

Scottish Legal Complaints Commission

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Our ref: JI

Dear Sir

Legal Services (Scotland) Bill

I write further to my letter of 30 November 2009 and now submit the Scottish Legal Complaints Commission's ("the SLCC") further representations on the Legal Services (Scotland) Bill ("the Bill").

1 INTRODUCTION

- 1.1 The SLCC was established under the Legal Profession and Legal Aid (Scotland) Act 2007 ("the 2007 Act") as an independent body to investigate complaints about legal practitioners in Scotland.
- 1.2 The SLCC is presently the sole Gateway for legal complaints against defined legal practitioners. The eligibility of the complaint is assessed, which includes determination of whether the complaint is frivolous, vexatious or totally without merit. The SLCC's remit is to investigate complaints about inadequate professional services and to pass complaints about professional misconduct and unsatisfactory conduct to the relevant professional bodies (e.g. the Law Society of Scotland and the Faculty of Advocates).
- 1.3 The Bill introduces a regulatory framework for new forms of legal entities. It is proposed that the SLCC will be involved in dealing with complaints about those entities and their regulators. The SLCC is therefore pleased to have the opportunity of commenting on those aspects of the draft Bill that are likely to affect its operations.
- 1.4 The SLCC is approaching the Bill from a neutral position and accepts that the its role in this consultation is limited to those areas which relate specifically to the complaints handling process allowed for under the provisions of the 2007 Act, as incorporated into the Bill. The SLCC also acknowledges the extended functions proposed by the Bill, which may impact on its current working practices and makes comment accordingly.

- 1.5 It is envisaged that the SLCC will receive at Gateway all complaints about Licensed Legal Services Providers (“LLSPs”) and all complaints about Confirmation Agents (“CAs”). The SLCC will investigate all service complaints about LLSPs and CAs. The SLCC will pass eligible conduct complaints about individual legal practitioners working within a LLSP and about CAs to the Approved Regulator (AR) or the Approving Body (for CAs) for investigation.

2 GENERAL COMMENTS

- 2.1 The SLCC should have the power under its existing and amended statutory functions to receive, process, refer, investigate and determine complaints. Consumers and legal services providers are effectively being provided with a one-stop shop for making their complaint. It is for the SLCC to ensure that the complaint process is properly managed. If this involves the referral of a complaint to another organisation, this requires to be adequately managed and communicated to the parties involved in the complaint. It is imperative that all potential service users are made aware of the SLCC’s core functions and any increased functions which may be imposed by the Bill. The SLCC has already been given the responsibility of advising about the complaint process under the provisions of the 2007 Act and to issue appropriate guidance as to how complaints are dealt with. It appears that this is to continue in terms of the Bill, although the extent to which the SLCC will be required to issue guidance is unclear, given the proposed overarching involvement of Scottish Ministers.
- 2.2 As the SLCC is a strong independent body serving as a single Gateway for legal complaints, regulation could be improved if its jurisdiction was widened to investigate all legal complaints, whether they be conduct, service, handling or the new regulatory type of complaint, about all legal service providers (including CAs). This will ensure consumers and legal services providers know which body has the responsibility for handling complaints and where complaints are to be made in the first instance. The Bill should be an opportunity to make services better for consumers. It should not create more complexity for consumers, nor for the practitioners who serve them. It will be for the SLCC to determine the type of complaint made and against whom, in the same way as the SLCC is doing at present for service, conduct and handling complaints. The SLCC, and not consumers or legal services providers, will then determine whether complaints are about ‘legal services’ or other services, such as financial or accountancy services. Responsibility would be placed on the SLCC to secure regulation of services and consumer redress in circumstances where things go wrong, which should reduce the risk of duplication of activities by regulators. Also, it is not left to the consumer to identify how or if the legal services provider is regulated; they know where to raise their concerns.
- 2.3 The Bill provides for service and conduct complaints to continue to be investigated by separate bodies. The SLCC is of the view that the interests of consumers and legal services providers would be better served if it was to have the right to investigate conduct complaints, in addition to service. It is the SLCC’s experience that a significant proportion of complaints comprise both service and conduct elements (i.e. hybrid). The SLCC considers that consumers often tend not to distinguish between these aspects and instead

