General Comments

We would like to thank the Delegated Powers and Law Reform Committee for the opportunity to appear and present our views, at the evidence session of the 24 October 2023,[1] on those sections of the Regulation of Legal Services (Scotland) Bill that confer delegated powers on Scottish Ministers. At the conclusion of that session, the committee invited the Law Society to provide supplementary written submissions.

We welcome this invitation to expand on our views and share observations on the wider delegated powers and we set these out below. In doing so, we emphasise that these reflect our views on the Bill as introduced. We are aware that the Minister for Community Safety and Legal Affairs has recently confirmed in writing, to the committee, her intention to bring forward amendments to the Bill relating to delegated powers to be conferred on Scottish Ministers. We look forward to considering these in due course. Therefore, our stated current position on delegated powers will be reviewed at that time and may be subject to change dependant on, and to reflect, those proposed amendments.

We also take this opportunity to re-emphasise our concerns and those of other legal sector regulatory partners with the extent to which the proposed delegated powers threaten, and will unquestionably erode, the constitutional principle of the rule of law, in particular sections 5, 20, 35, 41 and 49 of the Bill. As was highlighted by us throughout the evidence session, a key principle of the rule of law is the independence of the legal profession from the state. Many of the proposed delegated powers will provide the Scottish Government with direct powers to interfere in, and direct, the regulation of legal services. It is crucially important for all legal professionals, from judges to individual lawyers, to act freely from government interference and critical to guarantee the promotion and protection of human rights.

[1] Meeting of the Delegated Powers and Law Reform Committee 24 Oct 2023: https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/DPLR-24-10-2023?meeting=15500

It was notable that Esther Roberton commented several times during her evidence session before the committee on the extent to which delegated powers are to be conferred on Scottish Ministers and concurred with views that these threaten the independence of the legal profession.

Specific comments

Section 5(1) Power to amend the regulatory objectives and professional principles.

As we highlighted in the evidence session before the committee, our view is that the delegated power conferred by section 5(1) is unprecedented and in our view, being a direct threat to the independence of the legal profession, should be deleted in its entirety from the Bill. Although many of the delegated powers within the Bill are reflective of those within the Legal Services (Scotland) Act 2010, section 5 is a new power which does not appear in the 2010 Act which creates a real and fundamental risk to the rule of law.

Until the publication of the Bill, there was no suggestion in the 13 years since the 2010 Act was passed that these provisions should be changed. Our view is that the regulatory objectives and professional principles are too important to be left to delegated powers. The objectives and principles are both the foundational and overarching principles for the delivery and regulation of legal services. Any change to them should be rare and considered at the very highest level.

Allowing change through delegated powers gives Scottish Ministers direct control over the legal profession and the regulators and is potentially open to abuse. For example, the professional principles could be amended in a way that limits the ability of the profession to challenge the state.

In what circumstances do Scottish Ministers contemplate using these powers? Given that 13 years have elapsed since the last iteration of the regulatory objectives and professional principles, is it likely that further changes will be necessary which would not feature in a future Bill? When would Scottish Ministers, for example, remove the objective to support the constitutional principles of the rule of law and the interests of justice?

Even if additional checks and balances were to be introduced, our view is that the provisions of sections 2- 4 are too important to be subject to modification under delegated powers and allowing the regulatory objectives and professional principles to be amended through delegated powers is a direct threat to the constitutional principle of the rule of law and the independence of the legal profession.

Section 8(5): Regulatory Categories

As we advised the committee during the evidence session, we are not clear on the justification for, and the necessity of, introducing different categories of regulators. In our written evidence to the Equalities, Human Rights and Civil Justice Committee[2] (footnote) we have called on the Scottish Government for clarification of its reasoning and rationale for introducing what is, in effect, a two-tier regulatory model. We also note that this was a point raised by Esther Roberton in her oral evidence before the committee.

However, if the Bill proceeds with different categories of regulator, then we can see some merit in a delegated power remaining in place with some amendments to the procedure. For the purposes of transparency and accountability, we suggest that Scottish Ministers, when proposing to exercise this power, should be under statutory duty to report the outcome of the consultation to Parliament and explain the reasons for their decision as to why the regulations should be made.

We also suggest, again subject to the Bill proceeding with section 8 categorisation, that it would be appropriate to make the exercise of the delegated powers under section 8(5)(a) (reassigning a body) and section 8(5)(b) (adding a body) subject to the consent of the Lord President.

Finally, we question the necessity of section 8(5)(c) - providing powers to Scottish Ministers to remove a body once they have ceased to be a regulator. If the body has

[2] Law Society of Scotland response to the EHRCJ Committee call for written evidence: https://www.lawscot.org.uk/media/375069/regulation-of-legal-services-scotland-bill-call-for-evidence-response-of-the-law-society-of-scotland-27-july.pdf

ceased to be a regulator, then how can – and why would – Scottish Ministers remove that same body? In our view this power appears to be incongruous.

