OFFICIAL REPORT
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Equalities, Human Rights and Civil Justice Committee

Tuesday 28 November 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

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EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
25th Meeting 2023, Session 6

CONVENER

*Kaukab Stewart (Glasgow Kelvin) (SNP)

DEPUTY CONVENER

*Maggie Chapman (North East Scotland) (Green)

COMMITTEE MEMBERS

*Karen Adam (Banffshire and Buchan Coast) (SNP)
*Meghan Gallacher (Central Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Paul O'Kane (West Scotland) (Lab)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

The Rt Hon Lady Dorrian (Lord Justice Clerk)
The Hon Lord Ericht (Senator of the College of Justice)
Oliver Mundell (Dumfriesshire) (Con)
Esther Roberton

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 28 November 2023

[The Convener opened the meeting at 09:47]

Regulation of Legal Services (Scotland) Bill: Stage 1

The Convener (Kaukab Stewart): Good morning, and welcome to the 25th meeting in 2023 of the Equalities, Human Rights and Civil Justice Committee. We have no apologies this morning.

Our first agenda item is our fifth evidence session on the Regulation of Legal Services (Scotland) Bill. We have two panels of witnesses this morning. We are privileged to welcome senators of the College of Justice for our first panel. The Rt Hon Lady Dorrian is the Lord Justice Clerk, who is the second most senior judge in Scotland. She was appointed as a temporary judge in 2002, and she became a judge in the supreme courts in 2005. She was appointed Lord Justice Clerk in 2016. She sits in the inner house of the Court of Session, and she is the president of the second division of the inner house.

The honourable Lord Ericht was appointed as a judge of the supreme courts in 2016. He sits in the outer house of the Court of Session and also presides over trials in the High Court of Justiciary. He is also a chair of the United Kingdom Competition Appeal Tribunal.

We are grateful to both of you for giving up your time to speak to us today.

We are aware of the concerns that have been expressed by the senior judiciary with regard to the bill in response to our call for views and in correspondence with the Delegated Powers and Law Reform Committee. We will seek to explore those concerns in depth this morning.

We have also noted the DPLR Committee's report, which was published last Thursday, and we have written to the Minister for Victims and Community Safety to seek more detail from her on what impact any potential changes to the bill might have and whether they would alleviate and address the concerns that have been expressed.

We expect Oliver Mundell from the DPLR Committee to attend today's meeting as soon as his committee has concluded its business.

I refer members to papers 1 and 2, and I invite Lady Dorrian to provide an opening statement on behalf of the senators of the College of Justice.

The Rt Hon Lady Dorrian (Lord Justice Clerk): Thank you very much, convener.

The Lord President is grateful to the committee for accepting his offer that Lord Ericht and I attend today's meeting to indicate the grave concerns that we have about aspects of the bill. Members of the judiciary rarely attend Parliament to comment on proposed legislation. The fact that we are doing so merely underlines the extent of our concerns.

As members know, our principal concerns relate to the removal of the Lord President and the Court of Session as the ultimate regulators of the profession, and the constitutional threats to the independence of the judiciary and of the legal profession contained in some of the provisions.

Although the Scottish Legal Complaints Commission, the Law Society of Scotland, the Faculty of Advocates and others handle complaints, the profession is ultimately regulated by the Lord President, who has responsibility for the education, training and admission of all regulated lawyers, as well as for the disciplinary processes that apply to them. Regulation by the Lord President, who is independent from Government, Parliament and the lawyers whom he regulates, ensures compliance with the separation of powers and the rule of law, which are central to our democracy. That has evolved over hundreds of years to guarantee that it does so.

Under the bill, the Scottish ministers would be given direct control to change the professional obligations of lawyers; to reassign regulatory categories; to review the performance of, or impose sanctions on, the regulator; to directly exercise power to regulate the profession; and even to set up an entirely new regulator. Those provisions clearly transgress against adherence to the rule of law, as do provisions that require the Lord President to act jointly with the Scottish ministers.

It is equally unacceptable to remove the Court of Session's appellate jurisdiction, which is designed to prevent the SLCC from acting unlawfully to the detriment of consumers and others.

We agree that robust regulation is required and that regulatory bodies need to make continuous improvements to the way in which complaints are handled in the interests of consumers. All that can be achieved without removing the role of the Lord President or introducing a role for Government.

The fundamental problems with the bill, as with the Roberton recommendations before it, are the mistaken premise that the legal profession regulates itself, when there is an independent

regulator in the Lord President; and a failure to recognise the importance of the independence of the profession as a fundamental aspect of the rule of law. The senior judiciary voiced strong objections to the Roberton recommendations on grounds that echo our concerns about the bill—namely, that the proposals are constitutionally inept.

We are here to answer any questions that the committee may have, and we are very happy to do so.

The Convener: Thank you very much. I will kick off the questions; my colleagues will then come in.

Lady Dorrian, you mentioned the role of the Lord President. I want to give you an opportunity to unpick that a little bit. Can you give us some practical examples of the role of the Lord President and the implications of the bill for what the Lord President would or would not be able to do?

Lady Dorrian: I can give you an overview of what the Lord President does at the moment. As the head of the Court of Session, he has overall responsibility for the regulation of the profession. He has responsibility for the criteria for admission or removal from office of an advocate, and for regulating professional practice, conduct and discipline. His powers to regulate professional practice, conduct and discipline would all be adversely affected by the bill's provisions.

The Faculty of Advocates exercises functions that include handling disciplinary matters and complaints, but that is under a delegated power from the court, where the Lord President retains overall responsibility. The faculty's disciplinary rules must be approved by the Lord President, and they cannot be revoked or amended without his agreement. The rules are currently in the process of being amended, and he has written to the faculty to explain certain changes that he requires it to make, including improvements to the timescales for dealing with complaints.

Similarly, the Law Society of Scotland can make rules regarding training, education and rights of audience, whether they relate to professional practice, conduct, discipline, accounting, professional indemnity or whatever, only if the Lord President approves. The disciplinary tribunal must get the Lord President's approval of any rules relating to its procedure, complaints and appeals. The Lord President also appoints lay solicitors and members of the tribunal, and he has an important role in the termination of appointments.

The SLCC must consult the Lord President before making or amending rules about its practice and procedure or changes to those rules. The ministers must consult the Lord President before appointing members of the SLCC. The chair of the SLCC may not remove a member from office without the agreement of the Lord President, and the Lord President can remove the chair from office if satisfied, on the basis of rules set out in practice, that it is appropriate to do so. At every aspect of regulation, the Lord President is at the top, and everything requires his say-so.

The fundamental changes that the bill would introduce would be to remove that power of control from the Lord President as an independent regulator, independent of Government; to require him to act in certain circumstances along with Government, which is constitutionally inept, as I am sure members appreciate; and to substitute his role in other regards with action by Government or others.

I think that we have already indicated the maps that I have with me. Maybe Lord Ericht can go through them with you, because it might help to illustrate the point that we have been trying to make if you could look at them.

The Hon Lord Ericht (Senators of the College of Justice): The first map is of the current regulatory framework. You will see that, under the current system, the Lord President is at the top as the ultimate regulator of the legal profession, and underneath the Lord President as the ultimate regulator are the professional bodies. The current system has the Lord President as regulator, with limited self-regulation by the professional bodies, and the professional bodies have to get the consent of the Lord President—in fact, he makes the rules that Lady Dorrian mentioned.

In relation to the Court of Session, the Lord President's role as a regulator is bigger than that. The Court of Session can take direct control of a solicitor's firm through appointing a judicial factor to take control of the company, and can also directly remove and suspend advocates. The advocates are there as a delegated power of the Court of Session, so anything that the Faculty of Advocates does involves exercising a delegated power. The Faculty of Advocates has no independent right to regulate any advocates.

That is an overview of the current system.

The next thing that it might be helpful to look at is the model that is proposed by the Roberton report. We have replicated what is in the Scottish Parliament information centre briefing on that. Members will see that that completely transforms the current system. Instead of the Lord President, as the ultimate regulator, being at the top, the Scottish Parliament is at the top. In terms of the separation of powers, that is a major change. Control of the profession is moved from the judiciary to the Scottish Parliament.

That is quite deliberate—it is part of the whole scheme of the Roberton review. The first recommendation was that the new independent regulator should be accountable to Parliament. The Court of Session kind of falls off the edge under that plan—it does not have any place in the hierarchy. Under Roberton, we would continue to have an independent regulator, but instead of the independent regulator being the Lord President, it would be a new body answerable to the Scottish Parliament.