have an expectation that all the circumstances of a complaint will be examined by one body. It is the SLCC's view that consumers may not be able to properly distinguish between legal advice provided by a 'legal professional' and that provided by another professional in consultation with a legal colleague, or from a voluntary advisor who has no professional legal qualification. Service users may more easily understand concepts of 'financial advice', 'legal advice', 'accountancy advice' and 'surveying advice', but may not necessarily be alert to the providers' qualifications or the composition of the LLSP or who indeed is providing the "legal services". Simplification of the complaints process should make it easier for both legal services providers and consumers to understand and follow.

- 2.4 The ultimate disposal of conduct complaints could still rest with the AR. It is noted that a similar approach is envisaged under Section 64 of the Bill, in circumstances where the investigation of a complaint about an AR has been delegated for investigation to the SLCC, but the sanction to be applied is referred back to Scottish Ministers to administer. If the SLCC was to have the power to investigate the entire complaint, it would mean that, even if the complaint was of a hybrid nature, both consumers and legal services providers would only have to correspond with one organisation (the SLCC) during the course of the investigation of the complaint. The SLCC considers that simplifying the complaints process in such a way should improve service to both the consumer and the legal services provider, as it should reduce the length of time taken to investigate a complaint and be one port of call for any queries about the process. Decisions about which organisation should deal with the complaint and when will not have to be taken at the outset and information and evidence about the complaint will not have to be sent to, and reviewed by, two (or more depending on the hybrid nature of the complaint) different organisations.
- 2.5 Streamlining the complaints process by giving the SLCC the power to investigate all aspects of all legal complaints would also remove the difficulty that currently arises in trying to classify a complaint before the events giving rise to the concerns have been fully investigated and before all the evidence has been gathered. It would also avoid the need for discussions between the SLCC and ARs about how and when to deal with issues discovered during the course of the investigation that were not initially raised by the complainer, but which might be considered relevant to the existing complaint or sufficiently serious to warrant further investigation.
- 2.6 A more streamlined process would be in the best interests of consumers and legal services providers, as it should result in an earlier resolution of complaints and be more cost effective. The suggestion that the SLCC should investigate both the services and conduct elements of a complaint should also lead to greater consistency in the way that consumers' concerns are investigated. In addition, any concerns about potential conflicts of interest in an AR investigating a complaint about a member of the LLSP whom they also represent would be resolved.
- 2.7 The SLCC is able to expand its existing functions to incorporate the handling of additional complaints about LLSPs and those persons within the entity and, if delegated, complaints about ARs. However, the Bill needs to adequately legislate for these extended functions and provide a thorough set of regulations in order to allow the SLCC to practically carry out these tasks with adequate funding gathered from practitioners creating work for the body.

