

# Citizens Advice Scotland (CAS) response to the consultation on Legal Services Regulation Reform in Scotland

December 2021

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Scotland's Citizens Advice Network is an essential community service that empowers people through our local bureaux and national services by providing free, confidential, and independent advice. We use people's real-life experiences to influence policy and drive positive change. We are on the side of people in Scotland who need help, and we change lives for the better.

In the first eight months of 2021, Citizens Advice Bureaux (CAB) have collectively provided over 26,000 pieces of advice on legal proceedings. Advice on accessing solicitors and advocates is one of the most sought-after areas of advice on legal proceedings, second only to advice on simple procedure. Nearly one in five of all client interactions regarding legal proceedings are in relation to accessing the services of solicitors and advocates.

A recent report on the economic value of advice provided by the Citizens Advice Network in Scotland showed that the value of the advice provided by CAB on legal proceedings (including areas such as benefits, employment, housing, and debt) was estimated to be £11.58m<sup>1</sup>.

Citizens Advice Scotland (CAS) welcomes the opportunity to comment on how the regulation of legal services can be reformed to achieve better outcomes for Scottish consumers. We have been actively working with Scottish Government and other legal stakeholders for several years on this topic, including during the independent review led by Esther Robertson.

Our initial response to the Robertson review's call for evidence argued that we should:

- reform the current setup to make regulation fairer and more transparent to increase public confidence
- improve the processes for dealing with complaints against solicitors and advocates
- give any regulator a specific responsibility for increasing access to justice

We believe that these aims are still valid. CAS wishes to see a person-centred approach to legal services, ensuring that access to justice is available to all, no matter their geography, vulnerability, or area of need.

CAS knows that those using legal services have certain expectations. From our own research, conducted on our behalf by YouGov<sup>2</sup>, we know that Scottish consumers have high expectations of the legal service they might be offered. They want those supplying legal services to be trustworthy and reputable, with a good success rate and specialisms in the specific fields of law related to their issue. Important qualities in a lawyer include transparency, empathy, and attention to detail. Services where professionals did not communicate clearly or frequently and might even breach confidentiality or charge excessive fees were viewed as being "poor-quality". Participants in our research felt that it was critical

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<sup>1</sup> [https://www.cas.org.uk/system/files/publications/economic\\_value\\_of\\_advice\\_report.pdf](https://www.cas.org.uk/system/files/publications/economic_value_of_advice_report.pdf)

<sup>2</sup> 1,028 Scottish adults were polled between 5 and 9 March 2020 as part of YouGov's Omnibus Survey. YouGov subsequently conducted two online focus groups.

that lawyers are regulated by a national body and accountable to a consistent set of standards.

It is important to remember that consumers only use legal services infrequently, and when they do so they are often in a vulnerable position<sup>3</sup>. This needs to be taken into account when determining the correct regulatory model, as CAS believes the potential for consumer detriment is high given the likelihood of consumer vulnerability when using legal services.

We believe the future regulatory model should deliver certain core outcomes such as ensuring transparency and accountability and delivering access to justice for all. The regulator should also work to ensure a person-centred approach is applied universally across all legal services. This would include helping consumers make informed choices about using legal services, enabling them to make appropriate judgements about quality and value for money, along with ensuring effective consumer protection and redress. CAS would take this opportunity to highlight the importance of the consumer principles being adopted within legal services. We would expect any regulatory system to have these principles, of information, accessibility, consumer choice, redress, safety, fairness, and representation at its core<sup>4</sup>.

## Consumer Principles



We have put in brackets throughout the text where our response is relevant to a specific question or questions asked in the consultation document.

<sup>3</sup> [https://assets.publishing.service.gov.uk/media/5e78cc9b86650c296f6eda63/Research\\_report\\_-\\_Legal\\_services\\_in\\_Scotland\\_publication.pdf](https://assets.publishing.service.gov.uk/media/5e78cc9b86650c296f6eda63/Research_report_-_Legal_services_in_Scotland_publication.pdf)

<sup>4</sup> [https://www.cas.org.uk/system/files/publications/leading\\_by\\_example\\_final.pdf](https://www.cas.org.uk/system/files/publications/leading_by_example_final.pdf)

## **Regulatory Models**

CAS would expect any regulatory body to oversee the standard and quality of legal services. We would also expect such a regulator to oversee the conduct of those providing legal services. CAS supports having publicly available standards and best practice models, which are in a format which can be easily understood by consumers.

