

EXECUTIVE NOTE

THE LICENSED LEGAL SERVICES (MAXIMUM PENALTY AND INTEREST IN RESPECT OF APPROVED REGULATORS) (SCOTLAND) REGULATIONS 2012

SSI 2012/155

The above instrument was made in exercise of the powers conferred by paragraphs 2(2) and 11(2) of schedule 4 to the Legal Services (Scotland) Act 2010 (“the 2010 Act”). The instrument is subject to the negative procedure.

Background

The 2010 Act allows solicitors who offer legal services in Scotland to operate using certain business models which were previously prohibited. It removes restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership, and creates a regulatory framework in which the new types of business will operate. The new types of business are called licensed legal services providers (“licensed providers”) and will be licensed and regulated by approved regulators which in turn will be approved, authorised, and regulated by the Scottish Ministers.

Section 38 of the 2010 Act describes the measures which can be taken by the Scottish Ministers should they consider that an approved regulator is not performing its functions adequately. Subsection (4) sets out the measures which can be taken, which include (at paragraph (d)) imposing a financial penalty.

Under schedule 4, which sets out further detail about the imposition of financial penalties, the Scottish Ministers are required to set out the maximum penalty that can be imposed and the interest rate that can be applied to an unpaid penalty (or part thereof) if necessary.

Policy objectives

The policy objectives are to set a financial penalty that is proportionate and effective, and a reasonable rate of interest that may be applied to unpaid fines.

It is considered appropriate to introduce a model that reflects that approved regulators will regulate different numbers of licensed providers, and will have different incomes arising out of that regulation. Therefore, the maximum financial penalty has been set as a percentage of income derived from an approved regulator’s regulatory functions in respect of the most recent financial year for which the approved regulator has audited accounts. Following consideration of the comparable penalties in England and Wales, the maximum penalty has been set at 5% of such income.

However, a lower limit of £10,000 has also been set, to allow the penalty to be used in the first year of an approved regulator’s operation (when it will not have records for the past accounting year on which to base the penalty), and to ensure that it is not so small as to be ineffective (as may have otherwise been the case if an approved regulator were to regulate a very small number of licensed providers).

An interest rate of the base rate plus 2% has also been set for unpaid fines.

Consultation

There is a general requirement under section 5 of the 2010 Act for the Scottish Ministers to consult, where considered appropriate, such persons and bodies as appear to have a significant interest in the subject matter in question. In accordance with that section, consultation has taken place with the Lord President, the Law Society of Scotland, and the Institute of Chartered Accountants of Scotland. No comments were made on the regulations.

Impact Assessments

An Equality Impact Assessment was prepared for the Legal Services (Scotland) Bill, and which found no evidence of differential impact in respect of disability, gender, sexual orientation, race/ethnicity, or religion/belief. A further assessment was considered, but as these regulations do not introduce new policy but provide for the administration of the policy introduced by the 2010 Act, it was considered that this was unnecessary.

The Scottish Government also considered whether an environmental impact assessment was required. However, as it considers that the instrument has no environmental impact, no assessment was considered necessary.

A Regulatory Impact Assessment was carried out for the Legal Services (Scotland) Bill¹. A Business and Regulatory Impact Assessment is not considered necessary for this instrument, as it does not introduce substantive new policy and has no further significant impact on the Scottish Government, local government or on business.

Financial Effects

The instrument does not have any new financial effects that were not anticipated when the enabling legislation was enacted. A Financial Memorandum was produced which set out the financial implications of the Bill.²

Scottish Government

Justice Directorate

18 May 2012

¹ The regulatory impact assessment for the Legal Services (Scotland) Bill can be viewed at www.scotland.gov.uk/Resource/Doc/980/0087717.pdf

² See [http://www.scottish.parliament.uk/S3/Bills/Legal%20Services%20\(Scotland\)%20Bill/b30s3-intro-en.pdf](http://www.scottish.parliament.uk/S3/Bills/Legal%20Services%20(Scotland)%20Bill/b30s3-intro-en.pdf), pages 34ff