Better Regulation Consultation on Proposals for a Better Regulation Bill

The Law Society of Scotland's Response

October 2012
INTRODUCTION

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession.

Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Law Society of Scotland (the Society) welcomes the opportunity to respond to the Scottish Government consultation entitled ‘Better Regulation: Consultation on Proposals for a Better Regulation Bill’ and would like to respond as follows:

GENERAL COMMENTS

The Society welcomes the policy intent of the Scottish Government’s package of proposals which focus on process rather than decision making in order to deliver improved consistency, efficiency and effectiveness while still accommodating local democracy and circumstance.

The Society believes that this is the balance which requires to be struck in order to achieve better regulation.

The Society notes, however, that the core proposal is for new powers enabling duties to be placed on local authorities and other regulators to implement national regulation
systems and policies except where a local authority makes a compelling case that local circumstances merit a variation.

The Executive Summary states that such an approach would deliver improved consistency, efficiency and effectiveness while still accommodating local democracy and circumstance.

The Society welcomes this approach but notes the reference to Scottish Regulators and the range and scope of devolved regulatory activities as referred to at paragraph 10 of the Consultation Paper.

The Law Society of Scotland is of course also a Regulator in terms of the Solicitors (Scotland) Act 1980. While the Society recognises that this may not be the most appropriate forum for this comment, there is of course an issue arising out of Better Regulation in terms of the Society’s position as a regulator which may affect the public as well as users of legal services.

The Society notes, in particular, that a number of issues raised regarding the inception of the Scottish Legal Complaints Commission (the SLCC) in terms of the Legal Profession and Legal Aid (Scotland) Act 2007 regarding the complaints process. The Society notes, in particular that a number of issues have arisen involving both the Scottish Legal Complaints Commission and the Society. In particular, the Society believes that the SLCC should have an ability to review decisions or the terms of reference of a complaint without a challenge by way of appeal to the Court of Session.

With a view to better regulation, the Society also highlights that there is no requirement at present for the SLCC to liaise with the Society in conduct complaints
yet the SLCC must liaise with the Society when it considers that the complaint is ‘hybrid’ i.e. if the complaint relates both to service and conduct.

The Society believes that its expertise could be useful in conduct only cases and would no doubt help to obviate appeals.

The Society also notes that, at present, it is obliged to raise its own conduct complaints through the SLCC, only for these to be returned to the Society for investigation.

The Society believes that this causes unnecessary delay and confusion and that the Society should have the power to commence its own investigations and circumstances where it wishes to raise its own complaint with the requirement to notify the SLCC accordingly.

In all the circumstances, the Society believes that necessary changes to the relationship between itself and the SLCC are required for better regulation of the complaints process regarding solicitors in Scotland.

The Society also has the following general comments to make.

With regard to the Regulatory activities of local authorities, the Society believes that clear sets of guidance on how decision making bodies within local government such as planning departments, licensing boards and civic government committees should be published and reviewed by government on a regular basis. The Society agrees with the conclusions and recommendations of COSLA’s Regulatory Forum in 2010 and outlined at paragraph 14 of the Consultation Paper that:
• Consistency where appropriate is desirable from both the perspective of customers, in terms of clarity and ease of use, but also from the perspective of practitioners within local authorities, best practice and resource utilisation standpoint.

• Consistency though should be applied primarily to process leading to the decision and not the level of decision making which still should be made at a point of greatest effectiveness to the outcome of legislation.

In all the circumstances, the Society is of the view that local conditions should be taken into account by regulators regarding the determination of an application. On the basis that the application is granted, however, the Society agrees that a national set of standards and conditions should apply. This is expanded upon in the Society's answer to Question 24 on the Consultation Paper.

With regard to the questions contained within the Consultation Paper the Society should like to respond as follows.

**Question 1 – What in your view is the case for and against the proposed enabling power? Please provide evidence to support your answer.**

The Society believes that there should be an enabling power to provide clarity and transparency.

The Society believes that one local authority should be able to issue and recognise the appropriate Certificate of Compliance or consent in any circumstances.

