
SCOTTISH STATUTORY INSTRUMENTS

2008 No. 311 (C. 26)

LEGAL PROFESSION

**The Legal Profession and Legal Aid (Scotland)
Act 2007 (Commencement No. 5) Order 2008**

Made - - - - 17th September 2008

The Scottish Ministers make the following Order in exercise of the powers conferred by section 82(2) of the Legal Profession and Legal Aid (Scotland) Act 2007⁽¹⁾.

Citation

1. This Order may be cited as the Legal Profession and Legal Aid (Scotland) Act 2007 (Commencement No. 5) Order 2008.

Appointed day

2. 1st October 2008 is the appointed day for the coming into force of the following provisions of the Legal Professional and Legal Aid (Scotland) Act 2007:—

- (a) sections 2 to 26;
- (b) sections 28, 33, 35 to 38, 40, 42, 43 and 45;
- (c) sections 47 to 57;
- (d) section 66;
- (e) section 77;
- (f) section 81, in so far as not already commenced;
- (g) schedule 2;
- (h) schedule 4; and
- (i) schedule 5, in so far as not already commenced, except for paragraph 3(7)(a)(iii).

Status: *This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

St Andrew's House,
Edinburgh
17th September 2008

KENNY MACASKILL
A member of the Scottish Executive

EXPLANATORY NOTE

(This note is not part of the Order)

This Order brings into force on 1st October 2008 the remaining provisions of the Legal Profession and Legal Aid (Scotland) Act 2007 (“the Act”) which relate to the setting up of the Scottish Legal Complaints Commission (“the Commission”), as well as some of the legal aid provisions. This is the fifth Commencement Order.

Article 2(a) commences sections 2 to 26. Sections 2 to 25 provide for the receipt, handling and investigation of conduct or service complaints against practitioners by the Commission. Section 26 allows the Scottish Ministers, by order, to provide for the abolition of the Scottish legal services ombudsman. An order will be made shortly after the coming into force of this provision.

Article 2(b) commences a number of sections:

- Section 28 sets out the requirement for practitioners against whom a services complaint is made to pay a complaints levy to the Commission.
- Section 33 establishes the duty of relevant professional organisations to forward certain complaints to the Commission.
- Section 35 requires the Commission to monitor how practitioners deal with matters that result in services complaints, to identify trends and to publish reports on these trends. It also requires the Commission and relevant professional organisations to enter into protocols as respects sharing of information.
- Section 36 requires the Commission to monitor how practitioners deal with conduct complaints, to identify trends and publish reports on these trends. The Commission may also provide guidance and recommendations to the relevant professional organisations.
- Section 37 provides that the Commission may obtain information from the relevant professional organisations for purposes of section 23 (handling complaints), 24 (investigation under section 23) or 36 (monitoring etc of conduct complaints).
- Section 38 provides that the Commission and the relevant professional organisations must liaise with each other to ensure efficient and effective working in relation to any investigation or report under the Act.
- Section 40 provides that the Commission may issue guidance to the relevant professional organisations about how practitioners deal with complaints about professional conduct or professional services and this guidance may recommend standards.
- Section 42 provides, for the purposes of the law of defamation, that the publication of certain reports made by the Commission is privileged unless proved to be made with malice.
- Section 43 provides that the Commission, any of its employees or any person acting on its behalf are prohibited from disclosing information obtained by it in connection with a complaint, except for the purposes of enabling or assisting the Commission to exercise any of its functions, or where disclosure is required by law.
- Section 45 provides for the form and service of written notices under Part 1 of the Act.

Article 2(c) commences the following sections:

- Section 47 places a duty on the relevant professional organisations to investigate conduct complaints.

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- Section 48 provides the relevant professional organisations with the power to examine documents and demand explanations from a practitioner, a practitioners firm or an employing practitioner where they are satisfied they need to do so for the purposes of an investigation into a conduct complaint.
- Section 49 provides that a relevant professional organisation may apply to the court for an order freezing bank accounts held in the name of a practitioner or firm where there is reasonable cause to believe there has been financial impropriety, in the course of investigation into a conduct complaint.
- Section 50 provides that relevant professional organisations are entitled to recover from practitioners any expenditure they might reasonably incur in respect of action taken on their part under section 48 or 49 of the Act.
- Section 51 provides that a relevant professional organisation may apply for a court order where a third party refuses or fails to produce documents or information in relation to a conduct complaint.
- Section 52 provides that relevant professional organisations, any of their employees or any person acting on their behalf are restricted from disclosing information contained in a conduct complaint or obtained in the course of considering or investigating such a complaint unless it is for the purpose of enabling the professional body to exercise any of its functions in relation to such a complaint or where disclosure is required by law.
- Section 53 amends the Solicitors (Scotland) Act 1980 (“the 1980 Act”) (by inserting sections 42ZA, 42ZB, 53ZA, 53ZB, 53ZC, 54A and 55A) to create duties and powers for the Council of the Law Society of Scotland (“the Council”) and the Scottish Solicitors' Discipline Tribunal (“the Tribunal”) in relation to unsatisfactory professional conduct by a solicitor.
- Section 54 amends the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (“the 1990 Act”) (by inserting sections 20ZA, 20ZB, 20ZC, 20B, 20C, 20D and 20E) to create duties and powers for the Council and the Tribunal in relation to unsatisfactory professional conduct by conveyancing and executry practitioners.
- Section 55 inserts new provisions into both the 1980 Act (sections 42ZC and 42ZD) and the 1990 Act (sections 20ZD and 20ZE) for further powers of the Commission where it has made a report to the relevant professional organisation about a practitioner’s competence in relation to any aspect of the law or legal practice under section 10(2)(e) of the Act.
- Section 56(1) amends section 53 of the 1980 Act (powers of the Tribunal) to enable the Tribunal to direct a solicitor found guilty of professional misconduct to pay compensation of up to £5,000 to any person the Tribunal considers to have suffered loss, inconvenience or distress as a direct result of the professional misconduct.
- Section 56(2) amends section 55 of the 1980 Act (powers of the Court) to provide that on an appeal relating to a complaint of professional misconduct against a solicitor, the Court of Session may impose a fine of up to £10,000 on the solicitor and order the solicitor to pay compensation of up to £5,000 to the complainer.
- Section 56(3) amends section 20(2) of the 1990 Act (professional misconduct etc. for conveyancing and executry services) to allow the Council to direct the payment of compensation of up to £5,000 to a complainer in cases where that person has been directly affected by a practitioner’s professional misconduct or where the practitioner has been convicted of a criminal offence rendering the practitioner no longer a fit and proper person to provide services. Similarly, section 20(2B) of the 1990 Act has been amended so that the Tribunal may also direct a practitioner to pay compensation up to £5,000 to complainers in cases of professional misconduct.
- Section 57 inserts new provisions into section 54 of the 1980 Act setting out rights of parties in relation to reviews of decisions and appeals to the Court of Session against decisions of the

