



# Legal Profession and Legal Aid (Scotland) Act 2007

2007 asp 5

## PART 1

### THE SCOTTISH LEGAL COMPLAINTS COMMISSION

#### *Conduct or services complaints against practitioners*

## 2 Receipt of complaints: preliminary steps

(1) Where the Commission receives a complaint by or on behalf of any of the persons mentioned in subsection (2)—

(a) suggesting—

(i) professional misconduct or unsatisfactory professional conduct by a practitioner other than a firm of solicitors or an incorporated practice;

(ii) that a conveyancing practitioner or an executry practitioner has been convicted of a criminal offence rendering the practitioner no longer a fit and proper person to provide conveyancing services as a conveyancing practitioner or, as the case may be, executry services as an executry practitioner,

(a complaint suggesting any such matter being referred to in this Part as a “conduct complaint”);

(b) suggesting that professional services provided by a practitioner in connection with any matter in which the practitioner has been instructed by a client were inadequate (referred to in this Part as a “services complaint”),

it must, subject to subsection (3) and sections 3 and 4 and any provision in rules made under section 32(1) as to eligibility for making complaints, take the preliminary steps mentioned in subsection (4).

(2) The persons are—

(a) as respects a conduct complaint, any person;

(b) as respects a services complaint—

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- (i) any person who appears to the Commission to have been directly affected by the suggested inadequate professional services;
  - (ii) the Lord Advocate;
  - (iii) the Advocate General for Scotland;
  - (iv) any judge (including a sheriff);
  - (v) the Auditor of the Court of Session;
  - (vi) the Auditor of any sheriff court;
  - (vii) the Scottish Legal Aid Board;
  - (viii) any relevant professional organisation.
- (3) The Commission is not to take the preliminary steps mentioned in subsection (4), and is not to take any further action under any other provision of this Part, in relation to any element of a conduct complaint which is about a practitioner acting in a judicial capacity in a court or tribunal specified by order by the Scottish Ministers.
- (4) The preliminary steps are—
- (a) to determine whether or not the complaint is frivolous, vexatious or totally without merit;
  - (b) where the Commission determines that the complaint is any or all of these things, to—
    - (i) reject the complaint;
    - (ii) give notice in writing to the complainer and the practitioner that it has rejected the complaint as frivolous, vexatious or totally without merit (or two or all of these things).

### **3 Existence of specified regulatory scheme**

- (1) Where any element of a complaint referred to in section 2(1) is capable of being dealt with under a specified regulatory scheme, the Commission is prevented from dealing with the element but only to the extent that the element is capable of being dealt with under the specified regulatory scheme.
- (2) Where the circumstances referred to in subsection (1) apply, the Commission must give notice in writing to that effect to—
- (a) the complainer and the practitioner;
  - (b) such other persons as may be specified by the Scottish Ministers by order.
- (3) Notice under subsection (2) must specify under which specified regulatory scheme the Commission considers the element is capable of being dealt with.
- (4) Where the circumstances referred to in subsection (1) apply, notice under subsection (2) must in addition specify that the fact that the Commission is prevented by subsection (1) from dealing with the complaint to the extent that the complaint is capable of being dealt with under the specified regulatory scheme does not prevent the Commission taking the preliminary steps referred to in section 2(4) and dealing with the complaint under any provision of this Part to the extent that it is able.
- (5) In this section “specified regulatory scheme” means a scheme specified as such by the Scottish Ministers by order.

