59%, n=45) agreed that a baseline study should be undertaken to identify the current quantum of the sector’s contribution to the economy and to identify those niches in the global market where efforts could be targeted. However, a sizable minority (41%, n=32) disagreed with this proposal.

Those who agreed that a baseline study should be commissioned, including the Law Society of Scotland and those who endorsed their response, generally felt that establishing a baseline would help with the development of plans for expansion within the global market:

“Auditing what is presently happening would surely give an indication of where we are currently, and put the sector in a better position to extend and expand.” (Individual)

One organisation commented that such information could be used to measure performance and perhaps ensure accountability within regulation:

“A clear regulatory objective to support economic growth would assist the independent regulator to focus on this issue. A baseline

study would be an effective way to hold it to account for its performance.” (Organisation, Legal Services Provider)

A number of respondents commented on the need for extended regulation outside of Scottish jurisdiction:

“We [welcome] the clear indication to provide regulators with the power to seek authorisation to regulate outside of the Scottish jurisdiction. This will promote competition and further raise the profile of the Scottish legal sector.” (Organisation, Professional Body, Law Society of Scotland)

Of those who disagreed, some respondents questioned the need for a new study, stating that data were already available and that commissioning a new study would be a costly undertaking with little tangible benefit.

Many respondents also questioned the need for government to be involved/funding research in the sector:

“We are not convinced such a baseline study is necessary. The legal profession should be perfectly capable of identifying for themselves whether they are competitive, or capable of being competitive, in the global market.” (Organisation, Legal Service Provider)

This sentiment was not just found within those who disagreed with a study being commissioned, it was also echoed by some respondents who agreed that such data would be beneficial:

“I certainly think assessing in a meaningful way the contribution of the legal sector to the economy is overdue. I am not sure how the second part of the question fits because that is surely a matter for businesses to work out.” (Individual)

Despite there being a greater amount of support for the commissioning of a baseline study, there were some respondents who urged caution:

- To ensure unbiased results;
- Not to let a new study take priority over other matters dealt with within the consultation document; and
- To perhaps fund it via a levy on law firms rather than public finance.

A few respondents highlighted the need for investigation into the value of services provided by those registered outside of Scotland:

“To a certain extent we know the value of the legal market in Scotland as every firm regulated in Scotland has to have prof[essional] indemnity insurance and tell the insurers their turnover. What we don’t know is the values of the services provided in Scotland by English regulated or international firms with offices in Scotland.” (Individual)

One organisation provided a particularly comprehensive response to this question, disagreeing that a new study should be commissioned, citing the increasing international

adoption of English law and the need for Scottish law to remain within the physical boundaries of Scottish territory:

“For consumers of legal services, other than large scale commercial entities, a foreign choice of law is a luxury which may not be open. It is a fundamental principle of consumer law that remedies should be available close to where the consumer is resident. Family law matters depend on domicile or more recently habitual residence and forum shopping is not available. Property law disputes will be determined by the *lex situs* [law of the place where the property is situated]. There is no plan within Robertson for attracting international business. The Scottish Arbitration Centre which offers facilities for international arbitrations has been, at best, moderately successful in attracting business. Further tinkering with the regulatory system has no impact on such activities. We see no need to engage in any baseline study.” (Organisation, Professional Body for the Legal Profession)

# Part 4 Complaints and Redress

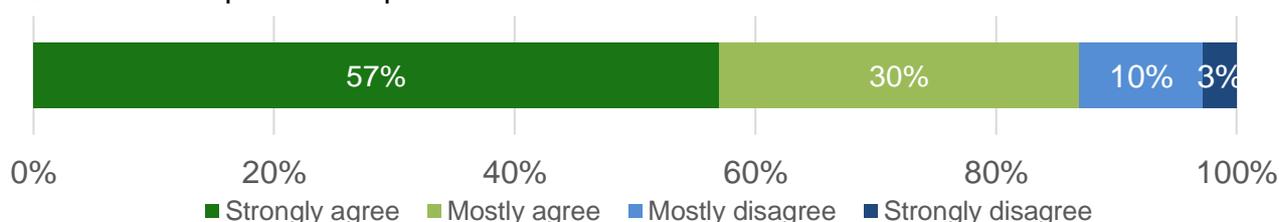
## Introduction

The Robertson Report advised that there was clear agreement in relation to the view of the legal complaints and redress process. It found a strongly held perception in the sector that the current complaints system was not fit for purpose. The consultation document set out the various recommendations made in relation to complaints and redress, as well as the implications of how this might work under the proposed regulatory framework options. Feedback was sought on the complaints process and how this should operate going forward. The consultation document also discussed the positioning of the Disciplinary Tribunals within the regulatory framework and whether the sanctions currently available to Tribunals should be amended. Views were also sought on the complaints budget, and whether this should be subject to the approval of the Scottish Parliament.

## Question 47

**Q47. To what extent do you agree or disagree that there should be a single gateway for all legal complaints?**

Chart 47: Responses to question 47



Base: 107

Of those respondents who indicated their level of agreement/disagreement, most (87%, n=93) agreed to some extent that there should be a single gateway for all legal complaints. Only 13% (n=14) disagreed with this.

Several respondents criticised the current complaints system, with a few outlining personal negative experiences of this, a few suggesting it was designed to protect the profession rather than consumers, and others arguing that the current system was confusing, time consuming, and had too many bodies involved. It was argued that providing a single gateway for all legal complaints would make the process more efficient, bring clarity and transparency to the process for both the profession and consumers, and make access simpler for consumers:

“The consumer needs as much clarity as possible. At present it is far too difficult and time consuming for the consumer to work out what to do.” (Individual)

“As recommended by the Robertson Report, a single gateway complaints-handling system is necessary to ensure simplicity, transparency and accessibility.” (Consumer Organisation, Professional Body)

It should be noted that, for the respondents above, it was not always clear whether they were discussing the benefits of a single gateway or were referring to a single complaints body that

would handle all stages of the complaint. Indeed, several did express a preference for a single body, while others were less explicit.

Several respondents also supported the current framework, with a single gateway for complaints to be raised, but then for these complaints to be referred to the relevant professional body to be actioned. It was cautioned that the processes operating behind the gateway were critical to the success of the system, with it being suggested these needed to be simplified and delays eliminated:

“I do agree, but I think it should be more administrative, simply providing an easy way for consumers to make a complaint and for it to be directed to the appropriate professional body without the consumer having to know who that is.” (Individual)

Several respondents from the legal profession, including the Law Society of Scotland 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:

“It may be that a modified version of the current system would be more efficient. For instance, a single gateway for consumers to make complaints but also allowing us, and the other professional bodies, to take conduct complaints forward under our own initiative. This would ensure consumers would be clear about where to take a complaint and professional bodies would not face delays in taking regulatory action in relation to conduct matters.” (Organisation, Professional Body, Law Society of Scotland)

There were also concerns that, to remove the single gateway approach (as already existed), would reduce the independence of the system, increase costs, and create inefficiencies, complexity and confusion:

“Removing the single gateway would reduce the independence within the system, make it less consumer focused, and is more likely to create greater inefficiency and ineffectiveness... It would also mean duplicating the enquiries and eligibility functions across the complaints body and the various regulators, leading to greater costs and inefficiency. This would be a significant backward step.”  
(Consumer Organisation, Public Body/Sector)

Those who disagreed tended to provide more disparate reasons for this. Reasons mentioned more than once included:

- The process needed to vary depending on the subject matter, and/or that separate systems were needed for business and individual consumers;
- The relevant professional bodies/regulators should be responsible for complaints;
- The current system was appropriate and therefore there was no need for change; and
- Disillusionment with the current single gateway system/SLCC was evident, with one suggesting this would simply protect the interests of the profession

while another felt this was not impartial and acted more in favour of the consumer.

The Faculty of Advocates, while disagreeing with the need for a single gateway in preference to Faculty assuming responsibility for all complaints against advocates, did suggest that, should the single gateway function continue, this should operate simply as a sifting mechanism with all substantive complaints against advocates being referred to Faculty for investigation. It was felt this was more efficient and cost effective in comparison to the current model where the SLCC and professional bodies pursue different types of complaints. Several respondents throughout this section of the consultation and in other comments also agreed there needed to be a stricter sifting process to identify and deal with vexatious complaints. A few possible complaints models which could offer useful learning were suggested, including New South Wales in Australia, and the system employed in England and Wales (although the latter was suggested as it may contain both pros and cons). A few respondents also outlined bespoke suggestions for how they felt the complaints and redress system should be set up and operate, with the system proposed by the Law Society of Scotland outlined in Appendix A as it was supported by a number of other respondents.

Seven focus groups also discussed the single gateway approach to complaints, with mixed views being expressed. Again, many attendees were keen to see a single gateway, although views were split as to whether this needed to be a new independent body or if the existing system could be adapted, and also regarding who should ultimately handle the complaints. Again, those who supported a fully independent body argued this was necessary to provide an unbiased approach.

A few agreed that the current framework, with a single gateway and then complaints referred to either sub-groups within the regulator, or to the relevant professional body was appropriate. However, it was argued that, if using the professional bodies, this needed better communication and to be publicly presented to highlight the transparency and independence currently built into the system to avoid perceptions of conflicts of interest. Others agreed that the current process needed to be 'fixed' rather than a new tier being added.

Others preferred:

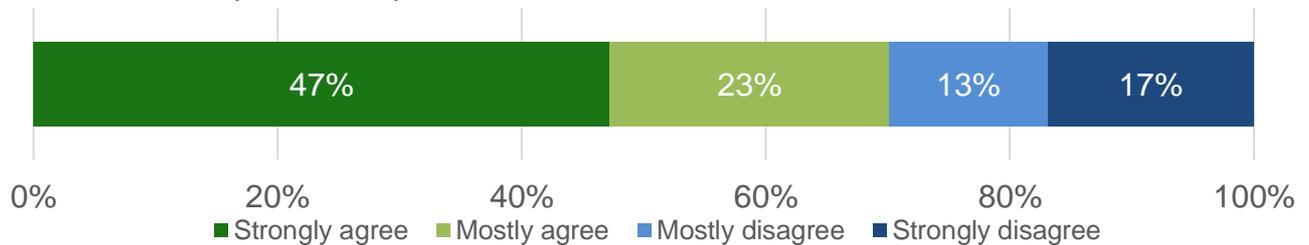
- A multiple gateway option for complaints, with the key issue being the need to speed up the process;
- A consumer panel to be involved in the regulatory body to help provide balance and reassurance to consumers;
- An independent ombudsman to be involved as this would be better understood by the public/consumers; and
- The courts to handle complaints as they have the required experience and there is a built in appeals process - although others disagreed as this was seen as expensive and inaccessible for most consumers.

