



**Scottish Parliament
Stage 1 Scrutiny of the Legal Services (Scotland) Bill**

The Law Society of Scotland's Memorandum of Comments

November 2009

INTRODUCTION

The Legal Services (Scotland) Bill aims to assist in the development of improved access for all to high quality legal services within a competitive market which is appropriately regulated to ensure public protection and maintains quality and independence of legal services in Scotland.

The Society supports the need to respond to new demands created by a changing market and believes that licensed legal services providers (LLSPs) will facilitate more modern and competitive delivery of legal services.

We are pleased that the bill appears to fulfil the policy intentions as set out in *Wider Choice Better Protection*, which is consistent with the Society's own policy paper, *Delivering Legal Services in Scotland*, published in 2008. We therefore approve of the general principle of the bill, subject to the specific comments on the detailed provisions contained in this memorandum.

The key will be to establish the best possible regulatory framework within which a range of business structures can develop. We will continue to work closely with the Government as it develops the legislation and sets out the framework for the future of legal services delivery in Scotland.

This paper gives detailed comments on each section of the bill. However there are some issues of principle which arise from the bill and which are outlined as follows.

- a) Independence of the legal profession. The regulatory objectives include: promoting an independent, strong, varied and effective legal profession. The professional principles require those providing legal services to act with independence and integrity and section 4 requires Scottish Ministers to act "so far as practicable in a way which is compatible with the regulatory objectives". However at various points in the Bill, these independence issues are compromised. This applies especially in relation to section 6, section 29, section 35 and section 39.

- b) Obligation to consult. Under the bill, Scottish Ministers are empowered to make regulations affecting approved regulators, LLSPs, the Scottish Legal Complaints Commission (SLCC) and the existing professional bodies. These powers by and large have no correlative duty to consult. Ministers should be required to consult with interested parties where this is not already stated in the bill.

- c) The need for a level playing field. The bill should ensure, so far as practicable, a level playing field between LLSPs and “traditional” firms and between approved regulators and existing regulators. The regulatory objectives include promoting competition in the provision of legal services and to that end, the bill confers duties on both approved regulators and LLSPs, which seek to ensure that competition law is observed. Regulatory costs and the obligations of LLSPs should not distort competition within the legal services market.

The bill also specifies certain characteristics of the Society’s internal governance arrangements. The Council has fully considered these requirements and believes that they should be adopted in order for the Society to be a modern and effective regulator. The bill should ensure that other approved regulators meet such requirements in relation to the discharge of their regulatory functions.

- d) Access to justice. The regulatory objectives include promoting access to justice and the professional principles oblige providers of legal services to support the proper administration of justice. The Society has a long-standing agenda to support access to justice by: i) better provision of legal aid; ii) supporting the reform of the civil justice system; iii) promoting initiatives such as arbitration, mediation and pro bono activities. It is important that the bill does not impinge on access to justice and that the safeguards in the bill increasingly build respect for this value into the system.

SPECIFIC COMMENTS

Part 1: The Regulatory Objectives etc.

Section 1 – Regulatory objectives

Section 1 should make reference to the ‘interests of justice’ and that this overarching principle should – with the ‘rule of law’ – assume paramountcy within the section.

Section 2 – Professional Principles

Section 2 should reflect section 1(3)(d) of the Legal Services Act 2007 which refers to those exercising rights of audience as requiring to comply with their duty to the court to act ‘with independence in the interests of justice’. Section 1(3)(d) reads as being exhaustive of the duty to the court. It should also require them to comply with other duties to the court, e.g. confidentiality.

While section 2(f) obliges those subject to professional principles to meet their obligations under any relevant professional rules, there should be a specific reference to treating the affairs of clients as confidential and in conformity to professional ethics.

Section 3 – Legal services

General

Legal services are defined very widely in section 3 and the definition appears to be similar to the way in which legal activities are defined in section 12 of the Legal Services Act 2007, except that the definition does not separately identify and define the reserved legal activities.

Nevertheless, the way in which legal services are defined would include, but is not restricted to, the legal activities which can only be carried out by qualified persons by virtue of section 32(1) of the 1980 Act. As a consequence, that section is amended to permit the provision of

such activities by licensed legal service providers – see section 90(4).

However, the absence of a definition of reserved legal activities in the Bill is significant because sections 12-26 of the Legal Services Act 2007 provide that the regulation of legal activities only applies to those activities which are reserved legal activities whereas the Bill proposes to regulate the provision of all legal services not just the reserved ones. This shows the extent of the regulatory regime proposed for Scotland.

