



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 7 November 2023

Session 6



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DELEGATED POWERS AND LAW REFORM COMMITTEE
30th Meeting 2023, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Oliver Mundell (Dumfriesshire) (Con)
Mercedes Villalba (North East Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Siobhian Brown (Minister for Victims and Community Safety)
Leanna MacLarty (Scottish Government)
Jamie Wilhelm (Scottish Government)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 7 November 2023

[The Convener opened the meeting at 09:24]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 30th meeting in 2023 of the Delegated Powers and Law Reform Committee. We have received apologies from Mercedes Villalba. I remind everyone to switch their mobile phones and other electronic devices to silent.

The first item of business is to decide whether to take items 5 and 6 in private. Is the committee content to do so?

Members indicated agreement.

Regulation of Legal Services (Scotland) Bill: Stage 1

09:25

The Convener: Under item 2, the committee will take evidence on the Regulation of Legal Services (Scotland) Bill from Siobhian Brown, the Minister for Victims and Community Safety. The minister is accompanied by two Scottish Government officials: Jamie Wilhelm, who is the legal services regulation reform manager, from the justice directorate; and Leanna MacLarty, who is a solicitor from the legal directorate. Good morning to you all.

I remind all attendees not to worry about turning on their microphones as broadcasting will deal with that. I invite the minister to make some opening remarks.

The Minister for Victims and Community Safety (Siobhian Brown): Good morning. I welcome the opportunity to make a brief opening statement about the Regulation of Legal Services (Scotland) Bill. As set out in the delegated powers memorandum,

“The overarching policy objective of this Bill is to provide a modern, forward-looking legal services regulatory framework for Scotland that will ... promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector.”

The bill seeks to implement a number of key recommendations from “Fit for the Future: Report of the Independent Review of Legal Services Regulation in Scotland” by Esther Robertson. That report’s primary recommendation of a single independent regulator resulted in largely polarised views from those in the legal and consumer landscapes. Despite that, there were many areas of broad agreement among stakeholders, including a common aspiration that any future model be transparent, open to public scrutiny and efficient, to ensure that justice remains accessible to all.

The bill is designed to take a proportionate approach that seeks to balance and deliver the key priorities of all stakeholders. As the committee knows, for each and every bill, the Scottish Government considers carefully the rationale for the inclusion of delegated powers—for example, to provide flexibility and to be able to react and be responsive to future events without having to resort to amending primary legislation. Therefore, the bill seeks to take a proportionate approach to what is provided for in the bill and what is provided for by way of delegated powers.

That said, I accept that certain delegated powers in the bill have caused concern among some stakeholders. Therefore, having reflected

carefully on our discussions with stakeholders, including the senior judiciary, I intend to lodge amendments at stage 2 to address concerns about the role that the bill would give to Scottish ministers. On 27 September, I wrote to the lead committee, the Equalities, Human Rights and Civil Justice Committee, to inform it of my intentions, and I provided further information on 27 October.

I reiterate that the Scottish Government has committed to continue to work collaboratively with stakeholders in respect of the reforms and throughout the passage of the bill. I am happy to take any questions.

The Convener: Thank you, minister. Section 5 of the bill gives the Scottish ministers the power to modify the regulatory objectives and professional principles for legal services that are set out in sections 2 to 4 of the bill. The committee heard evidence from the Law Society of Scotland and from the Faculty of Advocates that that provision should be removed from the bill. Their reasons included that it is, in their opinion, unforeseeable why or when those objectives and principles would require to be modified and that, if that were necessary, such objectives and principles are too important to be modified by secondary legislation.

What are your thoughts about those observations? Can you give the committee any examples of when it might be necessary to modify those objectives and principles?

09:30

Siobhian Brown: We recognise the importance of, and commit to maintaining, the regulatory objectives and professional principles. In order to strengthen the safeguards, we intend to introduce amendments that would require the Lord President's consent to be gained before any changes are made to the regulatory objectives or the professional principles, or to how they apply. We are also considering amendments that would limit the scope of how any such changes may be sought by limiting that to being done only at the request of certain bodies, such as the regulators or the consumer panel of the Scottish Legal Complaints Commission.

The regulation-making power is an important mechanism to future-proof the regulatory framework, in recognition of the fact that regulatory best practice may change over time. Since the introduction of the regulatory objectives and professional principles under the Legal Services (Scotland) Act 2010, it has become apparent that they can be strengthened by the inclusion of consumer principles and better regulation principles, as recommended by Esther Roberton. The Scottish Government also views

the human rights principles of participation, accountability, non-discrimination, empowerment and legality—the PANEL principles—as an important addition.