**Question 2 – Should national standards be mandatory in the future?**
Yes, but national standards should of course be kept under review.

Question 3 – Should local authority or other regulators have the capacity to seek approval to opt-out from national standards on grounds of exceptional local circumstances?

Yes. The Society believes, however, that emphasis should be placed on ‘exceptional’, the Society believes that consideration should be given to the definition of ‘exceptional’ recognising always that it will have to be an inclusive definition rather than a definitive definition.

Question 4 – What criteria should be used to assess any request to opt-out from national standards?

The Society is not yet in a position to comment.

Question 5 – Do you, on balance, favour opt-out decisions being the responsibility of

   a) Ministers
   b) Ministers, based on advice from the Regulatory Review Group
   c) The Regulatory Review Group

The Society believes that, on balance, opt out decisions should be the responsibility of Ministers, based on advice from the Regulatory Review Group.

Question 6 – Are there any specific regulations which should be candidates for new national standards in the future? If so, please explain why.
The Society believes that it is too early to comment. The Society recognises, however, that when these proposals form a more detailed shape, the Society would welcome the opportunity to comment further.

Question 7 – Which of the following options do you favour?

a) The status quo
b) Mandatory national standards and systems for new regulations
c) A flexible approach which includes the capacity to impose national standards and systems, where justified.

While the Society recognises that (b) is less transparent or clear, (c) can lead to existing problems continuing as ‘where justified’ lends itself to an additional process.

Question 8 – Do you think this could be supported in non-legislative ways? If so, please explain how.

Yes, the Society believes that greater use of guidance and regulations adopting always best practice are suitable non-legislative measures which should lead to better regulation.

Duty to promote economic and business growth in regulatory activity

Question 9 – What in your view is the case for and against introducing a new generic statutory duty on Scottish regulatory authorities to consider (and report on) the impact of their regulatory activity on business and/or promote regulatory principles? Please provide evidence to support your answer
The Society agrees with the principle that there should be a duty to promote economic and business growth in regulatory activity. The Society is concerned, however, as to whether this is a proportionate way of addressing this perceived difficulty.

Question 10 – Which of the following options do you favour?

a) The status quo
b) The introduction of a generic statutory duty

The Society refers to its comments at Question 9 above.

Question 11 – Do you think this could be supported in non-legislative ways? If so, please explain how

Yes. The Society believes that Scottish Government should consider appropriate non-legislative ways of reducing bureaucracy.

Reviews and sun setting

Question 12 – What in your view is the case for and against introducing a sun setting policy in Scotland? Please provide evidence to support your answer

The Society believes, in principle, that a sun setting policy should be introduced. In particular, this should be considered where there is a requirement for a new and quite often contentious measure to be properly scrutinised and tested. The Society notes
that the current minimum unit pricing of alcohol as referred to in Section 1 of the Alcohol (Minimum Pricing) (Scotland) Act 2012 has, at Section 2 thereof, a six year sunset period in order that Scottish Ministers lay before the Scottish Parliament a report on the operation and effect of the minimum pricing provisions.

It may, however, in other circumstances, not be necessary for every provision to have a sunset clause. The Society believes that this can be considered in the legislation which may fall upon this Consultation and consideration would have to be identified as to when it should apply.

**Question 13 – If introduced, should a sun setting policy be mandatory?**

The Society refers to its answer at Question 12 above.

**Question 14 – If non-mandatory, should there be exceptions and what should the rationale for these be?**

The Society refers to its answer at Question 12 above.

**Question 15 – If introduced, should the regulations in scope, and the nature and timeframes for review activity be equivalent to the UK approach? If not, please explain how they should differ and why?**

The regulations should reflect both the regulatory and business needs of Scotland at the time orders are made. Consideration could of course also be given as to whether the United Kingdom approach is appropriate.

The Society, in all of the circumstances, has no view on this at present.
Question 16 – Which of the following options do you favour?

a) The status quo
b) Adopting the UK Government approach without any changes
c) Adopting a modified policy

The Society refers to its answer at Question 15 above.