A few also felt that it was the rules and legislation which underpinned the complaints structure which needed to be addressed and reformed rather than necessarily the organisations or framework itself. They felt this was a missed opportunity to tackle those elements which would have the biggest impact.

## Question 48

**Q48. Dependant on the regulatory model take forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, where a complaint is generated by an external complainer such as a client, or non-client?**

Chart 48: Responses to question 48



Base: 101

Of those who provided a response at the closed element of this question, 70% (n=71) 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 for agreeing with professional regulatory bodies having a continued role in conduct complaint handling 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:

“Professional regulatory bodies should maintain a role in conduct complaint handling. They have an interest in protecting both the consumer and the reputation of their profession.” (Organisation, Legal Services Provider)

It was also felt that removing professional regulatory bodies from conduct complaints would be a disproportionate step, with the Law Society of Scotland also arguing that it would lead to a loss of expertise, undermining of the rule of law and independence of the profession, and increased costs for the consumer.

Those who disagreed with having professional regulatory bodies involved in conduct complaint handling preferred such issues to be handled by an independent complaints body to maintain independence from the profession, remove any bias in the process, and avoid conflicts of interest by separating complaints and representative functions. It was also argued that the ability to conduct a single investigation would abolish the need to attribute a complaint as either ‘service’ or ‘conduct’, which it was felt were linked and often indistinguishable from each other:

“An independent body is best placed to investigate all consumer complaints in full, avoiding an early and artificial distinction between service and conduct, and ensuring a consumer friendly and efficient process throughout, without handovers between different bodies. That means a single complaints body, able to manage complaints

from start to finish, without duplication and delay, should be created.” (Consumer Organisation, Public Body/Sector)

“Under no circumstances should the legal profession be granted anything which resembles the opportunity for them to mark their own homework - or more accurately... to protect their own.” (Individual)

Further, it was argued that, maintaining a system with different bodies involved in the complaints process was complex, confusing, slow, led to duplication in process, and increased costs:

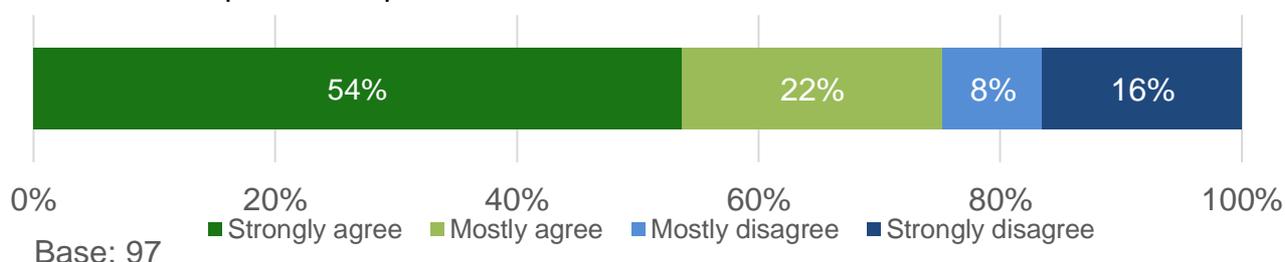
“One of the major shortfalls we identify in the current process is the duplication caused by different bodies being involved in the process and, in some cases, investigating different aspects of the same complaint - duplication to any degree inevitably builds delay into the process.” (Organisation, Consumer Body/Panel)

One respondent also felt that, having a single regulator responsible for monitoring all complaints would provide an effective means of collating consumer feedback to identify themes for driving forward improvement, and that this organisation could be flexible enough to incorporate any new market entrants.

## Question 49

**Q49. Dependant on the regulatory model taken forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, with regard to the investigation and prosecution of regulatory compliance issues?**

Chart 49: Responses to question 49



Around three quarters (76%, n=73) agreed that the professional regulatory bodies should maintain a role in conduct complaint handling, with regard to the investigation and prosecution of regulatory compliance issues.

Many respondents simply indicated that their response at Q48 was also relevant here, with others reiterating the points made above. This included that professional bodies were best placed/had the most experience and expertise to investigate conduct complaints, the risk of professional bodies becoming irrelevant if removed from the process, and that the process needed to change not the organisations involved:

“The issues that arise are not about who deals with the complaint but are about the cumbersome process. It is a rigid system that is not directed towards resolving the issues but determining fault. It also takes far too long.” (Organisation, Legal Services Provider)

It was noted that different rules of proof are required for conduct complaints, and that the current professional bodies have the required experience and expertise to deal with this, while the SLCC or any new/external regulatory body would not:

“Mainly because they have the expertise to do it which has been lacking in external investigation.” (Individual)

Again, those who disagreed preferred to have a fully independent regulator investigating such complaints, and noted that this would remove the confusion and complexity that exists in the current system:

“Like the Police or banking, you never allow in-house to investigate their own complaints. Why have an independent oversight if you then allow self-investigation.” (Individual)

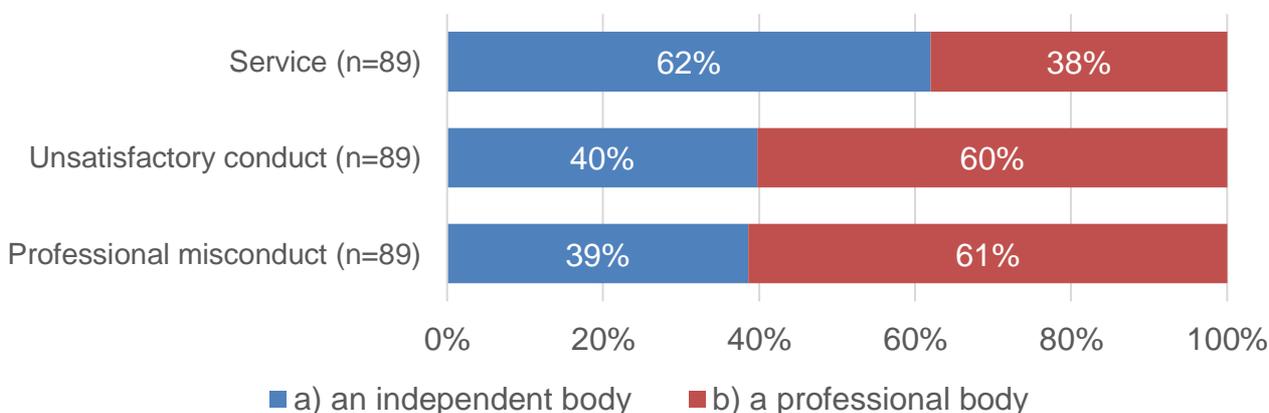
A few, who preferred the Robertson Model noted that, should Options 2 or 3 be chosen, then independent regulatory committees should be used in order to ensure greater independence and accountability.

It was again argued that, depending upon the model chosen, either the regulator or professional bodies should have the ability to bring investigations themselves rather than being reliant on a complaint being submitted.

## Question 50

**Q50. From the complaint issues below please give a preference between the options a) an independent body or; b) a professional regulatory body; who you think should investigate each of the following:**

Chart 50: Responses to question 50



For both ‘unsatisfactory conduct’ and ‘professional misconduct’ just under two thirds of respondents (60%, n=53 and 61%, n=54 respectively) preferred these to be investigated by a professional body. For ‘service’ issues however, 62% (n=55) preferred these to be investigated by an independent body.

Again, many respondents cited their previous answers, particularly at Q4, Q48 and Q49, regarding why they supported either an independent or professional body investigating issues. Little new information was provided at this question. A few respondents also outlined their preferred complaints handling system, typically bespoke to each respondent rather than based on established/referenced models in use elsewhere, although a few did note that the system in England and Wales (i.e. the Legal Ombudsman Service) may provide a useful model.

For those who preferred an independent body for each of the three issues, the reasons were again, that respondents felt this would provide more independent and impartial investigation which would be more suited to upholding consumer rights, and would simplify and streamline the system and allow for hybrid-complaints. Meanwhile, those who preferred professional bodies to investigate all issues felt they were the best placed to do so, with the need for independence from Government reiterated.

For some, the type of body preferred to deal with each type of complaint varied by the nature of the issue, how serious they considered the matter, and who would be best placed to deal with each:

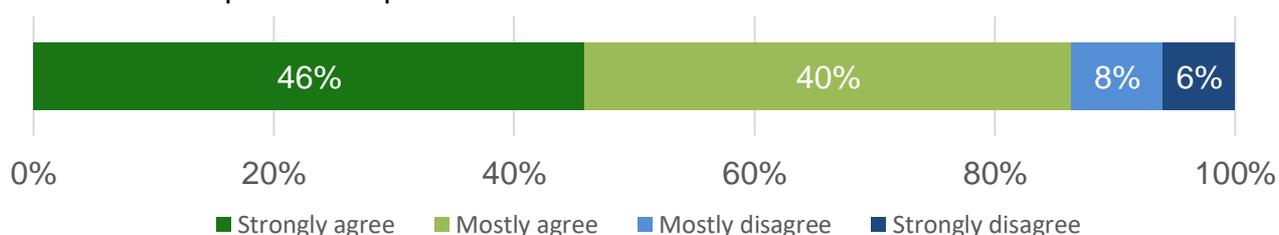
“Service and unsatisfactory conduct could be entrusted to an independent body since these issues are likely to be easier to fix, i.e. less messy. Professional misconduct, being a more serious situation would be better dealt with by a professional body.”  
(Individual)

“Professional regulatory bodies, as we have indicated above, are best placed to deal with issues relating to unsatisfactory conduct and professional misconduct. Service complaints, on the other hand, should remain with an independent body reflecting the difference between service complaints which impact the consumer and conduct complaints which deal with matters which may adversely affect confidence in the legal profession.” (Organisation, Legal Services Provider)

## Question 51

**Q51. To what extent do you agree or disagree that there should be a level of redress for all legal complaints, regardless of regulated activity?**

Chart 51: Responses to question 51



Base: 92

Most respondents who provided a rating agreed (86%, n=79) that there should be a level of redress for all legal complaints, regardless of regulatory activity.

