

*These notes relate to the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4) which received Royal Assent on 11 March 2003*

# **PUBLIC APPOINTMENTS AND PUBLIC BODIES ETC. (SCOTLAND) ACT 2003**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***General provisions***

#### ***Sections 18 and 19 – Orders and regulations, Ancillary provision***

61. Sections 18 and 19 provide that, where the Act gives the Scottish Ministers power to make an order or regulations, such power will be exercisable by statutory instrument. Some of the orders and regulations will be made under the negative resolution procedure and the remainder under the affirmative resolution procedure.

#### ***Schedule 1 - The Commissioner***

#### ***Paragraph 1 – Disqualification***

62. Sub-paragraph (1) sets out various persons who are disqualified from appointment, or from holding office, as Commissioner for Public Appointments in Scotland.
63. Sub-paragraph (2) sets out various offices and appointments which a person is disqualified from while holding office as the Commissioner for Public Appointments in Scotland.
64. Sub-paragraph (3) continues that disqualification for a period of 3 years after the Commissioner has ceased to hold that office unless the Parliament determines otherwise.

#### ***Paragraph 2 – Status***

65. Provision is made under this paragraph as to the status of the Commissioner for Public Appointments in Scotland and staff of the Commissioner's office. Specific provision is made for the Commissioner for Public Appointments not to be subject to the control or direction of any member of the Parliament, of any member of the Scottish Executive or of the Parliamentary Corporation, unless otherwise indicated in the Act.

#### ***Paragraph 3 – Validity of actings***

66. This provision ensures that the exercise by the Commissioner of his/her functions cannot be challenged on the grounds that there was a defect in the appointment, or the eligibility for appointment, of the Commissioner.

#### ***Paragraph 4 – Term of office and tenure***

67. This provides that the Commissioner for Public Appointments in Scotland will hold office for a term determined by the Parliament which will not exceed 5 years, and for no more than 3 periods of office, with, as sub-paragraph (2)(b) states, appointment for

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a third term only if it is desirable in the public interest. The Commissioner may resign and may be removed from office. The Parliamentary corporation will determine the Commissioner for Public Appointments' other terms and conditions.

***Paragraph 5 – Vacancy in the office of the Commissioner***

68. Provision is made for the Parliamentary corporation to appoint an acting Commissioner for Public Appointments where the office of the Commissioner is vacant.

***Paragraph 6 – Remuneration***

69. The Commissioner will receive a salary and allowances, the amount of which will be determined by the Parliament.

***Paragraph 7 – Pensions etc***

70. The Parliament may make arrangements for the payments of a pension, allowances or gratuity to a Commissioner on ceasing to hold office.

***Paragraph 8 – Staff***

71. The Commissioner has power, with the approval of the Parliament, to appoint staff. The Commissioner determines the terms and conditions of employment and may with the approval of the Parliament, make arrangements for the payment of pensions, allowances and gratuities to such staff when they cease to hold office.

***Paragraph 9 – Assessors***

72. *Sub-paragraph (1)* The Commissioner may appoint assessors to assist in the exercise of his/her functions.
73. *Sub-paragraph (2)* makes provisions that these assessors may be paid, with the approval of the Parliamentary Corporation.

***Paragraph 10 – Delegation***

74. This provides that any function of the Commissioner for Public Appointments may be exercised by another person (for example an assessor) with the authorisation of the Commissioner.

***Paragraph 11 – Financial provision***

75. This provides that the Parliamentary corporation pays the salary, allowances and expenses of the Commissioner for Public Appointments or Acting Commissioner.

***Paragraph 12 – Accountable officer***

76. Provision is made for the Parliamentary corporation to designate an accountable officer. This paragraph also describes the functions and duties of the accountable officer.

***Paragraph 13 – Accounts and reports***

77. This paragraph sets out the accounts and reports which should be prepared by the Commissioner.

***Paragraph 14 – Functions: supplementary provision***

78. *Paragraph 14* gives the Commissioner powers to enter into contracts and acquire or dispose of land or property in connection with his/her functions.

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### ***Schedule 2 – The Specified Authorities***

79. This schedule lists those public authorities which come under the Commissioner for Public Appointments' remit.

### ***Schedule 3 -The Advisory Council***

#### ***Paragraphs 1 and 2 - Status***

80. *Paragraphs 1 and 2* give the status of the new body. The new body will be a body corporate and as such will have legal personality.