3 SPECIFIC COMMENTS

3.1 Complaints about LLSPs

- 3.1.1 Section 65 adds provisions to the 2007 Act to bring complaints about LLSPs under the current complaint system. It does this by applying Parts 1 and 2 of the 2007 Act to complaints about LLSPs. As Parts 1 and 2 of the 2007 Act contain provisions which may not be applicable to LLSPs and ARs, it is proposed that Scottish Ministers may modify these by regulations. The SLCC believes that some modifications will be necessary to achieve consistency between the two Acts in order for the provisions to work effectively in practice. There should be adequate consultation with the SLCC about any amending regulations to ensure that its views on the practical impact of applying Parts 1 and 2 to the new entities and the effect on its processes are fully considered. There are already existing difficulties with certain provisions of the 2007 Act, which could be replicated if there are insufficient regulations in place to avoid those pitfalls which the SLCC has already identified as hindering the complaints handling process. The SLCC considers that consultation is imperative.
- 3.1.2 In respect of the new Section 57B about regulatory complaints (added to the 2007 Act by Section 65), subsections (4) and (5) refer to the procedure and functions of the SLCC in respect of regulatory complaints being the same as for a conduct complaint “about a licensed provider”. However, in terms of Section 57A(4), a conduct complaint cannot be made about a licensed provider as an entity. There appears to be a discrepancy between the two sections and it is the SLCC’s view that this requires clarification.
- 3.1.3 Section 24(7) requires an AR to refer any complaint of professional misconduct about a member of a professional association disclosed by a special assessment to be notified to that association. This appears to be limited to cases where the alleged misconduct is identified by an assessment carried out by an AR. In practice, the SLCC may receive complaints relating to both legal and non-legal services and to legal and non-legal practitioners. Is the responsibility for allocating such a complaint to the relevant professional association or body to rest with the SLCC or will this be undertaken by the AR? This requires to be clarified and reflected in the Bill.
- 3.1.4 The Bill makes no specific provision for the process whereby a conduct complaint about a non-legal practitioner is passed by the SLCC to the relevant professional body. Section 3 of the 2007 Act is of some assistance, but only if the definition of “practitioner” is altered to include non-legal practitioners for the purposes of Section 3. A consequence of applying Parts 1 and 2 of the 2007 Act to complaints about LLSPs is that the definition of “practitioner” is as stated in Section 46 of the 2007 Act. This will be an instance where amendment by regulations is likely to be required.
- 3.1.5 As Section 24(7) envisages that an AR will notify a professional association directly about a conduct complaint (arising from a special assessment) it would seem that the SLCC’s normal Gateway function would be bypassed. The SLCC considers that there should be provision in the Bill (or by regulations) for the SLCC to be notified of such complaints by the AR.

3.1.6 The power to monitor the performance of ARs lies with Scottish Ministers in terms of Section 28. One issue regarding this is that an organisation may have a dual role. For example, The Law Society of Scotland may be the AR for a LLSP, as well as being the relevant professional organisation (“RPO”) for a traditional firm of solicitors. The SLCC will retain its existing oversight role over RPOs (in terms of the 2007 Act), but cannot monitor the performance of that same organisation in its capacity as an AR under the provisions of the Bill. There is a resultant danger of duplication in oversight regulation and the SLCC wishes to clarify that the Bill will preserve or enhance its existing role in respect of ARs with a dual role.

3.2 Complaints about Approved Regulators

- 3.2.1 Section 64 imposes an obligation on Scottish Ministers to investigate any complaint about an AR. Scottish Ministers can however delegate certain of their investigative functions to the SLCC. The SLCC believes it is necessary to clarify if such complaints are to be delegated after Scottish Ministers have determined if the complaint is a regulatory handling complaint or frivolous, vexatious or totally without merit in terms of Section 64(2) or whether it will be left to the SLCC to decide the status of the complaint. The SLCC considers that some clarification of the extent of the functions that may be delegated is required and how Section 64 is to operate alongside the SLCC’s powers under the 2007 Act.
- 3.2.2 It is noted that the Bill proposes a slightly different wording for the assessment of frivolous, vexatious and totally without merit complaints to that contained in the 2007 Act. Section 5 of the 2007 Act states “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 conduct or services complaint”. Section 64(2) of the Bill states that “Scottish Ministers are not required to investigate (or may cease investigating) any complaint that they determine to be ... frivolous, vexatious or totally without merit”. The SLCC considers that for reasons of consistency and transparency, the test in the Bill is adopted to test if any complaint is frivolous, vexatious and totally without merit.
- 3.2.3 There appears to be no procedure laid down in the Bill as to how a delegated complaint against an AR is to be dealt with (unlike other complaints which are covered by reference to the 2007 Act). Complaints about ARs may be of a different nature to service / conduct / handling complaints, therefore a different investigation procedure may be required.
- 3.2.4 The Section does not specify whether it is envisaged that the SLCC will be required to make a recommendation to Scottish Ministers, or whether there is a distinct cut off point once the investigation has concluded and there is sufficient evidence to make a decision about whether or not to uphold the complaint. It is noted the responsibility for imposing any sanctions against the AR rests with Scottish Ministers. They can take any of the measures specified in Section 29.
- 3.2.5 Section 64(7) allows Scottish Ministers to make separate regulations as to how such complaints are dealt with. Again, it is considered necessary for Ministers to consult with the SLCC about the creation of the regulations in order to ensure that it is able to manage these types of complaints. The

