

Equalities, Human Rights and Civil Justice Committee

25th Meeting, 2023 (Session 6), Tuesday 28 November 2023

Regulation of Legal Services (Scotland) Bill

Note by the Clerk

Introduction

1. [The Regulation of Legal Services \(Scotland\) Bill](#) (“the Bill”) was introduced in the Parliament by the Cabinet Secretary for Justice and Home Affairs, Angela Constance on 20 April 2023.
2. The Parliament designated the Equalities, Human Rights and Civil Justice Committee as the lead committee for Stage 1 consideration of the Bill and initially agreed a Stage 1 deadline of 15 December 2023.
3. The Bill, accompanying documents and additional information provided by the Scottish Government can be accessed on its [dedicated webpage](#).
4. Also on that page is a [comprehensive briefing](#) on the Bill, prepared by the Scottish Parliament Information Centre (SPICe). The briefing incorporates—
 - a summary which provides background and context to discussions, reviews and consultations that have led up to the introduction of the Bill (page 4);
 - the main changes proposed by the Bill (pages 5 and 6);
 - an overview of legal services, legal service providers in Scotland and the current regulatory framework (pages 10 – 27);
 - background to the Bill (pages 28 – 32);
 - an overview of the main provisions in the Bill (pages 33 – 48);
 - Annexes 1, 2 and 3 provide respectively a diagram of the current regulatory landscape; the landscape proposed in the Robertson report; the landscape as proposed by the Bill.

Written evidence

5. The Committee issued a [call for views](#) on the Bill on 31 May 2023. The call for views closed on 9 August 2023. [Published responses](#) are available online.

6. Key themes highlighted in the responses are:

- Arguments in support of the principal recommendation of the Robertson Review, that an independent regulator should be created to regulate legal professionals
- The interests of consumers and the importance of consumer principles
- A general view that the current complaints system is overly complex and difficult for consumers to navigate
- Strongly expressed concerns in some submissions about provisions in the Bill relating to the role of Scottish Ministers in the regulation of legal services which would impact on the independence of the judiciary.

Stage 1 consideration

7. The Committee considered its approach to scrutiny of the Bill at Stage 1 at its meeting on Tuesday 5 September 2023. It agreed to begin taking oral evidence in early October with further sessions held during October and November 2023, and to consider in private the evidence heard during those sessions.
8. The Committee revisited its approach and timetable for evidence sessions at its work programme discussion on 19 September 2023. This followed the lodging of amendments for reconsideration of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (“the UNCRC Bill”).
9. The Committee had previously agreed to prioritise any scrutiny in respect of reconsideration of the UNCRC Bill and, as such, agreed that following its initial evidence session on the Bill (3 October 2023) it would resume taking evidence during November and December 2023.
10. To accommodate this, on 4 October 2023 the Parliament agreed to extend the Stage 1 deadline for the Regulation of Legal Services (Scotland) Bill to 23 February 2024.
11. A Stage 1 timetable is available on the [Bill webpage](#).

Oral evidence

12. On [3 October 2023](#), the Committee took oral evidence on the Bill from witnesses representing consumer-facing bodies. It heard from:
 - Vicky Crichton, Secretariat, Scottish Legal Complaints Commission Consumer Panel;
 - Sharon Horvitz, Legal Director, Competition and Markets Authority;
 - Tracey Reilly, Head of Consumer Markets, Consumer Scotland;
 - Dr Marsha Scott, CEO, Scottish Women’s Aid.

13. At its meeting on [7 November 2023](#), the Committee took oral evidence from:

- Brian Inkster, CEO, Inksters Solicitors
- Chris Kenny, former Chief Executive of the Legal Services Board of England and Wales and currently CEO of the Medical and Dental Defence Union of Scotland
- Professor Stephen Mayson, University College London
- Naeema Yaqoob Sajid, Solicitor and Director of Diversity+.

14. At its meeting on [14 November 2023](#), the Committee took oral evidence from:

- Rosemary Agnew, Ombudsman, Scottish Public Services Ombudsman (SPSO)
- Colin Bell, Chair of the Scottish Solicitors' Discipline Tribunal (SSDT)
- Neil Stevenson, Chief Executive, Scottish Legal Complaints Commission (SLCC).

15. At its meeting on [21 November 2023](#), the Committee took oral evidence from:

- Bill Alexander, Association of Construction Attorneys
- Roddy Dunlop KC, Dean and Morag Ross KC, Faculty of Advocates
- Rachel Wood, Executive Director of Regulation and David Gordon, Lay Convener, Regulatory Committee, Law Society of Scotland
- Darren Murdoch, President and Andrew Stevenson, Secretary, Scottish Law Agents' Society.

16. At this meeting, the Committee will first hear evidence from:

- The Right Honourable Lady Dorrian, Lord Justice Clerk, Senator of the College of Justice
- The Honourable Lord Ericht, Senator of the College of Justice

and then from

- Esther Robertson, author of [Fit for the Future, report of the Independent Review of Legal Services Regulation in Scotland](#).

17. At this session, the Committee is likely to explore in more depth issues including:

- The role of the Lord President in regulating the legal profession in Scotland;
- The arguments for or against an independent regulator;
- Independence of the legal profession and the rule of law;
- The proposals in the Bill relating to the role of Scottish Ministers;
- Other issues of concern and potential for changes to some provisions in the Bill;
- The views and interests of consumers;
- The complaints process.

Correspondence with Scottish Government

18. The Minister for Victims and Community Safety [wrote to the Committee](#) on 27 September 2023, indicating her “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”. The letter is included in Annexe A to this paper.
19. The Committee considered the letter at its meeting on 3 October and agreed to write to the Minister, to better understand the detail of any changes likely to come forward at Stage 2. Accordingly, the [Committee wrote to the Minister](#) on 6 October 2023. The letter is included in Annexe B to this paper.
20. The Minister for Victims and Community Safety [replied to the Committee](#) on 27 October 2023, indicating that the Scottish Government is “considering amendments which would retain the powers to review a regulator and impose measures (sections 19 and 20), but with responsibility for those functions sitting with the Lord President instead of Scottish Ministers”.
21. Further, the Minister indicates the Scottish Government is “exploring amendments which would address the balance of responsibilities between the Scottish Ministers and Lord President in the consideration of applications by bodies wishing to enter the legal services sectors as new regulators (section 29)”.
22. The Minister notes, however, that “planned changes to the Bill will take time to work through”. The letter is included in Annexe C to this paper.

Delegated Powers and Law Reform Committee consideration

23. The Delegated Powers and Law Reform (DPLR) Committee has been scrutinising the delegated powers in the Bill.
24. At its meeting on [24 October 2023](#) the DPLR Committee took oral evidence from Esther Roberton, the Law Society of Scotland and the Faculty of Advocates.
25. On [7 November 2023](#) it took oral evidence from the Minister for Victims and Community Safety, where it discussed the implications of any changes to delegated powers provisions which might come forward at Stage 2.
26. Following that session the DPLR Committee [wrote to the Lord President](#) at the Court of Session, seeking his views on “the appropriateness of the proposals to involve the Lord President’s Office through (a) the proposed transfer of regulation-making powers from Ministers to the Lord President, and (b) the introduction of a consent requirement, which could act as a “veto” over Ministers introducing new measures”. The letter is included in Annexe D to this paper.

