

# 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*

#### **Non-solicitor investors**

#### *Section 62 – Fitness for involvement*

138. This section provides that an approved regulator must be satisfied that all non-solicitor investors are fit to have an interest in the licensed provider at the licensing and renewal stages. The approved regulator must monitor the fitness of all investors at other times. Fitness to be an investor is to be determined in all these cases, with reference to the factors set out in section 64.
139. The approved regulator’s licensing rules in relation to applications and renewals for, terms of, and revocation and suspension of, licences may relate to any non-solicitor investor (as well as to a licensed provider) and the rules must explain how a non-solicitor investor’s fitness for having an interest in a licensed provider is to be determined.
140. An entity must not be licensed (or a licensed provider must have its licence revoked or suspended) if the approved regulator determines that an investor is unfit to have an interest. This does not apply, however, where the licensed provider can demonstrate within a reasonable time appointed by the approved regulator, that the investor no longer has a relevant interest in the entity. There is provision for an alleged unfit investor to make representations or take other steps before the approved regulator makes its final determination and also for an appeal to the sheriff.

#### *Section 63 – Exemption from fitness test*

141. **Section 63** provides that an approved regulator is not required to satisfy itself as to the fitness of an investor where that investor is an “exemptible investor”. Investors are exemptible if they have less than a 10% stake in the ownership or control of a licensed provider. Licensing rules must explain the circumstances in which the approved regulator will apply an exemption and its reasons for so doing. The licensing rules must also explain any threshold for exemption that the approved regulator will apply which is lower than 10%.

#### *Section 64 – Factors as to fitness*

142. **Section 64** provides examples of relevant factors when determining a non-solicitor investor’s fitness, such as financial position and business record, and family business and other associations. Subsection (3) sets out in what circumstances a non-solicitor investor is presumed to be unfit. These conditions are similar to those found in the first, second, third and fourth conditions in section 58(2) to (5) in relation to disqualification from positions within a licensed provider. It also sets out that if the non-solicitor investor

is a body, the approved regulator should consider the fitness of that body and of those having ownership, control, or any material interest in it and its affairs. It means that the fitness for involvement test cannot be avoided by investors within a company.

### ***Section 65 – Ban for improper behaviour***

143. This section requires the approved regulator to disqualify a non-solicitor investor from acting in that capacity should he or she contravene section 66(1) or (2) of the Act. It sets out that such disqualification can be permanent, or for a fixed period and that it extends to every licensed provider, not just those regulated by the same approved regulator. The approved regulator must allow the investor in question to make representations to it and there is provision for a disqualified person to appeal to the sheriff. An approved regulator must make provision in practice rules in relation to the procedure for disqualification and for review of a disqualification

### ***Section 66 – Behaving properly***

144. Subsection (1) forbids a non-solicitor investor from acting in a way which is incompatible with the regulatory objectives and the professional principles in the Act, the licensed provider's duties in relation to these objectives and principles, the regulatory scheme, the terms and conditions of the licence, and its other duties under Part 2 of the Act and under any other legislation.
145. Subsection (2) provides that a non-solicitor investor in a licensed provider must not interfere improperly in the provision of legal or other professional services by the licensed provider. Moreover he or she must not seek to exert undue influence over, or solicit unlawful or unethical conduct by, or otherwise behave improperly in relation to any designated or other person within the licensed provider.

### ***Section 67 – More about investors***

146. **Section 67** introduces schedule 8 which contains more provision about non-solicitor investors. Subsection (2) gives the Scottish Ministers power to make further provision by regulations in relation to interests in licensed providers and to make licensing rules in relation to persons with such interests.
147. Subsection (3) gives the Scottish Ministers further regulation making powers, with the agreement of the Lord President, to amend the percentage threshold for exemption from the fitness for involvement test in section 63(4) and the notification requirements in paragraph 3(4) of schedule 8, and to amend a definition in subsection (6)
148. Subsection (4)(c) extends the Scottish Ministers' regulation making powers to consideration of what counts as an interest or stake in a licensed provider including further provision about family, business, and other associates and (4)(d) allows regulations to include further provision setting out, where a body holds an interest in a licensed provider, what interest in the body counts towards an interest held by it in the licensed provider and the extent to which that interest so counts.
149. Subsection (6) defines an "investor" and a "non-solicitor investor" in a licensed provider.