In relation to the three proposed models set out in the paper, CAS's view is that Option 1 (the Robertson model) would deliver the most potential benefits for consumers and is the model that should be implemented for the regulation of legal services in Scotland. We recognise that Option 2 (Market Regulator model) also has merits and may be worthy of further consideration, although it is not our first-choice option. Our view on Option 3 (Enhanced accountability and transparency model) is that it does not go far enough to resolve the existing issues and concerns that consumers and advocacy bodies have with the current framework for legal services regulation. As such, we do not believe option 3 should be considered further by Scottish Government.

Our reasoning for this is explained in further detail below:

### Option 1 – Independent Regulator model

CAS sees this model, originally proposed by the Robertson review, as the best of the three suggested models for regulating legal services. [Question 6]

Consumers and complainers require legal regulation to be people-focused, clear, accountable, and transparent. CAS believes that a single regulator, responsible for the whole system of regulation, and independent of those it regulates, is the best way to achieve this. We believe this would demonstrate the values of protecting and promoting the public interest, including the interests of users of legal services. We believe such a model is capable of improving access to justice by promoting effective competition and choice, accessibility, affordability and understanding of services by service users. [Question 1-4]

This option would remove one of the major concerns with the current regulation set-up in that the professional bodies would no longer have a role in regulating themselves. Many consumers and advocacy bodies regard the status quo as lacking transparency, and this results in a potential lack of public faith in the system, especially in relation to complaints.

Replacing the current regulatory system with one regulator for all for-profit legal service providers would also seem proportionate, given the size of Scotland and its legal services market. The simplicity of this model, with one regulator, compared to the number of bodies which would be involved under the proposals in options 2 and 3 respectively, is evident. CAS believes this simplicity and transparency would make navigating the legal services market less complex and reduce the duplication that confuses many consumers.

We support the regulator being accountable to the Scottish Parliament as this would act as a part of the necessary checks and balances which are a key pillar of our democracy. This would also further the accountability and transparency that consumers and stakeholders wish to see.

### Option 2 - Market Regulator model

In CAS's view, option 2 would be better than option 3; but less optimal than option 1. We believe that a single regulatory body, with authority for the whole system of regulation, and

independent of those it regulates, is the best way forward for legal services and consumers. CAS believes that a market regulator option would achieve some of these aims in creating a single regulator, independent of those it regulates, that can bring a greater focus on consumer needs to the regulatory landscape and help to drive consumer confidence, choice, and accountability.

However, there are several issues with Option 2 that need to be highlighted as they would have practical implications for the consumer. For instance, we note that this model is similar to the model used within the English and Welsh legal system. The system south of the border has several issues and it is not clear that this model would transition to Scotland without creating similar issues.

The current regulatory landscape for legal services in Scotland is already complicated, involving five main regulatory bodies. There are three professional bodies: The Law Society of Scotland; the Faculty of Advocates; and the Association of Commercial Attorneys. There are also multiple bodies engaged in complaints/redress: the Scottish Legal Complaints Commission (SLCC) and the Law Society of Scotland, Faculty of Advocates, and the Scottish Solicitors Discipline Tribunal. CAS believes the addition of additional regulatory bodies would further add to the confusion and complexity of legal services for consumers and runs the risk of being disproportionate when assessed against the size of the legal services market in Scotland. There are also concerns that this option would be expensive to implement and maintain, and CAS is not convinced that this model would be cost neutral.