27. Subsequent to her appearance on 7 November, the Minister for Victims and Community Safety wrote to the DPLR Committee on [16 November 2023](#). In that letter, the Minister sets out areas in which the Scottish Government is “giving consideration to amendments”, for example in relation to sections 19, 20, 35 and 49 and those where delegated powers exercised by Scottish Ministers would require the Lord President’s consent (section 5(1), section 26(1) and section 41(2)).
28. As previously expressed in writing to this Committee, the Minister indicates that consideration and discussion of possible amendments in these areas is “ongoing”. The letter is included in Annexe E to this paper.
29. In his response to the DPLR Committee on [17 November 2023](#), the Lord President states he is not in a position to address the first part of the DPLR Committee’s question as “discussions with the Government about its proposals to amend the Bill are at an early stage”. He adds:
- “Much more information will be needed about the detail of how the Government’s proposals in relation to sections 19, 20, 49 and schedule 2 are intended to operate, before an assessment can be made about whether transferring functions from Ministers to the Lord President alleviates our concerns.”
30. On the issue of the introduction of a consent requirement the Lord President states:
- “Given the significance of what the powers in sections 19, 40, 49 and schedule 2 do, as the senior judiciary have made clear in their response, the need for Ministers to secure the consent of the Lord President, before exercising delegated powers, does not alleviate our concerns.”
31. The Lord President further notes the senior judiciary has not yet been consulted about a consent mechanism being introduced into paragraph 6 of schedule 2, nor on any proposed changes to section 35.
32. The Lord President’s letter is included in Annexe F to this paper and includes the full text of the senior judiciary’s response to this Committee’s call for views.
33. Separately, the Law Society of Scotland wrote to the DPLR Committee on [20 November 2023](#) in response to the Minister’s letter of 16 November. That letter refers to recent meetings (8 and 16 November) and communications (9 November) it has had with the Minister and officials. While it notes there had been “no discussion” on Ministers’ plans to amend sections 5, 19, 20, 35, 41 and 49 prior to these meetings, it does describe them as “highly constructive”.
34. The Law Society notes that it has not yet had sight of any draft amendments but was “greatly encouraged” by the Minister’s statement to the DPLR Committee on 7 November with regard to removing the role of Ministers from the Bill. The letter is included in Annexe G to this paper.

35. The Delegated Powers and Law Reform Committee published its [report on the delegated powers in the Bill](#) on Thursday 23 November 2023.
36. In paragraph 19 of its report, the DPLR Committee observes that it has “found it challenging to meaningfully report on a number of delegated powers in the Bill given that it is aware the powers are likely to change, but it does not have information on exactly how they might change, or have full access to stakeholder views on those changes”.
37. It recommends in paragraphs 30 and 39 powers that should not be delegated.
38. Paragraphs 100, 112 and 151 recommend either a review of how delegated powers should operate or that additional safeguards be built in.
39. The report also identifies powers that the DPLR Committee is not content with as currently drafted. Paragraphs 53, 121 and 160 all state:
- “Based on the evidence received, the Committee cannot come to a view on whether the proposed additional safeguards would alleviate concerns. The Committee echoes the Lord President’s view that “much more information will be needed about the detail of how the Government’s proposals...are intended to operate”.”

Parliamentary Questions

40. The Minister responded to question [S6O-02726](#) from Michelle Thomson MSP in the Debating Chamber on Wednesday 15 November 2023.

Next steps

41. The Committee will conclude its scrutiny of the Bill at its meeting on 5 December 2023, when it will take evidence from the Minister for Victims and Community Safety.

Clerks to the Committee November 2023

Annexe A

Letter from the Minister for Victims and Community Safety to the Convener - 27 September 2023

27 September 2023

Dear Convener

Regulation of Legal Services (Scotland) Bill

I write to you in respect of the Regulation of Legal Services (Scotland) Bill (“the Bill”) which will provide for a modern regulatory framework designed to promote competition and innovation while also improving the transparency and accountability of legal services regulation and the legal complaints system in Scotland.

There are many benefits the Bill will bring to both the legal sector and consumers of legal services and we want to ensure it strikes the right balance between the various interests.

Throughout the development of the Bill the Scottish Government has been committed to working collaboratively with all interested parties, including the legal sector and those representing the consumer interest and we will continue to do so during the Bill’s passage through Parliament.

We are aware and have discussed with some stakeholders, including the senior judiciary, their concerns about certain provisions in the Bill relating to the role of Scottish Ministers in the regulation of legal services which they consider could impinge upon the independence of the legal profession¹.

I have considered carefully these concerns and therefore wanted to let the Committee know in advance of it taking oral evidence, that it is my 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.

I will be happy to update the Committee further when I meet with you later this year.

SIOBHIAN BROWN

¹ In particular, ss. 5, 8, 19, 20, 29, 41 & 49 of the Bill.

Annexe B

Letter from the Deputy Convener to the Minister for Victims and Community Safety - 6 October 2023

6 October 2023

Dear Minister

Regulation of Legal Services (Scotland) Bill

At its meeting on Tuesday 3 October the Equalities, Human Rights and Civil Justice Committee considered your [letter of 27 September](#) in which you indicated your intention to bring forward amendments to the Regulation of Legal Services (Scotland) Bill at stage 2.

The Committee notes the Scottish Government's commitment to working collaboratively with all interested parties, including the legal sector and those representing the consumer interest.

We further note that your intention to bring forward amendments at stage 2 has been informed by discussions you have had with stakeholders, including the senior judiciary, with regard to their concerns about provisions in the Bill which they consider could impinge upon the independence of the legal profession.

The Committee began oral evidence sessions on Tuesday 3 October. These sessions will resume in November and will include sessions with the legal sector and the senior judiciary.

The Committee agreed that, in advance of these sessions, it would be helpful to better understand the detail of any changes likely to come forward at stage 2, to avoid any potential of future evidence sessions covering content and provisions of the Bill that might ultimately not apply.

As such, we would be grateful if you could advise, as far as you are able:

- How far into the development of amendments is the Scottish Government?
- What is the detail and potential effect of such amendments?
- Will the Scottish Government continue to work collaboratively with relevant stakeholders, including the senior judiciary, on such intended amendments?
- Other than those sections identified in the footnote to your letter, are there any other provisions the Scottish Government is considering changing?

EHRCJ/S6/23/25/1

The Committee would welcome a response in writing ideally by no later than Tuesday 31 October, with a view to informing its future evidence sessions.

Yours sincerely,

Maggie Chapman
Deputy Convener
Equalities, Human Rights and Civil Justice Committee

Annexe C

Letter from the Minister for Victims and Community Safety to the Convener – 27 October 2023

27 October 2023

Dear Convener

Regulation of Legal Services (Scotland) Bill

Thank you for the letter of 6 October from the Committee in response to my correspondence of 27 September, in respect of the Regulation of Legal Services (Scotland) Bill.

The Bill will bring many benefits to both the legal sector and consumers of legal services, and we want to ensure it strikes the right balance between the various interests. Therefore, reflecting carefully on the discussions we have had with stakeholders including the senior judiciary, it is my intention to bring forward amendments at Stage 2 intended to address concerns raised in respect of the role placed on Scottish Ministers within the Bill.

To aid the Committee in its consideration of the Bill and in response to the questions in the Committee's letter of the 6 October I have provided further information below.

Question 1: How far into the development of amendments is the Scottish Government?

The Scottish Government is currently considering options for amendments, reflecting on the views of stakeholders including the senior judiciary, and with the intention of building consensus around reform. Whilst we have indicated an intention to make amendments, and are working on their development, we are aware of the importance of the Stage 1 parliamentary process in drawing out stakeholder views, and of the Committee's consideration.