Prompt payment

Question 17 – What are the merits (or otherwise) of introducing a new national standard requiring all public sector bodies in Scotland (including local authorities and NHS Board) to pay suppliers’ invoices in less than 30 days? We would also welcome views on what that lower period should be and the scope to replicate the 10-day norm already achieved by the Scottish Government.

The Society agrees with the principle of attempting to ensure prompt payment to suppliers from public sector bodies. The Society is concerned, however, as to how this may operate in practice. Consideration clearly has to be given as to how such a standard would be enforced and appropriate sanctions.

The Society is not in a position to comment on a specific period for payment.

Question 18 – Would additional legislative or non-legislative steps lead to a change in business culture and a bias towards prompt payment? If so, what might these involve?
The Society refers to its comments at Question 17 above.

Legislation may well provide creditors with specific rights to assist in enforcing payments but the real value of these in day to day business relationships would be limited. Payment periods and late payment interest rates are routinely added to commercial contracts and the Late Payment of Commercial Debts (Scotland) Regulations 2002 applies in certain circumstances. However, such terms and interest rates are often not expressly adhered to unless the creditor resorts to legal action. Where legal action is raised for the recovery of a debt such terms are useful to the pursuer. On that basis, the potential for extending such rights would appear unlikely to shift the bias of business towards prompt payment.

The Society suggests that additional information requirements within annual reports of larger businesses in relation to their creditor payment profiles may be a useful method leading to change. The Society identifies however, that consideration would have to be given to the associated costs involved in additional reporting. Accordingly, consideration should also be given to identification of the size of businesses to which such standards should be applied and suggests that the Institute of Chartered Accountants of Scotland would be better able to comment.

**Question 19 – Would these additional legislative or non-legislative steps have a beneficial impact on the relative competitiveness of businesses in Scotland?**

The Society recognises that there may well be potential beneficial and negative impacts of both legislative and non-legislative steps regarding prompt payment.

The Society recognises that faster public sector payment profiles within Scotland would enhance competitiveness of businesses supplying services to the public sector in Scotland through the general beneficial impact of healthier cash flows.
The Society recognises, however, that where wider steps are applied to the private sector whether through statutory payment periods and interest rates or additional reporting standards, any benefits have to be set against the negative impact of additional burdens on purchasing businesses being a potential disincentive to businesses locating or purchasing in Scotland.

**Question 20 – How could any new arrangements be fully enforced?**

The Society refers to its answer at Question 17 above.

Payment performance of public bodies would require to be monitored by relevant bodies and regulators and disclosed by way of annual reviews and reports on performance.

The Society notes that specific or implied payment terms and interest rates are in certain cases not adhered to for commercial and relationship reasons in day to day business practice and their enforcement is most often seen when parties resort to litigation. Accordingly, the Society is concerned as to how standards would be enforced where court proceedings have not been initiated.

**Question 21 – Which of the following options do you favour?**

a) The status quo  

b) A practical and legitimate mechanism to promote prompt payment e.g. mandatory application of interest and/or maximum payment periods  

c) Actions to change business culture  

d) Actions to change corporate governance and reporting of payment performance
The Society, for reasons explained above, sees merit in options (b), (c) and (d).

Common commencement dates

Question 22 – Should common commencement dates be introduced for Scottish regulations impacting on business? Please provide evidence to support your answer

The Society believes that common commencement dates for the imposition of regulatory obligations on businesses may result in heightened awareness of impending changes. The obvious comparison in the Society’s view is the level of awareness the business community has in respect of taxation and budgeting changes which are in general communicated in accordance with Government’s budgetary cycles.

The Society notes that the knowledge of timing of release of budgetary information allows relevant business and advisory communities to focus on analysing and reporting on changes in an organised and pre-emptive manner.

The Society believes that a similar application to general regulation should in all of the circumstances result in the same response.

Question 23 – Which of the following options do you favour?

   a) The status quo
   b) The introduction of common commencement dates
The Society favours the introduction of common commencement dates for the reasons as expressed above.