Detailed comments

Section 3(1)(a)(i) refers to the provision of legal advice and assistance in connection with “any contract, deed, writ, will or other legal document”. The reference to “other legal document” in section 3(1)(a)(i) is likely to be construed according to the *eiusdem generis* rule. This is too narrow. It would appear not to include, for example, documents such as Parliamentary Bills. What then is the position about legal services which consist in drafting Bills or amendments to Bills etc or other legal activities which may not fall within that exhaustive definition?

The example at section 3(2)(c) should be deleted on that grounds that:

- a) mediation is not a ‘quasi judicial’ act
- b) The canon of interpretation *eiusdem generis* applies.

Section 4 – Ministerial oversight

The Society is concerned about the extent of the powers which are given to Scottish Ministers by Part 2 in relation to approved regulators of those legal services providers who provide legal advice and assistance and/or representation.

We agree with the Government’s policy objective that there should not be a Legal Services Board in Scotland. However, the grant of such powers to Ministers raises fundamental issues of constitutional propriety which occur at various sections throughout the bill. Section 4, obliging Ministers to act in a way which is compatible with the regulatory objectives, goes

some way to ensuring good constitutional practice but section 4(2) does not oblige Ministers in an absolute sense inasmuch as they are only required to act in accordance with the regulatory objectives 'so far as practicable' and subject to their consideration of the appropriate way to meet those objectives. This phraseology should be clarified to tighten the obligation on Scottish Ministers.

There should be a similar provision in Part 1 requiring an approved regulator or a licensed legal services provider to comply with the regulatory objectives and professional principles. There are echoes of this throughout Part 2, e.g. section 20(1)(a), but that only applies to the internal governance arrangements and not its other functions or section 38 (key duties of licensed legal services provider). It is only in section 62 where there is the equivalent provision in relation to approved regulators. The Society proposes that in the interests of making this clear, section 62 should be stated upfront in Part 1 in view of its importance – even though this will mean that the expression “approved regulator” would have to be construed in accordance with Part 2.

For the same reasons, section 86 should be brought into Part 1, subject to the comments on that section.

Part 2: Regulation of Licensed Legal Services

Section 5 – Approved regulators

Section 5(1) requires clarification that an “other body” could include an incorporated company or unincorporated association. Does the reference to “a professional or other body” simply mean a body which is either professional or non-professional? Is there any reason why the body (whether professional or otherwise) should not include a body corporate or an unincorporated association? It should clarify if ‘a body’ could be either.

The Society is concerned about the order making power in section 5(6) to prescribe fees which Scottish Ministers may charge (a) an applicant to become an approved regulator and (b) an approved regulator. This implies that it is intended that regulators who are approved

should be charged fees. It should be clarified why fees are being charged and what are the matters for which it is considered to be appropriate that fees should be charged, e.g. applications for authorisations to act. In this connection, it is not clear whether approved regulators have to apply for renewal of their approval (see also comments on section 6). The power to prescribe fees should be subject to consultation.

Section 6 – Approval of regulators

Wider Choice Better Protection stated at paragraph 5.16 that “the Scottish Government with the agreement of the Lord President should authorise regulatory bodies”. The Society believes that it is important for the Bill to reflect what was consulted upon in this respect.

The Society notes that according to section 6(3) Scottish Ministers must consult the Lord President, the OFT, consumer bodies and such other persons as they consider appropriate when deciding to approve a regulator. However, as the regulators will have a key role in the legal system and the system of the administration of justice, it is appropriate that approval should only take place with the Lord President’s consent.

Scottish Ministers should seek the approval of the Lord President and consult other bodies as to the conditions which they may impose under section 6(2) when they approve an applicant. In this connection it is not clear whether those conditions can include conditions as to the duration of the approval – cf section 7(4) which draws a distinction between duration and conditions in the case of authorisations to act.

In respect of section 6(5) and (6), there should be a right of appeal against Scottish Ministers refusing to grant an application or to grant it subject to conditions. Section 6(5) requires Scottish Ministers to notify an applicant if they intend to refuse to grant an application or to approve it subject to conditions but section 6(6) only entitles the applicant to make representations to Scottish Ministers or “to take such steps as it may consider expedient” – but it is not clear what this is intended to mean. This contrasts with section 13 which gives an applicant for a licence the right to appeal to the sheriff against a relevant licensing decision.

The regulation-making power in section 6(7) should be subject to consultation with relevant interested parties so that Ministers can act having taken a range of views into account.