A few 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:

“Since consumers are unlikely to be familiar with which activities are, or are not, reserved and/or regulated, they will assume that this exists for all legal complaints and so must be in place.” (Consumer Organisation, Third Sector)

Indeed, this concern appeared to be born out in the comments, with many individuals indicating that all complaints should be investigated and redress available, whatever the issue has been. It was argued by both individuals and organisations that this would ensure greater confidence and perceptions of fairness in the system:

“We agree that there should be a level of redress for all legal complaints, regardless of the regulated activity. However, that should be subject to such complaints having been judged (via the complaints system) to be well-founded. In that event, it is only fair that those who have suffered resultant loss are compensated. Having such redress also helps to maintain public confidence in any complaints system.” (Organisation, Legal Services Provider)

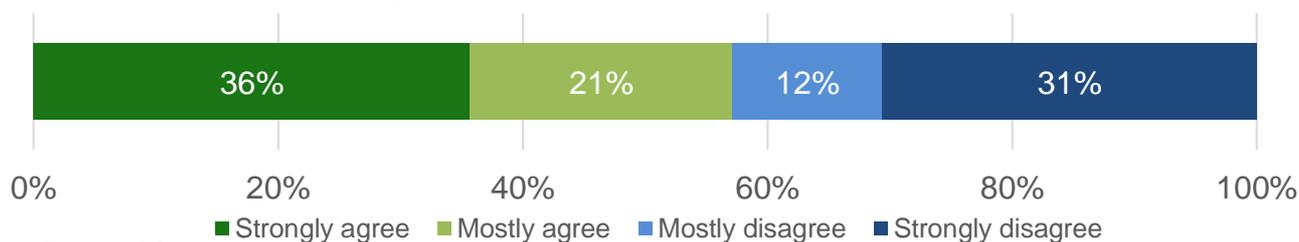
Of those who disagreed, very few provided any qualitative comments. Two respondents (along with one who had not specified whether they were for or against the proposal) indicated that they had found the question difficult to understand, while one noted:

“I am not sure how you can have redress for a complaint which is not a regulated activity.” (Individual)

## Question 52

**Q52. To what extent do you agree or disagree that there should be a single Discipline Tribunal for legal professionals, incorporated into the Scottish Courts and Tribunals Service?**

Chart 52: Responses to question 52



Over half of the respondents who provided a rating (57%, n=56) agreed that there should be a single Discipline Tribunal for legal professionals, incorporated into the Scottish Courts and Tribunals Service (SCTS), compared to 43% (n=42) who disagreed.

Those who agreed with this proposal provided a range of reasons, including:

- To avoid conflicts of interest and/or any bias;
- To provide consistency in decision making;
- To be more cost efficient; and
- To provide transparency/clarity, make the process more streamlined, and remove duplication in roles/efforts:

“A single discipline tribunal would help to reduce duplication in the system, make it more accessible for smaller professions/new entrants and ensure consistency of approach. Being housed within the Scottish Courts and Tribunals Service could also help to provide additional capacity on certain issues. It would also help to ensure public and professional confidence in the impartiality of the tribunal,

and support appropriate governance, for example in making appointments through an appropriate process and ensuring that legal and lay members are appointed and remunerated on an equal basis.” (Consumer Organisation, Public Body/Sector)

Those who disagreed with the proposal also provided a range of reasons, including:

- That professional bodies should be responsible for addressing such issues, whilst still being open and transparent - indeed it was noted that the Scottish Solicitors Disciplinary Tribunal (SSDT) and Faculty of Advocates already operated tribunal systems which were noted to be impartial, open and transparent. It was felt there was no cost or efficiency benefit in transferring this to SCTS as a single entity;
- It was not a proportionate reaction to the current issues or number of cases involved, court based tribunals were not used in other professions, therefore, this represented an unnecessary step;
- It would not be practical to have one tribunal dealing with both solicitors and advocates, it was felt that this would result in losing specialist expertise; and
- It would increase court workloads and increase public cost:

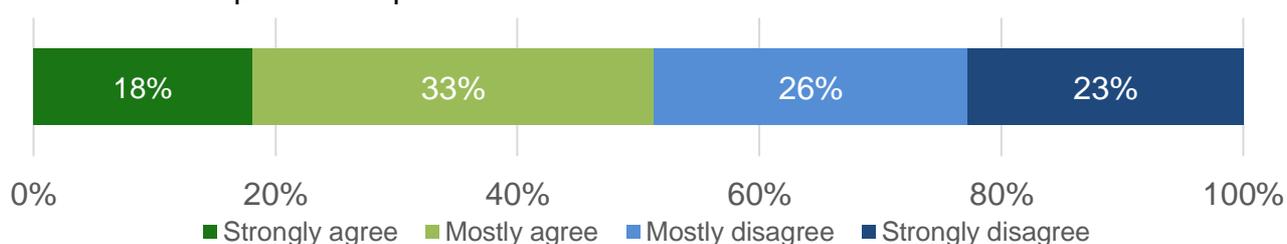
“Reform is disproportionate to the small number of cases involved. Merging the tribunal systems into the generic courts system will lead to loss of specialist expertise.” (Individual)

“The case for incorporation into SCTS is not clear. Other professional disciplinary tribunals are not part of the SCTS... Another major question would relate to funding of the Tribunal if it was to be incorporated into the SCTS. At present the SSDT is funded by the Law Society of Scotland and so the costs of operation are borne by the profession at large. Should the tribunal be funded by general taxation in the absence of any real case for change? The cost and administrative burden of incorporation might also not be justifiable for a Tribunal which deals with around 40 cases a year...” (Organisation, Legal Services Regulatory Body)

## Question 53

**Q53. To what extent do you agree or disagree that any future legal complaints model should incorporate the requirement for the complaints budget to require the approval of the Scottish Parliament?**

Chart 53: Responses to question 53



Base: 97

Around half (51%, n=50) of those who provided a rating agreed that any future legal complaints model should incorporate the requirement for the complaints budget to require the approval of the Scottish Parliament, while 49% (n=47) disagreed.

For those who agreed, this was felt to be a positive and sensible step which would provide public scrutiny, transparency and accountability. It would offer reassurance that the complaints system was being funded properly, fairly and efficiently.

A few agreed in general terms with there being a need to provide scrutiny in relation to the SLCC/complaints budget, but were resistant to the Scottish Parliament performing this role. It was felt this would undermine the independence of the legal profession:

“There are issues around the setting of the SLCC budget which need to be addressed. It is perhaps better dealt with outside Parliament but there is a need for checks and balances in that process. We agree... that to help preserve the independence of the profession, Parliament should not have control over the budget that is set for dealing with conduct complaints.” (Organisation, Legal Services Provider)

This was also a key issue for many who disagreed with the proposal. It was argued that oversight of the complaints budget by the Scottish Parliament could infringe upon, or be perceived as influencing, the independence of the legal system. Therefore, another independent body should be sought - with a few suggesting the Lord President as an option:

“We believe that scrutiny and approval of the SLCC complaints budget should be independent of the Parliament and the executive to demonstrate full transparency that would have the confidence of the regulated population and consumers alike. We suggest that there may be potential for the Lord President, as the independent head of the judiciary and courts services, to play a role in this or, alternatively, another independent third party... Under this proposal, the state, via the Scottish Parliament, would have an ability to directly influence the activity of the regulator through approval of its budget.” (Organisation, Professional Body, Law Society of Scotland)

A few in support of the proposal also caveated that the need for such an approval system would depend on the regulatory model implemented. It was suggested that Parliamentary approval would be required if a new, independent regulator receiving public funds were created, but it was not required for a system where complaints are handled by professional bodies, as this was self-funded by the profession:

“It depends on the model. If complaints are handled by the Law Society and the Faculty this wouldn't be necessary as the complaints budget comes as part of a direct ask of members to contribute to the organisational running costs. It is only when a third organisation creates a levy that there needs to be this additional scrutiny of the budget.” (Individual)

Again, this was another key reason given by respondents who disagreed with the proposal - they felt that the current system, of levies on the profession to pay for the complaints system

should continue, that this was a matter for the profession, and therefore it was inappropriate or unnecessary for Parliament to approve this:

“[The SLCC] budget does not come from the block grant administered by Parliament (as is the case for bodies subject to this type of budget approval), but from the profession, which makes this approval seem inappropriate... It would not be consistent with the arrangements in other professions, for example the General Medical Council, General Dental Council, or the General Teaching Council for Scotland. All these bodies have a model similar to the SLCC due to the concerns about the independence of the regulatory model.”  
(Consumer Organisation, Public Body/Sector)

## Question 54

**Q54. From the options listed how important do you think each of the following principles and objectives are for any future regulatory model?**

The chart below shows that, across all options provided, most respondents felt that the listed principles and objectives were either ‘very’ or ‘somewhat important’ for any future regulatory model.

Those elements which generated the greatest levels of support included:

- Model 1: Uphold the rule of law and the proper administration of justice - 100% felt this was important overall (91% felt this was very important);
- Model 1: Provide access to justice - 98% felt this was important overall (80% indicated this was very important);
- Model 1: Transparent, publish a range of information including decision criteria, complaints data and outcomes of cases. Be able to advise on trends and issues emerging from first tier complaints - 96% felt this was important overall (91% indicated this was very important); and
- Model 1: Provide prompt resolution, proportionate to the complexity of the complaint - 95% felt this was important overall (74% said it was very important).