In the next 10-year period, it may become apparent that further refinement is required; therefore, the bill allows for such flexibility. It is possible that the consumer principles or the better regulation principles will be updated in the next decade, and we would wish the bill to respond to any such changes. That happened in the eight years between the introduction of the legislation and Esther Roberton's report, when there was a need to update the objectives and principles.

The Convener: Thank you for that. Have you or your officials had any further dialogue with the Faculty of Advocates and the Law Society of Scotland in preparation for lodging those potential amendments?

Siobhian Brown: Yes, we have been having conversations, which are on-going. I will bring in my officials at this point.

Jamie Wilhelm (Scottish Government): Throughout the development of the bill, the Scottish Government has committed to work in collaboration with all stakeholders. We continue to engage in the development of amendments, and we will do so during the passage of the bill through the Scottish Parliament. As we are altering the delivery of certain provisions so that they move from ministers to the Lord President, our discussions have predominantly taken place with the Lord President's office. As the discussions advance, we will be able to engage further with the Law Society, the Faculty of Advocates and other key stakeholders.

The Convener: Section 8(5), on regulatory categories, gives the Scottish ministers the power to reassign legal regulators between category 1 and category 2, which would change the requirements that a legal services regulator is currently subject to. The Law Society suggests that that power should be subject to a statutory duty to report on the outcome of the consultation, and that the Lord President's consent should be required. The Faculty of Advocates does not agree that there should be a power to reassign regulators from one category to another through regulations.

How do you respond to those different considerations? Is the Scottish Government planning to make any amendments in that regard, or is it considering removing that particular power?

Siobhian Brown: The bill seeks to take a risk-based and proportionate approach. The categorisation of the regulator has implications in respect of the operation of its regulatory functions. For example, a category 1 regulator must delegate

its regulatory functions to an independent regulatory committee and establish a client protection fund, whereas category 2 regulators would not have such duties.

It is considered important that the bill contains a mechanism to alter the category of an existing or new regulator, should there be a significant change in how a regulator meets the relevant criteria under section 8(6). In order to strengthen the safeguards there, we intend to introduce amendments whereby the Lord President's consent would be required before any changes are made to the regulatory category of a regulator.

We are also considering amendments that would limit the scope of how such changes may be sought by limiting that to being done at the request of certain bodies such as the regulators or the consumer panel.

In addition, there may be scope for a new regulator to enter the market, which may require consideration of its categorisation or a change to that categorisation in respect of changing circumstances. For example, the Association of Construction Attorneys has only six people in it, so we do not feel that it would be appropriate for it to be in category 1, given all the duties that are put on category 1 compared with category 2.

Jeremy Balfour (Lothian) (Con): Good morning. On the general point of giving the power to the Lord President, there is concern from the Law Society and the Faculty of Advocates about the role of the Lord President. From your conversations with stakeholders, is there a concern in the judiciary that we are giving powers to the Lord President that could be seen as making him or her take political decisions, which is clearly not what the Lord President is there to do? Have concerns been raised that it is inappropriate for the Lord President to do that type of work?

Siobhian Brown: There has been on-going engagement with stakeholders and the legal sector. I bring in Jamie Wilhelm to give an update on that.

Jamie Wilhelm: The judiciary's response to the lead committee's call for views highlighted the oversight that the role of the Lord President plays in the framework. It is considered important that there is a check and balance when making such changes and for the Lord President to have that kind of role. The Lord President's consent is intended to act as a veto, and if that consent is not achieved, the measures or steps being considered would not be progressed further. Where consent is required, it is required before regulations are laid in Parliament, which means that Parliament makes the ultimate decision on whether the regulations will be passed into law.

The requirement for the Lord President's consent already exists in legislation in relation to alternative business structures in the Legal Services (Scotland) Act 2010. The Lord President gave consent to the authorisation of the Law Society of Scotland as an authorised regulator of licensed legal services providers.

Jeremy Balfour: Are the Lord President and the judiciary happy with the extension of those powers?

Jamie Wilhelm: Engagement is continuing in respect of those provisions. We hope to reach consensus on the way forward.

Jeremy Balfour: I will push the minister on that. I get the feeling from that answer that they are not happy with it and want further negotiations. Is that a fair summary?

