

*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 3 – Legal Profession: Other Matters

Section 58: Constitution of Scottish Solicitors’ Discipline Tribunal

156. **Section 58** makes changes to the constitution of the Scottish Solicitors’ Discipline Tribunal. It is to consist of not more than 28 members with equal numbers of solicitor and non-lawyer members. This adjusts the requirement for the Tribunal to have not less than 10 and not more than 14 solicitor members and 8 non-lawyer members. A vacancy in the membership of the Tribunal or a defect in the appointment of a member are not to affect the validity of any of its proceedings – this is the usual position adopted by statutory bodies. The Scottish Ministers may by negative resolution order vary the maximum number of members of the Tribunal, but not the proportion of solicitor and non-lawyer members.

Section 59: Scottish Solicitors Guarantee Fund: borrowing limit

157. **Section 59** increases the borrowing limit available to the Law Society of Scotland in respect of the Guarantee Fund from £20,000 to £1.25m. Under paragraph 2(2) of schedule 3 to the 1980 Act the Society may borrow money for the purposes of the Guarantee Fund in such manner and on such security as it may determine. The reasons for this increase are:

- The Scottish Solicitors Guarantee Fund has no cap on claims arising from dishonesty, but does have insurance cover for losses from £2m through to £5m which means that the Fund has to pay losses up to £2m from its own resources.
- The Society does not hold £2m as assets of the Fund, but would expect to be able to finance between £0.8m and £1m.
- On that basis it is considered that an overdraft limit of £1.25m would be sufficient to cover the shortfall.

Section 60: Safeguarding interests of clients

158. **Section 60** amends section 45 of the 1980 Act to provide for a client account held in the name of a solicitor or solicitor’s firm to vest in the Law Society of Scotland where a sole practitioner has been restricted from acting as a principal (either by the Scottish Solicitors’ Discipline Tribunal or as a result of an order of the court).

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159. The changes made by section 60 provide that until such time as the Council has approved the arrangements for the transfer of a client account in such circumstances, the client account vests in the Society. The purpose of the amendment is to enable the Society to protect the client account, as section 45 of the 1980 Act (prior to amendment by section 60) does not cover the situation where the solicitor subject to the restriction has been a sole practitioner. Vesting the right to operate the client account in the Society in such circumstances protects the client from any risk and is a temporary arrangement until such time as the Council has approved acceptable other arrangements in respect of the client account.

Section 61: Offence for unqualified persons to prepare certain documents

160. **Section 61** amends section 32 of the 1980 Act to remove a difficulty which would otherwise prevent an extension of rights to conduct litigation as envisaged by sections 25 to 29 of the 1990 Act. Section 32 of the 1980 Act makes it an offence for any unqualified person to draw or prepare any writ relating to any action or proceedings in any court. Sections 25 to 29 of the 1990 Act for their part provide for rights to conduct litigation (and rights of audience) to be granted to members of professional or other bodies, subject to the approval in each case of a scheme prescribing safeguards in relation to such matters as the training requirements to be imposed on members, the provision required for professional indemnity insurance and the arrangements for handling complaints against members.
161. The offence in section 32 of the 1980 Act is not however disapplied by the 1990 Act in relation to a member of a professional or other body which has acquired rights to conduct litigation. A member of such a body who sought to exercise such rights in good faith would therefore be guilty of an offence. Section 61 resolves the difficulty by adding an exception to the offence in section 32 of the 1980 Act in respect of a member of a body which has made a successful application under section 25 of the 1990 Act, but only to the extent to which the member is exercising rights acquired by virtue of section 27 of the 1990 Act.

Section 62: Notaries public to be practising solicitors

162. **Section 62** amends section 57 of the 1980 Act to provide that only an enrolled solicitor who holds a practising certificate may apply to the Court of Session to be admitted as a notary public. Sections 57(2A) and (2B) (of the 1980 Act) provide a limited exception to this, in that they permit a person who is applying for admission as a solicitor, and who will therefore not yet be enrolled or have a practising certificate, to include in that petition an application for admission as a notary public. Section 62(3) amends section 58 of the 1980 Act to provide that where a person who is a solicitor and notary no longer has a current practising certificate, the Council is to remove the person's name from the register of notaries public. The person's name must be restored to that register on acquisition of a current practising certificate.

Section 63: Regulation of notaries public

163. **Section 63** inserts a new section after section 59 of the 1980 Act. The new section provides the Council of the Law Society of Scotland with powers to make rules regulating the admission, enrolment and professional practice of notaries public. The procedure which the Council has to follow is to consult notaries public on a draft of the rules, take account of any representations made and submit the rules to the Lord President of the Court of Session for approval. Failure to comply with the rules may be treated as professional misconduct or unsatisfactory professional conduct on the part of the solicitor who is the notary public.