

*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 5 – General

Section 77: Advice, services or activities to which Act does not apply

206. Regulation of the legal profession in Scotland is not reserved unlike the regulation of architects¹ or the regulation of insolvency practitioners². Although the regulation of the legal profession is devolved, there are certain discrete areas where the Law Society of Scotland or the Faculty of Advocates is the regulatory body or co-regulatory body in terms of a UK statute, the subject matter of which is reserved. Therefore section 77 provides that nothing in the Act applies to complaints about, or the provision of advice, services or activities in relation to (a) activities carried out by virtue of a group licence under the Consumer Credit Act 1974; (b) activities of an insolvency practitioner within the meaning of the Insolvency Act 1986; (c) complaints about solicitors under the Financial Services Act 2000 1986 (the Law Society of Scotland retains the function of dealing with complaints about solicitors in relation to investment business carried on under the 1986 Act, as this function of recognising professional bodies was saved on repeal of the 1986 Act); (d) immigration advice or immigration services within the meaning of the Immigration and Asylum Act 1999; (e) regulated activities within the meaning of section 22 of the Financial Services and Markets Act 2000 in relation to which the Law Society of Scotland has been delegated a regulatory role by the Financial Services Authority (the activities covered include such matters as dealing or arranging deals in investment, managing investments or giving investment advice); and (f) financial services constituting exempt regulated activities under the Financial Services and Markets Act 2000.
207. It is intended that such advice or services should be subject to provisions analogous to those provided for by the Act in respect of the services with which it deals. The extension of the provisions of the Act to the advice and services listed in (a) to (f) above will be achieved through the Legal Services Bill which was introduced in the House of Lords on 23 November 2006.
208. The Act leaves these discrete reserved areas untouched. In schedule 5, the 1980 and 1990 Acts are amended to restrict the references to ‘inadequate professional services’ to these discrete areas. This means that, for example, the persons mentioned in section 51(3) of the 1980 Act may still make complaints to the Scottish Solicitors’

1 Head G1 of Schedule 5 to the Scotland Act 1998.

2 Head C2 of Schedule 5 to the Scotland Act 1998.

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Discipline Tribunal in relation to inadequate professional services in relation to the discrete reserved areas.

209. The definition of “complaints” and “practitioners” in section 46 (which deals with the interpretation of Part 1 of the Act), is extended to the references to complaints and practitioners in section 77(1) of the Act.

Consumer credit activities

210. In respect of (a) (*consumer credit*), in which field the subject matter of the Consumer Credit Act 1974 is reserved (Head C7 of Schedule 5 to the Scotland Act 1998), the Law Society of Scotland has a group consumer licence in terms of section 22(1)(a) of the Consumer Credit Act 1974 granted by the Director General of Fair Trading allowing its members to carry on consumer credit activities as described in the licence.

Insolvency

211. In respect of (b) (*insolvency*), in which field the regulation of Insolvency Practitioners is reserved (Head C2 of Schedule 5 to the Scotland Act 1998), the Law Society of Scotland³ is a recognised professional body under the Insolvency Act 1986 and issues licences to those solicitors who wish to be appointed as insolvency practitioners, supervised by the Insolvency Service, an agency of the Department of Trade and Industry. A person may act as an insolvency practitioner within the meaning of section 388(1) of the Insolvency Act 1986, if, by virtue of section 390(2)(a) of that Act, the person is a member of a professional body recognised under section 391 of that Act.

Financial Services - 1986 Act

212. In relation to (c) (*Financial services under the Financial Services Act 1986*), the Law Society of Scotland is still a recognised professional body under that Act. The Law Society of Scotland retains the function of dealing with complaints against solicitors in relation to investment business carried on under the 1986 Act, as this function of recognised professional bodies was saved on repeal of the 1986 Act.

Immigration services

213. In relation to (d) (*Immigration*), in which field Immigration and nationality (including asylum) are reserved areas in terms of head B6 of Schedule 5 to the Scotland Act 1998, the Law Society of Scotland and the Faculty of Advocates are designated professional bodies in terms of section 86 of the Immigration and Asylum Act 1999, which removes the need for Scottish solicitors and advocates who provide immigration advice to be individually registered with the Immigration Services Commissioner.
214. These bodies are designated professional bodies in terms of the Act (without any need for a designation order), but the Secretary of State, if he considers that a designated professional body has consistently failed to provide effective regulation of its members in their provision of immigration advice or immigration services, may by order de-designate a body. In the case of the Scottish bodies he has first to consult the Immigration Commissioner and the Scottish Legal Services Ombudsman in terms of section 86(4) of the Immigration and Asylum Act 1999.

Financial services - 2000 Act

215. In respect of (e), the Law Society has been delegated a regulatory role by the Financial Services Authority in relation to regulated activities within the meaning of section 22 of the Financial Services and Markets Act 2000. The activities covered include such

³ The Law Society of Scotland is recognised in terms of the [Insolvency Practitioners \(Recognised Professional Bodies\) Order 1986 \(S.I. 1986/1746\)](#).

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matters as dealing or arranging deals in investments, managing investments or giving investment advice.

216. In relation to (f), in which field Financial Services and Financial Markets are reserved areas in terms of heads A3 and A4 of Schedule 5 to the Scotland Act 1998, the Law Society of Scotland is one of nine professional bodies designated by the Treasury under section 326 of the Financial Services and Market Act 2000⁴.
217. This regulatory regime covers law firms in Scotland which provide only incidental investment advice. They carry on a narrow range of regulated activities, known as “exempt regulated activities”, under the supervision of the Law Society of Scotland as a designated professional body. In contrast law firms in Scotland which provide financial and investment advice as a main stream activity are regulated directly by the Financial Services Authority in relation to those activities.
218. There are around 100 Law Society of Scotland member firms that are regulated directly by the FSA and approximately 650 other member firms operating under the regulation of the Law Society of Scotland as a designated professional body.

Section 78: Ancillary provision

219. **Section 78** makes provision to enable the Scottish Ministers to make by order such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence of, or for giving full effect to the Act. Such an order may make different provision for different purposes and may modify any enactment, instrument or document. Such a power could, for example, be used to prescribe procedures to be followed by the Commission on its establishment in relation to services complaints not determined by a professional body at that time or handling complaints in respect of which the Scottish Legal Services Ombudsman had not completed an investigation at that time.

Section 79: Regulations or orders

220. **Section 79** provides that any power conferred on the Scottish Ministers by the Act to make orders or regulations must be exercised by statutory instrument, and may be exercised so as to make different provision for different purposes. The section specifies that statutory instruments containing an order or regulations made under the Act are to be subject to negative resolution procedure, except -
 - orders under section 10(7) or 24(8) amending the maximum amount of compensation available under those sections;
 - regulations under section 41(1) adjusting the duties or powers of the Commission;
 - orders under section 78(1) making ancillary provision which adds to, replaces or omits any part of the text of an Act; and
 - orders under paragraph 2(7) of Schedule 1 varying the numbers of members of the Commission.

which are to be subject to affirmative procedure, requiring a draft of the instrument to be laid before and approved by resolution of the Parliament.

⁴ This is in terms of the [Financial Services and Market Act 2000 \(Designated Professional Bodies\) Order 2001 \(S.I. 2001/1226\)](#).