Siobhian Brown: No, that is not fair. Early negotiations are on-going regarding the issue, and we will take forward and consider all the recommendations of this committee and the lead committee, and those of the legal sector. Engagement on the matter is on-going.

Oliver Mundell (Dumfriesshire) (Con): I am deeply concerned by the start to this morning's evidence session. I had hoped, after the evidence we heard last week, that the minister would be in a better position to tell us about the way forward. I share concerns about what is a big change to the Lord President's role, and I want to understand the situation.

It is clear that there is an uncomfortableness in the faculty and in the Law Society about the provisions, and it is clear that there are on-going discussions, to put it in its most positive sense, with the Lord President. If the power was in the bill, what would prevent negotiations and strong-arming happening to get agreement to changes to the principles or changes to regulations?

Siobhian Brown: I have to agree to disagree with Mr. Mundell. There are no people feeling uncomfortable here. I have been listening since before the bill was introduced. That is the reason why officials are engaging with sector stakeholders and the judiciary on how we move forward with the bill and bring a balance to the issues that have been raised thus far. The Scottish Government is considering the options for amendments and reflecting the views of stakeholders, including the senior judiciary, with the intention of building a consensus around the reform.

We have indicated an intention to make amendments and we are working on developing them in the meantime. We are aware of the importance of the stage 1 parliamentary process in drawing out all stakeholders' views and of the

committee's consideration of the bill. We have had constructive engagement with the senior judiciary and their officials to build consensus around the best approach to the detailed provisions. The planned changes to the bill will take time to work through. However, as we go through the different sections I will provide the committee with information on what our current proposals are.

Oliver Mundell: I do not want to be confrontational, but it appears that you are doubling down on the same strategy of making the Lord President's consent central to the provisions. Last week, we heard from the two biggest legal stakeholders outwith the judiciary, who said that they were deeply uncomfortable with that, that it would undermine confidence in the rule of law and that the powers were too broad. Those are pretty serious concerns. They were saying that that approach would embarrass Scotland around the world and that there were concerns from the Commonwealth Lawyers Association. They did not just have light concerns.

You have come today to tell us that you are just continuing with that approach and adding in a few quite minor safeguards. That makes me concerned that the Government does not really understand the strength of feeling in the legal profession.

Siobhian Brown: I would like to provide some context to what we are proposing by explaining how things are done in England and Wales. In England and Wales, the Legal Services Board acts as an independent regulator of the front-line regulators of solicitors, barristers and other branches of the legal profession. The LSB is accountable to the Parliament through the Lord Chancellor and is sponsored by the Ministry of Justice. The Lord Chancellor, a United Kingdom minister, has several statutory roles in relation to the Legal Services Board and the regulation of legal services within the Legal Services Act 2007. Some of those are very similar to the things that have been proposed in the bill.

I have listened to the views that the committee heard last week, and officials have been engaging with the judiciary and stakeholders.

Oliver Mundell: That offers me zero reassurance. I am very proud of the Scottish legal system and of our unique traditions. Aiming to model our legal system on what happens in England and Wales is not the approach that we should be taking. We have a very different and distinct system. I am sad to hear that from a Scottish Government minister. Furthermore, I have spoken out in relation to the Scottish law officers and on politicians having less of a direct role in their involvement in the legal profession. I do not think that pointing to the situation with the UK Government is helpful in that regard.

On section 20(6), which confers a power on Scottish ministers to make regulations specifying other measures that they may take in relation to a legal regulator following a review of their regulatory performance, measures already set out in the bill include setting performance targets, imposing financial penalties and changing or removing some or all of a regulator's regulatory functions. Last week, stakeholders told us that they were fundamentally opposed to that provision and have called for its deletion. Is there any movement on that?

The Convener: Just for clarification, Mr Mundell is referring to section 20(6)—that is subsection 6 of section 20—not section 26.

Siobhian Brown: Thank you, convener. Section 20(6) is intended to be used should it be discovered in practice that further additional measures would be helpful tools because the existing suite of powers in section 20 are found to be insufficiently robust or extreme or disproportionately severe.

The powers ensure that there are appropriate tools to tackle any poor performance on the part of regulators. The section is also intended to be used to give further details about the specifics of the measures that can be taken and the procedures involved. For example, it allows the Scottish ministers to specify the maximum amount of financial penalty that may be imposed on a regulator in accordance with paragraph 13 of schedule 2 to the bill. That power has already been written into legislation and approved by Parliament in the Legal Services (Scotland) Act 2010.