#### ***Paragraph 3 – Membership***

81. *Paragraph 3* sets out the essential elements of the constitution of the new body. The new body will consist of such members as the Scottish Ministers may appoint. The Scottish Ministers will appoint one member as a chair. All appointments will be subject to the appropriate terms and conditions, including length of appointment.

#### ***Paragraph 4 – Allowances etc.***

82. *Paragraph 4* provides for allowances to be paid to the chair and members of the new body and for remuneration to be paid to the chair.

#### ***Paragraph 5 – Proceedings***

83. *Paragraph 5* lays down a framework for the proceedings of the new body. The new body will, within these limits, be able to set down its own procedures.

#### ***Paragraph 6 – Reports***

84. *Paragraph 6* sets out the annual report which should be prepared by the new body.

#### ***Paragraph 7 – Functions: supplementary provision***

85. *Paragraph 7* gives the new body powers to enter into contracts and other commercial arrangements in connection with its functions.

### ***Schedule 4 – Miscellaneous provision***

#### ***Paragraph 1 – Confirmation of Executors (Scotland) Act 1858 (c.56)***

86. *Paragraph 1* repeals a reference in section 2 of the 1858 Act to a recognised financial institution providing executry services. The amendment takes account of the proposed repeal by this Act of section 19 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the purpose of which was to authorise the Scottish Conveyancing and Executry Services Board to consider applications from banks, building societies and other financial institutions to offer executry services.

#### ***Paragraph 2 – Historic Buildings and Ancient Monuments Act 1953 (c.49)***

87. *Paragraph 2* repeals those sections of the Historic Buildings and Ancient Monuments Act 1953 setting up the Historic Buildings Council for Scotland.

#### ***Paragraph 3 – House of Commons Disqualification Act 1975 (c.24)***

88. *Paragraph 3* makes modifications to the House of Commons Disqualification Act 1975 for the purposes of the Act. Sub-paragraph (a) removes the Scottish Medical Practices Committee and sub-paragraph (b) removes the Scottish Conveyancing and Executry Services Board from the list of bodies, membership of which acts as disqualification from membership of the House of Commons.

**Paragraph 4 – Race Relations Act 1976 (c.74)**

89. *Paragraph 4* makes modifications to the Race Relations Act 1976 for the purposes of the Act, removing the Ancient Monuments Board for Scotland, the Historic Buildings Council for Scotland, the Scottish Medical Practices Committee, and the Scottish Conveyancing and Executry Services Board from the list of bodies subject to the general statutory duty under the Act.

**Paragraph 5 – National Health Service (Scotland) Act 1978 (c.29)**

90. *Paragraph 5* makes modifications to the National Health Service (Scotland) Act 1978 for the purposes of the Act.
91. *Sub-paragraph (2)* repeals section 3, which provides for the establishment of the Scottish Medical Practices Committee (SMPC).
92. *Sub-paragraph (3)* repeals section 11 of the 1978 Act under which the Scottish Hospital Trust is constituted.
93. *Sub-paragraph (4)* amends subsection 19A(2) of the 1978 Act. Section 19A provides for the basis on which a medical practitioner is entitled to be included in a Health Board's medical list of persons with whom the Board may arrange to provide general medical services. The amendment is needed because, on abolition of the SMPC, a medical practitioner will no longer be nominated to the Committee for appointment to fill a vacancy.
94. *Sub-paragraph (5)* amends subsections 19B(2)(a)(b)(c) and (e) of the 1978 Act. Section 19B gives the Scottish Ministers power to make regulations on filling vacancies for medical practitioners to provide general medical services. Subsection 19B lists matters which the regulations may, in particular, include. Under subsections 19B(2)(a) to (c), regulations may include provision for references by a Health Board to the SMPC as to whether there is or will be a vacancy for a general medical practitioner in a locality; the determination of such references by the SMPC; and the determination by the SMPC of conditions of practice to be imposed on a practitioner who fills a particular vacancy. The amendments are needed to strip out the involvement of the SMPC and make consequential adjustments to the role of the Health Board.
95. *Sub-paragraph (6)* amends section 20 of the 1978 Act. Section 20 provides that all applications made to a Health Board for inclusion in a list kept by that Board of the names of medical practitioners undertaking to provide general medical services shall be referred by the Board to the SMPC, which shall then consider and grant applications. *Sub-paragraph (6)(a)* removes the role of the SMPC and provides for applications to be considered and granted by the Health Board.
96. For an applicant who is a national of a member state of the European Union, section 20(1A) of the 1978 Act requires the Health Board to apply a knowledge of English test to the procedure under section 20. *Sub-paragraph (6)(b)* amends section 20(1A) to reflect the abolition of the SMPC while retaining the procedure on knowledge of English.
97. *Sub-paragraph (7)* amends section 21 of the 1978 Act. Section 21 provides that regulations under section 19B of the 1978 Act must secure that a medical practitioner is not nominated (to the SMPC) or approved by the Health Board for appointment to fill a vacancy unless he or she is suitably experienced. The amendment is needed because, on abolition of the SMPC, a medical practitioner will no longer be nominated to the Committee.
98. *Sub-paragraph (8)* amends the definition of "applicant" in section 22 of the 1978 Act. Section 22 gives the Scottish Ministers power to make regulations for prescribing the medical experience needed for the purposes of section 21 of the 1978 Act. The