Section 7 – Authorisation to act

It is not clear why it is necessary to require an authorisation to act in addition to a body becoming an approved regulator. One approval should be sufficient. Why should a body apply to become an approved regulator and yet not want to carry out its regulatory functions?

It should be clarified whether an approved regulator has to apply for such authorisation; section 7(6), (9) and (10) implies that a request has to be made but this should be made clear.

In relation to section 7(7), Scottish Ministers should be under an explicit obligation to provide reasons for withholding authorisation or imposing conditions.

There should be a right of appeal against Scottish Ministers refusing to grant an application or to grant it subject to conditions under section 7(8) (see comment upon section 6(5) and (6) above).

The regulation-making power in section 7(10) should be subject to consultation with relevant interested parties so that Ministers can act having taken a range of views into account.

Section 8 – Regulatory schemes

Section 8(4) provides for amendments to regulatory schemes to be subject to approval of the Scottish Ministers and requires them to consult the Lord President and others. That approval should be subject to the consent of the Lord President.

Section 8(5) empowers Scottish Ministers to make regulations enabling the regulatory schemes to deal with the provision by their licensed providers of non-legal services. It is not clear what this is intended to achieve. Is it necessary to authorise the inclusion of such

matters in a scheme? If so, such a power should be included in section 8(3).

Section 9 – Reconciling different rules

Section 9(3) empowers Scottish Ministers by regulations to make further provisions about regulatory conflicts. In view of the potential width of this power, it should be subject to consultation and more specific definition.

Section 10 – Licensing rules

Section 10 provides for the licensing rules. These cover the conditions for becoming a licensed provider, the terms of the licences, their renewal and other issues including licensing fees. It is important to note that in accordance with section 62(3), any licensing regime should impose the minimum of bureaucracy while providing the best regulatory structure and approved regulators should have in mind these objectives when formulating licensing rules.

Section 11 – initial considerations

This section requires the licensing rules to provide for consultation with the OFT on a licence application and to state how the approved regulator would deal with a licence application where it would cause “a material and adverse effect on the provision of legal services”. The section also gives guidance to regulators as to when it is appropriate to consult the OFT. This is when the regulator believes that the licence may prevent competition within the legal services market or significantly restrict or distort such competition. This is an important provision to ensure that competition and access to justice issues are properly considered by approved regulators.

Section 12 – other licensing rules

The Society has no comments to make on this section.

Section 13 – Licensing appeals

The Society has no comments to make on this section.

Section 14 – Practice rules: general

Section 14 provides for practice rules which must provide for the operation, administration and standards of licensed providers, the operational positions within licensed providers, accounting and auditing, professional indemnity, complaints and the steps to be taken by an approved regulator in the event of a breach of the regulatory scheme or a complaint being upheld.

The creation of practice rules is an obligation on approved regulators and practice rules form part of the regulatory scheme which requires to be put to Ministers under section 5(3) in order to be included in the application to become an approved regulator.

In addition to the specific subjects which must be included in the practice rules, the rules may include professional practice, conduct or discipline rules, which – in the approved regulator's opinion – may be necessary.

These rules do not require the approval of the Lord President, although he, the OFT and other bodies will be consulted by Scottish Ministers in the context of approval of the regulator under section 6.

In formulating the practice rules, the obligation to reconcile different rules under section 9 must be taken into account.

As section 14 is currently drafted, there is no reference to a rule regarding compensation or fidelity fund arrangements. The Society is of the view that it is essential for proper consumer protection that adequate provision to ensure consumer redress in the event of dishonesty.

Section 15 – Financial sanctions

Section 15 provides for practice rules to include the imposition of a fine where there is a breach of the regulatory scheme or a complaint is upheld. The fine is subject to a statutory maximum.

The fine is payable to the approved regulator and must be applied to the cost of exercising the approved regulator's functions under Part 2.

Questions might be raised as to whether Article 6 of ECHR (requirement for civil rights to be determined by an independent and impartial tribunal) would be complied with if the approved regulator both imposes and gets the benefit of the fine but it is likely that it would be because there is an appeal to the sheriff under section 15(4).

However, the way the fine is treated under this section is quite different from the way that fines are currently imposed upon solicitors. Fines imposed by the SSDT are payable to the Crown (although this may be because the fines are imposed by a tribunal not an administrative body).

Section 16 – Enforcement of duties

Section 16(1) provides that the practice rules must include a provision that it is a breach of the regulatory scheme for a licensed provider to fail to comply with its statutory duties. This is a very broad provision which could include failures not only under the bill but also under company law, health and safety law and any other legislative provision. Questions may arise as to whether it is appropriate that the approved regulator should determine such matters, particularly if they are unrelated to the provision of legal services.

