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Mr S Todd
Assistant Clerk to the Public Petitions Committee

By email only to: petitions@scottish.parliament.uk

7 August 2013

Our ref: Petition PE 1479
Tel: 0131 201 2130
Email: enquiries@scottishlegalcomplaints.org.uk

Dear Mr Todd

Consideration of Petition PE1479

Thank you for your letter of 5 June 2013 seeking views on the issues raised in Petition PE1479 regarding the complaints procedure under the Legal Profession and Legal Aid (Scotland) Act 2007 (the 2007 Act).

We were asked three questions which have been answered below.

1. What are your views on what the petition seeks?

The 2007 Act set up the SLCC as an independent and impartial body which acts as the gateway for all legal complaints in Scotland. We agree that it is very important that vulnerable members of the public have access to a complaints system which builds trust and confidence. Under the Act, the SLCC's Rules set time limits for the making of complaints. We are very aware that there may be exceptional reasons or circumstances for a complaint being made outside of the time limits. In addition, it may be in the public interest for us to investigate a complaint which has been made beyond the time limits. These points are addressed in our Rules.

Although Petition PE1479 mentions Rule 4(6) which establishes a one year time limit for making complaints, it does not mention Rules 4(7) and 4(8) which qualify it. When we are calculating the one year period, Rule 4(7) allows us to disregard any time in which the complainer was excusably unaware of the suggested misconduct or inadequate professional services. Rule 4(8) gives us a wide discretion to investigate complaints not made within the time limit where we consider there are exceptional reasons or circumstances or where we consider it to be in the public interest to proceed. An extract of the relevant Rules is attached, for information.

We provide more information on how the criteria are used in answer to question 3 below.

2. *What is your view on the petitioners' call that there should be no time limit at all?*

Complaint handling systems usually, although not invariably, operate with a time limit. The principle is that if there is no time limit, then uncertainty results for both the complainer and the practitioner. As time goes on it can become harder to gather evidence to be able to assess a case fairly. Our time limit (with the discretion explained in the answer to question 1) bears comparison with other complaint handling bodies and we comment further on this in answering question 3.

We believe that there should be a time limit and that we should have the ability to exercise discretion for exceptional reasons or in exceptional circumstances or where it is in the public interest. We are able to do this under our current Rules.

3. *The rules explain that a complaint will not be accepted (unless the Commission considers that the circumstances are exceptional) if it is made more than one year after the suggested misconduct or inadequate service has occurred. What were the criteria used to decide on the time limit of one year? What circumstances are considered to be exceptional?*

Time limits are a common feature of complaint handling systems and our one year limit bears comparison with other bodies. Three examples may be helpful.

The Scottish Public Services Ombudsman which handles complaints about a range of public bodies including local authorities, the NHS and prisons, operates a one year time limit. The Police Investigations and Review Commissioner Scotland requires a complainer to submit a completed complaint form within three months of the date on which the police body communicated its findings. In England and Wales, the Legal Ombudsman is the equivalent body to the SLCC. It will consider complaints up to six years from the date of the act or omission or three years from when the complainer should have known about it. However, it requires complainers to submit their complaint within six months of receiving a final letter from the legal practitioner and in this sense this is a more restrictive timeframe than our Rules set out.

The SLCC is a second tier complaint handling organisation- in other words the practitioner should be given an opportunity to resolve the complaint before we are involved. A complaint does not have to be made in the middle of the service since the one year period for making a service complaint starts once the service has ended. This means that the complainer need not go to the trouble and possibly expense of instructing a new practitioner.

Although we believe that a year is sufficient time to make a complaint, we appreciate that a complainer may not be aware of their concerns within a year. For example, in a conveyancing transaction the complainer may be unaware that a practitioner had not registered the title to their property until they decided to sell the property years later. For this reason, in calculating the one year time limit we may disregard any time during which the complainer was, in our opinion, excusably unaware of their concerns.

We take a case by case approach to assessing exceptional circumstances. Our full policy on time limits is attached.