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amendment is needed because, on abolition of the SMPC, a medical practitioner will no longer be nominated to the Committee.

99. Section 23 of the 1978 Act gives Scottish Ministers the power to specify the maximum number of medical practitioners with whom all Health Boards taken as a whole may enter into arrangements for the provision of general medical services. *Sub-paragraph (9)* amends section 23(1B) to remove reference to the SMPC.
100. *Sub-paragraph (10)* repeals section 24, which provides for the conferring or imposing on the SMPC of additional functions in relation to arrangements for the provision of general medical services.
101. *Sub-paragraphs (11)-(14)* repeal miscellaneous references to the SMPC where they appear in the 1978 Act.
102. *Sub-paragraph (15)* repeals Schedule 1 (health boards), paragraph 16 of the National Health Service (Scotland) 1978 Act which gave Health Boards the power to transfer endowments to the Scottish Hospital Trust.
103. *Sub-paragraph (16)* repeals Schedule 2 of the 1978 Act, which details the membership and procedure of the SMPC.
104. *Sub-paragraph (17)* repeals Schedule 6 to the National Service (Scotland) 1978 Act under which the Scottish Hospital Trust is constituted.
105. *Sub-paragraph (18)* amends Schedule 9 of the 1978 Act. Schedule 9 supplements section 35 of that Act which sets out provisions under which it is unlawful to sell the goodwill of a medical practice. *Sub-paragraph (18)* amends Schedule 9 to transfer to the Health Board functions of the SMPC in providing certificates to the effect that a transaction does not amount to a sale of the goodwill.

#### ***Paragraph 6 – Ancient Monuments and Archaeological Areas Act 1979 (c.46)***

106. *Paragraph 6* repeals those sections of the Ancient Monuments and Archaeological Areas Act 1979 setting up the Ancient Monuments Board for Scotland.

#### ***Paragraph 7 – Solicitors (Scotland) Act 1980 (c.46)***

107. This paragraph amends section 32 of the 1980 Act, which makes it an offence for unqualified persons to prepare certain documents, to substitute a reference to “conveyancing practitioner” for an existing reference to “qualified conveyancer”.

#### ***Paragraph 8 – Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 (c.73)***

108. *Sub-paragraph (a)* repeals Section 54 subsection (1) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 in so far as it relates to Schedule 6 of the 1978 Act and *(b)* repeals an amendment to paragraph 4 of Schedule 6 to the 1978 Act as Schedule 6 is repealed under *paragraph 7(17)* to this schedule.

#### ***Paragraph 9 – Legal Aid (Scotland) Act 1986 (c.47)***

109. This paragraph repeals a reference to recognised financial institutions in section 43A(1) of the 1986 Act; and substitutes a reference to “conveyancing practitioners” for a reference to “qualified conveyancers”.

#### ***Paragraph 10 – Electricity Act 1989 (c.29)***

110. *Paragraph 10* repeals the duty placed by Schedule 9 of the Electricity Act 1989 on a licence holder or an authorised person to generate or supply electricity to consult with the Ancient Monuments Board for Scotland and the Historic Buildings Council for Scotland over a statement of how sites, buildings and objects of architectural, historic or archaeological interest will be protected.

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***Paragraph 11 – National Health Service and Community Care Act 1990 (c.19)***

111. *Sub-paragraph (a)* repeals an amendment to section 24 of the 1978 Act as section 24 is repealed under *paragraph 7(10)* to this schedule.
112. *Sub-paragraph (b)* repeals an amendment to section 11 and Schedule 6 of the 1978 Act as section 11 and Schedule 6 is repealed under *paragraph 7(3)* and *(17)* to this schedule.

