Published 8 February 2024
SP Paper 525
1st Report, 2024 (Session 6)

The Scottish Parliament
Pàrlamaid na h-Alba

Equalities, Human Rights and Civil Justice Committee

Stage 1 Report on the Regulation of Legal Services (Scotland) Bill

Published in Scotland by the Scottish Parliamentary Corporate Body.

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Equalities, Human Rights and Civil Justice Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

a. matters relating to equal opportunities, and upon the observance of equal opportunities within the Parliament; and
b. matters relating to human rights.
c. matters relating to civil justice within the responsibility of the Cabinet Secretary for Justice and Home Affairs.

2. In these Rules

(a) "equal opportunities" includes the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds or on grounds of disability, age, sexual orientation, language or social origin or of other personal attributes, including beliefs or opinions such as religious beliefs or political opinions; and

(b) "human rights" includes Convention rights (within the meaning of section 1 of the Human Rights Act 1998) and other human rights as for example contained in any international convention, treaty or other international instrument ratified by the United Kingdom.


ehrcj.committee@parliament.scot


0131 348 5224

Committee Membership

Convener
Kaukab Stewart
Scottish National Party

Deputy Convener
Maggie Chapman
Scottish Green Party

Karen Adam
Scottish National Party

Meghan Gallacher
Scottish Conservative and Unionist Party

Paul O'Kane
Scottish Labour

Fulton MacGregor
Scottish National Party

Annie Wells
Scottish Conservative and Unionist Party

Membership changes

1. On 28 June 2023, Meghan Gallacher and Annie Wells replaced Rachael Hamilton and Pam Gosal as Conservative members of the Equalities, Human Rights and Civil Justice Committee.

Introduction

2. The Regulation of Legal Services (Scotland) Bill ("the Bill") [1] was introduced in the Parliament by the Cabinet Secretary for Justice and Home Affairs, Angela Constance on 20 April 2023.

3. The Parliament designated the Equalities, Human Rights and Civil Justice Committee as the lead committee for Stage 1 consideration of the Bill.

4. Under the Parliament's Standing Orders Rule 9.6.3(a) it is for the lead Committee to report to the Parliament on the general principles of the Bill. In doing so, it must take account of views submitted to it by any other Committee. The lead Committee is also required to report on the Financial Memorandum [2] and Policy Memorandum [3] which accompany the Bill.

5. The Bill, accompanying documents and additional information provided by the Scottish Government can be accessed on its webpage [4] .

Background

6. Since December 2015, there have been several reports proposing changes to the regulation of legal services. In response to these calls, which came from the legal sector, professional bodies and consumer groups among others, the Scottish Government commissioned an independent review by Esther Roberton to look at reforming the regulation of legal services in Scotland.

7. The regulation of the legal profession has been a relatively controversial subject. Although there are a range of viewpoints, broadly speaking, two distinct strands of thought dominate:

   - Those who take the view that the current regulatory system overly favours solicitors and advocates and that this approach does not benefit consumers. This includes arguments that there should be an independent regulator and that there should be more room for innovation and new forms of business

   - Those who take the view that the current system provides high-quality legal services and that risks to consumers lie more in the market for unreserved legal services which are not subject to the same regulatory obligations as solicitors and advocates. This approach also stresses the importance of the independence of the legal profession and the judiciary from government

8. Additionally, there are arguments that elements of the existing system, for example the complaints process, do not work effectively, and that much of the legislation is outdated and in need of consolidation and renewal.

9. A detailed briefing [5] on the Bill by the Scottish Parliament Information Centre (SPICe) is available on our website. The briefing includes:

   - a summary providing background and context to discussions, reviews and consultations which led up to the introduction of the Bill

   - an overview of the current regulatory framework and legal service providers in Scotland and the main changes proposed by the Bill

   - a diagram setting out the current regulatory landscape; the landscape proposed in the Roberton report and the landscape as proposed by the Bill.

The Roberton Review and Scottish Government Consultation

10. The Chair's report, Fit for the Future - Report of the Independent Review of Legal Services Regulation in Scotland [6] was published in October 2018. It made 40 recommendations intended to reform and modernise the current regulatory framework. Its principal recommendation was that an independent body should be set up to regulate legal professionals, with professional bodies only retaining their role as representatives of the profession. The new system would be financed by a levy on practitioners.

11. In its response [7] published in June 2019, the Scottish Government indicated that while many of the recommendations were supported, views on the principal recommendation were much more polarised.

12. On 1 October 2021 the Scottish Government published a consultation [8] , which ran until 24 December 2021. Analysis [9] of the consultation was published on 8 July 2022, with the Scottish Government publishing its response [10] on 22 December 2022.

13. It concluded that, rather than follow the principal recommendation of the Roberton Review, it would build on the existing framework to the effect that "existing regulators should retain their regulatory functions, with a greater statutory requirement to incorporate independence, transparency and proportionate and risk-based accountability".

14. As such, this Bill does not take forward the principal recommendation made by the Roberton Review in the manner envisaged. However, the Bill does implement a number of other recommendations from the Review.

Structure of the Bill

15. According to the Scottish Government's policy memorandum, the overarching policy objective of the Bill is to provide a "modern, forward looking regulatory framework for Scotland that will best promote competition, innovation and the public and consumer interest in an efficient, effective legal sector." The Bill will also "implement a number of key recommendations from the 'Independent Review of Legal Services Regulation in Scotland' by Esther Roberton".

16. The Bill is divided into five parts.

Part 1 deals with the overarching regulatory framework. It has three Chapters which:

- set out what regulated legal services are to achieve and the standards that those should follow
- makes rules for all regulators of legal services. It divides regulators into two categories and places different requirements on each
- set out how an organisation can become a regulator and its members can gain permission to provide legal services

Part 2 sets out rules about how businesses that provide legal services should be regulated.

Part 3 covers complaints about legal services and how they are dealt with.

Part 4 makes a variety of other changes, including:

- Changing ownership limits for a type of legal business
- Making it simpler for charities and third sector organisations to provide legal services
- Creating new offences in connection with people who pretend to be able to provide legal services

Changes proposed by the Bill

17. The Bill amends and builds on the existing framework rather than setting up a new independent regulator. The main changes proposed are:

- The setting up of a framework whereby regulators can be assigned as either a category 1 or category 2 regulator
- New rules which allow professional bodies to apply to become a category 1 or category 2 regulator
- Rules aimed at increasing transparency
- The introduction of powers for the Scottish Ministers to review the regulatory performance of category 1 or 2 regulators
- The updating of the legislation on the regulatory objectives and professional principles for those providing legal services
- The regulation of legal businesses (“entity regulation”) in addition to individual solicitors
- Updating the rules on alternative business structures (ABSs)
- Making it an offence to use the title “lawyer" with intent to deceive in connection with legal services to the public for a fee, gain or reward

Consideration by the Equalities, Human Rights and Civil Justice Committee

Written evidence

18. The Committee undertook a call for written evidence [11] on the Bill between 31 May and 9 August 2023. It received 75 submissions. Written submissions which were accepted by the Committee as formal evidence are available online [12] .

19. A number of key themes arose in written responses. These included:

- Concerns expressed by Senators of the College of Justice [13] , Law Society of Scotland [14] , Faculty of Advocates [15] and the International Bar Association [16] among others, about the Bill's proposed powers for Scottish Ministers, which they consider would impact on the independence of the judiciary and legal profession and could lead to political abuse
- Arguments in support of the principal recommendation of the Roberton Review [6] , that an independent regulator should be created to regulate legal professionals. Those who supported this include Chris Kenny [17] (first Chief Executive of the Legal Services Board – oversight regulator of legal services in England and Wales), Professor Stephen Mayson [18] (who carried out the Independent Review of Legal Services in England and Wales [19]), Brian Inkster [20] (the CEO of the law firm Inksters who has published and spoken on legal regulation and legal innovation) and Naeema Sajid of Diversity+ [21] (a solicitor who runs a diversity and inclusion consultancy and co-founder of SEMLA (The Scottish Ethnic Minorities Lawyers Association)).
- The interests of consumers and the importance of consumer principles
- A general consensus that the current complaints system is overly complex and difficult for consumers to navigate

Oral evidence

20. The Committee held an informal briefing with the Scottish Government's Bill team in private on 16 May 2023. This was to enable members to understand the contents of the Scottish Government's Bill. It then began taking oral evidence on 3 October and concluded its evidence taking on 5 December 2023.

21. On 3 October 2023 [22] , it heard from witnesses representing consumer-facing bodies:

- Vicky Crichton, Secretariat, Scottish Legal Complaints Commission Consumer Panel

- Sharon Horwitz, Legal Director, Competition and Markets Authority
- Tracey Reilly, Head of Consumer Markets, Consumer Scotland, and
- Dr Marsha Scott, CEO, Scottish Women's Aid

22. On 7 November 2023 [23] , it heard from:

- Brian Inkster, CEO, Inksters Solicitors
- Chris Kenny, former Chief Executive of the Legal Services Board of England and Wales and currently CEO of the Medical and Dental Defence Union of Scotland
- Professor Stephen Mayson, University College London, and
- Naeema Yaqoob Sajid, Solicitor and Director of Diversity+

23. On 14 November 2023 [24] , it heard from organisations in relation to complaints procedures:

- Rosemary Agnew, Ombudsman, Scottish Public Services Ombudsman (SPSO)
- Colin Bell, Chair of the Scottish Solicitors' Discipline Tribunal (SSDT), and
- Neil Stevenson, Chief Executive, Scottish Legal Complaints Commission (SLCC)

24. On 21 November 2023 [25] , it heard from regulators of the legal profession:

- Bill Alexander, Association of Construction Attorneys
- Roddy Dunlop KC, Dean and Morag Ross KC, Faculty of Advocates
- Rachel Wood, Executive Director of Regulation and David Gordon, Lay Convener, Regulatory Committee, Law Society of Scotland, and
- Darren Murdoch, President and Andrew Stevenson, Secretary, Scottish Law Agents' Society (SLAS)

25. On 28 November 2023 [26] , the Committee took evidence from:

- The Right Honourable Lady Dorrian, Lord Justice Clerk, Senator of the College of Justice, and
- The Honourable Lord Ericht, Senator of the College of Justice

and then from-

- Esther Roberton.

26. Finally, on 5 December 2023 [27] , the Committee took evidence from the Minister for Victims and Community Safety, Siobhian Brown.

Consideration by other Committees

Consideration by the Delegated Powers and Law Reform Committee

27. The Delegated Powers and Law Reform (DPLR) Committee scrutinised the delegated powers in the Bill.

28. At its meeting on 24 October 2023 [28] , it took oral evidence from Esther Roberton, the Law Society of Scotland and the Faculty of Advocates.

29. On 7 November 2023 [29] , it took evidence from the Minister for Victims and Community Safety, where it discussed the implications of any proposed changes to delegated powers provisions at Stage 2.

30. The Minister wrote [30] to the DPLR Committee on 16 November 2023 setting out areas in which the Scottish Government was giving consideration to amendments.

31. The DPLR Committee wrote [31] to the Lord President seeking his views on “the appropriateness of the proposals to involve the Lord President’s Office through (a) the proposed transfer of regulation-making powers from Ministers to the Lord President, and (b) the introduction of a consent requirement, which could act as a “veto” over Ministers introducing new measures".