We have had constructive engagement with the senior judiciary and their officials in seeking to build consensus around the best approach to the detailed provisions. The planned changes to the Bill will take time to work through, however I will provide the Committee with an update on developments when I appear before the Committee later this year.

Question 2: What is the detail and potential effect of such amendments?

The provisions identified by the senior judiciary as being of concern are those which introduce new powers and duties in respect of the regulation of legal services, and

place certain functions on Scottish Ministers in their operation². We are considering amendments which would maintain these functions but transfer the responsibility for delivery of certain of those functions to the Lord President as the head of the judiciary. In the consideration of any such changes, we are also seeking to maintain the transparency and accountability which is integral to their operation.

By way of example, we are considering amendments which would retain the powers to review a regulator and impose measures (sections 19 and 20), but with responsibility for those functions sitting with the Lord President instead of Scottish Ministers. The carrying out of such functions would continue to include engagement and consultation with the regulator in question and other appropriate bodies. In addition, there would continue to be a requirement that the report detailing the findings of such a review and any measures intended to be taken, to ensure transparency in the process.

We are also exploring amendments which would address the balance of responsibilities between the Scottish Ministers and Lord President in the consideration of applications by bodies wishing to enter the legal services sectors as new regulators (section 29).

On a number of the delegated powers introduced by the Bill, we are exploring amendments which would narrow their scope so that they are considered at the instance of the sector and provide a consistent approval role for the Lord President throughout the Bill, for example at sections 5, 8, and 49.

These are some of the amendments being explored and I look forward to providing the committee with more detail in due course. While the detail is under consideration, the effect is intended to address the concerns raised by the judiciary in respect of the provisions identified.

Will the Scottish Government continue to work collaboratively with relevant stakeholders, including the senior judiciary, on such intended amendments?

Throughout the development of the Bill the Scottish Government has been committed to working collaboratively with all interested parties, including the legal sector and those representing the consumer interest, and we will continue to do so in the development of amendments and during the Bill's passage through the Scottish Parliament.

Other than those sections identified in the footnote to your letter, are there any other provisions the Scottish Government is considering changing?

As part of our ongoing engagement with stakeholders to consider how the Bill might be strengthened it is anticipated that further amendments will be lodged, by way of technical amendment and amendments intended to further provide proportionate and risk-based improvements to the regulatory framework.

² (In particular, sections 5, 8, 19, 20, 29, 41 & 49 of the Bill).

EHRCJ/S6/23/25/1

We will also carefully consider the findings and conclusions of the Committee. I will be happy to update the Committee further when I meet with you later this year.

SIOBHIAN BROWN

Annexe D

Letter from the Delegated Powers and Law Reform Committee to The Right Hon Lord Carloway, Lord President of the Court of Session – 9 November 2023

9 November 2023

Dear Lord Carloway

Regulation of Legal Services (Scotland) Bill

The Delegated Powers and Law Reform Committee has been scrutinising the delegated powers in the above Bill at Stage 1.

In the course of its scrutiny, the Committee has taken oral evidence from Esther Roberton, the Law Society of Scotland and the Faculty of Advocates on 24 October ([Official Report](#)) and the Minister for Victims and Community Safety on 7 November ([Official Report](#)).

You will see from the Official Reports, that while the Law Society of Scotland and the Faculty of Advocates asked for a number of the powers to be removed in their entirety from the Bill, they suggested others could be amended so as only to be used once the Lord President's consent has been obtained.

The Minister also made a number of commitments, both in her oral evidence to the Committee, and in [this letter to the lead committee](#) to:

- (a) transfer the responsibility for delivery of certain of those functions [regulation-making powers] to the Lord President as the head of the judiciary in relation to a number of the delegated powers; and
- (b) introduce amendments that would require the Lord President's consent to be gained before any changes are made by Scottish Ministers through regulations in relation to other delegated powers.

In their evidence to the Committee, Scottish Government Officials also commented: "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."

And in direct response to a question asking if "the Lord President is happy with the extension of those powers?", the Committee was told: "Engagement is continuing in respect of those provisions. We hope to reach consensus on the way forward."

In relation to this Bill, the Delegated Powers and Law Reform Committee seeks your view on the appropriateness of the proposals to involve the Lord President's Office through (a) the proposed transfer of regulation-making powers from Ministers to the Lord President, and (b) the introduction of a consent requirement, which could act as a "veto" over Ministers introducing new measures.

The Committee would appreciate a response in relation to the above question by 3pm on Friday 17 November.

Yours sincerely,

Stuart McMillan MSP
Convener of the Delegated Powers and Law Reform Committee

Annexe E

Letter from the Minister for Victims and Community Safety to the Convener of the Delegated Powers and Law Reform Committee – 16 November 2023

16 November 2023

Dear Convener

Regulation of Legal Services (Scotland) Bill

I wish to thank the Committee for inviting me to give evidence on the Regulation of Legal Services (Scotland) Bill (“the Bill”) on the 7 November 2023.

Following on from the evidence session, I thought it may be helpful to the Committee to set out further context and background to the current position.

Throughout the development of the Bill the Scottish Government has been committed to working collaboratively with all interested parties, including the legal sector and those representing the consumer interest and we will continue to do so during the Bill’s passage through Parliament.

We are aware and have discussed with some stakeholders, including the senior judiciary, their concerns about certain provisions in the Bill relating to the role of Scottish Ministers in the regulation of legal services.

As background to the position, it is important to reflect on Esther Robertson’s independent review and the consultation that followed. Views on the recommendation to establish a single independent regulator for all legal services in Scotland were polarised, therefore the Scottish Government, working in collaboration with stakeholders representing the legal and consumer perspectives developed a consultation which sought views on three distinct models of legal regulation.

That consultation sought views firstly on a model based on Esther Robertson’s primary recommendation of a single independent regulator, secondly a model similar to that in England and Wales of the addition of an independent oversight regulator, and thirdly a model which would build on the existing framework to increase the transparency and accountability of legal regulation that delivers a balance between the independence of the legal profession with their duty to work in the public interest.

While the legal perspective predominantly supported the third model, the Bill seeks to deliver the priorities of all stakeholders to deliver a strong regulatory system which provides for increased transparency, accountability and places public and consumer interest at its heart.

Therefore, some of the provisions contained in the Bill build on existing Scottish legislation which provide an equivalent role for Scottish Ministers in the current system of legal services regulation.

As set out in my correspondence of 27 September and 27 October to the Equalities, Human Rights and Civil Justice Committee, we want to ensure that the Bill strikes the right balance between the various interests of stakeholders, and it is therefore my intention to bring forward amendments at Stage 2 intended to address some of the concerns raised.

As we are giving consideration to the transfer of the exercise of certain functions from the Scottish Ministers to the Lord President, our discussions around amendments to address the main concerns raised on the Bill have predominantly taken place with the Lord President's office. I am aware that the Committee has written to seek the view of the Lord President in respect of those proposals.

Engagement on the wider aspects of the Bill has been ongoing with all stakeholders throughout the passage of the Bill to discuss and consider their views as to how the Bill might be strengthened, and we are giving careful consideration to all stakeholders' views.

As discussions advance with the Lord President's office in respect of the provisions relating to the role of Scottish Ministers and possible stage 2 amendments, we will continue to engage with wider stakeholders such as the Law Society of Scotland, the Faculty of Advocates and other key stakeholders including those representing the consumer view.

