



**THE LAW SOCIETY
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Myth-busting the Guarantee Fund

The later stages of the debate on the Legal Services (Scotland) Bill have brought the Scottish Solicitors' Guarantee Fund to the fore and with it some of the issues that relate not just to how it will work in the future under the Bill, but how it actually functions at the moment.

While discussions on the Bill are to continue over the summer recess with the Scottish Government prior to Stage 3 in autumn, this paper aims to set out how the Guarantee Fund operates and to clear up some of the key misconceptions about the Fund, who pays into it, how it is administered and examine some of the questions the Bill raises about its future.

The Society continues to work to its objective of supporting permissive legislation which will allow firms to develop new ways of working to meet the needs of their clients and compete with firms across the Scottish, UK and international markets. The Bill can be viewed as an opportunity for Scottish solicitors to promote their services and high standards in order to meet the needs and expectations of clients. Moreover, it is an opportunity to drive up standards in the delivery of legal services – for example, the Bill will see the introduction of regulation of non-lawyer will writers – for the benefit of the public.

Guarantee Fund Facts

- The Fund is a statutory fund vested in the Society under the Solicitors (Scotland) Act 1980 to protect clients who have lost money because of the dishonesty of a solicitor - or a member of his or her staff – and they are unable to obtain redress from any other source.

- Law Firm principals and incorporated practices pay an annual subscription to the Fund.
- The Council controls and manages the Fund.
- The Fund is strictly one of last resort and as such can only be used to compensate once all other avenues of recovery have been exhausted including contributory negligence.
- Most cases of loss as a result of dishonesty are covered through a claim by the firm on the Master Policy.
- If ALL the firm's partners were party to the dishonesty – and therefore more likely to occur in a small firm – a claim cannot be covered by insurance (e.g. in the case of a sole practitioner you cannot be insured to cover your own act of dishonesty) and after their personal estates of the principals are fully exhausted, any balance of loss will be referred to the Guarantee Fund.
- Claims for compensation are thoroughly investigated before a decision is taken on any grants payable – and even then awards are discretionary.

Impact of the Legal Services (Scotland) Bill on the Guarantee Fund (as of July 2010)

- The Fund is an important consumer protection and an important feature in the regulatory system of solicitors in Scotland and it will continue to play such a role following any reformed legal services marketplace – that much has been explicitly stated by the Scottish Government.
- There has been a significant win for the profession in that for the first time, the Bill will set a cap on individual claims on the Fund at £1.25 million. This offers reassurance that a single claim could not wipe out the Fund.

- The Society has sought to ensure a level playing field for solicitors and any licensed legal services providers as the Bill has progressed through Parliament. The Government has insisted that a compensation fund is an essential consumer protection whether clients go to a solicitors' firm or a Licensed Provider.
- The Government is in favour of the Guarantee Fund acting as a compensation fund for all legal services providers and not just solicitors' firms. Amendments made at Stage 2 of the Bill allow for that.
- As such, under the Bill, all Licensed Providers (irrespective of the approved regulator) would contribute to and access the Fund in addition to solicitors' firms. Bear in mind that, and as stated above, the fund is only available if there is no innocent principal. For example if there is more than one principal in a firm all of the principals would require to be party to the fraud before a valid claim can be made. It is expected that definition will be extended to include shareholders in a company.
- The Society will seek to clarify that the Fund is only available to a Licensed Provider in circumstances where any claim on the Fund relates to legal services and not any other activity.
- The Society's policy is that the Guarantee fund should only be open to those LPs that it regulates. The Society will continue to promote this position, but we have to recognise that the Government amendment was passed on a vote of 7:1 in the Justice Committee and that Parliament would be unlikely to reverse that decision. As it is unlikely that the Society's policy will be accepted, the Society is negotiating with Government to ensure that there are additional safeguards in the Bill to minimise risk and protect the fund.
- The structure of LPs as set out in the Bill, means they are likely to present less of a risk than originally thought because there cannot be a sole

partner or director meaning that professional indemnity insurance would cover the majority of cases of dishonesty in an LP as with a firm of solicitors).

- An LP also requires a qualified solicitor with a current PC as its Head of Legal Services who would be responsible for the LP's adherence to professional principles. A Head of Practice must also complete an annual performance reports as part of the regulatory stipulations set by approved regulators.

Master Policy and Guarantee Fund – how they work

The flow chart below is possibly the simplest guide to how the Master Policy and the Guarantee Fund operate as public protections for those who have sought legal advice and when each applies.

CLIENT FUNDS PROTECTION FLOWCHART

