OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 24 October 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 24 October 2023

CONTENTS

DELEGATED POWERS AND LAW REFORM COMMITTEE

28th Meeting 2023, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Oliver Mundell (Dumfriesshire) (Con)
Mercedes Villalba (North East Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Esther Roberton
Morag Ross KC (Faculty of Advocates)
Rachel Wood (Law Society of Scotland)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 24 October 2023

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 28th meeting in 2023 of the Delegated Powers and Law Reform Committee. We have received apologies today from Mercedes Villalba. Before we move to the first item on the agenda, I remind everyone to switch off mobile phones and electronic devices or put them to silent.

The first item of business is to decide whether to take items 6, 7, 8 and 9 in private. Is the committee content to take those items in private?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

09:31

The Convener: Under agenda item 2, we are considering two instruments, on which no points have been raised.

Parking Prohibitions (Enforcement and Accounts) (Scotland) Regulations 2023 [Draft]

Social Security (Residence and Presence Requirements) (Israel, the West Bank, the Gaza Strip, East Jerusalem, the Golan Heights and Lebanon) (Scotland) Regulations 2023 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

09:32

The Convener: Under agenda item 3, we are considering three instruments. An issue has been raised on the following instrument.

Council Tax Reduction (Scotland) Amendment (No 3) Regulations 2023 (SSI 2023/268)

The Convener: The instrument makes amendments to the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 and the Council Tax Reduction (Scotland) Regulations 2021 to ensure that certain types of payments, largely based on compensation or redress schemes, are disregarded for the purposes of calculating entitlement to council tax reduction. The instrument also makes provision to ensure that the capital of a person who is liable to pay council tax has no impact on their entitlement to second adult rebate.

In correspondence with the Scottish Government, the committee asked whether the Government considers it appropriate to insert the new paragraph 46 under part 5 of schedule 4 of the 2021 regulations, under the heading "Payments", as the amendment does not concern a payment; it concerns the whole of a person's capital. The Scottish Government recognised that it would be helpful to the reader to insert a new part number and heading into schedule 4 of the 2021 regulations at the next available opportunity, which it anticipates will be February 2024, when other substantive amendments to the 2021 regulations are expected to be made.

Does the committee wish to draw the instrument to the attention of the Parliament on the general reporting ground, in that it inserts under the heading "Payments", a new paragraph that concerns the whole of a person's capital rather than a payment?

Members *indicated agreement.*

The Convener: Does the committee welcome that the Scottish Government has undertaken to insert a new part number and heading into schedule 4 at the next available opportunity?

Members *indicated agreement.*

The Convener: Also under this agenda item, no points have been raised on the following instruments.

Title Conditions (Scotland) Act 2003 (Conservation Bodies and Rural Housing Bodies) (Miscellaneous Amendment) Order 2023 (SSI 2023/278)

National Health Service (General Medical Services Contracts and Primary Medical Services Section 17C Agreements) (Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/281)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instrument not subject to Parliamentary Procedure

09:33

The Convener: Under agenda item 4, we are considering one instrument, on which no points have been raised.

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Witness Citations in Solemn Proceedings) 2023 (SSI 2023/276)

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Regulation of Legal Services (Scotland) Bill: Stage 1

09:34

The Convener: Under item 5, we are taking evidence on the Regulation of Legal Services (Scotland) Bill. I welcome Esther Roberton, the author of "Fit for the Future—Report of the Independent Review of Legal Services Regulation in Scotland". Esther and I sat on the board of the Scotland's Futures Forum think tank until I left earlier this year.

Esther, do not worry about turning on your microphone during the session as that will be done by broadcasting. There is no need to answer every question. You are welcome to follow up any question in writing after the meeting, if you wish.

We move to questions, which I will open. Will you give the committee an overview of the work that you undertook in 2017-18 on the regulation of legal services and the main points of your report?

Esther Roberton: Thank you very much for the invitation. It is a bit strange to be here and not have been at the lead committee, but I am grateful for the opportunity to at least set out some context. When we were chatting outside, I said to our colleagues from the Law Society of Scotland that it is strange that it is exactly five years this week since the report was published. As a caveat, that means that I am perhaps not over the detail as much as I was at the time. I am obviously a bit disappointed that it has taken so long and that, needless to say, my main recommendation has not been accepted, but I will park that.

The review was undertaken over 18 months. I was asked by the then Minister for Community Safety and Legal Affairs, Annabelle Ewing, as an individual, to do the report, albeit I was supported by an advisory panel, so the report is mine—it was not a committee report. Over that time, we did significant engagement with consumers, professional lawyers, advocates and others, as well as a significant amount of research, including looking at the international context. I was asked to come up with recommendations for a modern and principles-based form of regulation.

The key for me was that I was asked to find a way to balance the professional interest with the interests of the public and the consumer. To a certain extent, that is almost irreconcilable, other than the fact that we all want the best for Scotland. It is no surprise to me that then, as now, consumer bodies were pretty much unanimous in supporting the Competition and Markets Authority position, which is the position that I recommended in the report and which is that regulation should be

independent of both Government and those regulated.

We had significant discussions about that main headline and about the various details in the report. However, on the detail, there was a lot of agreement between the consumer bodies and the professions about some of the other recommendations, including, not surprisingly, major reform of the complaints procedure, which does not meet the needs of anyone—solicitors or the consumers of services. In fact, I heard some horror stories about the impact that the current complaints procedure has had on many solicitors who were involved in that process.

I have watched developments with interest and have remained of the view over these years that independent regulation is still the best approach. Professor Stephen Mayson at University College London has since published a report on England and Wales, where there was already further separation than in Scotland between the regulation and membership bodies and, interestingly, he has now gone on to recommend total separation.

More recently, we had a visit from Professor Ron Paterson of New Zealand. It is interesting that he had been commissioned by the New Zealand Law Society to look at all options up to and including independent regulation. He has, with his panel, recommended that it should be independent, and the New Zealand Law Society has accepted that recommendation and has already published materials in preparation for becoming solely a membership body.

For me, that principal recommendation was not just about being independent of the regulators. At that stage, I made the point that we as a nation of 5.5 million people have fewer than 15,000 legal professionals. We have 11,500 solicitors, 450 advocates and a small number of commercial attorneys—as they were then; I think that they have changed their name—and solicitor advocates. We had a minimum of five organisations involved in that regulatory process, which in itself complicated things.

However, the process was also incredibly complex, and part of my recommendation was that new legislation should be drafted for an independent regulator that would be much more principles based and high level and would allow the regulator to deal with necessary changes over time, rather than having to keep coming back to Government and Parliament.

In my view, regulation should be independent of the professions, but one area where we—the Faculty of Advocates, the Law Society and I—agreed was that regulation should absolutely be independent of Government, which makes today's evidence session an interesting one. I think that someone said in response to the consultation that one reason for that is that we, as individuals, might one day want legal services to support us in action against the Government, and that we should not give the Government power to affect the regulatory process. However, for me, it is not about that type of negative argument; it is that regulation should be completely independent of day-to-day intervention—I will not say interference—by Government.

In conclusion, I do not think that the current model serves either the profession or the individual. My first public speaking engagement after the publication of the report was at a Harper Macleod conference, at which Lorne Crerar, the chair and founder of that partnership or firm—who supports the recommendation—made the point that he wants a strong membership body to represent him, his profession, his firm and Scots law, but that he does not want that same organisation to be prosecuting lawyers who might be guilty of misconduct. The point has been made by a range of people that, if a solicitor is going through a complaints procedure, the society is part of the organisation that is involved in that process, so how can it represent the solicitor if it is also prosecuting them?

The current model does not serve the profession any better than it serves the public, so I stand by my recommendation that the regulation should be independent, and that means independent of Government, too. That makes for an interesting discussion about the delegated powers, when I think that it should not have powers in the first place.

The Convener: Thanks very much for that comprehensive opening answer. I will hand over to Jeremy Balfour.

Jeremy Balfour (Lothian) (Con): Good morning, and thank you for coming, Esther. You dealt with some of this in your opening answer, but what is your view on the Regulation of Legal Services (Scotland) Bill, which the Government has introduced? Perhaps you could concentrate on the delegated powers aspect.

Esther Roberton: As I said, the current model is incredibly complex, and I think that solicitors and advocates would agree with that. That applies not only to the complaints procedure but to the broader regulatory procedure, and my concern is that the bill risks making that even more complex rather than simplifying it, which was one of the objectives that I was given to achieve in my report.

I read the bill, but I struggled with some of it. Besides complicating the process, it means that in future there would need to be Government and

Parliament intervention at various stages, which I do not think is helpful to anybody.

Jeremy Balfour: If it is not Parliament or the Government that intervenes—again, you outlined some of this in your opening answer—who should have that power?

