POLICY NOTE

THE SCOTTISH LEGAL COMPLAINTS COMMISSION (MODIFICATION OF DUTIES AND POWERS) REGULATIONS 2014

SSI 2014/XXX

The above instrument is made in exercise of the powers conferred by section 41 of the Legal Profession and Legal Aid (Scotland) Act 2007(the 2007 Act).

The instrument, which will make amendments to primary legislation, is subject to the affirmative procedure.

Background

The Law Society of Scotland and the Scottish Legal Complaints Commission ("the SLCC") raised concerns about certain practical aspects of the Legal Profession and Legal Aid (Scotland) Act 2007. They agreed to form a working group together with other stakeholders, the aim of which was to suggest improvements to the complaints process which would benefit both the public and the profession.

Following the conclusion of the working group, the Law Society of Scotland and SLCC wrote jointly to Ms Roseanna Cunningham, Minister for Community Safety and Legal Affairs, on 28 November outlining a number of proposals upon which all member of the working group were agreed.

Policy objectives

This instrument makes of the following changes to the 2007 Act.

1. Ability to re-visit eligibility questions

The Act currently obliges the SLCC to consider the eligibility of a complaint (on the grounds of timeousness, prematurity, frivolity, vexatiousness or lack or merit) prior to investigation of the complaint. Section 9 of the Act currently requires the SLCC, once it has begun an investigation, to continue to investigate that complaint even if it becomes clear, during the investigation, that the complaint would have been ineligible. The SLCC has reported that during the section 9 investigation phase, information can come to light which subsequently reveals that the complaint ought to have been rejected at a much earlier stage because of timeousness, prematurity, frivolity, vexatiousness, or lack of merit. These Regulations give the SLCC the ability to revisit the eligibility of the complaint during the investigation phase.

2. Rearranging the order of consideration

The Act provides for the order in which the SLCC has to consider various preliminary matters before it can begin its investigation. Currently, the SLCC has to firstly consider whether the complaint is premature or timeous, secondly whether the complaint is frivolous, vexatious or totally with merit and only then determine whether the complaint is a conduct or a service complaint. The "Rules of the Scottish Legal Complaints Commission 2013" envisage that different considerations should apply when considering the timeousness and prematurity of conduct complaints and service complaints. They therefore have to determine, administratively, which category the complaint falls into *before* considering timeousness or prematurity. This runs contrary to the order required by the legislation. The instrument provides therefore for a more flexible order of consideration, where prematurity can be considered in advance of the categorisation of each complaint as either conduct or services, with categorisation and the eligibility criteria considered afterwards.

3. Power to discontinue and reinstate service complaints

At present section 9 of the 2007 Act requires the SLCC to produce a determination in respect of each and every complaint which reaches the investigation stage. This applies even in cases where the complainer stops co-operating, or unreasonably fails to give the SLCC the information that it needs to properly investigate a complaint. This instrument gives the SLCC the ability to discontinue the investigation of a complaint and, should it wish, reinstate a complaint where it has discontinued an investigation.

4. Practitioners to be able to raise handling complaints

Conduct complaints are remitted by the SLCC to the relevant professional organisation ("RPO") to handle under section 6 of the 2007 Act. Section 23 allows the Commission to investigate complaints by members of the public that the RPO failed to investigate properly their conduct complaint. The instrument provides that practitioners about whom a conduct complaint has been made should similarly be able to complain to the SLCC if they feel that the conduct complaint was poorly handled by the RPO.

5. Dealing with recommendations in reports on handling complaints

Section 24(2) to (6) currently give the RPO 3 months to decide whether or not it will comply with a recommendation in a report by the SLCC on a handling complaint. The SLCC has the same period of 3 months within which to decide whether the RPO has complied with a recommendation in a report on a handling complaint. This means that the SLCC potentially has to wait 3 months before the RPO intimates whether it intends to comply with a recommendation. Additionally, in some cases, depending on the nature of the recommendation, implementation may take longer than 3 months.

The instrument instead provides that:

i. The RPO must notify the relevant people in writing within 14 days if it is not intending to comply with a recommendation. If that is the case then as at present Commission can take enforcement action.
ii. Normally the RPO should still have 3 months in which to comply
iii. There should be an exception where it is not practicable to comply within 3 months eg. if re-investigation of a complaint is ordered it might take longer than 3 months. In that case the onus is to be on RPO inform the relevant parties in such cases and to propose a reasonable timescale. The SLCC can take enforcement action if it doesn't consider what RPO proposing is reasonable or the RPO fails to comply.

6. SLCC to be able to reinstate a handling complaint

Section 23(2) allows the SLCC to discontinue a handling complaint, once they have begun to investigate it but there is no provision for reinstatement of handling complaints. This instrument provides for handling complaints to be reinstated and brings parity with the proposed changes in respect of service complaints.

7. SLCC to be required to establish an independent advisory panel

Provision is made to oblige the SLCC to set up and consult an independent panel. The panel is to include representatives from consumer and equalities organisations. The functions of the panel are to make recommendations to the Commission for improvements to the Commission's practice and procedures; to suggest topics for research; and express views on matters relating to the Commissions' functions, as the Commission directs. This will facilitate the existing statutory consultation function. Enshrining the existence of the group in statute will enhance its status and give it protection against arbitrary dissolution – a protection which a consumer group established administratively would not have.

Consultation

A stakeholder consultation was held between March and April 2014 on these proposed changes to the 2007 Act. It was decided that a short consultation with targeted groups representing business and consumer interests was appropriate rather than a full public consultation as this was a stakeholder initiative in the first place.

Consultation packs were sent to the SLCC, Law Society of Scotland, the Faculty of Advocates, the Association of Commercial Attorneys, the Legal Defence Union, the Scottish Solicitors' Discipline Tribunal, Citizens Advice Scotland, Which? and the Office of Fair Trading.

Regulatory impact assessment

A partial Regulatory Impact Assessment was carried out. It provided evidence to support our recommendation that no final BRIA needs to be produced for these proposals.

Financial effects

These amendments do not require law firms, consumers or the public sector to do anything, there is no additional cost to implementing the amendments. There will be a minimal cost to the SLCC in terms of staff time spent on creating new rules of procedure and adapting systems.