Proposed approach to amending the Bill

Having reflected on the feedback from stakeholders we are giving consideration to amendments which would transfer the exercise of the powers at sections 19 and 20 of the Bill to the Lord President. This in particular reflects the view of the Senators of the College of Justice, who stated in their submission to the Equalities, Human Rights and Civil Justice Committee that such a change would be acceptable to them³:

"In order to protect the independence of the legal profession from Scottish Government interference, the powers in section 19 and 20 should be added to the powers of the existing independent regulator, the Lord President."

The same transfer of functions is intended for sections 35 and 49 of the Bill.

We are also considering amendments which will provide additional safeguards in the form of requiring the Lord President's consent where certain delegated powers are exercised by Ministers and provide a more consistent approval role for the Lord President throughout the Bill. By way of example, the Lord President's consent would be required for any amendment to the regulatory objectives or professional principles at section 5(1), any additions to the regulatory scheme requirements at

³ [Response from Senators of the College of Justice to the call for views on the Regulation of Legal Services \(Scotland\) Bill.](#)

section 26(1) or any change to the rules for authorised legal businesses at section 41(2). It may also be appropriate to narrow the scope of any such changes to the extent that they are only possible at the recommendation of certain bodies.

As I set out to the Committee those discussions are ongoing and we are aware of the importance of the Stage 1 parliamentary process in drawing out stakeholder views, and of the Committees' consideration. Constructive engagement is ongoing with stakeholders in seeking to build consensus around the best approach to the detailed provisions and we hope to reach an agreed position giving careful consideration to all parties' views.

Equivalent provision in existing legislation

As set out above, some provisions of the Bill build on the existing legislative approach to legal services regulation. As we are proposing to further strengthen the role of the Lord President, we consider it may be useful to provide more detail as to where equivalent legislation already exists.

Section 20(6) and Schedule 2, Paragraph 23

Sections 36 to 38 of the Legal Services (Scotland) Act 2010 provides that Scottish Ministers may monitor the performance of approved regulators (of alternative business structures). The Scottish Ministers may take one or more of the measures (the same measures included at section 20 of the Bill) if they consider that to be appropriate in the circumstances of the case.

Sections 35 and 49

These provisions were drawn from section 44 of the Legal Services (Scotland) Act 2010 which allow the Scottish Ministers to take necessary measures, as a last resort, in order to ensure the provision of legal services by licensed providers (ABS) is regulated effectively.

Section 46(3)

This provision was drawn from section 13 of the Legal Services (Scotland) Act 2010, in relation to reconciling different rules. The Scottish Ministers may, by regulations, make further provision about regulatory conflicts in relation to an approved regulator.

Section 41(2) & (6)

This provision was drawn from section 45 of the Legal Services (Scotland) Act 2010, in relation to additional powers and duties. The Scottish Ministers may, by regulations, make provision conferring on approved regulators such additional functions as they consider appropriate.

I hope this information is helpful in the Committee's consideration of the Bill.

SIOBHIAN BROWN

Annexe F

Letter from The Right Hon Lord Carloway, Lord President of the Court of Session to the Convener of the Delegated Powers and Law Reform Committee – 17 November 2023

17 November 2023

Dear Convener

Regulation of Legal Services (Scotland) Bill

I thank you for your letter of 9 November. The senior judiciary responded to the Lead Committee's call for views on the Bill. A copy of this response is attached.

The judiciary were unanimous in their views that the Bill, as it is currently drafted, poses a serious threat to the rule of law and the independence of both the legal profession and the judiciary. This is mainly because the Bill gives powers to the Scottish Ministers, including some delegated powers, to regulate the legal profession. Not only is that constitutionally unacceptable, it also fails to protect the interests of consumers who may need to seek advice from lawyers in cases involving the Government.

Given the strength of our concerns, I welcome the Minister's commitment to bringing forward Stage 2 amendments to remove these functions from Ministers.

On the Committee's first question about the appropriateness of the Government's proposals to transfer regulation making powers from Ministers to the Lord President, I am not in a position to answer this question at this stage in relation to certain sections of the Bill. This is because discussions with the Government about its proposals to amend the Bill are at an early stage. The Government sent my office a high level paper which set out options on how it may amend certain sections of the Bill. Some of the senior judiciary and officials have considered this paper. Whilst some initial views have recently been provided to the Scottish Government on some provisions, these will need to be discussed in more detail.

Much more information will be needed about the detail of how the Government's proposals in relation to sections 19, 20, 49 and schedule 2 are intended to operate, before an assessment can be made about whether transferring functions from Ministers to the Lord President alleviates our concerns. These will not be adequately addressed by simply replacing a reference to the Scottish Ministers with one to the Lord President. For example, in relation to section 49, how would the Lord President set up a new regulator? How would this all be funded? In what circumstances would the Lord President directly regulate legal businesses?

Careful consideration must first be given to the justification for the existence of a provision, before we can look at what changes might be necessary to secure a system that is appropriate and workable. This includes looking at whether Ministers should have any delegated powers.

Before I comment on the Government's proposals to introduce a requirement for Ministers to obtain the Lord President's consent before they can bring forward regulations under certain sections of the Bill, it is important to stress that the inclusion of such a consent mechanism needs to be carefully considered. The scope of each delegated power, and what it permits Ministers to do, must be looked at in order to assess whether a consent mechanism would act as a sufficient safeguard in those circumstances. Consideration must also be given to how this mechanism would operate. For example, how will the Lord President obtain the necessary information on which to base a decision to withhold consent?

On the second question posed by the Committee, there are many examples on the statute book where the Lord President's approval is needed before Ministers may bring forward subordinate legislation. There are many examples where the Lord President possesses direct powers, and many permutations in between. However, if the Lord President was ever to withhold consent, whilst that should provide a strong indicator to the Government that any proposed Ministerial action is not felt to be appropriate, such a mechanism is not a veto. There would be a risk that future governments could seek a judicial review of a decision of the Lord President to withhold consent, if it felt strongly, for political reasons, that it needed to take action.

Given the constitutional issues which this Bill creates, the senior judiciary do not think it is acceptable for the Scottish Ministers to have a delegated power, as set out in section 5 of the Bill, to add to, amend or remove the regulatory objectives and professional principles. Changing those matters goes to the heart of regulating the legal profession. Placing a requirement on Ministers to seek the consent of the Lord President before bringing forward any such regulations risks politicising the office of Lord President, whether consent were given or withheld.

Based on the information which has been provided, the senior judiciary is not convinced that it is necessary for Ministers to have a power under section 8(5)(a) of the Bill to switch regulators into different categories. It would be inappropriate for the Faculty of Advocates to be able to be switched to become a category 1 regulator. The Faculty exercises regulatory functions on behalf of the Court of Session. Obtaining a power to change the status of the Faculty is to secure a power to regulate how the Court conducts its business. This is as constitutionally objectionable as the Court taking power to regulate how Parliament conducts its business. Should any further justification be provided about the necessity of such a power, the suitability of a consent mechanism, as distinct from other mechanisms, can be considered.

The Bill provides that the regulation-making powers in sections 20(6), 49 and paragraph 23 of schedule 2 are subject to the approval of the Lord President. Given the significance of what the powers in sections 19, 20, 49 and schedule 2 do, as the senior judiciary have made clear in their response, the need for Ministers to secure

the consent of the Lord President, before exercising delegated powers, does not alleviate our concerns.

The senior judiciary is of the view that section 41 should be amended so that it is only the Lord President who approves ALB rules or changes to them. Further clarity is needed on how section 41(6) is intended to operate. In principle, the senior judiciary's view is that the content of what can be included in ALB rules should not be changed unless the Lord President approves draft regulations, before these are laid in Parliament, which Ministers propose to make under section 41(2). What the regulation-making powers seek to govern here is not as significant as in other provisions. Obtaining the approval of the Lord President should therefore provide a sufficient safeguard.