Tribunal in conduct complaints other than unsatisfactory professional conduct, i.e. professional misconduct and failure by incorporated practices to comply with any provisions of the 1980 Act. Similarly, section 57 inserts new provisions into section 20 of the 1990 Act in relation to professional misconduct appeals involving conveyancing and executry practitioners.

Article 2(d) commences section 66. Section 66 amends section 25D of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”) to enable the Scottish Legal Aid Board to remove the name of a firm or solicitor from the register of those able to provide criminal legal assistance where the firm or solicitor has in the past committed a material breach of the code of practice in relation to criminal legal assistance, regardless of whether the code is currently being complied with.

Article 2(e) commences section 77. It provides that the Act will not apply to certain advice, services or activities. The Legal Services Act 2007 (Commencement No. 2 and Transitory Provisions) Order 2008 (S.I.2008/1436), which commences the Scottish provisions in the Legal Services Act 2007, commences section 195(4) of that Act, which omits section 77 of the Act. The result of the commencement of both these sections is that the Commission will have the power to deal with matters which are reserved.

Article 2(f) commences section 81 in so far as not in force. It relates to schedule 5 which makes minor and consequential modifications.

Article 2(g) commences schedule 2, which relates to the Commission’s powers under section 17 to require legal practitioners to produce documents and provide explanations in connection with complaints and under section 37 to require relevant professional organisations to provide it with information and documents for the purposes of sections 23, 24 or 36 of the Act.

Article 2(h) commences schedule 4 which provides relevant professional organisations with further powers to obtain documents by court order where either a practitioner or a complainer has refused or failed to produce or deliver them.

Article 2(i) commences schedule 5 in so far as not yet in force with one exception. Schedule 5 which makes a number of minor amendments and repeals and amendments consequential on the provisions of the Act to the 1980 Act, the 1986 Act, the 1990 Act and some other Acts. The exception is paragraph 3(7)(a)(iii) (in relation to amendments to the 1990 Act) since this contains a minor technical error.

All the amendments to the 1980 Act and the 1990 Act in the Act have to be read with the minor and consequential amendments made by the Legal Services Act 2007.

Sections 46, 79, 80 and 82 of the Act came into force on Royal Assent, which was 19th January 2007. Therefore, this Commencement Order brings into effect all provisions relating to the Commission and the new complaints regime. The only sections which require to be brought into force in the future relate to legal aid in Part 4 of the Act (namely, sections 64, 65, 69 (so far as not yet commenced), 70, 72 and 75).

NOTE AS TO EARLIER COMMENCEMENT ORDERS

(This note is not part of the Order)

The following provisions of the Act have been brought into force by commencement order made before the date of this Order:–

| <i>Provision</i> | <i>Date of Commencement</i> | <i>S.S.I. No.</i> |
|---|-----------------------------|--------------------------|
| Sections 69(1), (2)(a) and (4), 71, 73 and 76. | 8th February 2007 | 2007/57 |
| Section 1 so far as relating to paragraphs 1 to 7, 12 and 14 of | 19th March 2007 | 2007/140 |

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| <i>Provision</i> | <i>Date of Commencement</i> | <i>S.S.I. No.</i> |
|--|-----------------------------|--------------------------|
| schedule 1, sections 44 and 61, section 81 so far as relating to paragraph 3(10) of schedule 5, paragraphs 1 to 7, 12 and 14 of schedule 1, paragraph 3(10) of schedule 5. | | |
| Sections 67, 68 and 74. | 30th July 2007 | 2007/335 |
| Sections 1 (insofar as not already commenced), 27, 29, 30, 31, 32, 34, 39, 41, 58, 59, 60, 62, 63, 78 and 81 (so far as relating to paragraph 1(15) and (16) and paragraph 6 of schedule 5; paragraphs 8 to 11, 13, 15 and 16 of schedule 1; schedule 3; and paragraph 1(15) and (16) and paragraph 6 of schedule 5. | 23rd November 2007 | 2007/497 |