

# LEGAL SERVICES (SCOTLAND) ACT 2010

---

## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 4 – the Legal Profession**

##### *Chapter 1 – Applying the Regulatory Objectives*

##### *Section 119 – Application by the profession*

240. This section requires regulators of the legal profession (as listed in subsection (2)) when carrying out their regulatory functions (as defined in subsection (3)) to act in a way which is compatible with the regulatory objectives of the Act.

##### *Chapter 2 – Faculty of Advocates*

##### *Section 120 – Regulation of the Faculty*

241. **Section 120** sets out in statute the existing position regarding regulation of advocates, namely that the Court of Session is responsible for admitting and removing persons from the public office of advocates (including setting the criteria for admission and prescribing the procedure) and for regulating the professional practice, conduct and discipline of advocates. It can delegate any of this except the actual admitting and removal to the Lord President or the Faculty. In practice, the bulk of regulation is currently delegated to the Faculty and the Dean, including rules of professional conduct and disciplinary procedures.

##### *Section 121 – Professional rules*

242. Subsection (2) requires that all rules or changes to rules made by the Faculty relating to the criteria or procedure for admission or removal of advocates, and relating to regulating the professional practice, conduct and discipline of advocates must be approved by the Lord President and be published by the Faculty. If these requirements are not met then the rule is of no effect. Where a rule is made otherwise than by the Faculty, it is of no effect unless the Faculty has been consulted on it (subsection (3) (a)). If the Court of Session makes or changes these rules it must be by Act of Sederunt (subsection (3)(b)(ii)). If the Lord President makes or changes these rules, he must publish them (subsection (3)(b)(i)).
243. Subsections (4) and (5) make it clear that this section does not change any rule relating to the professional practice, conduct and discipline of advocates that was in force at the time this section comes into force and that those rules regulating the professional practice of advocates (particularly relating to their involvement in and with licensed providers) still apply unless some other necessary step is taken, such as revocation of a rule.

### ***Section 122 – Particular rules***

244. **Section 122** requires that the Scottish Ministers must consult the OFT and approve a change in any professional practice, conduct or disciplinary rule which prevents advocates from forming legal relationships, such as partnerships, before such a rule can have effect. It supersedes a similar rule in section 31 of the 1990 Act (which is repealed by section 122(4) of the Act).

### ***Chapter 3 – Solicitors and Other Representatives***

#### **Removal of practising restrictions**

### ***Section 123 – Licensed providers as qualified persons***

245. **Section 123** makes various amendments to the 1980 Act to remove certain practising restrictions so as to allow the formation of licensed providers and remove particular offences
246. Subsection (1) amends section 26 of the 1980 Act (offence for solicitors to act as agents for unqualified persons) to ensure that a licensed provider is not deemed to be an “unqualified person”.
247. Subsection (2) amends section 30 of the 1980 Act (liability for fees of other solicitor) so that when a solicitor (or incorporated practice) acting on behalf of a client employs a licensed provider, the solicitor (or incorporated practice) is responsible for the licensed provider’s fees unless other arrangements to the contrary have been made.
248. Subsection (3) amends section 31 of the 1980 Act (offence for unqualified persons to pretend to be solicitor or notary public) to require that a licensed provider has the Society’s written permission before they can call themselves solicitors or a firm of solicitors. The Council of the Society is required to make rules setting out the procedure for obtaining permission and the grounds on which it may be refused.
249. Subsection (4) amends section 32 of the 1980 Act (offence for unqualified persons to prepare certain documents) so that it is clear that a licensed provider can prepare writs relating to moveable or heritable estate, writs relating to actions or proceedings in court, and papers relating to an application for grant of confirmation in favour of executors.
250. Subsection (5) amends section 33 of the 1980 Act (unqualified persons not entitled to fees, etc.) which deals with unqualified persons not being entitled to fees or other reward or expenses to ensure that this section does not apply to licensed providers.
251. Subsection (6) adds certain definitions to section 65(1) (interpretation) of the 1980 Act in relation to the amendments made by the Act.
252. Subsection (7) amends section 17 of the 1990 Act (qualified conveyancers) to ensure that independent qualified conveyancers can provide conveyancing services upon the account of, or for the profit of, licensed providers.