32. In his response of 17 November 2023 [32] , the Lord President stated that he was not in a position to address the first part of the DPLR Committee's question as discussions with the Scottish Government about this were at an early stage.

33. On the issue of the introduction of a consent requirement the Lord President stated:

> "Given the significance of what the powers in sections 19, 40, 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."

34. The Lord President further noted the senior judiciary has not yet been consulted about a consent mechanism being introduced into paragraph 6 of schedule 2, nor on any proposed changes to section 35.

35. Separately, the Law Society of Scotland wrote [33] to the DPLR Committee on 20 November 2023 in response to the Minister's letter of 16 November. The letter refers to recent meetings (8 and 16 November) and communications (9 November).

36. The Law Society notes that it has not yet had sight of any draft amendments but was "greatly encouraged" by the Minister's statement to the DPLR Committee on 7 November with regard to removing the role of Ministers from the Bill.

37. The Delegated Powers and Law Reform Committee published its report [34] on the delegated powers in the Bill on Thursday 23 November 2023.

38. In paragraph 19 of its report, the DPLR Committee stated it had "found it challenging to meaningfully report on a number of delegated powers in the Bill given that it is aware the powers are likely to change, but it does not have information on exactly how they might change, or have full access to stakeholder views on those changes".

39. It recommended in paragraphs 30 and 39 powers that should not be delegated.

40. Paragraphs 100, 112 and 151 recommend either a review of how delegated powers should operate or that additional safeguards be built in.

41. The report also identifies powers that the DPLR Committee is not content with as currently drafted. Paragraphs 53, 121 and 160 all state:

> "Based on the evidence received, the Committee cannot come to a view on whether the proposed additional safeguards would alleviate concerns. The Committee echoes the Lord President's view that “much more information will be needed about the detail of how the Government's proposals…are intended to operate"."

Consideration by the Finance and Public Administration Committee

42. The Finance and Public Administration Committee issued a call for evidence on 15 June 2023 and received 4 written submissions. The Finance and Public Administration Committee agreed to take no further action in relation to the Bill.

Parliamentary questions

43. Michelle Thomson asked question S6O-02726 [35] in the Chamber on 15 November 2023 on whether the Bill will "meet the original objectives of the Roberton review regarding consumer complaints".

44. The Minister responded stating that the Bill is "designed to deliver the objectives of the Roberton review to provide a modern regulatory framework…", adding:

> "The Bill embeds consumer principles into the regulatory framework and introduces a more flexible approach to complaints while expanding independent oversight of complaint handling."

45. In her supplementary question, Ms Thomson noted that the Roberton review "concluded that the optimum regulatory model must be independent of regulatory bodies" and others shared this position. She said "[T]here is a clear and fundamental conflict of interest in having consumer complaints processed by bodies that exist to protect the interests of the profession" and asked the Minister to look again at how consumer complaints are best dealt with.

46. The Minister said the Bill would require the Law Society of Scotland to exercise its regulatory functions "independently of its other functions" and that:

> "The Scottish Legal Complaints Commission will retain oversight of complaint handling and continue to have a role in monitoring trends in legal complaints. In addition, the commission will have a role in setting minimum standards as to how legal practitioners and legal regulators handle complaints, thereby providing independent oversight."

Key issues in the Committee's consideration of the Bill

Regulatory objectives and professional principles

47. Currently, regulatory objectives and professional principles are set out in sections 1 and 2 of the Legal Services (Scotland) Act 2010 ("2010 Act") [36] . The Roberton report recommended that the regulatory objectives and professional principles for those providing legal services should be set out in primary legislation as should the definition of legal services. The Bill follows this general approach.

48. According to the Scottish Government, the Bill proposes to introduce a modern set of regulatory objectives and professional principles while incorporating key aspects of the Better Regulation Principles[i] and the Consumer Principles[ii].

49. Section 2 of the Bill states that the objectives of regulating legal services ("regulatory objectives") include principles linked to the public interest such as the rule of law, access to justice and an independent legal profession as well as consumer focused objectives such as "quality, innovation and competition". These are broadly the same as the regulatory objectives set out in Section 1 of the 2010 Act. The Bill also includes new objectives such as the promotion of effective communication between regulators, legal service providers and bodies that represent the interest of consumers.

50. An additional change is a requirement for regulators to follow consumer principles and the “Better Regulation Principles” derived from the Regulatory Reform (Scotland) Act 2014. The Bill also allows the Scottish Ministers to modify the regulatory objectives and the professional principles by regulation following consultation with various parties including the Lord President.

51. Consumer groups broadly welcomed these changes and hope they could begin to address some of the difficulties consumers faced in accessing and affording legal services.

52. Tracey Reilly of Consumer Scotland told us having consumer principles in the Bill was helpful as it gave them something to measure against. She said “The consumer principles deal with issues such as access, which would also include affordability, and choice, so that is in the Bill”. She stressed the importance of monitoring progress, stating “There is no evidence base to show whether those principles are being met currently. It is important that there is ongoing research to see what is happening and whether the objectives of the reform are being met.” [22]

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i The Better Regulation principles are set out in the Regulatory Reform (Scotland) Act 2014 and aim to ensure that regulation is effective, proportionate, transparent and based on evidence.

ii The Policy Memorandum defines these as "a set of tests used … by consumer organisations across the world to assess whether goods or services are being provided in the consumer interest" ".

53. Naeema Yaqoob Sajid of Diversity+ also welcomed the inclusion of consumer principles in the Bill but did not agree with the terms of the mechanisms through which they will be regulated and investigated. She said “The difficulty comes from how the principles are applied in practice and whether we are adding further complications through the scheme that we are looking to introduce. I do not think that the system has been simplified.” [23]

54. This was a view shared by Esther Roberton who told us that the Bill does not achieve one of the things she was trying to achieve which was to simplify the process. She stated that “If anything, it makes it much more complex.” [26]

Overarching regulatory framework

The case for independent regulation versus the existing framework

55. As noted above, the Bill does not set up an independent regulator and instead builds on the existing framework arguing that the primary recommendation of the Roberton report “largely polarised the views of those in the legal and consumer landscape”.

56. Currently, there are two main regulators - the Law Society of Scotland for solicitors and the Faculty of Advocates for members of the Bar.

57. In addition, the Association of Construction Attorneys (ACA) is a professional body which regulates commercial attorneys. There are also a very small number of commercial attorneys (according to the Policy Memorandum around 5 in total).

58. The Law Society's role is laid out in legislation and its regulatory function is carried out by the Law Society's Regulatory Committee. It also operates the Client Protection Fund to which solicitors contribute annually.

59. The Faculty of Advocates is not a statutory body but has been delegated responsibility for the regulation of Advocates by the Court of Session under the terms of the Legal Services (Scotland) Act 2010.

60. The Committee heard conflicting views on the setting up of an independent regulator.

61. Broadly speaking, existing regulators supported the current framework where professional bodies are also regulators. The legal profession was clear that the system of independent regulation already exists in Scotland in the role of the Lord President.

62. The Rt Hon Lady Dorrian (Lord Justice Clerk) of the Senators of the College of Justice told us “The fundamental problems with the Bill as with the Roberton recommendations before it, are the mistaken premise that the legal profession regulates itself, when there is an independent regulator in the Lord President; and a failure to recognise the importance of the independence of the profession as a fundamental aspect of the rule of law.” [26]

63. Lady Dorrian set out the functions of the Lord President as head of the Court of Session in having overall responsibility for the regulation of the profession which includes responsibility for the criteria for admission or removal from office of an advocate and for regulating professional practice, conduct and discipline. She explained that the Faculty of Advocates exercises functions that include handling disciplinary matters and complaints but that is “under a delegated power from the court where the Lord President retains overall responsibility."

64. Similarly, she explained, the Law Society of Scotland can only make rules regarding training, education and rights of audience for professional practice, conduct, discipline, accounting or professional indemnity if the Lord President approves. The

Scottish Legal Complaints Commission must also consult the Lord President on various issues including making or amending its rules and Ministers must consult the Lord President before appointing SLCC members. Accordingly, she said the Lord President is at the top on every aspect of regulation.

65. The Rt Hon Lord Ericht explained that the Roberton model proposed to transform this system removing the Lord President as the ultimate regulator and replacing him with the Scottish Parliament. He said "In terms of the separation of powers, that is a major change. Control of the profession is moved from the judiciary to the Scottish Parliament." [26]

66. There was a sense that a misunderstanding in public perception contributed to concerns. Lady Dorrian said, "I think that there is an element that people do not quite understand, which is that we have a system of independent regulation. Undoubtedly, it is a challenge to get that over to people and explain fully in a way that people fully understand." [26]

67. Roddy Dunlop, Dean of the Faculty of Advocates said a single regulator would serve only to destroy the independence of the legal profession and impinge on the independence of the judiciary. He told us that:

> "The Faculty provides cradle-to-grave regulation of the public office of advocate. By delegation from the Court of Session, the Faculty is responsible for deciding entrance requirements, training, examination continuing professional development and disciplinary matters."

68. He told us it would require a "Herculean effort" to set up a new regulator without cost to the public purse and that the Faculty had undertaken that role since 1543 "without any concerns as to efficacy or independence" as a result of the safeguards in place. He added "I find it difficult to see how the specialist knowledge expertise and resources of the Faculty, which have been there for centuries, could be replicated by a new regulator." [25]

69. David Gordon of the Law Society agreed. He said "We do not believe that a conflict of interests exists in having a professional body approach to regulation of solicitors specifically. The existing model, the dual role of the professional body with robust regulation on one hand, and representative functions on the other exercised independently, is common across professions." [25]

70. Rachel Wood of the Law Society further clarified the position that regulatory decisions are made entirely independently of the representative side of the house. She told us they are made by lay members and solicitors with more serious ones sent to the independent Scottish Solicitors Discipline Tribunal. She also referred to polling carried out by the Law Society which indicated public trust and confidence in solicitors was very high.

71. In contrast, consumer bodies, including the Competition and Markets Authority (CMA) and Consumer Scotland, as well as Scottish Women's Aid (SWA), the Association of Construction Attorneys and some individual solicitors favoured the proposal in the Roberton Review to set up a new independent regulator citing the potential to reduce conflicts of interest and potential cost saving.

72. Vicky Crichton of the SLCC consumer panel told us that a regulator independent

from government and from the profession it regulates "would help to protect consumer interests because it would help to ensure that that is the core part of how the regulator discharges its duties." [22]

73. Sharon Horwitz of the Competition and Markets Authority (CMA) agreed. She considered independent regulation was the best way to protect consumer interests including by "promoting competition among providers" as this would lead to "improved choice and innovation and support wider public interest issues" [22] . She told us:

> "There is a fundamental tension between the aims of the role of the regulator and those of a professional body. A representative body principally seeks to promote the profession's interests, while a regulator looks to protect the interests of the consumer and the wider public." [22]

74. She agreed there was the issue of public trust and cited SLCC research showing consumers do not have trust in the current model. Dr Marsha Scott of Scottish Women's Aid (SWA) said there had been an "opportunity to pivot the system away from maintaining the imbalances of power and the privilege that have been inimical to human rights for women and children and create a regulatory body based on the principles that is committed to the outcomes of improving human rights and access to justice." [22]

75. Several witnesses also referenced success in other jurisdictions and commented that an independent regulator in England and Wales had done nothing to diminish the standing of lawyers or compromise the constitutional principle of the rule of law. It had also solved the conflict-of-interest problem.