10:00

The next thing that I ask members to look at is the regulatory framework that is proposed by the bill. You will see that it immensely complicates the situation. In terms of constitutional theory, there is a complete mishmash of the three branches of Government. The Law Society category 1 regulators report to the Scottish Parliament, and the Lord President and the Court of Session exercise various differing powers. Sometimes they can achieve the same thing by using different powers over the different bodies. The professional bodies' functions are split. They have a representative function and a separate regulatory committee.

I now ask members to look at what is called diagram C. I am sorry—the numbers and the letters do not really make much sense, but the next thing to look at is the regulatory framework if the Scottish Government were to amend the bill to transfer ministerial powers to the Lord President. On that analysis, the Lord President retains their place as the ultimate regulator of the legal profession. However, underneath that, the existing limited self-regulation of the professional bodies is, in a sense, limited even further, because they are split into a representative part and a regulatory part.

I will mention a final thing now, if the convener would find that helpful. Members should have a look at the English position, because understanding what happens in England is useful by way of background.

Of course, we lawyers tend to look on England as a completely foreign country, because it has its own, separate legal system, which has been preserved since 1707. Historically, the position in England has always been very different from that in Scotland. In England, there was self-regulation of lawyers through professional bodies. In Scotland, that has been never the case—the Court of Session has been the ultimate regulator ever since it was created back in 1532. The 2007 reforms in England were brought in to address the position whereby the professions self-regulated.

The oversight map that we have taken from the Legal Services Board shows that England has got to a position that is quite similar to Scotland's position. At the top is the Legal Services Board, which is an independent regulator. In the Scottish system, that is where the Lord President sits as the independent regulator. Under that are the professional bodies: the Law Society, the Bar Council, et cetera. The Law Society and the Bar Council are split into separate representative and regulatory parts. In England, as in Scotland, there is an independent regulator, and sitting underneath that are the professional bodies, which have limited self-regulation and are split into a representative and a regulatory part.

The diagram does not show how things go upward from the Legal Services Board. However, that is important to know as well because, constitutionally, England is in a very different position from Scotland.

Looking upwards, the Legal Services Board reports to the Lord Chancellor. We do not have anything in Scotland at all that is similar to the Lord Chancellor. Traditionally, the Lord Chancellor was head of the judiciary. His traditional role could be plotted as being the equivalent of the Lord President. However, in 2007, there was a big reform and the judicial functions were mostly removed, but the Lord Chancellor retained some judicial functions. One judicial function that he retained was that the Legal Services Board reports to him. That is significant, because it reports to him not as a cabinet minister or a member of Parliament, but in the remnants of his role as head of the judiciary.

I hope that that helps to explain. I am happy to elucidate in more detail if I can.

The Convener: Thank you for that. The diagrams were exceptionally helpful and I say that not just as a teacher who loves diagrams. [*Laughter.*] They do illustrate things.

I will ask for clarification on a few points. The diagram of the current regulatory framework says that the

"Scottish ministers have duty to consult Lord President".

What does that involve? Is that a legal duty to consult and if so, on what, for example? How do you know that ministers have consulted? Does that transfer into decisions? I am interested in what power ministers have at the moment.

Lady Dorrian: The ministers must consult before making rules, in relation to changes to the rules for practice and procedure and before appointing members to the SLCC. That is usually done on a formal consultation basis: the rules would be proposed, the Lord President would consider them and indicate whether he deemed

them acceptable or not or, if it were a question of changing the rules, whether those changes were acceptable or not. I imagine that there may sometimes be a dialogue in order to achieve something that is acceptable to the Lord President. I have no personal experience of that. Equally, there would be a formal consultation in relation to the appointment of members of the SLCC.

The Convener: The minister has indicated that amendments will be lodged that should allay some of the concerns that have been robustly raised, but we do not know what those amendments will be. In that wriggle room, would either of you like to give me an indication of what those amendments could be that would address your concerns?

Lady Dorrian: Much as I would like to draft the legislation, I do not really think that we can do that. It is good that the Scottish ministers have recognised that it is important to amend the bill to address some of our concerns. We have had engagement, to a certain degree, on what the main issues are, as I outlined in my introduction.

However, as you pointed out, madam convener, we do not have any idea what those amendments will look like. As ever with these things, the devil is in the detail. Whether amendments that are to be lodged—we do not know what they are yet—will address our concerns adequately remains to be seen. It is really not possible to discuss it in a vacuum; you need to know what the amendments will be.

For example, simply transferring a function from the Scottish ministers to the Lord President is unlikely to be sufficient because it would not address some of the underlying issues. I will take the example of the power to create a new regulator. You cannot just transfer that power to the Lord President and say, "That's fine. That means everything's okay." How would the Lord President go about doing that? What would the system that enabled him to do that look like? How would it work? That, in itself, risks politicising the role of the Lord President. The extent to which amendments will address concerns really cannot be determined in advance of seeing those amendments. It is as simple as that.

The Convener: I have a final question before I bring Karen Adam in on that theme. I am interested in how the Lord President takes the views of consumers into account when he is carrying out his regulatory functions. For example, are there any formal processes to ensure that consumer views are considered in addition to the views of the legal profession?

Lady Dorrian: The Lord President considers that the interests of consumers are vital. That is one of the reasons why he wrote to the faculty to raise the issue of timescales, in particular the difficulties that have been raised in relation to some recent examples. Lord Ericht will perhaps be able to deal with the question about consumers more adequately.

Lord Ericht: Although the Lord President's door would no doubt be open if consumer groups wished to meet him, the formal structures are different, as they involve consumer groups engaging at the professional body level or through the consumer panel of the Scottish Legal Complaints Commission. We are not saying that the current regulatory framework is ideal; there are many ways in which it could be improved, and it may be that a process with more consumer involvement would improve it. Our point for the committee today, however, is that you do not need to remove the powers from the Lord President to make them better. You could strengthen the Lord President's powers in relation to consumers without removing his powers to regulate. We are always looking to improve and to do things better.

One of the key issues that consumers are concerned with goes back to the Competition and Markets Authority's view. One of the main things that the CMA is concerned with is price transparency and the extent to which consumers can shop around for prices. You do not need to remove the Lord President's regulatory powers to solve that, as that can all be done within the same structure or through improvements to the structure.

Lady Dorrian: Save in relation to the Faculty of Advocates, which is in a separate position, the Lord President, in dealing with matters concerning the SLCC and the Law Society, can operate only within the framework that has been given to him by the Parliament. The bill could have sought to strengthen his powers of regulation, particularly in the interests of consumers. Instead, however, the opportunity to do that was not taken, in favour of introducing governmental involvement.

I can give one small example of a situation that arose in relation to the SLCC and the Law Society. I do not want to go into great detail about it, but the SLCC raised an issue with the Lord President, complaining that a number of lawyers were not responding to it or providing it with necessary material. The Law Society disputed the figures that were being suggested by the commission. That is a factual issue, and it must be possible to determine, as a matter of fact, how many such instances there have been, so the Lord President suggested that it would be useful if the two parties could work together in the public interest and in the interest of consumers to present him with a joint factual basis on which he could then address the extent of the problem, what it was and how it could be resolved. That fell on deaf ears—let us

just put it that way. The Lord President does not have the power to make any kind of direction in that regard. There are a number of areas where the bill could have strengthened the Lord President's powers, but it did not do so.

Karen Adam (Banffshire and Buchan Coast) (SNP): Good morning to the panel. I appreciate your answer to the convener's earlier question, saying that you cannot really speculate on amendments. However, I wonder whether there are—if I can word it like this—any updates on discussions between the Lord President and the Scottish Government regarding any areas in which it may be easier to transfer, through an amendment to the bill, powers to the Lord President from the Scottish Government, where the bill currently proposes that they rest. You said, for example, that it would be tricky to set up an independent regulator. Are there any areas in which you see any hint that what I have described would be possible?

10:15

Lady Dorrian: We have to look at the bill's provisions as an overall scheme of regulation—it is not easy to cherry-pick one bit and say, "Well, that might work." Again, whether it might be possible to amend the bill to address those concerns would depend on the precise wording of the amendment. To be frank, we are in a very strange position. We had no sight of the bill before it was published and we are—like everyone else—reacting to its contents and trying to work backwards rather than forwards. I am sorry, but I therefore have to decline the invitation.

