

EXECUTIVE NOTE

THE LICENSED LEGAL SERVICES (COMPLAINTS AND COMPENSATION ARRANGEMENTS) (SCOTLAND) REGULATIONS 2012

SSI 2012/153

The above instrument was made in exercise of the powers conferred by sections 26(2) and 79(8) of the Legal Services (Scotland) Act 2010 (“the 2010 Act”) and by section 57A(2)(b) of the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”). The instrument is subject to the negative procedure.

Background

The 2010 Act allows solicitors who offer legal services in Scotland to operate using certain business models which were previously prohibited. It removes restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership, and creates a regulatory framework in which the new types of business will operate. The new types of business are called licensed legal services providers (“licensed providers”) and will be licensed and regulated by approved regulators, which in turn will be approved, authorised, and regulated by the Scottish Ministers.

This instrument provides for regulations which deal with three separate subjects:

- complaints about licensed providers;
- complaints about approved regulators; and
- compensation arrangements regarding the Scottish Solicitors Guarantee Fund (“the Guarantee Fund”).

Complaints about licensed providers

Section 81 of the 2010 Act inserts section 57A into the 2007 Act. The basic approach of the 2007 Act (which the 2010 Act retains) is that all complaints about legal professionals or law firms are initially looked at by the Scottish Legal Complaints Commission (“the Commission”), but the only complaints which are investigated by the Commission 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 (for example, the Law Society of Scotland (“the Law Society”) or the Faculty of Advocates) for investigation and possible disciplinary action.

Section 57A of the 2007 Act provides that conduct complaints may not be made about licensed providers (although they can still be made about legal professionals working within such an entity). Services complaints can, however, be made about a licensed provider (i.e. at the entity level).

Policy objectives

The instrument is necessary in order to clarify the scope of the complaints process in relation to complaints made about licensed providers at the entity level. Parts 1 and 2 of the 2007 Act currently provide for complaints about practitioners (solicitors, advocates, registered European or foreign lawyers, licensed conveyancers, and commercial attorneys), and makes no distinction between legal and non-legal services. While this does not present any issues in relation to existing legal practitioners, it raises questions around the exact remit of the Commission in relation to licensed providers, which are likely to provide a wide range of non-legal services (e.g. surveying or actuarial services) in addition to those legal services regulated under the 2010 Act. It is therefore considered necessary to modify the operation of the relevant provisions in the 2007 Act to clarify what type of complaints are to be considered as services complaints about licensed providers, and thus be handled by the Commission.

Given the focus of the 2010 Act on the regulation of legal services provided by licensed providers, the regulations provide that only complaints relating to the provision of legal services as defined in section 3 of the 2010 Act are to be classed as services complaints about licensed providers (and so be handled by the Commission).

In addition, the Commission is given the ability to accept and handle complaints which fall outside this definition where such complaints relate to services which are customarily provided by legal practitioners. This is to ensure that the complaints regime for licensed providers is broadly equivalent to that currently in place for legal practitioners, and that the sorts of services about which complaints can be made at the moment are covered by this.

Given the range of business models which may be adopted by licensed providers, it is considered possible that, in some cases, a services complaint made about such an entity may be more appropriately handled by another body. Therefore, where the Commission considers that an element of a services complaint concerns the activities of a person who provides regulated services but is not a legal practitioner, and that the complaint in question can be dealt with by the relevant professional association, it is given the ability to pass the complaint to that body. If the Commission is satisfied that the complaint is being dealt with, it is then able to take no further action itself.

The policy objectives above are achieved through regulation 2, which modifies the operation of Parts 1 and 2 of the 2007 Act.

Complaints about approved regulators

Section 79 of the 2010 Act requires that complaints about approved regulators must be made to the Commission. The Scottish Ministers are required to investigate any complaints referred to them by the Commission under section 79, but can delegate this investigatory function to the Commission under section 79(7). In the event that such delegation is made, the Scottish Ministers are still required, in the case of an upheld complaint, to decide what action (if any) should be taken against the approved regulator under section 38 of the 2010 Act (which sets out various measures which are open to the Scottish Ministers, including the imposition of financial penalties).