CAS notes the potential role that regulatory committees would have under this model, which the consultation paper sets out:

*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.*

If this model was to be chosen, then we would expect that the regulatory committees would be properly resourced by the professional bodies and have staff who are dedicated solely to regulation work. We would also strongly argue that the regulatory committees should have their own remits, separate from the professional bodies. CAS believes that where a regulatory committee has a differing opinion from the relevant professional bodies, then the professional bodies should not be able to intervene with the committees' duties, in relation to any complaint handling matter. For this reason, we would agree that regulatory committee members should not also sit on the professional body's governance committees. We would also expect to see a greater increase in the non-lawyer representation on any regulatory committee, to make them more representative of the consumer's voice.

[Question 18 –19]

In summary, this is not our preferred model and would require several adjustments, but it may still be worthy of future exploration.

### Option 3 - Enhanced accountability and transparency model

Having examined the model proposed, CAS would be disappointed and deeply concerned if this model was chosen as the future model for the regulation of legal services in Scotland.

Under this proposed model, the three current regulatory bodies (the Law Society of Scotland, Faculty of Advocates and Association of Commercial Attorneys) would regulate their respective professionals. Such a proposal does not address the need for independent regulation to prevent conflicts of interest and ensure public confidence in the system.

This model also does not address the lack of transparency in the current model as the proposal to enhance regulatory committees does not necessarily guarantee increased transparency, unless they are given autonomy from the regulators as noted in our response to Option 2. Given that we know that consumers using legal services value legal professionals being transparent and accountable, as found in our research, CAS cannot support this option as it does not address the issues and concerns that many consumers have with legal services in Scotland. We believe this model fails to deliver any greater focus on the needs of users and the accountability of the profession. It is CAS's view that Options 1 and 2 would both better deliver the independent, proportionate, and user-focused system of regulation that legal services in Scotland requires.

### **Entity regulation**

When interacting with legal services, consumers will generally believe they are contracting with a law firm, rather than an individual practitioner, especially given that Terms of Business are issued by a firm. Consumers rightly expect any firm to deliver a quality service, and to take responsibility for any issues, regardless of who carries out the work. From a consumer perspective, entity regulation makes sense. However, it is important that this does not have unintended adverse impacts on third sector providers of advice services. [Question 43]

CAS is opposed to entity regulation for not-for-profit entities, on the basis that consumers have a greater risk of detriment for services they are paying for, and that (depending on the regulatory burden imposed) this could in practice dissuade third sector organisations from hiring legal professionals to enhance their services.

The advice on legal matters or issues which CABs provide clearly differ from legal advice and representation provided by solicitors. Firstly, the nature and extent of the advice and support CAB provide is very different. Secondly, the services which bureaux provide largely fill 'gaps' in provision, in areas of law where there is a need for advice which is not met by traditional legal services carried out by members of the profession and regulated by their professional bodies. Thirdly, CAB provide advice and support free of charge to clients, often by volunteers or non-legally qualified advisers.

Citizens Advice Bureaux make a very important contribution to the provision of legal services in Scotland. They help identify issues with a legal dimension and provide advice to clients on these.

In 2019-20, the Citizens Advice network in Scotland advised over 188,000 clients and dealt with over 660,000 advice issues. This assistance helped clients gain over £170 million. The network helped clients in relation to more than 4,700 tribunal and court outcomes; and 90% of the cases were won/upheld<sup>5</sup>.

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<sup>5</sup> <https://www.cas.org.uk/news/scottish-cab-network-unlocked-%C2%A3170m-people-2019/20>

CAS would be concerned if those organisations within the Citizens Advice network in Scotland could potentially be subject to further regulation. Citizen Advice Bureau are currently regulated through various quality assurance arrangements. Firstly, they are subject to the Scottish National Standards for Information and Advice Providers (SNSIAP), which set out both: 1) organisational standards for service providers; and 2) generic and subject specific competences for advisers and agencies. CAS has a 'passporting agreement' with both the SNSIAP and the Money Advice Service Debt Advice Quality Framework (MASDAQF). This means that each member bureau is accredited under both sets of standards to the appropriate level.

Secondly, in order to ensure accreditation under both SNSIAP and MASDAQF, each member bureau must comply with the conditions of CAS's membership scheme. This includes complying with its quality assurance scheme and being subject to audit by the CAS audit team, to ensure that they meet a minimum standard of service, in terms of both the process of advice giving, and the technical accuracy of the advice provided. In recognition of the Membership Scheme, all Scottish bureaux are exempt from the requirement to register for advice they provide up to Level 1 - Initial Advice.

