LEGAL SERVICES (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose
1. This Memorandum has been prepared by the Scottish Executive to assist the Subordinate Legislation Committee in its consideration of the Legal Services (Scotland) 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. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 6(7) - Approval of regulators

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision
2. Section 6 provides the criteria which an applicant must meet before the Scottish Ministers can approve it as an approved regulator of licensed providers. This is the first stage of a two-stage process for becoming an approved regulator.

3. The powers in section 6(7) were in the Bill as introduced and, as originally drafted, gave the Scottish Ministers the power to make further provision about approval of approved regulators by regulations, including the process for seeking approval, the criteria for approval (including things that applicants must be able to demonstrate), and what categories of bodies may (or may not) be an approved regulator. The Subordinate Legislation Committee (“the Committee”) raised some concerns about these powers, noting in particular that the power to make further provision about criteria for approval in 6(7)(b) “goes beyond matters of detail and administration and into matters of substance”.

4. As amended at Stage 2, the power in section 6(7)(b) to make further provision about criteria for approval is limited to criteria which relate to the body’s capability to act as an approved regulator, in order to prevent the addition of substantive criteria which are unrelated or irrelevant to the performance of the functions of an approved regulator.
5. The power in 6(7)(c) to make further provision about what categories of bodies may or may not be approved regulators has been removed. As noted in previous correspondence with the Committee, this power was very widely drafted. On further consideration, it was felt that this power was in fact unnecessary. The Scottish Ministers are able to exclude unsuitable candidates by reference to their application, and it seems extremely unlikely that it would ever be desirable to exclude an entire class of bodies without consideration on an individual basis.

6. In addition, section 6(8) was added at Stage 2 and this requires that the Scottish Ministers must have the consent of the Lord President before making regulations under section 6(7).

**Reason for taking power**

7. The details of the approval process and criteria for approval are considered best addressed through subordinate legislation, as they are likely to involve a significant amount of detailed procedural provisions. They may also require revision at short notice in order to refine the process or to deal with any unforeseen issues. The Bill already spells out the main factors which should inform the decision of the Scottish Ministers on an application, but it is possible that other issues will emerge as significant to the performance of the functions of approved regulators, and the power to add to the criteria will allow this to be taken into account.

**Reason for choice of procedure**

8. As this power will be used to set out the operational details of a process already outlined in the Bill, and as there is the additional safeguard of the Lord President’s consent, the negative resolution procedure is considered appropriate.

**Section 7(10) – Authorisation to act**

- **Power conferred on:** Scottish Ministers
- **Power exercisable by:** Regulations made by statutory instrument
- **Parliamentary procedure:** Negative resolution of the Scottish Parliament

**Provision**

9. Section 7 sets out the criteria which must be met before the Scottish Ministers can give an approved regulator authorisation to undertake regulatory functions. This is the second stage in the process of allowing a body to act as an approved regulator, approval (section 6) being the first.

10. The powers in section 7(10) were in the Bill as introduced and, as originally drafted, gave the Scottish Ministers a regulation making power to make further provision regarding the process for authorising an approved regulator to exercise its regulatory functions. In particular, this included the process and criteria for authorisation.

11. The Committee expressed concern at the power in section 7(10)(b) to make further provision about criteria for authorisation, and recommended that this power be reconsidered. It is now felt that this power is unnecessary, as the criteria for authorisation are linked to the criteria for approval in section 6. Any additional criteria which are required can be added under
6(7)(b), and will then apply to the authorisation process under 7(2)(b). The ability to make further provision regarding criteria for authorisation has therefore been removed.

**Reason for taking power**

12. As with the approval process in section 6, the details of the authorisation process are considered best addressed through subordinate legislation, as they concern matters of operational detail. They may require revision at short notice in order to refine the process or deal with any unforeseen issues which arise.

**Choice of procedure**

13. As this power will be used to set out the operational details of a process already outlined in the Bill, the negative resolution procedure is considered appropriate.

**Section 9(3) - Reconciling different rules**

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**Provision**

14. In the Bill as introduced, section 8(2)(b) provides that the approved regulator’s regulatory scheme must include appropriate provision for dealing with regulatory conflict between it and any professional or regulatory rules of any other body which regulates the provision of legal or other services. Section 9(3) gives the Scottish Ministers a regulation-making power to make further provision about regulatory conflicts which may involve an approved regulator.

**Amendment at Stage 2**

15. At Stage 2, this provision was amended to require that the Scottish Ministers have the consent of the Lord President before making regulations.

**Choice of procedure**

16. The negative resolution procedure is considered most appropriate in this instance, as the power addresses a narrow area which is well defined in the Bill. In addition, there is now the additional safeguard of the Lord President’s required consent.

**Section 22(1) - More about governance**

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**Provision**

17. In the Bill as introduced, section 22 relates to the provisions on the internal governance arrangements of approved regulators, as covered in sections 20 and 21. Section 22(1) gives the Scottish Ministers a regulation-making power to make further provision regarding these internal
This document relates to the Legal Services (Scotland) Bill as amended at Stage 2 (SP Bill 30A)

governance arrangements. This is limited to arrangements relating to the regulatory function of the approved regulators.