The senior judiciary has not yet been consulted about a proposal to introduce a mechanism for obtaining the Lord President's consent into paragraph 6 of schedule 1. Nor have its views yet been sought on any proposed changes to section 35. I cannot comment on those matters at this stage.

The judiciary rarely attends Parliament to comment on the merits of policy contained in draft legislation. The Lord Justice Clerk (Lady Dorrian) and Lord Erich will attend the lead Committee to give evidence on 28 November. Autumn is a particularly busy time for court business but their commitments have been reorganised to facilitate their attendance. They will be happy to answer any further questions on these matters and to provide the lead Committee with any update in developments.

I hope that this is of assistance to you and your Committee. I will copy this letter to the Convenor of the lead committee.

Yours sincerely

Lord Carloway

Response from Senators of the College of Justice to the call for views on the Regulation of Legal Services (Scotland) Bill

Executive Summary

An independent legal profession, and an independent judiciary, is central to the rule of law. The protection of the public from the arbitrary abuse of power by the state depends upon it. Political regulation of the legal profession is not appropriate.

At present the legal profession is regulated by the Lord President. He is a regulator who is independent from government and parliament, and independent from those whom he regulates.

In this Bill the government proposes to:

- take into its own hands powers to control lawyers;
- remove aspects of the Court of Session's oversight of the legal profession; and
- impose itself as a co-regulator along with the Lord President.

These proposals are a threat to the independence of the legal profession and the judiciary. It is of critical constitutional importance that there is a legal profession which is willing and able to stand up for the citizen against the government of the day. The judiciary is fundamentally opposed to this attempt to bring the legal profession under political control. If the Bill is passed in its current form, Scotland will be viewed internationally as a country whose legal system is open to political abuse.

We have no difficulty with the Scottish Government's decision to create a framework of Category 1 and Category 2 regulators. The Bill ought to be amended so that it maintains, rather than threatens, the independence of the judiciary and the legal profession. If that is done, the Bill will form an acceptable foundation for updating the regulation of legal services in Scotland and provide for the protection of consumers and other users of legal services.

This response represents the unanimous view of all of the senior judiciary.

Response to questions posed by Equalities, Human Rights and Civil Justice Committee in their call for views on the Bill

1 a. What are your views on the principal recommendation of the Robertson Review that an independent regulator should be created to regulate legal professionals?

The Robertson Review proceeded on the fundamentally flawed premise that the legal profession in Scotland regulates itself. This is incorrect. The regulator of the legal profession is the Court of Session in the form of the Lord President. The Lord President is a regulator who is independent from government and parliament and independent from those whom he regulates. Limited self-regulation by the professional bodies is controlled by the Lord President, as the ultimate regulator.

The principal recommendation of the Robertson Review would have removed the power to regulate the legal profession from the judiciary and transferred it to a body responsible to parliament. This would have created an unwarranted and unacceptable interference by the government and parliament with the judiciary. The Review's failure to recognise the constitutional importance of the independence of the legal profession, its importance in helping secure the independence of the judiciary and thus the rule of law, was gravely concerning. Its lack of understanding surrounding the Lord President and the Court's role, and the fundamental democratic principles which underpin them, mean that the Robertson recommendation was never viable. The removal of regulatory power from the judiciary as was proposed by the Robertson Review is unacceptable to the judiciary.

1 b. What are your views on the Scottish Government's decision to "build on the existing framework" rather than follow that principal recommendation?

We welcome the Scottish Government's decision to build on the existing framework. We have no difficulty with the Scottish Government's decision to create a framework of Category 1 and Category 2 regulators. If the Bill is amended so that it would maintain, rather than threaten, the independence of the judiciary and the legal profession, the Bill should form an acceptable foundation for updating the regulation of legal services in Scotland and providing for the protection of consumers and other users of legal services.

The foundation of our democracy is the rule of law and the doctrine of the separation of powers. An independent legal profession, and an independent judiciary, are central to the operation of the rule of law; the protection of the public from the arbitrary abuse of power by the state depends upon it. It is for this purpose that the First Minister, the Scottish Ministers and the Scottish Parliament are under a statutory duty to uphold the continued independence of the judiciary.¹

The effect of this Bill is to transfer aspects of the regulation of the legal profession from the judiciary to the government. We have grave concerns about the current provisions of the Bill by which the Scottish Government would:

- take into its own hands powers to control lawyers;
- remove aspects of the Court of Session's oversight of the legal profession;

and

- impose itself as a co-regulator along with the Lord President.

These provisions would serve only to harm the independence of the legal profession, and in turn impinge upon the independence of the judiciary. Political regulation is simply not appropriate under any circumstances.

The rule of law requires a court system in which all citizens have complete confidence that their cases will be adjudicated impartially and independently and that the lawyers who represent them are able to do so confidently and without fear of reprisal.

The dangers of transferring aspects of regulatory power over the legal profession from the judiciary to the government, as proposed in this Bill, cannot be overstated.

Recently, we have seen attacks on lawyers by politicians who have, on multiple occasions, publically criticised “lefty activist lawyers” for “hamstringing” the justice system by challenging the government in court.²

To give a recent example, on 25 July 2023 the Prime Minister said: "*The Labour Party, a subset of lawyers, criminal gangs - they're all on the same side, propping up a system of exploitation that profits from getting people to the UK illegally.*" In response the Bar Council for England and Wales said:

*"Lawyers are not beyond reproach, and all professions have individuals who commit misconduct and are dishonest. Regulators are there to discipline them. The comments by the Prime Minister, however, are clearly an attempt to play politics with the legal profession. This damaging rhetoric undermines the rule of law, trust in lawyers and confidence in the UK legal system and is to be deplored."*³

That illustrates why neither political nor government regulation is an appropriate model for regulation of the legal profession. It is of critical constitutional importance that there is an independent legal profession willing and able to stand up for the citizen against the government of the day. A human rights lawyer, for example, must be free to act against the government without fear of disciplinary action. So too must a criminal defence lawyer. Similarly, independent lawyers representing the government, or involved in prosecutions, must be free from government interference in the exercise of their professional responsibilities. This is what sets the legal profession apart from other professions.

It may be suggested that no Scottish Government would abuse the powers which this Bill would give it over the legal profession. However, it is important that the Scottish justice system is seen and respected both at home and internationally as a system which protects the independence of the judiciary, the legal profession and the rule of law, and is not seen as a system which is open to political abuse.

Recent events in Israel and Poland serve as a timely reminder of the need for constant vigilance in the protection of the judiciary against government interference. On 24 July 2023, despite strikes and street protests, the Israeli Parliament enacted a government Bill to limit the power of the judiciary.⁴ Government interference with

the judiciary in Poland has led to Poland being fined €500,000 per day by the European Court of Justice. ⁵ In its final judgment on 5 June 2023 the court stated:

“...it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. The principle of the effective judicial protection of individuals’ rights under EU law, thus referred to in that provision, is a general principle of EU law stemming from the constitutional traditions common to the Member States”. ⁶

Although the UK is no longer a Member State, the principle that the citizen should have effective judicial protection is important in any democracy. ⁷ For example, Article 13 of the European Convention on Human Rights states:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

The need to ensure that the citizen has effective judicial protection against the actions of governments means that the legal profession must be independent from the government. As Justice Michael Kirby AC⁸ said:

*“Independence is not provided for the benefit of protection of judges or lawyers as such. Nor is it intended to shield them from being held accountable in the performance of their professional duties and to the general law. Instead, its purpose is the protection of the people, affording them an independent legal profession as the bulwark of a free and democratic society”.*⁹

The judiciary has made its views on the importance of the independence of the judiciary and the legal profession known in its consultation response to the Robertson Review.¹⁰ It also made these views known in its response to the 2021 Government consultation on Legal Services Regulation Reform in Scotland in the executive summary. The judiciary stated:

“To be clear, such an interference with role of the Lord President and the Court of Session in the manner proposed in this consultation is ... an interference with the rule of law. The judiciary will resist with all its strength this, and any other attempt by government or parliament to remove the Court’s regulatory powers.” ¹¹

Despite all of this, the current Bill, in its present form, fails to recognise the constitutional importance of the independence of the legal profession. It currently seeks to limit the power of the judiciary to regulate the legal profession by giving regulatory powers to the government.