CAS also has its own complaints policy and process, where clients who may feel unsatisfied with their bureaux experiences can formally complain<sup>6</sup>. Complaints may be made by phone, writing or email and are investigated by the bureau manager under the direction of the chair of the bureau, or by the chair if the complaint concerns the manager. Bureau aim to complete any investigation within 20 working days and if the complainer is unhappy, with the result, they can request that a review be carried out by CAS. A further review by an independent arbiter is available if required.

We are not aware of any call from stakeholders to further regulate third sector organisations and the Robertson review also cautioned against over-regulation.

CAS also has concerns regarding the potential impact of any changes to the definitions of "reserved" and "unreserved" legal services. Only legal professionals can provide reserved services, but many CABs are engaged in the provision of advice on unreserved legal services, which may include advice on debt, housing, and money. Any changes to these definitions may have an impact on how CABs provide support to clients. We would ask Scottish Government to clarify and consider how activities carried out by the Citizens Advice network in Scotland, and other not for profit organisations might be impacted if there were to be potential changes to these definitions. [Question 36]

The advice that CABs provide in this area, especially in relation to Simple Procedure and First Tier Tribunal work, fills a specific gap in the legal services market. For many cases valued at under £3000 legal aid is not available, and it is this gap that CAB services aim to meet, as many people taking these legal proceedings will be doing so without access to professional representation. This is an area in which CABs play a crucial role in ensuring all people in Scotland can access redress and protect their rights and it is important that CAB's ability to undertake this work is not inadvertently compromised by additional regulation.

We would welcome further thought being given to this matter to avoid limiting the ability of third sector, not for profit, advice agencies to support clients in need of assistance.

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<sup>6</sup> <https://www.cas.org.uk/complaints>

## Complaints

CAS strongly believes that the regulatory model chosen must result in an improved complaints process for consumers. There seems to be widespread consensus between the Robertson review, Scottish Government, and key stakeholders that the current complaints system is unfit for purpose, takes too long, and is unnecessarily complex for users. Some stakeholders argue that it also suffers from a lack of public confidence because of the involvement of the professional bodies in the complaints process. The system has also become less effective from a consumer perspective over time, following a Court of Session case decision in 2017, which unexpectedly ruled that hybrid complaints (dealing with both matters of conduct and poor service) are not permitted under legislation. We believe that the regulatory system should allow for hybrid complaints and that this will make the regulatory framework more consumer friendly.

CAS is aware that polling conducted by YouGov for the Scottish Legal Complaints Commission<sup>7</sup> in 2019 showed that many Scottish consumers are not confident organisations are able to deal with complaints about lawyers fairly. 39% of those polled were not very confident and a further 19% were not at all confident that a complaint would be handled fairly<sup>8</sup>. This evidence supports the notion that the complaint procedures and processes require updating and restructuring.

The option to have a single body which acts as a gateway and can investigate complaints and determine redress is strongly supported by CAS. We believe that a single complaints body, who investigates the complaints independently of the professional bodies, would enhance consumer confidence of the regulatory system overall.

We would highlight the need for any system to accommodate complaints from consumers who need or wish to have further support from third sector bodies during the complaint process. From January 2020 – November 2021, the Citizens Advice Network in Scotland provided 640 pieces of advice on complaints regarding a solicitors' firm and a further 426 pieces of advice on making a complaint to the SLCC or relevant ombudsman. This demonstrates that consumers are seeking assistance in making complaints, supporting the view that this process must be made as simple and straightforward as possible to ensure that consumers with additional needs or vulnerabilities still feel empowered to complain and are able to do so with the support of appropriate organisations such as CABs.

Overall, from the evidence and engaging with consumers and legal stakeholders, CAS would strongly support the creation of a single body for complaints and redress for the Scottish legal sector. We believe the body should handle complaints on service and conduct rather than this role being split with any professional body. However, in relation to professional sanctions, we can see a role for a body such as the SSDT or another tribunal to make disciplinary decisions.

