

REGULATION OF LEGAL SERVICES (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament’s Standing Orders in relation to the Regulation of Legal Services (Scotland) Bill (“the Bill”). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 25–EN);
 - a Financial Memorandum (SP Bill 25–FM);
 - a Policy Memorandum (SP Bill 25–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 25–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

OUTLINE OF BILL PROVISIONS

4. The overarching policy objective of this Bill is to provide a modern, forward-looking legal services regulation framework for Scotland that will best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector. The Bill will implement a number of key recommendations from the Independent Review of Legal Services Regulation in Scotland’ by Esther Roberton (the Roberton report).
5. This Bill delivers the Programme for Government commitment to introduce a Bill which will:

“Provide for a modern regulatory framework designed to promote competition and innovation while also improving the transparency and accountability of legal services regulation and the legal complaints system in Scotland.”

6. Key measures in the Bill include:

- Implementing a modern, forward-looking model for legal services regulation which will build on the existing regulatory framework. This will provide for a proportionate approach that seeks to balance and deliver the key priorities of all stakeholders. The existing regulators will retain their regulatory functions with a greater statutory requirement to incorporate independence, transparency and accountability within their regulatory approaches.
- Introducing a modern set of regulatory objectives and professional principles, to incorporate the Better Regulation and Consumer principles. The Better Regulation principles aim to ensure that regulation is effective, proportionate, transparent, and based on evidence. The purpose of these principles is to improve regulatory outcomes by reducing unnecessary burdens and costs associated with regulation while maintaining necessary safeguards. The purpose of the Consumer Principles are to protect and advocate for the rights of consumers. These principles aim to ensure that consumers have access to accurate information, are treated fairly and transparently, that they understand their rights and can access effective redress where appropriate, placing consumer interests at the heart of regulation.
- Allowing Scottish Ministers to investigate and, if necessary, take certain measures in the event of failure by legal services regulators to regulate in the public interest or meet the regulatory objectives¹.
- Allowing for greater flexibility in respect of alternative business structures, the Bill will seek to liberalise licensed legal services providers by removing restrictions which currently require such legal firms to operate for ‘fee, gain or reward’, and which require a minimum ownership of 51% by regulated professionals. Instead, regulated professionals would require to have at least a 10% stake in the total ownership or control of the entity. This will allow greater flexibility to address concerns that Scottish legal firms are at a competitive disadvantage compared to other jurisdictions.
- Enabling risk-based regulation of business areas, allowing for regulation of a legal firm as a whole, rather than solely at individual professional level as is predominantly the case.
- Allowing for protection of the use of the title ‘lawyer’, to address concerns that unqualified persons, or persons who have been struck off, can currently use the term to describe themselves when providing legal services to the public.
- Enabling risk-based and proportionate regulation of the use of LegalTech, by allowing regulators to grant waivers of targeted rules, in order to facilitate the use of regulatory sandboxes² to promote innovation under regulatory scrutiny.

¹ Measures would range from censure (public criticism) to continued scrutiny to financial penalty. In adhering to precedent set by the Legal Services (Scotland) Act 2010, the Lord President’s approval would be required for sanctions other than a financial penalty.

² A regulatory sandbox is a regulatory approach that allows live, time-bound testing of innovations under a regulator’s oversight. Novel financial products, technologies, and business models can be tested under a set of rules, supervision requirements, and appropriate safeguards.

- Reforming the legal complaints system, to address concerns that the statute underpinning it is too restrictive and prevents complaints from being dealt with in a proportionate and risk-based way, adding undue cost and time to the legal complaints process for consumers and legal professionals. The Bill reconstitutes the Scottish Legal Complaints Commission as the Scottish Legal Services Commission (“the Commission”) and provides it with an expanded independent oversight role of complaint handling by the regulated sector, in addition to a new role in overseeing complaints about unregulated legal services.

RATIONALE FOR SUBORDINATE LEGISLATION

7. The Bill contains a number of delegated powers provisions. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, and in deciding on the appropriate level for scrutiny of subordinate legislation, the Scottish Government has considered the importance of each matter against:

- the need to allow detailed operational arrangements to be set out in secondary legislation, in line with the basic structures and principles set out in the primary legislation;
- the need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- the need to ensure proper use of parliamentary time;
- the possible frequency of amendment; and
- the need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

8. The relevant provisions are described in detail below. For each provision, this Memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

9. Subordinate legislation is required to implement the Scottish Government’s policy and some form of parliamentary procedure is appropriate. For the decision on negative or affirmative procedure, the Scottish Government has considered carefully the degree of Parliamentary scrutiny that is thought to be required for the instrument, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views of the Government on the importance of the matters being delegated by the Parliament.

DELEGATED POWERS

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

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish Statutory Instrument**
Parliamentary procedure: **Affirmative**

Provision

10. Section 5(1) provides a regulation-making power for the Scottish Ministers to modify the regulatory objectives and the professional principles contained within the Bill. Section 5(1)(a) provides that the Scottish Ministers may add, amend or remove a regulatory objective or how it is to be applied. Section 5(1)(b) provides that the Scottish Ministers may add, amend or remove a professional principle.

11. Sections 2 to 4 of the Bill introduce a modern set of regulatory objectives which apply to regulatory authorities, and professional principles that apply to all regulated legal practitioners. The regulatory objectives support an increased focus on on quality, improvement and proportionate risk-based regulation, while also incorporating the Better Regulation Principles and Consumer Principles.

12. Before making regulations under section 5(1), the Scottish Ministers must consult the Lord President, the Commission, the independent advisory panel of the Commission (“Consumer Panel”), the Competition and Markets Authority (“the CMA”), the category 1 and 2 regulators and approved regulators of licensed legal services providers.

Reason for taking power

13. These powers are required to enable the Scottish Ministers to respond strategically in light of any changing circumstances that require consideration and modernisation of appropriate regulatory objectives and professional principles. This power allows future changes to be made by way of regulations as opposed to primary legislation so that the principles and objectives can be adjusted in consequence of changing circumstances in the future delivery of legal services to ensure that standards and quality in the delivery of legal services are safeguarded.

Choice of procedure

14. The power relates to one of the central tenets of the Bill, broadening out the existing principles and objectives that apply to the delivery of legal services. Since it proposes that Scottish Ministers can bring about strategic changes of the regulatory structure and enables amendment of the Bill itself, and as failure to comply with these objectives and principles may lead to sanctions, the Scottish Government believes that it is appropriate that this power is subject to the affirmative procedure.

Section 8(5): Regulatory categories

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative

Provision

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

16. The Bill currently provides for two categories of regulator. The only current regulators are the Law Society of Scotland (“Law Society”) (a category 1 regulator), the Faculty of Advocates (“Faculty”) and the Association of Commercial Attorneys (“ACA”) (both category 2 regulators). The Bill sets out the different requirements that each category of regulator is subject to. Where a new regulator is approved by virtue of section 29 of the Bill, it will be deemed to be a category 2 regulator until such time as regulations under this section are made.

17. Before making regulations under this section, the Scottish Ministers must consult the body whose category is being assigned or changed, the Lord President, the Consumer Panel, each other category 1 and category 2 regulator and each approved regulator of licensed providers.

18. When considering whether a new regulator entrant to the sector should be assigned to category 1 or category 2, Scottish Ministers must have regard to:

- the type and range of legal services that are, or are to be, to be regulated,
- whether the legal services are, or are to be, provided directly to members of the public,
- the number of legal services providers that the regulator regulates (or is likely to regulate).

Reason for taking power

19. The Bill will implement a modern, forward-looking model for legal services regulation. Building on the existing regulatory framework, a two-category system for legal services regulators will provide a proportionate and risk-based approach, while allowing the framework to adapt to changes in the market.

20. This regulation-making power is required to enable the Scottish Ministers to respond to any fundamental changes undergone by regulators in terms of the factors that Scottish Ministers should have regard to which may require a change to an existing regulator’s categorisation, or to add a new legal services regulator which will require to be considered in respect of its categorisation or to remove a legal services regulator who is no longer operating in the market.

Choice of procedure

21. As this provision may add new duties on new or existing legal services regulators, which could impose significant additional regulatory burden on both the regulator and its members, the greater parliamentary scrutiny offered by the affirmative procedure is therefore considered appropriate.

Section 14(8): Compensation funds

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Negative

Provision

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

23. By virtue of section 14(8), the Scottish Ministers may by regulations make further provision in connection with the compensation fund that a category 1 regulator is under a duty to establish and maintain, or the rules a category 1 regulator must have for such funds.

24. Before making regulations, the Scottish Ministers must consult the Lord President, each category 1 regulator (or, where applicable, its regulatory committee) and the Consumer Panel.

Reason for taking power

25. The power allows Scottish Ministers to make further provision in connection with the compensation fund and the rules the category 1 regulator must have. The Bill, in sections 14(4) to (5), specifies certain matters that the compensation fund rules must cover. Where a new regulator has been approved by virtue of section 29 and the compensation fund is operational it may be that it is necessary for other matters to be covered by the rules. It may also be necessary to allow for changes to be made to compensation fund requirements to accommodate future changes in how such funds operate – as has been the experience with the existing compensation fund operated by the Law Society.

Choice of procedure

26. This power allows Scottish Ministers to make provision in connection with the compensation fund of category 1 regulators. The power also allows Ministers to make provision as to the rules category 1 regulators must have for their fund. Any regulations are anticipated to be of a technical nature. However, in doing so the provision requires a consultation requirement as safeguard. The negative procedure is therefore considered appropriate.

Section 20(6): Measures open to Scottish Ministers

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative

Provision

27. Section 20 of the Bill specifies the measures open to Ministers to take in relation to a category 1 or a category 2 regulator following a review of their regulatory performance. These include, for example, setting performance targets, imposing financial penalties and changing or removing some or all of the regulator's regulatory functions. Section 20(6) gives the Scottish Ministers a regulation-making power to specify other measures which may be taken by them, and also to make further provision about such the measures, for example making provision as to the procedures to be followed when taking them.

Reason for taking power

28. Section 20 specifies a range of measures to allow the Scottish Ministers to ensure that category 1 or category 2 regulators carry out their functions effectively and appropriately. Section 20(6) is intended to be used should it be discovered in practice that further additional measures would be helpful tools for the Scottish Ministers to have. This could be because the existing suite of powers are found to be insufficiently robust or, at the other extreme, are disproportionately severe. This power prevents such a situation frustrating the policy intention behind this section, by allowing the Scottish Ministers to ensure that they have the appropriate tools to tackle any poor performance on the part of regulators.

29. This section is also intended to be used to give further details around the specifics of the measures which can be taken, and the procedures involved. The exact details of the measures and the procedures surrounding them are considered best set out in subordinate legislation, as this allows greater flexibility to make changes/updates as may be required in the future and a lot of what will be provided for will be procedural.

30. The regulation-making power also allows the Scottish Ministers to specify the maximum amount of financial penalty which may be imposed on a regulator, in accordance with paragraph 13 of schedule 2 of the Bill.

Choice of procedure

31. The power in section 20(6) is one which allows Scottish Ministers to create new sanctions on regulators. Given the potential impact of these sanctions on regulators, and the breadth of the power, the affirmative procedure is considered appropriate to confer the appropriate level of scrutiny over the power's exercise.

Section 26(1): Regulatory scheme

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative

Provision

32. Section 25 of the Bill makes provision for a body to apply to the Lord President and the Scottish Ministers for the purpose of enabling persons authorised by the body to acquire rights to conduct litigation on behalf of members of the public, rights of audience, or the right to provide other types of legal services.

33. An application for accreditation under this section must include a draft regulatory scheme. Section 26 sets out what must be included in the draft regulatory scheme and subsection (1)(d) allows Scottish Ministers to make provision about other regulatory matters which should be included in such a scheme.

Reason for taking power

34. The regulation-making power gives the Scottish Ministers flexibility to outline and expand upon the regulatory matters which are to be covered by the regulatory schemes, where necessary (for example, to add clarity, or to address unforeseen issues). It is anticipated that this measure will be used for operational reasons

Choice of procedure

35. While it is considered that this power will be used to address procedural matters, as outlined above, it is possible that it could more significantly alter the content of regulatory schemes of accredited regulators. AS this power could be used to add new requirements and impose additional regulatory burden on accredited regulators and authorised providers, it is considered that greater parliamentary scrutiny is appropriate.

Section 29(5): Approval of application and giving effect to the regulatory scheme

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Negative

Provision

36. This section applies where the Lord President and the Scottish Ministers have considered an application by a body to be accredited to provide legal services in accordance with section 28. Where an application has been approved, the Scottish Ministers must, as soon as reasonably practicable, make provision to give effect to the draft regulatory scheme and must lay before the Scottish Parliament draft regulations under section 8(5) to assign the body as a category 1 or category 2 regulator.

Reason for taking power

37. Chapter 3 of Part 1 of the Bill repeals sections 25 to 29 and schedule 2 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (which relate to a body acquiring rights for its members to conduct litigation and rights of audience) and restates the provisions in the Bill. The new sections are more broadly stated, allowing for a body to acquire wider rights to provide other types of legal services. This is intended to allow for new regulators to enter the legal services sector in Scotland in future.

38. Under the 1990 Act, a draft regulatory scheme was given effect by way of secondary legislation and it is considered that this remains appropriate for new applications made through Chapter 3 of Part 1 of the Bill. Under the provision in the 1990 Act, the aforementioned secondary legislation took the form of an act of sederunt or an act of adjournal. The Bill will now require such secondary legislation to take the form of regulations. It is viewed that this is more appropriate as the new provisions allow for rights to provide legal services outside of those exercised in the courts. However, it will remain subject to the Lord President's approval.

39. Secondary legislation is also required to assign any new regulator to a category and ensure that the relevant provisions of the Bill apply to that body.

Choice of procedure

40. As the categorisation of any new regulator by virtue of section 8(5) will be subject to the affirmative procedure, this provision is subject to the negative procedure to prevent a duplication of the Parliament's time in scrutinising these measures.

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

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Negative

Provision

41. Section 33 relates to the carrying out of a review of an accredited regulator's regulatory scheme. Such a review may be carried out by the regulator at any time or must be carried out at the joint request of the Lord President and Scottish Ministers. Subsection 33(3)(b) of the Bill requires the Scottish Ministers to make, by regulations, provision to give effect to a regulatory scheme where revisions carried out following a review have been approved by the Lord President and Scottish Ministers.

42. Where the Lord President and Scottish Ministers agree that proposed revisions to a regulatory scheme are not satisfactory or that proposed revisions should have been made but have not been, Ministers may make direct the body to apply such revisions and make regulations to give effect to the revised regulatory scheme by virtue of subsection (5)(b).

Reason for taking power

43. As approval of the regulatory scheme of an accredited regulator will be given effect by way of secondary legislation, it is appropriate that any revised regulatory scheme is given effect in the same manner.

Choice of procedure

44. This provision mirrors section 42 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 which it is intended to replace and which provided for scrutiny by the Lord President and Scottish Ministers. It is considered likely that revisions to a regulatory scheme will predominantly be of a minor or technical nature, to address unforeseen issues which arise following approval of a regulatory scheme. As revisions to the scheme will have been scrutinised by the Lord President in his oversight role in legal services regulation, and in balancing the need for appropriate scrutiny against the valuable resource that is parliamentary time and effort, it is considered that negative procedure is most appropriate here.

Section 34(1): Revocation of acquired rights

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish Statutory Instrument**
Parliamentary procedure: **Affirmative**

Provision

45. Where it appears to the Scottish Ministers that a body has failed to comply with a direction under section 33(5) to apply revisions to its regulatory scheme, the Scottish Ministers may by regulations revoke the approval of the application under section 29. Regulations under this section may only be made with the prior agreement of the Lord President.

Reason for taking power

46. Section 29 states that regulations should give effect to a regulatory scheme made under Chapter 3 of Part 1 of the Bill. Therefore, it is appropriate that the revocation of any regulatory scheme, where appropriate, should also be through regulations.

Choice of procedure

47. Due to the potential impact of the revocation power in section 34 on a body, its members and the provision of legal services, the affirmative procedure is considered the appropriate level of Parliamentary scrutiny.

Section 35(1): Replacement regulatory arrangements for authorised providers

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative

Provision

48. Section 35 of the Bill provides that the Scottish Ministers may, by regulations:

- establish a new body with a view to it becoming a regulator,
- amend the regulatory functions of a category 1 or 2 regulator, or
- specify the circumstances whereby the Scottish Ministers or a specified body may directly authorise and regulate authorised providers.

49. This may be done with a view to regulating the authorised providers of a discontinuing regulator, which is a regulator which has made an application to surrender its rights, is subject to the revocation of acquired rights by virtue of section 34, has otherwise ceased operating or which, in the opinion of Scottish Ministers, is likely to cease operating.

50. The intention here is to allow for continuity of regulation in the event that a category 1 or 2 regulator is no longer able to function as a regulator for the reasons outlined above.

Reason for taking power

51. The regulation making power is a mechanism by which the Scottish Ministers may ensure that regulation of legal services providers may continue in the event that an existing category 1 or 2 regulator is to cease to carry out some or all of its functions.

Choice of procedure

52. While it is considered unlikely it will be used, the power provided by section 35 is significant and could have a direct impact on those individuals who are legal services providers of a discontinuing regulator, in terms of changing the body they are regulated by. It is considered that this power should be subject to affirmative procedure in order to allow the Parliament a high level of scrutiny in relation to the question of whether the Scottish Ministers should use this power.

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

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Negative

Provision

53. Section 39 of the Bill places a requirement on legal businesses to be authorised to provide legal services, in order to provide for ‘entity regulation’ of legal firms. It is to be an offence for a person to own or operate a legal business which provides legal services without that business being authorised in accordance with the Bill.

54. A person who commits an offence under this section is liable on summary conviction to a fine not exceeding £20,000. Section 39(6) provides that the Scottish Ministers may by regulations amend the maximum fine which a person may be liable to pay for committing this offence.

Reason for taking power

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

Choice of procedure

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

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

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Negative

Provision

57. Section 40 sets out that it is an offence to pretend, with intent to deceive, to be an authorised legal business, and a person who commits this offence may be liable on summary conviction to a fine not exceeding £20,000. Subsection (3) provides that the Scottish Ministers may by regulations amend the maximum fine which a person may be liable to pay for committing this offence.

Reason for taking power

58. This provision allows for flexibility to adjust the maximum amount from time to time to reflect inflation, in line with section 39.

Choice of procedure

59. Similar to section 39, the maximum level of financial penalty is a relatively straightforward issue insofar as the making of regulations are concerned. They do not raise any issues of complexity and therefore the negative procedure is considered appropriate.

Section 41(2) & (6) – Rules for authorised legal business

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative

Provision

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

61. Section 41(2) provides that the rules are to contain authorisation rules and practice rules as well as including provision for reconciling different sets of regulatory rules, and deal with such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as the regulations may specify).

62. Section 41(6) gives Scottish Ministers an additional regulation-making power in this context to confer authority for the ALB rules of category 1 regulators to deal with the provision by their authorised legal businesses of such other services (in addition to legal services) as the regulations may prescribe. Ministers are also given the power to specify the extent to which (and the manner in which) the ALB rules may do so.

Reason for taking power

63. The power in section 41(2) gives the Scottish Ministers flexibility to expand upon the regulatory matters which are to be covered by the regulatory rules, if this proves necessary (for example, to add clarity, or to address unforeseen issues). Regulatory details and requirements are likely to become clear or change once the regulatory rules operate in practice. Subordinate legislation is considered the best approach to address operational details.

64. The power in section 37(6) will allow the Scottish Ministers to make regulations which authorise regulatory schemes to deal with other services in addition to legal services. This may be used if, once regulatory rules are in operation, it becomes apparent that other services provided by authorised legal businesses should be covered by the ALB rules.

Choice of procedure

65. These powers have the potential to alter the content of the regulatory rules of category 1 regulators, adding new requirements which could impose additional regulatory burden on both the

regulators and legal businesses. The greater parliamentary scrutiny offered by the affirmative procedure is therefore considered appropriate.

Section 45(2): Financial sanctions

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Negative

Provision

66. Section 45 of the Bill sets out that a financial penalty may be provided for in the practice rules relating to the measures an accredited regulator may take where an authorised legal business breaches the regulatory scheme or where a complaint against an authorised legal business is upheld. Section 45(2) gives the Scottish Ministers the power to specify by regulations the maximum amount of that financial penalty. Section 45(8) of the Bill provides that regulations under this subsection are subject to the negative procedure and may not be made without the agreement of the Lord President.

Reason for taking power

67. The power to prescribe the maximum penalty in regulations allows flexibility to adjust the maximum level from time to time to reflect inflation or changes in the market and provides an opportunity to consider its application with stakeholders in respect of commencement.

Choice of procedure

68. Similar to sections 39 and 40, the maximum level of financial penalty is a relatively straightforward issue insofar as the making of regulations are concerned. They do not raise any issues of complexity and therefore the negative procedure is considered appropriate. Regulations may not be made without the agreement of the Lord President, providing for an additional safeguard.

Section 46(3): Reconciling different rules

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Negative

Provision

69. Section 41(2)(b) as read with section 46(1) requires regulatory rules to include provision for reconciling different sets of regulatory rules so as to prevent or resolve regulatory conflicts and avoid unnecessary duplication of regulatory rules (for example, by applying existing regulatory rules in so far as possible).

70. A regulatory conflict is a conflict between any of (a) the ALB rules of a category 1 regulator for authorised legal businesses, (b) any professional or regulatory rules made by the regulator in respect of the persons who provide legal services that it regulates, and (c) any professional or regulatory rules made by any other body which regulates the provision of legal or other services.

71. Section 46(3) of the Bill enables Scottish Ministers, by regulations, to make further provision about regulatory conflicts (such as may involve a category 1 regulator). Before making such regulations under the Scottish Ministers must have the Lord President’s agreement.

Reason for taking power

72. The general approach is that it is for the approved regulators to resolve regulatory conflict, in discussion as appropriate with other regulators. However, should this prove impossible, or unduly complicated this power allows the Scottish Ministers the flexibility to ensure that such conflicts can be resolved. As the provisions to be made will depend on the detailed circumstances of any particular conflict which may arise and addresses an issue which is likely to require quick resolution, subordinate legislation is considered appropriate.

Choice of procedure

73. The negative procedure is considered most appropriate in this instance as the power addresses a narrow area which is well defined in the Bill. Section 46(1) describes the scope of the provision which must be in the approved regulator’s regulatory scheme, and section 46(2) defines “regulatory conflict” for the purposes of the section.

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

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative

Provision

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

75. Regulations under section 49(1)(b) (allowing the Scottish Ministers to authorise legal businesses) may provide for Part 2 of the Bill (relating to the regulation of legal businesses) to apply with or subject to such modifications as the regulations may specify. The section goes on to provide that no regulations are to be made under this section without the agreement of the Lord President, and unless the Scottish Ministers believe that their intervention is necessary, as a last resort, in order to ensure that the provision of legal services by legal businesses is regulated effectively. This may be as the result of a regulator ceasing to operate or as a result of a revocation of this role from another regulator.

Reason for taking power

76. The provision is intended to ensure that there always an appropriate category 1 regulator in place to regulate authorised legal businesses should there be no other suitable regulator.

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

Choice of procedure

78. The power is, as section 49 makes clear, not to be used unless the Scottish Ministers believe that their intervention is necessary, and as a last resort, in order to ensure that the provision of legal services by legal businesses is regulated effectively. The agreement of the Lord President is also required, therefore the affirmative resolution is considered appropriate.

Section 56 inserting new section 12A into the Legal Profession and Legal Aid (Scotland) Act 2007: Services complaint upheld: failure to refund fees and outlays

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Negative

Provision

79. Section 56 of the Bill inserts new section 12A into the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”), relating to a direction by the Commission to a practitioner or their employer to refund fees of a client where a complaint has been upheld. Where any proportion of that fee has not been paid within 90 days, as a result of the death, insolvency or cessation of trade of the practitioner or their employing firm, that fee refund may be treated – for the purposes of professional indemnity – as if it were an amount of compensation.

80. Subsection (3) places a cap of £35,000 on the amount of fee refund, taken together with any other compensation the practitioner has been directed to pay. Subsection (4) provides that the Scottish Ministers may make regulations which change the £35,000 maximum amount. Before making such regulations, the Scottish Ministers must consult with the relevant professional organisations (regulators) and such groups representing consumer interests as they consider appropriate.

Reason for taking power

81. This power allows for flexibility to adjust the maximum amount from time to time to reflect inflation.

Choice of procedure

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

Section 86 inserting new section 32A into the 1980 Act: Power to adjust what constitutes restricted legal services

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative

Provision

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

84. Before making regulations under this section, the Scottish Ministers must consult the Lord President, each category 1 and 2 regulator and the CMA.

Reason for taking power

85. This power allows the Scottish Ministers to widen or narrow the scope of legal services that may only be undertaken by qualified persons, i.e. regulated legal professionals. The intention is to allow the legal activities that are reserved to regulated legal professionals to be amended to reflect significant changes in the legal services market, or to respond to emerging risks.

Choice of procedure

86. This provision is subject to the affirmative procedure to reflect that it may have a notable impact on those who currently provide regulated and unregulated legal services. The greater parliamentary scrutiny offered by the affirmative procedure is therefore considered appropriate.

Section 90: Ancillary provision

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish Statutory Instrument**
Parliamentary procedure: **Affirmative procedure if modifying primary legislation otherwise negative procedure**

Provision

87. Section 90 of the Bill sets out that the Scottish Ministers may by regulations 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 this Act or any provision made under it. Regulations under this section may modify any enactment (including this Act).

Reason for taking power

88. This enabling power is sought to provide flexibility to quickly and effectively make any necessary adjustments that might be needed for the purposes of, in connection with, or for giving full effect to the Bill. Several of the Bill's provisions are inserted into or interact with other legislation, particularly the 1980 Act and the Legal Services (Scotland) Act 2010. While the Scottish Government has given careful consideration to such interactions, the Bill may give rise to a need for ancillary provision. The power to make such provision is common in Bills to provide flexibility to make any adjustments in light of experience in relation to the operation of the Act as timeously as possible.

89. The Scottish Government considers that it is appropriate to take a power to deal with any ancillary matters that might emerge in the course of implementing the Bill, so that any unexpected issues which require ancillary provisions can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed

Choice of procedure

90. If regulations made using the power were to textually amend any primary legislation, they would be subject to the affirmative procedure. Otherwise, where the regulations are clearly limited in scope and effect, such as transitional or transitory provisions intended to address temporary issues, the negative procedure is considered appropriate. This approach is typical for ancillary powers of this type and ensures that the Scottish Parliament is able to closely scrutinise and determine whether to approve any draft regulations that change the text of primary legislation before they can be made. It is considered that these procedures would provide for an appropriate level of Parliamentary scrutiny and control in such cases.

Section 92: Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: No procedure

Provision

91. Sections 92 and 93 come into force on the day of Royal Assent. Sections 89 to 91 come into force on the day after Royal Assent. The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint. Regulations under this section may include transitional, transitory or saving provision, make different provision for different purposes.

Reason for taking power

92. This power allows the Scottish Ministers to control the commencement of the various provisions as they consider appropriate. The intention is to stagger commencement in liaison with the bodies that will be affected, to ensure that each body is prepared to transition to the new framework within the Bill.

Choice of procedure

93. As is usual for commencement orders, no provision is made for laying the order in Parliament. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. Commencement? regulations bring into force provisions, the substance of which Parliament has already scrutinised.

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

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative

Provision

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

95. Before making regulations, the Scottish Ministers must consult the Lord President, the Law Society's regulatory committee and the Consumer Panel.

Reason for taking power

96. The provision allows Scottish Ministers to make further provision in connection with the Guarantee Fund. The fund provides an additional level of protection to consumers, compensating those who have suffered loss due to the dishonesty of a legal practitioner. However, weaknesses in the fund have been identified, for example, there are no provisions to prevent a claimant submitting multiple separate claims, and there is no restriction on the total value of claims against any one solicitor. There is the potential for the fund to be exhausted in such scenarios. While the Bill seeks to address these concerns with amendments to section 43 of the 1980 Act, there may be potential for other currently unforeseen matters to arise that threaten the fund.

Choice of procedure

97. As this power relates directly to the existing fund of the Law Society, the regulatory body who has the largest membership by a significant margin, the affirmative procedure is considered appropriate to ensure an appropriate level of scrutiny to any change to the fund which is likely to affect legal practitioners and consumers most.

Schedule 2, Paragraph 23: Making changes to regulatory functions

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Super-affirmative

Provision

98. Where the Scottish Ministers are satisfied that an act or omission of a category 1 or 2 regulator has had (or is likely to have) an adverse impact on the observance of the regulatory objectives, and the matter cannot be addressed in the taking of other measures provided for in section 20 of the Bill, they may make changes to that regulator's regulatory functions.

99. Where the regulator is not an accredited regulator, or it did not acquire its rights by virtue of an application under section 25 of the 1990 Act, these changes must be made by regulations. Such regulations may change or remove some or all of the regulator's regulatory functions. Such regulations may amend an enactment and may transfer the regulation of legal services providers to another regulator.

100. Paragraph 26 of schedule 2 sets out parliamentary procedure for any regulations made under paragraph 23. This provides that regulations may not be made unless:

- the regulator has been given a decision notice,
- consultees have been provided with draft regulations,
- draft regulations and an explanatory document have been laid before the Scottish Parliament and those draft regulations have been approved by resolution of the Parliament.

Reason for taking power

101. The power relates to the changes of a regulator's functions. Where that relates to a regulator whose regulatory scheme was approved by virtue of the 1990 Act, or for future regulators who achieve accreditation by virtue of the Bill, this may be done via direction. This is not considered possible for existing regulators whose regulatory functions are set out in primary legislation, for example, the Law Society. It is considered, in such a case, that regulations are the most appropriate way to make changes.

Choice of procedure

102. It is considered that making changes or removing some of the regulatory functions of an existing legal services regulator is a significant step which would require an extra level of parliamentary scrutiny. It is a step that is expected to be taken as a last resort and, as such, it is appropriate that additional layers of explanation and scrutiny have been required before any such steps are taken.

103. The greater parliamentary scrutiny offered by the super affirmative procedure is therefore considered appropriate.

This document relates to the Regulation of Legal Services (Scotland) Bill (SP Bill 25) as introduced in the Scottish Parliament on 20 April 2023

REGULATION OF LEGAL SERVICES (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

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