Amendment at Stage 2

18. At Stage 2, this provision was amended to require that the Scottish Ministers have the consent of the Lord President before making regulations.

Choice of procedure

19. As there is provision in the Bill for consultation with the affected parties (approved regulators), and the underlying principles relating to internal governance arrangements are stated clearly in sections 20(1) and 21(1), and the power would only be used to add further detail to this, the negative resolution procedure is considered appropriate. In addition, there is now the additional safeguard of the Lord President’s required consent.

Section 26(1) - Additional powers and duties

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

20. Section 26 relates to the regulatory functions of approved regulators, as set out in sections 23, 24 and 25. The power in section 26(1) was in the Bill as introduced, and gives the Scottish Ministers the power to make regulations giving approved regulators additional functions as are considered necessary or expedient for them to have for the purposes of regulating licensed providers. As amended at Stage 2, the Scottish Ministers must have the consent of the Lord President before making such regulations.

Reason for taking power

21. This is so that if an omission is discovered, or if in the light of experience the Scottish Ministers consider additional functions to be necessary or expedient, they can require approved regulators to take on those functions.

Choice of procedure

22. This power has a potentially significant impact, in that it can require approved regulators to take on functions which are not set out in the Bill. This is reflected by the requirement for the consent of the Lord President to be obtained, and for consultation with all approved regulators plus others as considered appropriate, prior to use of the power. It is also considered appropriate that any regulations made using this power be subject to the affirmative resolution procedure, in order to ensure a proper level of parliamentary scrutiny.
Section 27(1) – Guidance on functions

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Guidance  
**Parliamentary procedure:** None

**Provision**

23. In the Bill as introduced, section 27(1) provided that, in exercising its functions under Part 2, an approved regulator must have regard to any guidance issued to it or to approved regulators generally, by the Scottish Ministers. The Committee raised a question relating to the wording of this section, as it implies that guidance may be issued to either an individual approved regulator, or to all approved regulators. The intention behind this section is that the same guidance should be issued to every approved regulator, and that every approved regulator should be consulted on the guidance. Section 27(1) was amended appropriately at Stage 2.

**Reason for taking power**

24. Once the provisions in the Bill are operational, it may on occasion be useful to issue guidance to approved regulators in order to clarify or advise on the operation of the regulatory framework.

**Choice of procedure**

25. No Parliamentary procedure is required for the issuing of guidance.

Section 27A(6) – Review of own performance

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

**Provision**

26. Section 27A requires approved regulators to carry out an annual internal review of their operation as such, and send a report to the Scottish Ministers. This is to support the Scottish Ministers’ oversight role in the regulatory framework, and to ensure that approved regulators are operating effectively.

27. The Scottish Ministers are given a power in section 27A(6) to make regulations about what is to be covered in the review and report (including both elaboration of existing areas and addition of new areas), and setting out additional details of the report (including how, when and in what format it is to be submitted).

**Reason for taking power**

28. The operational details of the report and its submission (for example format and timing) are considered best set out in subordinate legislation, rather than on the face of the Bill. In addition, it may be necessary or desirable in light of experience to elaborate on, or add to, the areas which are covered by the report, in order to facilitate effective oversight of the performance of approved regulators.
Choice of procedure

29. This power will be used to set out the operational details around the performance report, and to make further provision about the performance review. While this power can be used to specify new areas which are to be covered by the review, these will still be related to the approved regulator’s performance as such, and so would not be substantive alterations. Therefore, the negative procedure is considered appropriate.

Section 29(6) - Measures open to Ministers

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

30. In the Bill as introduced, section 29 set out the measures open to the Scottish Ministers should they feel that an approved regulator is not performing its functions adequately. Section 29(6) gives the Scottish Ministers a regulation-making power to specify other measures which may be taken by them (subsection (6)(a)), and to make further provisions relating to measures that they can take, including the procedures to be used when taking them (subsection (6)(b)).

Amendment at Stage 2

31. At Stage 2, amendments were made that require that every approved regulator must be consulted before regulations are made, and that those regulations cannot be made unless the Lord President has given his consent.

Choice of procedure

32. The power in section 29(6) is one which creates new sanctions on approved regulators, which will be defined in the regulations themselves. Given the potential impact of these sanctions on approved regulators, and the breadth of the power, the affirmative resolution procedure is considered appropriate.

Section 35(1) - Step-in by Ministers

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

33. Section 35(1) gives Scottish Ministers a regulation-making power to make provision allowing them to establish a body with a view to it becoming an approved regulator. As amended at Stage 2, this power cannot be used unless the Scottish Ministers believe their intervention is necessary, as a last resort, in order to ensure that the provision of legal services by licensed providers is regulated effectively.
Reason for taking power

34. In the unlikely event that no bodies apply to become approved regulators, or none pass the application process, or an approved regulator ceases to operate and there is no other regulator to which licensed providers can transfer, a new regulatory body would be required in order to implement the provisions of Part 2 of the Bill.