Section 14(8): Compensation funds

In relation to the powers conferred on Scottish Ministers by section 14(8). We have no concerns to raise beyond highlighting several observations.

It is not clear from the wording of the Bill whether section 14 applies to the Law Society. The Law Society already operate a 'Guarantee Fund' - the operation of which falls under the 1980 Act. Schedule 1 paragraph 6 of the Bill inserts a new section 43A into the 1980 Act which echoes the provisions of section 14. If section 14 does apply to the Society, then the interrelationship between it and the new section 43A of the 1980 Act needs to be clarified.

In addition, we also question the rationale for section 14 being subject to the negative procedure, whereas the introduction of regulations under Schedule 1 paragraph 6 (inserting a new section 43A into the Solicitors (Scotland) Act) is to be subject to the affirmative procedure. Our view is that section 14 should likewise be subject to the affirmative procedure. This is reflective of our experience with operating our Guarantee Fund, in that changes are required rarely and not urgently. However, regardless of which procedure is carried forward, Scottish Ministers should be under an obligation to report the outcome of the consultation exercise to Parliament and explain the reasons for their decision as to why the regulations should be made.

Section 20(6): Measures open to the Scottish Ministers

As we highlighted in the evidence session, we are strongly opposed to this entire section and the related section 19 (Review of regulatory performance by the Scottish Ministers). Section 20 goes to the heart of the provisions which threaten the rule of law and the independence of the legal profession.

We note that the Minister has stated that it is the Scottish Government's *"intention to bring forward amendments to the Bill at stage 2 intended to address the concerns in respect of the role placed on Scottish Ministers within the Bill*.". Those amendments

should extend to deletion of section 20, including subsection (6), and nothing less will remove the threat to the rule of law or alleviate our concerns.

The delegated powers conferred under subsection (6) are very broad. For example, this provision will confer powers on Scottish Ministers to '…*specify other measures that may be taken by them…'* This raises the concerning question of what is meant by "other measures" which the Scottish Ministers may have in contemplation? This is an unprecedented broad power without express boundary.

The Delegated Powers Memorandum states that the power is, "*intended to be used should it be discovered in practice that further additional measures would be helpful tools for the Scottish Ministers to have. This could be because the existing suite of powers are found to be insufficiently robust or, at the other extreme, are disproportionately severe.*" This is a very wide spectrum of potential use, is unclear and inconsistent. If such a range of outcomes applies to the substantive parts of the section, it is not fit for purpose.

Schedule 2: Further provision about measures open to the Scottish Ministers

Schedule 2 relates to section 20 and is introduced by section 20(3). Schedule 2 sets out in detail those measures open to Scottish Ministers when exercising powers under section 20. For the reasons we have stated in relation to section 20, we believe that Schedule 2 in its entirety should be deleted from the Bill, and indeed would be a consequential deletion should section 20 not proceed.

Section 26(1): Regulatory scheme

This section relates to approving new regulators in the market and agreeing regulatory scheme. Having considered this, we have limited comments on these delegated powers at this time, though we note that this seems to be a very broad power.

As a matter of policy, it is crucial that there remains only one single regulator for solicitors in Scotland. We also suggest that generally the number of legal regulators in Scotland is limited. Chapter 3 of the Bill, which includes section 26, allows for the

creation of additional legal sector regulators. Potentially this could include the creation of a second (or more) regulator of Scottish solicitors and we would be strongly opposed to this. Not only would this be disproportionate given the size of the Scottish solicitor profession, but will have the potential to create an uneven regulatory landscape. There is a cautionary tale in England & Wales about the challenges caused by allowing multiple regulators for legal services. We would welcome confirmation from the Scottish Government that no additional regulator for solicitors in Scotland will be created.

Section 29(5): Approval of application and giving effect to the regulatory scheme

We have no comment on the delegated powers conferred by section 29 at this time. We will keep this under review and advise the committee accordingly should our position change.

Section 33(3) & (5): Review of regulatory schemes

We have no comment on the delegated powers conferred by section 33(3) and section 33(5) at this time. We will keep this under review and advise the committee accordingly should our position change.

Section 34(1): Revocation of acquired rights

We have no comment on the delegated powers conferred by section 34(1) at this time. We will keep this under review and advise the committee accordingly should our position change.

Section 35: Replacement regulatory arrangements for authorised providers

In relation to section 35, we have several serious concerns to raise regarding the delegated powers to be conferred in this section, in particular in relation to sections 35(1)(c), 35(2), and 35(5).