Policy objectives

The objective of this instrument is to ensure that, where the Scottish Ministers delegate their functions to the Commission under section 79(7), the Commission provides sufficient information in the event of an upheld complaint to allow a decision to be made on the measures which are to be taken against the approved regulator in question. Regulation 3 therefore provides that when the Commission determines that a complaint should be upheld, it must inform the Scottish Ministers of its determination and the reasons for it. It also provides that the Commission must give the Scottish Ministers any other information regarding the complaint that the Commission considers may be helpful, or the Scottish Ministers request, to assist them in determining what measures, if any, should be taken.

Compensation arrangements

Clients of solicitors, law firms, and incorporated practices who suffer monetary loss as the result of dishonesty can make a claim on the Guarantee Fund, which was established under the Solicitors (Scotland) Act 1980. The Guarantee Fund exists as a fund of last resort to compensate those who suffer such loss, and is administered by the Law Society. The 2010 Act requires that approved regulators make equivalent arrangements for a fund which can be used by clients of their licensed providers. Under section 24 of the 2010 Act, approved regulators must either set up their own compensation fund or use the existing Guarantee Fund.

Policy objectives

The policy objective is to ensure that the Law Society has sufficient information to efficiently administer the Guarantee Fund if it is utilised by approved regulators under the 2010 Act.

Regulations 4 to 8 require approved regulators which choose to use the Guarantee Fund (other than the Law Society itself, should it become such a regulator) to supply certain information to the Society for the purposes of its administration of the Guarantee Fund. Approved regulators must provide certain details when bodies are licensed as licensed providers (e.g. the name of the firm), and notify the Law Society of certain changes in the circumstances of a licensed provider (for example, suspension or revocation of a licence). Approved regulators are also required to notify the Law Society of any other changes in the circumstances of a licensed provider which they consider to be relevant to the Society for the purposes of administering the Fund. Finally, reasonable time limits for the notification of information are set out.

Consultation

There is a general requirement under section 5 of the 2010 Act for the Scottish Ministers to consult, where considered appropriate, such persons and bodies as appear to have a significant interest in the subject matter in question. In accordance with that section, consultation has taken place:

- in respect of complaints against approved regulators and licensed providers, with the Lord President, the Commission, the Law Society, and the Institute of

Chartered Accountants of Scotland (“ICAS”), all of which have a significant interest in the complaints regimes; and

- in respect of the compensation arrangements, with the Lord President, the Commission, the Law Society of Scotland, and ICAS, all of which have a significant interest in the compensation arrangements.

Any comments received were taken into account when the regulations were developed.

Impact Assessments

An Equality Impact Assessment was prepared for the Legal Services (Scotland) Bill, and which found no evidence of differential impact in respect of disability, gender, sexual orientation, race/ethnicity, or religion/belief. A further assessment was considered, but as these regulations do not introduce new policy but provide for the administration of the policy introduced by the 2010 Act, it was considered that this was unnecessary.

A Regulatory Impact Assessment was carried out for the Legal Services (Scotland) Bill¹. A Business and Regulatory Impact Assessment is not considered necessary for this instrument, as it does not introduce substantive new policy and has no further significant impact on the Scottish Government, local government or on business.

Financial Effects

This instrument does not have any new financial effects that were not anticipated when the enabling legislation was enacted. A Financial Memorandum was produced which set out the financial implications of the Bill.²

Scottish Government

Justice Directorate

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¹ The regulatory impact assessment for the Legal Services (Scotland) Bill can be viewed at www.scotland.gov.uk/Resource/Doc/980/0087717.pdf

² See [http://www.scottish.parliament.uk/S3/Bills/Legal%20Services%20\(Scotland\)%20Bill/b30s3-intro-en.pdf](http://www.scottish.parliament.uk/S3/Bills/Legal%20Services%20(Scotland)%20Bill/b30s3-intro-en.pdf), pages 34ff