76. Rachel Wood of the Law Society highlighted significant differences between what happens in England and Wales, the model that was proposed by Esther Roberton and the proposed model set out in the Bill. Roddy Dunlop, Dean of the Faculty of Advocates, added that in England in relation to the Bar Standards Board, there are multiple regulators. He said "It would be quite wrong to think that the Roberton model would simply ape what is happening in England, It would not." [25]

77. The Minister for Victims and Community Safety, Siobhian Brown told the Committee that, in her view, the Bill struck the right balance for stakeholders and for consumers. She explained the reasons the Scottish Government did not adopt the principal recommendation of the Roberton review. She said "It was simply due to both sides, the legal profession and the consumers having polarised views on the recommendation for an independent regulator that the decision was made not to go down that track" [27] . She did not accept that the Bill was making both sides unhappy and said it "tried to find a compromise."

78. Esther Roberton did not accept this. In her view, "there is no compromise. Either you believe in independent regulation as I do, or you do not. There is no halfway house." [26]

79. However, she suggested a possible route towards independence could involve a transitory body which become the overarching regulator in the longer term as it drew functions from the two professional bodies with overarching responsibility remaining with the Lord President. She said:

> "It is perfectly possible to give the Lord President a responsibility that makes him the ultimate regulator but in a very hands-off way that keeps him free of potential conflict and of politicisation. Nowhere is it very clearly codified what the Lord President's role is. One of the opportunities of the Bill would be to make that much more explicit and have it agreed and in the public domain." [26]

80. The Committee notes the conflicting positions of the legal profession and consumer groups and others to the setting up of an independent regulator and that this echoes the findings of the Scottish Government consultation. The Committee notes the Bill as proposed, which builds on the existing framework, appears to satisfy neither group.

81. However, it accepts that some form of reform of the regulatory framework is long overdue having been discussed for over a decade. It recognises the urgency for reform, particularly in relation to the complaints process and the alternative business structure model from across the debate. It notes that a number of the Bill's proposals are broadly welcomed. The Committee's views on the nature of the reforms and the regulatory model are set out later in this report.

Category 1 and Category 2 regulators

82. The Bill sets up a framework whereby regulators are assigned as Category 1 (consumer facing) or Category 2 regulator (non-consumer facing/ specialised). The Law Society are Category 1. The Faculty of Advocates and the Association of Construction Attorneys are Category 2.

83. New rules allow professional bodies to apply to become a Category 1 or Category 2 regulator and for more transparency as regulators will have to report annually on performance.

84. The Bill sets out the requirements with which regulators have to comply. For Category 1, who also represent the profession, this includes setting up an independent regulatory committee made up of legal and lay members. They must also set up a fund for making grants to compensate persons who suffer loss by reason of dishonesty, and issue annual reports on the exercise of their regulatory functions with the Scottish Ministers must lay before the Scottish Parliament.

85. The Bill does not require Category 2 regulators to delegate their regulatory functions to a regulatory committee. However, they do have to comply with specific requirements in section 15 of the Bill, for example, to exercise regulatory functions independently of other functions. They are also required to produce an annual report on the exercise of their regulatory functions (section 16).

86. The Committee heard a variety of views on these proposals.

87. The Law Society said a persuasive case for creating different categories had not been made. Rachel Wood told us "I understand what it [the Scottish Government]

has said which is that it is due to numbers. We regulate more people than the ACA or the Faculty. It has also said that it is because solicitors have direct face-to-face contact with members of the public who are seeking to use legal services. If it is simply because it is a numbers game, we do not think that that is a good justification." [25]

88. However, the Faculty of Advocates were broadly content with its Category 2 status as "a proportionate and risk-based approach to regulation" and did not accept the decision had been based on numbers. Roddy Dunlop said "What is more important is the limitations on what counsel can do. One really crucial example is that we do not handle client money, so a lot of the requirements that would be imposed on Category 1 regulators simply would not be apposite for the Faculty." [25]

89. Bill Alexander of the Association of Construction Attorneys said "The decision about what is a Category 1 or Category 2 regulator seems to me to be a numbers game. If we were asked to become a Category 1 regulator, we would struggle to do that because there are so few of us." [25]

90. The Senators of the College of Justice were content with the proposed division into two categories but indicated it was essential that requirements with which Category 1 and Category 2 regulators would have to comply, are set out in legislation, and by the Lord President rather than Scottish Ministers.

91. CMA and consumer groups highlighted that two categories with different regimes could add complexity rather than reduce it, and this would not benefit consumers.

92. In written evidence, SWA and others wished to see the Faculty included within Category 1 and subject to the same level of scrutiny.

93. A key change in the Bill is that the work of regulatory committees of Category 1 regulators will become subject to freedom of information requests under the Freedom of Information (Scotland) Act 2002 when these committees are exercising administrative regulatory authority. Several witnesses raised concerns in relation to FOI compliance including the Scottish Law Agents' Society and the Law Society of Scotland.

94. Rachel Wood described a requirement to operate FOI as "cumbersome" and "disproportionate" and highlighted that should the Law Society require to be subject to FOI they would be the only regulator in the UK required to comply.

95. She explained that the Legal Profession and Legal Aid (Scotland) Act made it a criminal offence for the Law Society to discuss any conduct complaint outside of the society. She said "There needs to be a balance between that and what complying with FOI could deliver for people because there would be very little that we could say under that that we would not already be able to say through the increased transparency, publishing powers and reporting obligations that we will have under the Bill." [25]

96. According to the Policy Memorandum, compliance to FOI requirements stems from the "Freedom of Information International Review: Scope of Bodies Included [37] " which suggested that bodies who exercise administrative authority could be an area where the law could be extended to be subject to FOI requirement. Responses to

the Scottish Government's "Consultation on Freedom of Information extension of coverage" supported extending the coverage of FOI to the Law Society. According to the Policy Memorandum, other professional regulators subject to FOI are the General Teaching Council for Scotland, the General Medical Council and the Scottish Social Services Council.

97. The Minister for Victims and Community Safety, Siobhian Brown explained the Scottish Government's reasoning behind the introduction of Category 1 and Category 2 regulators. She said:

> "The Law Society has 12,000 members one third of whom work in house while the other two thirds predominantly serve the public and handle client money. On the other hand, there are 450 advocates in Scotland and advocates are members of an independent referral bar. That means that, as a general rule, advocates do not provide their services directly to the public but are available to be instructed by solicitors and others. Similarly, construction attorneys operate in a specialist area of the law and there are 10 practising members of the Association of Construction Attorneys." [27]

98. It was therefore a "proportionate" decision to place greater regulatory requirements on the Law Society as it has more members.

99. The Committee notes the concerns expressed by consumer groups that the creation of two categories of regulator with different regimes may add rather than reduce complexity and that is not of benefit to consumers. It acknowledges that these concerns have not been adequately addressed and asks the Scottish Government how it intends to do so.

100. The Committee agrees that it is essential that the requirements with which Category 1 and Category 2 regulators have to comply should be set out in legislation, and by the Lord President rather than Scottish Ministers. The Committee welcomes the additional transparency that annual reporting on performance will bring.

101. The Committee heard concerns expressed by the Law Society that, as a Category 1 regulator, it will now be subject to FOI compliance under the Freedom of Information (Scotland) Act 2002. It is concerned that this may place a disproportionate burden on it which, due to confidentiality, may fail to provide any further transparency than exists under its current obligations. The Committee has noted these concerns but welcomes the extension of compliance and the transparency and accountability it will bring. However, it asks the Scottish Government to engage with the Law Society to discuss further and ensure that its decision to subject it to FOI compliance strikes the right balance.

Regulation of legal businesses entity regulation

102. The Roberton Review and the Law Society recommended the introduction of rules to regulate legal businesses in addition to individual solicitors. Under new rules in the Bill, legal businesses will be authorised by the relevant Category 1 regulator if they are a legal business who provide legal services to the public and operate for profit.

103. There was broad support in the evidence taken for entity regulation including from the SLCC, Chris Kenny and the Association of Construction Attorneys. Brian Inkster said it would only be beneficial if there is an independent regulator.

104. The Law Society welcomed entity regulation which would "allow us to wrap our arms around the whole business" which was "important for consumer protection because decisions that are made in the delivery of services are often made by multiple individuals some of whom will not even be solicitors."

105. However, Rachel Wood told us there were issues with the Bill's "special rule" exemptions which build on existing powers the Law Society has to issue waiver of practice rules. "That is something new and is not workable for us at all". She said:

> "We do not currently have powers to waive any rules in the ABS scheme under the 2010 Act. It is important we have such powers because that is where innovation is more likely to come from. We had asked Government for those powers, instead it has brought in the complex waiver provisions in the Bill. In addition, there are requirements on publishing waiver decisions which we would almost never be able to do because of commercial and client confidentiality." [25]

106. She said that the Law Society was "working constructively" with the Scottish Government to work through this issue.

107. Colin Bell of the Scottish Solicitors Disciplinary Tribunal was broadly in favour of entity regulation but raised concerns where a complaint had both conduct and service elements. He said "Our understanding of the Bill is that an entity complaint would have a different destination from a conduct complaint. The conduct complaint could land at the SSDT whereas the entity complaint would be determined by the regulation, and I am not aware that there would be any right of appeal." [24]

108. The CMA noted the potential benefits from the introduction of entity regulation. However, it considered that the current wording goes too far and could result in disproportionate regulatory costs which could restrict solicitors from working in unlicensed providers. As proposed, a legal business may require to be regulated even if only one solicitor is involved.

109. Sharon Horwitz of the CMA said it is important to strike the right balance as legal services regulation imposes regulatory costs on providers and regulators.

> "As a general rule, individual-based regulation is often necessary where high risks are identified that can be addressed only ensuring that the individual is competent to provide the service and should be personally responsible. If there are not such high risks, entity-based regulation where entities can set the necessary obligations on employees can be more proportionate. We

welcome the introduction of entity regulation but are concerned that the judgement about whether it should be entity regulation or individual regulation should be based on an assessment of market failure and where it is appropriate to introduce that." [22]

110. The Committee heard broad support for, and agree with, entity regulation and the potential benefits this will bring for both regulators and consumers. However, it notes the concerns expressed by the Law Society in relation to the waiver provisions provided in the Bill in relation to the ABS scheme. It notes that it is the intention of the Law Society to offer potential solutions in the form of amendments at stage 2 and would welcome an update from the Scottish Government on its ongoing engagement to resolve the issue.

111. The Committee notes the concerns raised by the CMA about the potential for disproportionate regulatory costs which could restrict solicitors working in unlicensed providers. It asks that the Scottish Government gives this issue further consideration to ensure that any unintended consequences are avoided.

Complaints

112. There was broad agreement from witnesses that the current system for legal services complaints is overly complex, slow and requires reform.

113. The Bill updates and modernises the way in which complaints are handled. As part of this, the Scottish Legal Complaints Commission (SLCC) gains some new functions and is renamed the Scottish Legal Services Commission. The Commission's powers are extended so it can deal with service complaints relating to individuals and bodies who are not regulated by a regulator but who provide legal services to the public for fee, gain or reward.