09:45

I have indicated my intention to lodge amendments that will transfer the responsibility for carrying out the review under sections 19 and 20 to the Lord President. The regulation-making powers remain necessary despite the change, but the provision already requires the Lord President's agreement before any regulations are made. That power acts as a veto against any new measures being introduced.

I will give members an example of where that delegated power could be used. Although we consider that the measures that are already provided are sufficient, the Lord President may seek a power to remove a particular individual from a role within a regulator rather than take measures against the regulator as a whole. As an example, in certain circumstances, the Lord President may remove the chair of the Scottish Legal Complaints Commission.

Oliver Mundell: I will leave it there, convener.

Jeremy Balfour: Two weeks ago, we took evidence from the Faculty of Advocates and the Law Society of Scotland. It became clear that the Law Society in particular seemed to be fundamentally opposed to the provision at section 35 that would allow the Scottish ministers to make replacement regulatory arrangements in circumstances in which a regulator has ceased operating or is likely to cease operating. Could you address those concerns and the appropriateness of acting by subordinate legislation in an urgent situation rather than by bringing primary legislation to the Parliament?

Siobhian Brown: It is considered that the newer regulators run the greatest risk of encountering circumstances that would render them unable to operate at short notice and create a need for the Scottish ministers to step in and ensure that their members continued to be authorised to provide legal services to the public while alternative arrangements are worked out. It was considered appropriate to separate those provisions from section 49, which also deals with situations of necessity in relation to any regulator, allowing the Scottish ministers to take action as a measure of last resort, while maintaining the requirement for parliamentary scrutiny and approval in advance of such steps. However, given the similarity of the measures in sections 35 and 49, we are exploring amendments that would bring them together in one provision that would maintain the power to take action in urgent situations, take it away from the Scottish ministers, and transfer it to the Lord President.

Jeremy Balfour: How would that be done? Do you foresee that happening through regulation or the bill?

Siobhian Brown: I will bring in Leanna MacLarty.

Leanna MacLarty (Scottish Government): The provisions in the bill would require to be amended to make it clear where the power to take that action lies. However, we consider that the regulation-making power is still necessary to give effect to any exercise of the power when the Lord President might seek to use it. That would still require the power to make regulations.

Jeremy Balfour: So the Parliament would have no involvement in that.

Leanna MacLarty: There would still be a regulation-making power, but the details of how that would operate are still being explored. Amendments would be required to make clear in the provisions in the bill where the ability to use the power lies. However, the regulation-making power would still be required if the power is exercised to give effect to the changes being sought.

Jeremy Balfour: Okay. I am slightly confused. Will the regulation-making power be introduced as the bill progresses, or, if a decision to introduce replacement arrangements were made, would regulations have to be laid before Parliament to allow the Lord President to act at a specific time?

Leanna MacLarty: The details of how it would operate are still being worked out, but what I have set out is the current thinking.

Jeremy Balfour: I come back to the final point of my question. Obviously, regulations are subject to a lot less scrutiny by Parliament. Also, we can only say yes or no to them; there is no amending them. If replacement arrangements were required, why would they be introduced by regulation rather than through emergency primary legislation, which can be done within two or three days?

Siobhian Brown: As Leanna MacLarty said, we are still working through the detail of that. Of course, we will give careful consideration to the recommendations from this committee and the lead committee.

Jeremy Balfour: I am still not quite sure why primary legislation cannot be used.

Leanna MacLarty: Section 35 applies directly to accredited regulators. Those are any new regulators that enter the legal sector through the bill. The only regulator that exists at the moment, which came into the system through the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which the provisions in the bill restate, is the Association of Construction Attorneys. That body has six people at the moment and has an existing regulatory scheme. It was considered that it would be possible to use regulations to ensure the continued operation of a very small body with a regulatory scheme that already exists rather than requiring emergency legislation.

Jeremy Balfour: Section 41 enables the Scottish ministers to specify other regulatory matters that must be dealt with in the rules. In the evidence that we took a couple of weeks ago, the Law Society of Scotland said that that power was

“very broad and ... an unwarranted extension of ministerial powers into the authorisation rules and practice rules for legal businesses.”—[*Official Report, Delegated Powers and Law Reform Committee*, 24 October 2023; c 37.]

