

JUSTICE COMMITTEE

Tuesday 16 September 2008

Session 3

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JUSTICE COMMITTEE **21st Meeting 2008, Session 3**

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Angela Constance (Livingston) (SNP)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*Paul Martin (Glasgow Springburn) (Lab)
*Stuart McMillan (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)
Marlyn Glen (North East Scotland) (Lab)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Paul Johnston (Scottish Government Legal Directorate)
Kenny MacAskill (Cabinet Secretary for Justice)
Colin McKay (Scottish Government Constitution, Law and Courts Directorate)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 16 September 2008

[THE CONVENER *opened the meeting at 10:16*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I remind everyone to switch off mobile phones.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take in private item 5, which is consideration of the committee's approach to its scrutiny of the draft budget 2009-10?

Members *indicated agreement.*

Subordinate Legislation

Legal Profession and Legal Aid (Scotland) Act 2007 (Transitional, Savings and Consequential Provisions) Order 2008 (Draft)

10:16

The Convener: Item 2 concerns an order that is subject to the affirmative procedure. I draw members' attention to the order and to its cover note. Before the motion is moved at agenda item 3, item 2 gives members the opportunity to ask the Cabinet Secretary for Justice and his officials any questions. I welcome Kenny MacAskill and his Scottish Government officials: Colin McKay, who is the deputy director of the legal system division; Paul Johnston and Carol Snow, who are solicitors in the constitutional and civil law division; and Carole Johnston, who is a policy adviser in the constitution, law and courts directorate.

I ask Mr MacAskill to speak to the order.

The Cabinet Secretary for Justice (Kenny MacAskill): The Scottish Legal Complaints Commission was established by the Legal Profession and Legal Aid (Scotland) Act 2007 to investigate complaints by the public about services provided by legal practitioners. The order provides for the transition from the complaints regime under the Scottish legal services ombudsman to the new regime under the commission. The SLCC will operate from 1 October 2008, when the remaining provisions on the SLCC in the 2007 act will come into force. A commencement order to that effect will be laid shortly. The office of the SLSO will shortly thereafter be abolished by another order.

The SLCC will receive conduct complaints and services complaints, but when it receives a complaint about a practitioner's conduct, it will refer it to the relevant legal body. From 1 October 2008, the SLCC will receive all conduct complaints and services complaints. Whether the existing law or the new law applies to a complaint will be determined by the type of complaint, and when the conduct first occurred or when the practitioner was first instructed.

The order will ensure that all conduct cases that the Law Society of Scotland or the Faculty of Advocates are investigating on 1 October, any subsequent handling complaints that follow and handling complaints that the SLSO is dealing with will continue to be dealt with in accordance with existing law—the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and the Solicitors (Scotland) Act 1980.

Conduct complaints that the SLCC receives on or after 1 October will be dealt with under the 2007 act if the conduct that is complained of occurred on or after 1 October. If the conduct first occurred before that date, it will be dealt with under the existing legislation.

Services complaints that the SLCC receives on or after 1 October will be dealt with under the 2007 act if the practitioner was first instructed after 1 October. If the practitioner was first instructed before 1 October, the existing law will apply.

To deal with complaints under the existing law, the SLCC needs to be able to perform the SLSO's functions, so the order provides that the SLSO's functions in the 1990 act—to the extent that they are saved—will be exercised by the SLCC.

The transitional provisions that relate to a complaint to the relevant professional organisation under section 33 of the 1990 act will apply only to a complaint that is made before 1 October 2010. After that date, the new regime will apply to all new complaints.

The order will ensure that no gap in provision exists for complainers, who would otherwise have nowhere to go. The arrangements will allow the SLCC to begin life without a backlog of cases and will give it time in the early days of its establishment to develop its processes and train staff.

The committee knows that in June we laid a draft order that was withdrawn when the revised order was laid. The revised provisions were drawn up following further consultation with the SLCC, the SLSO, the Scottish Solicitors Disciplinary Tribunal, the Faculty of Advocates and the Law Society of Scotland. The order reflects the considered approach of all parties and provides practical solutions to the complexities of transition.

