

**SUBMITTING EVIDENCE TO A SCOTTISH PARLIAMENT COMMITTEE
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Date:	May 2019
Organisation: (if required)	The Law Society of Scotland
Topic of submission:	Scottish National Investment Bank Bill

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I am happy for my name, or that of my organisation, to be on the submission, for it to be published on the Scottish Parliament website, mentioned in any Committee report and form part of the public record.

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Non-standard submissions

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I would like to request that my submission be processed in a non-standard way.

ECONOMY, ENERGY AND FAIR WORK COMMITTEE**SCOTTISH NATIONAL INVESTMENT BANK****SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND****1. What are the advantages or otherwise in establishing the Bank as a public limited company?**

The level of transparency offered by the regulatory requirements imposed on public limited companies in terms of publishing accounts are helpful in terms of facilitating compliance with Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings and SI 2009/2331 The Financial Transparency (EC Directive) Regulations 2009.

2. What in your view are the fundamental characteristics of a national investment bank?

We have no comment on this question.

3. Is the level of capitalisation proposed sufficient for the Bank to deliver its desired impact? Please expand.

We have no comment on this question.

4. What is your view on the proposed costs in the set up and day-to-day running of the Bank?

We have no comment on this question.

5. What governance arrangements ought to be in place?

We note that the Bill has a provision at s.10 referring to entrenchment of provisions, which in turns refers to s.20. There it says that the only way the bank company's articles can be changed is by a special resolution of the members of the Scottish National Investment Bank (SNIB) , with a draft having been laid in front of Parliament beforehand and approved by the MSPs. However, s.1(c) says that the Scottish Ministers constitute the sole member of the company. The special resolution (ie at least 75%) referring to the bank's members (plural) does not fit with the stipulation that there is to be only one member (the Scottish Ministers) as the one member either votes for it "unanimously" or not at all. It is not clear what would happen if the MSPs voted for something but the Scottish Ministers either opposed the decision or were divided on it. The Bill does not stipulate that the Scottish Ministers would be bound to accept the MSPs' vote. Further clarification as to whether a specific procedure should be followed in these circumstances might be of assistance.

If the intention is to ensure that where MSPs collectively want to change the articles, they have the right to do so, and then the Scottish Ministers will be bound by the will of the Scottish Parliament, then we do not consider that the Bill, as currently drafted, would achieve this aim.

We note that s.3(b) gives the SNIB the power to create subsidiaries. We consider that the Bill should clarify that where any such subsidiaries are to be established, their articles of association must mirror those of the bank itself as set out in s.2. In relation to section 8, we consider that any direction from the Scottish Ministers about remuneration of staff should be transparent and accountable in line with levels of transparency and accountability in terms of civil service remuneration.

6. How can we ensure the market is ready for the investment opportunities the Bank can offer?

We have no comment on this question.

7. What ethical and equalities considerations do you think should inform the Bank's ethos and decision making?

The Bank should comply with the law and best practice as regards ethical and equalities considerations.

8. It is proposed that the Scottish Government will set the strategic direction of the Bank but the body itself decide on its investment approach. What is your view on this "mission-led" approach?

We consider that this is a sensible approach. While the body should be accountable, if investments are to be made or capital granted on a commercial basis, then this is a matter for those who have been tasked with the relevant assessment on the basis of their expertise and experience.

Furthermore, we note that the fact that existing commercial banks will not lend to a particular undertaking on commercial terms does not necessarily mean there has been a market failure: if an undertaking presents a sufficiently bad credit risk, it may not be appropriate for the SNIB to provide finance for it either.

However, we are concerned that if the intention is to require the Scottish Ministers to set such strategic missions, this will not be achieved by s.11(1) of the Bill as currently drafted and "are" should be changed to "must" if such a duty is to be imposed. We also note that there is no timescale for laying the document setting out the SNIB's strategic missions before the Scottish Parliament or making it publicly available.

9. Is there any other aspect of the Bill you wish to address? Please elaborate.

We welcome the flexibility given to the bank in terms of its general powers. Allowing the SNIB to give financial assistance “by any description of investment, lending or guarantee” should allow the bank/lenders to utilise any new financing methods which enter the market and as such assists in future-proofing the Bill. We also consider the restrictions on ownership set out in article 5 are appropriate.

We welcome the remarks at page 44 of the SPICe briefing regarding the status of the Bank as a “National Promotional Bank”.¹ The Bank will be not only a business undertaking but also an organ of the state. Consequently, any investment or financial accommodation that it makes to any entity will be “from state resources” (part of the legal definition of “state aid”). Any aid that ought to have been notified as such but was not is unlawful, even if it would be likely to have been cleared if it had been duly notified. A body that provides an undertaking with unlawful state aid is legally obliged to claw it back and any promises or assurances that it might have given give to the contrary are legally void. The limitation period is ten years. During that time the liability to repay an unlawful aid is a contingent liability of the recipient. Appropriate risk management and compliance is therefore of paramount importance to all concerned, including the potential recipient of an aid. It follows that a thorough state aid vetting process must be part of the Bank’s own compliance structure.

Finally, while we note that the Bill makes provision for transparency and accountability in terms of the SNIB’s reporting to the Scottish Ministers, there is no corresponding duty of transparency and accountability on the Scottish Ministers to allow parliamentary and public scrutiny of the Bank’s performance in terms of reporting on missions. We consider the Bill could be strengthened in this regard, for example by requiring a copy of the report on missions to be sent to the Scottish Parliament and made publicly available. We also consider that reference should be made in s.14 to the qualifications/competencies of the person charged with carrying out the SNIB’s performance review and that provision should be made for their removal if a situation arises which means they are not an appropriate person to perform that task.

¹ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2019/4/26/Scottish-National-Investment-Bank-Bill/SB%2019-25.pdf>