The Law Society said that no amendment would make that power acceptable. Do you still want to keep section 41(2) in the bill?

Siobhian Brown: The power in section 41(2) gives the Scottish ministers flexibility to expand on the regulatory matters that will be covered by the regulatory rules in order, for example, to add clarity or address unforeseen issues. Currently, that will apply to the Law Society alone as the only category 1 regulator. However, if there were more

than one category 1 regulator in the future and different regulators applied rules inconsistently in a way that would have a negative effect on consumers or competition, it might be beneficial to make regulations so that regulators took a consistent approach.

We have listened to the concerns and intend to lodge amendments that will narrow the scope of the power so that a change would be made in response to a request from bodies such as the regulators or the consumer panel. That would introduce a requirement for the Lord President's consent and for consultation with regulators and the other bodies in respect of regulations under section 41(2).

Jeremy Balfour: To be absolutely clear, you are seeking to amend section 41(2) but you want to keep it in some form.

Siobhian Brown: Yes.

Jeremy Balfour: Do you not accept that it is an overreach of politicians into the legal world?

Siobhian Brown: No, we do not.

Jeremy Balfour: Section 41(6) contains a power for the Scottish ministers to make regulations to allow category 1 regulators to extend the scope of their authorised legal business rules to capture other services provided by the businesses that they regulate in addition to legal services. The Law Society has questioned what other services the Scottish Government is thinking about that the power could be used to cover and that are not already covered by legal services as defined in the bill. It is suggested that the power may allow ministers to change the definition of legal services "by the back door". What is your response to that?

Siobhian Brown: Section 41(6) has been criticised by the Law Society as preventing it from regulating legal businesses in terms of non-legal services—for example, that could involve estate agents, accountants or tax advisers. That is not the intention of the bill, and we are working with the Law Society to ensure that the introduction of entity regulation is as effective and beneficial as possible. Currently, we are exploring amendments that will make that clear.

Jeremy Balfour: Thank you.

Bill Kidd (Glasgow Anniesland) (SNP): I have a question on reconciling different rules. Section 46(3) allows the Scottish ministers to make regulations making further provision about reconciling regulatory conflicts, with a requirement to obtain the Lord President's consent before doing so. The Law Society has questioned the need for that section. Will you expand on your explanation of why the Scottish Government

requires the power? How foreseeable do you consider it to be that the power will be utilised?

Siobhian Brown: The general approach is that it is for the approved regulators to resolve regulatory conflict, in discussion with other regulators, as appropriate. However, should that prove to be impossible or unduly complicated, this power allows the Scottish ministers the flexibility to ensure that such conflicts can be resolved. As the provisions that would be made would depend on the detailed circumstances of any particular conflict that may arise and would address an issue that would be likely to require quick resolution, the use of subordinate legislation is considered to be appropriate. As was raised with the Law Society during its evidence, it is already subject to the oversight of a number of regulatory bodies, such as the Financial Conduct Authority, for the purposes of anti-money laundering and incidental financial business.

The bill also seeks to expand the oversight of the Scottish Legal Complaints Commission to allow it to set minimum standards for the first time. In addition, the bill introduces regulation of legal entities for the first time in Scotland, and we also have a system for the regulation of licensed providers, which it is hoped will be up and running soon. The Law Society will continue to be responsible for the regulation of individual legal practitioners and for some firms that operate across the border and that have regulatory responsibilities in each area of their operation. As has been acknowledged, the system is complex, and the regulation-making powers provide reassurance that any regulatory conflicts that may arise can be rectified.

Bill Kidd: Thank you—that is comprehensive. Are you still in talks with the Law Society over the issue, given the questions that it has raised?

Siobhian Brown: Yes. Talks are on-going with all stakeholders and the legal sector.

Bill Kidd: So that is still being brought up?

Siobhian Brown: Yes.

Bill Kidd: Thank you.

Following on from that, under section 49(1), the Scottish ministers will have powers to intervene. Section 49 provides that the Scottish ministers may establish by regulations a body with a view to its becoming a category 1 regulator. The section also specifies circumstances under which the Scottish ministers may directly authorise and regulate legal business. The bill states that ministers must obtain the consent of the Lord President before making such regulations and, even then, may make them only if they believe that doing so is necessary as a last resort.