There may be issues about the application of section 16 in connection with some of the duties under section 38, for example to "have regard to" the regulatory objectives. See comments under section 38.

Section 17 – Performance report

The Society has no comments to make on this section.

Section 18 – Accounting and auditing

Section 18 requires the practice rules to include an obligation on licensed providers to keep in place proper accounting and auditing procedures. This mirrors the Legal Services Act 2007 and the obligations imposed upon solicitors' practices under the 1980 Act. The Society is of the view that the reference to the application of sections 35 to 37 of the 1980 Act will assist in creating a level playing field between LLSPs and traditional firms.

Section 19 – Professional indemnity

Section 19 requires the practice rules to oblige licensed providers to keep in place professional indemnity and to include provisions corresponding to the application of section 44 of the 1980 Act on an incorporated practice. Section 44 is discretionary and therefore there is a potential distinction between the arrangements under section 19 and those under section 44 of the 1980 Act. Section 19 reflects paragraph 7.35 in *Wider Choice Better Protection*. The Society agreed with that policy aim in its response.

However, section 19 also highlights the lack of compensation or fidelity arrangements which were consulted upon in paragraphs 7.26 to 7.31. In the Society's view, it is essential for consumer protection that provision is made for financial arrangements to secure consumer redress.

Section 20 – Internal governance arrangements

The Society approves of the requirement that the internal governance arrangements of approved regulators should ensure that the approved regulator will act properly and independently in the exercise of its regulatory functions and allocate adequate resources to those functions and regularly review how those functions are carried out. However, there may

be a conflict between section 20(1)(a), which requires the approved regulator to exercise its regulatory functions independently of any other person or interest, and section 27, which requires an approved regulator, in exercising its functions, to have regard to any guidance issued by Scottish Ministers.

The Society's governance review has been progressing for two years. The first stage of the planned governance change is now complete, with the introduction of a Board and group conveners who have responsibility for representation and support; regulation; and registration and membership. The Board's role is to provide direction and scrutiny of the Society's committee and executive on behalf of Council. The second stage will review the committee structure in terms of focus, working practices and communications, with the aim of improving the Society's effectiveness as a regulator and as a representative organisation.

Within the unified structure of the society practical distinction of regulatory and representative roles is already a reality. Since the Council of the Law Society of Scotland Act 2003, all the Society's committees dealing with complaints have had delegated powers to decide cases without references to Council. These committees have 50% solicitor and 50% non-solicitor members, ensuring transparency and balance between the solicitors and the consumer. Many other committees have non-lawyer members including Guarantee Fund, insurance and professional practice committees.

The Society believes that the governance changes in relation to the regulatory committee, and the provision of a statutory foundation in terms of section 92 reinforce the practical distinction of functions and enable the Society to comply with section 20(2)(b).

In relation to section 20(2)(c), the section should provide that any governing council of an approved regulator should have an appropriate proportion of members who are not members of the professional or other body which is the approved regulator and that any regulatory committee is composed of at least 50% of non-members of the professional or other body.

Section 21 – Communicating outside

The Society agrees with the section 21, which is a whistle-blowing provision and requires the

governance arrangements of an approved regulator not to prohibit a person involved in regulation from communicating with other regulators.

Section 22 – More about governance

Section 22 empowers Scottish Ministers to make further provision about the internal governance arrangements of approved regulators. The Society is of the view that this provision could have an adverse impact on the independence of approved regulators and that such changes should require the consent of the Lord President.

Section 23 – Regulatory and representative functions

This section provides a safeguard to prevent Scottish Ministers from interfering in an approved regulator's representative functions however, there requires to be further clarification of the grounds under Part 2 on which interference by Ministers in the regulatory function is permitted under section 23(3).

Section 24 – Assessment of licensed providers

Section 24(8), which allows a regulator to delegate its functions under this section “to any suitable person or body” is very wide. There is no specification as to what is meant by “suitable”. There should be further criteria for suitability for delegation in this section. Scottish Ministers should be obliged to consult with interested parties on the regulations made under sub-section (9).

Section 25 – Giving information to SLAB

The Society has no comments to make on this section.