Meghan Gallacher (Central Scotland) (Con): As it stands, the Parliament is scrutinising legislation that the Scottish Government itself intends to amend, and that aspect has been part of the discussion that we have had thus far. We are looking at the bill at face value, but we know that significant and valid concerns have already been raised, and we do not know whether the forthcoming amendments will make those in the legal profession more amenable to the bill.

I throw this question out there. Is there a risk that if the intended amendments are not forthcoming as soon as possible, the legal profession could lose confidence in the principle and direction of the bill? Given that we might have to invite witnesses back to re-scrutinise the amendments once we have sight of them, could that set back the implementation of the intended principles of the bill?

Lady Dorrian: All that I would say is that the sooner one can see the amendments that are being proposed and understand what shape that will give the bill thereafter and what it would mean for the regulatory framework in this country, the easier it will be to address those issues and concerns, and try to find a way forward. Having sight of the amendments really has to be the first stage.

Lord Ericht: We are a long way away from that. We have had some high-level proposals from the Scottish Government as to how it may amend the bill and there have been some conversations between officials, but we need a lot more information from the Scottish Government before we can consider whether whatever proposals it comes up with are viable. It will be essential to see the draft amendments because it is only at that stage that we can focus on them.

Annie Wells (Glasgow) (Con): Good morning, panel. I am trying to get to grips with the issue of the independent regulator. In response to the committee's call for views, you put forward the argument that an independent regulator, as proposed by the Roberton review, would

"threaten ... the independence of the ... legal profession"

and the rule of law, as well as the role of the Lord President. Could you expand on that for us, please?

Lady Dorrian: The fundamental weakness of the Roberton proposals is that, rather like the present bill, they rest on the false premise that the legal profession regulates itself. There was a complete failure to understand the role of the Lord President as the independent regulator.

The senators of the College of Justice did not even feature on the list of consultees for Roberton—that in itself is an indication of the extent to which there was a complete failure to understand the role of the Lord President and the Court of Session in the regulation of the profession.

The other failure was in not appreciating the extent to which the proposals would impinge on the rule of law by importing a degree of political control over the profession, creating the same risks as the bill that we are considering would create.

One of the maps that we saw put the Scottish Parliament at the head and made the regulator of the profession accountable to it. That clearly impinges on the independence of the legal profession, which is an essential aspect of the independence of the judiciary. We cannot have one without the other. Making the profession accountable in that way transgresses against the separation of powers. It is as simple as that. It fails to recognise that the legal profession must be independent from Government and from the Parliament. There is just a lack of understanding of fundamental democratic principles.

It is particularly important to recognise that independence is not created for the benefit of lawyers. It is designed not to shield them or make them unaccountable but to benefit the individual consumer, so that someone who may end up having to sue the Government can be sure of obtaining a lawyer who will be absolutely fearless in the presentation of their case and entirely independent of any Government influence.

That is of particular importance given that, between April 2016 and November 2023, 4,946 civil cases before the courts have involved the Government. That is nearly 5,000 cases—and, of course, some of those are high-level litigations. There have been two litigations about representation on public boards; one in relation to the census; a section 35 challenge, which is on-going; a reference to the Supreme Court in relation to the independence referendum; litigation about the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill—the named person system; and loads of others. Those are high-level, important matters and it is essential that individuals who want to challenge the Government can do so through an independent lawyer of their own choosing who will not be subject to any kind of Government influence or risk of discipline.

Annie Wells: Thank you for that. Convener, Lord Ericht answered my other question earlier.

The Convener: The other question was about the Legal Services Board. Lord Ericht mentioned the different system for England and Wales. Thank you for explaining that. The evidence from Chris Kenny was that there was no evidence that independent regulation has damaged the independence of the legal profession in England and Wales. What is your view on that?

Lord Ericht: I think that we are slightly at cross purposes on that because we say that we already have independent regulation and that that is being taken away. Chris Kenny is coming at it from a separate angle, which is that we could have an independent regulator who was not the Lord President. We would say, first, you have to justify completely changing the system; and, secondly, maybe it could be done in that way but it would have to come under the control of the Lord President—not Parliament or elsewhere. We are talking about two different things—not so much an independent regulator, but who the person is that regulates.

We are not sitting with a blank piece of paper. We have to address ourselves to what is in the bill and what is in the Roberton report. If you sat with the millions of permutations with which you could work out a legal system, one of them might include a kind of legal services board under the authority of the Lord President, but that has not been suggested by anyone so we do not want to get into speculation about it.

The Convener: Fair enough.

Paul O'Kane (West Scotland) (Lab): Good morning to your lordships. The convener began her questions by asking about the area that I am interested in. Last week, I had an exchange with Roddy Dunlop, who attended on behalf of the Faculty of Advocates, on the issue of an independent regulator. Mr Dunlop's contention was that the discussion is academic, because an independent regulator is not in the scope of the bill. The challenge for the committee will be to take a broader view on whether the Government may wish to consider that at some point in the future, given the Roberton review.

Will you expand on Lord Ericht's points regarding your concerns about independent regulation? We have already heard quite a bit about that, but you could talk about any future moves towards the Roberton report's recommendations.

Lady Dorrian: We need to be absolutely clear that we have no concerns about independent regulation, because we already have it in the form of the Lord President. If there was a wish to strengthen the Lord President's powers for independent regulation, that would be all well and good. However, that is not what is being done.

As Lord Ericht says, the question is about who does the independent regulation. The problem with the Roberton report is that it recommends that a regulator should be responsible to the Scottish Parliament. However, that system would be constitutionally inept; it would be an impossible system. On the question of whether, further down the line, the independent regulation by the Lord President could be changed in some way to feature an independent board that is answerable to the Lord President, that is an entirely different landscape that we are not being asked to look at. As with the question of amendments, you would need to look at any scheme before you could address whether it offended against constitutional principles.

The point is that we have independent regulation at the moment, so what is the benefit of changing that to appoint another independent regulator, when you could make improvements and strengthen the powers that have been given to the current one?

Paul O'Kane: We heard some of those points last week from the Faculty of Advocates, the Law Society of Scotland and others. Do you think that there is a problem of perception, in that people think that, if there is a body that is, in lay people's views, completely separate, that constitutes independent regulation, rather than the Lord

President being an independent regulator as it stands currently?

Lady Dorrian: I think that there is an element that people do not quite understand, which is that we have a system of independent regulation. Undoubtedly, it is a challenge to get that over to people and explain, in a way that people fully understand, that we currently have a system that involves independent regulation. I think that you have a point.

Paul O'Kane: Finally, I will turn to the known unknown—to borrow a phrase—about the amendments. I presume that the Lord President has made certain views known about what the amendments might contain. From the Lord President's point of view, what has engagement been like with the Government thus far?

Lady Dorrian: As I said, high-level suggestions have been made to us. I think that we were presented with a paper that we felt we could not respond to, because it was lacking in detail. Another paper was submitted to us that had more detail, but at a very high level, about what the options for amendment might be. That is the level of it—we have not looked at detailed proposals for amendment. Insofar as we were able to, we responded to that in as positive and helpful a way as we could. However, as we have said repeatedly, and as I think everyone who is in the room appreciates, until you see the detail, you cannot find the devil.

Paul O'Kane: Lord Ericht, correct me if I am wrong, but I think that you said that we are some way off from having substantive amendments. Do we have any sense of the timescale from the Government? We have been frustrated in trying to get that detail.

Lord Ericht: No, we do not. As Lady Dorrian has explained, we have given some high-level comments on some high-level options. That is where we are at.

Paul O'Kane: I am grateful to your lordships.

The Convener: We have time, so I am happy to bring in Oliver Mundell, from the DPLR Committee, for a question.

10:30

Oliver Mundell (Dumfriesshire) (Con): Good morning. Thank you for making the time in your schedule to come to the Parliament. I am particularly concerned about a number of the delegated powers in the bill, particularly those in section 5, on the regulatory objectives and principles. The Lord President wrote to the convener of the DPLR Committee setting out some concerns. He said in that letter that his withholding consent would not be a "veto" and flagged up the risk of judicial review.

Will you elaborate on how that might come about?

Lady Dorrian: I agree with that entirely. The issue with section 5 is that it is simply unacceptable to have that delegated power to amend or remove the regulatory objectives and professional principles. I have yet to see any justification for it. That is the problem with a number of the delegated powers in the bill: there is very little by way of justification for them, when you consider the current system and ask what is the mischief that the powers are intended to address. It is really rather difficult.