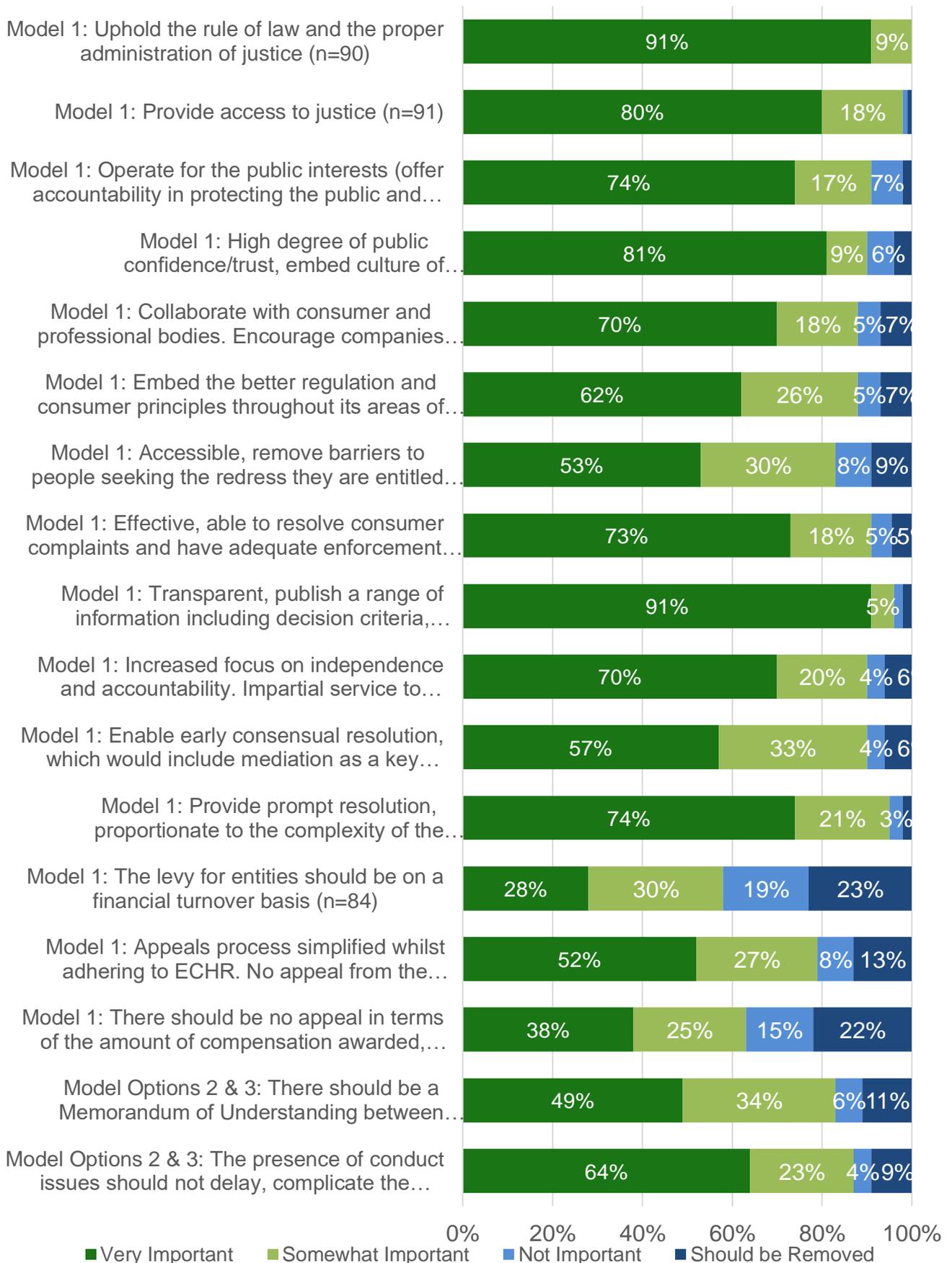
Those elements which received the lowest levels of support and greatest proportions of respondents who indicated they were either ‘not important’ or ‘should be removed’, included:

- Model 1: The levy for entities should be on a financial turnover basis - 42% saw this more negatively (19% indicated this was not important and 23% said this should be removed); and
- Model 1: There should be no appeal in terms of the amount of compensation awarded, similar to other professions - 37% saw this more negatively (15% said this was not important and 22% felt this should be removed).

While ‘Model 1: Appeals process simplified while adhering to ECHR. No appeal from the Complaints Ombudsman, but the ability to appeal to the Court of Session in relation to misconduct’ was generally supported by 79% of respondents, the use of the Court of Session for appeals was seen less favourably in the five focus groups where this was discussed. The Court of Session was generally considered to be too expensive, for both consumers and legal professionals, therefore limiting access to justice. A few suggested that the Court of Session was an inappropriate setting, preferring instead the Sheriff Court and Sheriff

Principal to hear appeals, and that virtual systems should be used. Others preferred a Tribunal system to handle appeals.

Chart 54: Responses to question 54



A few respondents (who provided non-standard responses) also offered unique qualitative comments, either to set out their reasons for supporting some/all of the above principles and objectives, to caveat in which circumstances they would support each one, or to outline whether they perceived that the different regulatory models set out in the consultation document would enhance or undermine these.

# Other Comments

## Lack of Consideration for Different Sectors of the Profession

Concerns were raised across the written consultation responses and in the focus groups about the perceived lack of consideration or clarity around how the regulatory models would operate for different sectors, in particular between solicitors and advocates, as well as for in-house solicitors and the not-for-profit sector.

A few felt that the consultation paper, and the proposed reforms more generally, were focused on solicitors rather than advocates. However, it was highlighted that these two professional strands needed to be considered differently due to their differing roles and client relationships.

It was also noted that there had been changes to the legal profession's structure, with increasing numbers of solicitors now working in-house for firms and across the public sector. Respondents felt this was not well reflected in either the Robertson Report or the consultation document/proposals for reform, and suggested that different regulatory models may be required for private practice and in-house arrangements.

Others highlighted the need for better consideration of the not-for-profit sector, noting that they were over-regulated, being subject to both the legal sector regulations and charity sector regulations. This was considered to be a barrier to establishing Law Centres/not-for-profit providers and needed to be considered within any review or reforms.

Similarly, one focus group respondent also highlighted the Scottish Legal Aid Board's (SLAB) role in providing access to justice, as well as their complaints procedure, and felt that they also needed to be reflected in the consultation document or any review of legal services regulation.

## Consideration of Minority/Vulnerable Groups

A few organisations representing minority and/or vulnerable groups responded to the consultation - this included Disabled People's Organisations (DPOs) (for both working in and trying to access legal services), and those representing survivors of domestic abuse (mostly women and children). These respondents highlighted limitations, restrictions and impacts of the current system on these populations, and stressed that they needed to be carefully considered within any reforms.

It was also felt that the consultation document largely overlooked the needs and possible impacts of changes on such vulnerable groups, and that, despite the inclusion of the summary consultation paper and focus groups, it was not well tailored to be accessible to such individuals.

## **Lack of Evidence Underpinning Case for Change**

Despite the papers by the Law Society of Scotland<sup>7</sup>, the Scottish Legal Complaints Commission<sup>8</sup>, and the Competition and Markets Authority's research report<sup>9</sup>, a number of respondents, typically those opposed to the Robertson Model, argued that there was a lack of evidence presented to support the need for the proposed regulatory reform. This was a criticism levied at the Robertson Report, and which was considered to have been replicated in the consultation document.

It was argued that there was no proper evaluation of the current system, as well as no evaluation of the systems adopted in other jurisdictions (particularly in England and Wales) or sufficient justification of why such alternatives would be suitable in the Scottish context. Further, it was felt there had been a lack of public input to the Robertson Report, a lack of Scottish based evidence, and that what had been presented was based on the experiences of small samples which were not representative of the total population of Scottish consumers.

## **Difficulties Responding to the Consultation Questions**

Although a summary consultation paper was included, several respondents noted difficulty with some of the consultation questions contained in the written consultation document. This included a lack of adequate discussion or framing of issues/questions, a lack of definitions for certain terms/elements/concepts, confusion around what was meant by certain terms or suggestions, confusion over how questions and response options should be interpreted, etc. A few also felt that some of the questions and response options contained bias or were leading, in that they assumed a preference for the model under discussion, with closed questions in particular failing to offer any neutral response options or any way to identify overall disagreement with the wider concept being discussed.

The length of the consultation, and technical nature of some of the sections, may also have presented a barrier to some taking part. This was the case for both lay persons who may have found the consultation too complex, and for professionals who may have struggled to dedicate the time required for completion:

“I am not an inexperienced individual having had a long career with multiple senior roles - yet I found the process extraordinarily difficult and time-consuming. I cannot see how many members of the public could successfully navigate this process.” (Individual)

A few felt there was a lack of clarity around how some of the models, or aspects of the regulatory framework, would operate. Many also refused to believe that the costs to establish and maintain all three options would be cost neutral. It was argued that a costing exercise needed to be undertaken and shared to allow fully informed feedback and decision making. Several also felt that the consultation did not tackle some of the key issues or overlooked issues which both consumers and professionals face in the current system:

“Lots of vague and pointless questions which again ignore the issues consumers have with the current system. The SLCC needs

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<sup>7</sup> [The Law Society of Scotland \(2015\) The Solicitors \(Scotland\) Act 1980: The Case for Change \(lawscot.org.uk\)](http://lawscot.org.uk)

<sup>8</sup> [Reimagine Regulation \(scottishlegalcomplaints.org.uk\)](http://scottishlegalcomplaints.org.uk)

<sup>9</sup> [7 CMA's Legal Services in Scotland Research Report 2020](#)

completely scrapped and the Law Society should have no say in the running of the new body, which needs to have consumers who have been through the complaints process on the board.” (Individual)

# Conclusions

## Cross Cutting Issues and Key Findings

There was strong agreement that almost all of the objectives and priorities for regulation of legal services as set out across the consultation document were either very or somewhat important. However, there was a mixed picture in terms of how respondents felt changes or consolidation should be achieved and who should have responsibility for the different regulatory aspects.

The consultation feedback tended to show no clear consensus with regards to either the Robertson Report's primary recommendation, or which regulatory model would be preferred and welcomed by both consumers and the profession alike.

While there was a higher number of respondents who were against Option 1 (The Robertson Model) and preferred Option 3 (The Enhanced Accountability and Transparency Model), caution is required when interpreting the results presented in this report due to the risk of sample structure bias. Those responding from within the profession tended (although not unanimously) to advocate for Option 3 and/or be strongly against Option 1, while consumers and those representing them tended to prefer Option 1 and be strongly against Option 3 (although again not unanimously). Should a greater number of legal professionals have responded than consumers, this could have driven the results.

Those who were opposed to the Robertson Model tended to feel that this would risk undermining the various principles and objectives set out by the consultation document. They argued that this would also fundamentally impact on the independence of the legal profession in Scotland due to Scottish Government/ Parliament input to the new regulator, thus negatively impacting on access to justice as well as the profession's international reputation. It was also felt that this model would result in increased costs, which would ultimately be passed on to the consumer. Further, it was felt that there was little evidence provided (either in the Robertson Report or the consultation document) to justify the need for such radical reforms, with many considering that any necessary changes could be more easily and efficiently incorporated into the existing framework. There were also concerns that such a model would limit the need for, and impactfulness of, the current professional bodies. Conversely, those in favour of the Robertson Model, urged the Scottish Government to be "brave" and "bold" when reforming the system, suggesting that more radical reform and a new framework was required rather than "tinkering" or adding further "layers of bureaucracy". These respondents were attracted to the independence from the legal profession that this model would bring, and it was considered to address concerns around bias and conflicts of interest which were perceived as afflicting the current system. It was argued that this would be fairer to consumers and engender greater transparency, accountability and trust in the system. Further, it was felt that the Robertson Model provided a more modern approach that placed consumer rights at the centre.