### ***Section 124 – Practice rules for licensed providers***

253. As with section 123 of the Act, this section amends the 1980 Act to remove restrictions which would prevent the formation of licensed providers.
254. Section 34 of the 1980 Act is concerned with the practice rules made by the Council in respect of the professional practice, conduct and discipline of solicitors.
255. Subsection (1) inserts a new section 33C into the 1980 Act to ensure that any rules made under section 34 of that Act do not unduly restrict the involvement of solicitors in or with a licensed provider, or the employment of solicitors by a licensed provider. Subsection (2) makes various amendments to the 1980 Act consequential on subsection (1).

256. Subsection (2) also amends the 1980 Act and the 1990 Act to remove references to multi-disciplinary practices. Multi-disciplinary practices will be an available business option for licensed providers under this Act.

### ***Section 125 – Citizens advice bodies***

257. **Section 125** amends section 26 of the 1980 Act so that it is not an offence for solicitors to be employed by citizens advice bodies to give legal advice to third parties. This is similar to the exemption given to law centres in the same section of that Act. A “citizens advice body” is defined in section 65(1) of the 1980 Act as a non-profit making body that has the sole or primary objective of providing legal and other advice (including information) to the public without charge. There is also provision of a power for the Scottish Ministers to modify the definition of “citizens advice body” by regulations after consulting with the Lord President, the OFT, and other appropriate organisations.

## **Lay representation**

### ***Section 126 – Court of Session Rules***

258. **Section 126** adds a section 5(e) to the Court of Session Act 1988. This extends the Court of Session’s power to make rules to include rules permitting a lay representative, when appearing along with a party at a hearing in any type of case to make oral submissions to the Court on the party’s behalf. It also inserts new section 5A after section 5 of the 1988 Act, which defines the term “lay representative” and provides that the new rules:
- only apply if the party is not otherwise represented;
  - may specify conditions as to when the rules apply; and
  - are subject to any other enactment that makes special provision about lay representation in a particular type of case.

### ***Section 127 – Sheriff court rules***

259. **Section 127** adds a new section 32(1)(n) to the Sheriff Courts (Scotland) Act 1971. This gives the Court of Session the power to make rules to permit a lay representative, when appearing along with a party at a hearing in any type of civil case to make oral submissions to the sheriff on the party’s behalf. It also inserts new section 32A after section 32 of the 1971 Act, which defines the terms “lay representative” and provides that the new rules:
- only apply if the party is not otherwise represented;
  - may specify conditions as to when the rules apply;
  - does not affect the operation of section 36(1) (procedure in summary causes) of the 1971 Act; and
  - are subject to any other enactment other than section 36(1) that makes special provision about lay representation in a particular type of case.

## **Guarantee Fund**

### ***Section 128 – Use of Guarantee Fund***

260. This section amends section 43 of the 1980 Act to allow licensed providers to be covered by the Guarantee Fund, so that the clients of licensed providers have the same protection in the event of loss owing to fraud by a licensed provider or any person within it whilst in receipt of legal services as clients of traditional firms. This protection exists where the approved regulator has chosen not to maintain a compensation fund of its own.

261. **Section 128** also extends the cover of the Guarantee Fund to those suffering pecuniary loss through the dishonesty of a conveyancing or executry practitioner, repeals section 21C of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 requiring the Society to set up and maintain a compensation fund in respect of such practitioners and requires that that compensation fund is transferred into the Guarantee Fund.

### ***Section 129 – Contributions to the Fund***

262. This section amends Schedule 3 to the 1980 Act to require licensed providers to contribute to the Guarantee Fund on the same entity-based model as incorporated practices. The scales for incorporated practices must take into account the number of solicitors that the entity has as directors, members or employees. The scales for licensed providers must take into account the number of solicitors that the entity has as investors or employees. In addition, new paragraph 1C of Schedule 3 provides for contributions to the Guarantee Fund from conveyancing or executry practitioners.

### ***Section 130 – Cap on individual claims***

263. **Section 130** amends Schedule 3 to the 1980 Act by making provision for a cap on individual grants from the Guarantee Fund and giving the Scottish Ministers power, by regulations, to vary the cap after consultation with the Council of the Society. The cap on each grant from the Guarantee Fund is £1.25 million.

## **The Law Society**

### ***Section 131 – Acting as an approved regulator***

264. This section inserts a new section 1A into the 1980 Act which allows the Society to act as an approved regulator within the meaning of Part 2 of the Act and to do anything that is necessary or expedient for the purposes of so doing.