#### **4 Complaint not made timeously or made prematurely**

- (1) Where a complaint referred to in section 2(1) is not made timeously, the Commission is not to take the preliminary steps referred to in section 2(4) in relation to it, and is not to take any further action under any other provision of this Part (except this section), in relation to it.
- (2) Where a complaint referred to in section 2(1) is made prematurely, the Commission need not take the preliminary steps referred to in section 2(4) in relation to it, and need not take any further action under any other provision of this Part (except this section), in relation to it.
- (3) For the purposes of subsection (1), a complaint is not made timeously where—
  - (a) rules made under section 32(1) fix time limits for the making of complaints;
  - (b) the complaint is made after the expiry of the time limit applicable to it;
  - (c) the Commission does not extend the time limit in accordance with the rules.
- (4) For the purposes of subsection (2), a complaint is made prematurely where—
  - (a) the complainer has not previously communicated the substance of it to the practitioner, the practitioner’s firm or, as the case may be, where the practitioner is an employee of another practitioner that other practitioner (referred to in this Part as the “employing practitioner”) and given the practitioner, the firm or the employing practitioner what the Commission considers is a reasonable opportunity to deal with it;
  - (b) rules made under section 32(1) either—
    - (i) do not provide for circumstances in which the Commission will take the steps and further action referred to in that subsection; or
    - (ii) do provide for such circumstances but none is applicable in relation to the complaint.
- (5) Where the circumstances referred to in subsection (1) or (2) apply, the Commission must give notice in writing to the complainer and practitioner to that effect.
- (6) Where the circumstances referred to in subsection (2) apply, notice under subsection (5) must specify whether or not the Commission is proceeding to take the preliminary steps referred to in section 2(4).

#### **5 Determining nature of complaint**

- (1) Where the Commission proceeds to determine under section 2(4) whether a complaint is frivolous, vexatious or totally without merit and determines that it is none of these things, it must determine whether the complaint constitutes—
  - (a) a conduct complaint;
  - (b) a services complaint,including whether (and if so to what extent) the complaint constitutes separate complaints falling within more than one of these categories and if so which of the categories.
- (2) Where it appears to the Commission that the complaint may constitute both—
  - (a) a conduct complaint; and
  - (b) a separate services complaint,

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it must consult, co-operate and liaise with the relevant professional organisation and have regard to any views expressed by the organisation on the matter before making a determination under subsection (1) as respects the complaint.

- (3) A relevant professional organisation must co-operate and liaise with the Commission in relation to subsection (2).

## **6 Complaint determined to be conduct complaint**

Where, or to the extent that, the Commission determines under section 5(1) that a complaint is a conduct complaint, it must—

- (a) remit the complaint to the relevant professional organisation to deal with (and give to the organisation any material which accompanies the conduct complaint);
- (b) give notice in writing to the complainer and the practitioner by sending to each of them a copy of the determination and specifying—
  - (i) the reasons for the determination;
  - (ii) that the conduct complaint is being remitted under this section for investigation and determination by the relevant professional organisation;
  - (iii) the relevant professional organisation to which it is being remitted;
  - (iv) that the relevant professional organisation is under a duty under this Act to deal with the conduct complaint.

## **7 Services complaint: notice**

Where, or to the extent that, the Commission determines under section 5(1) that a complaint is a services complaint, it must give notice in writing to the complainer and the practitioner by sending to each of them a copy of the determination and specifying the reasons for the determination.

## **8 Services complaint: local resolution or mediation**

- (1) This section applies where the Commission determines under section 5(1) that a complaint by or on behalf of a person referred to in section 2(2)(b)(i) is a services complaint.
- (2) Where the Commission considers that either—
  - (a) the complaint has been made prematurely (within the meaning of section 4(4)); or
  - (b) the practitioner, the practitioner’s firm or the employing practitioner has made no attempt, or an insufficient attempt, to achieve a negotiated settlement with the complainer,

the Commission may, by notice in writing to the complainer and the practitioner refer the complaint back to the practitioner, the practitioner’s firm or, as the case may be, the employing practitioner requesting that the practitioner, the firm or the employing practitioner attempt to achieve such a settlement.

- (3) Where the Commission refers a complaint back to the practitioner, the practitioner’s firm or the employing practitioner under subsection (2), it may, by notice in writing, require the practitioner, the firm or the employing practitioner to give, before the end

of such period being not less than 21 days as the notice specifies, an account and explanation of the steps which the practitioner, firm or employing practitioner has taken to attempt to achieve a negotiated settlement.

- (4) Where the Commission considers it appropriate to do so, it may, by notice in writing to the complainer and the practitioner, offer to mediate in relation to the complaint.
- (5) The Commission may enter into mediation in relation to a complaint only if both the complainer and the practitioner accept the offer made under subsection (4).
- (6) The Commission must discontinue mediation in relation to a complaint if either the complainer or the practitioner withdraws consent to the mediation and may do so in any other circumstances; and, if mediation is discontinued, the Commission must give notice in writing to the complainer and the practitioner of its decision.

## **9 Services complaint: Commission’s duty to investigate and determine**

- (1) Where—
  - (a) the Commission does not refer a services complaint back to the practitioner, the practitioner’s firm or the employing practitioner under section 8(2) (because it considers that the practitioner, firm or employing practitioner has made a sufficient attempt to achieve a negotiated settlement);
  - (b) the Commission refers a services complaint back to the practitioner, the practitioner’s firm or the employing practitioner under that section but—
    - (i) no attempt to achieve a negotiated settlement takes place;
    - (ii) such an attempt takes place but is discontinued or a negotiated settlement is not accepted by both the practitioner and the complainer;
  - (c) mediation by virtue of section 8(5) in relation to the complaint—
    - (i) does not take place;
    - (ii) takes place but is discontinued or the outcome of the mediation is not accepted by both the complainer and the practitioner;
  - (d) the Commission determines under section 5(1) that a complaint by or on behalf of any person referred to in sub-paragraphs (ii) to (viii) of section 2(2) (b) is a services complaint,

the Commission must, subject to section 15(2) and (5), investigate the complaint and after giving the complainer and the practitioner an opportunity to make representations, subject to subsections (2) to (4), determine it by reference to what the Commission considers is fair and reasonable in the circumstances.

- (2) Where the complainer is a person referred to in section 2(2)(b)(i) the Commission must, subject to subsection (3), propose to the practitioner and the complainer a settlement as respects the complaint which it considers is fair and reasonable in the circumstances.
- (3) Where the practitioner was, at the time the services were provided, an employee of an employing practitioner, a proposal under subsection (2) to the practitioner and the complainer must also be made to the employing practitioner.
- (4) Where the practitioner and the complainer, and where subsection (3) applies the employing practitioner, accept a settlement proposed by the Commission under subsection (2) as respects the complaint, the Commission is not to determine the complaint under subsection (1).

## **10 Commission upholds services complaint**

- (1) Where the Commission makes a determination under section 9(1) upholding a services complaint, it may take such of the steps mentioned in subsection (2) as it considers fair and reasonable in the circumstances.
- (2) The steps are, subject to subsection (3)—
  - (a) to determine that the amount of the fees and outlays to which the practitioner is entitled for the services provided to the client and to which the complaint relates, is to be—
    - (i) nil; or
    - (ii) such amount as the Commission may specify in the determination, and to direct the practitioner to comply or secure compliance with such of the requirements set out in subsection (5) as appear to the Commission to be necessary to give effect to the determination;
  - (b) to direct the practitioner to secure the rectification at the practitioner’s own expense of any such error, omission or other deficiency arising in connection with the services as the Commission may specify;
  - (c) to direct the practitioner to take, at the practitioner’s own expense, such other action in the interests of the complainer as the Commission may specify;
  - (d) where the Commission considers that the complainer has been directly affected by the inadequate professional services, to direct the practitioner to pay compensation of such amount, not exceeding £20,000, as the Commission may specify to the complainer for loss, inconvenience or distress resulting from the inadequate professional services;
  - (e) where the Commission considers that the practitioner may not have sufficient competence in relation to any aspect of the law or legal practice, to report the matter to the relevant professional organisation.
- (3) Where the practitioner was, at the time when the services were provided, an employee (referred to in this section as an “employee practitioner”) of an employing practitioner—
  - (a) a direction under subsection (2)(a), (b) or (c) must be to the employing practitioner instead of the employee practitioner;
  - (b) a direction under subsection (2)(d)—
    - (i) may be to and direct either the employing practitioner or, if the Commission considers it appropriate, the employee practitioner to pay all of the compensation directed to be paid under that subsection in relation to the complaint concerned;
    - (ii) may be to and direct the employee practitioner to pay such part of the total amount of compensation directed to be paid under that subsection in relation to the complaint concerned as the Commission considers appropriate and if it does so, must be to and direct the employing practitioner to pay the remainder of the total amount;
  - (c) a copy of any report under subsection (2)(e) must be sent to the employing practitioner.
- (4) The Commission must, in considering what steps to take under subsection (2), take into account any—
  - (a) prior direction by it under subsection (2)(d) that the employee practitioner concerned or, where subsection (3) applies, the employing practitioner, pay to the complainer an amount by way of compensation;

- (b) award of damages by the court to the complainer;
- (c) other compensation ordered (whether by determination, direction or otherwise) by a tribunal or other professional body to be paid to the complainer,

in relation to the subject matter of the complaint.

- (5) The requirements referred to in subsection (2)(a) are to—
  - (a) refund, whether wholly or to any specified extent any amount already paid by or on behalf of the client in respect of fees and outlays of the practitioner in connection with the services;
  - (b) waive, whether wholly or to any specified extent, the right to recover the fees and outlays.
- (6) Before making a determination in accordance with subsection (2)(a), the Commission may submit the practitioner's accounts for the fees and outlays to the Auditor of the Court of Session for taxation.
- (7) The Scottish Ministers may by order, after consulting—
  - (a) the relevant professional organisations;
  - (b) such groups of persons representing consumer interests as they consider appropriate,amend subsection (2)(d) by substituting for the amount for the time being specified in that subsection such other amount as they consider appropriate.

## **11 Fair and reasonable: matters to be taken into account by Commission**

In considering what is fair and reasonable in the circumstances, the Commission is to take into account the relevant law (including levels of damages awarded by courts in similar circumstances) and relevant codes of practice, professional rules, standards and guidance.

## **12 Services complaint: notice where not upheld or upheld**

- (1) The Commission must give notice in writing of a—
  - (a) determination by it under section 9(1) not to uphold a services complaint;
  - (b) determination by it under that section upholding any such complaint;
  - (c) determination, direction or report by it under section 10(2),to the complainer and every practitioner specified in it and, where section 10(3) applies, to the employing practitioner by sending to each of them a copy of the determination, the direction or, as the case may be, the report.
- (2) Where the determination is made by a determination committee by virtue of paragraph 13(2)(d)(i) or, as the case may be, (ii) of schedule 1, notice under subsection (1) must specify the reasons for the determination.

## **13 Services complaint: reports**

- (1) The Commission may, if it considers it appropriate to do so in any particular case, publish a report of—

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- (a) any mediation which has taken place by virtue of section 8(5) in relation to a services complaint, the outcome of which is accepted by both the complainer and the practitioner;
  - (b) an investigation of a services complaint under section 9 and—
    - (i) any settlement proposed under subsection (2) of that section as respects the complaint, which is accepted as mentioned in subsection (4) of that section;
    - (ii) any determination of the complaint under subsection (1) of that section;
  - (c) a determination, direction or report under section 10(2).
- (2) A report under subsection (1) must not (unless the complainer consents)—
- (a) mention the name of the complainer;
  - (b) include any particulars which, in the opinion of the Commission, are likely to identify the complainer.
- (3) A report under subsection (1) may only—
- (a) mention the name of the practitioner complained of; or
  - (b) include any particulars which, in the opinion of the Commission, are likely to identify the practitioner,
- if the practitioner consents or the condition in subsection (4) is met.
- (4) The condition is that—
- (a) the case is exceptional;
  - (b) in the opinion of the Commission, it is in the public interest for the identity of the practitioner concerned to be included in the report; and
  - (c) the Commission has given not less than 4 weeks notice in writing to the practitioner that it intends to identify the practitioner in the report, specifying the reasons for its decision.

**14 Determination under section 9(1) or taking of steps under section 10(2): effect in relation to proceedings**

- (1) Neither the making of a determination under section 9(1) upholding a complaint, nor the taking of any steps under section 10(2) may be founded upon in any proceedings.
- (2) A direction under section 10(2)(d) to a practitioner to pay compensation to a complainer does not prejudice any right of the complainer to take proceedings against the practitioner for damages in respect of any loss which the complainer claims to have suffered; and any amount directed to be paid to the complainer under that section may be taken into account in the computation of any award of damages made to the complainer in any such proceedings.

