



Response from the Faculty of Advocates
to
Services Common Framework Summary

The Faculty of Advocates is the independent referral Bar in Scotland. Advocates do not directly provide services to the public, but are instructed by solicitors and certain other direct access professionals. Under the Legal Services (Scotland) Act 2010, the Court of Session is responsible for regulating the professional practice, conduct and discipline of Advocates. The Court has delegated this responsibility to the Faculty of Advocates. Rules which the Faculty makes are subject to approval by the Lord President of the Court of Session, the most senior judge in Scotland.

The Faculty is glad to have had the opportunity to respond to questions posed in the paper entitled 'Services Common Framework Summary'. We would answer the questions from paragraph 26 as follows:

a) *Would you like to provide any insights of how the Framework might affect your organisation? This includes describing any resourcing implications associated with the Framework, and how your work may interact with the Framework moving forward.*

1. The Faculty of Advocates would be affected by a Common Framework regarding the regulation of services which extended to legal services. This is because, as explained above, the Faculty is the regulatory body for almost 500 individual practitioners, all of whom may provide legal services. The way in which provision of such services is regulated is a fundamental issue for advocates in Scotland, such that the Faculty would require to participate in the drawing up of any such framework. In demanding time of office bearers, representative practitioners and organisational staff, this would necessarily have resource implications.

b) *Do you have any views on governance structures that could be put in place to best facilitate cooperation between competent authorities?*

2. Scots law is a separate legal system from that operating in Northern Ireland, and in England and Wales. Scotland is a separate legal jurisdiction. Divergence in the systems of law and in the manner of regulation of the legal profession is not a consequence of devolution, but of the constitutional arrangements for the union of Scotland with England and Wales.

3. On matters of common interest, there is already discussion and cooperation with the representative bodies of the legal profession (particularly, for the Faculty, the Law Society of Scotland and the other Bars). There are well-established traditions of individual meetings face to face. There are also periodic gatherings of the Bars within the British Isles at which issues are considered and relationships fostered. We see no need for the

imposition of ‘governance structures’ to create an additional body, or for a set of additional processes, to formalise these existing arrangements.

4. Moreover, the Provision of Services Regulations 2009, as amended in 2018 in relation to the UK’s exit from the European Union, are already a common framework applicable to the provision of legal services in the territories of the UK. They strike a balance between the need for regulation of service provision in the interests of recipients and the need to avoid undue restriction on the ability to provide a service, although so far as the practice of certain professions is concerned, there is a need to recognise that additional protections may be required. This is for several reasons, including the difficulty a recipient will encounter in trying to assess the quality of the service received. Partly for these reasons, provision is made within the Internal Market Act 2020 exempting requirements regarding practice as a lawyer from the general freedom to practise a profession throughout the UK.

c) For those organisations in Scotland, Wales and Northern Ireland or those who have an interest in devolved areas, do you have any views on how the devolved areas of policy should be reflected in the Framework moving forward?

5. In paragraph 3, the paper records the intention to respect the devolution settlement. Inherent in the devolution settlement applicable to Scotland (and, according to our understanding, those applicable to Wales and Northern Ireland) is the possibility of policy divergence to reflect the different needs and priorities of the separate territories within the UK. This has been well-understood by the UK Government since the inception of devolution. Since the Brexit decision, we have noted the reiteration of this principled position in, for example, the commitment in Department of International Trade guidance prior to the introduction of what became the Internal Market legislation that

‘Every decision that a devolved administration could make before exit day, they can make afterwards’

6. The reference in the question to the reflection in the proposed Framework of devolved areas of policy could imply that the ability to legislate and to govern within devolved areas would be restricted in some way by the Framework. Such restriction would be at odds with the structure of devolution, and with the expressed respect. Likewise, the references in the paper to ‘dispute resolution’ are puzzling. The architecture of devolution does not create a requirement for a devolved administration to obtain the agreement of a body located within one of the other parts of the UK before it can legislate or govern in a devolved area. The formulation by one administration of an approach different from that taken by another would appear to us not to be a dispute requiring resolution, but a natural outworking of the concept of the devolution of power.

7. We have no difficulty, however, with the idea of a framework that operates as the basis for sharing information and examples of good practice. That would offer opportunities to share information about our own professional practice, to learn from other jurisdictions, and to develop solutions derived from an understanding of what works elsewhere. Indeed, the involvement of Ireland in such information sharing could usefully expand the sources of knowledge. A major exercise of reforming the regulation of the provision of legal services in Scotland is nearing completion at present. We have had significant involvement in executive and legislative processes around this reform. We would be

happy to share information and reflections about both process and substance with our sister bodies in Northern Ireland and in England and Wales, if that is felt to be helpful.

d) Are there any other views you would like to share?

8. We would observe that the manner in which Frameworks operate is somewhat lacking in clarity. We note the observation of Professor Michael Keating, set out in his briefing to the CEEAC committee of the Scottish Parliament in 2022, that any overarching reform of intergovernmental relations

‘...might also consider the way in which the UK Government also speaks for England, and of the ‘shadow of hierarchy’ that arises from the fact that the Westminster Parliament remains supreme in all circumstances’.

9. This structural problem is reflected in the current summary paper by the contrasting references to ‘the four governments within the UK’ (paragraph 2) and to the need for a new Services framework to be ‘representative of the four UK nations’ (paragraph 13 c)). The difficulty posed by UK government involvement in any internal negotiations regarding policy on services (or, indeed, goods) as both ultimate authority and as the government for England will require careful management if conflict of interest is to be avoided.

10. At a much more practical level, we would also wish to make some operational comments:

- i) It is not always borne in mind that we are geographically distant and institutionally distinct from London-based organisations. We welcome the fact that we were specifically contacted and invited to respond to this consultation. This is not always so. In matters that affect our professional practice, it would be appreciated if direct contact were to be made with the Dean’s secretariat at the point of a consultation being issued.
- ii) If there were to be any sector-specific work regarding the provision of legal services, we would welcome the opportunity to comment not only on the content of any proposals but also on the membership of any advisory group or body, in part owing to the structural issue alluded to in paragraph 8 above.

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