

Consumer Scotland Bill Amendment to be moved at Stage 2

Section 12, sub-section (2) Page 5, line 29

delete < may >

and

insert < must > after the word
'Ministers' and before the word 'by'

Effect

This amendment will place a duty on the Scottish Ministers to set out in regulations exemptions from the requirement to provide information.

Reason

As drafted, the provision in section 12 (2) provides a discretion to the Scottish Ministers as to whether or not to specify, in relation to exemptions:

- (a) persons or descriptions of persons to whom Consumer Scotland may not give notice under section 8(1),
- (b) information or descriptions of information which a person may refuse to supply in accordance with such a notice,
- (c) circumstances in which a person may refuse to comply with such a notice.

It is important that users and those who may potentially be captured under the provisions of the Bill have certainty as to the information that must be provided, and the information which is exempted for the purposes of section 8. There must also be certainty as to the circumstances where a person may refuse to provide such information.

By way of example, the SPICE briefing (page 17 paragraph 5) states that 'No person or body would be compelled to provide information which is covered by legal professional privilege. That covers discussions with a lawyer, or documents prepared to support court action' However, this exemption does not appear within any of the provisions of the Bill and would therefore need to be specified within regulations to provide certainty and assurance of the recognition of this fundamental principle.

There may also be information which potentially will fall within the scope of GDPR and although it could be implied that such information will be exempted, clarity on this should be expressly set out within regulations.

It is crucial that Scottish Ministers are under a duty, for the purposes of clarity, transparency and certainty, to expressly state, within regulations, exemptions from the provisions of section 8.

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Section 24, Page 11, line 7

after line 7 insert new sub section -

< (6) before making regulations under subsection (4)(c) the Scottish Ministers must consult relevant regulators and any other such persons as they consider appropriate and consider, for the purpose of section 8 to 12, the extent of existing statutory powers available to those regulators to be designated.>

Effect

This amendment will require the Scottish Ministers to consult when determining those regulators to be 'designated' for the purposes of sections 8 to 12 and to take into account the extent of the statutory powers currently available to those regulators.

Reason

The Bill is a framework Bill which provides that much of the detail will be set out in regulations made by Scottish Ministers. Sections 8 to 12 sets out provisions relating to information gathering and places certain obligations on 'designated regulators' where 'designated providers' have failed to provide information requested by Consumer Scotland. However, the provisions set out within sections 8 to 12 do not consider or reflect the limited scope of statutory powers that may be available to some regulators.

The Law Society of Scotland is the professional body and regulator for the Scottish solicitor profession. The scope and extent of the Society's powers are set out within legislation. In particular, the Solicitors (Scotland) Act 1980, Legal Profession and Legal Aid (Scotland) Act 2007 and the Legal Services (Scotland) Act 2010. The Society currently has the power to regulate solicitors on an individual basis and (to some extent) incorporated practices. The Society does not have the statutory power to regulate entities which are not incorporated practices in terms of the 1980 Act.

If, for example, the Society were to be a designated regulator for the purposes of sections 8 to 12 of the Bill, the current extent of the Society regulatory powers prevent it from taking effective enforcement action (section 10) where a practice unit – potentially a designated provider – fails to comply with a notice under section 8. The main issue is that likely the section 8 notice will be directed to the business or firm and the Society's main regulatory powers are directed towards the individual solicitor.

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In addition, the Bill presumes that the designated regulator has the power to compel the designated provider to provide information of *any* nature as set out within the section 8 notice. This is not the case. The Society, for example, only has the power to compel the production of prescribed information from those it regulates.

Further issues arise in relation to requiring designated regulators to make a determination and the reasons for this, and to provide the information to Consumer Scotland. Potentially, if Consumer Scotland were to make a reference to the Society where a designated provider failed to comply with a section 8 notice, then this may be grounds for a complaint. By virtue of the 2007 Act, all complaints must be submitted to the Scottish Legal Complaints Commission and will be subject to investigation and determination in accordance with the process as set out within the 2007 Act. This would therefore prevent the Society from making a determination as required under section 10 (3) of the Bill. There are additional provisions within the 2007 Act that would also potentially prevent the Society from providing information requested by Consumer Scotland, depending on the nature of that information.

The proposed amendment will ensure that Scottish Ministers consult with all those regulators that are under consideration for categorisation as a 'designated regulator' under section 8, to better understand the powers available to each regulator before bringing forward regulations. This will allow Ministers to develop the regulations to take into account the challenges faced by competing statutory provisions and ensure that policy intent of the Bill is realised in a proportionate way which recognises and reflects the differences in the regulatory regimes of each regulated market.