Section 26 – Additional powers and duties

Section 26 empowers Scottish Ministers to make regulations giving regulators “such

additional functions as they consider necessary or expedient” for the purposes of Part 2. Before doing so, Scottish Ministers are required to consult every approved regulator, the Lord President, and such other persons as they consider appropriate. Providing increased powers to regulators may have implications for the administration of justice and accordingly, the consent of the Lord President should be required, rather than him being simply a consultee.

Section 27 – Guidance on functions

There should be further definition as to the type of guidance which Scottish Ministers may issue. If such guidance were mandatory or subject to enforcement it could compromise the approved regulator’s independence. Clarification is needed as to the nature of the guidance.

Section 28 – Monitoring performance

Section 28 empowers Ministers to monitor the performance of approved regulators “in such manner as they consider appropriate”. This is to be done by reference to the factors specified in section 28(2), although these are not exhaustive. Nothing is said as to how such monitoring is to be carried out. It is important that the compliance monitoring is fair, open and transparent. The obligations to provide information within a set time under section 28(3) may have resource implications for approved regulators.

Section 29 – Measures open to Ministers

The powers given to Ministers under this section are very broad and require close scrutiny together with schedules 1 to 6. Care should be taken to ensure that Ministers in exercising the powers under section 29(4) do not impinge on the regulatory objectives or the professional principles. Furthermore, the provisions contained in section 29(2)(a) and (b) should require the consent of the Lord President; and section 29(2)(e) and (f) and schedule 6 should reflect paragraph 19 of *Wider Choice Better Protection* which requires the agreement of the Lord President to the revocation or amendment of authorisation. Ministers should be obliged to consult on the regulations made under section 29(6).

Section 30 – Surrender of authorisation

The Society has no comments to make on this section.

Section 31 – Cessation directions

Section 31 provides for when a regulator amends its scheme to exclude certain providers or the regulator's authorisation is amended, rescinded or surrendered. In these circumstances Scottish Ministers may direct the regulator to take action which is necessary for the continued regulation of the licensed provider. Before making such a direction, consultation with interested parties should be required. Section 31(3) imposes a duty upon the regulator to comply with a direction "so far as practicable". Should this not be "reasonably practicable"?

Section 32 – Transfer arrangements

The Society has no comments to make on this section.

Section 33 – Extra arrangements

The Society has no comments to make on this section.

Section 34 – Change of approved regulator

Section 34 allows a licensed legal services provider to switch regulators subject to the new regulator's consent and notice being given to the current regulator and Scottish Ministers. In the Society's view, it is not necessary for Scottish Ministers to be informed of such a decision.

Ministers may by regulations make further provision about transfers. There should be an obligation to consult with interested parties on the regulations.

Section 35 – Step-in by Ministers

Section 35 allows Ministers to establish a body with a view to its becoming an approved regulator. There needs to be further definition of the basis on which section 35 would be operated and what safeguards should be put in place to prevent the inappropriate use of this power. Again, Scottish Ministers should be obliged to consult with interested parties on the regulations made under this section.

Section 36 – Licensed providers

Section 36 provides for licensed legal services providers, which are business entities, offering to provide or providing legal services to the general public for fee, gain or reward under a licence issued by an approved regulator. The entity can only be a licensed provider if it has at least one solicitor holding an unconditional practising certificate. That certificate should be defined not only with reference to section 15 but also with reference to section 53 of the 1980 Act. This point arises again in respect of section 39(2).

Section 36(1)(a) may inhibit licensed legal services providers from offering pro bono services – this should be clarified. There should also be clarification of what it means for a solicitor to be “within an entity”. The same phrase occurs in section 38(2)(a) and (3).

Section 37 – Eligibility Criteria

There should be an obligation to consult with interested parties on the regulations made under this section.

Section 38 – Key duties

Section 38 sets out the key duties of a licensed legal services provider. It is significant that different language is used to describe the nature of the duty in each case. Section 38(1) and (2) requires a licensed legal services provider to:

1. Have regard to the regulatory objectives
2. Adhere to the professional principles
3. comply with its approved regulator's regulatory scheme and the terms and conditions of its licence
4. Ensure that everyone within the entity complies with the code of conduct

The requirement to “have regard to” the regulatory objectives is the weakest form of duty because the House of Lords has held that a duty “to have regard” to a matter does not mean that it has to be followed but simply that, provided regard is had to it, it can be disregarded¹. Is it appropriate that the licensed legal services provider should be able to do this? cf section 4(2)(a) and 20(1)(a).

The requirement to have a Head of Legal Services and either a Head of Practice or Practice Committee was referred to in the Society's policy paper. It is possible for one person to hold both the Head of Legal Services and the Head of Practice roles.