The powers conferred under subsection (1)(c) are unacceptable. We recognise that there may be a need to take steps to protect the public if a regulator ceases to be a

regulator. However, these powers would empower Scottish Ministers to appoint themselves as the regulator of the legal profession without the full parliamentary scrutiny which primary legislation would provide. There are serious and significant rule of law and human rights implications for such an approach. Even the alternative approach in subsection 1(c) - to create a new body - is not a step to be taken without full parliamentary scrutiny. If necessary, this could be achieved by bringing forward expedited or emergency legislation as permitted under the Parliament's Standing Orders.

In addition, the powers conferred under subsection (2) are equally concerning and unacceptable. These would allow Scottish Ministers to make any changes they wish to Part 1 of the Bill. Part 1 is one of the key parts of the Bill underpinning the entire proposed regulatory regime and includes those sections relating to the regulatory objectives, the professional principles, the definition of "legal services", the functions of the regulatory committee etc. All of Part 1 is significant and changes to the provisions in Part 1 should not be made without careful consideration and scrutiny.

The powers under subsection (5), together with subsections (6) – (8), which permit "made affirmative" regulations, are problematic for several reasons. In the case where the regulations would otherwise be subject to the affirmative procedure, subsection (5) includes provision to allow the Scottish Ministers, where they consider the regulations need to be made urgently, to make emergency regulations – in which case, regulations can be made, and become effective immediately, before being approved. These emergency regulations would cease to have effect unless they are approved by Parliament within 40 days.

Apart from the well-known concerns about "made affirmative" regulations they would be particularly inappropriate in the circumstances envisaged in the Bill as the regulations would involve the regulation of the legal profession without any parliamentary scrutiny before they are made. The appropriate course of action would be for expedited or emergency primary legislation to be brought forward. That would ensure proper parliamentary consideration of the complex, intricate and necessary provisions which regulation of an independent legal profession would require.

The Delegated Powers Memorandum presents an insufficient reason for the powers in the section. Paragraph 51 states "*The regulation making power is a mechanism by which the Scottish Ministers may ensure that regulation of legal services providers may continue in the event that an existing category 1 or 2 regulator is to cease to carry out some or all of its functions.*". That simple statement, in our opinion, does not provide an adequate reason for Scottish Ministers being permitted the wide-ranging powers in the section which may contravene the rule of law.

The regulation-making powers in section 35 (1)(c), (2) and (5) in so far as they allow for powers to be exercised by Scottish Ministers should be removed from the Bill.

Section 39(6): Requirement for legal businesses to be authorised to provide legal services

We agree with the delegated powers under section 39(6) giving Scottish Ministers power to amend the maximum fine that may be imposed where a person is convicted of an offence under section 39. However, we suggest that the exercise of these powers should be evidence-based. Therefore, Scottish Ministers should consult the relevant regulator in advance of changing the amount of the fine. Such consultation would also demonstrate transparency and accountability.

Section 40(3): Offence of pretending to be an authorised legal business

As with section 39(6) (see above) we agree with the delegated powers under section 40(3) giving Scottish Ministers power to amend the fine that may be imposed where an offence is committed. However, it is important that there is transparency and accountability in making any decision regarding amending the fine limits and we again suggest consultation with the relevant regulator for an evidenced-based decision to be reached.

Section 41: Rules for authorised legal businesses

We take the view that section 41(2)(c) is an unwarranted extension of ministerial powers into the authorisation and practice rules for legal businesses. The powers conferred are extremely broad and disproportionate.

Our view is that it must be for the regulator to set the practice rules for the legal profession, subject to the approval of the Lord President. Not only is this appropriate - reflecting the current process for the introduction / amendment of Rules, of which no concerns have been raised by the Scottish Government or others - but it allows for an agile response to identified issues and promotes a pro-active approach.

As with sections 5, 20, and 49 of the Bill, section 41(2) also threatens the independence of the legal profession, allowing Scottish Ministers to have the power to specify the detail of the rules which govern that profession.

In relation to section 41(6), we have several questions and concerns. Section 41(6) confers powers on Scottish Ministers to make regulations providing for *'…the ALB rules of category 1 regulators to deal with the provision by their authorised legal businesses of <u>such other services</u> (in addition to legal services)…'* Our question is what '*other services*' might Scottish Minsiters envisage which are not already covered by the definition of legal services within the Bill, and we would welcome clarification from the Scottish Government on this.

Our concern in relation to this provision is that it potentially allows Scottish Ministers to change the definition of "legal services" (set out in section 6 of the Bill) through delegated powers, in effect circumventing parliamentary scrutiny. In that regard, we would contend that the definition of legal services is too important to be changed by delegated powers and should be subject to full parliamentary scrutiny.