**15 Complaint appears during mediation or investigation to fall within different category**

- (1) Where a relevant professional organisation at any time during any mediation by it, or its investigation, of a conduct complaint remitted to it under section 6(a) considers that it is reasonably likely that the complaint (or any element of it) may instead constitute a services complaint, it must—
  - (a) suspend the mediation or, as the case may be, the investigation;



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- (b) consult, co-operate and liaise with the Commission as respects the matter;
  - (c) send the complaint and any material which relates to it and which is in the organisation's possession to the Commission;
  - (d) give notice in writing to the complainer and the practitioner that it so considers and is so doing.
- (2) Where the Commission at any time during its mediation by virtue of section 8(5) in relation to, or investigation by virtue of section 9(1) of, a services complaint considers that it is reasonably likely that the complaint (or any element of it) may instead constitute a conduct complaint, it must—
- (a) suspend the mediation or investigation;
  - (b) send a copy of the complaint and any material which relates to it and which is in the Commission's possession to the relevant professional organisation;
  - (c) consult, co-operate and liaise with the relevant professional organisation as respects the matter;
  - (d) give notice in writing to the complainer, the practitioner and the relevant professional organisation that it so considers and is so doing.
- (3) Where, in the circumstances referred to in subsection (1) or (2) the Commission, having regard to the views expressed by the relevant professional organisation as respects the matter, considers that—
- (a) its determination under section 5(1) as respects the complaint should be confirmed (to any extent), it must so determine; and the determination under this paragraph must specify the extent to which the determination under that section is confirmed;
  - (b) a complaint (or any element of a complaint) which was determined by it under section 5(1) to constitute—
    - (i) a conduct complaint constitutes instead a services complaint;
    - (ii) a services complaint constitutes instead a conduct complaint,it must determine accordingly.
- (4) Where, or to the extent that, the Commission determines under subsection (3)(a) to confirm to any extent its determination under section 5(1)—
- (a) it must give notice in writing to the complainer, the practitioner and the relevant professional organisation by sending to each of them a copy of the determination and specifying the reasons for the determination;
  - (b) any suspension under subsection (1)(a) or (2)(a) ceases.
- (5) Where the Commission determines under subsection (3)(b) that a complaint (or any element of a complaint) which was determined by it under section 5(1) to constitute a services complaint constitutes instead a conduct complaint, it must—
- (a) remit the conduct complaint to the relevant professional organisation to deal with (and give to the organisation any material referred to in section 6(a));
  - (b) give notice in writing to the complainer, the practitioner and the relevant professional organisation by sending to each of them a copy of the determination and specifying—
    - (i) the reasons for the determination;
    - (ii) that the conduct complaint is being remitted under paragraph (a);
    - (iii) the relevant professional organisation to which it is being remitted;
    - (iv) that the relevant professional organisation is under a duty under this Act to deal with the conduct complaint.

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- (6) Where the Commission determines under subsection (3)(b) that a complaint (or any element of a complaint) which was determined by it under section 5(1) to constitute a conduct complaint constitutes instead a services complaint—
- (a) it must give notice in writing to the complainer, the practitioner and the relevant professional organisation by sending to each of them a copy of the determination and specifying the reasons for the determination;
  - (b) sections 8 to 12 apply to the services complaint as they apply where a determination is made under section 5(1) that a complaint constitutes a services complaint.

**16 Power to monitor compliance with directions under section 10(2)**

- (1) The Commission must, by notice in writing, require every practitioner specified in any direction under section 10(2) to give, before the end of such period being not less than 21 days as the notice specifies, an account and explanation of the steps which the practitioner has taken to comply with the direction.
- (2) Where an appeal against any such direction is made under section 21(1), any notice under subsection (1) relating to the direction ceases to have effect pending the outcome of the appeal.