I entirely agree with the contents of the Lord President's letter to the convener of the DPLR Committee of 17 November.

Oliver Mundell: The minister who is taking forward the bill wrote to the committee on 16 November. In relation to section 5 and some other sections, there was a suggestion that it might be possible to narrow the scope of the changes so that they are possible only at the recommendation of certain bodies.

In terms of more specific detail on what amendments might look like, we heard from the Faculty of Advocates and the Law Society that there were no amendments in relation to section 5 that would make it acceptable. If there were further amendments to the bill, would that alleviate your concerns?

Lady Dorrian: That is unlikely, because the issue with something such as section 5 is that there is no explanation as to why it is needed. Should a situation arise where it was necessary to consider changing, amending or removing regulatory objectives or professional principles, that would be a matter of the utmost importance. The idea that it should, in any circumstances, be left to delegated power seems to me to be highly unsatisfactory.

I do not know whether Lord Ericht has anything to add.

Lord Ericht: You can see that when you look at the examples. I do not have the bill in front of me but, for example, there is a regulatory objective that lawyers must act independently and in the best interests of their clients. As the bill stands, the Government could abolish that. That is so absolutely significant that, if it were to be abolished, it should have a proper parliamentary act to deal with it.

Oliver Mundell: Should section 5, for example, be able to be changed only by primary legislation?

Lord Ericht: Yes. There is a kind of knock-on effect to that, because there is also a general clause—I think that it is section 90—allowing amendments to the bill. That may also have to be looked at to check that that is not used as a backdoor to do the section 5 things.

Maggie Chapman (North East Scotland) (Green): Good morning to the panel. Thank you for joining us and articulating so clearly the concerns that you have outlined.

Will you unpick a little more your concerns around the proposal to abolish the right of appeal to the Court of Session? What would that do, or what do you perceive that it would do, in relation to delays and the consumer experience, as well as the broader legal question at stake?

Lady Dorrian: First of all, there is the constitutional point, which is that the right of appeal to the Court of Session is part of the regulation of the profession; it is part of the exercise of regulatory functions by the court. It is important that there should be a right of appeal to the inner house of the Court of Session and not to a lower court that does not play a part in that regulatory function: the Court of Session does that. A right of appeal to a lower court or, worse still, the abolition of a right of appeal would diminish the importance of the issues to the consumer, which are considerable.

That would not entirely prevent cases from being brought to the Court of Session, because judicial review would still be available but, as I am sure that you are aware, that is not a complete jurisdiction. Looking at the history of appeals to the inner house, it would be far from satisfactory and, importantly, it would not enable any systemic failures in the disciplinary process to be identified, which an appeal process that looks at the facts found as well as the decision made can do. It would be a grave mistake to think that removing the right of appeal would mean a financial saving or that there would be a saving in time.

Perhaps I could give you some figures. We have a note of the number of appeals to date. Since 2020—I use that date only because, since then, we have figures specifically on appeals direct to the inner house, as opposed to potential other cases involving the SLCC—there have been 12 appeals. Of those, two are still alive and 10 have been resolved. Of those 10, four were disposed of by agreement—they were settled between the SLCC and the individual—and six were successful. In six of them, the court held that the SLCC had acted unlawfully.

Of the 10 cases that went to the inner house, six were appeals at the instance of the lawyer, but four were appeals at the instance of the consumer. Almost half of them were appeals at the instance of the consumer seeking to vindicate their rights. The average period of time that those appeals took was 34 weeks from start to finish, because it is a straightforward one-step process that goes straight to the inner house of the Court of Session.

If you change that through what is proposed in the bill, you will change a one-step process into a potential four-step process. The first step is the internal review or the marking of their own homework. The second is the bringing of a judicial review to the outer house of the Court of Session, and it could be predicted, I think, that a fair number of those would be appealed to the inner house, and such an appeal would be stage 3. In an important case, it is not inconceivable that an appeal could be made to the UK Supreme Court, which has hitherto never had jurisdiction in this field at all.

I can also give you figures for the costs, using the Court of Session etc Fees Order 2022 as a guide. I am talking averages here, because, obviously, this does not apply to every single case. The average fee payable to the court for bringing an appeal to the inner house is approximately £947, exclusive of what you pay for your lawyer on top of that. Those are court fees. The average fees for bringing a judicial review to the outer house range from £1,142 to £1,455. As I say, it might be expected that a number of the cases brought as judicial review would then be appealed, so you would add the £947 on top of that.

Therefore, the cost would definitely be more. I find it impossible to accept the suggestion that it would be cheaper to abolish the direct right of appeal to the inner house. Also, your 34 weeks would go off and up the Cowgate, because the length of time that it would take to present a judicial review would be significantly longer than that. I think that the average time for a decision on a judicial review is 17 months, and then, of course, you might have an appeal to the inner house.

Therefore, I fail to see the justification for removing the direct right of appeal for a consumer who is dissatisfied with the decision of the SLCC to the inner house to correct that decision in a simple, straightforward and relatively cost-effective process. Why should that be changed? We have had 10 cases in the past three and a half years.

Maggie Chapman: I wonder whether the volume of cases is an indication that consumers do not feel confident enough to use the direct route. Perhaps having what might be intermediate routes—or just lower level ones, if that makes sense—would not seem so daunting to consumers. Can you see that as an argument?

Lady Dorrian: I can see it being suggested, but I cannot see it as an accurate situation. In England, a person can complain to the

ombudsman, and the ombudsman can say—this happened in a specific case—"Well, because the lawyer has agreed to abate the fees by three quarters, we don't need to investigate," and the individual is left with nothing. That will put people off. I do not really think that that is an answer.

The reality is that any appeal should be to the court that has the regulatory responsibility. An appeal to, say, the sheriff court or even the sheriff appeal court would not suffice, because they do not have that responsibility. Over the years, the court has had to correct a number of decisions of the SLCC when, for example, it has not complied with time limits, investigated matters that it did not have authority to investigate, miscategorised complaints—which is quite a common issue about which consumers express concern—or sought to waive legal professional privilege when that was not permissible. Those are matters of considerable importance, and they should be dealt with at the appropriate level.

Maggie Chapman: Lord Ericht, do you want to come in on that, too?

Lord Ericht: I just want to add something about costs. I know that the SLCC is concerned about the costs involved and the costs to the profession. You will have seen from the statistics that the SLCC lost every single case that went to hearing. The reason why it has incurred a lot of legal fees is because, when it has lost, it has had to pay its own legal fees and those of the other side. You have to look carefully at the reason for the expense, which is because it has run cases that it has lost.

Maggie Chapman: That is helpful.

I have a question about the different regulatory regimes and the proposal to split the regulators. Last week, we heard from the Law Society that such a split is not appropriate. Do you or the senators have a view on that and on whether you consider it to be the Law Society's decision?

Lord Ericht: To clarify, do you mean the split between the regulatory arm and the representative arm?

Maggie Chapman: No, I mean the two different types of regulators—categories 1 and 2.

Lord Ericht: We do not have a strong view on that. The only thing that we bring to the table on the issue is that the Faculty of Advocates is not an independent regulator. It is a category 2 regulator, but it is the Court of Session that has that power, which it just happens to have delegated to the faculty. Beyond that, we do not have anything to say about it.

Maggie Chapman: Thank you. I will leave it there.

10:45

Karen Adam: Last week, the Association of Construction Attorneys stated that becoming a new regulator under the existing rules was

"challenging and, at times, traumatic".—[*Official Report*, *Equalities, Human Rights and Civil Justice Committee*, 21 November 2023; c 2.]

It also said that no reasons for decisions were given by the Lord President. Do the rules in sections 25 to 37 of the bill, on applications to become a new regulator, need to be amended in some way to deal with that issue?

Lady Dorrian: I wonder how easy it should be to become a new regulator. These are really important and serious powers, and the court has to be satisfied that someone who is given them has the required skills, experience and knowledge and operates in the correct ethical and professional way to be able to exercise them. It is probably only right that that should be a relatively challenging process, because these are very important matters.

To preserve the standards for consumers, it is important to make sure that those who enter the field know what they are doing, have ethical responsibilities, can be trusted to act in the best interests of consumers, are conscious of their obligations to the court, and are altogether suitable to be put into the role. I do not think that it should be an easy process.

Karen Adam: That is helpful. Thank you.

