

LEGAL SERVICES (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – the Regulatory Objectives Etc.

Section 1 – Regulatory objectives

Section 2 – Professional principles

12. *Section 1* provides for the regulatory objectives which the Scottish Ministers, approved regulators, approving bodies, and other regulators of legal services must comply with and promote in exercising their functions. Sections 4 and 5 set out the responsibilities of the Scottish Ministers in relation to the regulatory objectives. Section 77 does the same for approved regulators, section 93 for approving bodies for confirmation agents, section 104 for approving bodies of non-lawyer will writers, and section 119 for other legal services regulators.
13. The regulatory objectives include promoting and maintaining adherence to the professional principles (set out in section 2). There are eight such principles to which persons providing legal services should adhere. These principles do not differ substantially from the professional principles by which solicitors and other legal professionals act, and are intended to ensure that the current standard of quality in the delivery of legal services is safeguarded. Licensed providers would be expected to “act in the best interests of their clients (and keep clients’ affairs confidential)” meaning that they should, for example, avoid conflicts of interest and safeguard a client’s money and property. Licensed providers would be expected to maintain good standards of work, meaning that they should act competently, communicate effectively, be diligent and show respect and courtesy. Under section 50, licensed providers must have regard to the regulatory objectives and adhere to the professional principles. The Head of Legal Services is responsible for securing that adherence (section 51(5)(b)).
14. The regulatory objectives also include encouraging equal opportunities within the legal profession. While equal opportunities is a topic which is generally reserved to the UK Government (Section L2 of Part II of Schedule 5 to the Scotland Act 1998), there is an exception to this and that is the encouragement of equal opportunities, and in particular of the observance of the equal opportunity requirements. The Scottish Parliament may impose duties on the Scottish Government and Scottish public bodies to make arrangements to secure that their functions are carried out with due regard to the need to meet the equal opportunity requirements.
15. The Act does not rank these objectives or the principles in order of importance, so there is no hierarchy within them. The Scottish Ministers, the approved regulators and the other legal service regulators (see section 119(2)) will need to consider how they balance these competing objectives in any particular circumstances.

Section 3 – Legal services

16. This section defines legal services for the purposes of this Act. The definition is broad, and includes services currently provided by people other than solicitors and advocates (for example, tax and planning specialists, and voluntary bodies providing advice on social welfare issues). However, the Act does not seek to regulate all these various service providers. Apart from Part 3 (confirmation and will writing services), the Act is restricted to legal services provided by businesses involving legal professionals (meaning solicitors, advocates, licensed conveyancers and executry practitioners, and those with rights to conduct litigation and/or rights of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (“the 1990 Act”). In particular, a body can only be a licensed provider if a solicitor is involved (see section 47(2)).
17. Subsection (2) sets out exclusions from the definition of legal services for the purposes of this Act. Judges are excluded as are persons who exercise judicial functions. Arbitrators also fit within this exclusion as do chairs of tribunals.

Section 4 – Ministerial oversight

18. **Section 4** provides that the Scottish Ministers, in relation to their functions under this Act (except in sections 141(c) and 145(1)), must, as far as practicable, act in a way which is compatible with the regulatory objectives and which they consider most appropriate with a view to meeting those objectives. The phrase “so far as is practicable” is added because it is recognised that the duties are broad and compliance may not be able to be objectively measured. In particular, there may be tensions between objectives, and a reasonable balance will need to be struck between them.
19. The Scottish Ministers must also have regard to the principles of best regulatory practice under which (in particular) regulatory activities should be carried out effectively and in a way that is transparent, accountable, proportionate, consistent, and targeted. These are the “five principles of good regulation” first laid out in a report by the UK Better Regulation Task Force in 2005¹. These guidelines state that regulation should be:
 - proportionate: regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised;
 - accountable: regulators must be able to justify decisions, and be subject to public scrutiny;
 - consistent: government rules and standards must be joined-up and implemented fairly;
 - transparent: regulators should be open, and keep regulations simple and user friendly; and
 - targeted: regulators should be focused on the problem, and minimise side effects.

Section 5 – Consultation by Ministers

20. **Section 5** places a general requirement on the Scottish Ministers to consult in relation to the exercise of any of their functions under the Act. Where they consider it appropriate to do so, Ministers are required to consult with such persons or bodies that appear to them to have a significant interest in the subject matter to which the exercise of the function relates (except in relation to sections 141(c) and 145(1)). This general consultation requirement applies whether or not there is any other particular consultation requirement.

¹ “Regulation – More is Less. Reducing Burdens, Improving Outcomes”, Annex B to the Report, March 2005.