35. This is a fallback provision which we do not envisage being used. Given that the remit of the new body would be limited to those regulatory functions described in this Bill, it would not be an effective use of the Scottish Parliament’s time to create such a body by subsequent primary legislation. It is also possible that such provision will be required urgently to deal with a regulatory gap, particularly if an existing regulator has ceased to operate. Therefore, it is considered appropriate to address this through subordinate legislation.

Choice of procedure

36. The power is, as section 35(4) makes clear, only to be used as a last resort where necessary to ensure that licensed providers can continue to be effectively regulated. It is likely that the provisions will require to be implemented urgently if there is a regulatory gap, but given the financial and policy implications of creating an entirely new public body, affirmative resolution is considered appropriate.

Section 35(2) - Step-in by Ministers

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Provision

37. Section 35(2) gives the Scottish Ministers a regulation-making power to allow them to act as an approved regulator in circumstances set out in those provisions. As amended at Stage 2, this power cannot be used unless the Scottish Ministers believe their intervention is necessary, as a last resort, in order to ensure that the provision of legal services by licensed providers is regulated effectively.

Reason for taking power

38. This power ensures that there is always an approved regulator in place. For example, should an approved regulator fail, or no body applies to become an approved regulator, the Scottish Ministers can take on the regulatory duties until such time as an appropriate body can be found, or established using section 35(1). Such a step would likely be required at short notice to plug a regulatory gap, and is a safeguard rather than something which is anticipated will be needed, so subordinate legislation is considered appropriate.

Choice of procedure

39. This is a fall-back provision and is only intended to be used as a last resort, if the Government’s policy intention of providing for the regulation of licensed providers might otherwise be frustrated. As the Scottish Ministers would be regulating in accordance with the various details set out for approved regulators in the Bill, and the matter may require urgent
resolution, the negative resolution procedure seems to offer an appropriate level of scrutiny without adding in undesirable delay.

Section 37(6) - Eligibility criteria

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**Provision**

40. Section 37 sets out which types of entity would, and would not, be eligible to become a licensed provider. The power in section 37(6) was in the Bill as introduced, and gave the Scottish Ministers a regulation-making power to make further provisions around the criteria for eligibility (subsection (6)(a)). It also allowed them to expand the list of persons who are classed as “legal practitioners” for the purposes of this section (subsection (6)(b)(i)), and to add an additional type of legally qualified person to section 36(2) (subsection (6)(b)(ii)).

41. Section 37(6)(a) was amended at Stage 2 in light of concerns expressed by the Committee regarding the width of the power and the Parliamentary procedure proposed, and now consists of two distinct powers which narrow the scope of the Scottish Ministers’ powers to make further provision about eligibility to be a licensed provider. The first, in section 37(6)(a)(i), allows the Scottish Ministers to make further provision by regulations specifying other categories of entity that are, or are not, eligible to be licensed providers. This power is subject to the affirmative procedure. The second power, in section 37(6)(a)(ii), allows the Scottish Ministers to make further provision by regulation about criteria for eligibility to be a licensed provider.

42. The intention behind the amendments to section 37(a) is that the Scottish Ministers should be able to clarify or elaborate on the criteria for eligibility and add further criteria if necessary to deal with unforeseen problems or unusual business structures, but that any additional criteria should not substantially alter the essence of the eligibility criteria already described within section 37.

43. The powers in section 37(6)(b) remain unaltered, but following an amendment at Stage 2 the Scottish Ministers must now consult every approved regulator before making regulations under this provision.

**Reason for taking power**

44. Subsection (6)(a) gives the Scottish Ministers the flexibility to add further detail around the conditions of eligibility, as may be necessary once the provisions of the Bill are in force. This allows refinement of the current provisions – an example might be to provide further specification of the nature of separation required between a licensed provider and the larger entity of which it forms part, for section 37(3). It also provides the ability to address any unforeseen circumstances and to make provision in light of experience about categories of entity which are, or are not, eligible to become licensed providers.

45. Subsection (6)(b)(i) relates to section 36(2), which provides that an entity is only eligible to be a licensed provider if it employs at least one solicitor providing legal services. Subsection
(6)(b)(i) is intended to be used should an additional type of legally qualified individual seek to participate in licensed providers, and possess similar qualifications to those held by a solicitor. For example, should the Faculty allow its members to participate in licensed providers at some point in the future, section 36(2) could be changed to give advocates the same status as solicitors – section 36(2) would then require that either a solicitor or an advocate must be employed in order to be eligible to be a licensed provider.

46. Subsection (6)(b)(ii) allows an additional type of legal practitioner to be added to the list in subsection (5). This is to allow the addition, if appropriate, of any new types of legal practitioner which might be created in the future, thus keeping the Bill up to date.

47. Subordinate legislation is deemed appropriate in this case, as all the cases described above in subsection (6) will require action once the Bill comes into force, and are consequent on changes which may or may not happen. The changes do not undermine the essential safeguard provided for in section 36(2), that a legally qualified professional must be involved in every licensed provider.

Choice of procedure

48. Given the limited nature of the powers in section 37(6)(a)(ii) and (b), which are likely to be used, if at all, for clarification and technical additions to the requirements of section 37, the negative resolution procedure is considered appropriate.