The Convener: We are nearing the end of this evidence session. If any committee member wishes to clarify anything with Lady Dorrian while she is with us, this is the moment for them to do so.

Maggie Chapman: I have a question that is possibly slightly cheeky. In your earlier responses, Lady Dorrian, you were very clear about the powers that need to reside in the person of the Lord President. What happens if that person goes rogue? [*Laughter*.] Sorry.

Lady Dorrian: Well, we do not legislate on the basis that we have to worry about people going rogue. If the Lord President becomes incapacitated in some way, there are provisions that will enable the Lord Justice Clerk to become interim Lord President, as it were. There are steps that can be taken to address that. I certainly think that we would notice if the Lord President went rogue.

Maggie Chapman: Okay. Thank you.

The Convener: I think that I get Maggie Chapman's point, given the Lord President's power over the legal professions. From the consumer's point of view, I suppose that it is about

transparency. That is the more serious point. It is important that decisions are transparent and open, that there are enough checks and balances in the system and that transparency is provided for. I think that that is the point that Maggie was trying to make.

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

Maggie Chapman: I suppose that there is a point about who oversees the overseer. I wonder whether that is the root of some of what the Roberton report was trying to get at. You have made the case clearly that what is proposed is inappropriate. We have Esther Roberton coming in next, so we can ask her about that.

The Convener: Absolutely.

That concludes the committee's questions. Do you have any final points that you wish to make?

Lady Dorrian: I do not think so. I think that we have covered everything. Thank you for hearing us.

The Convener: On behalf of the committee, I thank you for giving up your time this morning. We appreciate how busy you are. Your evidence has been valuable.

I suspend the meeting briefly to allow for a change of witnesses.

10:49

Meeting suspended.

10:55

On resuming—

The Convener: Before we move on to our second evidence panel of the morning, I ask for any declarations of interest.

Maggie Chapman: Esther Roberton and I worked together when I was rector of the University of Aberdeen and she was senior governor. We are also on Scotland's Futures Forum together.

The Convener: That is on the record.

I welcome Esther Roberton, who, back in 2017, was commissioned to chair the independent review of legal services regulation in Scotland. Her report "Fit for the Future: Report of the Independent Review of Legal Services Regulation in Scotland" was published in October 2018. Its main recommendation was that an independent body with a non-legal chair and a non-legal majority should be set up to regulate legal professionals, with the professional body retaining only its role as a representative of the profession. The new system would be financed by a levy on practitioners.

Esther, we are very grateful that you accepted our belated invitation to appear before us. I invite you to make an opening statement before we move to questions.

Esther Roberton: Thank you for the invitation. It is a bit strange: I have already done a session in front of the Delegated Powers and Law Reform Committee, so you may already know some of what I am about to say. For the record, however, I will briefly set the context.

As you said, I was commissioned in 2017 to carry out the review and I spent 18 months on it. It is now more than five years since I published my report, so I preface all my remarks by saying that I am not as much in command of some of the detail as I might have been five years ago. However, I have gone back to the report to refresh my memory.

You will not be surprised to know that I am disappointed that matters have taken so long and that my principal recommendation was not accepted. I will come back to that. I am aware—not least because Jamie Wilhelm, who I worked with at the time, is sat behind me—that the civil servants have been working hard over that time to find a compromise between the two opposing positions. However, in my view, there is no compromise: either you believe in independent regulation, as I do, or you do not. There is no halfway house.

My review took 18 months. I was supported by an expert panel, which included some very senior solicitors and others with regulatory experience. Over that time, supported by a small secretariat, we did a wide range of engagement with a wide range of stakeholders, from both the professions and consumer bodies, and with individual groups of lawyers.

One of my challenges was to balance the consumer and the professional interest. We also commissioned significant research, and I became more of an expert about regulation than I ever expected that I might.

My conclusion was then, and still is, that regulation should be independent of those whom it regulates. That position is supported by the Competition and Markets Authority, by other consumer bodies—and by many senior members of the profession. In fact, early on, one very senior member of a big supporter of the Law Society said to me:

> "I've heard what you say about the perception of the public that the Law Society would always take the side of the lawyer and I've realised that that perception alone is damaging to the profession, whether it's true or not ... The thing that worries me most is that, on reflection, I realise that, on the rare occasions when there is that conflict, it is actually the case that it does side with the profession—because, in the end, that is what it's there to represent."

I do not believe that the current model serves the profession or the public. When we launched the report, Lorne Crerar went on record as saying that he was a keen supporter of a Law Society that represented him as an individual, his firm, his profession and Scots law as a model for the rest of the world, but that he was not happy with that representative and professional support body also being the body that would prosecute. I have come across that word a few times. If a lawyer is being prosecuted through the Law Society, where do they go for support? They cannot go to their professional body.

11:00

I believe that the global direction of travel in regulation is towards independence. Throughout my time, I have been surprised to hear people confuse the Architects Register with the Architects Registration Board. Architects have that board as their separate independent regulator as well as having their membership bodies, as do dentists, doctors, teachers and others. That is the direction of travel across the professions, and it is also the direction of travel in the legal profession.

Ireland had already carried out a review by the time I started my review, although it had not been terribly effective and the legislation was pretty muddled. Stephen Mayson started his review in England and Wales quite late in my time, and I did not think that he would come down in favour of independent regulation; he shared his report, and he obviously did come to that conclusion. Most recently, Ron Paterson, who had been in Scotland for a visit, and his colleagues came to the same view in New Zealand. It is interesting that their review was commissioned by the New Zealand Law Society, which has both roles. Its only funding has been provided because of its regulatory role, so it is already preparing for how it will persuade the profession to fund it as a membership body, because the independent regulatory model has been accepted.

The bill definitely goes some way to address many of the problems that we identified, in particular around complaints, but I think that it causes other problems. I suspect that the one the committee has heard the most about is the role that the bill gives the Scottish Government. My review was very clear that independent regulation should be independent not just of those it regulates, but of the Government. Nowhere is that more critical than with the legal profession. Therefore, I gave the Parliament a role not to control, but to appoint. Despite assurances, the Law Society never quite got that message. The Parliament would be required to appoint the chair, and a two-thirds majority would be needed to remove the chair, so those could never be Government or party-political decisions.

In conclusion, I do not think that the bill helps. It seems to have upset everybody—sometimes you can say that that is a good sign—and nobody is wholly happy.

As I have reflected on my report, it has come to me that, when it was commissioned, I was asked to come up with a set of recommendations but I was not asked, and I did not give consideration to, how to transition from the current model to the new model. One solution to the current dilemma would be to move that transition to the front of the bill and look at creating in Scotland something like a legal standards board as a first step towards having an independent regulator. Everybody, including the consumer bodies, has been upset by the powers that the bill currently gives to the Scottish Government. A legal standards board could be given the powers instead.

That would create independence from the profession and would also give the Parliament an opportunity to codify the role of the Lord President—I know that senators of the College of Justice spoke to the committee earlier. From my discussions with him, it was clear to me that the role of the Lord President is hugely wide. He is the overarching regulator, but in my view the risk in his being a direct regulator is quite significant. For one thing, the role politicises him. For another, if an individual is not happy with the regulator and wants to go to court, and the Lord President ultimately is that regulator, that creates a real conflict.

There is an opportunity now to revisit the matter in light of the evidence that the committee has heard. Doing so could take us a step closer to my recommendation and satisfy the needs of the consumer, and perhaps the senators. Obviously, I doubt that the Law Society or the Faculty of Advocates would be happy, because it would be a step towards them losing part of their function. However, I believe that, in the interests of the public and in the long-term interests of the profession, that would be the right thing to do.

The Convener: Thank you very much. Before I bring in my committee members, I will kick us off.

Both from our previous panel—I do not know whether you heard them—and also in written evidence that we have received, we have heard that your review was "fundamentally flawed" in its

"premise that the legal profession in Scotland regulates itself".

That suggestion has been totally refuted. Why do you think that your review has had that response?

Esther Roberton: I do not think that I can tell you why, but I do think that there is a misunderstanding about the role of the Lord President as the independent regulator and the role of the professional bodies. I do not think that the premise of the review is false. Also, if we come back to the issue of perception, the perception of the public will always be that the Law Society and the Faculty of Advocates will look after their own, if you like.

There is a debate to be had about the Lord President's role and that of the judiciary, but I am not persuaded that the two are irreconcilable, in the way that I think about the professions regulating themselves. Most of the work is done by the professional bodies, not by the Lord President. He has oversight and the final say, but that is a very different role, in my view.