With regards to whether any future legal complaints model should incorporate the requirement for complaint bodies' budgets to be approved by the Scottish Parliament, we believe all bodies delivering statutory regulatory duties (including regulators/ regulatory committees, complaints bodies and discipline tribunals) should be accountable and

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<sup>7</sup> Sample size – 1003; 940 of whom have never worked in the legal industry

<sup>8</sup> <https://www.scottishlegalcomplaints.org.uk/about-us/news/scottish-public-want-independent-regulation-of-lawyers/>

transparent. Should the professional bodies still have a role in complaint management, we believe there should also be scrutiny of their budgets in relation to complaints rather than there being differing rules for different bodies. [Question 32, 47, 51, 53]

### **Definitions of legal titles**

CAS would support the creation of clear definitions of legal titles such as “lawyer,” “advocate” and “solicitor”. Clearly defining these would ultimately improve transparency for the public, and help consumers understand what protections are available to them when using legal services. Our polling indicates that consumers currently believe that those using these terms are registered professionals who have insurance in place and who are subject to regulation. 85% of people we asked said they believed that anyone using the description 'lawyer' and providing legal services should be qualified and regulated by a professional body<sup>9</sup>.

CAS would support some protection of these titles to prevent consumer detriment occurring through confusion. However, CAS does note that the term ‘advocate’ or ‘advocacy’ is used extensively in other fields, including some with links to legal proceedings. Protecting this term could therefore have significant consequences for other groups and would need to be considered carefully so as to not result in unintended consequence particularly for third sector organisations.

Ensuring that any protected terms are properly protected and enforced will be key here, especially since consumer’s rights are at risk if not properly enforced. Should Scottish Government begin the process of creating clear definitions of legal titles, then they should engage with key legal stakeholders on how best to enforce these titles. [Question 38]

### **Consumer Voice**

CAS believes that the regulatory model should use a combination of the proposed methods to ensure the consumer voice is heard and present throughout the regulated legal sector. [Question 10]

We recognise that having established communication with consumers through consumer panels (and/or through their representation within regulatory committees under options 2 and 3) will assist in delivering a more user-centred approach, increasing accountability and accessibility to consumers.

Any approach to encouraging a greater consumer voice being heard should include firms considering and acting on customer feedback, engagement with the general public, including those representing vulnerable consumers, and consumer research by the regulatory body.

CAS believes that to be effective, consumer panels need to have room for direct input from those with lived experience and have access to dedicated, well-funded resources to undertake their functions, such as for example, being able to conduct research and

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<sup>9</sup> <https://www.cas.org.uk/news/how-accessible-scotlands-justice-system>

engagement with consumers themselves. This needs to be adequately factored into these plans. The scope and remit of any Consumer Panel should be widened beyond legal complaints to legal regulation more broadly, with any Panel being constituted and resourced to engage with the wider consumer environment. The Ofcom Communications Consumer Panel<sup>10</sup> is a good example of this type of approach.

We would expect the regulatory body to engage with advocacy and consumer bodies such as CAS and Which? regularly, along with drawing on input from Consumer Scotland, in order to understand current trends and gain insights into the practicalities of how consumers are using legal services.

CAS uses evidence-based research and the lived experience of CAB clients to form our views and as such, we recognise the value of taking an evidence-based, user-centred approach to designing a new regulatory system.

We would broadly support Consumer Scotland being given the power to make super-complaints, given its statutory role, however we would be strongly opposed if this led to any changes to CAS's ability to use our existing complaint powers. The ability of independent consumer advocacy bodies to make complaints is in the consumer's best interest. Removing this power would run counter to the aim of placing users at the heart of the regulatory process.

