

LEGAL SERVICES (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Regulation of Licensed Legal Services

Chapter 3 – Further Provision

Achieving regulatory aims

Section 76 – Input by the OFT

162. *Section 76* concerns the occasions when the Scottish Ministers and approved regulators consult with the OFT and sets out what they must do. Such consultation should be in relation to competition issues. The Scottish Ministers and approved regulators must take into consideration any advice given by the OFT.

Section 77 – Role of approved regulators

Section 78 – Policy statement

163. *Section 77* sets out the responsibilities of approved regulators with regard to the regulatory objectives and the adoption of best regulatory practice. *Section 78* provides that an approved regulator must prepare and issue (and may revise and re-issue) a policy statement detailing how it will meet these responsibilities. It must obtain the approval of the Scottish Ministers for any version and also must publish it.

Complaints

Section 79 – Complaints about regulators

164. *Section 79* requires that complaints against approved regulators must be made to the SLCC. The SLCC is responsible for determining the nature of the complaint and whether it is “frivolous, vexatious or totally without merit”. If the Commission determines that a complaint is frivolous, vexatious or totally without merit it is not required to take further action and must notify the complainer and the approved regulator. Complaints about how an approved regulator has dealt with a regulatory complaint are to be investigated by the Commission by virtue of section 57D(1) of the Legal Profession and Legal Aid (Scotland) Act 2007 (as inserted by section 81 of the Act). All other categories of complaint must be referred by the Commission to the Scottish Ministers and the Scottish Ministers must investigate any complaint that is referred to them.
165. Subsection (5) requires the Scottish Ministers to notify the complainers and the approved regulator if the complaint is not investigated or not upheld and give reasons for their decision. Subsection (6) requires the Scottish Ministers to notify both parties concerned if the complaint is upheld and give reasons for their decision. They may decide to take any of the measures or sanctions open to them (see section 38), including

direction, censure or ultimately rescinding authorisation. Subsection (7) allows the Scottish Ministers to delegate the function of investigating a complaint on their behalf to the SLCC. Subsection (8) allows the Scottish Ministers to make further provision about complaints by regulations.

Section 80 – Levy payable by regulators

166. **Section 80** provides that approved regulators must pay an annual levy to the SLCC. A complaints levy must also be paid in the event that the SLCC investigates a complaint against an approved regulator (having had this function delegated to it under section 79(7) and that complaint is upheld. The amount of the annual and complaints levy is set by the SLCC, following consultation with every approved regulator and the Scottish Ministers.

Section 81 – Complaints about providers

167. **Section 81** amends the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”) by inserting a new Part 2A making special provision for licensed providers in respect of complaints.
168. The basic approach of the 2007 Act, which the Act retains, is that all complaints about legal professionals or law firms are initially considered by the SLCC, but the only complaints which are investigated by the SLCC are those found to be about inadequate professional services (“services complaints”) or about how other complaints have been handled (“handling complaints”). Complaints which are found to be about the professional conduct of a legal professional (“conduct complaints”) are referred to the relevant professional organisation (e.g. the Society or Faculty) for investigation and possible disciplinary action.
169. New section 57A of the 2007 Act provides that conduct complaints may not be made about licensed providers, although they can be made about legal professionals working in the licensed provider. Services complaints may be made about either the licensed provider or individual practitioners within the provider. If an approved regulator receives a conduct complaint or a services complaint about a practitioner in one of its licensed providers, it must send the complaint and any relevant material to the SLCC without delay (unless the complaint came from the SLCC).
170. Various duties apply to the relevant professional organisation in the 2007 Act, for example, to liaise with the SLCC if a complaint being dealt with as a conduct complaint appears on investigation to be a services complaint (section 15 of the 2007 Act), and to provide the SLCC with information (section 37 of the 2007 Act). These duties are also imposed on approved regulators by sections 57A and 57B of the 2007 Act in relation to services complaints against licensed providers and the new regulatory complaints.
171. New section 57B of the 2007 Act introduces a new type of complaint – a “regulatory complaint” which can be made about a licensed provider alleging that it has not acted in accordance with the regulatory objectives, the professional principles, the approved regulator’s regulatory scheme, or the conditions of its licence. These complaints will be referred by the SLCC to the approved regulator to deal with, in accordance with the regulatory scheme. The procedures and functions of the SLCC are essentially the same as in respect of a conduct complaint.
172. New section 57C(1) and (2) of the 2007 Act deal with the levy to be paid by a licensed provider to the SLCC. In addition to any levy paid by individual practitioners in the entity, the licensed provider must itself pay an annual general levy, which might be a different amount from that paid by individual practitioners and might differ depending on the type of licensed provider. This gives the SLCC the discretion to impose an additional levy on licensed providers if the cost of regulating complaints against such providers is disproportionately high. However, it is possible for this annual levy to be set at nil – meaning only the legal professionals in the licensed provider would pay the

normal general levy. It would also be possible for the SLCC to reduce the levy in respect of professionals in a licensed provider under the provisions of section 29(2) of the 2007 Act. The SLCC is required to consult with approved regulators and licensed providers each year in relation to its budget for the next financial year. Approved regulators are required to provide the SLCC with an estimate of the number of licensed providers it regulates and which should be liable to pay the levy in the relevant financial year.