In the policy memorandum the Scottish Government states that:

“The Bill retains and builds upon the current oversight role of the Lord President in the legal services regulatory framework, prioritising the continued independence of the legal profession.” ¹²

However, the Bill in its current form falls far short of that policy objective. Instead it limits the role of the Lord President, and endangers the continued independence of the legal profession, by bringing aspects of legal regulation under government, and therefore political, control. It threatens the separation of powers between the government, parliament and the judiciary. It constitutes an unacceptable interference by the government with the judiciary.

This is in marked contrast to previous government policy. The policy memorandum for the Legal Services (Scotland) Act 2010 stated:

“The involvement of Ministers in the regulation of individual lawyers, even at one remove, may also raise constitutional concerns about the independence of the profession.”¹³

These constitutional concerns make it essential that the previous government policy is restored and the current Bill is amended so that the government is not involved in such regulation.

1 c. What are your views on whether there is a risk that the proposals could raise concerns about a potential conflict of interests?

In the Bill as currently drafted, the Scottish Government proposes:

- to take into its own hands powers to control lawyers;
- to remove aspects of the Court of Session’s oversight of the legal profession; and
- to impose itself as a co-regulator along with the Lord President;

which would give rise to a grave conflict of interest.

The Scottish Ministers have been directly involved in 4,121 cases in the Scottish courts between 2018/19 and 2022/23. The process of judicial review exists to allow citizens (and governments) to challenge executive power, safe in the knowledge that an independent judiciary will hear the case without fear or favour. High profile litigations involving the Scottish Government are routinely heard in the Court of Session. For example:

- the prorogation of parliament case;
- the Rangers cases;
- the Scottish Government’s reference to the Supreme Court in relation to the Scottish Independence Referendum Bill;
- the Scottish Government’s challenge to the UK Government’s use of Section 35 of the Scotland Act to stop the Gender Recognition Reform (Scotland) Bill going forward to Royal Assent;
- cases challenging government policy on, for example, Covid-19 restrictions;
- cases challenging Acts of the Scottish Parliament, for example the Tied Pubs (Scotland) Act 2021; and
- cases brought by members of the public challenging planning decisions.

Inevitably, these cases are particularly politically sensitive and independence from government is critical. It is essential that the lawyers acting for and against the government in such cases act independently; that they are not under the control of the government and that they do not fear being subject to regulatory sanction if they win or lose a politically controversial case. The same applies to lawyers defending accused persons (whether ordinary members of the public or prominent citizens) against criminal prosecutions brought by the state.

If the Bill is enacted in its current form there will be a clear conflict of interest for the Scottish Government; the Scottish Ministers will have the power to control the activities of lawyers acting for and against them.

2. What are your views on the current regulatory landscape for legal services in terms of complexity or simplicity?

The current regulatory landscape is that the Lord President is the ultimate regulator of the legal profession. Limited self-regulation by the professional bodies is controlled by the Lord President, as the ultimate regulator.

The Lord President's role as regulator is set out on the ["Regulating the Legal Professions" page](#) of the Judiciary of Scotland website. A table of the Lord President's regulatory powers is available on that page. The table is not exhaustive. The Lord President and the Court of Session perform roles which have been developed by case law. For example, the Court of Session regulates the conduct of proceedings before it, the Sheriff Appeal Court and the Sheriff Courts. The court acts as an arbiter of professional standards and judges regularly make observations about the standard and conduct of lawyers in their judgments.¹⁴

The Bill would complicate the current landscape by introducing a second regulator in the form of the Scottish Ministers, rather than the Lord President remaining the sole regulator. For example, sections 19 and 20 and schedule 2 would give certain regulatory powers to the Scottish Ministers (see below). Certain of the regulatory powers require the agreement of the Lord President (e.g. section 20(5)). Further complications would arise because of the possibility of disagreement between the Lord President, acting as independent regulator, and the Scottish Ministers acting as a regulator lacking independence due to their conflict of interest.

A particularly dangerous regulatory power, which the Scottish Government seeks to give itself and which would complicate the current landscape, is the power to authorise and regulate legal businesses directly (section 49). Direct government control of lawyers is unacceptable for the reasons set out by the government under its previous policy on the 2010 Act referred to above. The requirement in section 49 for the agreement of the Lord President would not be an adequate safeguard. If it is necessary for a regulator to authorise and regulate a legal business directly, it is essential that such a process be wholly within the control of the Lord President as the independent regulator of the legal profession, and not in any way under political control.

3. What are your views on the proposed division of regulators into two categories and the requirements which these regulators will have to comply with, as set out in Part 1 of the Bill?

We have no difficulty with the proposed division into two categories.

However, it is essential that the requirements, with which category 1 and category 2 regulators have to comply, are set out in legislation and set by the Lord President rather than being set, or altered, by the Scottish Ministers. In its current form the Bill would give extensive powers to the Scottish Ministers to amend the regulatory objectives and professional principles (section 5(1)). The Bill currently provides for this to be done without the consent of the Lord President, who is downgraded from regulator to one of many consultees (section 5(2)). This constitutes a gross interference with the powers of the judiciary and the rule of law. At present, the Bill would give the Scottish Government power, for example, to remove the requirement for lawyers to act with independence in the interests of justice (section 4(1)(b)), and remove the requirement that lawyers act with integrity (section 4(1)(c)). The potential for such political interference is unacceptable.

A particular concern arises with the regulation of advocates. Advocates are regulated by the Court of Session, which has delegated some of its functions to the Faculty of Advocates. This is set out in section 10 of the Legal Services (Scotland) Act 2010, and is reflected in section 8(3) of the Bill, which currently assigns “the Faculty of Advocates (acting on behalf of the Court of Session)” as a Category 2 regulator. However, this is not reflected in section 8(5) which would allow the Scottish Ministers to reassign the Faculty as a Category 1 regulator, without the consent of the Lord President or the Court of Session. The Faculty has no independent right to regulate, and does so only by exercising those powers of the Court of Session which have been delegated to it. By taking direct control of the re-assignment of the Faculty of Advocates, the Scottish Government would be interfering with the delegation by the Court of Session, and usurping the powers of the Court of Session.

4. Section 19 of the Bill gives Ministers the power to review the performance of regulators’ regulatory functions. Section 20 sets out measures open to the Scottish Ministers. What are your views on these sections?

Sections 19 and 20 of the Bill as currently drafted are an unacceptable interference with the role of the judiciary to regulate the legal profession.

Sections 19 and 20 represent an important and valuable addition to the powers of the regulator of legal services. The problem is that these additional powers would not be given to the existing regulator, the Lord President. Instead they would be given to the Scottish Government. For the reasons set out above, these powers should not be placed under political control. Unlike sections 37 and 38 of the Legal Services (Scotland) Act 2010, sections 19 and 20 would apply to the whole legal profession as opposed merely to alternative business structures.

