



CONSULTATION REPOSENSE

To Law Society of Scotland's *Regulation in the 21st Century:
Guarantee Fund*

A. INTRODUCTION

The SLCC welcomes the Law Society of Scotland's [consultation](#)¹ on the Guarantee Fund. In particular, we are pleased to see that the findings of KPMG's independent review have been considered and the Society are now considering implemented some of the recommendations.

We believe that following the KPMG review and before that Sheriff Principal Bowen's report on Consumer Protections in Conveyancing Cases, now is the right time to consider changes to the Guarantee Fund to ensure clients and others are protected by a sustainable, effective system.

Some of the changes we discuss will involve changes to legislation and it is entirely appropriate that these changes are considered at the same time the Society is proposing [wider changes to the regulatory framework](#)².

B. ABOUT US

The Scottish Legal Complaints Commission (SLCC) is an independent statutory body providing a single point of contact for all complaints against legal practitioners operating in Scotland. The SLCC investigates and resolves complaints about inadequate professional services; refers conduct complaints to the relevant professional body and has oversight of complaint handling across the profession.

The SLCC operates independently of the legal profession and government and aims to resolve complaints early, efficiently and effectively and to improve complaints handling across the profession. Through this work we aim to improve trust and confidence in Scottish legal services.

Our [annual report](#)³ and [website](#)⁴ have more information on our work.

¹ <http://www.lawscot.org.uk/media/555164/Regulation-consultation-Guarantee-Fund-2015.pdf>

² <http://www.lawscot.org.uk/media/555161/Regulation-consultation-Entity-2015.pdf>

³ http://www.scottishlegalcomplaints.org.uk/media/56936/slcc_annual_report_2013-2014_-_final_electronic_version.pdf

⁴ <http://www.scottishlegalcomplaints.org.uk>

The consultation to which we are responding relates only to the solicitor's profession in Scotland. The Law Society of Scotland formally recognises the SLCC as a "co-regulator" in the sector in their latest [Strategy](#)⁵.

C. OUR EXPERTISE

Every year we work with over 1,000 members of the public who wish to make a complaint about a lawyer. Whilst this may be a relatively small percentage of transactions which lead to a complaint, it gives the SLCC significant intelligence and evidence on the issues that can arise.

We have more experience than any other organisation of examining service issues between clients and lawyers, and believe that expertise should be used to assist better standards for all.

The SLCC also has a statutory '[Consumer Panel](#)⁶', the only such panel in Scotland with a statutory role to consider consumer issues around all legal services. The Panel has an independent lay chair, and we are grateful for their input into this paper.

D. RESPONSES TO INDIVIDUAL QUESTIONS

1. Currently, only partners in private practice contribute towards the Guarantee Fund by way of an annual levy charged at the same time as the PC fee. Do you pay into the fund?

No.

2. On a scale of 1-10, how much would you say you know about the Guarantee Fund (1 being "know nothing" and 10 being "know a great deal")?

10

Under section 39 of the Legal Profession and Legal Aid (Scotland) Act 2007, the SLCC can monitor the effectiveness of the Guarantee Fund. This led to us undertaking research on the operation of the Fund in 2009 and 2011 and conducting an audit in 2012.

⁵ <http://www.lawscot.org.uk/media/572056/Strategy-2015.pdf> page 4

⁶ <http://www.scottishlegalcomplaints.org.uk/about-slcc/who-we-are/consumer-panel.aspx>

We are pleased to see that action has been taken on the name of the Guarantee Fund – we had previously highlighted that the name may be misleading for claimants. However, while the decision on the name has apparently been finalised, we do have some concerns that the name Client Protection Fund will not cover all those who might have an eligible claim on the fund. For example, beneficiaries in an executry or a spouse in divorce proceedings due proceeds from a property sale. If the name Client Protection Fund is final, there needs to be clarity in the guidance literature to avoid deterring potentially eligible claimants.

In our [audit in 2012](#)⁷ we made some recommendations around administrative matters related to the Fund. We hope that the internal review of operational matters referred to on page three of the consultation paper will include action on recommendations which are still outstanding.

3. Who do you think should pay into the Guarantee Fund in the future?

As a general principle, we think it is appropriate that the funding arrangements for the levy should be linked to the relative risk profile of those paying. On that basis, we do not think that most in-house solicitors should have to contribute. In the majority of cases, there would be other employer liability which would cover this.

As far as the question of whether the levy should be charged per partner or on every solicitor is concerned, there are some firms which carry out significant volumes of legal work with a structure of one or two partners and large numbers of non-partner staff.

Outside of traditional private practice firms there are a range of business models that should be considered. The SLCC has noted the growth of legal services providers, owned and staffed by solicitors, providing services directly to the public and with the individuals advertising their status as a solicitor, but outwith the traditional regulation model. The solicitors are operating as 'in-house' paying a reduced levy for complaints and this means that there is no Master Policy or Guarantee Fund cover for clients. The SLCC believe the Law Society of Scotland (LSS) should consider whether this group should also contribute to the Fund and whether clients using this model of service should be protected.