49. However, the power in section 37(6)(a)(i) does have the potential to significantly alter the eligibility criteria in section 37 by setting out additional categories of bodies which may or may not be licensed providers. Therefore, the additional parliamentary scrutiny offered by the affirmative procedure is considered appropriate for this power.

Section 39(9) - Head of Legal Services

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

50. The power in section 39(9), which was in the Bill as introduced, gives the Scottish Ministers the power to make further provision about Heads of Legal Services of licensed providers, and the functions of such Heads (subsection (9)(a)). It also allows the Scottish Ministers to modify subsection (2) to add an additional type of legally qualified person who would then be eligible to become a Head of Legal Services (subsection (9)(b)).

51. This power remains essentially unaltered. Amendments at Stage 2 simply clarified that any further provision made about the functions of Heads of Legal Services must relate to that position, and provided that the Scottish Ministers must consult the Lord President before making regulations under this section.
Reason for taking power

52. The operational details around the position of Head of Legal Services may require to be expanded (under subsection (9)(a)) as it is determined how the position operates in practice, or in response to any unforeseen circumstances. This may provide, for example, for further responsibilities to be specified for the Head of Legal Services to ensure an identifiable individual in the licensed provider takes personal responsibility for ensuring the business is complying with regulatory requirements.

53. The power in subsection (9)(b) is intended to be used where an additional class of legally qualified individuals seek to participate in licensed providers, and possess similar qualifications to those held by a solicitor. For example, should the Faculty allow its members to participate in licensed providers at some point in the future, subsection (2) could be changed to give advocates the same status as solicitor, allowing them to take the position of Head of Legal Services.

Choice of procedure

54. This power is not likely to raise any contentious issues, being concerned with the details of a position which is described in some depth in the Bill. In addition, the Lord President will be consulted before any regulations are made. Therefore, the negative resolution procedure is considered appropriate.

Section 40(7) - Head of Practice

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

55. Section 40 describes the position of Head of Practice, along with the requirements, duties and responsibilities associated with the role. Section 40(7) gives the Scottish Ministers the power to make further provisions about Heads of Practice of licensed providers, and the functions of such Heads.

56. This power remains essentially unaltered. Amendments at Stage 2 simply clarified that any further provision made about the functions of Heads of Practice must relate to that position, and provided that the Scottish Ministers must consult the Lord President before making regulations under this section.

Reason for taking power

57. The operational details around the position of Head of Practice may require to be expanded as it is determined how the position operates in practice, or in response to any unforeseen circumstances. As this is an operational matter, subordinate legislation is considered appropriate.

Choice of procedure

58. As with section 39(9), this power is not likely to raise any contentious issues, being concerned with the details of a position which is described in some depth in the Bill. In addition,
the Lord President will be consulted before any regulations are made. Therefore, the negative
resolution procedure is considered appropriate.

Section 41(5) - Practice Committee

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision
59. In the Bill as introduced, section 41(5) gave the Scottish Ministers the power to make
further provisions relating to the Practice Committees of licensed providers, and the functions of
such Committees.

Amendment at Stage 2
60. At Stage 2, an amendment was made that requires the Scottish Ministers to consult the
Lord President before making regulations.

Choice of procedure
61. As with the powers relating to the other named positions within licensed providers in
sections 39 and 40, being concerned with the details of a position which is described in some
depth in the Bill. In addition, the Lord President will be consulted before any regulations are
made. Therefore, the negative resolution procedure is considered appropriate.

Section 52(2), (2A) and (2B) - More about investors

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative/affirmative resolution of the Scottish Parliament

Provision
62. Section 52 relates to sections 49-51 which address non-solicitor investors in licensed
providers (for example, setting out the criteria which must be met by such investors in terms of
financial position and behaviour). Most of the powers in this section were present in the Bill as
introduced and give the Scottish Ministers power to make regulations to make further provision
about such investors, and for licensing rules about individuals who have an interest in a licensed
provider.

63. Such provision may include imposing requirements on licensed providers or those with
an interest in licensed providers, defining or clarifying the terminology, specifying the criteria or
circumstances by reference to which an outside investor is presumed or held to be fit or unfit,
and modifying the definition of investor or non-solicitor investor as described in section 52(4).

64. The Committee raised some concerns about the level of scrutiny proposed for the powers
in this section, given their potential reach. In light of this, an amendment was made at Stage 2 to
make the power to amend the definition of investor or non-solicitor investor in section 52(4)
subject to the affirmative procedure, given its potential to make substantive changes. The other powers in this section which were in the Bill as introduced remain substantially unaltered (though their position has changed).

65. Three further powers were added to section 52 at Stage 2. The first of these, in section 52(2A)(a), relates to the definition of “exemptible investor”, which is introduced in section 49A. Exemptible investors are investors who have less than a 10% stake in the total ownership or control of a licensed provider, and approved regulators have the discretion to not apply the fitness for involvement test to such investors. This power allows the Scottish Ministers to amend the percentage ownership or control relating to the definition of “exemptible investor” in section 49A(4) and paragraph 3A(3) of schedule 8.

