

Regulation of Legal Services (Scotland) Bill

[As amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This supplementary Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with rule 9.7.9 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Regulation of Legal Services (Scotland) Bill ("the Bill"). This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

Delegated powers

Section 5(1): Power to modify regulatory objectives and professional principles

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: Revised (removed)

Provision

4. Section 5(1) of the Bill as introduced provided a regulation-making power for the Scottish Ministers to modify the regulatory objectives, and the professional principles

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contained within the Bill. Section 5(1)(a) provided that the Scottish Ministers may add, amend or remove a regulatory objective or how they are to be applied. Section 5(1)(b) provided that the Scottish Ministers may add, amend or remove a professional principle. The Bill was amended at Stage 2 to remove the delegated power.

Section 8(5)(a): Regulatory categories

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: Revised

Provision

5. Section 8(5) of the Bill as introduced provided that the Scottish Ministers may by regulations amend section 8 to reassign the regulatory category to which a regulator of legal services is assigned, add a body which is approved to become a regulator of legal services and assign its regulatory category, remove a body that has ceased to be a regulator of the provision of legal services, or update the name or description of a regulator specified in this Act.

6. Amendments at Stage 2 reduce the breadth of the delegated power conferred by section 8(5) with the effect that the power does not apply to the Law Society of Scotland or the Faculty of Advocates. In addition, the regulation-making power may only be exercised at the request of the Lord President. New section 8(8A) was added to require the Lord President to consult certain specified bodies before making such a request, new subsection (8B) sets out what documents the request must include and new subsection (8C) places a requirement on the Lord President to publish those documents.

Reason for taking power

7. The reasons for taking this power remain as set out in the delegated powers memorandum as introduced.

Choice of procedure

8. The reasons for applying the affirmative procedure remain as set out in the delegated powers memorandum as introduced.

Section 14(8): Compensation funds

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: Revised

Provision

9. Section 14 of the Bill requires a category 1 regulator to establish and maintain a compensation fund for the purpose of making grants to compensate persons who suffer financial loss by reason of dishonesty by a legal services provider regulated by the regulator (or a provider it regulated at the time the dishonesty occurred). The category 1 regulator or, where applicable, its regulatory committee must have rules in relation to the fund corresponding with the requirements of section 14.

10. By virtue of section 14(8), the Scottish Ministers may by regulations make further provision in connection with the compensation fund that a category 1 regulator is under a duty to establish and maintain, or the rules a category 1 regulator must have for such funds. Before making regulations, the Scottish Ministers must consult the Lord President, each regulator and the Consumer Panel. Section 14 of the Bill was amended at Stage 2 so that, instead, the Scottish Ministers can only exercise the power to make regulations where they have received a request to do so from either the Lord President, a category 1 regulator or the Consumer Panel. New subsections (9A) to (9E) set out the process and requirements for making a request including in respect of consultation, publication and obtaining the Lord President's agreement.

Reason for taking power

11. The reason for taking the power is as explained in paragraph 25 of the delegated powers memorandum as introduced. The power was revised to give the Lord President a greater role so that the exercise of this delegated power is restricted to cases only where either the Lord President, a category 1 regulator or the Consumer panel has made a request. The amendment specifies the information that must be included with such a request and sets out who must be consulted before such a request is made, when the Lord President's agreement must be secured as well as what information must be given to the Lord President when seeking their agreement.

Choice of procedure

12. Amendments require regulations made under this power to be subject to the affirmative procedure rather than the negative procedure. The reason for this change to affirmative procedure is to align this procedure for this power with that for the delegated power in new section 43A of the Solicitors (Scotland) Act 1980 ("the 1980 Act") as inserted by paragraph 6 of schedule 1 of the Bill.

