

*These notes relate to the Legal Profession and Legal Aid
(Scotland) Act (asp 5) which received Royal Assent on 19 January
2007 (asp 5) which received Royal Assent on 19 January 2007*

LEGAL PROFESSION AND LEGAL AID (SCOTLAND) ACT (ASP 5) WHICH RECEIVED ROYAL ASSENT ON 19 JANUARY 2007

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – the Scottish Legal Complaints Commission

Section 46: Interpretation of Part 1

85. **Section 46** defines what is meant by expressions used in Part 1. Most of the definitions are straightforward, but the following are of note:

“client” is defined to include (in relation to any matter in which the practitioner has been instructed) any person on whose behalf the person who gave the instructions was acting; and where the practitioner is an employee of a person who is not a practitioner, to include (in relation to any matter in which the practitioner has been instructed by the employer) the employer. This definition thus allows an employer of an in-house lawyer to complain against that lawyer.

“complainer” is defined to mean the person who makes the complaint and, where the complaint is made by the person on behalf of another person, includes that other person.

“complaint” is widely defined to include any expression of dissatisfaction.

“inadequate professional services” are defined to mean professional services which are in any respect not of the quality which could reasonably be expected of a competent advocate/solicitor/conveyancing or executry practitioner etc; and to include any element of negligence in respect of or in connection with the services.

“the court” means the Court of Session.

“practitioner” is defined widely to cover—

- (a) an advocate and includes any advocate whether or not a member of the Faculty of Advocates at the time when it is suggested the conduct complained of occurred or the services complained of were provided and notwithstanding that subsequent to that time the advocate has ceased to be such a member;
- (b) a conveyancing practitioner and includes any such practitioner, whether or not registered at that time and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;

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- (c) an executry practitioner and includes any such practitioner, whether or not registered at that time and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;
- (d) a firm of solicitors, whether or not since that time there has been any change in the firm by the addition of a new partner or the death or resignation of an existing partner or the firm has ceased to practise;
- (e) an incorporated practice, whether or not since that time there has been any change in the persons exercising the management and control of the practice or the practice has ceased to be recognised by virtue of section 34(1A) of the Solicitors (Scotland) Act 1980 or has been wound up;
- (f) a person exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and includes any such person, whether or not the person had acquired the right at that time and notwithstanding that subsequent to that time the person no longer has the right;
- (g) a solicitor, whether or not the solicitor had a practising certificate in force at that time and notwithstanding that subsequent to that time the name of the solicitor has been removed from or struck off the roll or the solicitor has ceased to practise or has been suspended from practice.

“unsatisfactory professional conduct” is a new concept which is defined to mean professional conduct which is not of the standard which could reasonably be expected of a competent and reputable advocate, solicitor, conveyancing or executry practitioner etc but which does not amount to professional misconduct and which does not comprise merely inadequate professional services.

- 86. As Crown Counsel and procurators fiscal are independent public prosecutors and do not act on the instructions of a client, section 46(2) makes clear for the avoidance of doubt that they are not subject to the services complaints regime for the work they do in that capacity. (By virtue of section 2 of the Act, legal services need to have been instructed by a client before they can be the subject of a services complaint.) The provision thereby eliminates the possibility of any attempt to challenge convictions or decisions whether to prosecute by using the services complaint route.
- 87. [Section 46\(3\)](#) makes clear for the avoidance of doubt that exercises of prosecutorial discretion are not in themselves capable of constituting professional misconduct or unsatisfactory professional conduct. Misconduct which does not form part of legitimate prosecutorial discretion can however be the subject of a valid conduct complaint.