



**Scottish Parliament
Legal Services (Scotland) Bill - Financial Memorandum**

The Law Society of Scotland's Memorandum of Comments

November 2009

INTRODUCTION

The Law Society of Scotland (the 'Society') welcomes the opportunity to comment on the Legal Services (Scotland) Bill – Financial Memorandum and has the following comments to make:

Consultation

Question 1 – Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

There were no questions regarding financial assumptions in the consultation exercise.

Question 2 – Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Not applicable.

Question 3 – Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

Question 4 – If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

If the Society seeks to become an approved regulator and the application is approved, there will be financial implications for the Society in that capacity.

The Financial Memorandum correctly states that there are two broad categories to the costs of being an approved regulator, namely:

- The costs of becoming an approved regulator; and
- The costs of running the licensing regime once approved.

Some of these costs will depend on the number of licensed providers likely to be established. The Financial Memorandum correctly states that this is a difficult estimate to make. However, the memorandum goes on to say that it may be in the range of 150-250 (paragraph 236), and later uses the figure of 200 licensed providers to estimate the unit costs of regulation (paragraph 245). It is not clear where these figures come from. The Society is concerned that the figures are overly optimistic, especially as a starting point, in the current economic climate. The Society expects most firms that choose to become ABSs will be those which are currently Incorporated Legal Practices. There are currently 197 of these practices operating. It is unreasonable to expect that all or a very high percentage will become ABSs, but that would be the only way to reach the number of firms suggested in the Financial Memorandum. Furthermore, even if many firms eventually becomes ABSs, it may take some time for the option to gain popularity - by way of example Incorporated Legal Practices began in 2001 and uptake was slow initially.

The Society believes that the costs of setting up an ABS regulatory regime will involve costs for regulators. This cost is not discussed in the Financial Memorandum except in passing, but is likely to be more substantial than is suggested in the Memorandum. As set out in section 5 of the Bill, applying to become a regulator will involve:

- Developing a proposed regulatory scheme for licensing and regulating legal services, which includes the development of licensing rules and practice rules
- Developing a statement of policy
- Providing a description of its constitution and composition, its representative functions and other activities
- Providing other information as required
- Paying any fees that are charged

The development of a regulatory scheme to fit the new regime is likely to involve considerable

time and expense for those hoping to become approved regulators. The Financial Memorandum does not set out how these costs are to be covered by approved regulators.

The Financial Memorandum goes on to estimate costs per LSP, based on the SLCC becoming an approved regulator. The Society again notes that estimate is based on the figure of 200, which may be overly optimistic, at least at the beginning of the licensing regime. Furthermore, the accounting given is simplistic and does not fully consider of some of the necessary costs such as governance costs which cannot be simply based on an organisation created for a very different purpose (e.g. complaints handling work). The Society notes that even though it is apparent that estimating costs is very difficult, approved regulators are being asked to provide information about proposed fees, assumed to be an initial application fee and an annual renewal fee.

The Society is currently beginning work on the financial modelling for a regulatory scheme, but until more details about regulations are known, it is very difficult to create a useful model. For example, section 24 requires an approved regulator to assess each LSP at least once every three years and prepare a report on the assessment. 24(9) allows Scottish Ministers to make further provisions about this section. The cost of this duty may vary substantially depending on what will be required for the report. A desktop assessment based on paper forms completed by the LSP is likely to cost an approved regulator substantially less than an assessment where the approved regulator must visit each LSP. This is just one example of a case where more guidance is needed before the Society will be able to estimate costs.

Finally, the Society believes there are some implications that have not been taken into account. For example, the Bill includes among its objectives the promotion of access to justice and competition. It is possible that the Bill may have an adverse impact on these objectives which may have knock on costs, such as the requirement under section 11(2) to consult the OFT.

Question 5 – Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

The Society believes it would meet its financial costs out of existing resources, in anticipation of recouping losses through licensing. That is of course predicated on the Society being accepted as a regulator, and receiving a reasonable number of applications to become LSPs.

The Society notes that under section 35 of the Bill, Scottish Ministers have step-in powers to act as an approved regulator should the need arise, which would require a substantial budget. In light of these powers, there may be scenarios where it would be prudent to support approved regulators, particularly with start-up costs.

Question 6 – Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

As discussed above, the estimates set out in the Financial Memorandum are based on insufficient empirical evidence. The Society is concerned that they may fall outside a reasonable margin of uncertainty, particularly with respect to the estimate of take up by 200 licensed providers.

Question 7 – If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Not applicable.

Question 8 – Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Yes. The Bill provides Scottish ministers with a broad ability to make a number of regulations. There may very well be costs associated with these regulations. The Bill currently gives Scottish Ministers the power to make regulations under 35 different provisions within the Act. Given these powers, it appears quite likely that there will be new subordinate legislation and developed guidance. It is difficult to quantify these costs.

Furthermore, there is a need to consider knock on costs to the Society, such as the potential impact the Society is concerned that as some firms choose to take the ABS route, the Bill may have an impact on both our Guarantee Fund and Master Policy. There is currently no provision in the Bill for a compensation fund. The Society believes a compensation fund is necessary to protect consumers. Also, if LSPs are not required to pay into a compensation fund, it creates an uneven playing field between LSPs and traditional firms.

No consideration seems to have been given to the possible cost implications for the Scottish Legal Complaints Commission in terms of its oversight regulation role which currently only extends to The Law Society of Scotland and the Faculty of Advocates but would require to extend to all regulators involved in the regulation of legal services providers to ensure a level playing field. Consideration also needs to be given to how the costs of the Commission would be recovered with this wider remit and if it was asked to carry out specific tasks for Scottish Ministers, for example the investigation of a regulatory complaint. As provided for in section 27(1) of the Legal Profession and Legal Aid (Scotland) Act 2007, it is only practising solicitors, advocates, conveyancing and executry practitioners and those non-legal professionals with rights of audience who pay an annual general levy to the Commission.

Finally, the Society welcomes the fact that the Bill does not contain provision for a Legal Services Board similar to the one in operation in England and Wales. This extra layer of governance has resulted in significant costs, which will ultimately be borne by the consumer of legal services or the tax payer.



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