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

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: Revised

Provision

13. Section 20 of the Bill as introduced specified measures open to the Scottish Ministers to take in relation to a category 1 or a category 2 regulator following a review of their regulatory performance. These included, for example, setting performance targets and making changes to the regulatory functions exercised by the regulator. Section 20(6) confers on the Scottish Ministers a regulation-making power to specify other measures which may be taken, and also to make further provision about such the measures, for example, making provision as to the procedures to be followed when taking them. But, before making the regulations, the Scottish Ministers must have the Lord President's agreement and must consult each regulator.

14. Amendments to the Bill provide that it would be the Lord President rather than the Scottish Ministers, who would be able to undertake a review of regulatory performance and be able to take the specified measures.

15. In addition, amendments at Stage 2 provide that the Scottish Ministers can only exercise the delegated power following a request to do so by the Lord President (rather than with their agreement). New subsections (6B) to (6D) set out the process and requirements for making a request including in respect of consultation and publication.

Reason for taking power

16. The reason for taking the power is as explained in paragraph 28 of the delegated powers memorandum, as introduced. The power was revised to give the Lord President a greater role. The amendment provides that the delegated power may only be exercised following a request from the Lord President to do so. The amendment requires the Lord President to consult with each category 1 and category 2 regulator, the Consumer panel, and any other appropriate persons or bodies. before making a request and specifies what documents, such a request must include (such as copies of representations received during the consultation period. In addition, there is placed on the Lord President a requirement to publish those documents.

Choice of procedure

17. It is considered that the affirmative procedure remains relevant to confer the appropriate level of scrutiny over the exercise of the power as amended at Stage 2.

Sections 26 and 26A: Regulatory scheme

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: Revised

Provision

18. Section 25 of the Bill as amended at Stage 2 makes provision for a body to apply to the Lord President for the purpose of enabling persons authorised by the body to acquire rights to conduct litigation on behalf of members of the public, rights of audience, or the right to provide other types of legal services. An application for accreditation under this section must include a draft regulatory scheme. Section 26 sets out what must be included in the draft regulatory scheme and subsection (1)(d) allows Scottish Ministers to make provision about other regulatory matters which should be dealt with in such a scheme.

19. Amendments to the Bill at Stage 2 insert a new section 26A into the Bill, which makes further provision in respect of the delegated power under section 26(1)(d). New section 26A provides that the Scottish Ministers can only exercise this power if they have received a request to do so from the Lord President, an accredited regulator, or the Consumer Panel following a period of consultation with specified bodies. Except where the Lord President is the requester, the Lord President's agreement must be obtained. New section 26A specifies what information must be provided to the Lord President and the Scottish Ministers and what documents are to be published.

Reason for taking power

20. The reasons for taking the power are as set out in paragraph 34 of the delegated powers memorandum and remain unchanged. The delegated power was revised to give the Lord President a greater role.

Choice of procedure

21. While it is considered that this power will be used to address procedural matters, as outlined above, it is possible that it could more significantly alter the content of regulatory schemes of accredited regulators. As such it is considered that the greater parliamentary scrutiny of the affirmative procedure remains appropriate.

Section 29(4)(a): Giving effect to a regulatory scheme

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or New power: Revised (removed)

Provision

22. The Bill required that where an application by a body to be accredited to provide legal services in accordance with section 28 of the Bill had been approved, the Scottish Ministers would be required to make provision, by regulations, to give effect to the draft regulatory scheme. Amendments to the Bill no longer require the Scottish Ministers to give effect to a draft regulatory scheme by regulations. This requirement was based on provisions in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (“the 1990 Act”) which are now considered to be unnecessary in a modern, streamlined process. Instead, new regulators are to give effect to their draft regulatory schemes themselves and are required to publish them in accordance with new section 29(5A).

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

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or New power: Revised (removed)

Provision

23. The Bill required Scottish Ministers to make provision, by regulations, to give effect to a revised regulatory scheme of an accredited regulator. Instead, following the amendments as Stage 2, the Lord President will direct an accredited regulator to make the necessary revisions of the regulatory scheme. The reason for the change is to ensure consistency of approach with giving effect to the draft regulatory scheme.

