

# LEGAL SERVICES (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2 – Regulation of Licensed Legal Services**

#### *Chapter 2 – Licensed Legal Services Providers*

#### **Key duties and positions**

#### *Section 50 – Key duties*

112. **Section 50** sets out the key duties applicable to all licensed providers, including their obligations with respect to the regulatory objectives, professional principles, their approved regulator's regulatory scheme and licence terms and conditions. Licensed providers must also ensure compliance with any professional code of conduct applicable to persons within the licensed provider – whether or not such codes are directly incorporated within the approved regulator's scheme.
113. Because a licensed provider is an intangible entity, the Act provides that all such providers must have identifiable individuals responsible for securing compliance with the key duties, namely a Head of Legal Services (see section 51) and either a Head of Practice (see section 52) or Practice Committee (see section 53). The two posts have distinct but overlapping duties. Broadly, the Head of Legal Services is responsible for ensuring compliance with regulatory objectives and professional principles, while the Head of Practice is responsible for the broader compliance with the relevant regulatory scheme, and licence terms and conditions.

#### *Section 51 – Head of Legal Services*

114. **Section 51** describes the position of Head of Legal Services, along with the requirements, duties and responsibilities associated with the role. This position must be filled in a licensed provider otherwise there is a risk that the licensed provider's licence will be revoked (see section 69). As stated above, the Head of Legal Services is responsible for ensuring compliance with regulatory objectives and professional principles. The Scottish Ministers have the power to make further provision about this position and its function by regulations (subsection (9)(a)).
115. Subsection (2) requires that the Head of Legal Services is to be currently qualified to practice as a solicitor and that he or she has a valid practising certificate, free of conditions. The relevant legislation on practising certificates and conditions is to be found in sections 4, 15(1) and 53(5) of the 1980 Act. The Scottish Ministers, following consultation with the Lord President, have a power to modify by regulations this subsection to allow an additional type of legally qualified person to become Head of Legal Services (subsections (9)(b) and (10)).
116. The Head of Legal Services is personally responsible for securing the licensed provider's compliance with the regulatory objectives, its adherence to the professional principles, and its fulfilment of its other duties, and to take such reasonable steps

(such as issuing of instructions, establishing appropriate arrangements for training, monitoring and supervision of staff, and internal audit) for these purposes. The Head of Legal Services is also responsible for managing designated persons (subsections (4) to (6)). This section also provides for the action to be taken by the Head of Legal Services where it appears to him or her that the licensed provider is failing to fulfil its duties.

117. Subsection (8) provides that where any function falls to both the Head of Legal Services and the Head of Practice they are jointly and severally responsible for exercising the function. It will be noted that the Act gives a “whistle blowing duty” to both the Head of Legal Services (section 51(7)) and Head of Practice (section 52(6)), the difference being that the Head of Legal Services is required to report to the Head of Practice and the Head of Practice to the approved regulator. Another joint function is to ensure that designated persons in the licensed provider meet their professional obligations (sections 51(5)(b) and 52(4)(b)). Other joint functions may be provided for at a later date through the regulation-making power in sections 51(9) and 52(7).

### **Section 52 – Head of Practice**

118. Section 52 describes the position of Head of Practice, along with the eligibility requirements, and the duties and responsibilities associated with the role. As stated above, the Head of Practice is responsible for broader compliance with the relevant regulatory scheme. This position must be filled in a licensed provider otherwise there is a risk that the licensed provider’s licence will be revoked (see section 69).
119. Subsection (2) gives details of the criteria that are required for a person’s appointment as its Head of Practice. Unlike the Head of Legal Services, no particular qualification is stipulated, although it is possible for the Scottish Ministers, following consultation with the Lord President, to add specific requirements by regulations under subsection (7). Such regulations may also make further provision about the functions of the Head of Practice.
120. Subsection (3) states the Head of Practice has the function of securing the licensed provider’s compliance with its approved regulator’s regulatory scheme and the terms and conditions of its licence. The duty is both to ensure compliance by the organisation as a whole, and to manage those working within the organisation to ensure they take account of the regulatory scheme. Whereas the Head of Legal Services managerial oversight is restricted to designated persons (i.e. those involved in the delivery of legal services – see section 59), the Head of Practice has oversight of everyone in a licensed provider.
121. Subsection (6) creates a “whistle blowing” duty. It provides that, if it appears to the Head of Practice that the licensed provider or any person having an interest in the licensed provider is failing (or has failed) to fulfil any of its duties, or that any such person is behaving (or has behaved) improperly in relation to the licensed provider or to any person within it, the Head of Practice must report the matter to the licensed provider’s approved regulator.

### **Section 53 – Practice Committee**

122. Section 53 describes the composition and responsibilities of the Practice Committee, which licensed providers can choose to have instead of the Head of Practice. They have the same functions under the Act. The Practice Committee must have as one of its members a person who would be eligible to be the Head of Practice (if the licensed provider had decided to have a Head of Practice). The members of a Practice Committee are to be jointly and severally responsible as regards the Committee’s functions. The Scottish Ministers, following consultation with the Lord President, have the power to make further provision by regulations relating to Practice Committees and their functions (subsections (5) and (6)).