114. Under the proposals, the Commission will remain the single gateway for all complaints against regulated legal professionals, i.e. services complaints, conduct complaints and regulatory complaints.

115. The Minister's officials clarified that the statutory process for the SLCC will be more streamlined and proportionate. They said "There will be a swifter consideration of their complaint which will benefit the consumer and the legal professional that the complaint has been raised against." [27]

Scottish Legal Complaints Commission remains as the single gateway

116. The Committee heard broad support for proposals in the Bill. Rosemary Agnew from SPSO said the Bill will simplify and improve aspects of the complaints system including enhanced standard setting powers for the SLCC, enabling greater flexibility at the earlier stages of a complaint and removing the Court of Session as the route for appeals but that there was the opportunity to take a more user-focused and simpler approach.

117. Neil Stevenson of the SLCC agreed. He welcomed provisions as "tremendous steps forward that will reduce complexity and give extra discretion to deal with particular situations which should benefit consumers and practitioners". However, he considered "there is still a lot of complexity which is the trade-off for not moving towards a single complaints process." [24] This split between bodies will prevent the complaints process from being "seamless".

118. He explained that when a consumer has a complaint, the SLCC can deal with the service element while another heading within the same complaint might go to a Law Society committee who will consider whether there has been unsatisfactory professional practice. A third element of the complaint might be prosecuted by the Law Society at the Scottish Solicitors' Disciplinary Tribunal. Having multiple bodies involved meant "It could be challenging communicating that complexity to a member of the public who has phoned with an inquiry in a distressed state." [24]

119. It was vital therefore for both consumers and practitioners that all bodies involved were as efficient as possible but that with "multiple agencies involved there could be problems with hand offs, handovers, computer systems not speaking to each other and duplication with separate case management systems.". This was inevitable he

concluded “even when well managed”.

120. The Bill does provide an exception which allows regulators to investigate conduct or regulatory complaints which arise from their regulatory monitoring without first sending them to the Commission. Currently, they have to raise a complaint to the SLCC.

121. Where this is the case there will be a duty to inform the Commission of the nature of the investigation so that it may take a view on any consumer detriment which would require further consideration as a services complaint. The Minister’s officials told us that the Bill will therefore “remove that ping-pong situation between those bodies. The issue will go straight to the Law Society, and it can move more swiftly to investigate.” [27]

Hybrid complaints

122. As in the current system, conduct complaints will remain the ultimate responsibility of the regulator concerned with the Commission retaining responsibility for service complaints. The Bill introduces rules aimed at the dealing with the problem that the SLCC is not currently permitted to deal with “hybrid complaints”. These rules allow the Commission to split up complaints on the same factual issue into conduct elements which would be dealt with by the regulator, and service elements which would be dealt with by the Commission.

123. The Faculty of Advocates was not convinced that this would improve efficiency. Roddy Dunlop told us:

> “The Faculty does not have a difficulty with the statutory reintroduction of hybrid complaints. The main point that arises from that system is that it potentially involves the same set of facts leading to parallel proceedings one before the SLCC for services and one before the disciplinary body for conduct. That is not necessarily a good thing and we have suggested that it can easily be resolved by the Faculty dealing with all complaints, whether on services or conduct, as was the case before services complaints were arrogated to the SLCC.” [25]

Scottish Legal Complaints Commission to be renamed

124. The proposal to rename the SLCC as the Scottish Legal Services Commission came under criticism. The Law Society, Faculty of Advocates, Scottish Law Agents’ Society and consumer groups expressed concern that this may create confusion amongst the public particularly as the word “complaints” will be omitted.

Extension of the complaints system to investigate

unregulated legal service providers

125. Currently, complaints can only be lodged about regulated legal professionals. One of the key changes in the Bill is to extend the Commission's power to investigate complaints to cover unregulated legal service providers where legal services are provided to the public for fee, gain or reward. The new system would apply to services complaints as it is not possible to raise a conduct complaint against an unregulated individual or body.

126. Neil Stevenson welcomed the provision and explained that this was not a power that the SLCC had requested but that it had arisen from concerns expressed by the Law Society about an unregulated market. He said “Our understanding of those powers is that they give a backstop so that if there were a serious public interest complaint about a currently unregulated legal services provider, we would be allowed to investigate that and provide a remedy. It is a very proportionate way of starting to do work in that market.” [24]

127. Rachel Wood of the Law Society agreed commenting “regulation of the title “lawyer” is a start. It will be interesting to see how it pans out in practice. It might be difficult to identify such providers. There will be a voluntary register of those who agree to be regulated by the SLCC, but we are not sure that people will sign up for that. It will be interesting to see what happens.” [25]

128. The Bill also allows the Commission to set up a voluntary register of unregulated legal services providers. The Policy Memorandum states that this would “offer a kitemark (or recognition that those legal service providers were part of a consumer redress scheme) to those providers who wished to join, allowing consumers to make an informed choice when selecting legal services."

129. Both the CMA and Professor Mayson argued for a mandatory register of unregulated legal service providers rather than a voluntary one. This would allow regulators to deal with providers who pose a risk to consumers and who choose not to register voluntarily.

Commission permitted to initiate a complaint in its own name

130. The Bill makes provision for the Commission to initiate a complaint in its own name in circumstances where, according to the Policy Memorandum “it becomes aware of a public interest issue”.

131. Neil Stevenson of the SLCC welcomed this, explaining that the current system did not allow them “to take steps to protect the public” when they were already aware of a problem, for example where multiple complaints are made against one firm. He told us the Bill would also cut out several steps in the current process for allowing a public interest complaint to go forward.

132. Rosemary Agnew of SPSO agreed. She told us “There is often a lack of confidence amongst individuals to take a complaint” so this power will enable an organisation to use its intelligence gathering and stakeholder engagement to focus on an issue to

gain maximum coverage. She went on "There is huge merit in being able to do such investigations as a way of addressing power imbalances and using resources really effectively." [24]

133. Others who supported this new power included the Faculty of Advocates and the Law Society who noted "If repeated complaints are coming through against a solicitor, we may not be aware of that, so it is important the SLCC can say there is a bigger issue" [25] . Roddy Dunlop highlighted that "there would need to be a proper demarcation in the SLCC so that people who were involved in initiating a complaint were not involved in any way in the adjudication of it." [25]

Rules on monitoring and standard setting

134. The Bill amends the rules in the Legal Profession and Legal Aid (Scotland) Act 2007 (2007 Act) [38] on the monitoring and setting of minimum standards in relation to complaints. The SLCC is given new powers to set minimum standards to which professional bodies have to comply. Currently, the SLCC can only make recommendations.

135. The Commission can also issue guidance to professional organisations about how they are to investigate and determine conduct and regulatory complaints.

136. The Law Society argued that this new power is inappropriate due to the lack of safeguards. Rachel Wood said "One of our main concerns is that two sections in the Bill, the combination of sections 69 and 71, would allow the Commission to bring in practice rules for the profession by the back door … There are no checks and balances on that; there is no requirement for approval by the Lord President." [25]

137. Additionally, she said the SLCC has direction powers and its power over the Law Society will increase. Currently, its direction powers are limited. She told us:

> "It can make recommendations and it is a very collaborative process. The SLCC investigates and writes a report and at the end of that the SLCC makes a recommendation which we will almost always follow. The Bill will change that to a direction. It will eliminate recommendations and say that there are directions. Our concern is that checks and balances are missing. With the requirement to direct rather than recommend there would be no requirement for the Commission to consult on its recommendation or to give reasons for them, which is key as those requirements exist in current legislation. That omission seems to us to fly in the face of fair process." [25]

138. She continued "At stage 2 we will be recommending that the Commission retains the power to recommend with reasons and that we would have a statutory obligation to respond to it and provide reasons if we are not going to follow its recommendations. We will recommend that the SLCC has a mechanism to take any matters further, possibly to the Lord President if it feels that we are wrong." [25]

139. The Faculty agreed that the powers go "too far" and would introduce "control over conduct standards which is inconsistent with Faculty's role as regulator and

potentially with the ultimate role of the Court".

140. In contrast, Neil Stevenson of the SLCC supported its introduction. He explained that the SLCC currently has certain oversight powers. He said:

> "At the moment, we have an oversight power in relation to conduct complaints that is expressed in two forms. First, individuals, once their conduct complaint has been investigated, can ask us to review the case. We cannot interfere with a decision of the Law Society, but we can make findings on whether it has followed its own process and awarded compensation. Secondly, we have a power of audit on conduct complaints. The idea was that, even in this multiorganisation system, one organisation would have the chance to see the whole process from start to finish from a consumer perspective and publish data on how it performed. That was the intention."

141. He agreed that the SLCC and Law Society collaborated well in respect of recommendations. However, he explained there were occasions where there was pushback on recommendations or responses took longer than necessary, stating "Even if we work with the Law Society and engage it to reach consensus, we feel it appropriate to have that backstop power so that we have the ability to properly enforce that. It links back to the fact that what the consumer bodies were arguing for is not coming but the Bill provides that extra little step towards safeguards on professional regulation." [24]

142. The Minister and Scottish Government officials told us that the Bill introduces opportunities for regulators to be involved in the development of minimum standards where the standards relate to them. The Bill also introduces provisions for disputes to go to arbitration between the regulator and the Commission. Ultimately, the court can look at the question of the minimum standards and how to resolve a dispute. The Minister told us there is a "firm level of accountability to ensure that the standards can be examined and there is a role for the regulator in developing those standards." [27]

143. The Committee heard from stakeholders and consumer groups that the current complaints system is overly complex, slow and in need of reform. The Committee recognises and welcomes the Scottish Government's intentions to address this.

144. However, while there is support for simplifying the process, the Committee agrees that a lot of complexity will remain, largely due to the retention of a multi-agency approach rather than the creation of a single complaints process. This will invariably make communication and navigation of the system more difficult for everyone involved. The Committee is concerned that the Scottish Government may have missed an opportunity to take a simpler, more user-friendly approach in creating a single streamlined complaints process which would have benefited consumers and regulators alike. The Committee also notes concerns expressed by the Faculty of Advocates in relation to hybrid complaints and its assertion that the set of facts may be duplicated before the Commission and the Faculty. The Committee strongly recommends that the Scottish Government looks again at how the process can be further simplified, taking on board the compelling

evidence presented to it by all stakeholders.

145. The Committee notes concerns expressed by senior judiciary, the Law Society and the Faculty that renaming the Scottish Legal Complaints Commission as the Scottish Legal Services Commission may cause confusion among the public as to its function due to the removal of the word “complaint”. The reasons for the name change remain unclear. The Committee recommends that the Scottish Government seriously reconsiders whether a new name is necessary.

146. The Committee notes the broad support to extend the Commission’s powers to investigate unregulated legal services. It welcomes this as a proportionate response to work in a new area. It also supports the creation of a voluntary register of service providers. However, it notes concerns expressed that providers may choose not to register voluntarily and that this may pose a risk to consumers. It asks the Scottish Government to consider strengthening this provision and creating a mandatory register of unregulated legal services rather than a voluntary one in order to provide adequate consumer protection.