### ***Section 132 – Council membership***

265. This section amends section 3 and Schedule 1 to the 1980 Act in order to allow the co-option (as well as election) of solicitor members and the appointment of non-solicitor members to the Council. It provides the criteria for such election, co-option, or appointment.

### ***Section 133 – Regulatory committee***

266. This section amends the 1980 Act by inserting new sections 3B-3G, which require the Council of the Society to establish a regulatory committee, and set out various rules in relation to that committee. New section 3B provides that the regulatory functions of the Council must be carried out on its behalf by an independent regulatory committee, at least 50% of the membership of which must be lay persons.
267. A key part of the regulatory committee's independence is that it alone can make decisions relating to regulatory matters and so subsection 3 of new section 3B prohibits the Council from exercising its regulatory functions by any other means and from undue interference in the business of the regulatory committee. This does not prevent the Council from exercising reasonable control and oversight of the regulatory committee, as it does currently with other committees, for example requiring regular reports, exercising proper financial control, and removing members under appropriate circumstances. However, it cannot interfere in the committee's regulation of the profession by, for instance, setting performance targets, standards or timescales.
268. Despite the prohibition on the Council carrying out regulatory functions, subsection (4) of new section 3B allows the regulatory committee to determine that in a particular case action needs to be taken by the Council to ensure that its regulatory functions

are carried out appropriately. For example, this may be used where the Council has a specific statutory obligation. If the regulatory committee makes such a determination the Council must, when taking the action in question, follow any directions issued by the Committee, which is still to make the regulatory decisions in the case.

269. Subsection (1) of the new section 3C provides rules that apply to the regulatory committee, in particular, rules relating to its composition regarding solicitors and lay members (lay members are defined in subsection (4)). Subsection (2) provides that sub-committees of the regulatory committee are subject to the same rules as the regulatory committee itself (set out in new section 3C(1)), but allows such a sub-committee to be chaired by a solicitor and also to co-opt people who are not members of the regulatory committee.
270. Subsection (3) of new section 3C ensures that the regulatory committee can still function where the number of lay members is temporarily lower than it should be and that no decisions are invalid because of such a temporary shortfall.
271. New section 3D provides that disputes between the Council and the regulatory committee in relation to new section 3B will be resolved by arbitration. In such a dispute, the Lord President will appoint an arbitrator should the parties fail to agree on one themselves. The arbitrator's decision is final and binding on both the committee and the Council.
272. The Scottish Ministers are given a regulation-making power in subsection (1) of the new section 3E to prescribe the maximum size of the regulatory committee or sub-committees of it, to prescribe a maximum proportion of the committee or sub-committee or it which may comprise co-opted members, to make further provision about the Council's regulatory functions if necessary to ensure the regulatory functions are exercised independently and properly, and also to modify in certain respects the definition of the Council's "regulatory functions". Before making such regulations, the Scottish Ministers must consult the Council.
273. New section 3F defines the Council's regulatory functions.
274. New section 3G provides that if the Society becomes an approved regulator, its regulatory functions include any relevant functions in relation to that role.

### **The 1980 Act: further modification**

#### ***Section 134 – Keeping the solicitors roll etc.***

275. **Section 134** inserts new subsections after section 7(2) and section 12A(2) of the 1980 Act. These require the Council of the Society to enter on the roll of solicitors, the address of the place of business of every enrolled solicitor and registered European lawyer.

#### ***Section 135 – Removal from the roll etc.***

276. **Section 135** amends sections 9 and 12C of the 1980 Act so that the Council of the Society must be satisfied that the solicitor or registered European lawyer has made adequate arrangements for any outstanding business before removing his or her name from the roll/register.

#### ***Section 136 – Restoration to the roll***

277. **Section 136** amends sections 10 and 53 of the 1980 Act. The effect of these two amendments is that the Scottish Solicitors' Discipline Tribunal has the power to order that a solicitor, who has voluntarily removed his or her name from the roll, is prohibited from having his or her name restored to the roll except by order of that Tribunal.