Option 2 (The Market Regulator Model) emerged as the agreed middle-ground, however, caution is again required. As the level of support for the options presented was not measured, simply the order in which respondents would place them in terms of preference, it is not known how much support this option would receive if proposed for implementation. Indeed, several indicated this option was only marginally better than their last place choice, and therefore it may not receive significant levels of support from any side.

Regardless of the extent of any future changes to the regulatory structure or the option chosen, one key area which was consistently highlighted as requiring reform was the approach to complaints and how these are handled. This was discussed as a reason for supporting Option 1 (The Robertson Model) and was flagged as an issue that needed to be addressed within any implementation of Option 3 (The Enhanced Accountability and Transparency Model). While there was general consensus over some proposals around how to reform this element, such as in providing a single gateway for complaints, views were again generally polarised regarding how and who should deal with complaints once they have been submitted.

A final point of agreement was the need for any future model to be transparent, open to public scrutiny and efficient (including being fair to providers of all sizes) to ensure that justice remains accessible to all. All respondents, regardless of affiliation, shared this as a common aspiration.

## **Concluding Remarks**

The consultation findings provide consideration of the different regulatory models and supporting proposals, as well as the 'for and against' arguments made in relation to each. Some aspects/proposals were generally well supported, for example: the need for a baseline survey of consumers; the importance of the role of the Lord President in the regulatory framework; the testing of non-lawyer owners and managers of legal entities to be fit and proper persons; continuation of the Client Protection Fund; the need for a clear definition of legal services; and the need for entity regulation. However, views on other issues, as well as how to achieve those aspects which generated general agreement, were more mixed and often polarised. It may be that further engagement would be beneficial with both the legal profession and consumers to develop a solution which would be more widely supported by both sides.

The purpose of this report, however, was not to make recommendations over which regulatory model should be taken forward, but rather to collate and present the feedback from stakeholders on their views resulting from the consultation. The Scottish Government will continue to explore the best way forward with regulatory reform in the legal sector, considering the findings from both this consultation and other work in the area.

# Appendix A: Proposed Regulatory Models

Options 1-3 below have been reproduced from the consultation paper for ease of reference.

## Option 1: Robertson Model

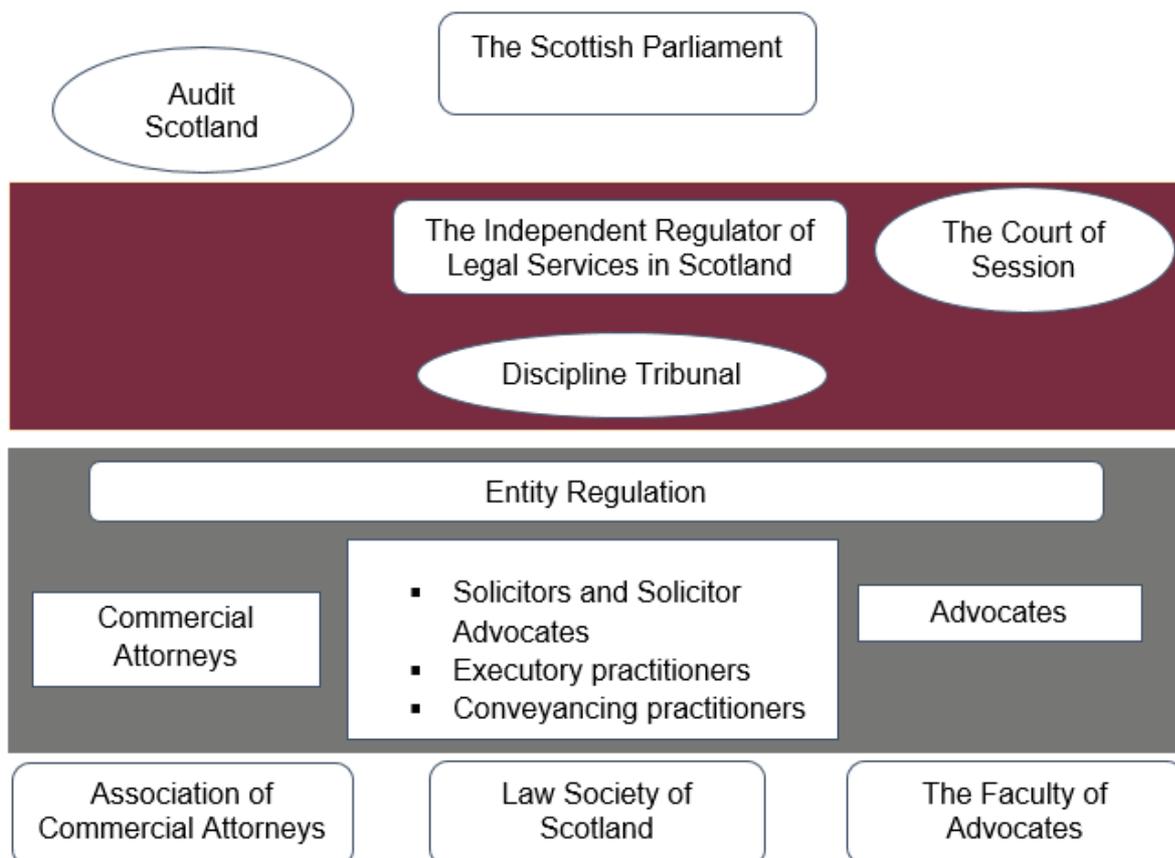


Chart 55: Robertson Model

### Key points of the Option 1 model

This model is the primary recommendation of the Robertson report.

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

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

That new body would be funded through a levy on those it regulated, the legal profession. The cost to the profession would be intended to be no more than the current system. Current regulators, The Law Society of Scotland, The Faculty of Advocates, and The Association of Commercial Attorneys, would no longer have regulatory roles. Instead they would be invited to work with the new independent regulator as professional organisations.

## Option 2: Market Regulator Model

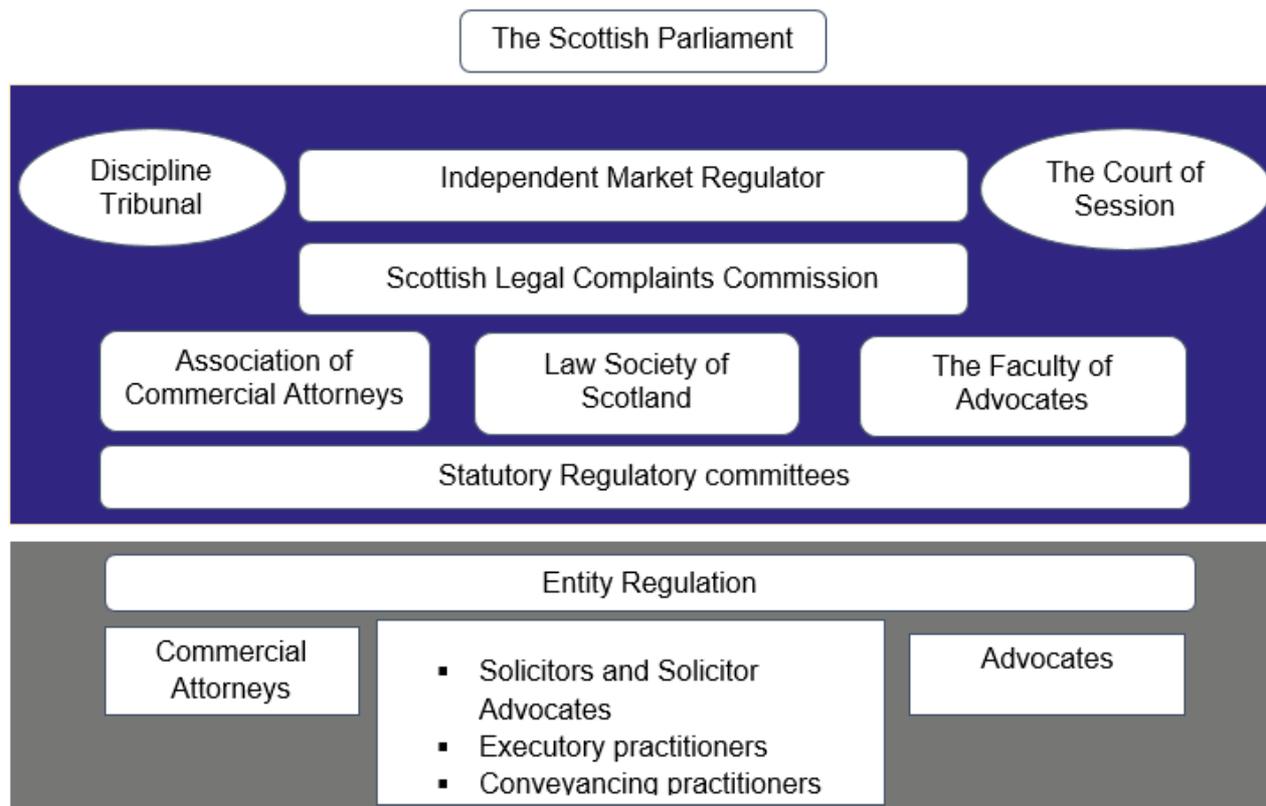


Chart 56: Market Regulator Model

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

### The role of a market regulator:

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

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

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

### Key points of the Option 2 model

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

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

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

### Option 3: Enhanced Accountability and Transparency Model

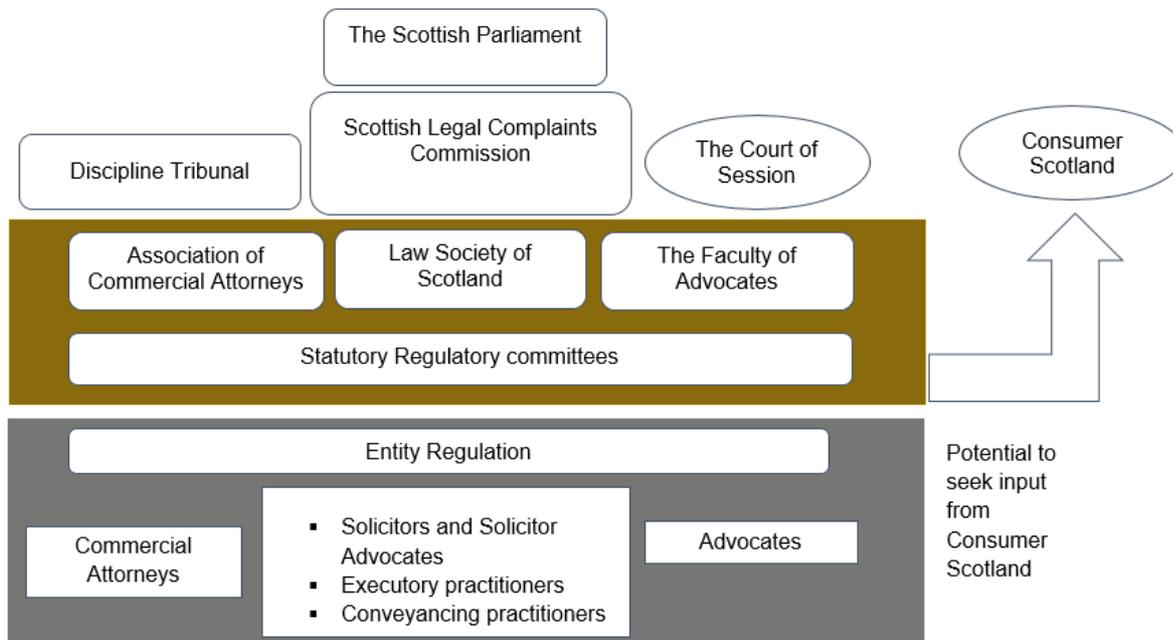


Chart 57: Enhanced Accountability and Transparency Model

#### Key Points of the Option 3 model

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

The SLCC would continue to handle complaints. The extent and form of accountability, and the complaints process would be informed by the views expressed to this consultation. The regulators and SLCC would be funded through a levy on those regulated, the legal profession, with the cost intended to be no more than the current system.