147. The Committee heard overwhelming support for the introduction of rules to enable the Commission to raise a complaint in its own name where a public interest issue arises and welcomes this positive addition to the Bill. However, the Committee agrees with the Faculty who highlighted that there must be necessary demarcation in the Commission between those initiating a complaint and those adjudicating it.

148. The Committee notes the conflicting views on one hand from the Law Society and Faculty of Advocates that new powers for the Commission on monitoring and standard setting “go too far” and that there are insufficient checks and balances in place and on the other, those from the Commission who welcome this additional “backstop” power. The Committee notes it is the intention of the Law Society to offer potential solutions in the form of amendments at stage 2 and it would welcome an update from the Scottish Government on its ongoing engagement to resolve the issue. One suggestion may be to consider imposing a duty on the SLCC to consult regulators ahead of issuing guidance.

Appeals

149. The Bill changes the route for appeals for decisions in relation to services complaints from the Court of Session to an internal review committee of the renamed SLCC. The Commission's decision will be final but remain open to judicial review. In contrast, for complaints involving professional conduct, the relevant professional discipline tribunal will retain oversight and existing routes of appeal remain.

150. Questions were raised as to whether this internal review process will allow the SLCC to "mark its own homework". The Committee heard conflicting views.

151. Rosemary Agnew of the Scottish Public Services Ombudsman (SPSO) welcomed the change as a benefit to consumers "unpicking of the right of appeal to the Court of Session from the ability to ask for review and ultimately judicial review". She said this would align with other ombudsman regulatory-type bodies and give increased flexibility with a focus on trying to achieve resolution.

152. Neil Stevenson agreed stating "It is an absolute anomaly in the ombudsman world that there is a direct appeal to the inner house of the Court of Session. We are not aware of any other ombudsman in the UK that has that." His view is the current appeal route created an "unacceptable level of risk for a member of public" as expenses could be awarded against the losing party. It also meant action taken by a complainer against the SLCC over a few hundred pounds could cost the SLCC thousands of pounds in fees. Similarly, where the SLCC won the case and expenses were awarded against the complainer, it was "duty bound" to make reasonable efforts to recover those.

153. This route, he said, had added more than £3 million to their costs over 15 years. "When the legal profession asks why our process is more expensive than other ombudsmen, the answer is that we are using the most expensive dispute resolution forum for the final stage of the process." [24]

154. Rosemary Agnew emphasised that this was not just about cost but also about the disproportionate balance of power and that "people have to appeal by a legal route when the issue is all about the legal profession". She went on "In practice, the internal right of review is much more customer and consumer focused because it can involve looking at things in a different way. It does not have to look through a legal lens." [24]

155. She rejected concerns expressed about the SLCC "marking its own homework" commenting "Can you ever be completely at the end point? Occasionally you will hear someone say "There should be an ombudsman overseeing ombudsmen". But you have to trust the body that we have put in place to be the decision maker." [24] . One suggestion for promoting confidence in the system she told us would be to put a review process in place.

156. The Scottish Solicitors' Discipline Tribunal said the current appeal system is neither streamlined nor proportionate to the issues involved. However, it questioned whether the new route is the right approach. The Scottish Law Agents Society considered an appeal to an internal review committee was a regressive measure

and proposed that appeals could be made to the sheriff court instead.

157. Darren Murdoch told us that "Appealing to the inner house of the Court of Session is cost prohibitive for solicitors. My concern is that if a solicitor gets a finding against them as a result of which they have to pay £4,000 they will have to spend multiple times that to appear in the inner house. I believe if we hold the sheriff court as being competent for other business, it should be competent to hear an appeal." [25]

158. Other witnesses, including the senior judiciary and the Faculty of Advocates, opposed the removal of the direct right of appeal to the Court of Session. Roddy Dunlop told us "Some people have said that that is a good thing, but I beg leave to differ. On the suggestion that the right of appeal as it currently stands be replaced with a right of review by the SLCC itself, it is highly questionable whether that would be an adequate remedy. In any event, the result would be challengeable by way of judicial review."

159. He continued by adding that "If the SLCC makes a wrong decision there is an ability to go direct to the inner house for a final decision with no onward appeal. If one had to go to review and then to judicial review in the outer house and then to an appeal in the inner house it would add considerably to the delays and expense involved. I query whether that is right. It seems to me there needs to be some sort of automatic right to go to court rather than going via judicial review." [25]

160. The Senators were of the view that any appeal should be to the court that has regulatory responsibility. The Rt Hon Lady Dorrian said:

> "There is the constitutional point which is that the right of appeal to the Court of Session is part of the regulation of the profession, it is part of the exercise of regulatory functions by the court. It is important that there should be a right of appeal to the inner house of the Court of Session and not to a lower court that does not play a part in that regulatory function. The Court of Session does that. A right of appeal to a lower court, or worse still, the abolition of a right of appeal would diminish the importance of the issues to the consumer, which are considerable. That would not entirely prevent cases from being brought to the Court of Session because judicial review would still be available, but that is not a complete jurisdiction." [26]

161. The Bill, she concluded, would change a one-step process into a potential four- step process (internal review, judicial review to the outer house of the Court of Session, appeal to the inner house of the Court of Session, appeal to the UK Supreme Court). She was of the view that the costs involved in that would be greater. She said "I find it impossible to accept the suggestion that it would be cheaper to abolish the direct right of appeal to the inner house." [26]

162. In response to concerns about the costs involved both to the SLCC and the profession, the Right Hon Lord Ericht said "You will have seen from the statistics that the SLCC lost every single case that went to hearing. The reason why it has incurred a lot of legal fees is because when it lost it had to pay its own legal fees and those of the other side." [26]

163. Following the evidence session, the SLCC wrote [39] to the Committee on 1 December with clarification and to provide further context. The letter stated "We

have some concerns the data presented may not give the Committee a full picture of the workload and cost of appeals for the SLCC, and the impact on parties."

164. The Committee heard conflicting views on the removal of the direct route of appeal for decisions on service complaints by the SLCC to the Court of Session and whether an internal review committee is the right approach. It notes concerns expressed by the Law Society, Faculty of Advocates and others that the right to appeal to court should be an automatic right and it is appropriate that any appeal should remain with the court that has regulatory responsibility.

165. However, it recognises the view of the SLCC that the current route is an "anomaly" for an ombudsman which can be disproportionate given the issues involved. On balance, the Committee agrees that the internal review committee procedure should provide a more proportionate, accessible, swifter and cost-effective approach and resolution which will benefit both consumers and those against whom a complaint is made. The Committee also calls on the Scottish Government to give consideration to putting in place a review process of the new committee to monitor progress and ensure transparency.

Broader complaints issues discussed (not provided in the Bill)

Mechanism to access information in a timely way

166. While the SLCC welcomed the "significant improvements" in the Bill it was critical that it does not provide a mechanism for the SLCC to access the information it needs in a timely way to handle complaints efficiently, or to be able to conclude complaints when that information is not forthcoming from solicitors' firms. Neil Stevenson explained:

> "We have around 300 solicitors a year who do not respond when we issue a statutory notice requiring them to give us files. By not responding, they are breaking the law but our remedy is to go to the Court of Session to get an order for the solicitor to comply."

167. He told us that the SLCC had spent over £100,000 in legal fees on getting solicitors to meet a basic duty of their regulation. He said:

> "We are slightly stuck between sending our own reminder letters and jumping to the inner house of the Court of Session – it is a big leap. We hope that if we were able to write and say we will apply a £500 statutory fine if you do not comply with 14 days, a tranche of those not responding would see tangible consequences." [24]

168. Consequently, the failure to respond he told us, undermined public confidence in the system so it was important that a more proportionate way was available to help solicitors comply.

169. The Minister acknowledged the significant problem the SLCC had in solicitors' failure to respond to requests for files. She said "We are working with the SLCC and looking at amendments to strengthen the Bill so that it gets the information that it needs." [27]

170. Her officials clarified that the SLCC is not necessarily seeking new powers as they already have the power to require solicitors to provide information but that when that information is not provided, currently their only recourse is to go to court. The Scottish Government are therefore working with them "to make it easier to avoid the Commission having to go through the court process to obtain the information that it has a right to get." [27]

Compulsory mediation

171. Several witnesses including Brian Inkster supported compulsory mediation being on the face of the Bill. He told us that mediation is offered to both parties but if one party does not accept it does not happen. He said "If mediation was made compulsory, we would see a lot of complaints being settled earlier without too much

problem and without the expense that the Scottish Legal Complaints Commission currently costs." [23]

172. Rosemary Agnew was of the view that it was better to have less detail on the face of the Bill and it would not be appropriate to have that level of detail. She said "The Bill provides the framework and parameters rather than the process. That enables you over time to adapt your process for a changing environment. If we want the SLCC to have flexibility, it needs to be able to write the rules and to write the processes without constantly going back to something that is in legislation or that somebody else may interpret differently." [24]

173. Neil Stevenson recognised the challenge in getting the balance right in the drafting of the legislation as different approaches may be needed to support different complainers effectively. He said "you have to ensure that the legislation contains sufficient detail to set out what we are meant to do. The challenge in doing that lies in the breadth of work that we have to deal with." [24]

174. He supported mediation and acknowledged the suggestion may appear sensible in the process of alternative dispute mediation but highlighted that making it compulsory may have unintended consequences. He said "As we are also the gateway for conduct complaints, that could force me to take a woman who has accused her lawyer of sexual assault to mediate with that lawyer before she could access the rest of the conduct complaints system. I think SWA and others would say that is fundamentally wrong". For this reason, he believed it was so important to have flexibility in the system.

Time bar

175. Additionally, Brian Inkster suggested that a complaint needs to have a definite prescriptive point and not be accepted after a certain point. He explained that currently the SLCC "is given a lot of leeway" to allow complaints that are many years old, yet it gives solicitors only a short time to respond to complex issues. He added that "They might only be given a week or two to respond yet the SLCC can take months to reply. There is unfairness and imbalance there." [23]

Request for additional powers for the Law Society of Scotland and the Scottish Solicitors' Discipline Tribunal

176. The Law Society welcomed the Bill's reforms but also made a number of requests which would assist them in resolving conduct complaints more efficiently including rules to allow frivolous or vexatious complaints to be rejected, new powers to enable them to dispose of conduct cases early if all parties were in agreement, powers to allow the Law Society to issue letters of advice and warning in response to minor regulatory breaches and wider powers to suspend a solicitor on an interim basis where possible serious wrongdoing is uncovered.

177. It would also like to see the Scottish Solicitors' Discipline Tribunal to have powers to order a solicitor to undertake education or training and be able to make their own finding of unsatisfactory professional conduct rather than passing that complaint back to the Law Society.

178. Rachel Wood told us that "Powers on consensual disposal and discontinuing investigations would allow us to flush things out where it is appropriate to do so or to impose more quickly a moderate appropriate sanction rather than having to go all the way to the end." [25]

179. Colin Bell of the SSDT also indicated areas which could be improved including the tribunal being given more input to the process of recruiting members. He also agreed that when a tribunal reached a decision that professional misconduct has been established, the case should not be passed back to the Law Society but decided by the tribunal including applying the appropriate sanction. He supported the tribunal having powers to order a solicitor to undertake training.