Esther Roberton: Sorry. I should be very clear: I do not believe that Government should have a role, but I think that Parliament has to have a role. Government's role should stop with legislation to establish a new regulator. My model is that Parliament should appoint the chair of the regulator, and that chair should not be able to be removed without a majority of two thirds of Parliament, so that no individual party can ever intervene.

One of the people on my advisory panel was Jim Martin, who was the Scottish Public Services Ombudsman and who went on to be the chair of the Scottish Legal Complaints Commission. He explained to me—I should have known, but I did not—the process of the Parliament appointing the ombudsman and what happens thereafter. As far as I am concerned, there is a role for Parliament, but it is a fairly hands-off role.

I believe that, in the interest of transparency, the regulator should submit a report to Parliament, and I have recommended that Audit Scotland should have oversight, because there is a lot of discussion among members of the public and the profession about the amount of money that they pay to the society, the faculty and the SLCC without much clarity about how that money is spent. I consulted Audit Scotland, and it felt that, if there was a parliamentary appointment of the chair and the regulator operated independently, it would be happy to provide scrutiny.

Jeremy Balfour: That is helpful. Just to push you slightly, do you think that there should be any delegated powers?

Esther Roberton: No. I do not believe that the Government should have powers. Therefore, how could it have delegated powers?

Jeremy Balfour: Okay—thanks.

Bill Kidd (Glasgow Anniesland) (SNP): Thank you very much for your presentation. You are obviously aware of—and you have actually made remarks about—comments that have been made by key legal stakeholders in response to your report and the bill as introduced by the Government. The Government has indicated in response to some of the concerns expressed that it plans to lodge amendments at stage 2. Do you have a response to what it has proposed, and do you have any views specifically in relation to criticisms from legal stakeholders about the delegation of powers in the bill?

09:45

Esther Roberton: No. I have to say that that is an area that is more detailed than I am aware of. I know that the Government has said that it will lodge amendments, but I am not aware of the detail of those amendments.

Part of the difficulty that the Government has faced—I absolutely acknowledge that it has faced a challenge—is that the profession is not unanimous in this. The Law Society has a lot of support among its members for retaining the regulatory function, but a range of senior solicitors, such as Lorne Crerar, Brian Inkster and others, believe that it should be independent, and they would take the same view as me that there should therefore be no delegated powers. The powers that I have read about are incredibly complex, and that is my concern.

Bill Kidd: Asking this might be too much, because you have not seen what the proposals are as yet, but can you see any way towards a meeting of minds?

Esther Roberton: I think that I was hinting at it earlier when I made the point about balancing the professional and the consumer interest, so no, I do not think that there is.

Something came to me when I was preparing for today. A senior member of the Law Society came along to some of my engagement events, and I remember him saying to me that I had made him realise that, if the public's perception is that there is a conflict and that society will always come down on the side of the lawyer, even if that is not true, that perception is bad for the profession. That is the public perception. It was interesting that he followed that up by saying that he had, on reflection, realised that it does not happen often, but the likelihood is that it is not just a perception—it is reality.

In the end, the Law Society is a professional body that is there to support its members and there is an inherent conflict there. As I have said, it came to me fairly early on that the conflict is not just between the public and the profession; it can sometimes be between the profession and its membership bodies.

Other professions have made the separation. In one of the responses to the original consultation, I saw reference to the architects. Of course, the person who responded had got it quite wrong, because there is now the Architects Registration Board, which handles the registration and regulation of architects, while the Royal Institute of British Architects and the Royal Incorporation of Architects in Scotland are the membership bodies. The General Medical Council and the British Medical Association are similar. They have already moved in that direction.

I do not believe that the two can be reconciled. I think that that is my answer.

Bill Kidd: I just want to put some emphasis on things. In light of the Scottish Government's commitment to work with stakeholders to lodge amendments on the delegated powers, which we are not so excited about, do you have any views specifically on what could or should change? Is there anything in the bill that you feel strongly that you would like to keep?

Esther Roberton: Yes, there are things in the bill that I would be keen to keep, but that is difficult when they are not going to be within the bigger picture. Things such as the improvement to complaints procedures and the like are positive, but we should not have needed to legislate for those things. In most similar organisations, it would be for an independent regulator, in partnership with the consumer bodies and the profession, to develop a complaints procedure that would meet people's needs, that was much more risk based and streamlined, and that would save the profession from spending lots of money on court cases and the like. There is merit in that.

I have to say that I have not studied the detail of those provisions in the bill to see how far they go. One thing that I found interesting—I went back to study it, although I do not have my copious notes with me—was about the titles "lawyer" and "solicitor". I realised that I would not die in a ditch on that, because there were balanced views about whether the two titles should be regulated or only the one. It went back to being risk based.

The issue came up at the time because there was a high-profile case in which someone had been struck off as a solicitor. He became an independent practitioner and called himself a lawyer and, of course, the public was confused by that. However, we should not legislate on the basis of one or two bad apples. I would not lose sight of things like that.

The point is that the Government is agreeing to work with stakeholders. The biggest point of learning for me is that the Competition and Markets Authority is categoric that, not just in this field but generally, independent regulation of those regulated is the right way. I had not realised that the CMA's position is purely advisory, but you are not going to get it to change its mind on that. It has been too explicit about it.

You will not be able to satisfy those consumer bodies that feel that independent regulation is the right way forward. I know that civil servants have been working to try to find some middle ground, which is why it has taken five years, but I do not think that that middle ground can be found.

Bill Kidd: Thank you for that, because that is exactly what I was going to ask you about. Given that it is five years since the report was produced, is everything in the report as up to date as it could be?

Esther Roberton: As you can see, I have been back through it in some detail, and to the best of my knowledge it is, although things might have changed that I do not know about.

Again, in our discussions outside the committee room, we were talking about alternative business structures. Thirteen years on, the legislation on that is still to be fully enacted and, actually, what has happened is that people have found workarounds to make alternative arrangements. I have been struck by how desperately slowly change happens in this sector—it is astonishing, really. However, I would not change anything major in the report, although I would say that our professional reputations and businesses have taken a bit of a hit.

In 2017, Lorne Crerar made the point that, when he became chair of Harper Macleod, there were 34 independent Scottish law firms operating and that that number was now down to, I think, six or eight. Our businesses are losing ground. I have discovered that New Zealand, which has a smaller population than us, has 16,000 legal professionals; we now have 12,000. I apologise to the lawyers when I say that I do not know whether that is a good thing, but it is a statement.

One of my arguments was that, if we had professional bodies that were not involved in regulation, they could focus their efforts on promoting Scottish law across the world, because there is scope for us. Somebody quite senior, who I will not name, said, "We're a small jurisdiction; we'll not get a big slice of the cake." The answer to that is that, no, we will not get a big slice but that a very small slice of a very big cake could make a big difference to the Scottish economy. That was another angle that I was asked to look at, and there is scope for improvement.

I do not think that anything fundamental in the report has changed.

Bill Kidd: On what happens in New Zealand, where Scotland has links and all sorts of stuff, do we need to learn more about what is going on over there and are correspondence and conversations, at least, needed between Scotland and New Zealand to develop that? Perhaps we could move things on better by working together.

Esther Roberton: Yes, absolutely. I do not know about the Faculty of Advocates but, to be fair to the Law Society, it has very significant international links. I make the point in the report that, not just in legal services but professional services generally, that is the direction of travel. In my view, that is where we will go.

I do not normally admit to being competitive but, when I met Ron Paterson, I said that I hoped that we would get there first. It now looks as though that will not be the case. As I said, I have seen a video and papers produced by the New Zealand Law Society about the preparations that it is already making, so I assume that it must think that its Government is going to legislate, albeit that New Zealand has just had an election and the legislative priorities of an incoming Government might be different. However, yes, we need to work more closely. England and Wales are also moving in that direction and have already made significantly more progress than we have in Scotland.

Bill Kidd: Thank you.

Oliver Mundell (Dumfriesshire) (Con): I want to come back on your point about the number of independent law firms. I assume that the numbers that you gave relate to big whole-service law firms.

Esther Roberton: Yes.

Oliver Mundell: Obviously, there are hundreds of smaller independent law firms. Thinking about my constituents, I would say that most people probably interact with smaller independent firms.

Esther Roberton: Yes, that is an important point. The conference that I spoke at the day after the report was published was for Harper Macleod's HM Connect, which is a network of small law firms to which it provides support. For example, a small firm might be asked to do something for a client that is outwith that firm's specialism. That is not to undo that, but those small firms are struggling, too, and the complexity of regulation is one of the things that does not help them either.

Oliver Mundell: I do not deny that. I just felt that it was important to clarify that the sector is probably still a bit more diverse than just 16 firms.

Esther Roberton: Yes. To be fair, the firms have not all disappeared. They are here, but they have merged or been taken over by other companies.

Oliver Mundell: You said that, overall, you do not feel that the bill is an improvement. You think that it makes things more complex.

Esther Roberton: Yes. There are areas where the bill improves things but, overall, it makes things much more complex.