Section 39 – Head of Legal Services

The Society approves of the terms of section 39 and the role ascribed to the Head of Legal Services (which reflects the Society's policy paper), subject to the comment made under section 36.

However, in relation to section 39(9), Scottish Ministers should not be empowered to make regulations directing the functions of solicitors.

Section 40 – Head of Practice

The Society approves of the terms of section 40, which reflects the Society's policy paper. The power under section 40(7) to make regulations should be subject to consultation with appropriate persons.

¹ Harvey v Strathclyde Regional Council 1989 SLT 612

Section 41 – Practice Committee

The Society approves of the terms of section 41, which reflects the Society's policy paper. The power under section 41(5) to make regulations should be subject to consultation.

Section 42 – Notice of appointment

The Society has no comments to make on this section.

Section 43 – Challenge to appointment

Section 43 provides that a regulator may challenge a licensed provider's appointment of a person ("P") as Head of Legal Services, Head of Practice or member of a practice committee on the grounds that the person is ineligible, unsuitable or there are other reasonable grounds for a challenge. If the approved regulator determines that the grounds of challenge are made out, section 43(4) enables it to direct the licensed provider to rescind the appointment.

Section 43(6)(a) provides that the licensing rules made under section 10(1)(b) and (c) are required to explain the basis on which suitability for appointment is determinable. Section 43(7) provides an example of what might be relevant in assessing suitability, i.e. a record of misconduct. There may be a danger that this example may restrict what is meant by "unsuitability" by reference to the *eiusdem generis* rule. In the case of disqualification, there are other conditions specified in section 46. It is assumed that similar conditions would also apply in determining P's suitability for appointment but this is not expressly provided.

There is no provision for any appeal to the courts against any challenge made by the approved regulator to the appointment of P or any rescission of his appointment – section 45(5) only provides for an appeal to the sheriff against a disqualification and not a challenge to appointment. This may raise questions as to the compatibility of section 43 with Article 6 of ECHR.

It should be made clear in section 43(3) that the grounds on which a challenge may be made

do not include the conditions detailed in section 46, which – if met – would result in immediate disqualification from the position. It is unclear, however, how section 43(3) interacts with section 44(6) and 46(6), as in this case, if the condition were met, it would not necessarily result in immediate disqualification.

Section 44 – Disqualification from position

The Society has no comments to make on this section.

Section 45 – Effect of disqualification

This section provides that disqualification can be limited or unlimited in time and applies to all licensed providers, however regulated. It could be limited by reference to activities, whether carried out with or without supervision. The Society is of the view that the example in section 45(2)(b) should be deleted, as it is unnecessarily restrictive.

Section 46 – Conditions for disqualification

There are varying approaches to the conditions for disqualification in terms of compliance with bankruptcy and insolvency legislation and company directors' disqualification. These provisions should be simplified and made more uniform.

Section 47 – Designated persons

Section 47(2) provides in effect that a designated person is a person who is designated by a licensed provider to carry out “legal work” in connection with the provision of legal services but it is not clear what is meant by “legal work”. The only qualifications for being a designated person are those stated in section 47(3)(b). What is meant by “legal work” should be clarified.

The Bill should also provide a procedure for how designation takes place.

Section 47(4) ensures that the reserved areas remain as they are at present. It refers to “a

particular sort of legal work” when it is intending to refer to the kind of work mentioned in section 26(1) of the 1980 Act which can only be done by qualified persons. The description of qualified persons is extended by the amendment made in section 90(4) to include licensed legal service providers but not any designated person.

Section 48 – Listing and information

The list should be available to members of the public on request.

Section 49 – Fitness for involvement

The Society has no comments to make on this section.

Section 50 – Factors as to fitness

Section 50 details the factors for assessing an outside investor’s fitness. This echoes the Society’s policy paper. Section 50(2)(b)(ii) seems extremely broad in respect of compliance with any enactment.

In relation to section 50(4), Registered European and Foreign Lawyers or Multi-national Practices should be subject to the same presumption.

Section 51 – Behaving properly

The sanctions to be imposed on an outside investor for not acting properly should be clearly stated. Under the Bill, the accountability is not particularly clear. A failure to comply with section 51 should raise a presumption of unfitness.

Section 52 – More about investors

Scottish Ministers should consult interested parties on the regulations made under section 52(2). The definition of ‘investor’ and ‘outside investor’ under section 52(4) needs some

further thought. Is it not clear when an investor may or may not become someone whom the licensed provider intends to become a designated person. It is not clear how the licensed provider's intentions are to be determined.

