

LEGAL SERVICES (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Regulation of Licensed Legal Services

Chapter 1 – Approved Regulators

Ceasing to regulate

Section 39 – Surrender of authorisation

83. **Section 39** deals with the situation where an approved regulator ceases to regulate. It allows an approved regulator to surrender its authorisation, with the prior agreement of the Scottish Ministers, under the procedure in schedule 7. Subsection (3) provides that an approved regulator must take all reasonable steps to ensure that the effective regulation of its licensed providers is not interrupted by the surrender of its authorisation. For example, this may involve ensuring that the licensed providers have sufficient time to find and transfer to an alternative approved regulator before authorisation is surrendered.
84. Subsection (4) states that if an approved regulator surrenders its authorisation to regulate, it also loses its status as an approved regulator. This reflects the two-stage process involved in a body becoming a functioning approved regulator – it must first be approved (section 7), and then given authorisation to regulate by the Scottish Ministers (section 10). In giving up authorisation, both authorisation and approval are removed.

Section 40 – Cessation directions

85. **Section 40** applies where an approved regulator's regulatory scheme is amended so as to exclude its regulation of certain categories of licensed provider or legal services, or its authorisation is (or is to be) amended under section 38(4)(e), rescinded under section 38(4)(f), or surrendered under section 39(1).
86. **Section 40(2)** gives the Scottish Ministers a wide power to direct an approved regulator to take such action as they consider necessary or expedient for the purpose of providing continued effective regulation of affected licensed providers. This might include, for example, requiring an approved regulator to alter the timing of its surrender of authorisation to ensure that another approved regulator was in a position to accept its former licensed providers.

Section 41 – Transfer arrangements

Section 42 – Extra arrangements

87. These sections cover the situation whereby licensed providers may be forced to transfer from one approved regulator to another approved regulator. For example, this would occur if an approved regulator surrendered its authorisation or had its authorisation rescinded, or amended an authorisation so it was no longer regulating particular

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categories of licensed provider or legal services. In such circumstances, the approved regulator must inform its licensed providers of the situation, and notify those which will have to transfer to another approved regulator (section 41(2) and (3)).

88. Subsections (4) and (5) of section 41 set out the process and timescales involved in moving from one approved regulator to another. The changeover period refers to the period of time during which a licensed provider which has been forced to transfer may continue to operate according to the regulatory scheme of its previous regulator, whilst being regulated by the new regulator. There is a requirement on the licensed provider to comply with the new regulator's rules within the 6-month changeover period.
89. For example, suppose an approved regulator "X" notifies a licensed provider that it is ceasing to exist as an approved regulator, and that a transfer is therefore necessary. The licensed provider would identify a new approved regulator "Y", and arrange to transfer to it within 28 days (or as soon as was practicable). Starting from the date on which Y took over responsibility for regulating the licensed provider in question, it would have 6 months in which to adopt Y's regulatory scheme. During the 6-month "changeover" period, the licensed provider is free to continue to comply with only X's regulatory scheme, but on the day that the changeover period is completed, it must comply fully with Y's scheme.
90. This process requires the new approved regulator to regulate the licensed provider using the previous approved regulator's regulatory scheme for the duration of the changeover period.
91. Section 42 gives the Scottish Ministers the power to make regulations relating to transfer arrangements.
92. This power can be used to address any unforeseen circumstances which might occur in the transfer process described in section 41. However, regulations may be used in two particular cases, described in subsection (2).
93. The first of these (subsection (2)(a)) is where a licensed provider has not transferred to a new approved regulator despite being required so to do. In this case, the Scottish Ministers can arrange for the licensed provider in question to be regulated by an approved regulator of their choice (subject to that approved regulator's consent). This may be necessary to ensure continuity of regulation where a licensed provider has failed, for whatever reason, to identify a new regulator within a reasonable time.
94. The second case (subsection (2)(b)) is where there is a need to recover fees paid to the former approved regulator, in relation to the current licence of the licensed provider. This may be necessary where, for example, a licensed provider is forced to move to a new regulator whilst having paid an annual fee to its former regulator less than 12 months previously and is unable to recover the outstanding portion of the fee.