Mobile food businesses, and a transferrable certificate of compliance

Question 24 – Which of the following options do you favour?

a) The status quo

b) The development of national standards and a change in legislation requiring moveable food businesses to be inspected only by the local authority in which the business is registered/based, and other local authorities to accept certificates of compliance issued by other authorities

The Society favours option (b).

The Society refers to its general comments and believes that national standards should be developed requiring moveable food businesses to be inspected only by the local authority in which the business has its main place of business as opposed to where the business is registered or based. Other local authorities to accept Certificates of Compliance issued by other authorities on the basis that the Best Practice Standard is applied and not the lowest common denominator.

Linking planning application fees to the performance of the Planning Authority

Question 25 – What in your view is the most effective mechanism for introducing the proposed link between planning application fees and performance? Please provide evidence to support your answer.
The Society does not believe that there should be a link between application fees and the performance of the planning authority as reducing the funding available to underperforming planning authorities appears to be counter-productive.

The reason for not making targets may be that there are not enough resources afforded through planning authorities in the first place.

The Society respectfully suggests that consideration is given to a ‘floating’ group of planners who can move between local authorities in order that backlogs are reduced and targets accordingly met.

**Extending Statutory Review Mechanisms to Challenges Against Scottish Ministers’ Decisions in Infrastructure Projects**

**Question 26 – Do you agree that it is appropriate to expand the types of decisions subject to statutory review (instead of judicial review)?**

Yes.

**Question 27 – If Yes, for what types of decisions would it be appropriate to introduce a statutory review mechanism?**

The Society highlights in particular that there would be a benefit to having a consistent approach to the judicial challenge of planning and other forms of decision making. The Society notes from the Consultation Paper that some forms of decision require to be challenged by means of a statutory form of Court challenge within the 6 weeks of the decision concerned whereas other forms of decision are challenged by way of judicial review in respect of which there is no statutory time limit.
The Society believes that this process can cause confusion and agrees that rationalisation of the judicial challenge process would be beneficial.

However, the Society questions why the Consultation Paper only appears to consider expanding the role of the statutory challenge process in respect of decisions by Scottish Ministers as there does not seem to be any reason in principle why decisions of Scottish Ministers (together with decisions of local review bodies) should be subject to statutory challenge procedure within a 6 week time limit for challenge whereas decisions of planning authorities are subject to judicial review with no statutory time limit.

**Question 28 – If No, for what types of decisions would it not be appropriate to introduce a statutory review mechanism.**

The Society refers to its comments at 27 above.

**Question 29 – Do you agree that a statutory review mechanism for people or bodies with a sufficient interest to challenge the legality of Scottish Ministers’ decision in the Court of Session should replace the current arrangements for applicants wishing to challenge in respect of granting a marine licence?**

The Society refers to the comments at paragraph 66 of the Consultation Paper and favours a consistent approach regarding marine licences, Section 36 consents under the Electricity Act 1989 and resulting planning consents.

The Society, however, in advocating such an approach, recognises that there will be potential cost implications and access to justice issues.
Question 30 – Do you agree that the procedure for review should be made the same across all relevant legislation?

Yes.

Question 31 – What impacts – positive, negative, financial or other – do you think a Better Regulation Bill will have?

The Society has no comments.

Question 32 – What further suggestions do you have to improve the regulatory landscape?

The Society has no comments.

Questions 33 – Are there any specific regulations causing burdens on business or which have unintended consequences. Please provide details of the regulation, the impact and your proposed solution to address this.

The Society is well aware of the lack of provision of legal advice in certain localities and in particular rural Scotland due to the creation of ‘advice deserts’ and believes that measures are necessary in order to alleviate this problem.
Accordingly, consideration could be given to rate abatements or concessions for legally aided legal practices in such areas.

Partial Business and Regulatory Impact Assessment

Question 34 – Does the partial BRIA reflect the sectors and groups affected, and costs and benefits of the proposals? If not, please explain why and provide further information

The Society has no comments