

These notes relate to the Council of the Law Society of Scotland Act 2003 (asp 14) which received Royal Assent on 1 May 2003

COUNCIL OF THE LAW SOCIETY OF SCOTLAND ACT 2003

EXPLANATORY NOTES

THE ACT

3. The Act arises from three proposals by the Council to remove any doubt about the powers of the Council—
 - to delegate their statutory functions to a committee or sub-committee or some other person;
 - to provide for the appointment of sub-committees in the scheme for the constitution of the Council; and
 - to provide in that scheme for the appointment of lay persons to be members of a committee or sub-committee and for the lay persons so appointed to form a majority in the committee or sub-committee to which they have been appointed.

4. The Law Society of Scotland (“the Society”) is a statutory body corporate established by the [Solicitors \(Scotland\) Act 1980 \(c.46\)](#) (“the 1980 Act”). Under section 1 of the 1980 Act, the Society has as its objects the promotion of—
 - the interests of the solicitors’ profession in Scotland; and
 - the interests of the public in relation to that profession.

The Society regulates the profession of solicitors in Scotland and every practising Scottish solicitor is a member of the Society. The 1980 Act confers functions upon the Society but provides that the business of the Society is conducted by the Council and the Council may generally act for and in the name of the Society (section 3(1) and Schedule 1, paragraph 11). The Council consists of members elected by the Society. The constitution of the Council and of their committees is regulated by a scheme made by the Council and approved by the Society (Schedule 1, paragraphs 2-5). Statutory functions are conferred upon the Council by the 1980 Act and by other enactments, including in particular the functions under sections 42A-C of the 1980 Act of determining and dealing with complaints made by a member of the public about inadequate professional services provided by a solicitor.

5. The background to the first proposal is that, prior to 1999, committees and sub-committees of the Council used to discharge certain functions of the Council with the approval of the Council. However, in 1999, questions arose as to whether the Council had power to delegate or arrange for the discharge of their statutory functions by some other person or body. These questions arose because of the common law rule that, where statutory functions are conferred upon a person, that person cannot generally delegate those functions to be discharged by someone else unless that person is authorised to do so either expressly or by necessary implication. This common law rule is not absolute and is subject to certain qualifications and exceptions but it may be argued that the functions of the Council do not fall within those qualifications and exceptions. There is no express provision in the 1980 Act which enables the Council to delegate their

functions, even to their own committees or to a member of the staff of the Society. It may also be difficult to imply such a power, in view of the statutory precedents which exist where express powers to delegate are conferred upon a body, including, in particular, the powers conferred upon the Council of the Law Society of England and Wales to delegate their functions in section 79 of the [Solicitors Act 1974 \(c.47\)](#), as amended by paragraph 16(2) of Schedule 18 to the [Courts and Legal Services Act 1990 \(c.41\)](#).

6. In these circumstances, the Council decided in 1999 that, on balance and until a suitable legislative opportunity could be found to rectify the position, the safer course would be to discontinue the previous practice of delegating their functions and to make arrangements for all of their functions to be discharged by the Council. However, the burden of doing so is adversely affecting the Council's ability to provide speedy and effective regulation of the profession. The Act, therefore, remedies this in section 1 by inserting a new section 3A into the 1980 Act which provides expressly that the Council may delegate or arrange for the discharge of their functions (other than excepted functions) by a committee, sub-committee or an individual. There are ancillary provisions enabling a committee or a sub-committee to sub-delegate the functions delegated to them but only with the approval of the Council. In order to avoid any possible difficulties with the European Convention on Human Rights, these powers are not made retrospective. However, it is expressly provided in the new section 3A(10) that the new powers are without prejudice to any other power which the Council may have to delegate their functions. This is intended to preserve whatever arguments there may be for saying that the Council may already have powers to delegate their functions or at least certain of their functions.
7. The background to the second and third proposals arises out of the fact that the Council is required by paragraph 2 of Schedule 1 to the 1980 Act to prepare a scheme providing for "(d) the appointment and constitution of committees". The scheme containing the Constitution of the Law Society of Scotland (see Green's Solicitors Professional Handbook page F415) only provides, in paragraph 22, that "The Council shall establish such Committees as it considers necessary". No reference is made to the appointment of sub-committees even although they have been appointed in the past. Equally, no reference is made as to whether persons other than members of the Council or the Society (i.e. non-solicitors) can be members of such committees or sub-committees, even although some have been appointed in the past. In order to remove any doubt about the position, section 2 of the Act confers express powers upon the Council to make provision for such matters in the scheme and to enable lay persons to form a majority upon any committee or sub-committee to which they are appointed.
8. The provisions in the Act are modelled upon those which apply to the Council of the Law Society in England and Wales in section 79 of the [Solicitors Act 1974 \(c.47\)](#), as amended by paragraph 16(2) of Schedule 18 to the [Courts and Legal Services Act 1990 \(c.41\)](#).