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18 April 2024

Dear Convener

## Regulation of Legal Services (Scotland) Bill

Thank you for your letter of 21 March 2024 in respect of the Regulation of Legal Services (Scotland) Bill (“the Bill”).

I am grateful to the Committee for agreeing a Stage 2 deadline of 31 May. While engagement with stakeholders continues in respect of the Bill, I note that the Committee have agreed that it would be helpful to receive a further detailed update on the progress of finalising amendments, and the Committee would also welcome early sight of amendments where practical, to assist it in its approach to Stage 2 scrutiny.

I am pleased that the Committee welcomes the information that I have shared so far, including my response to the Stage 1 report and my commitment to continue to work with the Committee and key stakeholders as I seek to build consensus with regard to the measures identified by the Committee during its scrutiny at Stage 1.

I am also grateful to the Committee for its detailed consideration of the Bill and constructive report at Stage 1. The Committee has heard that stakeholders often have differing views on the regulation of legal services which is why I want to ensure the Bill strikes the right balance between the various interests.

Further to my correspondence of 22 January 2024 the Annex below includes further information where there is more detail to provide.

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I am grateful to the Committee for its continued engagement and careful scrutiny of the Bill.

Yours sincerely,

**SIOBHIAN BROWN**

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## Annex

### Section 5 (and section 90)

Section 5 allows for the regulatory objectives and professional principles to be amended. As set out in my correspondence of 29 November 2023 and 22 January 2024, the Scottish Government accepts the recommendation of the Delegated Powers and Law Reform Committee that the Bill be amended to remove section 5, and I will bring forward an amendment to that effect at Stage 2.

Some concerns were raised with the Committee that section 90 of the Bill may be used to make amendments of the nature at section 5. To provide assurances, section 90 is a common ancillary provision. Supplemental and incidental provision are not uncommon and are required to make the Act operate effectively, rather than to change the substance of the Act. These powers are used narrowly and could not be used to make amendments such as the power at section 5, to add, amend or remove a regulatory objective.

### Section 8

As set out in my correspondence of 29 November 2023, the creation of a category system for regulators creates an inherent requirement for flexibility to respond to any changes, or proposed changes, to how a regulator operates or in its membership numbers and is intended to futureproof the regulatory framework.

Section 8(5)(b), (c) and (d) are necessary to ensure the Bill accurately reflects any changes to the regulatory framework in respect of new accredited regulators receiving approval, any regulator ceasing to operate or a change in a regulator's name, as recently evidenced with the Association of Construction Attorneys' name change.

An amendment will be lodged at Stage 2 to narrow the scope of section 8(5)(a) so it applies only to allow the recategorisation of new accredited regulators. In addition, to include an additional safeguard, that it may only apply in respect of a recommendation of, and with the consent of, the Lord President.

### Section 13 and 16

Sections 13 and 16 require a category 1 and 2 regulator to publish an annual report on the exercise of their regulatory functions. The report must include, among other things, information demonstrating how the regulator is complying with the regulatory objectives and a statement on the strategic priorities for the next reporting year. I will lodge an amendment at Stage 2 to the effect that regulators will require to send their report to the Lord President at the same time as being published. We are also making some minor amendments to the requirements on what the annual reports must contain, following feedback from stakeholders.

### Section 19 and 20

This Bill is designed to increase the transparency and accountability of legal regulation. Sections 19 and 20 provide an important mechanism so that there is a process for review of

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regulatory performance if concerns are raised about a regulator not upholding the regulatory objectives.

We continue to explore with the office of the Lord President what adjustments are required to the current drafting at sections 19 and 20. This includes consideration of changes to how a section 19 review may be triggered, to take account of the feedback of the senior judiciary and some of the bodies named as being capable of triggering a review. We are also looking at changes to the parameters of a review, in that it should only be capable of being carried out to examine whether a regulator is failing to exercise its regulatory functions in a manner that is compatible with the regulatory objectives or to comply with the requirements placed on it in the Bill. This is different from the current terms of the Bill.

On how a review may be triggered, we are limiting the Bill to a small list of statutory bodies however, it will be the Lord President's role to ascertain whether these concerns are founded and whether any action requires to be taken.

I consider that the power to carry out a review should be available for use at the Lord President's discretion and using rules and guidance that he has produced. I consider that the power to compel the regulator and other bodies to provide information within the Bill should sit with the Lord President. These are among the amendments being brought forward at Stage 2.

We will bring forward amendments which require a requesting body to seek a review to first have first communicated their concern to the regulator and given the regulator an opportunity to respond, which can include an opportunity to rectify.

## **Section 29**

The intention behind Chapter 3 of Part 1 of the Bill is to allow a route for new regulatory bodies to enter the legal services sector and for new types of practitioners to provide legal services in Scotland if this is deemed to be appropriate. This is done by replicating and expanding the relevant provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 which requires approval from both the Lord President and Scottish Ministers for a new body to become a legal services regulator. I will lodge an amendment to the effect that it would be the responsibility of the Lord President alone to consider any application by bodies wishing to enter the legal services sector as a new regulator. We continue to explore with the office of the Lord President what adjustments are required.

## **Sections 35 and 49**

Section 35 is specifically intended to address the possibility that any new accredited regulator ceases to regulate by surrendering its acquired rights (section 31), having its acquired rights revoked (section 34) or for any other unanticipated circumstance. I have already committed to lodging amendments at Stage 2 which will remove a role for Scottish Ministers in relation to this section.

The current intention is that if any members of a discontinuing regulator wished to continue to access acquired rights under the Bill, those members may seek to make a new application under section 25 of the Bill, or have responsibility for their regulation transferred to another regulator. We are exploring whether temporary measures are required so that

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any permission to practice could be deemed to continue for a period of time and arrangements may be made to ensure regulation of those providers could continue while a section 25 application or possible transfer was being considered and developed.

Similarly, the principle of section 49 was included as a part of the system of licencing for legal businesses (entity regulation) to create an offence for legal businesses to operate without authorisation. In the event that something happens to interfere with a category 1 regulator's ability to operate, there requires to be some mechanism to ensure that legal businesses are not committing an offence if they continue to provide legal services.

As an established body I believe that the risk of the Law Society of Scotland being unable to operate its regulatory functions as a category 1 regulator is sufficiently low as to negate the requirement for this provision when taken in combination with section 35 as amended in respect of any category 1 accredited regulator.

The amendment to section 35 will ensure that if any accredited category 1 regulator is unable to operate its regulatory functions, there remains a proportionate mechanism for those members to seek to continue to operate. Therefore, I will lodge an amendment at Stage 2 to remove section 49.

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