66. The remaining powers (in section 52(2B)(c)(ii) and (iii)) relate to the power of the Scottish Ministers to set out what amounts to ownership, control, or any other material interest, which was in the Bill as introduced. These powers allow the Scottish Ministers to also set out what interest of type is relevant as regards a particular percentage stake in ownership or control, and to what other interest or type also counts towards such a stake, by reference to family, business or other associations.

Reason for taking power

67. The powers relating to the fitness for involvement test allow the Scottish Ministers to set out further detail on what must be covered in the “fitness for involvement” test which must be applied by approved regulators to any non-solicitor investor in a licensed provider (as described in sections 49 and 50), or in how non-solicitor investors should behave.

68. The Bill provides the framework and key issues to be addressed in the fitness for involvement test, and provides for the detail to be addressed in regulatory schemes, particularly the licensing rules (see section 49(2) which requires that licensing rules relating to outside investors must explain the basis on which an outside investor’s fitness is determinable). It also sets out in section 51 the behaviour required of non-solicitor investors.

69. The safeguards to ensure that outside investors are suitable and behave properly are highly important in ensuring that the public interest and professional standards are protected. It may prove desirable to add further specification to these safeguards, to ensure consistency between the approaches taken by different regulators, or to reflect further qualifying tests which are identified in future.

70. The power to amend the percentage set out in section 49A(4) and paragraph 3A(3) may be required if, once the relevant provisions are operational, it appears to the Scottish Ministers that the figure of 10% is unsuitable. Without the benefit of experience, it is difficult to ensure in advance that this figure is correct, and it may require to be changed at short notice. Therefore, subordinate legislation is considered appropriate.

Choice of procedure

71. The powers in section 52(2B) apply to a restricted class of people (non-solicitor investors) and are essentially provided to clarify or expand on provisions which are already in
the Bill, so as to maximise public protection. Negative resolution procedure is therefore considered appropriate.

72. The powers in section 52(2A) allow changes to be made to the Bill itself. Given the potential to make substantive changes through such powers, the additional scrutiny offered by the affirmative procedure is considered appropriate.

Section 68(6) - Lists of disqualified persons

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

73. In the Bill as introduced, section 68 in the Bill provides that an approved regulator must keep and publish a list of the persons it has disqualified from holding a position in a licensed provider (see section 44), and those it has determined to be unfit to be an investor in a licensed provider (see section 49).

Amendment at Stage 2

74. At Stage 2, section 50A (“Ban for improper behaviour”) was inserted into the Bill to provide for disqualification of those who contravene sections 51(1) or (2). The regulations under section 68(6) could affect the lists of those disqualified under section 50A.

Reason for taking power

75. The Scottish Ministers may wish to provide more detail on the exact content of such lists and the procedure to be used in keeping and publishing them and amend such details as necessary once the regulatory framework is in operation. As this power relates to a largely administrative function, it is considered appropriate for the details to be set out in subordinate legislation.

Choice of procedure

76. The negative resolution procedure is still considered appropriate in view of the non-contentious and administrative nature of the power.

Section 74(7) - Certification of bodies

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

77. Section 74 sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body for confirmation agents. In the Bill as introduced, the powers in section 74(7) gave the Scottish Ministers power to make regulations to make further
provision regarding the process for seeking certification, the criteria for certification, and what categories of bodies may or may not be an approving body.

78. The Committee indicated some concern with the width of the powers in this section. In light of this concern, amendments were made at Stage 2. The power in section 74(7)(b) to make further provision about criteria for certification is now limited to criteria which relate to the body’s capability to act as an approving body, in order to prevent the addition of substantive criteria which are unrelated or irrelevant to the performance of the functions of an approving body.

79. In addition, the power in 74(7)(c) to make further provision about what categories of bodies may or may not be approving bodies has been removed. As noted in previous correspondence with the Committee, this power was very widely drafted. On further consideration, it was felt that this power was in fact unnecessary. The Scottish Ministers are able to exclude unsuitable candidates by reference to their application, and it seems extremely unlikely that it would ever be desirable to exclude an entire class of bodies without consideration on an individual basis.

80. The intention behind the amendments made to section 74(7) at Stage 2, is that the Scottish Ministers should have the power to make regulations regarding the certification process and, in relation to their capability to act as approving body, the criteria for certification, but that any additional criteria should not substantially alter the essence of the criteria already described within section 74.

Reason for taking power

81. The details of the certification process are considered best addressed through subordinate legislation, as they may require revision at short notice in order to refine the process, or deal with any unforeseen issues which arise.

Choice of procedure

82. This power will be used to set out the operational details of a process already outlined in the Bill. Where criteria for certification are added, these will be limited by reference to the performance of the functions of an approving body, which are also set out in detail in the Bill. Therefore, the negative resolution procedure is considered appropriate.

Section 76A(6) – Review of own performance

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament.

Provision

83. Section 76A sets out the requirement that an approving body for confirmation agents review its own performance annually. In so doing, the approving body must provide the Scottish Ministers with a report; a copy of which the latter must lay before Parliament. Section 76A(6)
gives the Scottish Ministers a regulation making power to make further provision about the annual review and the report.

**Reason for taking power**

84. As with the operational details of any new regulatory framework, the processes and requirements of this review process and the subsequent report, are likely to require some elaboration, once the Bill provisions come into force. The ability to do this through subordinate legislation gives the Scottish Ministers sufficient flexibility to address any issues or make changes as required.