The Convener: Thank you. That question was just to get us going and I would now like to bring in Maggie Chapman.

Maggie Chapman: Thanks, Kaukab. Good morning, Esther. Thank you for joining us. I will follow up your last point about oversight and the final say being different to regulation. Can you unpick what you mean by that?

Esther Roberton: I was always very clear that an independent body would be required to work with the professions and the Lord President; it would not operate in a vacuum and it would not look to the Parliament for guidance.

One of the arguments that the Law Society made against the case for an independent regulator was that a lot of its regulatory activity is supported by lawyers who give their time voluntarily. My argument was that that would not change. If you had an independent regulator, I believe that those lawyers would continue to contribute in the interests of their profession. There would be legal members on the panel itself and the Lord President would be consulted—you could take that further, if you wished—on the appointments.

For me, the independent regulator would have all the functions that it was described and would still have the oversight of the profession and of the Lord President to ensure that it did not act outwith the rule of law or whatever.

Maggie Chapman: You talked about a legal standards board. Would you see that as the equivalent to the Legal Services Board in England?

Esther Roberton: That is a thought that has come to me quite recently, having heard some of the evidence that the committee has taken. When Chris Kenny set up the Legal Services Board in England, the board was very clear that it wanted to be redundant and to move to completely independent regulation.

As part of my engagement, I went to London and I met with the Solicitors Regulation Authority, the Bar Standards Board, the Law Society in England and the Bar Council. Of course, that had been portrayed as independent regulation by the SRA and the BSB but, when I spoke to them, they did not see it as that at all. They were very much of the view that they were controlled by the professional bodies. At that time, the chair of the BSB herself was a barrister and she said, "I'm not even allowed a chequebook. I have to get cheques written by the Bar Council."

However, the Legal Services Board was quite clear that its direction of travel was towards properly independent regulation that would remove it and the need for it from the equation. Therefore, what I am suggesting—it is still in the thinking stage—is that it would be a transitory body that could become the overarching regulator in the longer term, as it draws functions to itself from the two professional bodies. However, that would have to be done in consultation with them and the Lord President, obviously.

Maggie Chapman: I want to be sure that I understand your point. You said earlier that the global direction of travel is towards complete independence of regulation and you talk about a transitional relationship, perhaps as a way to deal with the situation that we are in at the moment. However, I suppose that that does not necessarily address the contention made by the senators of the College of Justice and others that the Court of Session and the Lord President do function independently in terms of their regulatory function. Can you tease that out a bit?

Esther Roberton: They could still do that but, instead of it being the two representative membership bodies, it would be the legal services board—or whatever you wanted to call it—that had the overarching responsibility to the Lord President, if that was something that could be agreed on. That would be for discussion with them.

I do not know what the New Zealand position is, other than that the recommendation for an independent regulator has been made. There has been an election there, so we do not know whether the new Government will prioritise legislating on that, but I have not heard from my colleagues in New Zealand that there is any resistance from its judiciary. Its model, like the English model, might be very different from ours,

historically, but I still believe that, if their independent regulator was going to compromise the rule of law, we would be hearing much more objection than we are hearing at the moment.

Maggie Chapman: On a similar point, but looking at it from the other angle, the proposal in the bill as it stands—we expect that to change—is that there would be a role for, or accountability or a relationship to, the Scottish ministers. That impinges on the independence of the legal profession.

With a completely independent body, who would oversee the overseer, if that makes sense? There is no opportunity for that role, as we have heard, and the Government has conceded that having ministerial oversight is problematic for a whole range of reasons. Who would oversee the independent regulator?

Esther Roberton: I want to be clear that, as an individual and putting aside my role in the review, I would be really unhappy about it being the Government. I might want to sue the Government one day—who knows?—and, if that were the case, I would not want the Government to be the regulator. There are all sorts of reasons why ministers should not be the regulator.

At the moment, the model is that the Lord President oversees, but that only means that he is consulted and makes decisions. He has no governance responsibility for either of the bodies. Well, actually, I might be wrong; I am not as familiar with the Faculty of Advocates as I am with the Law Society.

It is about who an independent regulator would be accountable to, which was one of the questions that was asked. For me, the accountability to the Parliament and Audit Scotland is about a financial governance model; it is about the transparency of the finances; and it is about appointing a person to chair and a board that are acceptable both to the public and the judiciary and legal profession.

It is perfectly possible to give the Lord President a responsibility that makes him the ultimate regulator but in a very hands-off way that keeps him free of potential conflict and of politicisation. The one thing that I gathered from my own research and from conversations with the Lord President is that nowhere is it very clearly codified what the Lord President's role is. When you ask individual solicitors, they have no idea. To me, one of the opportunities of the bill would be to make that much more explicit and have it agreed and in the public domain.

Maggie Chapman: One of the Law Society's contentions is that, if we went down the route of an independent regulator, it would be considerably more expensive. What is your view on that position?

Esther Roberton: As you will know, there is a section in the report about cost. Partly due to time, partly due to resource and partly because the information was so difficult to get to grips with, we could not do the detailed analysis that I would have liked to have done.

If you are a solicitor right now, you have no option but to pay your fee to the Law Society. As I said, the New Zealand Law Society is allowed to take money only for regulation. Here, there is no accounting—or there was not; that may have changed—that would allow you as a lawyer to say which proportion of your money is spent on regulation and which is spent on the membership and professional body part of it.

In the end, the key is that we currently have five organisations: the SLCC, the Faculty of Advocates, the Law Society, the Association of Commercial Attorneys—although I believe that the association has changed its name—and the Scottish Solicitors' Discipline Tribunal. It is not conceivable in my head that to have one organisation doing those things would not be cheaper.

The one thing that we were able to cost was the current cost of the SLCC. Apart from saving on back office functions, the current legislation around complaints makes the complaints handling process much more complex and expensive than it needs to be. If we adopted a more modern complaints process, that should reduce its costs. The overall levy on the profession should not be more than, and might even be less than if there were a streamlined organisation. However, I was not able to prove that.

Maggie Chapman: I appreciate that. Thank you.

The Convener: I bring in Paul O'Kane.

Paul O'Kane: Thank you, convener, and good morning to Ms Roberton. I am particularly interested in the regulatory role for the Lord President that might have been envisaged by your review. If there was an independent regulator, what role would the Lord President play? In evidence over the preceding weeks and this morning, we have heard the view that the Lord President is an independent regulator. Will you expand on that for the committee?

Esther Roberton: Overall, you could argue that he absolutely is. However, as I said earlier, it is a much more hands-off role on a day-to-day basis, certainly with the Law Society, although perhaps less so with the Faculty of Advocates, because the judiciary are still members of the faculty so there is more engagement there. However, to avoid politicisation and conflict, that should remain a slightly arm's-length relationship.

If you are going to change the rules about the training of solicitors and admissions and the like, the Lord President has to have a role; whether that is a consultative role, a right of veto or whatever, that could be codified and negotiated.

It was impossible for me, in the time that was available, to clarify what the existing functions are and how they were carried out, because he has a much bigger role than just his role in regulating the profession.

11:15

Paul O'Kane: At the beginning of your remarks, you spoke about the bill's being imperfect, to put it kindly. In your view, could there have been a different version of legislation that would have created something that was independent but that had a role for the Lord President, which could have been developed in concert between the parties, essentially?

Esther Roberton: Yes. Once I had published the report and had begun to do some of the engagement, that was probably when I started to think about transition. It will not surprise you to know that, as time went on, I stopped thinking about that and moved on to other things. However, there was no doubt in my mind that, just as I worked with everyone to write the report in the first place, were the Government to adopt my recommendation, the transition would be done not in a vacuum but in collaboration with the various bodies and the Lord President.

The bit that I struggle with is that, currently, the SLCC is a non-departmental public body that is answerable to the Government. I did not hear huge amounts of complaint about that at the time. If the new model had been adopted, it would have created more space between that part of the operation and the Government. Certainly, I was surprised to see the scale of the role that was being put in place for the Government. I do not envy you your task when it comes to delegated powers. I have not read everything, but I already knew that the Government was planning to renegotiate, which will make the next stage of your bill interesting.

Paul O'Kane: Is it your view that, given the current bill, compromise will be impossible—or really difficult to achieve?

Esther Roberton: Yes. When it comes to the consumer bodies, when I was doing my consultation, even the CMA was not completely explicit, but it became so. I engaged with Citizens Advice Scotland. It was on the fence, but my understanding now is that it believes that too. All the organisations that I engaged with on the consumer side—for example, the new Consumer Scotland body and Scottish Women's Aid—are very clear that the compromise does not satisfy their major interests. It satisfies some of their interests. Scottish Women's Aid will be pleased that it might be able to hire its own lawyers, for example, which I was keen for it to be able to do. However, I do not think that a compromise can be achieved.

That is not a surprise. With all due respect to the Faculty of Advocates and the Law Society, they are never going to be happy if they lose that function. I understand that. However, at the same time—I do not think that they believe that I believe this, but I do—I think that, in the long run, it would be good for them, as it would free them up to become professional bodies. Some of the lawyers to whom I spoke were keen for the Law Society to spend much more time on representing Scots law, contract law and legal firms beyond Scotland, and on increasing the visibility and the economic future of the legal profession in Scotland—for it to have that separation. A fair number of lawyers would welcome it.

Paul O'Kane: Obviously, the bill will be amended, we believe—

Esther Roberton: Sorry?

Paul O'Kane: The Government will lodge amendments, we think. In a sense, that is the known unknown. We have had that discussion with other witnesses.

Can the bill be amended? You said that a compromise will not satisfy everyone. Are there amendments that could be made that would move the bill to a place where we could get more consensus? There was a view that perhaps the Lord President did not feel as consulted in your review as he could have been. I am keen to get your view on that. Could the legal profession have contributed more to your review and got us to a position of consensus?

Esther Roberton: Can I take those in reverse?

Paul O'Kane: Sure.

Esther Roberton: I might have to ask you to remind me about the scope of the first one.

Paul O'Kane: Yes.

Esther Roberton: I met the Lord President twice: once at the very beginning of my review and once at the end, before I started to have the report drafted. With the benefit of hindsight, I could have asked for wider engagement, but my view was that, if I met the Lord President, he would speak on behalf of the judiciary. I could maybe have done more, and I am pleased to hear that the Government is now engaging.

I am not a parliamentary draftsperson, so I cannot comment on amending the bill. There are two things. First, the bill does not achieve one of

the things that I was trying to achieve, which is to simplify the process. If anything, it makes it much more complex. I cannot get my head around category 1 and category 2 regulators, for example. I have not studied the bill in the kind of detail in which I might have studied it, but I am sure that, with consultation, the bill could be streamlined and some of the issues could be resolved.

However, you cannot find a compromise between a group of people—they are not all consumers; some are lawyers—who believe that a regulator should be independent of the profession, and the bodies that currently regulate. You will not get a compromise that satisfies both. It is really about whether the Parliament is willing to be bold enough to say, "Actually, we need to find a way that meets the public interest while giving as much say to the professions as possible." The professions should absolutely have a say and a role; I simply do not believe that regulation should be their role, any more than I would want the General Medical Council not to be regulating doctors or the like.

Meghan Gallacher: I must admit that, after the line of questioning from Paul O'Kane, I am concerned about the current status of the bill. You rightly summed it up at the start by saying that the bill seems to have upset everyone. That is certainly true.

I am worried because we could end up having to heavily amend the bill, which would involve scrutinising the amendments that were forthcoming from the Scottish Government and engaging with all stakeholders involved. That goes beyond the legal side; it also relates to the consumer side, because the intention of the bill is to streamline the legal process to make sure that people can access it where possible.

I do not know whether you have any further comments on that, but I will put that aside and move on to the concerns relating to the independence between the legal profession, the judiciary and, of course, the Executive. Many concerns and arguments have been raised that, with the new legislation, the Lord President could be drawn into a collaborative Administration with the Scottish ministers.

I would like to hear your thoughts on the proposed powers for the Scottish ministers and whether there is any way of manoeuvring to make sure that the judiciary remains completely independent.

Esther Roberton: I will answer your first question first, in relation to my biggest concern. As I said, I am not a parliamentary draftsman, but I helped to establish the Parliament and its committee structure, and I have taken an interest in that for 25 years. I know that it is a huge ask for a committee to say to ministers, "This bill won't do—go and start again." We have waited 13 years for alternative business structures, and it has been five years since my report was published. Going back to the drawing board is a huge ask.

However, one of the reasons why the SLCC process is so convoluted is that amendments were added at a late stage to the bill that established the SLCC. My understanding is that what came out at the end bore very little resemblance to what went in at the beginning and that there have been lots of unintended consequences, which lawyers have paid a price for, because of the additional complexity, the costs, the Court of Session cases and so on. I am therefore concerned about the notion of having to amend a bill so much that, by the time that you get to the end of the process, it is not ideal.

I am sorry—I have forgotten the other part of your question.

Meghan Gallacher: It relates to the powers that the bill, as it stands, gives to the Scottish ministers.

Esther Roberton: When I was invited to give evidence to the Delegated Powers and Law Reform Committee, I had not looked at the bill at that point. I was not sure whether I would need to. When I read it, I remember saying to a former colleague around that table, "This will be a very short evidence session." I believe that, in this case, the Government should have no powers, so an automatic consequence of that is that it should have no delegated powers.

My position has not changed. I do not think that it is in the interest of ministers, or in the interest of the profession and the public, that the Government be involved in this at all. There were not many things that the Law Society and I agreed on, but that notion was one of them. I share the concerns about the Lord President having to be that close to the Government; I do not think that that is appropriate in relation to the independence of the judiciary. I would stand very firm on that.

The only compromise, in relation to a transition, that I could think of was to say, "Nobody wants the Government to have those powers, so take them out and put them in an oversight body that could be the next step towards an independent regulator." However, I do not know enough to know what the knock-on effects of that would be on the rest of the bill. I am glad that you are doing that job, not me.

Meghan Gallacher: I go back to the first answer that you gave. Do you think that where we are now is far removed from where you started in terms of your review? If you were to give any advice to the Scottish ministers at this point, would it perhaps be

to relook at the original principles that you outlined?

Esther Roberton: Absolutely. The committee will give a view on the general principles of the bill in its stage 1 report. If I were sitting round your table, I would be saying that I do not accept the principles. I spent 18 months making a case for the alternative, and I am sorry that the Government felt unable to deliver that.

Karen Adam: Thank you for your evidence thus far. It has been really interesting, particularly given our previous evidence session. It has been really helpful to have the two sessions side by side.

My first question follows on from Meghan Gallacher's questions. What are your views on the Scottish Government's proposal to amend the bill so that some powers would be transferred to the Lord President?

Esther Roberton: I cannot comment until I know what the powers are. I can only imagine that it would not be all the powers, so it would still leave a role for the Scottish Government, which I would be uncomfortable with. As I said, although I think that the Lord President has a key role to play in this, whatever form that role takes, I want him or her—whoever the role is held by—to be independent of Government. That is in the best interests of us all. I cannot see how tweaking and amending the relevant section of the bill could possibly keep the separation of powers between the Government and the Lord President and the judiciary.

Karen Adam: Lady Dorrian stated that it would be problematic for the Lord President to have a say over an independent review body. Do you agree?

Esther Roberton: We discussed the matter at length round my advisory board table, and there were pretty strong views that the Lord President should have no role at all. I am a pragmatist, in the end, and I am a defender of the independence of the judiciary and of the rule of law. If that requires giving the Lord President clear powers, I can live with that. Those powers can just as easily be exercised over an independent regulator as they are exercised at the moment over the faculty and the Law Society, so I do not think that that needs to change.

As a member of the public who has got to grips with this incredibly complicated system, I am really keen to see whatever role the Lord President ends up with being clearly codified and articulated so that we can understand it. However, the Lord President—Chris Kenny made this point when I had a chat with him—should be very careful about being the direct regulator, because of potential conflict further down the line. At the moment, he is an arm's-length regulator, and I think that the powers could be exercised over an independent body in the same way.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Like my colleague Karen Adam, I have a couple of questions on the substance of the bill as drafted. Before I ask them, however, it would be remiss of me not to recognise the concerns that you and others have expressed about the bill. We will have a decision to make on its general principles, and it looks as though that will be very difficult. That is coupled with the fact that amendments are coming but we do not know when. However, I will leave that to the side, because you have articulated your concerns well, and move on to my questions.

My first question is a basic one. Do you think that the complaints process under the bill would be more consumer friendly than the existing one?

Esther Roberton: There are stages in the process that look better, but I do not know all the details. I have not had any conversations with the SLCC team more recently. From my perspective, given what I looked at regarding better regulation and consumer principles, the bill should avoid being too prescriptive. I have believed all along that, should we have an independent regulator, there should be high-level principles that allow it, in consultation with the professions and the Lord President, to develop procedures that keep up to date with best practice.

I think that there have been steps forward, but I cannot comment in any detail on how much better the proposed process would be than the current model. I am sure that the SLCC will have been pretty clear about that. Under the leadership of Jim Martin and Neil Stevenson—Jim was on my panel—it has taken a lot of steps to improve the process as far as possible under the legislation, but it is still, without question, far too complex.

Fulton MacGregor: What are your views on the fact that the bill as drafted will remove the right of appeal to the Court of Session? We heard from the Faculty of Advocates and the Senators of the College of Justice that abolishing the right of appeal is likely to lead to increased delays and expenses in the complaints process. Would you like to put your view on that on the record?

11:30

Esther Roberton: That is a very technical point that goes beyond my detailed expertise. However, I will go back to the conversations that I had during my review. I was certainly concerned about the fact that the SLCC had to go very quickly to the court and that that was a very costly process that involved hiring lawyers and advocates and all the rest. However, that is different from removing the right of appeal. If I take a complaint to the SLCC or

any other body, I want to know that, ultimately, I have the right of appeal. If my recollection is correct, the issue was not the right of appeal but the sudden jump. Therefore, if that is what is being proposed, I would be concerned, but I am not a particular expert in that area.

Annie Wells: Is the bill as drafted in line with the Scottish Government's better regulation principles, as proposed in your report?

Esther Roberton: No.

Annie Wells: No.

Esther Roberton: It is an easy answer. I went back, because I was not sure—and I have forgotten again—whether the better regulation principles are explicit about the independence point. However, one of the people whom I consulted as part of the review was Russel Griggs—the Government's adviser on better regulation. At that point, he certainly seemed very clear that independent regulation was the right move and the right direction to go in. I do not think that the bill is in line with those principles. The bill is also overly complex, as well as everything else.

Annie Wells: Can you expand on why you are no longer of the view that there is a need for regulation of the title "lawyer"?

Esther Roberton: I have not said anywhere that I do not believe that there is a need for regulation. It is the one area where I have wrestled with where I got to at the time of the report. At the time, there was a lot of noise about a particular case, which had generated a view that seemed to be unanimous across the profession and the consumer bodies. Having reflected a lot, I am not sure that I would stand by it, but I am not sure that I would abolish it either. You do not legislate on the basis of one bad apple. I do not know how prevalent the issue has been since that time. As far as I was aware at the time, there had been only one case that everybody knew about, and I understand that there are difficulties.

I had the same discussion with the faculty about the title of "advocate". I could understand why the faculty wanted the use of that title to be regulated, but it also understood why that is complicated, because that word is used in other contexts. However, the bottom line is that, first of all, a consumer does not commission an advocate and, secondly, there is no alternative title, so there is no confusion about the person in the wig in the court; whereas, for the public, there is confusion between the terms "lawyer" and "solicitor". Until I got involved in that process, that had not occurred to me. Therefore, I would step back from that issue and allow wiser voices than mine to comment, because, as I said, it was a unanimous view at the time but I suspect that it was a knee-jerk reaction to a particular case.

The Convener: I have been listening really carefully and would like to come back on a few points. I would like to generate more discussion about the consumer's perspective, because we have taken lots of evidence on the lawyer's point of view and every other view. Can you give us some insight into how the consumer's point of view informed your report, whether your views have developed on that and whether the consumer is served well by the bill in its current state?

Esther Roberton: I had lots of engagement with consumer bodies. I met Citizens Advice Scotland, but I also met some of the managers of individual citizens advice services, as well as Women's Aid. I did not meet Consumer Scotland, because it did not exist at the time.

There was a general view that the current model was not designed to meet the needs of consumers, particularly those who are in the most need. There was a whole conversation—I have been there, and I have used these words—about the fact that nobody consults a lawyer other than in times of stress. It is not always a time of distress, although it can be, but it is a time of stress, because we all know that even buying a house is stressful. There is a power imbalance, and the view around the tables of all the consumer groups that I met was that that power imbalance is not helped by the fact that the profession regulates itself.

One of the clear things that I came up with, which Women's Aid was happy about, was the notion of asking, "Why can't Citizens Advice, Women's Aid or whoever employ their own lawyers?" My report addressed that in a range of ways, such as entity regulation and the like, which can all be very proportionate. I am not sure whether the bill does that. You do not apply the same kind of entity regulation to Women's Aid as you would to Pinsent Masons or Harper Macleod. The general view was that those organisations would have much more confidence in such situations.

Women's Aid gave the specific example that, when a woman came to it for advice, it would look for a lawyer who had a background in that sector. I am not sure whether the Law Society called it an accreditation scheme, but my understanding was that its website listed a group of lawyers who claimed to be specialists in domestic abuse cases.

However, Women's Aid had not been involved in any discussions about that, and its experience of dealing with lawyers under that category was that they had not had any special training, did not have accreditation and did not necessarily even have a lot of experience in that field. There were some horror stories about women being very badly let down by their legal advisers. I am sure that it is

not common across the board, but there were enough awful stories. I met some women who were directly involved—not just Women's Aid workers.

There was a general view about consumer principles, better regulation principles, perception, the power imbalance and so on. I heard no voices at all that were opposed to the notion of independent regulation and regulation being taken out of the hands of the Law Society.

The Convener: That is interesting. Earlier this morning, the committee heard about the situation in which a citizen might want to sue the Government. However, what about the consumer—the person on the street—who might want to sue their lawyer because they have not received a good service? What I have heard, albeit anecdotally—but also through constituency work, because people know that the committee is dealing with this so they come to talk to me—is that some people have not had good experiences. They feel that they are up against a whole system and that that system looks after itself. Did you speak to individuals or look at such casework? Can you give us an example of that?

Esther Roberton: That is a really good point. Those of you who know my background will know that I have chaired health boards. We have the same sort of debate in the health service about the public and their complaints. What I found on the legal side was much the same as I found in the health service, which is that most people do not want to sue. They want satisfaction, speedy resolution, an apology and, yes, sometimes, compensation, because, in a legal situation, there will potentially be financial loss in a way that there is not in the health service.

One of the things that we looked at in quite a lot of detail, using the experience that we had around the table and elsewhere in complaints handling, was that law firms did not all have particularly effective complaints handling procedures. If you are dealing with a public body, you cannot go to the ombudsman unless you can demonstrate that you have been through that process. One of my recommendations was that an independent regulator should take not a punitive approach but a quality improvement approach by working with law firms to help them to develop appropriate processes.

Part of the argument against the idea is that lawyers are under a huge amount of pressure in many cases. If complaints against them have a conduct element that might end up with the Law Society prosecuting them, sometimes, the easiest thing for someone to do is to put their head in the sand, because it is all too much.

Therefore, my view was that we should have a much more positive and supportive model that helps firms to develop proper complaints procedures that mean that fewer complaints come to the regulator. One option would be to say that, if you have a persistent offender who does not respond to the positive approach, you can fine them. The SLCC currently has no opportunity to address the issue of a firm that might be a multiple offender, because that is not allowed under the legislation.

However, a regulator that had oversight of the whole process would know not only that a firm was not handling its complaints well but, perhaps, that it was in financial difficulty or whatever, and a regulator could then take a whole-systems approach to that. Therefore, my view is that the process should not be punitive and it is not about encouraging people to sue. My goodness, I would not want to be somebody who was trying to sue a law firm, because that would be a very expensive process, apart from anything else. My view is that you should take all the steps that you can to avoid ever reaching that stage.

The Convener: Thank you very much. We have come to the end of our evidence session, but I want to give you the opportunity to bring anything to the committee's attention that we have not covered. This is your time.

Esther Roberton: I do not think that I have anything to add. No doubt I will be halfway down the stairs when I remember something—

The Convener: Yes, as is the usual experience.

Esther Roberton: —but, no, your questions have been very thorough, and I have had the opportunity to say what I needed to say. Thank you very much. I wish you every success with the task ahead of you. I will be watching with some interest.

The Convener: Thank you, once again, for your evidence.

That concludes our business in public. We will consider the remaining item on our agenda in private.

11:40

Meeting continued in private until 12:07.

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