Section 45(2): Financial sanctions

Section 45(2) confers delegated powers on Scottish Ministers to '*specify the maximum amount of a financial penalty that may be imposed'* where a breach of practice rules is found. We have no concerns regarding this provision. However, for consistency (with sections 39 and 40 above) any exercise of this power should be subject to consultation with the appropriate regulator and any decision evidenced-based.

Section 46(3): Reconciling different rules

We have no substantive views on the delegated powers conferred by section 46 beyond questioning the policy objective and the necessity for this provision, as we cannot envisage such circumstances where it would be necessary for the power to be exercised.

Unlike the scenarios underpinning section 13 of the Legal Services (Scotland) Act 2010 - from which section 46 is drawn - it would not be possible for a solicitor or authorised legal business regulated under this Bill to *also* be regulated by another regulator which is also subject to Scottish legislation. For example, regulation by the Law Society of Scotland and the Institute of Chartered Accountants Scotland (ICAS), would be impossible under this Bill as the relevant firm would have to become a Licensed Legal Service Provider under the 2010 Act in order to provide both legal and accounting services. It is the case that cross-border and international law firms providing only legal services under this Bill will be regulated by multiple legal regulators. But Scottish legislation cannot provide for, nor compel, for example, the SRA in England & Wales or a French bar to resolve a regulatory conflict. However, although we have no objections beyond questioning the necessity for this provision, we do suggest that if this provision is to proceed in the Bill, then any proposed regulations should be subject to consultation with relevant stakeholders and the affirmative procedure.

Section 49(1): Powers of the Scottish Ministers to intervene

Section 49 (1) is of significant and serious concern. Section 49 (1)(a) allows Scottish Ministers to create its own regulator and is a gross extension of Scottish Ministers' powers over the Scottish legal profession. Section 49 (1)(b) goes further and allows the state to directly regulate the legal profession itself. As with several other sections of the Bill, this section seriously threatens the independence of the legal profession and contravenes the rule of law.

Section 49 has been criticised by the International Bar Association, by the Commonwealth Lawyers Association and by many business organisations (such as City UK) who have highlighted that these provisions not only undermine the separation of justice from the executive, but could also have a seriously detrimental impact on the international competitiveness and reputation of Scotland's legal sector and could, over time, threaten jobs and economic investment in Scotland. In a global legal market, potential clients of international firms often have the option of jurisdiction shopping and there is a significant risk that such delegated powers would deter clients from selecting Scotland as their preferred legal jurisdiction.

We need to be clear that we are not suggesting that the current Scottish Government would exercise these powers in a manner detrimental to the rule of law, but legislation needs to be alive to future shifts, and risks, in the political landscape.

We note that the exercise of the powers under section 49 is subject to the 'affirmative procedure' which offers some small safeguard. However, this does not remove the threats to the rule of law and the risks to inward investment posed by section 49.
In our view section 49 must be deleted from the Bill.

Section 56 –Services complaint: sanctions

We have no concerns or views on this provision beyond noting that paragraph 81 of the Delegated Powers Memorandum states that the power is to be used to adjust for inflation. However, this restriction is not actually reflected in the language of the Bill itself.

Section 86 Power of the Scottish Ministers to adjust restricted legal services

We are broadly content in principle with section 86, as it reflects our own previous submissions to the Scottish Government. However, we believe that the exercise of this power should be subject to the "super-affirmative" parliamentary process because changing the definition of "restricted legal services" is a significant step which requires both consultation (already provided for) and an extra level of parliamentary scrutiny. Regulations should not be made unless the regulator has been given a decision notice, consultees have been provided with draft regulations, draft regulations and an explanatory document have been laid before the Scottish Parliament, and those draft regulations have been approved by resolution of the Parliament.

Section 90: Ancillary provisions

We note that section 90(1) provides delegated powers to bring forward regulations to make '*any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for*' giving effect to the provisions of the Bill. We have no substantive concerns, and recognise that this is a common statutory provision. However, this is a very wide power and, given the importance of ensuring the independence of the legal profession from the state, we believe that before

exercising this power, Scottish Ministers must consult with relevant stakeholders to ensure an informed decision is reached.

Section 92: Commencement

We have no comments on this section.

Schedule 1, Paragraph 6: Guarantee fund: further provision

Paragraph 6(6) inserts a new section 43A into the 1980 Act. This provides Scottish Ministers with powers to make regulations in relation to the Guarantee Fund. Although we are broadly happy with these powers, as they have the potential to influence the operation of the Guarantee Fund then we suggest that in addition to consulting with the relevant stakeholders, Scottish Ministers should be required to report on the consultation exercise and set out reasons to support the introduction of the regulations. We also refer to our comments in relation to section 14 of the Bill above.