***Paragraph 12 – Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c.40)***

113. *Paragraph 12* makes substantive changes to sections 16 to 18 and 20 to 23 of the 1990 Act, inserts new sections 20A, 21A, 21B and 21C, amends sections 33, 34, 40 and 42, and repeals section 19 and Schedule I.
114. *Sub-paragraph (2)*. This sub-paragraph substitutes a new section 16 in the 1990 Act which confers the function of regulating the provision of conveyancing and executry services under sections 17 to 23 of the 1990 Act on the Council of the Law Society of Scotland. The Scottish Ministers are empowered to make grants to the Council towards expenses incurred, or to be incurred, by them in connection with the exercise of that function and such grants may be made subject to terms and conditions.
115. *Sub-paragraph (3)– Conveyancing practitioners*. This sub-paragraph amends the main provisions dealing with conveyancing practitioners in section 17 of the 1990 Act. The Council of the Law Society of Scotland is to take over the Board's responsibility for maintaining a register of conveyancing practitioners, which is to include entries in respect of all conveyancing practitioners registered with the Board immediately before its abolition takes effect. Entries in the register which relate to independent conveyancing practitioners are to be annotated to that effect. The Council may charge such fees for registration as they may determine. In granting an application for registration, the Council may attach such conditions as they may determine; when attaching conditions or when refusing an application, the Council must give the applicant written reasons for their decision.
116. The effect of the repeal of section 17(7) of the 1990 Act is that the Council of the Law Society of Scotland will not be able to consider applications for registration as an independent conveyancing practitioner, though practitioners already registered with the Board as independent conveyancing practitioners will be able to continue to practise in that capacity.
117. Section 17(3) and (11) of the 1990 Act are replaced by new subsection (11) which gives the Council powers to make rules for regulating the conduct and practice of conveyancing practitioners and independent conveyancing practitioners. The Council is to assume the powers of the Board to make rules as to the requirements to be satisfied by applicants for registration as conveyancing practitioners in relation to educational qualifications and practical training. The powers of the Scottish Ministers to make regulations to maintain appropriate standards of conduct and practice by independent conveyancing practitioners are transferred to the Council, but as a power to make rules for such matters. Rules made by the Council are to be approved by the Lord President of the Court of Session and the Scottish Ministers after consultation with the Director General of Fair Trading. Existing rules and regulations made by the Board or the Scottish Ministers are kept in effect, but the Council is given the power to amend or repeal them.
118. *Sub-paragraph (4) – Executry practitioners*. This sub-paragraph amends the main provisions dealing with executry practitioners in section 18 of the 1990 Act. The Council of the Law Society of Scotland is to take over the Board's responsibility for maintaining a register of executry practitioners, which is to include entries in respect of all executry practitioners registered with the Board immediately before its abolition takes effect. Applications may be made only by natural persons; section 18(3) of the 1990 Act is repealed as it does not relate to natural persons, but to recognised financial

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institutions in terms of section 19 of the 1990 Act. The Council may charge such fee for registration as they may determine.

