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16 November 2023

Dear Convener

Regulation of Legal Services (Scotland) Bill

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

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

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

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

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

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire
Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

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

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

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

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

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

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

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

Proposed approach to amending the Bill

Having reflected on the feedback from stakeholders we are giving consideration to amendments which would transfer the exercise of the powers at sections 19 and 20 of the Bill to the Lord President. This in particular reflects the view of the Senators of the College of Justice, who stated in their submission to the Equalities, Human Rights and Civil Justice Committee that such a change would be acceptable to them¹:

¹ [Response from Senators of the College of Justice to the call for views on the Regulation of Legal Services \(Scotland\) Bill](#).

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

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

We are also considering amendments which will provide additional safeguards in the form of requiring the Lord President’s consent where certain delegated powers are exercised by Ministers and provide a more consistent approval role for the Lord President throughout the Bill. By way of example, the Lord President’s consent would be required for any amendment to the regulatory objectives or professional principles at section 5(1), any additions to the regulatory scheme requirements at section 26(1) or any change to the rules for authorised legal businesses at section 41(2). It may also be appropriate to narrow the scope of any such changes to the extent that they are only possible at the recommendation of certain bodies.

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

Equivalent provision in existing legislation

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

Section 20(6) and Schedule 2, Paragraph 23

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

Sections 35 and 49

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

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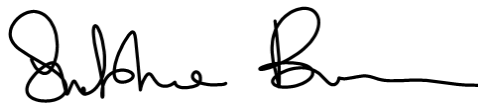
Section 46(3)

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

Section 41(2) & (6)

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

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



SIOBHIAN BROWN

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