We recognise that someone affected may feel unable to make the complaint themselves, so we accept complaints which are made on their behalf. We believe this is an important support, particularly in cases where the complainer may be vulnerable.

When we consider a complaint has been made outwith the time limits, we write to both parties explaining our initial view. Both parties are invited to submit comments on this. In particular, complainers are invited to comment on:

- a) Whether they consider they have made the complaint within the time limits; and / or
- b) Whether there are exceptional reasons why the complaint was not made sooner; or

- c) Whether there are exceptional circumstances relating to the nature of the complaint; or
- d) the circumstances are such that they consider it to be in the public interest to proceed;

Any comments received are considered before a final decision is made. The decision and the reasoning for it are then issued to both parties. There is a right of appeal to the Court of Session.

Our Rules are written following consultation with the relevant professional organisations and consumer interest groups. We reviewed our Rules on the timebar and consulted on them in April 2013. There was no suggestion from any of the parties to the consultation that the one year limit should be removed or amended. We are currently involved in a working group looking at how the 2007 Act might be improved and again consumer interest groups are part of this process. As a result of this work we expect to be consulting on our full rules, including time limits, in the autumn. We will consider how best to ensure that the views of vulnerable groups are sought as part of the process.

We are ready to assist the Public Petitions Committee in providing any further information or comment required.

Yours sincerely

Matthew Vickers
Chief Executive Officer

Enc.

Extract of 2013 Rules

Copy of policy on Time Limits for Making Conduct and Inadequate Professional Service Complaints

Rules of the Scottish Legal Complaints Commission 2013

The rules and directions as to procedure

(Extract)

4. (6) Subject to the provisions contained in Rule 4(8):
- (a) A complaint alleging professional misconduct, unsatisfactory professional conduct or a conviction, will not be accepted if, in the opinion of the Commission, it is made more than 1 year after the alleged occurrence of the professional misconduct, unsatisfactory professional conduct or conviction complained of.
 - (b) A complaint made by a client alleging inadequate professional services, i.e. where professional services have been provided by a practitioner in connection with any matter in which the practitioner has been instructed by the client, will not be accepted if, in the opinion of the Commission, the complaint is made more than 1 year after the **date on which any** services in respect of that matter **were last** provided to that client.
 - (c) A complaint made by a third party alleging inadequate professional services, i.e. where the professional services have been provided by a practitioner in connection with any matter in which the practitioner has not been instructed by the complainer, will not be accepted if, in the opinion of the Commission, the complaint is made more than 1 year after the alleged occurrence of the specific act or omission complained of.
- (7) In determining whether the period of 1 year mentioned in sub-paragraph (6) has elapsed, there is to be disregarded any time during which the complainer was, in the opinion of the Commission, excusably unaware of the alleged:
- (a) professional misconduct, unsatisfactory professional conduct or conviction;
 - (b) inadequate professional services.
- (8) Notwithstanding sub-paragraphs (6) and (7), the Commission may proceed to take preliminary steps and further action as regards a complaint that has not been made within the Commission's time limits if there are, in the opinion of the Commission:
- (a) exceptional reasons why the complaint was not made sooner or;
 - (b) exceptional circumstances relating to the nature of the complaint or;
 - (c) the circumstances are such that the Commission considers it to be in the public interest so to proceed.
- (9) On a complaint being accepted, the Commission is to send a copy of it to each of the parties.

**Title: CH005 Time Limits for Making Conduct and IPS
Complaints POLICY**

Author: SLCC

Date: 11 June 2013

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1 Introduction & Application

- 1.1 This document sets out the Scottish Legal Complaints Commission's (SLCC) policy on timescales for making a complaint about the conduct of and / or service provided by Scottish Legal Practitioners. This policy applies to complaints received by the SLCC on or after 3 June 2013.