119. Section 18(10) of the 1990 Act gave the Scottish Ministers powers to make regulations to maintain appropriate standards of conduct and practice of executry practitioners, and to make provision as to educational qualifications and practical training. Under the new subsection (10) the Council is to assume these powers, but as powers to make rules which will require the approval of the Lord President of the Court of Session, and the Scottish Ministers after consultation with the Director General of Fair Trading.
120. *Sub-paragraph (5) – Executry services by recognised financial institutions.* This sub-paragraph repeals section 19 of the 1990 Act which provided for the Board to vet applications from financial institutions such as banks and building societies to perform executry work. It was intended that applicant institutions should satisfy the Board that they complied with requirements set out in regulations regarding educational qualifications and practical training for those of their employees to be engaged in the provision of executry services and related complaint procedures. Section 19 has not been brought into force and is now to be repealed.
121. *Sub-paragraph (6) – Professional misconduct, inadequate professional services, etc.* This sub-paragraph amends section 20 of the 1990 Act to implement the detailed changes required to that Act in relation to disciplinary arrangements for conveyancing and executry practitioners (see text on section 13 above).
122. *Sub-paragraphs (6)(d) and (e)* transfer from the Board to the Scottish Solicitors' Discipline Tribunal powers to suspend or revoke a registration, impose a fine of up to £10,000 or censure a practitioner. These will be the main sanctions available to the Tribunal where it is satisfied after an inquiry that a practitioner has been guilty of professional misconduct or has provided inadequate professional services; or where a practitioner has been convicted by any court of an act involving dishonesty or been sentenced to a term of imprisonment of not less than 2 years.
123. *Sub-paragraph (7)* inserts a new section 20A into the 1990 Act which requires the Council of the Law Society of Scotland to establish a review procedure in relation to their decisions to refuse to grant an application for registration; or to grant such an application subject to conditions; or to exercise their disciplinary powers under section 20(2) of the 1990 Act. The new section follows the equivalent requirement on the Board in paragraph 15 of Schedule 1, which is to be repealed.
124. *Sub-paragraph (9) – Powers of investigation* inserts a new section 21A into the 1990 Act which provides the Council and the Scottish Solicitors' Discipline Tribunal with powers of investigation in relation to disciplinary inquiries and related matters. The new section replicates the powers of investigation conferred on the Board by Part II of Schedule 1 to the 1990 Act, which is to be repealed.
125. *Sub-paragraph (9) – Procedures of the Scottish Solicitors' Discipline Tribunal* inserts a new section 21B into the 1990 Act which applies existing Tribunal powers and procedures in relation to solicitors under Schedule 4 to the Solicitors (Scotland) Act 1980 to (a) any inquiries by the Tribunal into complaints against conveyancing and executry practitioners, and (b) appeals by such practitioners against disciplinary steps taken against them.
126. *Sub-paragraph (9) – Compensation fund* also inserts a new section 21C into the 1990 Act which empowers the Council to establish and maintain a fund to compensate clients who have suffered pecuniary loss because of dishonesty on the part of an independent conveyancing practitioner or an executry practitioner who provides executry services to the public for a fee, gain or reward. The Council may enter into a contract of insurance for the purpose of guaranteeing the sufficiency of the fund and may make rules with regard to the fund's operation. The Scottish Ministers may make contributions to the fund and defray any premium, fee or other expense payable by the Council in relation to

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any contract of insurance. The fund managed by the Board is transferred to and vested in the Council; the Board's rules in relation to the operation of the fund are kept in force and the Council is given the power to amend or repeal them.

***Paragraph 13 – Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997 (c.9)***

127. *Sub-paragraph (a)* removes the duty on the Scottish Ministers to consult with the Historic Buildings Council for Scotland as to the makings of grants or loans for the preservation or enhancement of conservation areas.
128. *Sub-paragraphs (b) and (c)* remove the provision that the Scottish Ministers may consult with the Historic Buildings Council for Scotland as to the making of town scheme agreements with local authorities and as to the making of grants for the repair of buildings in town schemes.

***Paragraph 14 – National Health Service (Primary Care) Act 1997 (c.46)***

129. *Paragraph 16* makes modifications to the National Health Service (Primary Care) Act 1997 for the purposes of the Act. Sub-paragraph 16(a) repeals subsection 5(5) of the 1997 Act, which lays a requirement on Scottish Ministers to consult the Scottish Medical Practices Committee.
130. *Sub-paragraphs (b) to (d)* make other minor changes consequential to the abolition of the Scottish Medical Practices Committee.

***Paragraph 15 – Ethical Standards in Public Life (Scotland) Act 2000 (asp 7)***

131. *Paragraph 15* repeals the entry in schedule 3 (devolved public bodies) of the Ethical Standards in Public Life (Scotland) Act 2000 relating to the Scottish Conveyancing and Executry Services Board, and the Scottish Medical Practices Committee. Paragraph 16 – [Scottish Public Services Ombudsman Act 2002 \(asp 11\)](#)
132. *Paragraph 16* repeals the entry to schedule 2 of the Scottish Public Services Ombudsman Act 2002 relating to the Scottish Medical Practices Committee and inserts an entry for the Commissioner for Public Appointments in Scotland..

***Paragraph 17 - Freedom of Information (Scotland) Act 2002 (asp 13)***

133. *Paragraph 17* repeals the entry in schedule 1 of the Freedom of Information (Scotland) Act 2002 relating to the Scottish Hospital Trust, the Scottish Medical Practices Committee and the Scottish Conveyancing and Executry Services Board and inserts entries for the Commissioner for Public Appointments and the Historic Environment Advisory Council for Scotland.