**Reason for choice of procedure**

85. Further provision made using this power will deal with the operational details of the review process and the report. Given this, the negative resolution procedure is considered appropriate.

**Section 81(5) - Ministerial intervention**

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</tr>
<tr>
<td>Parliamentary procedure:</td>
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</table>

**Provision**

86. In the Bill as introduced, section 81(5) gave the Scottish Ministers power to make regulations to make further provision about approving bodies and confirmation agents. The Committee expressed concern at the wide nature of this power, and the lack of any indication as to when it might be used. Following further consideration, it was felt that, given the other powers available in Part 3, this power is most likely to be used where, owing to unforeseen circumstances, the regulation in place is felt to be insufficient for the adequate protection of client interests. An amendment was therefore made at Stage 2 to link the power in section 81(5)(b) to this purpose, ensuring that the Scottish Ministers are able to make further provision about the functions of approving bodies and confirmation agents only where they consider this to be necessary to safeguard the interests of the clients of confirmation agents.

87. A further amendment was made at Stage 2 in relation to reviews of confirmation agents. In the Bill as introduced, section 81(4) allowed the Scottish Ministers to require approving bodies to carry out annual reviews of the performance of their confirmation agents, and send a report to the Scottish Ministers. In previous correspondence with the Committee, it was indicated that an amendment would be lodged at Stage 2 to remove this power, and insert the requirement for annual reviews on the face of the Bill. This amendment was passed, and such a requirement is provided for in section 81(3A). A new power to allow the Scottish Ministers to make further provision about this review has also been inserted, at section 81(5)(a).

**Reason for taking power**

88. As with the operational details of any new regulatory framework, the processes and requirements of this review process are likely to require some elaboration once the Bill provisions come into force. The ability to do this through subordinate legislation, as provided
for in section 81(5)(a), gives the Scottish Ministers sufficient flexibility to address any issues or make changes as required.

89. The power in section 81(5)(b) allows the Scottish Ministers to prescribe further safeguards in relation either to those who grant powers to deal with confirmation, or those who carry out this work. Given that the work involved is of a specialist nature, may involve potentially vulnerable clients, and is currently restricted to solicitors, it is felt appropriate to retain a reserve power to create further regulatory safeguards, should they prove desirable.

Choice of procedure

90. Further provision made using the power in section 81(5)(a) will deal with the operational details of the review process. Given this, the negative resolution procedure is considered appropriate.

91. The power in section 81(5)(b) has a potentially wide scope, despite the changes made at Stage 2. Therefore, the affirmative resolution procedure is considered appropriate.

Section 81B(6) - Approving bodies

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

92. Section 81B sets out the requirements of the application to the Scottish Ministers to become an approving body of non-lawyer will writers. Section 81B(6) gives the Scottish Ministers a regulation-making power to prescribe fees which they may charge applicants to become approving bodies.

Reason for taking power

93. While the Scottish Government does not intend to charge applicants to become approving bodies when the Bill is implemented, this may become necessary to protect public funds should the number of applicants or the resources required to administer the process be higher than expected. Subordinate legislation is considered a suitable way of introducing fees in such a case.

Choice of procedure

94. As this power is narrow in scope, and intended only to be used to recoup costs, the negative resolution procedure is considered to offer sufficient parliamentary scrutiny.
Section 81C(7) - Certification of bodies

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision
95. Section 81C sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body for non-lawyer will writers. Section 81C(7) gives the Scottish Ministers power to make regulations to make further provision regarding the process for seeking certification and, in relation to their capability to act as an approving body, the criteria for certification.

Reason for taking power
96. The details of the certification process are considered best addressed through subordinate legislation, as they may require revision at short notice in order to refine the process, or deal with any unforeseen issues which arise.

Choice of procedure
97. This power will be used to set out the operational details of a process already outlined in the Bill. Where criteria for certification are added, these will be limited by reference to the performance of the functions of an approving body, which are also set out in detail in the Bill. Therefore, the negative resolution procedure is considered appropriate.

Section 81D(2)(f) - Regulatory schemes

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision
98. Section 81D requires the approving body for non-lawyer will writers to have a regulatory scheme which allows for individuals who meet the qualifying criteria to provide will writing services, and which regulates those members in the provision of those services. It also sets out what must be included in such schemes.

99. Section 81D(2)(f) gives the Scottish Ministers a regulation-making power to require approving bodies to cover such regulatory matters in their regulatory schemes as the Scottish Ministers specify, in addition to those already listed in section 81D.

Reason for taking power
100. As with section 8(2)(c) in respect of approved regulators, this gives the Scottish Ministers flexibility to expand upon the regulatory matters which are to be covered by the regulatory schemes for non-lawyer will writing services, if this proves necessary (for example, to add clarity, or to address unforeseen issues).
Choice of procedure

101. The level of parliamentary scrutiny offered by the affirmative resolution procedure is considered appropriate in this case, as the power has the potential to significantly alter the focus of the regulatory schemes of approving bodies, and to impact on the regulatory burden on approving bodies and will writers.