⁷ <http://www.scottishlegalcomplaints.org.uk/resources/oversight-research/2012-guarantee-fund.aspx>

The advent of alternative business structures and the increasing role of non-solicitor staff will further increase the diversity of models of legal service providers on the market. Consumers may not understand the nuances between these, but will understandably assume that protection and redress will be available to them regardless of company structure and regulatory framework.

Taking all of this into account, it is clear that the current arrangements may not be suitable for the future. While changing to a levy on every solicitor in private practice would be the best of the options shown, this would still not be an ideal arrangement. We would suggest some form of firm levy for all firms providing legal services, regardless of company structure and regulatory framework, as discussed below.

4. Do you think the funding should be changed to a levy per firm?

Change to a model partly per individual and partly per firm

We are in favour of an entity based approach to regulation, for reasons outlined in our responses to the two consultations on the issue (2014 and 2015). It would therefore make sense if the funding for the Fund were done on the same basis, particularly as this could address many of the issues raised above. However, there may still be claims on the fund arising from errant individual conduct, so a funding model that is partly per firm and partly per individual would be our preferred option.

5. Most claims on the Guarantee Fund relate to firms with one or two partners. Do you think the funding should be changed to reflect this?

While risk related funding has a number of advantages, there is also a danger that this puts additional financial pressures on one or two partner firms and sole practitioners, which may in turn lead to problems which put further pressure on the fund. The priority, in our opinion, should be ensuring the Fund is sustainably funded. It is particularly important that the right data is identified and available to make a balanced assessment on risk and sustainability.

6. Currently, anyone who has suffered loss due to the dishonesty of a solicitor or the employees of a solicitor can make a claim against the Fund. This currently includes lending institutions and other large corporations as well as individual consumers.

Do you think this should be changed?

Yes, access to the Fund should be limited to individual consumers and small businesses (with for example less than £2 million turnover).

We believe that larger businesses will have the resources to obtain redress through other means and that access to the fund should be limited to individual consumers (whether clients or not) and small businesses – i.e. those with fewer resources to seek redress elsewhere. This is particularly important as the Fund is one of last resort. We note Sheriff Principal Bowen’s comment in the [Consumer Protections in Conveyancing Cases](http://www.lawscot.org.uk/media/439009/Law-Society-report-Consumer-Protections-in-Conveyancing-Cases.pdf)⁸ report that the LSS should consider working to amend the legislation behind the Fund so that claimants do not always have to exhaust all other means of redress first. We would support this.

7. Currently the maximum claim allowed by the legislation is £1.25m. However the fund could still be faced with multiple claims of up to £1.25m arising from dishonesty within one single firm. Do you think this should be changed?

We believe that a limit on the aggregate value of claims arising from a single firm would have a serious impact on access to redress for consumers and should not be implemented.

8. KPMG recommended that consideration should be given to whether some or all firms should be subject to some form of capital adequacy rules as a counter to the fact law firms can often hold very considerable sums of client money. Do you think this is good idea in principle?

Yes

We know that problems arise and dishonest conduct often occurs when firms are nearing or already in serious financial difficulties. This then leads to complaints

⁸ <http://www.lawscot.org.uk/media/439009/Law-Society-report-Consumer-Protections-in-Conveyancing-Cases.pdf>

being made to us and can also lead to claims being made on the Fund. We also know that some consumers can lose out on fee refunds and other forms of redress when firms go into bankruptcy due to client moneys being exhausted. Capital adequacy rules would help avoid these situations and ensure that consumers are protected.

It is very important that the arrangements for monitoring and regulating any capital adequacy rules are carefully thought through.

9. KPMG noted that, whilst whistleblowing is encouraged, there is currently no formal whistleblowing requirement for solicitors. KPMG recommended that consideration should be given introducing a requirement for all registered solicitors to report any suspicion of dishonest behaviour within the profession. Do you think this is a good idea in principle?

Yes

This is a proposal we would strongly support. While there are currently informal whistleblowing arrangements in place, this is entirely at the discretion of individual solicitors. At the moment, a solicitor wishing to raise concerns about potential dishonest behaviour within the profession can do so through the complaints process, but this relies on them engaging with the process over a period of time and having their name shared with the solicitor complained about.

Any whistleblowing requirement should be included in the LSS's rules and enforced – knowledge of dishonest behaviour without reporting it should be a regulatory issue in itself.

Before going further with the principle of a whistleblowing requirement, consideration should be given to how this would work with the complaints system. We have recommended [elsewhere](#)⁹ that the LSS should consider a process to “fast-track” certain complaints. Having this system in place would help the LSS to act swiftly on reports of dishonesty. Given that section 33 of the Legal Profession and Legal Aid (Scotland) Act 2007 requires the LSS to refer complaints to the SLCC, we would be

⁹ <http://www.scottishlegalcomplaints.org.uk/resources/oversight-research/2015-conduct-complaints-about-scottish-solicitors-trend-analysis-report.aspx>

happy to receive information from whistle-blowers which we could then share with the LSS.

Contact the SLCC

The SLCC can be contacted at the following address:

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