

The Licensed Legal Services (Complaints About Approved Regulators) (Scotland) Regulations 2018

Purpose

The purpose of this instrument and accompanying Guidance document is to establish a framework for the investigation of a complaint about an Approved Regulator of Licensed Legal Services Providers.

The Legal Services (Scotland) Act 2010 (the 2010 Act) removes restrictions which previously prevented solicitors entering into business relationships with non-solicitors, allowing both investment by non-solicitors and external ownership. Solicitors (and/or investors who are members of a regulated profession e.g. actuaries) will require to hold at least a 51% majority stake in the business. These new legal entities will be known as Licensed Legal Services Providers. An Approved Regulator (the 2010 Act allows for a maximum of 3 Approved Regulators) will regulate them. The Law Society of Scotland has been approved by Scottish Ministers as an Approved Regulator, but has yet to be authorised.

Complaints Handling Process against an Approved Regulator

Section 79 of the 2010 Act outlines the process for making complaints about an Approved Regulator. It also contains a power to make further provision by regulations.

The draft **Licensed Legal Services (Complaints About Approved Regulators) (Scotland) Regulations 2018** make further provision setting out the statutory requirements for:

- Investigation of multiple complaints against an Approved Regulator;
- Interim report arrangements; and
- Obtaining information, documents and an explanation from an Approved Regulator.

The process for dealing with complaints about how an Approved Regulator has dealt with a Regulatory Complaint regarding a Licensed Legal Services Provider is set out in Parts 1 and 2 of the Legal Profession and Legal Aid (Scotland) Act 2007 (the 2007 Act).

A **guidance document**, which sits alongside these Regulations, sets out the role of the Scottish Ministers in the handling of complaints about Approved Regulators. Under Section 79, the Scottish Ministers have a function of investigating and determining a complaint. They have the discretion to delegate the function to the Scottish Legal Complaints Commission (the Commission).

The Scottish Ministers intend to write to the Commission formally **delegating** their functions of investigating a complaint and notifying the complainer and Approved

Regulator of the outcome. In addition, the delegation will waive the requirement on the Commission to refer a complaint to the Scottish Ministers.

Rationale for Scottish Government Intervention

The intended effect of the Regulations and Guidance documentation is to put in place an effective system for handling complaints about an Approved Regulator to ensure that:

- (a) complaints are dealt with efficiently;
- (b) complaints are properly investigated;
- (c) complainants are told the outcome of the investigation of their complaint; and
- (d) upheld complaints are passed from the Commission to the Ministers for remedial or punitive action to be taken if necessary, in the light of the outcome of a complaint.

National Performance Framework

These Regulations and Guidance will contribute towards achievement of the following outcomes in the Scottish Government National Performance Framework:

- We have a globally competitive, entrepreneurial, inclusive and sustainable economy.
- We have thriving and innovative businesses, with quality jobs and fair work for everyone.
- We respect, protect and fulfil human rights and live free from discrimination.

Scottish Government Economic Strategy

These Regulations and Guidance documentation will contribute towards the achievement of the following objectives of the Scottish Government Economic Strategy:

- By widening the legal services market and introducing competition, the introduction of non-legal investment could introduce competition into the legal services market and in doing so this may **empower consumers to make good choices for legal services**.
- These Regulations and Guidance will supplement a statutory complaints system that is **effective, flexible and capable of both protecting consumers of legal services from harm and empowering them to make good choices**. It also provides a system of measuring the performance of the Approved Regulator, through the investigation of complaints.

Consultation

In accordance with section 5 of the 2010 Act, a consultation in relation to the complaints handling process took place between June and August 2018 with interested parties. There were 3 responses to this consultation. These were:

- The Law Society of Scotland
- The Scottish Legal Complaints Commission
- The Scottish Legal Complaints Commission Consumer Panel

The 3 responses favoured the introduction of the process and made some helpful suggestions for strengthening the complaints process. We have listened to the views put forward by the respondents and subsequently made further revisions to the Guidance on handling complaints about Approved Regulators. A copy of the responses to the consultation has been published on the Scottish Government website.

Options

Option 1: Do Nothing

Complaint handling is a crucial element of the implementation of the scheme to liberalise the legal services market by allowing alternative business structures (ABS). Complaints should be handled by people who have the appropriate skills and authority to resolve or investigate complaints and, where appropriate, provide remedies and identify improved practices.

Section 79 requires a complaints process and the Regulations and Guidance are required to ensure that the process is clear and complainers and Approved Regulators understand the various obligations.

In addition, if the Scottish Government decided not to delegate the function of investigating complaints to the Commission, the effect would be that Scottish Ministers would have sole responsibility for investigating and disposing of Approved Regulator complaints. LSS point out that the Scottish Government can't recover from costs from the approved regulator so the impact could be a higher Approved Regulator levy on the basis of having to develop or acquire specialist expertise to deal with complaints.