Again, stakeholders have called for the removal of the provision, asserting that it interferes with the rule of law and threatens the independence of the legal profession, which is quite a serious issue. What are your reflections on those assertions? Is the Scottish Government considering removing the provision? If not, is it considering making an amendment to it?

Siobhian Brown: The provision is intended to ensure that an appropriate regulator is always in place to regulate authorised legal businesses, should there be no other suitable regulator. Such intervention may be necessary because the members of the regulator may be involved in an on-going court case that might be disrupted, or because of transactions that might put them into difficulty. To avoid that and to respond to it, the Scottish ministers may intervene to create a body to become a new regulator or have another regulator, such as the Law Society, step in to take over the regulation, or they may even regulate the providers themselves.

10:00

In relation to when the power could be used, the provision is intended as a measure of last resort in specific circumstances and only in the event that a regulator finds itself unable to operate. It is designed to cover situations in which a regulator of authorised legal businesses gets into difficulty, such as a financial collapse or as a result of regulatory failures.

Moving on, as I mentioned when we were discussing section 35, given the similarity of the measures in section 49 with those in section 35, we are exploring amendments that would bring them together in one provision that would maintain the power to take action in urgent situations but would transfer it to the Lord President.

Bill Kidd: Will you remain in consultation with the Law Society and so on over that, given what you have said about the fact that you are still looking at how those provisions might develop?

Siobhian Brown: Yes, we are engaging with all stakeholders and the legal sector as we progress the bill.

Bill Kidd: Thank you.

Oliver Mundell: I want to ask about the proposed powers for ministers in relation to the guarantee fund in schedule 1, paragraph 6. The Law Society suggested that the consultation requirement should be paired with a requirement to publish the outcome of that consultation. Does the Scottish Government have a view on that?

Siobhian Brown: Having considered the feedback from stakeholders, we intend to lodge amendments at stage 2 that will introduce a

requirement for the Lord President's consent to be obtained before any regulations are made using that provision and which will narrow the scope so that it will be used in response to a request by a regulator or the consumer panel.

The provisions are necessary to ensure that the guarantee fund, which is established in what is now quite aged legislation, continues to be able to adapt to changes in the way in which solicitors operate.

Do any of my officials want to come in on that?

Jamie Wilhelm: Of course. As the guarantee fund relates to a key provision in respect of ensuring that there is a mechanism to support consumers, and because of the public interest that consumers are protected in terms of legal services regulation, the measure is designed to ensure that there is a lever to inform any failures in the client protection fund. As the minister has pointed out, we are looking at amending that provision so that such changes could be introduced following a request made by a regulator or the consumer panel and so that the Lord President's consent would be required before such changes could be brought forward.

Oliver Mundell: Can you provide more clarity on how the Lord President's consent provision would work in practice? What would that look like? How would stakeholders and the Parliament follow that process?

Siobhian Brown: We are still working through the detail on that, but we will take on board any recommendations from the committee, if it makes any in relation to schedule 1, paragraph 6.

Oliver Mundell: You will recognise that it is hard for the committee, or for individual members of the committee, to come to a view on the scope of that Lord President's consent provision, which will now run through a substantive part of the bill, without knowing how it will work in practice or what the process would look like. How would we know what discussions had taken place around that? How would stakeholders know if there were concerns about the proposals? Will the regulations be introduced to Parliament before consent is sought, or will consent be sought before the regulations come to Parliament? Will there be ministerial-level discussions with the Lord President before Parliament knows about it? How will the process actually work?

Siobhian Brown: Since the bill has been introduced, there have been on-going discussions with stakeholders, the Lord President and the judiciary about that. We are still at stage 1, so we have a bit to go, but as we move forward through the parliamentary process, we will be happy to provide further detail. At the moment, we are still working on the detail.

Oliver Mundell: Do you not think that the consent procedure is too fundamental for us to have got to this point in the process and still not be able to give a relatively high-level explanation of how it would work?

Siobhian Brown: I do not. I will bring in my officials, but since the introduction of the bill, we have shown a willingness and an openness to work with the judiciary and stakeholders and to consider amendments prior to stage 2, so I do not agree with you.

Jamie Wilhelm: I will reiterate what the minister pointed out. The mechanism would be as it is in existing legislation—the Legal Services (Scotland) Act 2010. That consent mechanism is a veto, and it would apply at the start of the process. It is a statutory process whereby ministers would have to obtain consent before they could bring forward regulations. However, we are looking at the scope of that, so that consent could be sought only when the consumer panel or a regulator makes a request to the Lord President, and the Lord President could perhaps have the ability to make a recommendation to the Scottish ministers to bring forward regulations. That is the broad mechanism that we are looking at, which already exists in statute.