Section 34(1): Revocation of acquired rights

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: Revised (removed)

Provision

24. The Bill provided that where it appeared to the Scottish Ministers that a body had failed to comply with a direction under section 33(5) to apply revisions to its regulatory scheme, the Scottish Ministers may by regulations revoke the approval of the application under section 29. Regulations under this section would only have been made with the prior agreement of the Lord President.

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25. Amendments at Stage 2 instead give the Lord President the power to revoke approval of the scheme. This is appropriate since amendments to the Bill no longer require the Scottish Ministers to give effect to a regulatory scheme (or a revised regulatory scheme) of an accredited regulator by regulations. Instead, the Lord President is given powers to approve regulatory schemes and proposed revisions to the scheme. It is therefore considered appropriate for the Lord President to also have the power to revoke approval of the scheme.

Section 35: Replacement regulatory arrangements for authorised providers

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or made affirmative where urgent

Revised or New power: Revised (removed)

Provision

26. Section 35 of the Bill as introduced provided that the Scottish Ministers may, by regulations; establish a new body with a view to it becoming a regulator, amend the regulatory functions of a category 1 or 2 regulator, or specify the circumstances whereby the Scottish Ministers or a specified body may directly authorise and regulate authorised providers. This would have enabled the Scottish Ministers to intervene to create a new regulator, have another regulator step in to take over the regulation or regulate the providers themselves. Amendments to the Bill remove this provision.

Section 35A(5): Discontinuing regulators

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: New

Provision

27. Section 35A was introduced at Stage 2 to replace section 35. It gives the Lord President rather than the Scottish Ministers (with the exception of some cases) powers to deal with cases where a regulator ceases to operate (“the discontinuing regulator”) by determining an alternative regulator (“the receiving regulator”) to authorise and regulate the authorised providers of legal services who are/were regulated by the discontinuing regulator. Where the receiving regulator is either an accredited regulator or a body who has had an application under section 25 of the 1990 Act granted, the Lord President can amend the regulatory functions of the receiving regulatory to enable it to regulate the authorised providers of the discontinuing regulator. In any other case, the Lord President can request that the Scottish Ministers make regulations under section 35A(5) to amend the regulatory functions of a receiving regulator in order to regulate the legal services providers who were authorised by a discontinuing regulator.

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Reason for taking power

28. The regulation making power is a mechanism to ensure that regulation of legal services providers may continue in the event that an accredited regulator or a regulator granted rights under the 1990 Act is to cease to carry out some or all of its functions.

Choice of procedure

29. As this is a power (see section 35A(57)) which allows textual modification of primary legislation, it is considered appropriate that it be made subject to the affirmative procedure.

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

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Negative

Revised or New power: Revised

Provision

30. Section 39 of the Bill makes it an offence (liable on summary conviction to a maximum fine of £20,000) for a person to own or operate a legal business which provides legal services without that business being authorised in accordance with the Bill.

31. Section 39(6) provides that the Scottish Ministers may by regulations amend the maximum fine. Stage 2 amendments inserted new subsection (6A) requiring the Scottish Ministers, before making any such regulations, to consult each category 1 regulator and such other person or body as the Scottish Ministers consider appropriate. The Scottish Ministers are also required to publish copies of any written representations received from the consultees.

Reason for taking power

32. The reason for taking this power remains is as set out in the delegated powers memorandum, as introduced. It allows for flexibility to adjust the maximum amount from time to time to reflect inflation.

Choice of procedure

33. The maximum level of financial penalty is a relatively straightforward issue insofar as the making of regulations are concerned. They do not raise any issues of complexity and therefore it is considered that it remains appropriate that regulations made under section 39 as amended at Stage 2 be subject to negative procedure.