In instances of multiple complaints against an Approved Regulator or several regulators, the effect of doing nothing would be that the Commission cannot opt to conduct one single investigation. There would also be no requirement on the Approved Regulator to provide information, documents and explanations in relation to a complaint about an Approved Regulator.

Option 2: Make further provision through secondary legislation and guidance documentation for complaints handling against an Approved Regulator.

If the Scottish Government makes further provision for the complaints handling procedures in secondary legislation and guidance, the Scottish Government will be carrying out the will of the Scottish Parliament (Section 79 of the 2010 Act requires a complaints process) in a manner that is appropriate and fair.

We propose a mixed approach to set out the requirements for complaints handling and complaints investigation. The Regulations set out the requirements for:

- Investigation of multiple complaints about an Approved Regulator;
- Interim report arrangements; and
- Obtaining information, documents and explanation from an Approved Regulator.

The Guidance sets out:

- Definition of Approved Regulator as specified in the Legal Services (Scotland) Act 2010;
- Definition of Licensed Legal Services Providers as specified in the Legal Services (Scotland) Act 2010;
- The process for determining whether a complaint is an Approved Regulator complaint (or a handling complaint under the 2007 Act) and whether it is frivolous, vexatious or totally without merit;
- The function of delegation by Scottish Ministers;
- Who can complain;
- What can be complained about;
- Time limit;
- Continuation of complaints;
- Handling multiple complaints;
- Investigatory powers;
- Process for investigation and determination of an Approved Regulator complaint; and
- Summary of actions that may be taken by Scottish Ministers.

The advantage of guidance is that it is flexible and can be revised easily and quickly and can be adapted to changing circumstances. This will be subject to appropriate consultation.

In addition, by delegating the investigatory and notification functions to the Commission, complaints will be dealt with (to the point of issuing sanctions in upheld complaints, which is exercisable only by the Scottish Ministers) by an expert body who are experienced in investigating and handling legal service complaints.

Sectors and Groups Affected

These proposals will impact on consumers of legal services and all business sectors – public, private and third sector- because the proposals make provision for a complaints system that enables a complaint or multiple complaints to be investigated about an Approved Regulator of legal services.

Costs

The Commission has incurred costs in setting up a separate complaints system to handle complaints against an Approved Regulator. The Scottish Government is providing grant funding amounting to £48,545 payable over the financial year 01/04/2018 to 31/03/2019 in connection with funding the set up costs of the ABS scheme for complaints about legal services. This comprises costs accrued to 31 March 2018 (£20,080) and future costs (limited to £28,465) reimbursed the Commission for the set up costs amounting to £48,545. The main objective of the grant is to have an effective complaints handling system to be fully operational before authorisation of an Approved Regulator for the ABS scheme for legal services in Scotland.

The Commission's Board has approved and published the year 1 (2018/2019) costs in terms that the Approved Regulator levy is £20,000 and the Licensed Legal Service Provider levy will be £1,000 (based on an estimate of 5 x providers entering the market, although no such provider has yet to be licensed). If a complaint is upheld, a Complaints levy of up to £10,000 could be applied by the Commission. The application of the Complaints Levy is yet to be determined, and will largely depend on the actual cost to the Commission of dealing with the complaint. The same principles which the Commission applies in the application of the Complaints Levy for service complaints may be followed.

As this is enabling rather than prescriptive legislation, it is not possible at this stage to assess with any precision the actual operational costs or the extent to which ABS will be adopted by the legal profession, and in what form.

The level of take up, and the nature of ABS which emerge, will have a significant impact on the regulatory costs. There will be regulatory costs for Approved Regulators and Licensed Legal Services Providers, but these are businesses which would not be able to operate without this legislation, and will only come into being if the benefits outweigh the costs.

Discussions on the Alternate Business Structures Scheme and Complaints Handling Process

The Scottish Government has engaged with, and consulted, a broad range of parties interested in the ABS Scheme since the 2010 Act was passed. The respondents to the last consultation have favoured the introduction of the process and made some helpful suggestions for strengthening the complaints process. We have listened to the views put forward by the respondents and subsequently made further revisions to Guidance on complaints handling.

Legal Aid Impact Test

There is no impact on legal aid.

Enforcement, sanctions and monitoring

The Scottish Ministers will work closely with the Commission and other stakeholders to keep the complaints handling process under review and consult if any substantive changes are required.

Enforcement Procedures

The Scottish Ministers will delegate their power to investigate complaints about Approved Regulators to the Commission. Where a complaint is upheld the Scottish Ministers must decide whether to take any of the measures open to them under Section 38 of the 2010 Act and Schedules 1 to 6 of the 2010 Act.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: **ASH DENHAM**

Date: 1 November 2018

Minister's name: **ASH DENHAM**

Minister's title: **Minister for Community Safety**

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