CAS would support the development of a baseline survey of legal service consumers in Scotland, as part of a wider research and consumer engagement programme. The Robertson review highlighted the lack of research on consumer needs in Scotland. A baseline survey would identify the key areas that the new regulatory system should prioritise as well as highlight any areas of particular detriment or poor consumer confidence with services. This could be used to set targets and monitor ongoing performance in relation to consumer confidence, quality assurance and overall satisfaction. Consideration should be given to the survey's design and engagement approach, in order to reach relevant consumers and groups, including vulnerable consumers and those less likely to respond to a survey. Any survey should incorporate questions which encapsulate the consumer principles and seek to engage with both existing legal service users, and those who could potentially benefit from legal services but have not been willing or able to use them. This would require the use of various channel options for completing the survey. [Question 12]

We would also support the use of ongoing and appropriately resourced engagement and outreach, rather than simply a one-off survey, in order to ensure the legal services market can meet the current, potential, and future needs of legal services users.

CAS would support the regulator having a greater emphasis on quality assurance, prevention, and continuous improvement as this would be in the best interest of consumers. 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. [Question 31]

We welcome a system that would support legal practitioners in providing a high-quality service to consumers. Continuous improvement should be a given, as this is a value that should be instilled in every service, not just legal services. We believe that providers should

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<sup>10</sup> <https://www.communicationsconsumerpanel.org.uk/>

be willing and able to look at any mistakes that have been made previously and learn from them. In this regard, CAS was concerned to learn that attempts have been made by a number of firms to set out in their Terms of Business that any unsuccessful complaint made to the regulator may result in the firm charging the client for the time taken to deal with the complaints. CAS believes this is unacceptable and that any regulator should make clear that this practice is not permitted.

CAS would broadly agree that the rules within the regulatory framework should be simplified with the aim of making them more proportionate and consumer friendly. 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.

## **Legal Technology**

CAS recognises that Scottish society is moving towards increasing digitisation of services including the usage of legal technology. We note that recently moves have been made to make online submission of legal claims the default method, and to provide for virtual hearings in a variety of settings. We believe that moves toward digitisation must include sufficient safeguards to ensure that no-one is excluded from accessing the justice system. Alternative communication and engagement methods must be easily accessible and available to users.

We know that increasingly consumers may access advice on legal issues through online means, whether this be AI assisted resolution services or apps or robots dealing with common advice queries. If bringing legal technology under the regulatory framework and including it within the "legal services" definition will guarantee channel choice and future proof consumer protection while allowing consumer access to advice through a wider variety of channels, then CAS would support this change. Put simply, if legal tech is delivering legal advice, then consumers should be protected if advice is of poor quality and has a detrimental impact on them.

CAS has carried out research into digital access which identified that key barriers to getting online include skills and confidence; practical access; health issues, and literacy and language<sup>11</sup>. While there have been positive changes in recent years, there remains a group of CAB clients, often with vulnerabilities, who may lack the skills to go online and also may face other barriers in doing so. While we understand the inevitable and necessary move towards online services during the pandemic, we would note that this has led to further complications for some CAB clients. Many clients would previously have accessed devices and Wi-Fi through support services or community venues such as public libraries and the pandemic has prevented these clients from being able to access face-to-face advice and assistance. Opportunities for getting online, or receiving assistance in doing so, have been reduced.

CAS would oppose any new regulatory body or legal services provider taking a digital only or digital first approach. CAS is proactive in calling for channel choice when interacting with the legal system and believe that consumer choice should always be the priority when it comes to interaction. [Questions 24-27]

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<sup>11</sup> [https://www.cas.org.uk/system/files/publications/cas\\_disconnected\\_report.pdf](https://www.cas.org.uk/system/files/publications/cas_disconnected_report.pdf)

## **Client Protection Fund**

The Client Protection Fund is currently administered by the profession. In keeping with other client protection measures, we believe it would be more appropriate for these functions to be carried out by the regulator.

CAS is 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. CAS would wish to see a system where all redress awarded is capable of being obtained, with adequate measures in place to allow for circumstances where firms no longer exist, practitioners are bankrupt or deceased and so on. This is essential for maintaining consumer confidence in any complaints system. This may require some broadening of the fund's criteria, but we believe it is essential that this scheme, together with the Master Policy, provides wrap-around protection to consumers. [Questions 29 and 30]

## **Miscellaneous**

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 trialled and regulators may need some additional flexibilities to accommodate this, in common with practice in other sectors. [Question 28]