#### Option 3+: Proposed by the Law Society of Scotland

The Law Society of Scotland detailed an alternative proposal for the regulatory system in their consultation response, which constituted an enhanced Option 3 and was referred to as Option 3+. This has been reproduced here as a number of other respondents also endorsed and supported this:

“We support Option 3 but would like to strongly enhance this model to address the real problems and real concerns within the current regulatory regime. This includes:

- “A radical overhaul of the complaints system, widely seen as failing consumers and the profession, by moving to a system which is quick, agile and treats all parties fairly. The Scottish Government should transform the Scottish Legal Complaints Commission into a proper Scottish Legal Ombudsman Service which could concentrate more effectively on dealing with consumer complaints thoroughly and swiftly. This would, in turn, allow the Law Society to continue its strong track record of protecting the public interest by addressing issues of professional misconduct and prosecuting disciplinary

breaches. This is the kind of system which already exists and works well in England and Wales and was recently adopted in Northern Ireland.

- “Changes to the way our already independent Regulatory Committee is populated and making it more accountable for its work.
- “An important move towards entity regulation, which would create a regulatory system more relevant and more applicable to modern legal practice and provide the Law Society with a broader range of powers to take action when we need to. This could also be used to address the need for more robust regulation around the use of artificial intelligence and other technology in the delivery of legal services.
- “Action to tackle the unregulated legal services market, which puts consumers at risk, an issue which the consultation paper regrettably fails to discuss or adequately recognise. This is disappointing as this current review presents possibly the only opportunity to address problems and risks associated from unregulated legal services.
- “New powers to allow cross-border regulation, a change which can position Scotland as a more attractive jurisdiction in which legal firms can be based and offer the chance to grow inward investment and jobs.”

### **Reformed Complaints System**

Part of the Law Society of Scotland’s Option 3+ system also focused on an alternative complaints system. This contained elements of the model in England and Wales between the Legal Ombudsman Service (LeO) and the Solicitors Regulation Authority (SRA), and is reproduced from the Law Society of Scotland’s response below:

- “The SLCC is replaced with SLOS [a Scottish Legal Ombudsman Service]. This body would focus on handling complaints from consumers and ensure a speedy resolution or, if a formal determination is needed, appropriate redress. In line with the recommendations of the Robertson report, we suggest the Chair of SLOS be subject to the public appointment process and be required to lay an annual report before the Scottish Parliament. The office of the Lord President would oversee SLOS (see below).
- “SLOS would handle service complaints, with the [Law] Society (or respective co-regulators, such as the Faculty of Advocates) handling conduct complaints. This recognises the differences between consumer redress complaints and conduct concerns, which engage issues of public protection and public confidence in the profession.
- “The single gateway for consumer complaints would be retained and SLOS would act as the gateway. However, the Law Society would be able to proceed to investigate conduct concerns without first seeking approval from the SLOS (as we currently must do with the SLCC). This would ultimately allow us to take action quicker, minimising risks to the public. In addition, as with the SRA and LeO, there would be a Memorandum of Understanding between the Law Society and SLOS to address the mechanics of eligibility of conduct complaints and cross-referral of service issues.
- “There would be a speedier process to decide which complaints are investigated, replacing the current cumbersome set of statutory ‘eligibility’

tests which a complaint must pass through. The different bodies would need to apply the same eligibility tests for conduct complaints. The principles to be applied in accepting a conduct complaint for investigation could be included in the legislation. The underlying mechanics of the eligibility tests, responsibility and referrals between the different bodies could be dealt with through Memoranda of Understanding, as is the case in England and Wales. This would allow the different bodies to develop a more flexible and proportionate approach, similar to the approach the SRA adopt in their enforcement strategy.

- “Hybrid complaints would be reintroduced.
- “There would be powers to award compensation in relation to both service complaints and conduct complaints.
- “The SLOS would have the power to award compensation in relation to service complaints where an aspect of consumer redress is required.
- “Given the limited size of the Scottish jurisdiction, we are of the view the Office of the Lord President (LP) should adopt an oversight role over both the SLOS and the professional bodies within the legal sector. This would be similar to the role which the LP currently has in overseeing the Scottish Solicitors’ Discipline Tribunal (SSDT). In addition to oversight, we suggest that the LP would be responsible for receiving and investigating handling complaints about SLOS or the professional bodies. This reflects the important role of the Lord President as the independent head of the Scottish legal profession and is a system which works well elsewhere.
- “The appeals process would be simplified, while remaining compliant with the European Convention on Human Rights. In keeping with other regulatory ombudsmen and alternative dispute resolution schemes, service complaint decisions would be binding on regulated professionals, subject to judicial review. Appeals of conduct complaint decisions would be heard by the Court of Session.
- “We support the principle of there being an independent disciplinary tribunal which is separate to the professional bodies and takes decisions in the most serious of cases against Scottish solicitors. This tribunal would sit outside the Scottish Courts and Tribunals Service. We believe the current arrangements where we act as prosecutor before the SSDT in cases of professional misconduct works effectively. This is evidenced by the number of cases which we bring before the SSDT under our own initiative. Over the past five years, 33% of the complaints we have prosecuted at the SSDT arose from complaints we initiated.”

The Law Society of Scotland also stated that:

“There must be more permissive legislation underpinning this model. This is the approach the Scottish Parliament has adopted with professional regulators in other devolved areas, and it has worked well. For example, the modern legislation underpinning the General Teaching Council for Scotland (GTCS) and the Scottish Social Services Council (SSSC) serves as a stark contrast to the

patchwork quilt of complex legislation underpinning legal regulation. Over the past 10 years, these two regulators have introduced various innovations including changing to fitness to practise models of regulation, developing thresholds for investigating cases and implementing consensual disposal for cases. It should be noted that the GTCS, like us, is a regulating professional body. This underlines our key point: the current problems are not caused by the model of regulation or who is regulating - they are caused by overly prescriptive process set out in law.”

## Appendix B Quantitative Results

Q1 From the options listed, how important do you think each of the following principles and objectives are for any future regulatory model for legal services in Scotland?

Table 2.1: Responses to question 1

	Very Important		Somewhat Important		Not Important		Should be Removed		Total
	Number	%	Number	%	Number	%	Number	%	
Q1a Protecting and promoting the public interest including the interests of users of legal services	87	91%	5	5%	2	2%	2	2%	96
Q1b Supporting the constitutional principle of the rule of law	89	92%	4	4%	4	4%	0	0%	97
Q1c Promoting independent legal professions and maintaining adherence to the professional principles	81	85%	9	9%	2	2%	4	4%	96
Q1d Improving access to justice including choice, accessibility, affordability and understanding of services by service users	72	74%	17	18%	6	6%	2	2%	97
Q1e Embedding a modern culture of prevention, quality assurance and compliance	58	61%	28	29%	4	4%	6	6%	96

	Very Important		Somewhat Important		Not Important		Should be Removed		Total
Q1f Working collaboratively with consumer, legal professional bodies, and representatives of legal service providers as appropriate	45	47%	37	39%	5	5%	8	9%	95
Q1g Embedding the better regulation principles throughout its areas of responsibility (additionality; agility, independence, prevention, improvement, cost consideration of cost, and efficiency)	53	56%	31	33%	2	2%	8	9%	94
Q1h Promoting innovation, diversity and competition in the provision of legal services	40	43%	34	36%	8	8%	12	13%	94

Q2 From the options listed, how important do you think each of the following are in supporting the framework of any future regulatory model?

Table 2.2: Responses to question 2

	Very Important		Somewhat Important		Not Important		Should be Removed		Total
	Number	%	Number	%	Number	%	Number	%	
Q2a Enable access to justice including choice and diversity	72	75%	18	19%	2	2%	4	4%	96
Q2b Uphold the rule of law and the proper administration of justice	89	93%	6	6%	1	1%	0	0%	96
Q2c Offer accountability in protecting the public and consumer interest	81	86%	10	11%	2	2%	1	1%	94
Q2d Offer accountability to those regulated by the framework	76	80%	14	15%	0	0%	5	5%	95
Q2e Secure the confidence and trust of the public	80	84%	11	12%	3	3%	1	1%	95
Q2f Enable future growth of legal services	43	47%	33	36%	9	10%	7	7%	92

Q3 From the options listed, how important do you think each of the following criteria is in a regulatory framework?

Table 2.3: Responses to question 3

	Very Important		Somewhat Important		Not Important		Should be Removed		Total
	Number	%	Number	%	Number	%	Number	%	
Q3a Support and promote sustainable legal services, which benefit consumers	69	74%	18	19%	2	2%	5	5%	94
Q3b Agile	38	43%	38	43%	7	8%	6	6%	89
Q3c Risk based	42	48%	34	38%	5	6%	7	8%	88
Q3d Efficient	65	74%	18	20%	2	2%	3	4%	88
Q3e Outcomes based	41	46%	35	39%	5	6%	8	9%	89
Q3f A proactive focus continuous improvement and prevention of failures (which lead to complaints)	52	56%	31	33%	4	4%	6	7%	93
Q3g Proportionality	61	66%	22	24%	3	3%	6	7%	92
Q3h An increased focus on independence and accountability	55	59%	28	30%	3	3%	7	8%	93

Q4 To what extent do you agree or disagree with [the primary] recommendation [in the Robertson Report]?