**17 Power to examine documents and demand explanations in connection with conduct or services complaints**

- (1) Where the Commission is satisfied that it is necessary for it to do so for the purposes of section 2, 4, 5, 8, 9, 10, 15 or 16, it may give notice in writing in accordance with subsection (2) to the practitioner, the practitioner's firm or, as the case may be, the employing practitioner.
- (2) Notice under subsection (1) may require—
  - (a) the production or delivery to any person appointed by the Commission, at a time and place specified in the notice, of all documents mentioned in subsection (3) which are in the possession or control of the practitioner, the firm or, as the case may be, the employing practitioner and which relate to the matters to which the complaint relates (whether or not they relate also to other matters);
  - (b) an explanation, within such period being not less than 21 days as the notice specifies, from the practitioner, the firm or, as the case may be, the employing practitioner regarding the matters to which the complaint relates.
- (3) The documents are—
  - (a) all books, accounts, deeds, securities, papers and other documents in the possession or control of the practitioner, the firm or, as the case may be, the employing practitioner;
  - (b) all books, accounts, deeds, securities, papers and other documents relating to any trust of which the practitioner is the sole trustee or a co-trustee only with one or more of the practitioner's partners or employees or, as the case may be, where the practitioner is an incorporated practice of which the practice or one of its employees is a sole trustee or it is a co-trustee only with one or more of its employees.

- (4) Where the Commission is satisfied that it is necessary for it to do so for the purposes of section 2, 4, 5, 8, 9, 10 or 15, it may give notice in writing in accordance with subsection (5) to the complainer.
- (5) Notice under subsection (4) may require—
  - (a) the production or delivery to any person appointed by the Commission at a time and place specified in the notice, of all documents mentioned in subsection (6) which are in the possession or control of the complainer and which relate to the matters to which the complaint relates (whether or not they relate to other matters);
  - (b) an explanation, within such period being not less than 21 days as the notice specifies, from the complainer regarding the matters to which the complaint relates.
- (6) The documents are all books, accounts, deeds, securities, papers and other documents in the possession or control of the complainer.
- (7) Schedule 2 makes further provision about the powers of the Commission under this section.

## **18 Power of Commission to recover certain expenses**

- (1) The Commission is, subject to subsection (2), entitled to recover from a practitioner, the practitioner's firm or, as the case may be, the employing practitioner, in respect of whom it has taken any action by virtue of section 17, any expenditure reasonably incurred by it in so doing.
- (2) Expenditure incurred in taking action by virtue of section 17 is recoverable under subsection (1) only where notice has been served under paragraph 2(a) of schedule 2 in connection with that action and either—
  - (a) no application has been made in consequence under paragraph 3 of that schedule; or
  - (b) the court, on such an application, has made a direction under paragraph 4 of that schedule.

## **19 Documents and information from third parties**

- (1) Where the Commission has requested that documents or information in the possession or control of a person be produced for the purposes of an investigation by it under this Act and the person refuses or fails to produce the documents or information, the Commission may apply to the court for an order under subsection (2).
- (2) An order by the court under this subsection may require a person to produce or deliver the documents or information or to cause them or it to be produced or delivered to the person appointed at the place fixed by the Commission within such time as the court may order.
- (3) The court may make an order under subsection (2) only if—
  - (a) it appears—
    - (i) the documents sought are; or
    - (ii) the information sought is,relevant to the investigation; and

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- (b) it is in the public interest for the documents or information to be produced.
- (4) Where the Commission receives possession of any such documents or information which have been produced or delivered to it, it must without delay serve on the person from whom the documents or information were received, a notice giving particulars and the date on which it took possession.
- (5) Before the expiry of the period of 14 days after service of a notice under subsection (4) the person on whom the notice has been served may apply to the court for an order directing return of the documents or information to the person from whom they were received by the Commission or to such other person as the applicant may request; and on the hearing of any such application the court may make the order applied for or such other order as it thinks fit.
- (6) If no application is made to the court under subsection (5), or if the court on any such application directs that the documents or information in question remain in the custody or control of the Commission, the Commission may make enquiries to ascertain the person to whom they belong and may deal with the documents or information in accordance with the directions of that person.
- (7) This section does not apply to documents or information in the possession or control of—
  - (a) the person who made the complaint from which the investigation arises;
  - (b) the practitioner concerned;
  - (c) a relevant professional organisation.

## **20 Enforcement of Commission direction under section 10(2)**

A direction by the Commission under section 10(2) is enforceable in like manner as an extract registered decree arbitral in its favour bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.