Section 81F(6) – Review of own performance

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament.

Provision

102. Section 81F(6) sets out the requirement that an approving body for non-lawyer will writers review its own performance annually. In so doing, the approving body must provide the Scottish Ministers with a report; a copy of which the latter must lay before Parliament. Section 76A(6) gives the Scottish Ministers a regulation making power to make further provision about the annual review and the report.

Reason for taking power

103. As with the operational details of any new regulatory framework, the processes and requirements of this review process and the subsequent report are likely to require some elaboration once the Bill provisions come into force. The ability to do this through subordinate legislation gives the Scottish Ministers sufficient flexibility to address any issues or make changes as required.

Reason for choice of procedure

104. Further provision made using this power will deal with the operational details of the review process and the report. Given this, the negative resolution procedure is considered appropriate.

Section 81K(5) - Ministerial intervention

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

105. Section 81K(5) gives the Scottish Ministers power to make regulations about the annual review of non-lawyer will writers’ performance, as required under section 81(4), and to make further provision about approving bodies and non-lawyer will writers where this appears necessary to safeguard the interests of the clients of will writers.
Reason for taking power

106. As with the operational details of any new regulatory framework, the processes and requirements of this review process and the subsequent report are likely to require some elaboration once the Bill provisions come into force. Section 81K(5)(a) provides for this. The ability to do this through subordinate legislation gives the Scottish Ministers sufficient flexibility to address any issues or make changes as required.

107. In section 81K(5)(b), a broad power has been taken to allow the Scottish Ministers to prescribe further safeguards in relation either to those who grant powers to deal with non-lawyer will writers, or those who carry out this work. Given that the work involved is of a specialist nature and may involve significant amounts of money and potentially vulnerable clients, it is felt appropriate to retain a reserve power to create further regulatory safeguards, should they prove desirable.

Reason for choice of procedure

108. In the case of section 81K(5)(a), further provision made using this power will deal with the operational details of the review process and the report. Given this, the negative resolution procedure is considered appropriate.

109. In the case of section 81K(5)(b), given the potentially wide scope of this power, affirmative resolution procedure is considered appropriate.

Section 81L(1) – Step-in by Ministers

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

110. Section 81L(1) gives Scottish Ministers a regulation-making power to make provision allowing them to establish a body with a view to it becoming an approved regulator.

Reason for taking power

111. This power is similar to that in section 35(1). In the unlikely event that no existing bodies successfully apply to become approving bodies for non-lawyer will writers, or an approving body ceases to operate and there is no other regulator to which non-lawyer will writers can transfer, a new regulatory body would be required in order to implement the provisions of Part 3, Chapter 2 of the Bill.

112. This is a fallback provision which we do not envisage being used. Given that the remit of the new body would be limited to those regulatory functions described in this Bill, it would not be an effective use of the Scottish Parliament’s time to create such a body by subsequent primary legislation. It is also possible that such provision will be required urgently to deal with a regulatory gap, particularly if an existing regulator has ceased to operate. Therefore, it is considered appropriate to address this through subordinate legislation.
Choice of procedure

113. The power is, as section 81L(4) makes clear, only to be used as a last resort to ensure that non-lawyer will writers can continue to be effectively regulated. It is likely that the provisions will require to be implemented urgently if there is a regulatory gap, but given the financial and policy implications of creating an entirely new public body, affirmative resolution is considered appropriate.

Section 81L(2) - Step-in by Ministers

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

114. Section 81L(2) gives the Scottish Ministers a regulation-making power to allow them to act as an approved regulator in circumstances set out in those provisions.

Reason for taking power

115. This power is similar to that in section 35(2) and ensures that there is always an approving body for non-lawyer will writers in place. For example, should an approving body fail, or no body applies to become an approving body, the Scottish Ministers can take on the regulatory duties until such time as an appropriate body can be found, or established using section 81L(1). Such a step would likely be required at short notice to plug a regulatory gap, and is a safeguard rather than something which is anticipated will be needed, so subordinate legislation is considered appropriate.

Choice of procedure

116. This is a provision of last resort and is only intended to be used if the Government’s policy intention of providing for the regulation of non-lawyer will writers might otherwise be frustrated. As the Scottish Ministers would be regulating in accordance with the various details set out for approved regulators in the Bill, and the matter may require urgent resolution, the negative resolution procedure seems to offer an appropriate level of scrutiny without adding in undesirable delay.

Section 91A(2) – Citizens advice bodies

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument

Provision

117. New section 91A amends section 26 of the Solicitors (Scotland) Act 1980 (“the 1980 Act”) to provide for a citizens advice body to employ a solicitor directly, to give advice to third parties, without the necessity of being approved and authorised as a licensed provider. Section 91A(3) allows the Scottish Ministers to amend the definition of “citizens advice body”, which is inserted into section 65(1) of the 1980 Act.
Reason for taking power

118. This power allows the Scottish Ministers to amend the definition of “citizens advice body” if there are any difficulties in practice caused by it either being too tight or too loose a definition. Should this be the case, this would need to be resolved without delay and so subordinate legislation is considered appropriate.

Reason for choice of procedure

119. This power is narrow in scope and will only be used if there are difficulties that come to light in practice. Given this, the negative resolution procedure is considered appropriate.