173. New section 57C(5) of the 2007 Act requires the SLCC to provide advice about making a regulatory complaint if requested and gives the SLCC power to issue guidance to approved regulators and licensed providers about how the latter should deal with regulatory complaints.
174. New section 57D of the 2007 Act requires approved regulators to collect the annual general levy due to the SLCC from its licensed providers (under new section 57C of the 2007 Act, inserted by section 65 of the Act), and to pay the total amount of the levies collected to the SLCC. This requirement is equivalent to that placed on professional organisations (i.e. the Society, the Faculty, and the Association of Commercial Attorneys) under section 27 of the 2007 Act.
175. The provisions of the 2007 Act in relation to the failure to pay and late payments of levies are applied to the levies payable by licensed providers (section 57D(2) to (5)).
176. New section 57E of the 2007 Act indicates that a complaint about how an approved regulator has handled a conduct complaint is dealt with in the same way as a complaint about how a conduct complaint has been handled by a relevant professional organisation (see Parts 1 and 2 of the 2007 Act).
177. New section 57F allows the SLCC to monitor the effectiveness of any compensation fund set up by an approved regulator, in the same way as it may monitor the effectiveness of the Guarantee Fund under section 39 of the 2007 Act.
178. New section 57G of the 2007 Act ensures that certain terms used in the new Part 2A of the 2007 Act have the same meanings as in the Act.

Registers and lists

Section 82 – Register of approved regulators

Section 83 – Registers of licensed providers

179. **Section 82** provides that the Scottish Ministers must keep and publish a register of approved regulators and that it should include information such as contact details, the date on which the regulator was given approval under section 7, the date on which it was given the relevant authorisation (see section 10), the categories of legal services covered by each authorisation, and details of any measures or sanctions taken by the Scottish Ministers (section 38).
180. Similarly, section 83 provides that approved regulators must keep and publish a register of their licensed providers, and lists the information which is to be included. In section 83(5) the Scottish Ministers have the power by regulations to make further provision about the information which must be held in the registers of licensed providers and set out how these registers are to be kept and published.

Section 84 – Lists of disqualified persons

181. **Section 84** provides that an approved regulator must keep and publish lists of the persons it has disqualified from holding a position in a licensed provider (see section 56) and of those it has determined to be unfit to be an investor in a licensed provider (see section 62) or disqualified from being an investor (see section 65). These provisions may, for example, assist in ensuring that disqualified persons do not seek similar positions in businesses regulated by another approved regulator. Subsections (2) and

(4) list the information to be recorded in those lists. Subsection (5) provides that the lists must not contain information relating to persons who have had their determination or disqualification reversed on appeal or in respect of whom the determination or disqualification no longer applies. The Scottish Ministers must be notified of any alterations made to either list (subsection (6)(b)).

182. Subsection (7) gives the Scottish Ministers a regulation-making power to make further provision regarding the information to be contained in the lists and to prescribe how these are kept and published.

Miscellaneous

Section 85 – Privileged material

183. **Section 85** provides that any publication of any advice, report, or notice or of other material under Part 2 of this Act is privileged in relation to the law on defamation unless there was malicious intent in publishing the material.

Section 86 – Immunity from damages

184. **Section 86** provides that an approved regulator is (and those who work in it are) not liable for any damages for any act or omission in the exercise of their functions, provided the act or omission was not in bad faith.

Section 87 – Appeal procedure

185. This section deals with appeals to the sheriff under Part 2 of the Act (regulation of licensed legal services). It provides that an appeal to the sheriff is to be by summary application, details what the sheriff may do with regard to an appeal and provides that the sheriff's determination is final.

Section 88 – Corporate offences

186. This section provides that if an offence under Part 2 of the Act is committed by a relevant organisation and the offence involves the connivance, consent, or negligence of a responsible official within that organisation, the official, in addition to the organisation, also commits the offence. Both "relevant organisation" and "responsible official" are defined.

Section 89 – Effect of professional or other rules

187. This section makes it clear that the Act does not affect any professional rules which regulate professional practice, conduct or discipline of persons (other than solicitors and advocates) who provide professional services. In other words, if the rules of any other profession contain provisions which would forbid or restrict their operating in a business alongside legal professionals, they would not be able to participate in licensed providers unless and until those rules were changed. Sections 121(5) and 124(3) of the Act deal with the effect of professional rules of advocates and solicitors.