Oliver Mundell: So, on balance, you are not in support of the legislation as proposed.

Esther Roberton: In principle, no, not at all.

Oliver Mundell: I will just put that issue to one side and ask you to step away from that position, because obviously we are focusing on the delegated powers in the bill. Do you think that, with the model that the Government has opted for, there is a problem with the specific delegated powers?

Esther Roberton: As I have said, I have read them, but I cannot say that I understand them all. It is difficult to take the issue in isolation—indeed, it is almost impossible.

Oliver Mundell: So you do not have a firm view on the specific delegated powers.

Esther Roberton: No. Some of them—on the complaints procedures and the like—are definitely helpful, but I cannot quite understand the logic of having different categories of regulator. For me, this was all about moving towards a modern principles-based and risk-based system.

Given that the representative of the Law Society of Scotland is sitting in the public gallery, I will just say that, in my report, I make the point that there is no evidence of huge wrong-doing—not at all. There is sometimes such a perception, but what I am saying is that we have a hugely complex regulatory system to address problems that mostly do not exist. If we could streamline that system and deal with the rare cases of, say, bad practice, complaints or whatever, that would be much better. There are some powers in the bill that would streamline that bit, but the system itself is still incredibly complex.

Oliver Mundell: Thank you.

Jeremy Balfour: I think that Oliver Mundell has picked up most of what I was going to ask, but there is still something that I am trying to grasp. Quite a number of years ago, my father was a prosecutor for the Law Society; when he was instructed by the Law Society to prosecute a case, he just got on and did it, completely independently and without any interference. How is that different from the whole bureaucracy of having an independent person do this? Is it purely, as you have said, a perception issue? If so, it seems like a lot of money to spend on what is purely a matter of perception. I found it interesting that in your opening statement you talked about lawyers looking after lawyers. Did you get any evidence of such incidents, or is that just a perception?

Esther Roberton: The comment about lawyers looking after lawyers is, in the main, a perception, but such a perception is in itself quite dangerous. However, you are absolutely right: lawyers are involved in that prosecution process. In actual fact, my understanding is that they still would be under an independent regulator; the difference is that the framework would be different.

Part of the problem is that those lawyers, many of whom give their time almost voluntarily, get caught up in inquiries that can last for years. I had

people coming to me with lever-arch files of cases against solicitors who had turned out to be innocent but who had had the matter hanging over their heads for several years, because of the complexity of the process. That is not a criticism of those lawyers such as your father or of the Law Society; it is a criticism of the system being so complex and having been amended so often over the years since the Law Society was founded without a comprehensive overhaul being carried out.

The one thing that I would take issue with—it is one of the things on which the Law Society and I disagreed—is that an independent regulator would be more expensive. If you look at the SLCC as one part of the process, you will see the money that is spent—and which costs lawyers, because that is how the commission is funded—on fighting battles in the courts, on regular appeals and the like. With a normal complaints procedure in any other area, a resolution process would be built in at a much earlier stage. The chief executive of the SLCC, Neil Stevenson, and its most recent chair, Jim Martin, both felt that if the process were streamlined, they could reduce the levy charged to law firms and individuals for complaints handling. At the moment, however, huge amounts of money are being spent unnecessarily on court cases.

Jeremy Balfour: I would like to go into policy, but as I cannot, I will steer away from that and not ask any more questions.

The Convener: Thank you. I do not really have any questions; what has been put on the table so far has been extremely enlightening, to say the least.

As members have no more questions, I thank Esther Roberton for her evidence. The committee might follow up with a letter if any additional questions stem from the session.

I suspend the meeting briefly for a change of panel.

09:59

Meeting suspended.

10:00

On resuming—

The Convener: I welcome our second panel: Rachel Wood, executive director of regulation at the Law Society of Scotland, and Morag Ross KC, from the Faculty of Advocates, who is joining us online.

I remind witnesses not to worry about turning on their microphones during the meeting, because those are controlled by broadcasting. If you would like to answer a question, please raise your hand or catch the clerk's eye. There is no need to answer every question if you do not feel the need to respond, but please feel free to follow up in writing regarding any question after the meeting, if you wish to.

We move to questions. Section 5 of the bill gives the Scottish ministers a power that would allow them to modify the regulatory objectives and professional principles for legal services that are set out in sections 2 to 4. What is your view on the delegation of that power, and its scope? Is it reasonably foreseeable that the objectives and professional principles set out in the bill will require to be added to, amended or removed over time? If so, is it your view that that should be done by primary legislation?

Rachel Wood (Law Society of Scotland): I thank the committee for inviting me here today. I appreciate that we are moving straight to questions but will say briefly that, although there are many matters of policy on which we do not agree with Esther Roberton, I am grateful to her for pointing out that there is no great mischief in the regulatory system.

It is my view that the key thing to do is to move forward on how we regulate and to improve the system where it needs to be improved, particularly in relation to complaints, rather than continuing entrenched arguments about who the regulator should be. As Esther has just said, there may never be common ground on that matter. The Law Society is very keen to move forward on making the bill as good as it can be, in order to improve the system for everyone involved. Thank you for allowing me that brief digression.

Section 5 creates an entirely new power. Many of the delegated powers in the bill have been lifted from the Legal Services (Scotland) Act 2010, but this one has not. It is an entirely new power, one that allows ministers to add, amend or remove the regulatory objectives or professional principles. That provision was a surprise to us. Before the publication of the bill, there was never any suggestion that the provisions should be changed at all. The bill makes changes to the regulatory objectives, but not to the professional principles. The regulatory objectives are those by which regulators are bound to regulate; the professional principles are those principles that underpin the ethics and delivery of legal services by the profession.

It is our view that regulatory objectives and professional principles are far too important to be left to delegated powers. They are the foundation and the overarching principles of the entire regulatory system and of the delivery of legal services. You could describe them as the bread in the sandwich of legal services and regulation, which seems too important to be changed by

delegated powers. If there are to be changes, those should be subject to the fullest parliamentary scrutiny. As I said, there was no suggestion from anyone that change was needed and I do not anticipate a need for quick change in the future.

Aside from that, the other concern is that allowing change to delegated powers would give ministers direct control over the legal profession and the regulators, and that could be open to abuse. For example, the professional principles could be amended in a way that limits the ability of the profession to challenge the state.

Section 5 is one of the sections that goes to the heart of the threat to the rule of law and the independence of the profession. That is important because, as has been mentioned, the legal profession, whether it is solicitors or advocates, sometimes plays the role of protecting citizens from overreach by the state. We sometimes challenge the state, which is why it is important that there is independence of regulation and independence of the profession, perhaps unlike some other professions, because the role that the legal profession plays is so different and so crucial to protecting civic society.

Therefore, having the powers over regulatory objectives and professional principles as delegated powers is unacceptable to us. We wonder in what circumstances the Scottish ministers might contemplate using those powers, given, as I said, that there was no suggestion that changes were needed and that there has not been any criticism over the past 13 years since those principles and objectives came into place. Certain circumstances would be concerning. For example, might the Scottish ministers wish to remove the regulatory objective to support the constitutional principles of the rule of law and the interests of justice? One would hope that they would never wish to, but it is concerning to see delegated powers in relation to those principles.

If the power were retained, we recognise that the affirmative procedure and the requirement for consultation provide some checks and balances, but there are no caveats as to how or why ministers could alter those principles and objectives—there is simply the power to do so. There is a requirement to consult but no requirement to publish the consultation or give reasons for accepting or rejecting views expressed during the consultation, and there is no requirement for consent by the Lord President.

Even if additional checks and balances were introduced if the power remained, our view is simply that the provisions of sections 2 to 4 are too important to be subject to modification under delegated powers, and we will seek amendments to those sections at stage 2 if the minister does not delete those provisions from the bill.

Morag Ross KC (Faculty of Advocates): I also extend my thanks for the invitation to participate in this discussion, and my apologies that I am not able to join you in person.

I begin, as Rachel Wood did, with a couple of observations about what we have already heard. I listened with interest to the evidence that Esther Roberton provided. I do not propose to say very much more about that—in fact, probably nothing. That evidence dealt primarily with the principal recommendation of her report, and the faculty made its position on that plain in its written submission to the committee.

I do not understand that to be the primary focus of this committee's work, and I intend to confine my observations to the really important delegated powers issues. Of course, the faculty will be happy to engage with questions about the general principles, either in writing or with the lead committee if that is felt to be important. I am happy to answer more questions about that, but I just wanted to make that clear at the outset.

I turn to section 5. The faculty's primary position is that that section ought to be removed. I agree entirely with the explanation that has been provided by the Law Society; it is a surprise that it is there at all. It is frankly mystifying as to why it is justified. In the faculty's view, it is wholly unwarranted.

In looking at what is proposed in section 5, some concerns emerge that also emerge about subsequent sections—chiefly sections 19 and 20—but one sees those concerns quite crisply in their introductory form in relation to section 5. The section gives a power to Government—to the Scottish ministers—to use delegated powers to amend fundamental principles, but it is completely unexplained as to why that is thought to be necessary.

Rachel Wood has drawn attention to the fundamental nature of the objectives. The first is listed in section 2 and is:

> "to support the constitutional principles of the rule of law and the interests of justice".

In what possible circumstances could it be thought that that might be subject to amendment using powers exercised in the way that is suggested? If that objective is to be changed, that absolutely ought to be the subject of primary legislation. One can anticipate that, if it were suggested that lawyers ought not to act in accordance with those principles, the faculty, the Law Society and, I am sure, very many others would have very strong things to say about that. However, that absolutely should be done in primary legislation.

That is a fundamental objection but, taking issues at a different level, section 5 would give ministers the power to introduce new criteria, principles and objectives. That creates the potential to give Government direct control over the ethical and professional standards of the profession. That direct control by Government over how lawyers do their job and what standards they should be expected to maintain, by its nature, runs the risk of interference with independent regulation. That is completely unwarranted.

That explains the faculty's position—the provision just should not be in the bill.

The Convener: The delegated powers memorandum that the Scottish Government has produced states that the power is required

"to enable the Scottish Ministers to respond strategically in light of ... changing circumstances",

and that regulations would be a more efficient way of achieving that in comparison to primary legislation.

Rachel Wood touched on consultation. A wide variety of individuals and organisations would need to be consulted, including the Lord President, the Scottish Legal Complaints Commission, the independent advisory panel of the commission, the Competition and Markets Authority, each category 1 and category 2 regulator, and each approved regulator of licensed providers. The bill proposes that a detailed level of consultation would take place. Do you agree that all those relevant organisations and individuals would put forward proposals and suggestions that would assist the legal profession rather than potentially having the opposite effect?

Morag Ross: One has to ask, "What's the strategy?" Yes, the explanation is given in the memorandum that the power would

"enable the Scottish ministers to respond strategically",

but to what end? What actually is the strategy? With respect, that does not mean very much.

In response to the specific question on consultation, yes, it is good practice to consult relevant bodies, and one would expect that to happen. There is a list in the bill of who would be consulted.

You would consult anyway and would certainly want to do so if you were introducing primary legislation, but I come back to the prior question about why you would want to do that at all. What circumstances could change that would be so important that you would have to adjust fundamental principles and objectives by using the speedier mechanism of exercising power under regulations, rather than by using primary legislation? That is what is unexplained. It is not clear what the Government's strategy would be.

10:15

Rachel Wood: I agree with Morag Ross's comments. I do not think we have been given an adequate explanation of in what circumstances, or why, changes to such important principles and objectives should be delivered under delegated powers. As I said earlier, there was no suggestion that there was any issue with those principles and objectives and there was no historical criticism. The existing principles and objectives have been in place for 13 years. The Government has taken the opportunity to use the bill to make changes now through primary legislation and that is how changes should be made if there are any issues in future.

The Convener: Oliver Mundell, do you have a supplementary question?

Oliver Mundell: Yes, I have a question about section 5. I want to understand the evolution of the regulatory objectives and professional principles. The Government is saying that the power in section 5 is needed because that would be a more efficient way of making any changes that are needed in the future. What is the timescale over which the current objectives and principles emerged? How quickly does strategic change happen?

Rachel Wood: The short answer is: very slowly. I caveat my answer by saying that I will come back to the committee in writing to clarify it, but I do not think that the professional principles and regulatory objectives were set out in statute before the Legal Services (Scotland) Act 2010. Principles were certainly set out in the Law Society's practice rules before then and regulatory objectives and professional principles also exist through what we might call administrative and regulatory law, which is the law about discipline and compliance for professionals.

Some modifications have now been suggested, but the current principles have been in place for 13 years. I do not think that they were in statute before that, but I would have to check that.

Morag Ross: I can answer on behalf of the Faculty of Advocates and am also happy to provide further information in writing about the history of the principles, if that would be of assistance.

I can expand a little. I agree with Rachel Wood's analysis. The fact that evolution is slow should not be seen as a bad thing, because the principles are really important. In its own guide to professional conduct, the faculty sets out considerations that are relevant to professional ethics. You cannot just

go chopping and changing those things at will, because they are really important. For example, if someone is training entrants who come into the faculty to learn to become advocates, they must be very clear in explaining the importance of the rules about professional ethics and what those rules are.

Those rules go back over decades and centuries. They have, of course, evolved over time and it is necessary to express them in a modern way, but they cannot just be tweaked here and there or be modified, adjusted and updated in a way that is perhaps intended to be responsive and strategic. They must be considered with care so that everyone understands the basis on which they are acting. There is nothing fundamentally wrong with having objectives and principles, but there must be transparency, clarity and reliability over time.

Oliver Mundell: That is helpful. I was just trying to understand the position, because the memorandum talks about changing circumstances. Over that longer period, there have been lots of changing circumstances and, if the principles have generally remained constant, I would just like to understand the efficiency argument for changing them. However, that is more of a comment than a question.

Morag Ross: Forgive me for interrupting, but the important thing about principles is that they are capable of being applied in changing circumstances over time. Just because circumstances change and you get new types of cases, that does not mean that you change your principles. If anything, that illustrates the problem with the intention to be agile and responsive. Yes, you are agile and responsive in applying fundamental principles, but those principles should not change.

Rachel Wood: I was going to make much the same point. The evolution of principles should be slow and considered. Principles and high-level objectives should be capable of working for a long time without needing to change. I appreciate that this is not a policy committee, so I will not go into huge detail. However, I will say that, although we understand why the Government has chosen to change the regulatory objectives to bring in some consumer principles, we have some questions about those as well. There are things in the bill that we think are perhaps not in the spirit of principle and are perhaps very detailed and of the time now. It might be right that there should be some consideration in bringing in something in relation to consumer principles, which stem from the United Nations principles, but some of what is in there is quite detailed, and it is important that it is able to stand the test of time—as Morag Ross said, some of these principles have been around for centuries. It is not just a case of taking time to think about them when they change; rather, we must ensure that they are fit for purpose for an extremely long time.

The Convener: I have one final question in this area. Would the requirement for the Lord President to grant consent in relation to the powers in section 5 be of any assurance to you?

Rachel Wood: It would certainly be an improvement on what is there, but our fundamental view is that the state should not have those delegated powers. Parliament is free to change the objectives and the principles as it is doing, but the state should not have that power.

Morag Ross: I agree with that. It would represent an improvement, but that does not go far enough. One sees in the judiciary's response and in the unanimous view of the senior members of the judiciary their fundamental concerns about the impact of Government interference with the independent regulation of the legal profession—that is a long way of saying that I agree.

Bill Kidd: Thank you for your responses so far. Section 8 talks about regulatory categories and sets out that a regulator of legal services providers is subject to different requirements according to whether it has been assigned as a category 1 or category 2 regulator. It says that the Law Society of Scotland is assigned as a category 1 regulator and that the Faculty of Advocates and the Association of Commercial Attorneys are assigned as category 2 regulators.

As you have already noted, section 8(5) gives a power to Scottish ministers that would enable them to reassign legal regulators between category 1 and category 2, which would change the requirements that such legal services regulators are subject to. The Scottish Government has stated that that regulation-making power is required so that ministers can respond to any fundamental changes that regulators undergo. Can you imagine what those fundamental changes would be?

Rachel Wood: No, we cannot. Perhaps I can back up slightly—and, indeed, potentially stray into policy again—and say that we are not clear about the justification and necessity for different categories of regulator. I will just leave it at that: we have not received a good, persuasive explanation from the Government as to why there should be different categories.

However, if there are going to be different categories of regulator, we can see merit in some regulation-making power, but with significant amendments to the process. If you will allow me a minute, I can go through some of the detail of that. As has been said, we cannot think of a scenario in which one would want to change the category of a

regulator, and any change to the category of a regulator would need to be done very carefully and mindfully. Just in terms of the day-to-day mundane work, such a move would require huge amounts of change to the policy and process within the regulator itself, which might bring with it a great deal of cost and resource requirement, and time would need to be taken to work through how it might actually happen in practice. I think, therefore, that such a move would be extremely rare.

As I have said, if the bill were to be passed with provisions on different categories of regulator, we would recognise some requirement for consultation, but we certainly think that Scottish ministers should be under an obligation to report the outcome of any consultation to Parliament and to explain the reasons for their decision to make regulations.

Perhaps I can break down section 8(5)(a), which reassigns a body, and 8(5)(b), which adds a body. We wonder whether both provisions should, in fact, be subject to the Lord President's consent, given that he is, in effect, the head of the regulatory and justice systems. Moreover, we would sound a note of caution on section 8(5)(b). There have been a few references to the salutary tale of England and Wales, where there are now, I think, 13 legal regulators. It is a much bigger jurisdiction, but in England and Wales, they are looking at and thinking about whether that is the best way to progress with regulating the legal profession. Given that Scotland has just over 13,000 solicitors, around 450 advocates and, I think, six to eight commercial attorneys, do we really need to be adding other bodies—other regulators—to the system?

Those are our points in relation to section 8(5)(a) and (b). We have no views on section 8(5)(d), on updating the name of a regulator. I am not quite sure why we would need ministerial approval for that, but we have no comment in that respect.

That leaves us with section 8(5)(c), on removing

"a body that has ceased to be a regulator".

We do not really understand that provision, because it is not—we think—a power to remove the body itself; it is, as I have said, a power to remove

"a body that has ceased to be a regulator".

To us, the two parts are nonsensical, and there are other provisions to which we will come that give ministers the power to remove some or all of a regulator's powers—or essentially to shut it down altogether. We therefore do not really understand the point of section 8(5)(c) at all.

I hope that that answers your questions.

Bill Kidd: Morag, would you like to add anything?

10:30

Morag Ross: Again, I do not propose to say much at all about the general policy, other than to make it clear that the faculty considers that, if there is to be this proposed division of regulators and if there is a policy aim in that respect with which the faculty agrees, the faculty should be a category 2 regulator. If that is the case, it will be content with the policy objective and what is intended there.

However, the faculty does not consider that ministers should have the power to make regulations reassigning regulators to a different regulatory category. Whether a body is in category 1 or category 2 is really quite a significant matter; it determines the extent of the obligations to which a regulator is subject, and the regulator should be able to know where it stands, having regard to the terms of the legislation. As such, the criteria should be clear and specific on the face of the legislation. The faculty, therefore, does not agree that there should be a power to reassign regulators from one category to another through regulations.

I agree with the puzzlement that has been expressed about the remaining subparagraphs in section 8(5), particularly the provision on updating the name or description of a regulator. It is hard to see the justification for that.

Perhaps I can go into a little more detail on section 8(6), which suggests that the criteria that are set out should be taken into account in a reassignation. Those criteria include

"the type and range of legal services that are (... to be) regulated"

and whether they are

"provided directly to members of the public".

These matters are already established. It has already been explained in the written submission to the lead committee that the faculty does not provide services as solicitors do, subject to its own direct access rules, and it is hard to see circumstances in which the situation would change to the point where that power would need to be exercised. In short, it is not clear why the provision is necessary. It is, after all, an important matter, and it should not be done through regulation.

Bill Kidd: Thank you very much indeed. I think that we know the answer to this question, but I will ask it anyway. Are there any amendments that could—and, indeed, should—be made to the power as suggested in order to limit its scope? Do you have any views on the requirements attached to the proposed power—for example, the

requirement on ministers to consult affected bodies and key stakeholders as set out in the bill—before it can be used?

Rachel Wood: I will take that question first.

We differ slightly from the faculty on this in that we struggle to see where one would reassign a body if the categorisation were to remain in the bill. We have concerns about the powers to add a body, but we can see why they would be wanted, and we would be content to leave them as delegated powers, as long as Scottish ministers were under an obligation to report the outcome of their consultation, provide their reasons to Parliament and explain those reasons. As far as reassigning or adding a body is concerned, we would go further and say that that should also be subject to the Lord President's consent.

As I have said, we just do not understand the circumstances in which section 8(5)(c) would be used, and I cannot comment any further on the provision without understanding what it is intended to achieve. We do not really agree with section 8(5)(d), but, equally, we are not going to make a fuss about it.

Morag Ross: In general, there is a bit of a risk in looking at consultation as something that will cure or remove doubt or concern about the exercise of powers through delegated legislation. Of course, the bodies in question should be consulted, but consultation on its own will not solve the problem.

I agree with Rachel Wood that, if the powers are to be exercised, consent, and in particular the consent of the Lord President, ought to be required, which would be a stronger condition than is provided at the moment. That does not change my fundamental position, which is that the categorisation is important and should be subject to primary legislation if there is to be any change.

Jeremy Balfour: Section 20(6) of the bill confers a power on the Scottish ministers to make regulations specifying other measures that they may take in relation to a legal regulator following a review of their regulatory performance. Do you have any concerns regarding the delegation and scope of that power?

Rachel Wood: The Law Society has significant concerns. We are completely opposed to section 20(6) of the bill and to the related section 19; we think that both sections should be removed in their entirety from the bill, as should the consequential parts of schedule 2. Those sections go to the heart of the provisions in the bill that threaten the rule of law and the independence of the legal profession.

We note that the minister can lodge amendments relating to those sections. We urge the minister to lodge such amendments, which should extend to the removal of the delegated regulation powers in subsection 6.

To dive slightly into the detail, the regulation-making power is astonishingly broad. No explanation or justification has been given for what the "other measures" that are set out in section 20(6)(a) are. The bill says that

"Scottish Ministers may by regulations ... specify other measures that may be taken by them in relation to category 1 and category 2 regulators",

in addition to measures such as

"setting performance targets",

directing actions, censuring, penalising financially and changing or removing all or some of the regulatory functions. That is big, big stuff: it is direct control of the regulation of the legal profession.

What other measures would Scottish ministers be contemplating, aside from those in that already very long list? I find it interesting that the delegated powers memorandum states that the power in section 20(6)

"is intended to be used should it be discovered in practice that further additional measures would be helpful tools ... This could be because the existing suite of powers are found to be insufficiently robust"—

although I cannot imagine what would not be robust about what is already proposed—

"or, at the other extreme, are disproportionately severe".

That really covers everything. I do not know whether that is an acknowledgement that what is proposed may already be overkill.

There is a very wide spectrum of potential use. It is unclear and inconsistent. I would also argue that it is an example of the Scottish ministers marking their own homework. They are saying that they have given themselves all those powers and put them in place, but that they might want to change the powers because they might not be enough, or they might be too much. We were completely astonished to see that.

I am in no way suggesting that the current Government would use the powers in a way that it did not think was right, but laws outlast Governments. Down south, we have seen very real instances of challenges to the rule of law that might once have been unheard of in the United Kingdom. We argue that section 20(6) should be entirely removed from the bill.

Jeremy Balfour: Before Morag Ross comes in, I note the caveat that the Lord President would have to give consent. Does that not give you any comfort?

Rachel Wood: No, because section 20, together with section 5—and some other sections,

which we will come on to—represent fundamental threats to the rule of law and the independence of the judiciary. If the provision is intended to be part of oversight, and to partly involve some sort of compromise in terms of who the regulator is, I would remind the committee that there is already quite a lot of oversight of the regulation of legal services, and much of that will be strengthened again—although that is not for discussion with this committee today. The Scottish Legal Complaints Commission already has oversight and will have extensive additional oversight powers when it becomes the newly named legal services commission; the Financial Conduct Authority already has oversight over much of the regulation that the Law Society does; the Office of the Immigration Services Commissioner has oversight over what the Law Society of Scotland does as a regulator; and the Lord President has oversight of what the Law Society does. Therefore, fundamentally, we think that, as a point of principle, the ministers should not have these powers at all.

Jeremy Balfour: Again, just to push you on this, the ministers have that power only if the Parliament approves the regulations and the Lord President signs them off. Is that not two safeguards? It is not that the Government is saying that it is going to do something and there is no backstop; we have two backstops, because the Parliament and the Lord President have to approve the proposal and, if either of them does not do that, it will not happen. Does that backstop of the judiciary and the Parliament having a role in the process not represent a safeguard?

Rachel Wood: It is always open to Parliament to make those changes through primary legislation, if it wishes, given that we are a statutory body. Experience has shown that primary legislation receives far more scrutiny in Parliament than delegated legislation does.

Morag Ross: The provisions in section 19 and—particularly for today's purposes, because we are looking at delegated powers—section 20 open the door to what could be political regulation of the legal profession, and there are no circumstances in which that is appropriate. To come directly to the most recent question that you asked, Mr Balfour, in some ways, the exercise of this as a delegated power falls away. The provision would be opposed. It ought not to be introduced in any circumstances. It is particularly concerning that, in this bill, the ministers are seeking to introduce the power through exercising delegated powers. With the greatest respect, the measures that you are suggesting—the use of the affirmative procedure and the consent of the Lord President—are not sufficient safeguards in those circumstances. The objection is more fundamental than that and would not be addressed through mitigating measures or ways in which protections might be put in place.

As I say, the proposal opens the door to the exercise of power by Government to regulate directly how the professions work. That threatens the independence of the legal profession and that, in turn, threatens the independence of the judiciary.

I am speaking only for lawyers, and specifically only those who are members of the Faculty of Advocates, but, if I may, I will extend my remarks to cover all lawyers and say that lawyers and judges play a vital role in a democratic society.

10:45

The independence of the legal profession is a fundamental principle. Lawyers represent citizens and organisations that seek to challenge the exercise of power by the executive—that is, the exercise of Government power—and that might involve challenging Government policy relating to, say, planning decisions or cases involving high constitutional principles. There are all sorts of cases in which the independence of lawyers is vital, and it is essential that lawyers are able to practise free from the fear—I know that that is a strong word—of Government-mandated regulatory sanction.

The same considerations apply to lawyers defending accused persons in criminal prosecutions that are brought by the state. Their ability to exercise their professional responsibilities independently is a core principle, and the suggestion that there might be moves to allow the Government to determine how those professional responsibilities should be exercised and to place limits on them is, frankly, unthinkable. We are not in the territory of minor or mitigating measures or protections; this is a root-and-branch objection to the proposed powers. Whilst I have to make it clear, again, that I am speaking on behalf of the faculty, I have already referred to the views that have been put forward by the judiciary in its response to the lead committee, and it is important for this committee to be aware of those views and the strength of opposition from that side, too.

Perhaps I can set this out in a little bit more detail. Going back to the point about the Lord President's consent, I would say that, although such consent would, of course, be a good thing, the exercising of the powers would, in fact, undermine the role of the Lord President, who, ultimately, is the regulator. There is already an existing and working set of relationships in that respect—and here I am talking about the regulation of advocates. They are subject to regulation by the Lord President; the exercising of that regulation is delegated to the faculty, and

what is proposed would cut through that and undermine it in a dangerous way.

Like Rachel Wood, I acknowledge that one would not expect these powers to be exercised in a way that gave rise to more extreme difficulties, but the fact that they are on the statute book at all is extremely worrying. It would risk putting Scotland in a highly unusual position, and it would undermine confidence in our systems. Earlier, Esther Roberton referred to the size of the Scottish jurisdiction and the carrying out of legal business here. How other people see us is really important, whether that be in the pragmatic or practical sense of people willing to do business with us or in a different sense—say, people looking at Scotland and considering what it means for Government to be allowed to interfere in the regulation of the professions in such a way. It would be unfortunate in the extreme if it were to be taken from such a move that that was in any way acceptable.

Jeremy Balfour: Can I come back on that briefly, convener?

The Convener: Okay, and then I will bring in Oliver Mundell for a supplementary.

Jeremy Balfour: Perhaps I can play devil's advocate for a moment. What we are doing is looking at how this will happen. As Rachel Wood has said, the Government could do this through primary legislation but, as a result, the safeguard of the Lord President would not apply—the matter would simply be for the Parliament to decide. I understand the principle that you do not want this to happen, but from a delegated powers perspective, is it the case that, if it were to happen, you would want it to happen through primary legislation rather than through delegated legislation, because of the scrutiny issue? Is that right?

Morag Ross: The fundamental principle is that it is for Parliament to decide on the laws that are in force in this country. If a bill were to be brought forward saying that the Government should regulate the legal profession and that the legal profession should be subject to the will of Government, with the Government deciding who is or is not allowed to become a lawyer and deciding the rules about how lawyers should behave, that would, of course, be opposed on all of the same bases. If Parliament nevertheless decided to implement that, that would take us into some fairly interesting constitutional discussions.

You can therefore take it that the Faculty of Advocates would not say that it would be all right to have all of that done by primary legislation. It would not be, but we have an extra concern that ministers are seeking to take that upon themselves by a regulation-making power.

To put that more briefly, it would not be acceptable in any circumstance.

Oliver Mundell: My concern is that we could end up in a situation in which the Parliament says that it is okay to proceed but in which the Lord President says that it is not. I would like to get a sense of how big a problem you think that would be. I fear the politicisation of the Lord President's role. As you said, Parliament is here to make the law. Parliament might think that something should be the law of the land, but the judiciary might block that. Are there examples of the Lord President having that sort of role in other areas of the law? How might an impasse like that affect the legal profession?

Morag Ross: The concerns that you express are serious ones and must be considered with the greatest of caution. Our system works: the Lord President has an important role, which is exercised with care. There have been changes to that in recent decades: we have the Scottish Legal Complaints Commission, which shows that it is possible to make such adjustments.

However, none of the legislative changes has gone as far as interfering with, or risking cutting across, the role of the Lord President with the potential consequences that you describe. Politicisation of the judiciary, or the risk of its politicisation, is very serious. The separation of powers within our system functions as it should, and any steps that might serve to collapse distinctions or to create circumstances in which there is the risk of collision must be avoided.

Moreover, there is no need for that. There is no great benefit to be gained from ministerial intervention, or regulatory intervention, of that kind. It should be avoided not only because of the serious risks that you are describing but because it is unwarranted and unnecessary.

Rachel Wood: I echo what Morag Ross said and will pick up on her final point about the reasons and justifications for the powers. We have asked the Scottish Government that question several times. As Morag said, we are talking about recent decades. Has there been a circumstance in which ministers might have felt the need to use any of the powers that are set out in sections 19 and 20, or in section 49? There has been no such example—we have not even had a hypothetical scenario presented to us as to why the powers are necessary. I want to make it very clear that we, too, fundamentally disagree with them in any shape or form.

You have identified the exact issue here. We do object to this altogether but, leaving aside all the other difficulties with the powers, I suggest that there would, potentially, be a real mess if the powers remained and there was a disagreement

between ministers and the Lord President. That, together with section 49, is something that, as the committee will know, the International Bar Association and the Commonwealth Lawyers Association have spoken out against.

Many stakeholders who might not have been in favour of the model of regulation that the Government has brought forward are also deeply concerned about these particular sections. Why are they so concerned? Because it is unheard of that such powers should exist in a western democracy. People around the world are very worried about this happening.

In addition, there are commercial considerations. Esther Roberton referred to the consolidation and change in the legal profession. Mr Mundell pointed out that there are still in excess of 1,000 law firms in Scotland, but there is no doubt that a small handful of very large law firms sit at the top. They are international firms and—at the risk of stating the obvious—it is a global world. Trade is global and, like it or not, the clients of those international law firms are able to shop around with regard to jurisdiction, forum and, to some extent, choice of law. If they think that the state in Scotland could interfere in the regulation of legal services, they will choose to take their business elsewhere.

Again, responses from business organisations to the lead committee's call for evidence have very clearly stated their great concern about this. In its response, TheCityUK, which represents the City of London, has said that it and its members not only object to the principle of the separation between the state and the justice arm being eroded but have deep concerns that it will affect the competitiveness of Scotland's legal and—as it has referenced—financial services sectors, of which we are rightly so proud.

The Convener: Thank you. As Jeremy Balfour has no further questions, I call Oliver Mundell.

Oliver Mundell: I want to ask about section 46(3), which allows Scottish ministers to make, by regulations, further provision to reconcile regulatory conflicts, with the requirement again to get the Lord President's consent before doing so. I am aware that you have questioned the need for this subsection, too, but do you have any further comments on it?

Rachel Wood: The subsection puzzles us, and we are really struggling to think of a circumstance or situation in which a regulatory conflict could be resolved by Scottish legislation.

Perhaps I can give you a little bit of background. The provision appears in the 2010 act; I apologise if the committee is already aware of this, but I want to explain this clearly. That act contained some minor amending provisions, and it also set out in legislation for the first time the regulatory objectives and professional principles, but in the main what it did was bring in the possibility of having in Scotland what it called licensed legal service providers—or what are more colloquially known as alternative business structures. They are structures and organisations that deliver legal services and are owned not just by solicitors but by non-solicitors as well.

11:00

If you think about ABS in the context of the 2010 act, logically, you can see why there could be a regulatory conflict for an ABS, because it is more than likely that an alternative business structure that is delivering legal services licensed under that act would also be delivering other professional services. It is quite likely that it would be regulated by, for example, the Law Society of Scotland and also by the Institute of Chartered Accountants of Scotland, which is the regulator of the accounting profession in Scotland. As I say, there is logic to the possibility of there being, first, a regulatory conflict and, secondly, a potential need to resolve that in some way through legislation, whether primary or secondary.

The bill brings in entity regulation for law firms—currently we only regulate individual solicitors. We will be regulating entities, but we cannot think of any situation under this bill where it would be possible to have another regulator, because you would not have ICAS, the actuaries, the architects or any of the other organisations or other regulators under the bill and the legislative matrix that sits behind it, such as the Solicitors (Scotland) Act 1980. What you will have are cross-border and international law firms, which I have already mentioned, which will be regulated by multiple legal regulators. That is already the case, anyway: our multinational practices are already regulated by us, by the Solicitors Regulation Authority in England and Wales and by a host of legal regulators around the world. However, Scottish legislation would not be able to compel the SRA, a French bar association or the legal regulator in Dubai to reconcile any regulatory conflicts, and the system of reconciling those already works very well: we already work together with other regulators to reconcile those differences. So, we are puzzled, generally. I think that that explains why we raised concerns about the proposal.

Oliver Mundell: Sorry to interrupt, but have you asked for any more information from the Government?

Rachel Wood: We have, and we have not had an answer on that.

Oliver Mundell: No answer at all?

Rachel Wood: We have not had an answer yet.

Morag Ross: I do not have anything to add to that. I recognise the concerns that have been expressed by Rachel Wood. These are probably more matters for the solicitors' branch of the profession, but I share the concerns that have been expressed.

Oliver Mundell: In which case, I will move on to ask about section 49, which I know has already been touched on, at least in passing. It provides that the Scottish ministers may establish by regulations a body with a view to it becoming a category 1 regulator and may specify

"circumstances under which the Scottish ministers may directly authorise and regulate legal businesses."

The bill states that ministers must obtain the consent of the Lord President before making such regulations and, even then, make them only if they believe them to be necessary as a last resort.

Again, I am interested in your reflections on that delegated power and any other concerns that you have with it that have not already been stated. Do you consider that it is effectively hemmed in?

Rachel Wood: As I said, we completely object to the provisions in this section, together with the provisions in sections 20 and 5, and we think that they should be removed in their entirety. I do not wish to choose between the sections that give us concern but, in some ways, section 49 gives me the most concern. At the risk of being flippant, if you could see my handwritten notes on my copy of the bill, you would see that I have simply written "No, no, no" against it.

Let me explain why section 49 is a special concern. Section 49(1) allows the Scottish ministers to establish a new body under paragraph (a) and then—this is simply astonishing—in paragraph (b), says:

"Scottish Ministers may directly authorise and regulate legal businesses."

That is stepping into the shoes of the regulator and directly regulating the legal profession of Scotland. There are no filters. There is no appointing a head of an independent regulator. There is nothing like that. It is the Government and the state directly regulating the legal profession and it absolutely threatens the independence of the legal profession and contravenes the rule of law. Most stakeholders, including the IBA, the Commonwealth Lawyers Association and business organisations have heavily criticised the provision. It could have a seriously detrimental impact on Scotland's reputation and competitiveness, as well as contravening those principles.

I will make one other small point. I did not spot it initially but, in reading it many times, I noticed that section 49(2) allows ministers to make any modifications that they wish to make to part 1 of the bill by regulation. I remind the committee that part 1 of the bill sets out the regulatory objectives, the professional principles, who the regulators will be, the categorisation and the requirements for what regulators should do—how they regulate and the transparency of regulation. Section 49(2) is an equally astonishing provision to be subject to delegated powers.

Oliver Mundell: You have made strong representations at the meeting and throughout the process. Do you get any sense that the Government is listening to that feedback? What is the engagement on the issue? Given that you have said that it is "No, no, no" for you, is there a sense that that is being listened to?

Rachel Wood: To some extent, yes. We are encouraged by the fact that the minister has written to say, as was mentioned, that she would lodge amendments to certain delegated powers sections and section 49 was one of those that was mentioned in her letter. We have asked, but we have not seen those amendments. I do not think that anybody has received additional detail on what they might look like.

We would be looking for section 49 to be removed in its entirety. It is a particular overreach. There is small encouragement because of the minister's letter, but we do not know the detail of what that means in practice.

Oliver Mundell: For absolute clarity, is there nothing that could be done to the section other than to remove it?

Rachel Wood: Absolutely nothing. To be clear, even if it were by primary legislation, the concept of the state directly regulating the legal profession—saying who can and cannot be in that profession and how people would operate—goes to the heart of the necessary constitutional principle of the separation of the Government from the legal profession and the judiciary.

Morag Ross: I will come in on that final point. The faculty is aware of the Government's stated intention in correspondence to lodge amendments but, like the Law Society, I am not aware of the content of what is proposed. It would be very helpful to know what the Government's position is on that, but I have no further information.

On one view, it looks as though section 49 might not affect the faculty. It extends to category 1 regulation but, as we have already seen, the ministers are seeking to take to themselves the power to move categories. Therefore, it is conceivable that, if that were to happen in the future, the position of the faculty would be affected as well. For all the reasons that have already been given, that is opposed at a fundamental level. It is not a matter of adjusting the provision to bring in

improvements through forms of consent or so forth, as it is already subject to the agreement of the Lord President. For all the reasons given in relation to section 20, it is just far too far.

It is quite extraordinary that we should be in a position where we are looking at legislation through which the Government seeks, by regulations, to make provision to establish a body with a view to it becoming a category 1 regulator and at circumstances in which the ministers may directly authorise and regulate legal business. That is an astonishing proposition to find on the face of legislation. There is no justification for it, and it represents an intrusion on the independence of the legal profession and a threat to the rule of law. It is opposed for those reasons.

The Convener: Oliver Mundell has one more question.

Oliver Mundell: I want to ask about the guarantee fund. Paragraph 6 of schedule 1 makes further provision about the guarantee fund. Commenting on the power, the Law Society noted:

"This has the potential for significant change to be made which may adversely impact ... the Fund".

It also noted that there is

"no requirement for the Lord President's consent".

Will you elaborate further and give your view on the power and the consultation requirements that are associated with it?

Rachel Wood: To be very clear, we asked the Government for some powers to be delegated through regulation in relation to the guarantee fund. The amendments that we were looking for have been made through the proposed new section 43A to the Solicitors (Scotland) Act 1980 and also through future proofing. However, those are very minor points relating to, for example, the statutory limit on the maximum amount of an award under the guarantee fund, which has not kept pace with time. Therefore, if there is to be a maximum limit in the statute, there should be delegated powers to adjust that, and we are happy with that.

However, we have concerns about the more blanket provision of the proposed new section 43A(1), which would allow the Scottish ministers to

"make provision"—

of any sort—

"in relation to the Guarantee Fund".

Subsection (2) lists particular examples, including when amending

"the maximum amount of an individual grant",

which is something that we have asked for.

It is the broader application of the provision to change anything and everything under the guarantee fund that gives us concern, if it is done as is currently set out. Again, we might be comfortable with that still being done under delegated power, but there would at least need to be an amendment to the process relating to that general provision to make any change at all. That would be done through the affirmative procedure at the moment, but we would need to ensure that there was not only consultation, which is provided for, but a requirement to give reasons for any broader changes. Reasons and an explanation should be given to the Parliament before it votes on the regulations.

11:15

I will explain why that should be the case. The guarantee fund is precious; it is a jewel in the crown of regulation in Scotland and a protection for the consumers of legal services. The guarantee fund is there when, in very rare cases, through dishonesty or fraud, a solicitor has defrauded their client of money. It ensures that we protect clients in that regard and make payments in those very limited circumstances. It has worked well. There have been no problems or issues with the fund over its long history—other than the fact that, for example, as I said, the maximum amount of award has not kept pace with inflation over time, so some tweaking is needed.

It is important not only that there is consultation with the people who have the evidence on how the fund works in practice—as is set out in the bill—but that reasons are presented for any change to something that works so well and is so precious that the bill states that, if a new category 1 regulator were to come into being, it should have a "compensation fund", as it is called in the bill, that is the same as the Law Society's guarantee fund. We seek to add that extra protection to the broader potential for changes other than the small tweaks that we had asked the Government for.

Oliver Mundell: What would that look like, as a process? You mentioned having a statement of reasons. I am just trying to understand where that would fit in. Obviously, all secondary legislation that comes to the Parliament comes with an explanation from the Government, setting out the need for it at the time.

Rachel Wood: I suggest that those general provisions—not some of the particular and specific ones—be done under what I think is referred to elsewhere as the super-affirmative procedure, which it is not just about consultation: the regulator is given a decision notice and consultees are provided with draft regulations because, as we know, the devil is always in the detail, particularly given the technicalities around the guarantee fund.

Those draft regulations and an explanatory document would be laid before the Scottish Parliament before being approved.

Oliver Mundell: That is helpful.

The Convener: Morag, do you have anything to add?

Morag Ross: I do not seek to make any comment in relation to the Law Society or the guarantee fund.

Jeremy Balfour: I turn to section 41(2) and (6). The latter, for example, gives the Scottish ministers regulation-making powers to allow category 1 regulators to extend the scope of the authorising and regulating legal businesses rules. What are your reflections on the scope of the powers in those subsections, including whether they should be necessary in practice?

Rachel Wood: I am grateful for the opportunity to address section 41, which is sometimes overlooked due to all the noise around sections 20 and 49.

There are two elements to section 41. Subsection 2 includes a provision that rules should

"deal with such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as the regulations may specify)."

We take the view that that provision is very broad and that it is an unwarranted extension of ministerial powers into the authorisation rules and practice rules for legal businesses.

Again, that wording exists in the Legal Services (Scotland) Act 2010, which is about licensed providers or alternative business services. The Scottish Government has said to us that we did not object to that legislation. My response is that I think that, now, we would object. The 2010 act is a piece of legislation of its time. The whole notion of alternative business structure was very new and untested in 2008 and 2009 when that legislation was being worked up. In England and Wales, and other jurisdictions, such as Australia and certain US states, it has now been up and running for more than 10 years and, generally, people have moved on in that regard.