Section 91F(b) – Cap on individual claims

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Provision

120. Section 91F is a new provision that amends Schedule 3 to the Solicitors (Scotland) Act 1980 to provide for a limit on an individual grant payable from the Scottish Solicitors Guarantee Fund (“the Guarantee Fund”).

Reason for taking power

121. Section 91F provides for a limit on an individual grant of £1.25 million. It is possible that this figure may, in the light of experience, have been set too high and that multiple claims threaten to empty the Guarantee Fund despite the stop loss insurance in place. In this situation, the Scottish Ministers might consider revising the cap. More likely, inflationary pressures will in time reduce the monetary value in real terms of the cap and the Scottish Ministers might consider it appropriate to raise the value of the cap. Section 91F(b) allows for a decrease or increase in the cap.

Reason for choice of procedure

122. We consider that there are important issues relating to this cap and any amendment to either decrease or increase it, including ensuring that consumers of legal services are adequately protected. Given this, we consider that the affirmative resolution procedure is appropriate.

Section 92 - Council membership

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<td>Parliamentary procedure:</td>
<td>Not applicable</td>
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Provision

123. In section 92(2)(c) of the Bill as introduced, there was a provision (3A(4)) inserted into the Solicitors (Scotland) Act 1980 giving the Scottish Ministers the power to specify either the minimum number or the proportion of members of the Council of the Law Society of Scotland (“the Council”) who must be non-solicitors.
Stage 2 amendment

124. Further consideration of this matter resulted in the conclusion that as the Bill will set up a regulatory committee (see section 93) which will discharge the regulatory functions of the Council, and as that regulatory committee must have a non-solicitor chair and at least 50% non-solicitor membership, there is no longer a need to have a statutory requirement that the Council include a certain proportion of non-solicitor members. Consequently, a Stage 2 amendment removed section 3A(4), (5), and (6).

Section 93 - Regulatory committee

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

125. In the Bill as introduced, section 93(2) adds a provision (section 3B(5)) to the Solicitors (Scotland) Act 1980, giving the Scottish Ministers the power to make further provisions about the Council’s regulatory functions. The power can also be used to modify the definition of “regulatory functions”, as given in subsection (9), if it is believed that such modification is appropriate.

126. At Stage 2, section 3B(5)za was inserted which provides for the Scottish Ministers to prescribe by regulations the maximum number of members that the regulatory committee may have.

Reason for taking power

127. This provision was considered advisable to ensure that the regulatory committee does not grow to a size where it is unable to act effectively.

Choice of procedure

128. As this power is narrow in scope, relates to operational matters, and would only be used in consultation with the Law Society, the negative resolution procedure is considered appropriate.

Section 98A(1) – The 2007 Act: further provision

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament.

Provision

129. Section 98A provides that the Scottish Ministers can make further provision in connection with the Legal Profession and Legal Aid (Scotland) Act 2007 or related provisions of the Solicitors (Scotland) Act 1980, including with regard to the effect that the Legal Services Act 2007 has on the subject matter of Parts 1 and 2 of the Legal Profession and Legal Aid (Scotland) Act 2007.
**Reason for taking power**

130. Section 98A(1) relates to the ancillary provision of the Legal Profession and Legal Aid (Scotland) Act 2007. This provision is currently limited in scope owing to changes made by the Legal Services Act 2007 which affect the Legal Profession and Legal Aid (Scotland) Act 2007. This amendment allows the ancillary provision to be used as intended, including in areas altered by the Legal Services Act 2007.

**Reason for choice of procedure**

131. As this power is intended only to allow the ancillary provision of the Legal Profession and Legal Aid (Scotland) Act 2007 to be used as intended, negative resolution is considered appropriate.

**Section 99A(1) – Further modification**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Affirmative resolution of the Scottish Parliament.

**Provision**

132. Section 37A(1) provides that an entity would only be eligible to be a licensed provider if at least 51% of the entity is owned, managed or controlled by solicitors, firms of solicitors or incorporated practices or other regulated professionals. Section 99A(1) provides that the threshold of 51% can be increased, decreased, or removed. In exercising this power, the Scottish Ministers must act in a way which is compatible with the regulatory objectives and, before making regulations, they must consult, amongst others, the Lord President and the Law Society of Scotland.

**Reason for taking power**

133. This power does not represent an attempt to negate the provision for majority ownership of licensed providers by solicitors or regulated professionals in section 37A(1). It is rather a measure to ensure that flexibility is retained. An unforeseen change in circumstances may require an increase or decrease in the percentage stated. Similarly, if the protection offered by a cap on external ownership becomes an obstacle to commercial development by firms or to the way services are available to consumers instead of an aid, it may be considered necessary to revisit it and remove it altogether.

**Reason for choice of procedure**

134. The issue of non-solicitor ownership of licensed providers has been a contentious one with widely differing views expressed within the legal profession, and indeed in the Justice Committee. Consequently, it is considered appropriate that any change that results in an increase or decrease of the percentage of non-solicitor ownership of a licensed provider should be subject to the affirmative procedure.
LEGAL SERVICES (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM