

**EXPLANATORY MEMORANDUM TO**  
**THE LEGAL SERVICES ACT 2007 (TRANSITIONAL, SAVINGS AND**  
**CONSEQUENTIAL PROVISIONS) (SCOTLAND) ORDER 2008**

**2008 No. 2341**

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. **Description**

2.1 The Order relates to the establishment of the Scottish Legal Complaints Commission (“the SLCC”) under the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5) (“the 2007 Act”). The SLCC will become operational on 1 October 2008. The SLCC will deal with complaints about inadequate service by the legal profession in Scotland and refer complaints about lawyers’ conduct to the relevant professional body, either the Law Society of Scotland or the Faculty of Advocates. The office of the Scottish Legal Services Ombudsman (SLSO), which currently deals with how the professional bodies have handled complaints, will be abolished when the SLCC becomes operational.

2.2 The Legal Services Act 2007 (Commencement No. 2 and Transitory Provisions) Order 2008 (SI 2008/1436) commences, as of 1 October, sections 195 and 196 of and Schedule 20 and relevant entries in Schedule 23 to, the Legal Services Act 2007 (“the LSA”). The commencement of these provisions will extend the remit of the SLCC to the advice, services and activities specified in section 195(2) of the LSA which are reserved to the UK Parliament (broadly speaking consumer credit, insolvency, immigration and financial services) and disapply the functions of the SLSO in relation to those areas.

2.3 This Order makes transitional, savings and consequential provisions necessary to ensure a smooth and orderly transition from the current complaints system for the reserved advice, services and activities. The Scottish Executive is making a similar Order (to be effective on 1 October 2008) in relation to devolved advice, services and activities.

2.4 The effect of this Order, which will come into force on 1 October 2008, will be that existing provisions relating to complaints (sections 33, 34, 34A and 34B of, and paragraph 6 of Schedule 3 to, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40)) will continue to have effect in relation to complaints made to the Commission before 1<sup>st</sup> October 2010 about reserved activities. Provisions in the Solicitors (Scotland) Act 1980 in force immediately before 1<sup>st</sup> October 2008 will also continue to have effect in relation to reserved activities. This will enable complainants whose complaint comes under the transitional arrangements following the establishment of the SLCC to raise a complaint about a legal practitioner under the existing law. The Order will ensure that:

- All conduct complaints that are currently being investigated by the Law Society of Scotland or Faculty of Advocates as at 1 October 2008, or handling complaints that are being dealt with by the SLSO, will continue to be dealt with in accordance with the existing law.
- Following the conclusion of conduct complaints raised before 1 October 2008, or concerning conduct which took place before that date, any subsequent handling complaint will be dealt with under the existing law which allows complainants to refer their complaint to the SLSO.
- Any new conduct complaints raised on or after 1 October 2008 will only be accepted by the SLCC under the 2007 Act if the conduct complained of took place on or after 1 October 2008. Conduct taking place before that date will continue to be dealt with under the existing legislation.
- Any new service complaint raised on or after 1 October 2008 will only be dealt with by the SLCC under the 2007 Act if the practitioner was first instructed after 1 October 2008. In all other cases the existing legislation will apply.
- In respect of the above provisions, after 1 October 2008, the functions which would, before its dissolution, have been exercised by the SLSO will be exercised by the SLCC.

### **3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

### **4. Legislative Background**

4.1 This Order saves the existing law for a transitional period, as outlined in section 2 above, in relation to complaints concerning reserved matters (i.e. matters reserved to the UK Parliament under the Scotland Act 1998).

4.2 The Scottish Executive is able to save the relevant sections of the existing legislation for devolved matters but cannot do so where such provision would relate to a reserved matter. It is saving the existing law for devolved purposes in the Legal Profession and Legal Aid (Scotland) Act 2007 (Transitional, Savings and Consequential Provisions) Order 2008 which has been laid in the Scottish Parliament. For consistency, saving provisions are needed under the Legal Services Act (“the UK Act”) which mirror the Order that the Scottish Executive has prepared. Without such provision the SLCC would have to deal with all complaints made about legal services in reserved areas from 1 October 2008 onwards, regardless of when the conduct complained of took place or the services were delivered. In doing so, it would be required to apply the provisions of the 2007 Act, including increased powers to award compensation for claimants. There would therefore be an unintended and unjustified

difference between the treatment of complaints about reserved and devolved activities.

## **5. Territorial Extent and Application**

5.1 This instrument applies to Scotland only.

## **6. European Convention on Human Rights**

6.1 The Parliamentary Under Secretary of State, Bridget Prentice, has made the following statement regarding Human Rights:

In my view the provisions of the Legal Services Act 2007 (Transitional, Savings and Consequential Provisions) Order 2008 are compatible with the Convention rights.

## **7. Policy background**

7.1 The 2007 Act reforms the system for dealing with complaints about the legal profession in Scotland. The Act establishes the SLCC, which will receive and resolve complaints about the service received from a legal practitioner. The SLCC will refer to the professional bodies complaints relating to conduct on the part of a legal practitioner and will oversee the way in which such complaints are handled by the professional body.

7.2. The key aim of the 2007 Act was to promote public confidence in the system for dealing with complaints. The SLCC will be independent and will provide fair redress. Early resolution of complaints is encouraged by the SLCC and they will have a role in disseminating good practice.

7.3 The original intention was that the SLCC would accept any complaints referred to it which related to matter arising after April 2008. However, it became clear as the work to establish the SLCC progressed that this would not be practicable, due to the complexity of setting up its operational functions. Accepting complaints relating to the period before it became operational would seriously put at risk the SLCC's ability to deliver its new responsibilities in the initial period. In addition, it was felt that it would not be consistent with natural justice to have cases begin under one complaints system and transfer to another under the 2007 Act, with different sanctions.

7.4 The SLCC therefore stated that it did not believe it would be practical or desirable for it to accept complaints under the new legislation in respect of matters that had been instructed before 1 October 2008. Scottish Ministers were only made aware of this change of approach when the SLCC consulted in June 2008 on its draft rules. This was after the Legal Services Act 2007 (Commencement No.2 and Transitory Provisions) Order 2008 had been laid, which provided for provisions relating to the establishment of the SLCC to be commenced on 1 October 2008.

7.5 The Scottish Executive accepted the SLCC's approach to complaints handling, following consultation with the professional bodies, who also agreed with the

proposal. This approach would however mean that there would be complaints which are not resolved or not even initiated before 1 October 2008 that could not be accepted by the SLCC under the 2007 Act.

7.6 The option of doing nothing would not be acceptable. It would either mean requiring the SLCC to take on complaints which they are not in a position to deal with, or accepting that some complaints cannot be dealt with at all. Either of these outcomes would potentially be very harmful for consumer confidence in the new system, and the second option would mean that some potentially justified complaints would not receive the benefit of either the current or the future system.

7.7 Therefore, transitional arrangements are necessary to ensure that such complaints are considered fully and properly and to promote the confidence of consumers and the legal profession in the SLCC.

7.8 Following discussion with the SLCC and the professional bodies, about the transitional arrangements, two modifications were agreed which would limit the impact of this change, and avoid the transitional arrangements operating for an indefinite period. It was agreed that:

- the transitional arrangements should have an end date, hence the inclusion of the 2010 cut off date (Article 2 of the Scottish Order makes provision for this), and
- the SLCC would be able to deal with *conduct* complaints where the conduct complained of occurred after 1 October 2008, whether or not the solicitor had taken instructions from the complainant before that date. (This reflects the fact that the complainant in a conduct issue may not be a client of the solicitor, so tying the provisions to the date of instruction may not always be possible.)

7.9 Consideration was also given to whether it was appropriate for the date of instruction to determine whether a *service* complaint should be dealt with under the old or new regime. An alternative would be to determine the appropriate regime by reference to the date on which the alleged inadequate service occurred. This would reduce the number of cases requiring transitional provision (although it would not remove the requirement for such provision altogether). On balance, it was decided that this was not appropriate. The SLCC and the Law Society of Scotland (which is the professional body with the greatest experience of investigating such complaints) both advised that the instruction date provided greater clarity for both complainants and the profession. This is because it is often difficult to determine the precise date when inadequate professional service occurred (for example, if the complaint concerns undue delay), while the date of instruction could usually be objectively and simply established.

7.10 The savings provisions ensure that there is no gap in provision for complainants who would have nowhere to go if the SLCC is unable to deal with complaints not resolved prior to 1 October 2008. The Legal Services Act 2007 repeals the existing law which allows conduct complaints to be made and investigated by the Law Society of Scotland (under section 33 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990) when the Schedule 20 to that Act is brought into

force on 1 Oct, however the transitional arrangements provide for the continuation of complaints under the relevant regime.

### *Consultation*

7.8 The 2007 Scottish Act was the product of widespread consultation both before and during the Parliamentary process. Public interest and involvement in the Act was considerable with input and amendments from the Law Society of Scotland.

7.11 As mentioned in paragraph 7.8 discussions have taken place with the main stakeholders in relation to this order: the SLCC, Law Society of Scotland, Faculty of Advocates and the Scottish Solicitors' Disciplinary Tribunal. All parties have been fully consulted in the preparation of the Order and have not raised any concerns regarding its terms.

## **8. Impact**

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies. It should be noted that the Scottish Executive will meet the costs associated with those cases which the SLCC will handle under the powers of the SLSO. The Scottish Executive currently sponsors the SLSO.

## **9. Contact**

Any enquiries about the contents of this Memorandum should be addressed to:

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