Section 53 – Duty to warn

There is no definition of 'serious financial difficulty'. This will need to be clarified.

Section 54 – Ceasing to operate

The Society has no comments to make on this section.

Section 55 – Safeguarding clients

Scottish Ministers should consult with interested parties on the regulations made under section 55(10).

Section 56 – Distribution of client account

The Society has no comments to make on this section.

Section 57 – Employing a disqualified lawyer

The Society has no comments to make on this section.

Section 58 – Concealing disqualification

The Society has no comments to make on this section.

Section 59 – Pretending to be licensed

The Society has no comments to make on this section.

Section 60 – Professional privilege

There should be a specific provision for an obligation of confidentiality to apply to the licensed provider and its employees and it should be reinforced by a criminal sanction where those employees are not subject to professional rules of conduct.

Section 61 – Input by the OFT

Scottish Ministers should be under an obligation to publish advice under this section.

Section 62 – Role of approved regulators

As with section 4(2), section 62(2) does not oblige approved regulators in an absolute sense.

It has already been suggested that section 62 should be put into Part 1 in view of its general importance.

Section 63 – Policy statement

Policy statements appear to be an unnecessary level of bureaucracy. If the approved regulator complies with the regulatory objectives and professional principles and the other provisions of the draft Bill, that should be sufficient.

Section 64 – Complaints about regulators

Section 64 obliges Scottish Ministers to investigate complaints about approved regulators. It should be clarified that any complaint must arise from a breach of a statutory duty under the bill and that such a complaint may only be made by a person having a direct interest.

Where the complaint is a complaint about how an approved regulator has dealt with a regulatory complaint (a handling complaint), as mentioned in section 57D of the 2007 Act, as amended by section 65, Scottish Ministers must refer the complaint to the SLCC. It would

also appear that such complaints may be made directly to the SLCC under section 23-25 of the 2007 Act.

Section 64(6) enables Scottish Ministers to delegate any of their functions under section 64 (1),(3) and (5)(a) to the SLCC. Is it appropriate that such functions should be able to be delegated to the SLCC?

If it is appropriate, should not the SLCC deal with all complaints against approved regulators rather than involving Scottish Ministers in this role? Scottish Ministers should fund the SLCC to fulfil its role under this section.

It would be appropriate for the SLCC where there is partial or complete delegation to be under an obligation to inform Scottish ministers that:

- a) a complaint against an approved regulator had been made; and
- b) what finding and, where appropriate, sanction had been reached.

Section 65 – Complaints about providers

Section 65 inserts 5 new sections into the Legal Profession and Legal Aid (Scotland) Act. Section 57A applies the 2007 Act provisions about service complaints against practitioners to service complaints about licensed providers. In relation to new section 57B of the 2007 Act (regulatory complaints), this new species of complaint is a combination of service and conduct. There are issues of complaints-handling conflict, which need to be addressed, including the possibility of double-jeopardy.

In respect of new section 57C (levy advice and guidance) the Society questions whether it is appropriate that a licensed provider pays an annual levy to the SLCC in addition to the levies paid by a solicitor employed by the licensed provider. This element of double-counting is unjustified and abatement should be made for any individual levy paid, or individual exemption should be provided where a licensed provider pays the total levy.

Section 66 – Register of approved regulators

The public should be entitled to consult the register without incurring a fee.

Section 67 – Registers of licensed providers

The public should be entitled to consult the register without incurring a fee. Scottish Ministers should be required to consult with interested parties on the regulations made under section 67(5).

Section 68 – Lists of disqualified persons

The public should be entitled to consult the list without incurring a fee. Scottish Ministers should be required to consult with interested parties on the regulations made under section 68(6).

Section 69 – Privileged material

The Society has no comments to make on this section.

Section 70 – Immunity from damages

The Society has no comments to make on this section.

Section 71 – Effect of professional or other rules

The Society has no comments to make on this section.

Part 3: Confirmation Services

Sections 72-85

This part provides the structure for the approval of professional and other bodies as

“approving bodies” for the purposes of approving confirmation agents who can prepare papers for the confirmation of executors. The Society is of the view that the reserved areas (including executry practice) should remain as they are currently constituted.

If the Government wishes people to be able to practice as confirmation agents this must be on a level playing field with other practitioners providing confirmation services, namely solicitors and executry practitioners. Accordingly, the creation of any approving body and any regulations made under sections 73 and 74 should require the consent of the Lord President. Confirmation agents should require to hold an annual licence from the approving body and should hold professional indemnity insurance and either fidelity guarantees or maintain a compensation fund to ensure consumer confidence and public protection.

The range of sanctions which may be taken by an approving body in relation to a confirmation agent in the event of a conduct complaint should include censure and a compensation order.

Part 4: The Legal Profession

Section 86 – Application by the profession

Section 86 applies the regulatory objectives to the Society and other regulating authorities. Confirmation approving bodies and confirmation agents are not mentioned here.

It has already been suggested that, in view of its importance, this section should be moved into Part 1.

Section 86(3) defines what is meant by the regulatory functions of inter alia the Council of the Law Society for the purposes of that section. It differs from the definition in section 23 for the purposes of Part 2 which refers to functions regulating the professional practice of legal practices and it does not distinguish those functions from its representative functions. It is also different from the definition in section 3B(9) of the 1980 Act as inserted by section 93(2) which refers to solicitors and incorporated practices. Such differences create issues of

interpretation, which ought to be clarified.

Sections 87-89 – Regulation of the Faculty/changes to Faculty’s rules

The Society has no comment to make on these sections.

Section 90 – Qualified persons

Section 90(6) amends the definition of “unqualified person” in section 65(1) of the 1980 Act. The amendment refers to “legal services provider as defined in Part 2” but it does not identify where it is defined. It is suggested that, in the interests of clarity, the amendment should refer to where it is defined, namely section 33C(4) of the 1980 Act as inserted by section 91(1). It would even be better if there was a similar definition inserted in section 65(1) because it is difficult to find that definition for the purposes of other provisions in Part 2 of the definition of incorporated practice in section 65(1).

Section 91 – Changes to practice rules

Section 91(1) inserts section 33C into the 1980 Act which invalidates any rule made under section 34 “which prohibits or unduly restricts” certain matters. There is likely to be uncertainty as to whether a particular rule “unduly restricts” those matters. There should be some further clarification.

Section 92 – Council membership

Section 92 empowers the Council to appoint non-solicitors to the Council. Scottish Ministers reserve the power to make regulations regarding criteria for members, subject to consultation. In new section 3A(3)(b) of the 1980 Act, inserted by section 92(2)(c), are the Society’s ‘objectives’ the same as the objects of the Society under section 1 of the 1980 Act?

Section 93 – Regulatory committee

Section 93 puts the regulatory committee on a statutory footing. There are issues regarding the definition of regulatory functions in new section 3B(9). Professional practice in the Society’s understanding includes guidance and advice on professional ethics as well as the formulation and interpretation of rules, granting of waivers and analogous procedures of a regulatory nature. The definition therefore needs some further thought. In this connection, reference should also be made to the definition of “regulatory functions” of the Law Society in terms of section 86(3).

Section 94 – Removal from the solicitors roll

The Society has no comments to make on this section.

Section 95 – Exclusion from giving legal assistance

The Society has no comments to make on this section.

Section 96 – Availability of legal services

The Society has no comments to make on this section.

Section 97 – Information about legal services

Section 97 gives SLAB the power to require the Society, the Faculty and the Scottish Court Service to provide information in order to fulfill its obligations to Ministers. This obligation should be extended to any approved regulator.

Section 98 – Minor amendments

The Society has no comments to make on this section.

Sections 99 – 102

The Society has no comments to make on this section.

Schedule 1 – Performance targets

Does paragraph 2(2), which obliges a regulator to ‘do its best’ impose any kind of justiciable obligation?

Schedule 2 – Directions

The power to issue directions highlights the constitutional issue of Scottish Ministers having control over the providers of legal services. Providing the Lord President with a requirement to consent to directions would be an additional safeguard.

Schedule 3 – Censure

The power to censure highlights the constitutional issue of Scottish Ministers having control over the providers of legal services. Providing the Lord President with a requirement to consent to directions would be an additional safeguard.

Schedule 4 – Financial penalties

With regard to the appeal grounds, these are lacking inasmuch as there is no appeal on an issue of fact. This should be corrected.

Schedule 5 – Amendment of authorisation

The Society believes that the Lord President should consent to any amendment to an authorisation.

Schedule 6 – Rescission of authorisation

The Society is of the view that Scottish Ministers must accept the advice of the Lord President.

Schedule 7 – Surrender of authorisation

The Society has no comments to make on this schedule.

Schedule 8 – Investors in licensed providers

Paragraphs 1 and 3 contain requirements to give information. The requirements at paragraph 1(3)(a)(ii) seem to be extremely broad. This requires some clarification.



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