The Ministry of Justice will lay an order that mirrors ours and which is also intended to be in force on 1 October. The two orders will ensure that devolved and reserved areas are—to the extent that they can be—covered in the same way.

I move that the committee recommend that the draft order be approved.

The Convener: You are a bit ahead of yourself in trying to move the motion.

Do members have questions? The order is reasonably straightforward.

Robert Brown (Glasgow) (LD): I declare my membership of the Law Society of Scotland, which is relevant, although I have been a non-practising solicitor for some years.

I do not follow the second part of the first paragraph in the Executive note, which is on policy objectives. It says:

“On 1 October 2008 the SLCC's new complaint functions ... are commenced ... Subject to a commencement order which will be made shortly, those provisions will not, however, be commenced until 1 October 2008.”

What on earth does that mean?

Kenny MacAskill: The draft order sets out transitional arrangements; the commencement order is still to be laid. The draft order paves the way and various issues will be consequent on it as we head in the general direction of bringing matters together. It is not the be-all and end-all. It is not a start, as the journey has already commenced, but a further order will be laid to commence provisions in October.

Robert Brown: I am not totally certain that I understand that.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I share a wee bit of Robert Brown's concern about that paragraph.

What changes will people see from 1 October? What difference will the order make?

Kenny MacAskill: The SLCC will kick in. The order divides up the hangover matters. Debates will have to take place about conduct and services complaints, which are described in the principal legislation that was passed in 2007.

We had to decide what to do with complaints that predate 1 October and which are being dealt with. We decided that, instead of winding down the previous system entirely and passing everything to the SLCC's books, we required a transitional period in which complaints that the SLSO was handling continued to be dealt with. The aim is to make the transition as seamless as possible in a fairly complex situation.

Cathie Craigie: On 1 October, the SLCC's new complaints functions will come into being. In what way will somebody who lodges a complaint in the middle of September be treated differently from somebody who lodges a complaint on 1 or 2 October?

Colin McKay (Scottish Government Constitution, Law and Courts Directorate): The SLCC's regime gives it greater powers of investigation and allows it to award compensation levels that are not available to the SLSO. The SLSO is a traditional ombudsman. In essence, it considers how the Law Society has investigated a complaint and makes recommendations to the Law Society about how it investigates complaints. It can criticise the Law Society, but it has no powers to determine complaints.

When the SLCC takes on new complaints under the new law, if they are in relation to inadequate professional services, it will carry out its own investigation from the start and make its own determination, including awards of compensation

up to £20,000. The 2007 act brings in that new regime, but the order provides that, in relation to inadequate professional services, it will apply only to cases in which the solicitor was instructed by the client after 1 October 2008. It sets out the cut-off date for the new provisions applying.

Nigel Don (North East Scotland) (SNP): I am confident from what the cabinet secretary has just said that the operational provisions are seamless and I think I can see what you are trying to do. However, is there a risk that at some point in the future the kind of lawyer that we are having to deal with in such situations, because they are the kind of lawyer who is imperfect, will find it convenient to say that their imperfection started earlier and therefore goes back to a previous regime when compensation was not payable? Might a lawyer want to backdate his misconduct to avoid paying compensation?

Colin McKay: When the conduct or the inadequate professional services occurred would be a matter of fact that the SLCC would determine. One reason for making the cut-off date for inadequate professional services the date of instruction by the client is that it is usually reasonably clear and unarguable when the client first instructed. It should not be possible for the solicitor to forum shop and try to go back to the earlier regime.

Kenny MacAskill: If there is to be an argument, it will be at the outset, because it is the date of instruction that decides which regime will be used. Any solicitor would have to make that argument at the outset as opposed to waiting many moons and saying, "Yah, boo—you instructed me on such and such a date." Clearly, the first issue that has to be considered is under which path the complaint will be considered. Therefore, one looks at the date of instruction. There may in some cases be an argument at the outset but, as Colin McKay correctly said, the date of instruction is a matter of fact, which I presume could be gleaned from the file notes and the evidence of the client and the solicitor as to when people attended and first instructed.

Nigel Don: But do you accept in principle that there is a risk—forgive me, it may be penny numbers—that if someone pops in to see a solicitor for 10 minutes for advice on whether something is worth coming back on and then comes back a month later, there may be a scrap about which of those dates was the first instruction, because it could significantly affect the situation?

Kenny MacAskill: There clearly could be scenarios in which a client who has many cases is consulting a solicitor and a matter may be floated. The date of instruction would be a matter of fact that would have to be decided by the appropriate

body in the first instance. For example, if the date was disputed because a client went in to discuss their divorce and it was only during the course of the discussion that they asked the solicitor to look at their will or their house, clearly such matters are matters of fact that will have to be resolved at the outset, because the date is pivotal to the process.

In the limited number of cases in which the matter may arise—I accept that it may arise in some cases—the first question that will have to be discussed and decided is when the first instruction was. It may be that the client said, "I'm thinking of buying a house." That is not necessarily an instruction to buy. The date of instruction is a matter of fact that the organisation would have to establish.

Nigel Don: The decision as to fact would be made by the SLCC.

Kenny MacAskill: Yes.

Nigel Don: Definitely? You can never exclude the courts, but—

Kenny MacAskill: Subject to any challenge that may be sought by judicial review or any other means, it is a matter on which the SLCC would decide, I presume by looking at documentary evidence—in particular, the file—or, if need be, the evidence of witnesses.

Bill Butler (Glasgow Annie'sland) (Lab): I am a wee bit confused, as my colleague Robert Brown was, by the end of the first paragraph of the Executive note with regard to policy objectives. The second last sentence ends,

"w will replace the complaint functions under the 1990 Act."

Rather than have another sentence, would it not be better to put in parentheses

"subject to a commencement order which will be made shortly"?

What comes after that is redundant, if not tautological.

10:30

Kenny MacAskill: There may be a tautology, but our understanding is that that has no legal effect and therefore is not critical. I bow to Bill Butler's superior grammar, but such notes are written in that manner. I understand your disagreement with the syntax or grammar, but there is no consequential effect.

Bill Butler: Fair enough. I am not going to die in a ditch over the matter, but there seems to be a lack of clarity. However, I hear what you say and, if that is what you are advising the committee, I accept it.

Robert Brown: I am sorry, but I am going to be difficult again. The problem is that I do not take

meaning out of that paragraph in the Executive note. I think that I understand what the order will do, but I want to be clear about the other commencement order. What will it commence or, to put it another way, what will not be commenced until 1 October?

Paul Johnston (Scottish Government Legal Directorate): A commencement order that will be laid in the next few days will bring into force the vast majority of the provisions of the 2007 act that are not already in force. That order will ensure that the Legal Complaints Commission has all the powers that the Parliament decided to give it under the 2007 act.

Robert Brown: So that is the main commencement order.

Paul Johnston: Yes—it is the fifth commencement order, but it is the main one. The reason why we need two orders is to do with the powers in the 2007 act. To make transitional provisions, we must use one set of powers—which is what we have done in the order that we are considering today—and to commence, we use a different set of powers. There is no parliamentary procedure associated with those powers, although the order will be laid a couple of weeks before it comes into force.

Robert Brown: That is helpful.

The Convener: Leaving aside the tautology in the policy objectives, and as members have no further questions, we will proceed to agenda item 3, under which we will consider formally the motion to recommend that the order be approved. I invite Mr MacAskill to move motion S3M-2220.

Motion moved,

That the Justice Committee recommends that the draft Legal Profession and Legal Aid (Scotland) Act 2007 (Transitional, Savings and Consequential Provisions) Order 2008 be approved.—[*Kenny MacAskill.*]

Motion agreed to.

Scotland Act 1998 (Agency Arrangements) (Specification) (No 2) Order 2008 (SI 2008/1788)

The Convener: Agenda item 4 is consideration of one item of subordinate legislation under the negative procedure. The Subordinate Legislation Committee raised no points on the order. Are members content to note the order?

Members *indicated agreement.*

The Convener: That concludes the public part of the meeting, so I ask members of the press and public to leave.

10:33

Meeting continued in private until 12:13.

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