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The Scottish Parliament
Edinburgh
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22 January 2024

Dear Convener

Regulation of Legal Services (Scotland) Bill

I write to you in respect of the Regulation of Legal Services (Scotland) Bill (“the Bill”).

At the session on 5 December 2023, I undertook to keep the Committee updated on progress in developing amendments to certain sections of the Bill and on engagement with relevant stakeholders in respect of those amendments. This work is ongoing in preparation for Stage 2 and we continue to have constructive engagement with stakeholders including the Lord President’s Private Office.

I understand that the Committee is considering its draft Stage 1 report this week. To aid the Committee in its consideration, the attached annex sets out the current position in relation to the main provisions of the Bill which provided a function to the Scottish Ministers.

The proposals set out in the annex were shared with the Lord President’s office on 4 December, with supplementary information shared on 15 December and a response to that paper was shared with the Scottish Government on the 19 January. That response is very welcome and helpful in informing our consideration and approach to amendments at Stage 2.

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I would like to thank the Committee for their careful and considered scrutiny of the Bill and to all those who provided written submissions and gave evidence at Stage 1. I also welcome the recent correspondence from the Law Society of Scotland and the Scottish Legal Complaints Commission, in which both recognise the many benefits that the Bill provides, notwithstanding the points raised. As with the passage of any legislation this Government will work with stakeholders to seek to resolve areas of concern.

The broad provisions of the Bill have clear benefits which the Committee has heard in its evidence sessions and there is support for the general principles in respect of the improvements that would be made to legal regulation in Scotland.

I look forward to receiving the Committee's Stage 1 report and I will, of course, give careful consideration to the Committee's recommendations.

SIOBHIAN BROWN

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Annex

Section 5

Section 5 allows for the regulatory objectives and professional principles to be amended to update them to reflect regulatory best practice. As set out in my correspondence of 29 November 2023 the Scottish Government will accept the recommendation of the Delegated Powers and Law Reform Committee that the Bill be amended to remove section 5, and I will bring forward an amendment to that effect at Stage 2.

Section 8

As set out in my correspondence of 29 November 2023, the creation of a category system for regulators creates an inherent requirement for flexibility to respond to any changes, or proposed changes, to how a regulator operates or in its membership numbers and is intended to futureproof the regulatory framework.

Section 8(5)(b), (c) and (d) are necessary to ensure the Bill accurately reflects any changes to the regulatory framework in respect of new accredited regulators receiving approval, any regulator ceasing to operate or a change in a regulator's name, as recently evidenced with the Association of Construction Attorneys' name change.

An amendment will be lodged at Stage 2 to narrow the scope of section 8(5)(a) so it applies only to allow the recategorisation of new accredited regulators. In addition, to include an additional safeguard, that it may only apply in respect of a recommendation of, and with the consent of, the Lord President.

Section 13 and 16

Sections 13 and 16 require a category 1 and 2 regulator to publish an annual report on the exercise of their regulatory functions. The report must include, among other things, information demonstrating how the regulator is complying with the regulatory objectives and a statement on the strategic priorities for the next reporting year. I will lodge an amendment at Stage 2 to the effect that regulators will require to send their report to the Lord President prior to being published.

Section 19 and 20

This Bill is designed to increase the transparency and accountability of legal regulation. Sections 19 and 20 provide an important mechanism so that there is a process for review of regulatory performance if concerns are raised about a regulator not upholding the regulatory objectives or acting in the public interest.

In recognition of the comments within the response from the Senators of the College of Justice to the Committee's call for views on the Bill, that the powers in section 19 and 20 should be added to the existing powers of the Lord President, we will continue to explore

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with the office of the Lord President what adjustments may be required to the current drafting at sections 19 and 20.

Changes being considered include strengthening the test for when a section 19 review may be triggered, including an ability for the Lord President to raise a review himself and introducing an ability for the Lord President to seek representations from the regulator where he is considering whether the test for a review has been met.

Section 29

The intention behind Chapter 3 of Part 1 of the Bill is to allow a route for new regulatory bodies to enter the legal services sector and for new types of practitioners to provide legal services in Scotland if this is deemed to be appropriate. This is done by replicating and expanding the relevant provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 which requires approval from both the Lord President and Scottish Ministers for a new body to become a legal services regulator. I will lodge an amendment to the effect that it would be the responsibility of the Lord President alone to consider any application by bodies wishing to enter the legal services sector as a new regulator.

Section 41

The Bill adopts the same position of the Legal Services (Scotland) Act 2010 which requires the agreement of both the Scottish Ministers and the Lord President on the rules for authorised legal businesses. Having listened to the views of stakeholders I will lodge an amendment at Stage 2 so that this function is exercised solely by the Lord President.

Sections 35 and 49

Section 35 is specifically intended to address the possibility that any new accredited regulator ceases to regulate by surrendering its acquired rights (section 31), having its acquired rights revoked (section 34) or for any other unanticipated circumstance. Currently the Bill makes provision that Scottish Ministers may by regulations establish a body with a view to it becoming a regulator for the purposes of regulating the authorised providers of a discontinuing regulator. This is intended to provide a mechanism for a body's members to continue to provide legal services to their clients and continue to be regulated if appropriate in the circumstances. I will lodge an amendment at Stage 2 which would remove provision for Ministers to make such regulations to establish a new body.

If any members of a body wished to continue to access acquired rights under the Bill in a scenario in which the regulator ceases to regulate by surrendering or having its acquired rights revoked, those members may seek to make a new application under section 29. We are exploring whether temporary measures so that any permission to practice could be deemed to continue for a period of time so that arrangements may be made to ensure regulation of those providers could continue while an application under section 29 was being developed and considered.

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Similarly, the principle of section 49 was included as a part of the system of licencing for legal businesses (entity regulation) to create an offence for legal businesses to operate without authorisation. In the event that something happens to interfere with a category 1 regulator's ability to operate, there requires to be some mechanism to ensure that legal businesses are not committing an offence if they continue to provide legal services.

As an established body I believe that the risk of the Law Society of Scotland being unable to operate its regulatory functions as a category 1 regulator is sufficiently low as to negate the requirement for this provision when taken in combination with section 35 as amended in respect of any category 1 accredited regulator.

The amendment to section 35 will ensure that if any accredited category 1 regulator is unable to operate its regulatory functions, there remains a proportionate mechanism for those members to seek to continue to operate. Therefore, I will lodge an amendment at Stage 2 to remove section 49.

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