2 Powers and Rules

- 2.1 Sections 4(1) and 4(3) of the Legal Profession and Legal Aid (Scotland) Act 2007 (the Act) provide that:

- (1) *Where a complaint referred to in section 2(1) is not made timeously, the Commission is not to take the preliminary steps referred to in section 2(4) in relation to it, and is not to take any further action under any other provision of this Part (except this section), in relation to it."*
- (3) *For the purposes of subsection (1), a complaint is not made timeously where –*
- (a) *rules made under section 32(1) fix time limits for the making of complaints;*
 - (b) *the complaint is made after the expiry of the time limit applicable to it;*
 - (c) *the Commission does not extend the time limit in accordance with the rules.*

Paragraph 2 of Schedule 3 to the 2007 Act provides that rules as to the SLCC's practice and procedure made under section 32(1) may in particular include provisions fixing time limits for the making of complaints against practitioners and as to the extension of any time limit for making complaints and the circumstances in which such extensions may be made.

- 2.2 The Commission's 2013 Rules include the following provisions:

- 4(1) *A complaint is made when it is on an SLCC complaint form registered as received at the office premises of the Commission at a time when those premises are open for business.*
- ...
- 4(6) *Subject to the provisions contained in Rule 4(8):*
- (a) *A complaint alleging professional misconduct, unsatisfactory professional conduct or a conviction, will not be accepted if, in the opinion of the Commission, it is made more than 1 year after the alleged occurrence of the professional misconduct, unsatisfactory professional conduct or conviction complained of.*
 - (b) *A complaint made by a client alleging inadequate professional services, i.e. where professional services have been provided by a practitioner in connection with any matter in which the practitioner has been instructed by the client, will not be accepted if, in the opinion of the Commission, the complaint is made more than 1 year after the date on which any services in respect of that matter were last provided to that client.*
 - (c) *A complaint made by a third party alleging inadequate professional services, i.e. where the professional services have been provided by a practitioner in connection with any matter in which the practitioner has not been instructed by the complainer, will not be accepted if, in the opinion of the Commission, the complaint is made more than 1 year after the alleged occurrence of the specific act or omission complained of.*
- 4(7) *In determining whether the period of 1 year mentioned in sub-paragraph (6) has elapsed, there is to be disregarded any time during which the complainer was, in the opinion of the Commission, excusably unaware of the alleged:*

- (a) *professional misconduct, unsatisfactory professional conduct or conviction;*
- (b) *inadequate professional services.*
- (10) *Notwithstanding sub-paragraphs (6) and (7), the Commission may proceed to take preliminary steps and further action as regards a complaint that has not been made within the Commission's time limits if there are, in the opinion of the Commission:*
- (d) *exceptional reasons why the complaint was not made sooner or;*
- (e) *exceptional circumstances relating to the nature of the complaint or;*
- (f) *the circumstances are such that the Commission considers it to be in the public interest so to proceed.*

3 Decision makers

3.1 Delegated authority for decision-making on timescales is set out in the SLCC's Scheme of Delegation.

Section of the Act	Decision	Main decision maker	Alternative decision maker
4(1) and (3)	Reject a complaint that is out of time	One Board Member	Determination Committee
4(1) and (3)	Accept a complaint that is borderline or where there are exceptional circumstances	One Board Member	Determination Committee
4(1) and (3)	Accept a complaint as being within time	HI	One of the following <ul style="list-style-type: none"> • SCI, or • OD

4 Applying the test

- 4.1 The test for whether a complaint should be rejected / accepted under this policy is two-stage:
- i. Was the complaint made outside the time limits?
 - ii. If so, are there exceptional circumstances and/or public interest reasons that mean the complaint should be accepted anyway (subject to the complaint being eligible under other criteria in the 2007 Act)?
- 4.2 The test can be applied at **any stage** in the SLCC's handling of the complaint. What this means in practice is that even when the SLCC has accepted a service complaint as eligible for investigation, if the investigation produces information that shows the complaint was late, the test can be applied at that later stage.
- 4.3 If the SLCC's initial view is that the complaint has not been made within time limits, the parties to the complaint will be given an opportunity to comment on the SLCC's view and to indicate whether exceptional circumstances apply before a decision is taken. Specifically, the complainer will be invited to provide an explanation as to why they believe exceptional circumstances apply and what those circumstances are. The SLCC may ask either or both parties for further information and/or evidence before making its decision.
- 4.4 IPS that pre-dates January 1989:
Complaints about IPS cannot be accepted if the alleged IPS pre-dates January 1989. The Solicitors (Scotland) Act 1988, which introduced the statutory concept of inadequate professional service, did not have retrospective effect and was not applied to complaints