### ***Section 137 – Suspension from practice***

278. **Section 137(1)** amends section 18 of the 1980 Act to allow the Council of the Society to suspend a solicitor’s practising certificate if that solicitor has been convicted of an offence involving dishonesty or, following a conviction, has been sentenced to imprisonment for a term of 12 months or more or been fined an amount equivalent to level 4 on the standard scale or more. Subsection (3) makes similar provision in section 24F of the 1980 Act to allow the Council of the Society to suspend a registered European lawyer in the same circumstances.
279. Section 137(2) and (4) of the Act inserts new subsections into sections 19 and 24G of the 1980 Act that require a solicitor or registered European lawyer to notify the Council when:
- their practising/registration certificate, which had ceased to have effect because they have been detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 or a guardian is appointed under the Adults with Incapacity (Scotland) Act 2000, comes back into effect again on their discharge;
  - their practising/registration certificate, which had ceased to have effect because a judicial factor had been appointed on their estate under section 41 of the 1980 Act comes back into effect again on the judicial factor being granted his discharge.

### ***Section 138 – Accounts rules fee***

280. **Section 138** inserts new section 37A into the 1980 Act. The effect is that an “accounts fee” is to be set by the Council of the Society and paid to the Society by each solicitor, incorporated practice, registered European or foreign lawyer, and multi-national practice who/which is required to contribute to the Guarantee Fund under Schedule 3 to the 1980 Act. The accounts fee is to be used to fund the Council’s function of securing compliance with the accounts rules.

### ***Section 139 – Powers of Tribunal***

281. **Section 139** amends section 53 of the 1980 Act and has three effects. Firstly, it provides that the Scottish Solicitors Discipline Tribunal (“the Tribunal”) can exercise its powers under subsection (2) of that section if a solicitor has been sentenced to a term of imprisonment of 12 months or more, or has been fined an amount equivalent to level 4 on the standard scale or more. Secondly, it provides that the Tribunal can order an incorporated practice to pay compensation to a complainer under subsection (2) of section 53 of the 1980 Act, as it can so order a solicitor at present. Finally, it provides that such compensation orders can be made against former solicitors or incorporated practices.

## ***Chapter 4 – Other Bodies***

### **Scottish Legal Aid Board**

#### ***Section 140 – Exclusion from giving legal assistance***

282. This section amends section 31 of the 1986 Act. Currently, the Society and the Faculty have the power to prevent solicitors and advocates respectively (on the grounds of their conduct) from being instructed by a client to whom legal aid or advice and assistance is available. This amendment transfers the current powers of the Society and the Faculty to the Board. There is an appeal under the 1986 Act to the Court of Session.

#### ***Section 141 – Availability of legal services***

283. **Section 141** amends the 1986 Act in order to give the Board responsibility for monitoring the availability and accessibility of legal services in Scotland, including by



reference to any relevant factors relating particularly to rural or urban areas, and for giving advice to the Scottish Ministers regarding this. This is linked to the regulatory objective of promoting access to justice, as well as the objectives of promoting the interests of consumers, competition in the provision of legal services, and an independent, strong, varied and effective legal profession.

### ***Section 142 – Information about legal services***

284. **Section 142** requires the Society, the Faculty, and the Scottish Courts Service to provide information that the Board might reasonably require in monitoring the availability and accessibility of legal services in Scotland. This is similar to the duty placed on approved regulators (section 32(1)). In addition, for the purposes of the Board's functions of excluding legal practitioners from giving legal assistance under section 31(3) of the 1986 Act, the Society, the Faculty and the SLCC must inform the Board when they uphold conduct or services complaint about a solicitor or an advocate, and give it a summary of the relevant facts.

## **Scottish Legal Complaints Commission**

### ***Section 143 – Relevant practitioners***

285. **Section 143** amends section 46(1) of the 2007 Act. The effect is to amend certain definitions within that section so that the SLCC can deal with complaints against registered European and foreign lawyers.

### ***Section 144 – Minor amendments***

286. This section makes several minor amendments to the 2007 Act.

### ***Section 145 – The 2007 Act: Further provision***

287. **Section 145** amends section 78 of the 2007 Act which provides for the power of the Scottish Ministers to make ancillary provision by order in relation to the provisions of that Act. The scope of the existing power was limited following changes made by the Legal Services Act 2007 which affected the 2007 Act. This section inserts a new subsection (1A) into section 78 of the 2007 Act, and a reference to that new subsection in section 79 of the 2007 Act, which allows the order making power to be used as intended, including in areas altered by the Legal Services Act 2007.