Oliver Mundell: Would you recognise that what is proposed in the bill is a significant expansion of that? The mechanism in the current statute is a one-off, whereas the one that is proposed in the bill runs right through the topics that the bill covers. The range of provisions to which the mechanism applies and their potential reach are far wider than in previous legislation. Is that fair?

Jamie Wilhelm: There is a range of mechanisms in existing legislation that require the consent of the Lord President—for example, that is required under the 1990 act, in which the Association of Construction Attorneys was given the ability to exercise rights of audience and rights of litigation, and under the Legal Services (Scotland) Act 2010, whereby the Law Society of Scotland was authorised to regulate alternative business structures.

As the Senators of the College of Justice set out in their response to the lead committee, the Lord President has an overarching role in legal services regulation, so we believe that it is appropriate that that situation remains.

Oliver Mundell: I feel that it is a bit unfair to keep pushing an official, so I will stop there.

Bill Kidd: Thank you for your responses so far, minister. I want to ask a question about making changes to regulatory functions.

Paragraph 23 of schedule 2 provides that where a regulator has acted or failed to act in a way that

has had, or is likely to have, an adverse impact on the observance of any of the regulatory objectives, and the matter cannot be addressed adequately by the Scottish ministers taking any of the measures mentioned in the bill, such as setting performance targets or imposing a financial penalty, the Scottish ministers may make regulations to change or remove some or all of the functions of the regulator. That sounds quite dramatic. Additional requirements must be met before such regulations may be made, including sharing them with consultees and laying them in draft before the Scottish Parliament.

Stakeholders who appeared before the committee have suggested that schedule 2 should be deleted in its entirety, given that they are also calling for the deletion of section 20, to which schedule 2 relates. Do you have any further reflections on the matter?

Siobhian Brown: The power allows for changes to a regulator's functions. Where that relates to a regulator whose regulatory scheme was approved by virtue of the 1990 act, or for future regulators that achieve accreditation by virtue of the bill, that may be done via direction. That is not considered possible for existing regulators whose regulatory functions are set out in primary legislation, such as the Law Society and the Faculty of Advocates. It is considered, in such a case, that regulations are the most appropriate way to make changes. I will give an example. If it was considered that the Law Society had failed to properly regulate conveyancing or executry practitioners, that function could be used.

The power is also designed to be applied when a category 1 or category 2 regulator has not observed the regulatory objectives. Having considered stakeholders' feedback, we intend to lodge amendments at stage 2 to transfer the responsibilities in sections 19 and 20 to the Lord President. We are also giving consideration to amending the sections so that regulations may be introduced only on the recommendation of the Lord President. As an additional safeguard, we are also considering whether the Lord President should have to give consent to any draft regulations before they can be laid in Parliament.

I have listened carefully to the concerns of the legal sector. Even though Esther Robertson, who appeared before the committee last week or the week before, wanted an independent regulator, she did not consider it appropriate to have any ministerial interference. I am listening carefully to such views, which is why we are considering those amendments.

Bill Kidd: On that basis, although Scottish Government ministers would be making an intervention, that would be to redirect the powers to the Lord President. Is that correct?

Siobhian Brown: We are working on the detail of that now; we are in discussion about that.

Bill Kidd: Okay—thank you for that.

The Convener: There are 21 delegated powers in the bill. We have focused our questions on nine of them, which were those that have focused the minds and attention of stakeholders in the legal sector. However, the committee will report on all the delegated powers in the bill to the lead committee to help to inform its stage 1 considerations. You will be aware of an additional written submission from the Law Society giving additional views on some of the other delegated powers. Do you wish to make any final comments on any of the other delegated powers that are contained in the bill?

Siobhian Brown: I would just like to thank the committee for its time, and I look forward to receiving your report.

The Convener: Okay. Thank you.

Jeremy Balfour: I am reflecting on all the evidence. We are trying to future proof legislation that will probably last for several decades. Are you confident that the bill does not give too much power—not necessarily to your Government or the next Government but to Governments beyond that—to ministers, which could be misused in the wrong hands, or are you confident that safeguards are in place?

Siobhian Brown: I am confident because, as you will have noted in relation to the amendments that I have talked about today, we are trying to remove the role of ministers from the bill and design the process so that there will be no Government interference.