Table 2.4: Responses to question 4

	Number	Percent
Strongly Agree	39	35%
Mostly Agree	16	14%
Mostly Disagree	11	10%
Strongly Disagree	45	41%
Total	111	100%

Q5 Of the three regulatory models described, which one would you prefer to see implemented?

Table 2.5: Responses to question 5

	Number	Percent
Option 1: Robertson Model	46	38%
Option 2: Market Regulator Model	8	7%
Option 3: Enhanced accountability and transparency model	66	55%
Total	120	100%

Q6 Of the three regulatory models described above, please rank them in the order you would most like to see implemented?

Table 2.6: Responses to question 6

	Option 1: Robertson Model		Option 2: Market Regulator Model		Option 3: Enhanced accountability and transparency model	
	Number	Percent	Number	Percent	Number	Percent
Ranked First	42	42%	7	7%	61	60%
Ranked Second	7	7%	77	82%	9	9%
Ranked Third	51	51%	10	11%	32	31%
Total	100	100%	94	100%	102	100%

Q7. Please rank in importance the aspects of regulation you would most like to see handled by professional regulatory bodies, through independent regulatory committees? (1 most liked to see handled and 3 least liked to see handled)

Table 2.7: Responses to question 7

	Education and entry		Oversight of standards and conduct		Complaints and redress	
	Number	Percent	Number	Percent	Number	Percent
Ranked First	31	37%	26	31%	28	33%
Ranked Second	14	17%	47	57%	21	25%
Ranked Third	38	46%	10	12%	35	42%
Total	83	100%	83	100%	84	100%

Q8 Of the three models described above, please rank in importance the aspects of regulation you would most like to see handled by a body independent of, and external to the professional regulatory bodies, and of government? (1 most liked to see handled and 3 least liked to see handled)

Table 2.8: Responses to question 8

	Education and entry		Oversight of standards and conduct		Complaints and redress	
	Number	Percent	Number	Percent	Number	Percent
Ranked First	16	21%	16	21%	47	60%
Ranked Second	17	22%	44	57%	15	19%
Ranked Third	44	57%	17	22%	16	21%
Total	77	100%	77	100%	78	100%

Q9 Under the Robertson Model, to what extent do you agree or disagree that the professional bodies should have a statutory footing?

Table 2.9: Responses to question 9

	Number	Percent
Strongly Agree	30	37%
Mostly Agree	25	30%
Mostly Disagree	13	16%
Strongly Disagree	14	17%
Total	82	100%

Q10 Which of the following methods do you think the final regulatory model should utilise to embed a consumer voice?

Table 2.10: Responses to question 10

	Number	Percent
A requirement for consumer expertise within regulatory committees	21	25%
Through a consumer panel	13	15%
Seeking input from Consumer Scotland	9	11%
A combination (please specify)	42	49%
Total	85	100%

Q11 To what extent do you agree or disagree that Consumer Scotland should be given the power to make a Super-Complaint in respect of the regulation of legal services in Scotland?

Table 2.11: Responses to question 11

	Number	Percent
Strongly Agree	23	27%
Mostly Agree	25	29%
Mostly Disagree	12	14%
Strongly Disagree	26	30%
Total	86	100%

Q12 To what extent do you agree or disagree that a baseline survey of legal services consumers in Scotland should be undertaken?

Table 2.12: Responses to question 12

	Number	Percent
Strongly Agree	27	31%
Mostly Agree	27	31%
Mostly Disagree	19	22%
Strongly Disagree	13	15%
Total	86	100%

Q13 To what extent do you agree or disagree with the Robertson report, that the legislative approach should make clear the role of the Lord President and the Court of Session in the regulatory framework?

Table 2.13: Responses to question 13

	Number	Percent
Strongly Agree	61	61%
Mostly Agree	23	23%
Mostly Disagree	8	8%
Strongly Disagree	8	8%
Total	100	100%

Q14 To what extent do you agree or disagree that the role of the Lord President and Court of Session in the regulatory framework in Scotland is important in safeguarding the independence of the legal profession?

Table 2.14: Responses to question 14

	Number	Percent
Strongly Agree	64	65%
Mostly Agree	19	19%
Mostly Disagree	7	7%
Strongly Disagree	8	8%
Total	98	100%

Q15 Should the Lord President and Court of Session have a 'consultative' role, or 'consent' role with regard to the following potential changes to the operation of any new regulatory framework?

Table 2.15: Responses to question 15

	Changes to professional rules: practice rules, conduct and discipline		Changes in relation to complaints practice and procedure		New entrants to the market seeking to conduct of litigation and exercise right of audience	
	Number	Percent	Number	Percent	Number	Percent
Consent	39	51%	28	38%	37	50%
Consultative	37	49%	46	62%	37	50%
Total	76	100%	74	100%	74	100%

Q16a To what extent do you agree or disagree that the Lord President should have a role in any new regulatory framework in arbitrating any disagreements between independent Regulatory Committees and the professional regulatory bodies?

Table 2.16: Responses to question 16

	Number	Percent
Strongly Agree	41	43%
Mostly Agree	26	28%
Mostly Disagree	13	14%
Strongly Disagree	14	15%
Total	94	100%

Q17 To what extent do you agree or disagree that the Lord President should have a role in the process of appointment of any new 'legal members' to relevant positions, such as regulatory committees, in any new regulatory framework?

Table 2.17: Responses to question 17

	Number	Percent
Strongly Agree	16	22%
Mostly Agree	20	27%
Mostly Disagree	18	25%
Strongly Disagree	19	26%
Total	73	100%

Q18 To what extent do you agree or disagree that regulatory committees, as described in the consultation, should be incorporated into any future regulatory framework?

Table 2.18: Responses to question 18

	Number	Percent
Strongly Agree	34	40%
Mostly Agree	23	27%
Mostly Disagree	10	12%
Strongly Disagree	18	21%
Total	85	100%

Q19 To what extent do you agree or disagree that Regulators should be required by statute to ensure that Regulatory Committees are suitably resourced, with a certain quota of persons being exclusively ring-fenced for dealing with regulation?

Table 2.19: Responses to question 19

	Number	Percent
Strongly Agree	31	38%
Mostly Agree	18	22%
Mostly Disagree	21	26%
Strongly Disagree	11	14%
Total	81	100%

Q20 To what extent do you agree or disagree that regulatory functions of Regulatory Committees should be subject to Freedom of Information legislation or requests?

Table 2.20: Responses to question 20

	Number	Percent
Strongly Agree	40	46%
Mostly Agree	18	20%
Mostly Disagree	12	14%
Strongly Disagree	18	20%
Total	88	100%

Q21 To what extent do you agree or disagree that the following aspects of 'fitness to practice' requirements or regulations are appropriate and working well in Scotland?

Table 2.21: Responses to question 21

	Strongly agree		Mostly agree		Mostly disagree		Strongly disagree		Total
	Number	%	Number	%	Number	%	Number	%	
Q21a Content of the criteria	40	45%	36	40%	5	6%	8	9%	89
Q21b Frequency of career points where the criteria must be satisfied	34	38%	38	43%	8	9%	9	10%	89
Q21c Transparency and fairness in decision making	35	40%	38	44%	5	6%	9	10%	87

Q23 To what extent do you agree or disagree that there should be a test to ensure that non-lawyer owners and managers of legal entities are fit and proper persons?

Table 2.23: Responses to question 23

	Number	Percent
Strongly Agree	79	77%
Mostly Agree	18	17%
Mostly Disagree	2	2%
Strongly Disagree	4	4%
Total	103	100%

Q24 To what extent do you agree or disagree that Legal Tech should be included within the definition of 'legal services'

Table 2.24: Responses to question 24

	Number	Percent
Strongly Agree	25	29%
Mostly Agree	44	50%
Mostly Disagree	12	14%
Strongly Disagree	6	7%
Total	87	100%

Q25 To what extent do you agree or disagree that those who facilitate and provide Legal Tech legal services should be included within the regulatory framework if they are not so already?

Table 2.25: Responses to question 25

	Number	Percent
Strongly Agree	34	40%
Mostly Agree	24	29%
Mostly Disagree	18	21%
Strongly Disagree	8	10%
Total	84	100%

Q26 To what extent do you agree or disagree that, not including legal tech may narrow the scope of regulation, and reduce protection of consumers?

Table 2.26: Responses to question 26

	Number	Percent
Strongly Agree	35	43%
Mostly Agree	20	24%
Mostly Disagree	16	20%
Strongly Disagree	11	13%
Total	82	100%

Q27 To what extent do you agree or disagree that the inclusion of legal tech in a regulatory framework assists in the strength, sustainability and flexibility of regulation of legal services?

Table 2.27: Responses to question 27

	Number	Percent
Strongly Agree	37	44%
Mostly Agree	32	38%
Mostly Disagree	8	9%
Strongly Disagree	8	9%
Total	85	100%

Q28 To what extent do you agree or disagree that the Scottish regulatory framework should allow for the use of Regulatory Sandboxes to promote innovation?

Table 2.28: Responses to question 28

	Number	Percent
Strongly Agree	20	25%
Mostly Agree	25	31%
Mostly Disagree	14	18%
Strongly Disagree	21	26%
Total	80	100%

Q29 To what extent do you agree or disagree that the Client Protection Fund works well?

Table 2.29: Responses to question 29

	Number	Percent
Strongly Agree	40	51%
Mostly Agree	22	28%
Mostly Disagree	8	10%
Strongly Disagree	9	11%
Total	79	100%

Q31 To what extent do you agree or disagree that any future regulatory model should incorporate a greater emphasis on quality assurance, prevention and continuous improvement than the current model provides?

Table 2.31: Responses to question 31

	Number	Percent
Strongly Agree	50	56%
Mostly Agree	23	25%
Mostly Disagree	10	11%
Strongly Disagree	7	8%
Total	90	100%

Q32 To what extent do you agree or disagree that the rules within the regulatory framework should be simplified with the aim of making them more proportionate and consumer friendly?

Table 2.32: Responses to question 32

	Number	Percent
Strongly Agree	46	51%
Mostly Agree	27	30%
Mostly Disagree	11	12%
Strongly Disagree	6	7%
Total	90	100%

Q33 Which of the following methods do you think regulatory model should incorporate to provide quality assurance and continuous improvement?

Table 2.33: Responses to question 33

	Number	Percent
Peer review	10	12%
A system of self-assessment for all legal professionals	13	16%
Both of these	37	45%
Neither, or other	22	27%
Total	82	100%

Q34 To what extent do you agree or disagree that there should be a definition of legal services?

