



The Rt Hon Lord Carloway  
Lord President

Parliament House  
Edinburgh, EH1 1RQ

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*Dear Convenor,*

#### **REGULATION OF LEGAL SERVICES (SCOTLAND) BILL**

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

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

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

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

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

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

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

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

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

Based on the information which has been provided, the senior judiciary is not convinced that it is necessary for Ministers to have a power under section 8(5)(a) of the Bill to switch regulators into different categories. It would be inappropriate for the Faculty of Advocates to be able to be switched to become a category 1 regulator. The Faculty exercises regulatory functions on behalf of the Court of Session. Obtaining a power to change the status of the Faculty is to secure a power to regulate how the Court conducts its business. This is as constitutionally objectionable as the

Court taking power to regulate how Parliament conducts its business. Should any further justification be provided about the necessity of such a power, the suitability of a consent mechanism, as distinct from other mechanisms, can be considered.

The Bill provides that the regulation-making powers in sections 20(6), 49 and paragraph 23 of schedule 2 are subject to the approval of the Lord President. Given the significance of what the powers in sections 19, 20, 49 and schedule 2 do, as the senior judiciary have made clear in their response, the need for Ministers to secure the consent of the Lord President, before exercising delegated powers, does not alleviate our concerns.

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

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

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

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

*Tom Simpson*