However, this is not about ABS or legal services organisations that are not owned by solicitors. It is about the practice units—the existing law firms that we have regulated for nearly 75 years. For all those years, we have had in place the very effective system of practice rules that are approved by the Lord President. Sometimes, the Lord President chooses to consult external stakeholders as well, and, sometimes we choose voluntarily to consult external stakeholders on practice rule changes. Therefore, we are deeply concerned about it now being said that ministers or Parliament should have a role in the actual practice rules and authorisation rules for the profession, because that threatens the independence of the legal profession.

I will move on to section 41(6), which is slightly different and provides that, by regulations, the ministers could allow the ALB rules—the practice rules for law firms going forward—to deal with the provision by law firms of other services in addition to legal services. We are puzzled by that because we do not know what other services—that are not already covered by the definition of legal services—the ministers have in mind. If they are not legal services, that entity should be a licensed legal provider or ABS under the 2010 act rather than a regulated entity under the bill.

We do not quite understand where that provision is going. Our concern is that section 41(6) might allow Scottish ministers to change the definition of legal services, as set out in sections 6 and 7, by the back door. We contend that the definition of legal services is far too important to be changed by delegated powers and that any changes to that should be subject to full parliamentary scrutiny.

There are two slightly different provisions in that section, and we have issues with both of them.

Jeremy Balfour: I put the same question to Morag Ross, if that is okay.

Morag Ross: Yes—I can answer that briefly. Section 41 and the references to the regulation of legal business do not have the same direct and immediate impact on the Faculty of Advocates—subject, of course, to the possible moves in categorisation. Although there is no immediate impact on the faculty's interests, it is, nevertheless, important to register concern about the direction of what is intended. I share the concerns and reservations that Rachel Wood expressed.

Jeremy Balfour: Ms Wood, will you clarify something that you said? I think that you said that, if the provision in section 41(6) is to be included, any changes should be subject to primary legislation. I might have missed what you said with regard to section 41(2). I appreciate that you do not want that provision at all, but, if it is included, should any changes be made through primary legislation or should that be done through regulations? Is there no way that we can make section 41(2) acceptable to the Law Society?

Rachel Wood: It is the latter. We do not think that there is any justification or need for section 41(2). It goes to the fundamental independence of the profession.

The issue is not about the high-level professional principles or regulatory objectives,

which are rightly set out in primary legislation. It is about the detailed practice rules that the regulator, with the evidence and experience that it has, makes in order to implement the good and ethical provision of legal services. That should not be subject to Parliament or ministers.

I would add that section 41(2) concerns us from a slightly different point of principle. As Esther Roberton touched on, we should remember that the bill has come about not because of any scandal or market failure but because we, the SLCC and the Faculty of Advocates said that there are things that need to be modernised in the regulation of legal services, and we asked for those things, mainly around the complaints system. We also suggested that the existing legislative matrix, which is underpinned by the 1980 act but also by some other existing pieces of legislation, was too prescriptive and complicated, and that there should be a more principles-based approach that would leave the regulators to deal independently with much of the detail. That is part of the trend, I suppose you could call it, in good modern regulatory practice across all professions, so the provision seems to be counterintuitive. As well as being a threat to the rule of law and the independence of the profession, it is counterintuitive that a system in which the Law Society brings in rules and they are approved by the Lord President, which has worked extremely well, should also require all that oversight and interference from the state.

Bill Kidd: We are talking about regulations and the legal system. Paragraph 23 of schedule 2 provides that, when a regulator has acted or failed to act in a way that has had, or could have, an adverse impact on the observance of any of the regulatory objectives, and the matter cannot be addressed adequately by ministers taking measures such as setting performance targets or imposing a financial penalty, the Scottish ministers may make regulations to change or remove some or all of the functions of the regulator. The idea is that there would be additional requirements for the regulations, including the need to share them with consultees or lay them in draft before the Scottish Parliament. Do you have any reflections on the delegation of that power? Do you have any concerns about it? The super-affirmative procedure was mentioned earlier. How do you see that working or not working in relation to the exercise of that power?

Rachel Wood: Schedule 2, particularly paragraph 23, is intricately entwined with section 20. You will appreciate that our starting point is that much of schedule 2 should also be removed.

Changing or removing some or all of the regulatory functions of a regulator is significant. It really matters. It is right, and we accept, that the primary legislation should set out the regulatory functions that the Parliament has within its gift, but it is not right that the Parliament should then gift further delegated powers to change those regulatory functions in any way, even using the super-affirmative procedure. That should be given the fullest parliamentary scrutiny. If regulatory functions were to be changed, it should be done by primary legislation only.

Bill Kidd: On that basis, do you agree that such regulations should have to meet additional requirements and that, therefore, they would have to be laid in draft before the Scottish Parliament before they could be made?

11:30

Rachel Wood: I agree that that is what is proposed at the moment, but we do not agree with that being a delegated power.

Bill Kidd: Thank you. Morag Ross, what is your view?

Morag Ross: This power is clearly of a piece with section 20. For the same reasons, the concerns that have been expressed here are serious. I am not sure that it is necessary to expand on that further. I do not think that the proposed power is properly within the scope of delegated powers. Beyond that, there are serious issues about any intervention of this kind.

Bill Kidd: Those are very clear standpoints. Thank you very much indeed.

The Convener: The bill as introduced contains 21 delegated powers. We have focused on eight of them, which appear to have been the focus of comments that you have made in response to the lead committee's call for views. As a committee, we will report on all 21 of the proposed delegated powers in our report to the lead committee. Do you have any comments on any of the other delegated powers that are contained in the bill?

Rachel Wood: We do. If it would help the committee, we intend to put something in writing on those. As you said, there are 21 delegated powers, and there are little bits and pieces on many of those. We will put something in writing, but the delegated power that we have not discussed today that gives us great concern is the one in section 35.

Section 35(1) allows ministers, by regulation, to make provisions for new regulators or alternative regulators to amend the regulatory functions of another regulator. I recognise that section 35 relates only to what is called a discontinuing regulator. That would be a regulator that the Scottish Government has stripped of some or all of its powers, or a regulator that has decided, for whatever reason, not to continue to be a regulator

and has requested to stand back. Despite the fact that we are talking about limited circumstances, there are, nonetheless, some concerns and questions, and I would like to highlight a few points in that regard.

The powers under section 35(1)(c) give the Scottish ministers direct authority to regulate themselves, which we object to. In addition, subsection (2) allows ministers to make any modification at all to part 1 of the bill, which we think is extraordinarily broad and concerns us.

We have already been through the reasons for our objections to the Scottish ministers appointing themselves as the regulator of the legal profession, and I do not intend to rehearse those again. As I said, the powers under section 35(2) allow the Scottish ministers to make any changes that they wish to make. As we have mentioned, the areas in which such changes could be made include the definition of legal services, the functions of the regulatory committee, the regulatory objectives and the professional principles. Again, we would like that provision to be removed.

Finally, on section 35(5), which, together with section 35(6) to (8), permits made affirmative regulations, the committee is already extremely aware of the fact that such regulations are, by their very nature, problematic, and we would argue that they would be particularly inappropriate in the circumstances envisaged in the bill. We cannot imagine a situation in which it would be appropriate for ministers to exercise the power to create a new regulator or to step in to regulate directly themselves on a made affirmative basis, with those regulations being laid before the Parliament and dealt with in what would be a short time period of 40 days. Again, it is astonishing that that would be permitted.

If a regulator were, for any reason, to choose to discontinue being a regulator or were to be discontinued, steps would clearly need to be taken. We would suggest that such things would happen only in the most limited of circumstances. I cannot think of a circumstance in which it would happen overnight, and, even if it did, it would still be open to the Parliament, if it needed to, to take emergency primary legislation measures.

I am conscious that we have gone over time, but I just want to say that, for those reasons, we have deep concerns about section 35.

Morag Ross: On the face of it, I find it a little bit puzzling that section 35 is where it is. Although it falls within the provisions applicable to new regulators, its scope might be intended to go beyond them. There might be a good answer for that, but it is not entirely clear how all of it is supposed to fit together.

Beyond that, I would only be repeating myself and the observations that have already been made by Rachel Wood, with which I concur. I am happy to take further questions on the matter, but, again, this looks like overreach for a couple of reasons. The provisions appear to go beyond new regulators of legal services, but, perhaps more important, they appear to give ministers powers to regulate in a way that does not fit our normal and proper structures.

The Convener: Thank you for that. I note that Rachel Wood said that we would be receiving something in writing, and the committee certainly looks forward to that.

As colleagues have no more questions, I thank Morag Ross KC and Rachel Wood for their extremely useful and helpful evidence this morning. The committee might well follow things up in writing afterwards if we have any further questions.

With that, I move the committee into private session.

11:39

Meeting continued in private until 12:04.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba