

# LEGAL SERVICES (SCOTLAND) ACT 2010

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## 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 2005<sup>1</sup>. 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.

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

## **Part 2 – Regulation of Licensed Legal Services**

### **Chapter 1 – Approved Regulators**

#### **Approved regulators**

##### **Section 6 – Approved regulators**

21. This section sets out how a professional or other body can become an approved regulator. This is framed as a two-stage process – the first stage is to obtain approval and the second to obtain authorisation. Essentially this is by application to the Scottish Ministers and this section details what information an application must include. If an application for approval is granted, then this means that the body can now call itself an approved regulator. It is only after successfully being granted an application for authorisation that the approved regulator can regulate its licensed providers. No more than three approved regulators may exist at any one time, though this number may be amended by regulations made by the Scottish Ministers with the agreement of the Lord President.
22. Subsection (6) gives the Scottish Ministers a regulation making power to prescribe fees they can charge. This could allow a charge for each application or an annual regulatory charge or both.

##### **Section 7 – Approval of regulators**

23. **Section 7** provides the criteria in relation to which the Scottish Ministers must be satisfied before approving an applicant as an approved regulator. These include, among others, that the applicant:
  - has the necessary expertise as regards the provision of legal services;
  - has a thorough understanding of the application of the regulatory objectives and professional principles; and
  - is adequately resourced.
24. The Scottish Ministers must also be satisfied that the applicant would always exercise its regulatory functions independently of any other person or interest and otherwise properly, that the applicant's regulatory scheme is adequate (with reference to section 12) and that its internal governance arrangements (how it is structured and managed) are suitable (with reference to section 27). The Scottish Ministers must have the consent of the Lord President before approving a body.
25. The Scottish Ministers can approve a body as an approved regulator subject to conditions. Conditions may, for example, restrict an approving body to regulating a particular type of licensed provider, and can be imposed indefinitely or for a period of at least 3 years. The Scottish Ministers may vary any restrictions or conditions following consultation with the approved regulator. This includes adding or deleting any conditions or restrictions.
26. The Scottish Ministers have the power to make regulations regarding the approval of approved regulators, including in relation to the application process and the approval criteria. Regulations about the approval criteria must relate to the capability of applicants to act as approved regulators.
27. The Scottish Ministers are required to consult the OFT and any other person or body that they consider appropriate before approving an applicant as an approved regulator.

### ***Section 8 – Pre-approval consideration***

28. Before deciding to approve an applicant as an approved regulator, the Scottish Ministers must consult the Lord President, the OFT, other appropriate consumer organisations, and any other bodies and persons as they consider appropriate.
29. Where the Scottish Ministers indicate that an application might not be approved, or if conditions are attached, the applicant can make representations within a 28-day period or take such other steps as it considers necessary (for example, by modifying its application or scheme).

### ***Section 9 – Lord President’s agreement***

30. The Scottish Ministers must have the agreement of the Lord President before approving a body as an approved regulator, or imposing or varying any conditions or restrictions. The Scottish Ministers must also impose conditions about the expertise relating to the provision of legal services as are reasonably sought by the Lord President.

### ***Section 10 – Authorisation to act***

31. Authorisation is the second stage of the process. Having been approved by the Scottish Ministers as an approved regulator, the body may not exercise any of its regulatory functions unless authorised so to do by the Scottish Ministers (subsection (1)). The section also makes provision in relation to the restrictions and conditions that may be placed on authorisation.
32. Subsection (2) provides that the Scottish Ministers can only give their authorisation if they are satisfied or continue to be satisfied as to the matters mentioned in section 7(1) and that it continues to meet any criteria provided for in regulations made under section 7(5)(b).
33. Authorisation may be with or without conditions, may be subject to a time limitation and may also be restricted to particular types of legal services or legal service provider. A restriction in relation to a particular type of legal services may be appropriate where an approved regulator has expertise in a specialised area. One example is a body which regulates accountants which might seek to regulate mixed practices of accountants and lawyers, but not other forms of multi-disciplinary practice. The Scottish Ministers may vary by addition or deletion any restrictions and conditions following consultation with the approved regulator.
34. The Scottish Ministers have the power to make regulations regarding the authorisation process. This power could be used to set out the process for authorisation in more detail, and to address any issues which arise with regard to the criteria used.