Table 2.34: Responses to question 34

	Number	Percent
Strongly Agree	54	58%
Mostly Agree	28	30%
Mostly Disagree	4	4%
Strongly Disagree	7	8%
Total	93	100%

Q35 To what extent do you agree or disagree that the definition of legal services should be set out in primary legislation?

Table 2.35: Responses to question 35

	Number	Percent
Strongly Agree	52	58%
Mostly Agree	22	24%
Mostly Disagree	11	12%
Strongly Disagree	5	6%
Total	90	100%

Q36 To what extent do you agree or disagree that there should be no substantial change at this stage to bring more activities within the scope of those activities “reserved” to solicitors or to remove activities?

Table 2.36: Responses to question 36

	Number	Percent
Strongly Agree	30	35%
Mostly Agree	35	41%
Mostly Disagree	9	10%
Strongly Disagree	12	14%
Total	86	100%

Q37 To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated?

Table 2.37: Responses to question 37

	Number	Percent
Strongly Agree	34	38%
Mostly Agree	30	34%
Mostly Disagree	9	10%
Strongly Disagree	16	18%
Total	89	100%

Q38 To what extent do you agree or disagree that there should be a change such that the title 'lawyer' would be given the same protections around it as the title 'solicitor'?

Table 2.38: Responses to question 38

	Number	Percent
Strongly Agree	46	49%
Mostly Agree	22	23%
Mostly Disagree	15	16%
Strongly Disagree	11	12%
Total	94	100%

Q39 To what extent do you agree or disagree that the title 'advocate' should have the same protections around it as the title 'solicitor'?

Table 2.39: Responses to question 39

	Number	Percent
Strongly Agree	38	43%
Mostly Agree	24	27%
Mostly Disagree	18	20%
Strongly Disagree	9	10%
Total	89	100%

Q40 To what extent do you agree or disagree that the legislation should allow for the protection of other titles in relation to legal services as appropriate?

Table 2.40: Responses to question 40

	Number	Percent
Strongly Agree	26	30%
Mostly Agree	37	42%
Mostly Disagree	11	12%
Strongly Disagree	14	16%
Total	88	100%

Q41 To what extent do you agree or disagree that it should be for the regulator(s) to propose to the Scottish Government which titles to protect?

Table 2.41: Responses to question 41

	Number	Percent
Strongly Agree	38	41%
Mostly Agree	30	32%
Mostly Disagree	9	10%
Strongly Disagree	16	17%
Total	93	100%

Q42 To what extent do you agree or disagree that the 51% majority stake rule for Licenced Legal Services Providers should be removed?

Table 2.42: Responses to question 42

	Number	Percent
Strongly Agree	21	28%
Mostly Agree	18	24%
Mostly Disagree	15	20%
Strongly Disagree	21	28%
Total	75	100%

Q43 To what extent do you agree or disagree that entity regulation should be introduced?

Table 2.43: Responses to question 43

	Number	Percent
Strongly Agree	39	47%
Mostly Agree	28	33%
Mostly Disagree	11	13%
Strongly Disagree	6	7%
Total	84	100%

Q44 To what extent do you agree or disagree that all entities providing legal services to the public and corporate entities should be subject to a “fitness to be an entity” test?

Table 2.44: Responses to question 44

	Number	Percent
Strongly Agree	53	62%
Mostly Agree	23	27%
Mostly Disagree	7	8%
Strongly Disagree	2	3%
Total	85	100%

Q45 To what extent do you agree or disagree that, as all lawyers providing legal services will be regulated – entity regulation should engage only those organisations who employ lawyers where those organisations are providing legal services for a profit – with the exclusion that when that legal service is in the context of an organisation whose main purpose is not to provide a legal service (for example banking) then regulation would remain at the level of an individual lawyer only and no entity regulation would apply?

Table 2.45: Responses to question 45

	Number	Percent
Strongly Agree	14	18%
Mostly Agree	38	48%
Mostly Disagree	17	21%
Strongly Disagree	10	13%
Total	79	100%

Q46 To what extent do you agree or disagree that the Scottish Government should commission or facilitate a baseline study to identify the current quantum of the sector's contribution to the economy and to identify those niches in the global market where we might target our efforts?

Table 2.46: Responses to question 46

	Number	Percent
Strongly Agree	22	29%
Mostly Agree	23	30%
Mostly Disagree	18	23%
Strongly Disagree	14	18%
Total	77	100%

Q47 To what extent do you agree or disagree that there should be a single gateway for all legal complaints?

Table 2.47: Responses to question 47

	Number	Percent
Strongly Agree	61	57%
Mostly Agree	32	30%
Mostly Disagree	11	10%
Strongly Disagree	3	3%
Total	107	100%

Q48 Dependant on the regulatory model taken forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, where a complaint is generated by an external complainer such as a client, or non-client?

Table 2.48: Responses to question 48

	Number	Percent
Strongly Agree	48	47%
Mostly Agree	23	23%
Mostly Disagree	13	13%
Strongly Disagree	17	17%
Total	101	100%

Q49 Dependant on the regulatory model take forward, to what extent do you agree or disagree that the professional regulatory bodies should maintain a role in conduct complaint handling, with regard to the investigation and prosecution of regulatory compliance issues?

Table 2.49: Responses to question 49

	Number	Percent
Strongly Agree	52	54%
Mostly Agree	21	22%
Mostly Disagree	8	8%
Strongly Disagree	16	16%
Total	97	100%

Q50 From the complaint issues below please give a preference between the options a) an independent body or; b) a professional regulatory body; who you think should investigate each of the following: Service, Unsatisfactory conduct, Professional misconduct

Table 2.50: Responses to question 50

	Service		Unsatisfactory conduct		Professional misconduct	
	Number	Percent	Number	Percent	Number	Percent
An independent body	55	62%	36	40%	35	39%
A professional body	34	38%	53	60%	54	61%
Total	89	100%	89	100%	89	100%

Q51 To what extent do you agree or disagree that there should be a level of redress for all legal complaints, regardless of regulated activity?

Table 2.51: Responses to question 51

	Number	Percent
Strongly Agree	42	46%
Mostly Agree	37	40%
Mostly Disagree	7	8%
Strongly Disagree	6	6%
Total	92	100%

Q52 To what extent do you agree or disagree that there should be a single Discipline Tribunal for legal professionals, incorporated into the Scottish Courts and Tribunals Service?

Table 2.52: Responses to question 52

	Number	Percent
Strongly Agree	35	36%
Mostly Agree	21	21%
Mostly Disagree	12	12%
Strongly Disagree	30	31%
Total	98	100%

Q53 To what extent do you agree or disagree that any future legal complaints model should incorporate the requirement for the complaints budget to require the approval of the Scottish Parliament?

Table 2.53: Responses to question 53

	Number	Percent
Strongly Agree	18	18%
Mostly Agree	32	33%
Mostly Disagree	25	26%
Strongly Disagree	22	23%
Total	97	100%

Q54 From the options listed how important do you think each of the following principles and objectives are for any future regulatory model?

Table 2.54: Responses to question 54

	Very Important		Somewhat Important		Not Important		Should be Removed		Total
	Number	%	Number	%	Number	%	Number	%	
Q54a Model 1 - Uphold the rule of law and the proper administration of justice	82	91%	8	9%	0	0%	0	0%	90
Q54b Model 1 - Provide access to justice.	73	80%	16	18%	1	1%	1	1%	91
Q54c Model 1 - Operate for the public interests (offer accountability in protecting the public and consumer interest).	66	74%	15	17%	6	7%	2	2%	89
Q54d Model 1 - Have a high degree of public confidence and trust, embedding a modern culture of prevention, continuous quality improvement, quality assurance and compliance. Promote improvements, use information and evidence gathered to identify sector-wide issues.	74	81%	8	9%	5	6%	4	4%	91

	Very Important		Somewhat Important		Not Important		Should be Removed		Total
Q54e Model 1 - Work collaboratively with consumer and legal professional bodies as appropriate. Encourage companies to act on complaints data. Publish guidance, and provide training to help firms and the sector improve complaint handling. Provide support for 1st tier complaints management (be able to provide guidance on handling).	63	70%	16	18%	5	5%	6	7%	90
Q54f Model 1 - Embed the better regulation and consumer principles throughout its areas of responsibility.	56	62%	24	26%	5	5%	6	7%	91
Q54g Model 1 - Accessible, remove barriers to people seeking the redress they are entitled to. There should be a single gateway and investigation for complaints. 3rd party complaints would be allowed.	47	53%	27	30%	7	8%	8	9%	89

	Very Important		Somewhat Important		Not Important		Should be Removed		Total
Q54h Model 1 - Effective, able to resolve consumer complaints and have adequate enforcement powers to hold providers to account when things go wrong.	66	73%	16	18%	4	4.5%	4	4.5%	90
Q54i Model 1 - Transparent, publish a range of information including decision criteria, complaints data and outcomes of cases. Be able to advise on trends and issues emerging from 1s tier complaints.	87	91%	5	5%	2	2%	2	2%	96
Q54j Model 1 - Have an increased focus on independence and accountability. Provide an impartial service to both consumers and providers. Accountable, to a competent authority or a regulator. Undertake periodic reviews on the effectiveness of ADR schemes and publish the results.	63	70%	18	20%	4	4%	5	6%	90

	Very Important		Somewhat Important		Not Important		Should be Removed		Total
Q54k Model 1 - Enable early consensual resolution, which would include mediation as a key process should be built upon.	50	57%	29	33%	4	4%	5	6%	88
Q54l Model 1 - Provide prompt resolution, proportionate to the complexity of the complaint.	67	74%	19	21%	3	3%	2	2%	91
Q54m Model 1 - The levy for entities should be on a financial turnover basis.	24	28%	25	30%	16	19%	19	23%	84
Q54n Model 1 - Appeals process simplified whilst adhering to ECHR. No appeal from the Complaints Ombudsman, but the ability to appeal to the Court of Session in relation to misconduct.	46	52%	24	27%	7	8%	11	13%	88
Q54o Model 1 - There should be no appeal in terms of the amount of compensation awarded, similar to other professions.	33	38%	21	25%	13	15%	19	22%	86

	Very Important		Somewhat Important		Not Important		Should be Removed		Total
Q54p Model Options 2 & 3 - There should be a Memorandum of Understanding between the complaints body and the professional bodies on cross-referring cases.	39	49%	27	34%	5	6%	9	11%	80
Q54q Model Options 2 & 3 - The presence of conduct issues should not delay, complicate the process or disadvantage the outcome of service complaints for consumers.	52	64%	19	23%	3	4%	7	9%	81



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