

*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 2 – Conduct Complaints: Other Matters

Section 53: Unsatisfactory professional conduct: solicitors

99. **Section 53** amends the Solicitors (Scotland) Act 1980 (“the 1980 Act”) to create duties of and powers for the Council of the Law Society of Scotland and the Scottish Solicitors Discipline Tribunal in relation to unsatisfactory professional conduct by a solicitor. The expression “unsatisfactory professional conduct” is defined by section 46 in relation to a solicitor to mean “professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor, but which does not amount to professional misconduct.”
100. **Section 53** inserts new sections 42ZA, 42ZB, 53ZA, 53ZB, 53ZC, 54A and 55A in the 1980 Act.

Section 42ZA of the 1980 Act

101. New section 42ZA is inserted into the 1980 Act to provide that when a complaint of unsatisfactory professional conduct is remitted to the Council by the Commission under section 6(a) or 15(5)(a) of the Act, the Council must investigate the complaint and, having given the solicitor an opportunity to make representations, make a determination. In considering the complaint, the Council may take account of the outcome of any previous unsatisfactory professional conduct or professional misconduct complaint against the solicitor determined by it, the court or the Scottish Solicitors Discipline Tribunal. The Council must similarly investigate and determine (after giving the solicitor the opportunity to make representations) complaints remitted to it by the Scottish Solicitors Discipline Tribunal under new section 53ZA of the 1980 Act.
102. Where the Council upholds an unsatisfactory professional conduct complaint, it must censure the solicitor. The Council may also take any of the following steps which it considers appropriate: (a) where the Council considers that the solicitor does not have sufficient competence in relation to any aspect of the law or legal practice, direct the solicitor to undertake such education and training as regards the law or legal practice as it considers appropriate; (b) direct the solicitor to pay a fine not exceeding £2,000; and (c) where the Council considers that the complainer has been directly affected by the conduct, direct the solicitor to pay the complainer compensation of up to £5,000.

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103. The Council may not direct payment of a fine where, in relation to the subject matter of the complaint, the solicitor has been convicted by any court of an act involving dishonesty and sentenced to a term of imprisonment of at least 2 years. This is akin to the double jeopardy rule. In any circumstances where a fine is applied, it will be treated as if it were a fine imposed in the High Court for the purposes of section 211(5) of the Criminal Procedure (Scotland) Act 1995 and will thus be payable to and recoverable by the Treasury.
104. The Council is required to intimate its determination and any direction or censure to both the complainer and the solicitor by sending them a copy. The Council must also give them reasons for its determination and any direction it makes.
105. The solicitor has a right of appeal to the Scottish Solicitors' Discipline Tribunal against the Council's determination or direction.
106. The complainer has a right to appeal to the Tribunal within 21 days against (a) a determination by the Council not to uphold the complaint, (b) a decision by the Council when upholding the complaint not to direct the solicitor to pay compensation, or (c) the amount of compensation which the Council has directed the solicitor to pay.

Section 42ZB of the 1980 Act

107. This new section requires the Council to monitor compliance with directions issued by it. When a direction is made by the Council or varied/ confirmed by the court or Tribunal, the Council must request from the solicitor an explanation of the steps which he or she has taken to comply with the direction. The solicitor must respond to the Council within 21 days of the date specified in notice. The request will however be suspended for the duration of any appeal by the solicitor or the complainer.

Section 53ZA of the 1980 Act

108. New Section 53ZA provides that where the Tribunal has considered a complaint of professional misconduct and does not uphold the complaint and considers that the solicitor may be guilty instead of unsatisfactory professional conduct, then the Tribunal must remit the complaint to the Council. In so doing, the Tribunal may make available to the Council its findings in fact.