SLCC will in due course have considerable data on regulatory process operation and expertise in regulatory oversight in terms of its functions in the 2007 Act. The SLCC suggests that Scottish Ministers may wish to call on this or oblige us to make general recommendations on regulatory practice including codes of conduct and service standards for legal services providers.

- 3.2.6 An AR is responsible for dealing with a regulatory complaint about a LLSP. It is possible for a complainer to make a handling complaint about the AR arising from the investigation of the regulatory complaint. The handling complaint is dealt with by the SLCC under the new Section 57D. If the AR does not comply with a direction made under Section 24(6) of the 2007 Act, the SLCC can take court action. The SLCC queries whether there should be specific provision in the Bill entitling it to make a complaint to Scottish Ministers about the ARs failure to comply with a direction before SLCC considers referring the matter to court. A complaint would be cheaper and possibly more effective solution than applying to the court, as it is Scottish Ministers who grant licences and impose conditions (and in certain cases) sanctions on ARs in terms of the Bill.
- 3.2.6 As Parts 1 and 2 of the 2007 Act may not apply automatically to complaints about ARs delegated to the SLCC by Scottish Ministers, the SLCC would like to see regulations imposing obligations on AR's to co-operate and liaise with the SLCC in relation to complaints and related matters along the lines of Sections 37 and 38 of the 2007 Act.
- 3.2.7 It is not clear whether Parts 1 and 2 of the 2007 Act will apply to handling complaints about AR's under Section 57D. Section 57A specifically applies these Parts to complaints about LLSPs but there is no similar provision in Section 57D. The SLCC considers that certain aspects of Parts 1 and 2 require to apply to handling complaints under Section 57D. If this is to be dealt with by future regulations made under Section 57D(2), the SLCC considers it appropriate for Scottish Ministers to engage in prior consultation with it about the applicable regulations.
- 3.2.8 The SLCC is funded by a levy on legal practitioners. Under Section 57C (added by Section 65), this is extended to include an annual levy on LLSPs. If the SLCC is to handle complaints about ARs under delegation by Scottish Ministers thereby relieving Scottish Ministers of that expense, consideration could be given to Scottish Ministers contributing to the cost of the investigation of such complaints and / or that a complaint levy should be imposed on an AR (and payable to the SLCC as part of the measures open to Scottish Ministers under Section 29) if a complaint is upheld.
- 3.2.9 The SLCC notes that it is anticipated that the only costs the Scottish Government will incur will be in relation to putting in place and monitoring ARs. The SLCC assumes that if the power to investigate complaints against and AR is delegated to the SLCC, that this is part of the "monitoring" function and that the costs involved in the investigation of those complaints will also be borne by the Scottish Government. This is not clear from the Bill.

I hope that our comments above are self explanatory, but if the Committee requires any clarification, please do not hesitate to contact me. I am disappointed not to be called to give evidence given the SLCC's central role in complaints and conduct handling. The SLCC will continue to have an important role to play at the heart of the

regulatory process and I am happy to participate in any further consultation or informal discussions about the Bill and future regulations.

Yours sincerely

Jane Irvine
Chair