In order to protect the independence of the legal profession from Scottish Government interference, the powers in section 19 and 20 should be added to the powers of the existing independent regulator, the Lord President. The Scottish Government's legitimate interest in the legal profession could be recognised by adding the Scottish Ministers to the list of people who may request a review (section 19(1)). A review by the Lord President could be requested by the Scottish Parliament, the CMA, Consumer Scotland, or the Scottish Ministers. If that is done, suitable arrangements would require to be made to ensure that the Lord President receives adequate funding to exercise these additional and important functions.

In addition to that general point, there are two particular objections to the detail of the mechanism, currently set out in sections 19 and 20 of the Bill.

First, the Bill seeks to impose the Scottish Ministers as a co-regulator of the legal profession along with the Lord President. If the Bill were to remain in this form, it would minimise the role of the Lord President. The review process would be driven entirely by the Scottish Ministers. The Scottish Ministers would decide whether there is to be a review and would conduct it, all without any input from the Lord President (section 19). The Scottish Ministers could impose a financial penalty upon a regulator without the agreement of the Lord President (section 20(4)(d) and (5)). The Lord President's agreement would be required for other sanctions (section 20(4)(a), (b), (c) or (e) and (5)), but he is not involved in the review itself. His role would be minimised either to agreeing (or not agreeing) with the sanctions proposed by the Scottish Ministers. An exercise by the Lord President of his right to veto the sanctions could lead to public conflict between the Scottish Government and the judiciary. That is another reason why the review should not be under political control.

Secondly, in its current form the Bill would give the Scottish Ministers power to delegate the review to any person or body whom they consider appropriate (section 19(6)). Important constitutional matters such as regulation of the legal profession should not be delegated in this way. The proposed unfettered discretion of the Scottish Ministers to delegate to anyone the ability to review the performance of a category 1 or category 2 regulator is inappropriate. The appropriate person to undertake a review and to impose sanctions on category 1 and 2 regulators is the Lord President, as ultimate regulator of the legal profession.

5. What is your understanding of the experiences of other jurisdictions, for example England and Wales, where independent regulators have been introduced to regulate legal services?

Both before and since the Union with England in 1707, the regulation of the legal profession in Scotland has been different and distinctive from the regulation of the legal profession in England and Wales.

In England, the legal professions were self-regulating. Therefore, the Legal Services Act 2007 introduced independent regulators to regulate legal services.

However, in Scotland there is (and has been for many centuries) an independent regulator in the form of the Lord President and the Court of Session.

The regulation of the legal profession must not be transferred from the current independent regulator in Scotland to the Scottish Government. Issues such as competition, protection of consumers and modernisation of legal practice can all be addressed while the Lord President retains his position as independent regulator, and the regulatory regime safeguards the rule of law.

6. What are the main deficiencies in the current complaints system and do you believe the proposals in the Bill are sufficient to address these issues?

At present, the Court of Session, as part of its function as regulator of the legal profession, oversees the complaints system by considering appeals against decisions made by the Scottish Legal Complaints Commission.¹⁵ Deficiencies in the operation of the current complaints system, which have been caused by the Scottish Legal Complaints Commission acting unlawfully, have been corrected in appeals to the Court of Session.¹⁶

The Bill seeks to put the Scottish Legal Complaints Commission (which the Bill proposes to rename the Scottish Legal Services Commission) above the law by abolishing the appeal from it to the Court of Session. Instead the decision of the SLSC's review committee would be final.¹⁷

The proposal in the Bill to abolish the appeal to the Court would constitute the removal of a regulatory function from the Court of Session. The judiciary objects to this proposed interference with its regulatory functions. Because of the constitutional role of the Court of Session in regulating the legal profession, it is unacceptable for the Scottish Government to propose ousting the court's appellate jurisdiction to prevent the SLSC from acting unlawfully.

Abolishing the direct right of appeal to the Inner House of the Court of Session is likely to lead to increased delays and expense in the complaint process. At present, if the SLCC acts unlawfully, there is only one step between the SLCC decision and the Inner House of the Court of Session. Under the Bill as currently drafted, this would be increased to three steps: review by the review committee, judicial review of the review committee in the Outer House of the Court of Session, and then appeal against the Outer House decision to the Inner House of the Court of Session.

The Financial Ombudsman and the Scottish Public Services Ombudsman are not suitable models for an appeal process in relation to complaints against lawyers.¹⁸ The constitutional issues which arise in the regulation of the legal profession do not arise in relation to financial services and public services. Further, the Court does not exercise a regulatory function over financial and public services.

7 a. What do you consider the impact of the Bill's proposed rules on alternative business structures might be generally?

We have no comments on this.

7 b. What do you consider the impact of the Bill's proposed rules on alternative business structures might be in relation to consumers of legal services?

We have no comments on this.

8 a. What are your views on the provision of "Entity regulation" (as set out in Part 2 of the Bill)?

We have no comments on this.

8 b. What are your views on the provision of title regulation for the term "lawyer" (section 82)?

We have no comments on this.

9. Do you have any further comments on the Bill and any positive or negative impacts of it?

Our response to this call for views sets out our main concerns about the Bill. There may be additional matters of detail which require to be raised in due course.

Our concerns with the Bill as it is currently drafted can be summarised under three headings.

First, the Scottish Government proposes taking into its own hands the power to control lawyers. It would be giving itself the power to:

- change the professional obligations of lawyers, for example by removing the requirements that lawyers act with independence, keep client's affairs confidential, and act in conformity with professional ethics (section 5(1)(b));
- rewrite the Act after it is passed by Parliament (section 90);
- re-assign the Faculty of Advocates, the Law Society of Scotland and the Association of Commercial Attorneys to a different category of regulator (section 8(5));
- review the performance of a regulator (section 19);
- publicly censure regulators (section 20(4)(c));
- impose financial penalties on regulators (section 20(4)(d));
- impose unknown regulatory requirements on new regulators of legal services (section 26(1)(d)); and
- directly authorise and regulate legal businesses (with the agreement of the Lord President) (section 49).

Secondly, the Scottish Government would be able to interfere with the judiciary's oversight of the legal profession by:

- introducing a requirement that category 1 regulators report not to the Lord President, but to the Scottish Parliament (section 13); and
- removing the right to appeal to the Court of Session from a decision of the Scottish Legal Services Commission (section 58(4)).

Thirdly, rather than leaving the Lord President as the sole and independent regulator, the Scottish Ministers seeks to impose themselves as a co-regulator. The agreement of the Scottish Government, as well as the Lord President, would be required to:

- approve a new regulator of legal services (section 29);
- set performance targets for, give directions to, impose financial penalties on, and change the functions of, regulators (section 20);
- approve a category 1 regulator’s authorising and regulating legal businesses rules (section 41(4)(b));
- take action as a last resort to ensure that the provision of legal services by legal businesses is regulated effectively (section 49).

If the Bill is amended to meet these concerns, it should form an acceptable foundation for updating the regulation of legal services in Scotland and providing for the protection of consumers and other users of legal services. As noted earlier, this is subject to ensuring that the Lord President receives adequate funding to exercise these additional and important functions.

¹ Judiciary and Courts (Scotland) Act 2008, section 1.

² CJ McKinney “5 times the Johnson government complained about ‘lefty lawyers’ (2022) Legal Cheek, available at <https://www.legalcheek.com/2022/06/5-times-the-johnson-government-complained-about-lefty-lawyers/>.

