



Law Society
of Scotland

Consultation Response

Scottish Government Consultation on Regulations and Guidance in relation to Approved Regulator Complaints

14 August 2018



Introduction

The Law Society of Scotland is the professional body and regulator of over 11,000 Scottish solicitors. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law.

We have applied to become an Approved Regulator of Licensed Legal Services Providers (LLSPs) in terms of the Legal Services (Scotland) Act 2010. Our scheme was submitted to Scottish Ministers and has been approved by Scottish Ministers. However, in terms of the legislation, we have yet to be authorised as an Approved Regulator.

The Society has been approved as a regulator and is subject to the Approved Regulator complaints regime. This means we are required to pay a levy to the Scottish Legal Complaints Commission annually to cover the costs of considering such matters – including whether or not such complaints are eligible for investigation. Any other Approved Regulators would also be subject to the levy.

We are grateful for this opportunity to provide feedback on the Scottish Government's draft regulations and guidance. This response follows consideration by our Board and Regulatory Committee.

Our response in context

Section 79 of the Legal Services (Scotland) Act sets up the Scottish Legal Complaints Commission (the Commission) as the gateway for all Approved Regulator complaints. It is understood that Scottish Ministers will delegate their powers to investigate and determine Approved Regulator complaints in terms of the Act and the only power which will be directly exercised by Scottish Ministers will be the power under Section 38 of the Act to determine the penalty, if any, for an upheld complaint.

Who can complain?

In considering the draft regulations, there is no reference to who can make a complaint. The draft guidance suggests at page 5 that anyone with an interest can complain.

Both Section 51 of the Solicitors (Scotland) Act 1980 and Section 2(2) of the Legal Profession and Legal Aid (Scotland) Act 2007 define who can make a complaint direct to the Scottish Solicitors Discipline Tribunal and to the Scottish Legal Complaints Commission respectively. We ask the Government to make clear reference in the regulations as to who can make a complaint. This is important to ensure that clarity

can be given to potential complainers and so the Commission can handle matters at the gateway stage in an efficient manner

Resolving a Complaint

The guidance also makes reference to an Approved Regulator complaint being “resolved”. Section 79 (4) of the 2010 Act refers to the fact that Scottish Ministers must investigate. That would infer there has to then be a formal outcome. When the legislation was written and passed by the Scottish Parliament, it was understood that Approved Regulator complaints would form part of the underlying monitoring regime for Approved Regulators. We welcome the intention in the guidance to give an Approved Regulator the opportunity to resolve an Approved Regulator complaint in advance of a full formal investigation and outcome. This would bring some consistency with other legal complaints where there are in built mechanisms to encourage resolution of certain complaints quickly, efficiently and without a full statutory process. If this is the intention of Scottish Ministers with respect to Approved Regulator complaints then it is important for the Scottish Government to provide clarity in how it sees this fitting with the current wording of Section 79 (4). Change should be effected through the regulations if necessary in order to provide that clarity.

What can be complained about?

The draft guidance sets out examples of what an Approved Regulator complaint can be about. This is important in assisting the Commission with determining eligibility. However, the scope of complaints should be contained in the regulations to ensure the position is clear. The key point is that the Approved Regulator complaint cannot and must not be used as an alternative to the appeal or review route as set out, either in the legislation or the approved scheme. This needs to be in the regulations.

Whilst the Commission may want flexibility around this, we believe the absence of clear and unambiguous statements about what can be complained about poses a potential risk to the Commission. The Commission as one of the consultees may have specific views on this.

Vexatious complaints

The term ‘vexatious’ has been the subject of considerable discussion with the Commission and consumer groups. This has been in the context of solicitor complaints because of the connotations of the word. We are currently discussing a possible amendment to the current legislation on solicitor complaints which could see the removal of the word “totally” from “without merit” complaints. It is suggested that the wording of the

relevant part of the guidance (page 4) with reference to vexatious might also be re-visited. It is also recommended that the regulations are drafted to remove the word “totally” from Section 79 (2) (b).

During our discussions with the Commission, it has been acknowledged that it would also be better for the Commission to have a level of flexibility around the application of tests and the order in which they are to be applied and it is suggested that should be clarified either in the guidance or regulations.

Time limit

The draft guidance suggests that Approved Regulator complaints should be raised timeously. We accept there should not be a reference to a time limit in the regulations. However, we believe the current term of “timeously” is too vague and is likely to give the Commission challenges in determining whether a complaint is eligible or not.

The Commission currently set the time bar – currently three years – for solicitor complaints in their Rules as allowed for in Section 32 (1) of the Legal Profession and Legal Aid (Scotland) Act 2007. It should have the same ability and be required to make rules about time limits for making complaints about Approved Regulators. There is also a public interest safeguard and an exceptional circumstances exemption within the current solicitor complaints rules. We would have expected a similar approach for Approved Regulator complaints.

Investigation of multiple complaints

There appears to be a minor difference between the wording in the draft regulations and the draft guidance in relation to this issue. It is not clear why this is and whether reference to this is actually necessary within the guidance.

Standard of proof

There is no reference in the draft guidance as to what standard of proof will be applied to Approved Regulator complaints. This is important in terms of an Approved Regulator and a complainer being able to understand the approach being taken. This is particularly important for an Approved Regulator given the ultimate sanction is the removal of the Approved Regulator status.

Determining a complaint/interim report

The draft regulations acknowledge it may be appropriate for an interim report to be made. However, the Act and draft regulations fail to give a clear idea about the process for determining a complaint and what opportunities an Approved Regulator may have to challenge a report including the findings of fact and decision to uphold – or not.

There is nothing currently in either Section 79 or 38 of the Act that gives an Approved Regulator the opportunity to challenge the position as set out by the Commission in the report, including the decision.

The outcome may be potentially damaging to the Approved Regulator. The absence of a provision to make representations before a final decision is made means the only option open to an Approved Regulator who was concerned would arguably be to consider an interim interdict or judicial review. In either case, this would involve the Courts and would not be in the interests of running a fair and even handed system of complaints against Approved Regulators.

Even if the Commission is going to set out a process in rules, there is a clear argument that the regulations ought to set out a broad process which should ensure an Approved Regulator has the right to make representations on a report before it is sent to Scottish Ministers.

Sanctions

Section 38 of the 2010 Act sets out the sanctions that Scottish Ministers may impose if a complaint is upheld.

It is considered there needs to be guidance about sanctions and how Scottish Minister might decide what is appropriate if they decide to exercise the powers under Section 38. This links back to the need for the process to be transparent and for the Approved Regulator to have the ability to comment on the report and before Scottish Ministers determine if a sanction is appropriate.



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