180. A further suggestion was that the powers of the chair and vice chair should be contained within the legislation. Colin Bell explained that "Improvements could be made in that area in order to make the system more transparent and make it absolutely clear what decisions the chair or vice-chair may make without having to convene a full panel." [24]

Introduction of a complainer's fee

181. The Scottish Law Agents' Society expressed a wish to see the introduction of a £60 fee to make a complaint, refundable on success. The aim would be to reduce malicious complaints. They also indicated there should be audit and scrutiny of the SLCC's accounts via Audit Scotland.

182. This proposal was rejected by the SLCC, regulators and consumer groups.

183. Neil Stevenson of SLCC recognised why solicitors may be looking at ways to reduce complaints but said there are few examples where a consumer is charged to go to an ombudsman. He explained that many complainers have vulnerabilities, and some may have no access to funds. He questioned how such a system could work in practice commenting that if it were means-tested this would add further bureaucratic and banking arrangement complexity which would invariably add overall costs to the system. He asked:

> "Do you expect to pay a fee in advance if your flight is delayed? I would want to hear a really compelling case as to why legal services are truly different to that." [24]

184. Roddy Dunlop also rejected a fee as being neither "necessary" nor "desirable" and indicated that it would be a significant barrier for some people. Morag Ross welcomed a mechanism to sift out cases without merit at an early stage but added "It seems to me that a financial barrier is the wrong way to address that issue." [25] . However, she told us that it is important there should be an opportunity to sift those cases out at an early stage.

185. Andrew Stevenson of the SLAS defended its position. He said "We do not think that it is a barrier to justice. Indeed, £60 is less than someone would pay to sue a solicitor under simple procedure in the sheriff court. They must pay a fee to the sheriff clerk. We spoke about trying to make the process faster and more efficient. We feel that that is a reasonable requirement so the entire costs is not borne by the solicitors and the complainer is required to put their money where their mouth is. In our view, that will free up the SLCC.s resources to deal with meritorious actions at the expense of frivolous actions." [25]

186. The Committee has heard evidence about additional ways in which the Bill could be amended to further improve the complaints system.

187. The SLCC already holds powers to access information it requires to investigate service complaints. However, it highlighted to the Committee that some solicitors' firms fail to respond to requests for their files. The Committee notes that the SLCC's only recourse is to go to the Court of Session for an order to comply which is costly and disproportionate. We note that it seeks a power to apply a £500 statutory fine for non-compliance within 14 days and that this may be a practical and proportionate solution.

188. Similarly, both the Law Society and the Scottish Solicitors Discipline Tribunal made a number of suggestions outlined in this report which may resolve conduct complaints more efficiently.

189. The Committee welcomes the ongoing engagement by the Scottish Government with these stakeholders and asks that it considers the merit of these ahead of stage 2.

190. The Committee also heard arguments supporting the introduction of a fee for making a complaint. The Committee rejects those arguments for the reasons outlined by the SLCC and the Law Society. However, it urges the Scottish Government to work with the SLCC to ensure a system is in place to efficiently deal with complaints without merit to avoid clogging up the system and causing unnecessary delay.

Alternative Business Structures (ABSs)

191. The Bill will update the rules on alternative business structures in the Legal Services (Scotland) Act 2010 (2010 Act) with the aim of increasing the number of businesses and other bodies like law centres and charities which can operate as ABSs (referred to in the 2010 Act as "licensed legal services providers").

192. Amendment is made to section 47 of the Legal Services (Scotland) Act 2010 to remove a requirement that a business entity can only be a licensed legal services provider if it offers legal services for fee, gain or reward.

193. Amendment is also made to section 48 of the 2010 Act which prohibits law centres from being a licensed legal services provider. The Bill also amends section 49 of the 2010 Act so that a business entity is eligible to be a licensed legal services provider if the qualifying investors in it (i.e. solicitors or members of another "regulated profession") have at least a 10% stake in the total ownership of the entity.

194. The Committee heard broad support for the reduction in ownership threshold although questions were raised as to why a 10% stake was required rather than it being removed entirely. Some witnesses including SLCC supported rules being fully liberalised to help spur price and service competition.

195. Dr Marsha Scott of SWA supported the proposals. She told us "We welcome expanding the ability of law centres and other organisations to meet what is a rather extraordinarily large unmet need." [22] She highlighted the need for flexibility and the importance of being able to employ solicitors on a fixed salary. "Our model in Edinburgh is a combination of paralegals and part-time solicitors which accommodates the need for women solicitors as well as expanding the flexibility of provision. We need to ensure that it accommodates that flexibility." [22]

196. Sharon Horwitz of the CMA said ABSs would provide several benefits like "access to external capital efficiencies, the ability to achieve efficiencies by exploiting economies of scale, the ability to retain high-performing non-solicitor employees or attract outside talent, the involvement of non-legally qualified practitioners in management who could facility entry of more business oriented firms and the ability to deal with entry and exit, allowing partners in small firms who wish to retire opportunities to transfer opportunities."

197. Others such as the Scottish Law Agents' Society raised questions about how the existing rules on the suitability of outside investors in ABSs in the Legal Services (Scotland) Act 2010 will work given that the minimum percentage for solicitors or other regulated professionals will be reduced to 10%. It suggested that the new system could be open to abuse.

198. Andrew Stevenson of SLAS said:

> "Under the 2010 Act, anyone who owns less than 10% of an ABS is not liable to undergo a suitability test. The provisions in the Bill mean that if an ABS has 11 owners with a lawyer owning 10% and 10 non-lawyers each owning 9%, together the non-lawyers would own 90% and they would not be liable to undergo any suitability test. We do not understand why that provision is in the

> Bill, because it alters considerably the responsibility that we have to ensure that the owners of legal businesses are suitable and proper persons to do that. We have a real concern about that." [25]

199. The Committee understands that this refers to section 63 of the Legal Services (Scotland) Act 2010 which exempts investors from the fitness test for non-solicitor investors in section 62 of that Act when that investor is an "exemptible investor", i.e. has less than a 10% stake in the ownership or control of the ABS.

200. Rachel Wood welcomed the provision and explained that it was the Law Society who had asked for a reduction in the 51% stake, but it had not suggested a percentage. She said "We would say that if the threshold is going to be 10% why have one at all? We are now 10-12 years on from the introduction of ABS and it is working very well. There is a lot of data to show that there are no issues, and it increases access to justice and to legal services and helps the existing profession to innovate." [25]

201. CMA recommended the 10% ownership threshold be removed completely commenting that it was a "barrier to participation" creating "a competitive disadvantage for Scottish law firms relative to their counterparts in England and Wales where there is no minimum ownership threshold". Sharon Horwitz of the CMA told us "The risks associated with relaxation are extremely low." [22] She continued:

> "Having an ownership requirement could limit the introduction of novel business models. It might end up limiting ABSs to simply having an additional non-solicitor partner added to a firm keeping traditional firm structures and not getting new models".

202. The CMA also welcomed the proposed removal of the fee, gain or reward requirement: "It is important to allow third-sector organisations to directly employ legal professionals to undertake reserved activities". Additionally, Sharon Horwitz told us "Scottish consumers would benefit from the removal of restrictions on advocates forming partnerships whether with other advocates or in ABSs with legal and/or non-legal professionals and on their being able to accept instructions directly from consumers should they choose to do so. That would create efficiencies and streamline processes." [22]

203. Organisations representing consumers were also supportive. Tracey Reilly of Consumer Scotland said that access for consumers should improve, particularly in areas less well served by private practice providers. SLCC highlighted that ABSs should provide consumers with more choice. Its view was there should be a single regulatory system for ABS's and other legal entities rather than separate systems.

204. Brian Inkster made reference to the delays of implementation of the Legal Services (Scotland) Act and called for this Bill to be implemented when enacted. He noted further "It should be noted by the Equalities, Human Rights and Civil Justice Committee that the 51% rule could currently be removed by Scottish Ministers who can do so by regulation (under Section 147(1) of the Legal Services Act."

205. The Minister explained there was a "divergence" of views on whether the minimum ownership requirement should be removed entirely. In the response to the Scottish

Government consultation, just over half agreed that the 51% share should be removed compared with 48% who disagreed. She told us "Our approach in the Bill is to strike a balance between the two views". The Scottish Government considered that a figure of 10% would retain a minimum requirement for a regulated professional to have a stake in a business and strike the right balance. "It was felt that 10% was an appropriate minimum percentage if we were to require the retention of a regulated investment." [27]

206. The Committee heard broad support for the reduction in business ownership threshold and welcomes proposals in the Bill. It agrees that this new model will provide consumers with more choice and will benefit not for profit advice services and law firms.

207. The Minister told the Committee that a 10% figure was chosen to provide a balanced compromise. However, the Committee agrees that no satisfactory explanation has been given to why 10% was decided upon nor why the percentage is not removed entirely. It notes that safeguards already exist in relation to investors in ABSs in the Legal Services (Scotland) Act 2010, in particular, section 62 provides a fitness or suitability test for outside investors. It also considers that requiring 10% of investors to be solicitors or other regulated professionals could limit the number and types of investors who might invest in ABSs.

208. However, the Committee also notes concerns raised by SLAS as to whether the new rules allowing non-solicitor investors to have up to a 90% stake are sufficient to deal with situations where individual investors each have less than 10% stakes and are exempt from the current fitness test (section 63 of the 2010 Act). It asks the Scottish Government to consider whether any additional safeguards are required to deal with this situation beyond those already provided in the Legal Services (Scotland) Act 2010. It would welcome clarity on this point in advance of stage 2.

Regulating the term "lawyer"

209. The Bill will make it an offence to use the title “lawyer” with intent to deceive when providing legal services to the public for fee, gain or reward**.** The Committee heard conflicting views.

210. A number of witnesses including the Faculty of Advocates, SSDT and ACA supported regulation on the basis that struck off individuals may continue to work as “lawyers” and advertise their services as such. The SLCC also supported regulating the term but stressed that it is more important for consumers to have clarity on what to expect from a regulated firm or practitioner.

211. Colin Bell told the Committee “There are difficulties from the point of view of public confidence and public perception.” [24] The Law Society agreed emphasising that the public needed this protection but considered “intent to deceive” would be difficult to prove. It suggested there should be an offence of acting wilfully and falsely as a lawyer.

212. Neil Stevenson of the SLCC highlighted that the issue was not as straightforward as it seems and that we need to understand in more detail how consumers are confused by terminology. He suggested we need to look at the issue of titles more generally.

> “There are two categories of solicitors, those with practising certificates and those without. Those who do not have practising certificates are not allowed to provide legal services, but they still get to use the title “solicitor”. On the one hand you are saying that people cannot call themselves a lawyer because that is confusing, but that lawyer might be delivering a service that is not regulated and that they are entitled to offer. On the flipside, you would have a solicitor able to use a title while being prohibited from offering a legal service.” [24]

213. For this reason, he told us the SLCC “are not unsupportive of the provision but, perhaps, in isolation it could be confusing, as there are solicitors who are not allowed to provide legal services”. [24]

214. He also expressed concern about how the provision would be enforced. “Who will police it more generally? It is not about ex solicitors; it is also about other people who use the title. If it is not clear, who will police the provision and where the funding will come from, it will be a weak power in practice”.

215. In written evidence, the Faculty of Advocates suggested that protection could be extended to the title “advocate” but recognised difficulties of its use in other contexts. Roddy Dunlop told us, on reflection, that he believed the Bill had struck the right balance in making it an offence for someone to hold themselves out as a member of the Faculty of Advocates if they were not.

216. Those opposed to the regulation of the title considered it could have unintended consequences which would outweigh any benefits. The CMA highlighted that it may make it harder for unlicensed providers to advertise and promote their services as consumers may incorrectly assume that only a qualified solicitor can provide certain services and that was not how the law works in relation to unreserved legal

services.

217. Sharon Horwitz argued that while consumers can rely on titles such as "solicitor" when navigating the market and may use that as an indicator of quality, its regulation had the potential to "limit the scope for competition which has a consequence in terms of affordability because it may result in consumers avoiding unauthorised providers completely." [22]

218. Professor Mayson did not support protection for the term and thought it sufficient an offence be created for providers to pretend to be regulated when they are not.

> "If you look at the Bill's proposals on allowing the unregulated to come within some form of regulation by the commission, many of those people might legitimately call themselves and be called lawyers. To make it an offence would seem to me to cut across the very good policy objective of regulating the currently unregulated. I think that the real consumer issues are already caught by the Bill in the two offences in sections 83 and 84." [23]

219. Esther Roberton agreed commenting that "we should not legislate on the basis of one or two bad apples". [26]

220. In their written submission [40] , Professor Roderick Paisley of the University of Aberdeen and Professor Andrew Steven of the University of Edinburgh raised the issue of academic opinion in return for a fee. They said "Such individuals may not be solicitors or advocates. Alternatively, they may like one of us be solicitors but not hold a current practising certificate. This type of opinion is normally given to a law firm which has requested it, rather than being offered to the public. Section 82 may not be engaged on that basis. Further, an academic lawyer who provides such an opinion is unlikely to have an intention to deceive. Nevertheless, given the exception for advice on religious law, we think that the position of academic opinions merits further consideration."

221. The Minister told the Committee that public polling by the Scottish Government and the Law Society had shown support for the title of lawyer being given the same protection as solicitor. "That was considered important to protect the consumer who might not understand the distinction between the two terms when they are seeking legal services from a regulated professional. Our view is there is a public protection concern involved in protecting the title of lawyer." [27]

222. The Committee heard conflicting views on whether the term "lawyer" should be regulated. The Committee agrees that there is a generally held public perception that the term "lawyer" is interchangeable with the term "solicitor" with the potential that consumers may think they have received legal advice from a regulated professional (a solicitor) when this may not be the case.

223. However, it notes that all legal services do not require to be provided by a solicitor and many legal services are provided by those with other qualifications such as paralegals. There is the added complication that solicitors without a practising certificate are not authorised to practise as a solicitor but are still

entitled to use the title “solicitor”. The CMA and others highlighted that its regulation could have unintended consequences which would outweigh the benefit.

224. The Committee agrees that it is important for consumers to understand and be absolutely clear what service they are being offered and by whom. It agrees that confusion exists amongst consumers within the current landscape and asks the Scottish Government to look at ways to reduce this confusion. It also heard concerns about potential unintended consequences for regulation particularly in relation to academic lawyers who give legal opinions. On balance however, the Committee supports the regulation of the term “lawyer”. However, it asks the Scottish Government to give further consideration as to whether an exception to the rule for academic opinion may be appropriate.

Powers to Scottish Government Ministers

225. Various sections of the Bill give powers to the Scottish Ministers. The Committee heard significant opposition to these proposals from the senior judiciary, Law Society and the Faculty as well as from other organisations on the basis that the powers were "inappropriate" and had potential for political interference and bias. However, the SLCC did support Scottish Ministers having an oversight role.

226. The Rt Hon Lady Dorrian told us the senior judiciary had "grave concerns" as under the Bill the Scottish Ministers would be given "direct control to change the professional obligations of lawyers, to reassign regulatory categories, to review the performance of or impose sanctions on the regulator, to directly exercise power to regulate the profession and even to set up an entirely new regulator" and those provisions "clearly transgress against adherence to the rule of law as do provisions that require the Lord President to act jointly with the Scottish Ministers." [26]

227. The Rt Hon Lord Ericht told us that the regulatory framework proposed in the Bill complicates the current situation and in constitutional terms creates "a mishmash" of the three branches of Government.

228. Darren Murdoch of the Scottish Law Agents Society said "I believe that all sections of the Bill relating to the Scottish Ministers having power over the legal profession should be omitted. I do not believe that those sections have any place in a democratic society." [25]

229. Rachel Wood of the Law Society agreed stating "There is already extensive oversight of the solicitors' profession and the Law Society of Scotland. The SLCC has oversight powers, and we have oversight from a number of other bodies. We accept that there should be oversight, but we do not accept that there should be oversight by the state." [25]

230. This view was shared by Esther Roberton who said "I believe that the Government should have no powers so an automatic consequence of that is that it should have no delegated powers. I do not think that it is in the interest of Ministers or in the interest of the profession and the public that the Government be involved in this at all. There are not many things that the Law Society and I agreed on, but that notion was one of them." [26]

231. The Committee also sought clarification on what mechanisms are in place to "oversee the overseer" to ensure that, from a consumer's point of view, they could be confident that decisions are transparent and open and there are sufficient checks and balances in place within the current system.

232. Lady Dorrian told us:

> "we do not legislate on the basis that we have to worry about people going rogue. If the Lord President becomes incapacitated in some way, there are provisions that will enable the Lord Justice Clerk to become interim Lord President, as it were. There are steps that can be taken to address that." She continued:

> "The system is not incompatible with transparency. As I said, the fact that improvements could be made does not mean that we have to throw the baby out with the bath water, as they say. The improvements can be made within the current system, and they are already being made." [26]

The Scottish Government's response

Correspondence

233. In response to these concerns, the Minister for Victims and Community Safety wrote [41] to the Committee on 27 September 2023, indicating her "intention to bring forward amendments to the Bill at stage 2 intended to address the concerns in respect of the role placed on Scottish Ministers within the Bill."

234. The Committee considered the letter at its meeting on 3 October and agreed to write to the Minister, to better understand the detail of any likely changes and thereafter wrote [42] to the Minister on 6 October 2023.

235. In her response [43] dated 27 October 2023, the Minister indicated that the Scottish Government was "considering amendments which would retain the powers to review a regulator and impose measures (sections 19 and 20), but with responsibility for those functions sitting with the Lord President instead of Scottish Ministers."

236. The Minister also indicated that the Scottish Government was exploring amendments which would address the balance of responsibilities between the Scottish Ministers and Lord President in the consideration of applications by bodies wishing to enter the legal services sectors as new regulators.

237. The Committee wrote [44] again to the Minister on 24 November 2023 again highlighting concerns and to seek clarity on timescales. The Minister responded on 29 November 2023 [45] indicating that "constructive engagement and discussions" with stakeholders was ongoing and it was expected to "reach an agreed position by early next year."

238. As detailed in paragraphs 30-33 of this report, the letter [32] from the Lord President to the DPLR Committee of 17 November 2023 outlined the Lord President's initial views on the proposed amendments. He was clear that more information was required, and it was too early to know whether his concerns would be allayed. He also emphasised that his concerns will not be addressed by simply replacing references to the Scottish Ministers with the Lord President.

Oral evidence

239. In oral evidence, the Rt Hon Lady Dorrian welcomed recognition by Scottish Ministers that amendments are required but echoed the position of the Lord President stating "We do not have any idea what those amendments will look like. As ever with these things, the devil is in the detail. Whether amendments that are to

be lodged will address our concerns adequately remains to be seen." [26]

240. The Rt Hon Lord Ericht told us that there had been some engagement and some "high level proposals from the Scottish Government as to how it may amend the Bill" but that a lot more information was needed before they could consider whether proposals were viable, No timescale had been provided to them.

241. Following that session, the Minister wrote [45] to the Committee on 29 November including further detail on the proposals. In the annex to her letter, she set out sections of the Bill alongside proposals for amendment. These are duplicated below for ease of reference.

242.

Section of Bill	Scottish Government Proposal
Section 5	This section allows for the regulatory objectives and professional principles to be amended by regulation.The Scottish Government accepts the DPLR Committee's recommendation to remove section 5 and will bring forward an amendment at Stage 2 to that effect.
Section 8	Section 8(5) allows regulators to be reassigned between category 1 or 2. The DPLR Committee recommended section 8 be removed from the Bill.The letter states that "we will bring forward an amendment to narrow the scope of section 8(5)(a) so it applies only to allow the recategorisation of new accredited regulators and to include an additional safeguard in respect of a requirement for the Lord President's consent before any such change may be made."
Sections 13 and 16	Sections 13 and 16 require a category 1 and 2 regulator to publish an annual report on the exercise of their regulatory functions.The Scottish Government's letter states that it, "will amend the Bill to include an additional requirement for those regulators to report to the Lord President."
Sections 19 and 20	These sections allow for a review of regulators' performance.The letter states that, "the Scottish Government are having active discussions with the office of the Lord President in respect of a review function sitting with the Lord President and expect to reach an agreed position."
Section 29	Section 29 allows for a new regulator to be set up with the aim of new regulatory bodies entering the legal services sector. Currently both the Scottish Ministers and Lord President have to agree to the regulatory scheme.The Scottish Government will bring forward an amendment so that it "would be the responsibility of the Lord President alone to consider any application by bodies wishing to enter the legal services sector as a new regulator."
Section 41	Section 41 relates to the rules which category 1 regulators make for "authorised legal businesses", i.e. legal entities. Section 41(4) gives the Scottish Ministers the power to block amendments to these rules (with the Lord President's agreement).The Scottish Government will table an amendment at Stage 2 so that this function is exercised solely by the Lord President.
Sections 35 and 49	Section 35 is aimed at dealing with situations where a new regulator (an "accredited regulator") ceases to operate. Section 49 has a similar aim in relation to entity regulation if something happens to interfere with a category 1 regulator's ability to operate. Both give powers to the Scottish Ministers to intervene.The letter states, "… we consider that it remains important to have some mechanism in place for action to be taken in certain circumstances to ensure that there is no interruption in the legal services provision by practitioners whose regulator loses or surrenders its functions. We are having active discussions with the office of the Lord President to explore the most appropriate approach and expect to reach an agreed position."

243. The sections broadly match sections highlighted as problematic by the Senators in their written response. However, the Senators also raised concerns in relation to the following sections:

- Section 90 – This is an ancillary provision giving the Scottish Ministers the power to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Act flowing from the Bill. The DPLR has reported that it is content with this provision, noting that:

  "139. The power allows issues of an ancillary nature which may arise to be dealt with effectively by the Scottish Ministers. Without such a power, any changes would require to be made by primary legislation, which would not be an effective use of either the Parliament's or the Scottish Government's resources."

- Section 26(1)(d) - section 26 sets out what the draft regulatory scheme must contain for a body to apply to the Lord President and the Scottish Ministers to become accredited so that its members can acquire rights to conduct litigation. Section 26(1)(d) confers a power of the Scottish Ministers to specify other regulatory matters which should be included in such a scheme. The DPLR Committee has reported that it:

  "58 … is content with the power in principle and that regulations made under the power would be subject to the affirmative procedure."

- Section 58(4) – this removes the right to appeal to the Court of Session from a decision of the Scottish Legal Services Commission. The senators have argued that this right of appeal is an integral part of the role of the Lord President in regulation.

244. In oral evidence, the Minister offered further reassurance to the Committee. She said the Scottish Government "acknowledged the concerns" and her officials were working closely with the Lord President's office and had "already come to a firm position on several areas of the Bill to amend and we are close to agreement on other areas." [27]

245. The Minister acknowledged that any amendments would affect various parts of the Bill and were engaging on all aspects of the Bill. She said "There is not a straight cut to remove one function and give it to the Lord President. We have to consider the whole Bill."

246. However, she said "We hope to have agreement on most amendments at the beginning of the new year and I am willing to keep the Committee updated on all progress." [27]

247. Scottish Government officials advised that they had shared two papers with the Lord President's office and had provided a further paper on worked examples of how amendments would operate in practice. They said that "It is a bit of a chicken and egg situation in that we have to agree a position before we can draft amendments and then seek agreement on the working of the amendments." [27]

248. The Minister acknowledged the challenge faced by the Committee in its scrutiny. She said "I know it is not ideal for the Committee not to have the detail of the amendments that we will lodge at stage 2. However, the situation is unprecedented in that they will not be drafted by the lawyers until agreement is made with the legal profession, the Lord President's office and the stakeholders. I am keen to share all the information with the Committee as we progress and to get agreement as soon as we are able to do so." [27]

249. On 19 January 2024 [46] , the Committee received a further letter from the Lord President's office with an update on discussions with the Scottish Government. The letter stated "While progress has been made on sections 5, 8, 29 and 41 of the Bill, there are some outstanding points that need addressed". However, the Lord President stated that he "would hope these matters can be easily addressed."

250. The letter further stated that:

"Further work is needed on sections 19, 20 and schedule 2 before the senior judiciary can provide a view on whether we would be content with a model to give functions to the Lord President to review the performance of regulators. If functions do need to be given to anyone to review performance, it is our view that is only appropriate for those to be given to the Lord President. Based on the information which has been provided to us so far, we are not convinced that it is necessary for the Lord President to be given functions to regulate the members of regulators directly, or to set up a new regulator, under sections 35 and 49 of the Bill. We have also provided some suggestions for the Scottish Government to consider in relation to the right of appeal to the Inner House, which section 58 of the Bill seeks to remove. On all of these matters, we will consider any further information which is provided to us by the Scottish Government."

251. It concludes "It is essential that the senior judiciary can assess how the proposed law is intended to work and that they know exactly what functions may be given to the Lord President. To that end, I would echo what the Lord Justice Clerk said when she attended Committee, that ultimately the senior judiciary will need to see draft amendments, with sufficient time for consideration, before any assurance can be given that the concerns we have with the Bill have been alleviated."

252. On 22 January 2024 [47] , the Committee received a letter from the Minister for Victims and Community Safety providing details on discussions with the Lord President's office and an update on specific sections of the Bill. The annex to the letter set out the updated proposals on the amendments. These are duplicated below.

253.

Section of the Bill	Scottish Government proposal
Section 5	Section 5 allows for the regulatory objectives and professional principles to be amended to update them to reflect regulatory best practice.As set out in the Minister's correspondence of 29 November 2023 the Scottish Government accepts the recommendation of the Delegated Powers and Law Reform Committee that the Bill be amended to remove section 5 and will bring forward an amendment at Stage 2 to that effect.
Section 8	As set out in the Minister's correspondence of 29 November 2023, the creation of a category system for regulators creates an inherent requirement for flexibility to respond to any changes, or proposed changes, to how a regulator operates or in its membership numbers and is intended to futureproof the regulatory framework.Section 8(5)(b), (c) and (d) are necessary to ensure the Bill accurately reflects any changes to the regulatory framework in respect of new accredited regulators receiving approval, any regulator ceasing to operate or a change in a regulator's name, as recently evidenced with the Association of Construction Attorneys' name change.An amendment will be lodged at Stage 2 to narrow the scope of section 8(5)(a) so it applies only to allow the recategorisation of new accredited regulators. In addition, to include an additional safeguard, that it may only apply in respect of a recommendation of, and with the consent of, the Lord President.
Sections 13 and 16	Sections 13 and 16 require a category 1 and 2 regulator to publish an annual report on the exercise of their regulatory functions. The report must include, among other things,information demonstrating how the regulator is complying with the regulatory objectives and a statement on the strategic priorities for the next reporting year.The Scottish Government will lodge an amendment at Stage 2 to the effect that regulators will require to send their report to the Lord President prior to being published.
Sections 19 and 20	This Bill is designed to increase the transparency and accountability of legal regulation.Sections 19 and 20 provide an important mechanism so that there is a process for review of regulatory performance if concerns are raised about a regulator not upholding the regulatory objectives or acting in the public interest.In recognition of the comments within the response from the Senators of the College of Justice to the Committee's call for views on the Bill,that the powers in section 19 and 20 should be added to the existing powers of the Lord President, the Scottish Government will continue to explore with the office of the Lord President what adjustments may be required to the current drafting at sections 19 and 20.Changes being considered include strengthening the test for when a section 19 review may be triggered, including an ability for the Lord President to raise a review himself and introducing an ability for the Lord President to seek representations from the regulator where he is considering whether the test for a review has been met.
Section 29	The intention behind Chapter 3 of Part 1 of the Bill is to allow a route for new regulatory bodies to enter the legal services sector and for new types of practitioners to provide legal services in Scotland if this is deemed to be appropriate. This is done by replicating and expanding the relevant provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 which requires approval from both the Lord President and Scottish Ministers for a new body to become a legal services regulator. I will lodge an amendment to the effect that it would be the responsibility of the Lord President alone to consider any application by bodies wishing to enter the legal services sector as a new regulator.
Section 41	The Bill adopts the same position of the Legal Services (Scotland) Act 2010 which requires the agreement of both the Scottish Ministers and the Lord President on the rules for authorised legal businesses. Having listened to the views of stakeholders the Scottish Government will lodge an amendment at Stage 2 so that this function is exercised solely by the Lord President.
Sections 35 and 49	Section 35 is specifically intended to address the possibility that any new accredited regulator ceases to regulate by surrendering its acquired rights (section 31), having its acquired rights revoked (section 34) or for any other unanticipated circumstance. Currently, the Bill makes provision that Scottish Ministers may by regulations establish a body with a view to it becoming a regulator for the purposes of regulating the authorised providers of a discontinuing regulator. This is intended to provide a mechanism for a body's members to continue to provide legal services to their clients and continue to be regulated if appropriate in the circumstances. The Scottish Government will lodge an amendment at Stage 2 which would remove provision for Ministers to make such regulations to establish a new body.If any members of a body wished to continue to access acquired rights under the Bill in a scenario in which the regulator ceases to regulate by surrendering or having its acquired rights revoked, those members may seek to make a new application under section 29. The Scottish Government is exploring whether temporary measures so that any permission to practice could be deemed to continue for a period of time so that arrangements may be made to ensure regulation of those providers could continue while an application under section 29 was being developed and considered.Similarly, the principle of section 49 was included as a part of the system of licencing for legal businesses (entity regulation) to createan offence for legal businesses to operate without authorisation. In the event that something happens to interfere with a category 1 regulator's ability to operate, there requires to be some mechanism to ensure that legal businesses are not committing an offence if they continue to provide legal services.As an established body the Scottish Government states it believes that the risk of the Law Society of Scotland being unable to operate its regulatory functions as a category 1 regulator is sufficiently low as to negate the requirement for this provision when taken in combination with section 35 as amended in respect of any category 1 accredited regulator.The amendment to section 35 will ensure that if any accredited category 1 regulator is

Section of the Bill	Scottish Government proposal
	unable to operate its regulatory functions, there remains a proportionate mechanism for those members to seek to continue to operate. Therefore, I will lodge an amendment at Stage 2 to remove section 49.

254. Various sections of the Bill give powers to the Scottish Ministers. The Committee heard significant opposition from the Law Society, Faculty of Advocates and the Senators of the College of Justice among others in relation to these proposals that these powers are inappropriate and have potential for political interference and bias. The Committee shares these concerns. It is of the view that there is no place for Ministerial powers in the Bill and these should be removed.

255. The Committee accepts that this is a complex process which affects various parts of the Bill and welcomes the Scottish Government's commitment to resolve these issues by way of amendment at stage 2 and to keep the Committee updated. It notes its ongoing engagement and significant progress that has been made and welcomes the updates within the correspondence from the Lord President's office and the Minister's letter.

256. The Committee would also welcome clarification from the Scottish Government on what mechanisms are in place within the current system to "oversee the overseer" and ensure that all decisions are transparent and open and there are sufficient checks and balances in place.

General principles

257. The Committee notes the strongly held views that have been expressed in relation to this Bill, particularly whether the decision to adopt the principal recommendation of the Roberton Review (for independent regulation) was the correct one. It also notes the broad and significant opposition to the Scottish Government's initial proposals to give powers to Scottish Ministers in certain parts of the Bill.

258. On the issue of an independent regulator, we acknowledge that there are polarised views and that the Scottish Government has attempted to find a compromise. We are not convinced that such a compromise is possible between the competing positions nor that it has been achieved in this Bill as drafted. However, we recognise that there are several other benefits this Bill will bring to both regulators, consumers and others particularly in relation to the complaints process and in setting up alternative business structures. We welcome those benefits.

259. As our report makes clear, the Committee shares the concerns expressed by the Law Society, Faculty of Advocates and Senators of the College of Justice on the powers proposed for Scottish Ministers and, while unresolved, is unable to meaningfully reach a conclusion on whether or not amendments at Stage 2 will resolve these issues satisfactorily due to an absence of detailed information on what is going to be proposed.

260. However, we acknowledge and welcome the work which is ongoing by the Scottish Government in its engagement with the Lord President's office to resolve this issue and that this work is detailed and technical. Specifically, we note the detail provided by the Scottish Government of its intentions to amend various sections included in the Minister's letter of 29 November [45] (detailed in paragraph 241 of this report). However, there are a number of sections on which the Senators raised concerns which do not appear to have been addressed satisfactorily.

Recommendations on the general principles of the Bill

261. Whilst it would have been valuable to have received the detail of the amendments proposed during our Stage 1 deliberations, the majority of the Committee is content at this stage to accept the reassurances given by the Minister in her evidence and the detail provided in the annex of her letters dated 29 November 2023 and 22 January 2024.

262. We note the Scottish Government's ongoing work with the Lord President to reach a resolution. On balance, this process and assurances are sufficient for the majority of the Committee to recommend that Parliament agrees the general principles of the Bill in order that we can see what emerges during Stage 2. Three members of the Committee were not content to recommend that Parliament agree the general principles of the Bill.[iii]

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iii The majority who support the general principles of the Bill are Kaukab Stewart, Maggie Chapman, Karen Adam and Fulton MacGregor. The minority who do not support the general principles of the Bill are Meghan Gallacher, Paul O'Kane and Annie Wells. In

263. All members of the Committee would welcome early sight of the amendments and are likely to require an extended deadline at Stage 2 to consider whether these are sufficient to allay any concerns and to consult with interested parties before dealing with the amendments themselves.

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dissenting, Paul O'Kane's preference was to recommend that the Committee make no recommendation on the general principles of the Bill at Stage 1.

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