³ Bar Council “Bar Council reacts to PM’s comments on immigration lawyers” The Bar Council, available at <https://www.barcouncil.org.uk/resource/bar-council-reacts-to-pm-s-comments-on-immigration-lawyers.html>.

⁴ Paul Adams, Raffi Berg & Laurence Peter, “Israel judicial reform: Crowds confront police as key law passed” available at <https://www.bbc.co.uk/news/world-middle-east-66258416>.

⁵ Court of Justice of the European Union, Press Release No 89/23 Judgment of the Court in Case C-204/21 | Commission v Poland (Independence and private life of judges), available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-06/cp230089en.pdf>.

⁶ Judgment of the Court in Case C-204/21 Commission v Poland (Independence and private life of judges) available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=274364&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3814104>.

⁷ See for example the Bangalore Principles of Judicial Conduct, available at https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangaloreprinciples.pdf and Articles 6 and 13 of the European Convention on Human Rights, available at https://www.echr.coe.int/documents/d/echr/convention_eng.

⁸ Former Australian High Court Judge and Chair of the UN Human Rights Council Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea.

⁹ The Hon. Justice Michael Kirby, (2005) *Independence of the Legal Profession: Global and Regional Challenges*, p2, available at www.icj.org/wp-content/uploads/2012/04/independence-legal-profession-occasional-paper-2005.pdf.

¹⁰ Full response of Senators of the College of Justice available at https://judiciary.scot/docs/librariesprovider3/judiciarydocuments/regulatory-role-page/roberton-response-paper-final-27-5-19-doc-final.pdf?sfvrsn=a9f27de3_2.

¹¹ Full response of the Senators of the College of Justice available at https://judiciary.scot/docs/librariesprovider3/judiciarydocuments/regulatory-role-page/legal-services-regulation-reform-in-scotland-consultation.pdf?sfvrsn=2247d1b3_2; Executive Summary available at https://judiciary.scot/docs/librariesprovider3/judiciarydocuments/regulatory-role-page/executive-summary.pdf?sfvrsn=5b155b9c_2.

¹² Scottish Parliament, Regulation of Legal Services (Scotland) Bill, Policy Memorandum, para 105 available from the Bill page on the Scottish Parliament website: <https://www.parliament.scot/Bills-and-laws/Bills/regulation-of-legal-services-scotland-Bill/introduced>.

¹³ Scottish Parliament website archive, Legal Services (Scotland) Bill, Policy Memorandum, para 139 available at [https://archive2021.parliament.scot/S3_Bills/Legal%20Services%20\(Scotland\)%20Bill/b30s3-introd-pm.pdf](https://archive2021.parliament.scot/S3_Bills/Legal%20Services%20(Scotland)%20Bill/b30s3-introd-pm.pdf).

¹⁴ For example, see *Nyiam* 2021 HCJAC 44, *Macdonald* 2020 HCJAC 21, *Lundy* 2018 HCJAC 03, *Donegan* 2019 HCJAC 10.

¹⁵ This is explained in the Regulation of Legal Professions section of the Judiciary of Scotland website, available at <https://www.judiciary.scot/home/judiciary/regulating-legal-professions>; and paras 39-41 of the Response from the Senators of the College of Justice to the Robertson Review, available at https://judiciary.scot/docs/librariesprovider3/judiciarydocuments/regulatory-role-page/robertson-response-paper-final-27-5-19-doc-final.pdf?sfvrsn=a9f27de3_2m.

¹⁶ For example, see *Kerr Stirling v SLCC* [2012] CSIH 98; *Bartos v SLCC* [2015] CSIH 50; *McSparran Cormick v SLCC* [2016] CSIH 7; *Anderson Strathern v SLCC* [2016] CSIH 71; *Benson v SLCC* [2019] CSIH 33; *McGregor v SLCC* [2019] CSIH 58; *Beltrami v SLCC* [2022] CSIH 22; *SLCC v Murray* [2022] CSIH 54; *Aberdeen Computer Services v SLCC* [2023] CSIH 5; *De La Torre v SLCC* [2023] CSIH 12.

¹⁷ Section 58(3) of the Bill (which proposes to insert new section 20A (8) to the Legal Aid and Legal Profession (Scotland) Act 2007 Act providing that the decision of the committee is final), and section 58(4) (which proposes to abolish the right of appeal to the court).

¹⁸ Scottish Parliament, Regulation of Legal Services (Scotland) Bill, Policy Memorandum, para 259 available from the Bill page on the Scottish Parliament website: <https://www.parliament.scot/Bills-and-laws/Bills/regulation-of-legal-services-scotland-Bill/introduced>.

Annexe G

Letter from the Law Society of Scotland to the Convener of the Delegated Powers and Law Reform Committee – 20 November 2023

20 November 2023

Dear Convener

Regulation of Legal Services (Scotland) Bill

I am writing to the committee following the Minister for Community Safety's letter to you of 16 November.

When I appeared before the committee on 24 October, I set out the Law Society's deep concerns over the provisions in the above Bill which would confer unprecedented new powers on the Scottish Government to intervene directly in the regulation of the legal profession. Given the concerns we and others have raised, we warmly welcome the Minister's recognition at how the Bill needs to be amended at Stage 2.

The Law Society met with the Minister on 8 November and received a high level options paper on delegated powers from Scottish Government officials on 9 November. We discussed the options set out in that paper with Scottish Government officials on 16 November. These were the first occasions on which we discussed the Scottish Government's plans to amend the Bill with respect to delegated powers. There had been no discussion with the Scottish Government before these two meetings on Ministers' plans to amend Sections 5, 19, 20, 35, 41 and 49.

Both of these recent meetings have been highly constructive. While some options have been discussed, we have not yet seen any draft amendments. Given this, it is not possible for us to know whether the government's approach will fully address our concerns.

However, we are conscious that, when the Minister appeared before your committee, she said; "we are trying to remove the role of ministers from the bill and design the process so that there will be no Government interference" [Official Report, 7 November 2023, column 17]. We were greatly encouraged by this statement and look forward to getting sight of the specific amendments which deliver on this commitment.

In her most recent letter to you, the Minister also made references to there being existing provisions from the Legal Services (Scotland) Act 2010 in terms of Ministerial powers of intervention in legal services.

It should be stressed that the 2010 Act was passed in order to legislate specifically for wholly new forms of non-solicitor owned legal businesses (licensed legal service providers, LLSPs). At the time of the 2010 legislation, LLSPs were unknown and, for many, controversial new legal entities. The debate around even the principle of allowing such business structures was a highly polarised and contentious one. The equivalent alternative business structure provisions in England & Wales were not in force until 2012. Given all of this, at the time the 2010 Act was under consideration it was recognised that the Scottish Government should have greater levels of oversight and, if needed, intervention.

However, we believe it is wholly wrong to equate the provisions of the 2010 Act, designed for untested new types of businesses, with what the Scottish Government has now sought with respect to established law firms and individual solicitors. Indeed, before the Bill was published, there had been no suggestion from the Scottish Government that it would seek such sweeping new powers of interference in existing law practice. The Scottish Government's own 2021 consultation on legal services regulation made no mention of this, hence why the provisions in the current Bill were met with such surprise and shock.

Nevertheless, we remain encouraged by the Minister's latest approach to the Bill. As always, we are keen to find a way forward that allows for a proportionate and modern regulatory scheme while also respecting core constitutional principles around the rule of the law and the independence of the legal profession from the state.

Yours sincerely

Rachel Wood
Executive Director of Regulation