relating to events that occurred prior to its commencement in January 1989. There is no provision in the 2007 Act to enable the SLCC to extend the concept of inadequate professional service back beyond the commencement of the 1988 Act in January 1989. It would be necessary for the 2007 Act to make express provision for such retrospective effect in order to overcome the strong common law presumption that professional persons should not be subjected to disciplinary sanctions in respect of conduct that did not constitute a disciplinary offence at the time that it occurred. There are no such express provisions in the 2007 Act.

4.5 The date services were last provided is the last date on which it can be demonstrated the practitioner provided services in respect of the particular matter in which the practitioner has been instructed by their client. For example, if the issues of complaint only concern a conveyancing matter but the practitioner later acted for the client in respect of an employment matter, the date the services were last provided in respect of the conveyancing matter is the key date.

4.5.1 The following are not counted as the last date on which services were provided:

- The date of chasing the complainer for payment of an unpaid fee note; and/or
- The date a complaint about conduct / service was dealt with by a practitioner.

Excusably unaware

4.6 The complainer must provide an explanation as to why they were unaware or could not reasonably have been aware of the issue complained about. The SLCC will consider the explanation and make a judgement based on its own assessment of the circumstances of the case.

Exceptional circumstances

4.7 Exceptional circumstances may relate to the substance of the complaint made and/or to why the complainer did not make the complaint sooner.

4.8 Claims of exceptional circumstances should normally be supported by appropriate evidence to support them. The SLCC will invite explanations and may seek supporting information. For example, if a complainer says they were in hospital for six out of the last 12 months, they should provide a doctor's letter (or confirmation from the hospital). The SLCC will not normally write to the doctor or hospital on the complainer's behalf (subject to any specific needs or difficulties a particular complainer may have).

4.9 There is no specific definition of exceptional and ultimately, what is exceptional is a matter of judgement for the SLCC. Exceptional reasons for not making complaint sooner might include:

- A medical condition or time in hospital. For example, if someone had been receiving regular treatment for a serious condition for much of the 12 months concerned, and could prove it.
- A serious medical condition of a close relative for whom the complainer was a main carer and could provide reasons/evidence for why it prevented them from complaining.
- Personal circumstances that made complaining difficult to the point that to reject the complaint would be unfair. For example someone serving in the armed forces in a war zone.

4.10 Exceptional would not normally include:

- Not knowing about the SLCC

- Illness that affected only a small part of the time. For example, if someone was in hospital for six weeks after a serious break to their leg.
- A prolonged illness that would not have prevented a complaint being made. For example, recuperation after a relatively minor operation.
- Being too busy to make the complaint because of pressures of work / other circumstances.

4.11 Exceptional reasons relating to the substance of a complaint might include issues of such seriousness that in the SLCC's view it is in the public interest it is investigated, for example allegations of financial transgression.

Rejecting part of a complaint

4.12 The SLCC may apply the test to part of a complaint if it considers it appropriate to do so in a particular case. This will normally only apply where it can be demonstrated that the act / issue to which the test is applied can stand-alone from the rest of the complaint and where they are so separate that there is no justification for relaxing the time limit in relation to an earlier act / issue simply because a complaint is also directed at a subsequent act / issue.

5 Communicating the decision

5.1 The SLCC will give reasons and explanation as to why it has:

- rejected a complaint as being outside time limits and why exceptional circumstances have not been accepted; and / or
- accepted a late complaint because it accepts that circumstances were exceptional.

5.5 The reasons should set out clearly why the decision was taken, what evidence or information was taken into account.