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

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Negative

Revised or New power: Revised

Provision

34. Section 40 (as amended at Stage 2) provides that it is an offence to pretend, without reasonable excuse, to be an authorised legal business, and a person who commits this offence may be liable on summary conviction to a fine not exceeding £20,000. Subsection (3) provides that the Scottish Ministers may by regulations amend the maximum fine. At Stage 2 a new subsection (3A) was inserted requiring the Scottish Ministers, before making any regulations to amend the maximum fine to consult each category 1 regulator, and such other person or body as the Scottish Ministers consider appropriate. The Scottish Ministers are also required to publish copies of any written representations received from the consultees.

Reason for taking power

35. The reason for taking this power remains is as set out in the delegated powers memorandum as introduced.

Choice of procedure

36. Similar to section 39, the maximum level of financial penalty is a relatively straightforward issue insofar as the making of regulations are concerned. It is therefore considered that it remains appropriate for regulations made under section 40 as amended at Stage 2 to be subject to negative procedure.

Section 41(2)(c): Rules for authorised legal business

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

New or Revised Power: Revised

Provision

37. Section 41 of the Bill provides that a category 1 regulator must make rules for authorising and regulating legal businesses (“the ALB rules”), apply the rules in relation to those businesses, and make the rules publicly available.

38. Section 41(2) provides what the ALB rules are to contain. It also (see paragraph (c)) provides that ALB rules are to deal with such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as the regulations

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may specify). Stage 2 amendments limit this power to being exercised only on the request of the Lord President, a category 1 regulator, or the Consumer Panel. New subsections (6C) to (6G) are inserted into section 41 setting out the procedure and requirements which must be followed where a person or body intends to request the Scottish Ministers to make regulations.

Reason for taking power

39. The reason for taking the power to give the Scottish Ministers flexibility to expand upon the regulatory matters which are to be covered by the regulatory rules as set out in the Delegated Powers Memorandum as introduced remains (for more details see paragraphs 63 and 64 of the delegated powers memorandum). The amendments introduce checks on the use of the Scottish Ministers' power as are considered appropriate.

Choice of procedure

40. It is considered that the greater parliamentary scrutiny offered by the affirmative procedure remains the appropriate procedure as the reason for the taking of the delegated power remains the same.

Section 41(6): Rules for authorised legal business

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

New or Revised Power: Revised (removed)

Provision

41. Section 41 of the Bill provides that a category 1 regulator must make rules for authorising and regulating legal businesses ("the ALB rules"), apply the rules in relation to those businesses, and make the rules publicly available.

42. Section 41(6) gave the Scottish Ministers an additional regulation-making power in this context (in addition to the power at section 41(2)(c)) to confer authority for the ALB rules of category 1 regulators to deal with the provision by their authorised legal businesses of such other services (in addition to legal services) as the regulations may prescribe. Ministers were also given the power to specify the extent to which (and the manner in which) the ALB rules may do so. This provision has now been removed by amendment at Stage 2. Section 41(3) as amended now makes provision so that ALB rules may relate to other services (in addition to legal services) that form part of the professional practice of solicitors, or qualifying individuals, within a legal business. Those rules would require the agreement of the Lord President.

Section 45(2): Financial sanctions

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

New or Revised Power: Revised

Provision

43. Section 45 of the Bill allows practice rules to provide for the imposition of a financial penalty. Section 45(2) gave the Scottish Ministers the power to specify by regulations (but only with the agreement of the Lord President) the maximum amount of that financial penalty. A new subsection (7A) was inserted at Stage 2 requiring the Scottish Ministers to consult each category 1 regulator and such other person or body as they consider appropriate (and publishing any written representations made by the consultees) before making regulations.

Reason for taking power

44. The reason for taking this power remains as is set out in the delegated powers memorandum. It allows flexibility to adjust the maximum level from time to time to reflect inflation or changes in the market and provides an opportunity to consider its application with stakeholders in respect of commencement. The power was amended to introduce a requirement on Ministers to consult regulators (in addition to obtaining the Lord President's agreement) when considering setting the maximum financial penalty to ensure it is both reasonable and effective.

Choice of procedure

45. It is considered that it remains appropriate for regulations made under section 39 as amended at Stage 2 to be subject to negative procedure.

Section 46(3): Reconciling different rules

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Negative

New or Revised Power: Revised

Provision

46. Section 41(2)(b) as read with section 46(1) requires regulatory rules to include provision for reconciling different sets of regulatory rules so as to prevent or resolve regulatory conflicts and avoid unnecessary duplication of regulatory rules.

47. Section 46(3) of the Bill enabled the Scottish Ministers, by regulations, to make further provision about regulatory conflicts (such as may involve a category 1 regulator) only where they have the Lord President's agreement to do so. Section 46(4) was

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amended at Stage 2 to replace this requirement to secure the Lord President's agreement with a requirement for Ministers to only make regulations where they have received a request to do so from either the Lord President, a category 1 regulator, or the Consumer Panel. New subsections (4A) to (4E) were also inserted at Stage 2 setting out the procedure and requirements which must be followed where a person intends to request that the Scottish Ministers make regulations.

Reason for taking power

48. The reason for taking the power remains as set out in paragraph 72 of the delegated powers memorandum, as introduced, to give the Scottish Ministers flexibility to ensure that regulatory conflicts can be resolved.

Choice of procedure

49. The negative procedure remains appropriate as the amendments do not affect the breadth or nature of the power.

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

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

New or Revised Power: Revised (removed)

Provision

50. Section 49 of the Bill provides that Scottish Ministers may by regulations make provision (a) establishing a body with a view to it becoming a category 1 regulator, and (b) specifying circumstances under which the Scottish Ministers may directly authorise and regulate legal businesses. This provision has been removed at Stage 2.

Section 71C(2): Restriction on disclosure of information: Commission

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or New power: New

Provision

51. New section 71C of the Bill was inserted at Stage 2 and amends section 43 of the Legal Profession and Legal Aid (Scotland) Act 2007 ("the 2007 Act"). It removes a restriction on the disclosure of certain information about complaints. It allows Ministers to specify in regulations "regulatory body" with who the Scottish Legal Complaints Commission may disclose information about complaints "for the purpose of enabling or assisting a regulatory body [as defined] to exercise any of the body's functions". Before

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making regulations, the Scottish Ministers must consult with any regulatory body that is proposed to be specified by the regulations, the Lord President, the Scottish Legal Complaints Commission, the Consumer Panel and certain approved regulators, publish a report on the consultation and confirm the Lord President agrees with the proposal to make the regulations.

Reason for taking power

52. This provision relates to section 43 of the 2007 Act to allow information to be disclosed for the additional purpose of enabling or assisting a regulatory body to exercise its functions, a regulatory body being a body specified as such in regulations following a period of consultation with a range of stakeholders and with the agreement of the Lord President. This reflects that there may be a requirement to add further regulatory bodies in the future.

Choice of procedure

53. As the power aids the Scottish Legal Complaints Commission to disclose information where it is in the public interest to do so, the negative procedure is considered appropriate.

Section 71E: Restriction on disclosure of information: relevant professional organisations

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or New power: New

Provision

54. New section 71E of the Bill was inserted at Stage 2 and amends section 52 of 2007 Act relating to relevant professional organisations in ways equivalent to the changes made to section 43 in respect of the Scottish Legal Complaints Commission. It allows Ministers to specify in regulations “regulatory body” with who regulatory professional organisations, such as the Law Society of Scotland, may disclose information about conduct or regulatory complaints “for the purpose of enabling or assisting a regulatory body [as defined] to exercise any of the body’s functions”. Before making regulations, the Scottish Ministers must consult with any regulatory body that is proposed to be specified by the regulations, the Lord President, the Scottish Legal Complaints Commission, the Consumer Panel, each category 1 and category 2 regulators and certain approved regulators. Scottish Ministers are also required to publish a report on the consultation and confirm the Lord President agrees with the proposal to make the regulations.

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Reason for taking power

55. This provision relates to section 52 to allow information to be disclosed for the additional purpose of enabling or assisting a regulatory body to exercise its functions, a regulatory body being a body specified as such in regulations following a period of consultation with a range of stakeholders and with the agreement of the Lord President. This reflects that there may be a requirement to add further regulatory bodies in the future.

Choice of procedure

56. As the power aids the regulatory professional organisations to disclose information where it is in the public interest to do so, the negative procedure is considered appropriate.

Section 86(1), inserting new section 32A of the 1980 Act: Power of the Scottish Ministers to adjust what constitutes restricted legal services

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: Revised

Provision

57. Section 32 of the 1980 Act makes it an offence for unqualified persons to prepare certain documents. Section 86 of the Bill as introduced inserts new section 32A into the 1980 Act to provide that the Scottish Ministers may, by regulations, amend section 32 of the 1980 Act to make provision for or in connection with it being an offence for an unqualified person to draw or prepare certain documents or to provide certain other legal services. In particular the power allows Scottish Ministers to add, amend or remove a description of the documents that may not be drawn or prepared or the type of legal services that may not be provided by an unqualified person without committing an offence, or add, amend or remove exemptions to the offence in relation to some or all of the documents or services.

58. Amendments at Stage 2 introduce the requirement that Scottish Ministers can only make the regulations if they have received a request to do so from the Lord President, a category 1 regulator, an approved regulator (as defined) or the Consumer Panel. The agreement of the Lord President is also required where they have not requested the making of the regulations. New subsections (3B) to (3E) are inserted into new section 32A setting out the procedure and requirements which must be followed where a person or body intends to request the Scottish Ministers to make regulations.

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Reason for taking power

59. The reason for taking this power remains as is set out in the delegated powers memorandum as introduced.

Choice of procedure

60. It is considered that it remains appropriate for regulations made under new section 32A as amended at Stage 2 to be subject to the affirmative procedure.

Schedule 1, Paragraph 6 inserting section 43A into the 1980 Act: Guarantee fund: further provision

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: Revised

Provision

61. Paragraph 6 of schedule 1 of the Bill inserts new section 43A into the 1980 Act. The provision states that the Scottish Ministers may by regulations make provision in relation to the Law Society's compensation fund (called the "Guarantee Fund" in the 1980 Act) and may, in particular, modify section 43 and schedule 3 of the 1980 Act. Regulations made under this section may amend the maximum amount of an individual grant that may be made, make provision in relation to when grants are (or are not) to be made and make provision as to the making of contributions to the Fund and its administration and management.

62. Amendments at Stage 2 introduce the requirement that Scottish Ministers can only make the regulations if they have received a request to do so from the Lord President, the regulatory committee or the Consumer Panel. The agreement of the Lord President is also required where they have not requested the making of the regulations. New subsections (3B) to (3E) are inserted into new section 43A setting out the procedure and requirements which must be followed where a person or body intends to request the Scottish Ministers to make regulations.

Reason for taking power

63. The reason for taking the power remains as set out in paragraph 96 of the Delegated Powers Memorandum, as introduced.

Choice of procedure

64. As this power relates directly to the existing fund of the Law Society, the regulatory body who has the largest membership by a significant margin, it remains appropriate for the affirmative procedure to apply to ensure an appropriate level of

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scrutiny to any change to the fund which is likely to affect legal practitioners and consumers most.

Schedule 2, para 23(1)(b): Power to make changes

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: Revised

Provision

65. The Bill on introduction allowed the Scottish Ministers to intervene and take specified measures in relation to a category 1 or category 2 regulator. Schedule 2 of the Bill made provision concerning some of these measures and the procedure to be followed in taking them. Amendments at Stage 2 transferred the power of intervention from the Scottish Ministers to the Lord President and changes were made to schedule 2 to reflect this. On introduction, the Scottish Ministers had a delegated power to change or remove some or all of the functions of a current category 1 or category 2 regulator. Following Stage 2 amendments, the Scottish Ministers retain this delegated power in respect of these regulators but, given the Lord President's new role in the procedure, they can only make regulations following a request from the Lord President to do so and in accordance with that request. The power enables Ministers, by regulations, to change a regulator's regulatory functions or the way in which any of the regulatory functions of the regulator are to be exercised by it. It remains the case that regulations made under this power can amend an enactment. In addition, before regulations are made by Scottish Ministers, the Lord President (rather than the Scottish Ministers as was provided by the Bill on introduction) must give the regulator a decision notice.

Reason for taking power

66. The reason for the power remains as set out in paragraph 101 of the delegated powers memorandum as introduced.

Choice of procedure

67. It is considered that the affirmative procedure remains appropriate notwithstanding the additional check on the use of the power provided for by the increased role of the Lord President in the process.

Schedule 3, para 22A(8), inserting section 53ZAA(10) of the 1980 Act: Powers of Tribunal: unsatisfactory professional conduct

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or New power: New

Provision

68. This is a new power added by amendment at Stage 2 which inserts new section 53ZAA into the 1980 Act. It confers on the Scottish Ministers the ability to amend subsection (4)(b) to change the maximum penalty (currently £2,000) that may be imposed by the Scottish Solicitors' Discipline Tribunal on finding that a solicitor is guilty of unsatisfactory professional conduct following an investigation into a complaint of professional misconduct (and being not satisfied that the solicitor concerned is guilty of professional misconduct). Ministers must consider that the new amount is justified by a change in the value of money.

Reason for taking power

69. This provision allows for flexibility to adjust the maximum fine amount from time to time to reflect inflation.

Choice of procedure

70. The maximum level of financial penalty is a relatively straightforward issue insofar as the making of regulations are concerned. They do not raise any issues of complexity and therefore the negative procedure is considered appropriate.

Schedule 3, para 22B(11), inserting section 62B(1) of the 1980 Act: Power to amend application of regulatory complaints provisions to licensed providers

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or New power: New

Provision

71. This is a new power added by amendment at Stage 2 which inserts new section 62B into the 1980 Act. It confers on the Scottish Ministers the ability, by regulations, to amend sections 52E, 53ZE, 54B or 55B of the 1980 Act to disapply (or reapply) those provisions to licensed legal services providers.

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Reason for taking power

72. This provision provides for powers to disapply (or reapply) the provisions in the sections mentioned above in relation to licensed providers, to make provision for regulatory complaints align in the 1980 Act and the Legal Services (Scotland) Act 2010 (“the 2010 Act”), including the appeal route for regulatory complaints against licensed providers and authorised legal businesses. The Lord President’s agreement is required for the making of these regulations.

Choice of procedure

73. These powers relate to procedural matters and do not raise any issues of complexity and therefore the negative procedure is considered appropriate.

Schedule 3, para 27(3), inserting new section 19(2) of the 2010 Act: Legal Services (Scotland) Act 2010

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or New power: New

Provision

74. This is a new power added by amendment at Stage 2. It amends section 19 of the 2010 Act to allow Scottish Ministers to specify in regulations a maximum penalty that may be imposed as a financial sanction under section 19(1) of the 2010 Act in respect of a breach of the regulatory scheme by or a complaint about a licensed legal services provider. Before making such regulations, the Scottish Ministers must consult each approved regulator, and such other persons or bodies considered appropriate. The Lord President’s agreement is required for the making of these regulations.

Reason for taking power

75. This power allows Ministers flexibility to specify the maximum penalty when appropriate.

Choice of procedure

76. The maximum level of financial penalty is a relatively straightforward issue insofar as the making of regulations are concerned. They do not raise any issues of complexity and therefore the negative procedure is considered appropriate.

This document relates to the Regulation of Legal Services (Scotland) Bill (SP Bill 25A)
as amended at Stage 2

Regulation of Legal Services (Scotland) Bill

[As amended at Stage 2]

Supplementary Delegated Powers Memorandum

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