Jeremy Balfour: Okay; thank you.

The Convener: As colleagues have no further questions, I will ask a final one. It is not really a committee question. You will be aware of the McClure Solicitors situation. I am quite sure that colleagues from all parties will have received emails from constituents about the issue. It is clear that there are a lot of unhappy individuals across the country and elsewhere in the United Kingdom. Some of the issues that have been raised involve trusts and succession and legal services. Obviously, the committee is scrutinising two bills on those topics.

Would you be content to meet me to discuss concerns that constituents have raised, with a view to potentially making amendments to the Trusts and Succession (Scotland) Bill and the Regulation of Legal Services (Scotland) Bill?

Siobhian Brown: Yes, the matter has been raised with me. As you know, it is not possible for the Scottish ministers or the Scottish Government

to intervene in or comment on individual legal matters. However, I will be happy to meet you to discuss the issue.

The Convener: Thank you for that. The Law Society's second submission helpfully references sections 39(6), 40(3) and 45(2) of the Regulation of Legal Services (Scotland) Bill, which could be part of the discussion.

Siobhian Brown: I will be happy to meet you.

The Convener: Thank you very much for that, minister.

I thank the minister and her officials for their evidence. The committee may follow up in writing if we have any additional questions that arise from the meeting.

I will suspend the meeting to allow the witnesses to leave the room.

10:15

Meeting suspended.

10:16

On resuming—

Instruments subject to Affirmative Procedure

The Convener: Under agenda item 3, we are considering three instruments subject to the affirmative procedure. An issue has been raised on the following instrument.

Retained EU Law (Revocation and Reform) Act 2023 (Consequential Amendments) (Scotland) Regulations 2023 [Draft]

The Convener: The instrument is made under section 19(1) of the Retained EU Law (Revocation and Reform) Act 2023, which enables the Scottish ministers to make any provision that they consider appropriate in consequence of that act. The instrument updates various pieces of primary and secondary legislation to replace the term “retained EU law” and associated expressions with the term “assimilated law” and associated expressions.

In correspondence with the Scottish Government—which was published online with the agenda for this meeting—the committee queried paragraph 3 of schedule 1 of the instrument, which would amend the Freedom of Information (Scotland) Act 2002 by changing the words “EU obligation” to “assimilated obligation” in sections 26 and 45. In particular, the committee noted that those references to “EU obligation” seemed not previously to have been changed to “retained EU obligation” and asked the Scottish Government why it considered that the power in section 19 of the 2023 act enabled that amendment to be made.

In its response, the Scottish Government confirmed that the references to “EU obligation” in those sections have not been updated to “retained EU obligation”. The Scottish Government advised that such a change could have been made following enactment of the European Union (Withdrawal) Act 2018, but it did not say why that was not done. The Scottish Government considers those amendments to be consequential, in particular on the establishment by the 2023 act of “assimilated obligation” as a defined term within the body of assimilated law, including for the purposes of statutory interpretation.

The instrument in front of us seeks to change those references straight from “EU obligation” to “assimilated obligation”, skipping the step of updating them to say “retained EU obligation”. The committee notes that the term “EU obligation” is no longer a defined term.

It appears to the committee that the provision in question may address a failure to have updated

those sections in consequence of the 2018 act, rather than making provision that is properly in consequence of the 2023 act. As such, the committee considers that there is room for doubt that the provision in question is envisaged by and within the limits of the enabling power. Therefore, there appears to be a doubt about whether the provision is *intra vires*.

Does the committee wish to draw the instrument to the attention of the Parliament on reporting ground (e), in that there appears to be a doubt about whether paragraph 3 of schedule 1 is *intra vires*?

Members *indicated agreement.*

The Convener: Also under this agenda item, no points have been raised on the following instruments.

Colleges of Further Education and Regional Strategic Bodies (Membership of Boards) (Scotland) Order 2023 [Draft]

Quality Meat Scotland (Amendment) Order 2023 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

10:19

The Convener: Under agenda item 4, we are considering two instruments subject to the negative procedure, on which no points have been raised.

Public Procurement (Agreement on Government Procurement) (Thresholds) (Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/300)

Rural Support (Simplification and Improvement) (Scotland) Regulations 2023 (SSI 2023/308)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Convener: That concludes the public part of today's meeting.

10:20

Meeting continued in private until 10:53.

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