Section 53ZB of the 1980 Act

109. This new section sets out the powers of the Scottish Solicitors' Discipline Tribunal in relation to appeals made to it by solicitors or complainers against Council determinations or directions in unsatisfactory professional conduct cases, as follows.
110. Where a solicitor appeals a Council determination upholding a complaint or appeals a consequent direction requiring remedial education or training or the payment of a fine or compensation, the Tribunal may (a) quash or confirm the determination being appealed against (and if it quashes the determination it must also quash the censure which accompanied it); (b) quash, confirm or vary the direction being appealed against; (c) direct the solicitor to undertake such education or training as regards the law or legal practice as the Tribunal considers appropriate; (d) fine the solicitor an amount not exceeding £2000; or (e) where the Tribunal considers the complainer to have been directly affected by the conduct, direct the solicitor to pay compensation of up to £5,000 in respect of resulting loss, inconvenience or distress.
111. Where a complainer appeals a Council determination not to uphold a complaint, the Tribunal may quash the Council determination and uphold the complaint; may direct the solicitor to pay compensation of up to £5,000 for loss, inconvenience or distress, where the Tribunal considers the complainer to have been directly affected by the conduct; or may confirm the determination.

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112. Where the Council upholds a conduct complaint but does not direct the solicitor to pay compensation, a complainer may appeal to the Tribunal against the Council's decision not to direct payment of compensation. The Tribunal may, where it considers the complainer to have been directly affected by the conduct, direct the solicitor to pay compensation of up to £5,000 for loss, inconvenience or distress.
113. Where a complainer appeals to the Tribunal against the amount of compensation which the Council has directed a solicitor to pay, the Tribunal may quash, confirm or vary the direction being appealed against.
114. The Tribunal may not direct the solicitor to pay a fine where in relation to the subject matter of the complaint the solicitor has been convicted of an act involving dishonesty and sentenced to a term of imprisonment of at least two years. This is akin to the double jeopardy rule.
115. Any fine imposed by the Tribunal is to be payable to and recoverable by the Treasury.
116. A direction of the Tribunal under the section is enforceable in the same manner as an extract registered decree arbitral in favour of the Council.

Section 53ZC of the 1980 Act

117. New section 53ZC provides that, where a solicitor fails to comply with a direction given by the Council, the direction, as confirmed or varied on appeal by the Tribunal or court, is to be enforced in like manner as an extract decree arbitral in favour of the Council bearing a warrant for execution issued by a sheriff court.

Section 54A of the 1980 Act

118. New section 54A provides a right of appeal to the Court of Session for a solicitor or complainer in respect of decisions made by the Tribunal in unsatisfactory professional conduct cases.
119. A solicitor is provided with a right to appeal against decisions by the Tribunal under new section 53ZB(1), (2), (3) or (4). So for example, a solicitor may appeal against a Tribunal decision confirming the Council's upholding of the complaint or the Tribunal's decision itself to uphold the complaint (where the Council did not uphold it); a Tribunal decision confirming or varying a Council direction, or itself imposing a direction, as to education or training, a fine or payment of compensation.
120. A complainer has the right to appeal against the following decisions by the Tribunal – a decision quashing the Council's determination to uphold the complaint or confirming the Council's decision not to uphold the complaint; quashing the Council's direction that the solicitor pay compensation or varying the amount the Council directed to be paid; confirming the Council's decision not to direct payment of compensation; itself directing or not directing the solicitor to pay compensation (where the Council did not direct payment).
121. Having heard an appeal by the solicitor or complainer, the court is empowered by new section 54A to give such directions in the matter as it thinks fit, including directions as to the expenses of the court proceedings or any order by the Tribunal relating to expenses. The decision of the court is final.

Section 55A of the 1980 Act

122. New section 55A supplements the general power in new section 54A(4). It provides the court with the following powers in respect of unsatisfactory professional conduct by a solicitor: (a) to fine the solicitor an amount not exceeding £2000; (b) where the court considers the complainer to have been directly affected by the conduct, to direct the solicitor to pay compensation of up to £5,000 for loss, inconvenience or distress resulting from the conduct; and (c) to find the solicitor liable in any expenses which

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may be involved in the proceedings before it. The decision of the court is final. The maximum level of fine which the court may impose is variable by order by the Scottish Ministers under the negative resolution procedure, in line with inflation. The maximum level of compensation which the court may award is variable under the affirmative resolution procedure following consultation with the Council of the Law Society and such consumer groups as the Scottish Ministers consider appropriate.