### ***Section 11 – Request for authorisation***

35. This section allows requests for authorisation to be made at any reasonable time and to be withdrawn. It requires the Scottish Ministers to notify the applicant and to give reasons if they intend to withhold authorisation or impose conditions. If such notification is given, the applicant, or the approved regulator, may within 28 days make representations and take any other steps it considers expedient. There is a duty on the approved regulator or applicant to provide the Scottish Ministers with any information they reasonably require.

## **Regulatory schemes**

### ***Section 12 – Regulatory schemes***

36. **Section 12** sets out the approved regulator’s responsibility to create and implement a regulatory scheme for its licensed providers, and describes what must be included in the scheme. This is regulation of licensed providers as entities – individuals within the

entities who are regulated by professional bodies will continue to be so regulated by them. For example, solicitors will be regulated by the Society.

37. The Scottish Ministers have the power to specify by regulations additional matters which the regulatory schemes must cover. This power could be used to address unforeseen issues with the regulatory schemes which may arise once the system is in operation.
38. The scheme should relate to the provision of legal services, as defined in section 3. However, the Scottish Ministers have the power to make regulations which authorise regulatory schemes to deal with other services in addition to legal services (subsection (5)).
39. Subsection (2) requires the scheme to include details about three sets of rules:
  - the licensing rules (that is, rules relating to the application process and the issuing or renewal of licences – see sections 14 to 16);
  - the practice rules (governing how licensed providers operate – see sections 18 to 23); and
  - the compensation rules (governing the arrangements for compensating the clients of licensed providers for financial loss resulting from the dishonesty of the licensed provider or someone in it – see sections 25 and 26).
40. Subsection (4) allows the approved regulator to amend fully or in part its regulatory scheme but any material change requires prior approval of the Scottish Ministers, who must have the agreement of the Lord President and consult any other person or body they consider appropriate. If prior approval for the changes is not given, they are invalid.

### ***Section 13 – Reconciling different rules***

41. **Section 13** provides that the approved regulator’s regulatory scheme must include appropriate provision which prevents or resolves regulatory conflicts, as well as avoids unnecessary duplication of regulatory rules. Regulatory conflict is conflict between the regulatory scheme and any professional or regulatory rules of any other body which regulates the provision of legal or other services. For example, conflict between a regulatory scheme and the Society’s rules or professional regulatory code of an accountant.
42. The Act does not prescribe that one set of rules would automatically “trump” another in the event of any conflict. It will be for approved regulators to identify and address any potential conflicts, and for the Scottish Ministers to consider whether this has been done adequately in assessing any application for approval or authorisation under sections 7 and 10. However, it will be possible for the Scottish Ministers, with the agreement of the Lord President, to make regulations about regulatory conflict under subsection (3).

## **Licensing rules**

### ***Section 14 – Licensing rules: general***

### ***Section 15 – Initial considerations***

43. **Sections 14** and **15** give details about what the licensing rules that are to be contained in an approved regulator’s regulatory scheme, cover. Licensing rules cover areas such as the procedure and requirements involved in making an application to become a licensed provider (including fees payable to the approved regulator).
44. The general approach of the Act is to set out a broad framework and allow approved regulators the flexibility to devise an appropriate set of rules as best fits the services being regulated and which follows best regulatory practice. However, in some instances

the Act requires certain mandatory provisions to be contained in the licensing rules. The rules must include provision for consultation with the OFT (see section 15(1)(a) and (2)) where there may be an effect of preventing or restricting or distorting competition within the legal services market, and must set out how the regulator would deal with an application where it believes there would be a material and adverse effect on the provision of legal services (section 15(1)(b)).

### ***Section 16 – Other licensing rules***

45. This section provides for the possibility of provisional licences to allow a licensed provider to operate in anticipation of the full licence application being granted. This may be used, for example, in a situation where a licensed provider is transferring from one approved regulator to another. This section also requires licensing rules to make provision in relation to non-compliance with, or breaches of, the regulatory scheme.

### ***Section 17 – Licensing appeals***

46. This section provides for an appeal by a licensed provider (or an applicant to be a licensed provider) to the sheriff against a refusal of its application for a licence or to renew its licence, attach conditions or restrictions to its licence, or to suspend or revoke its licence.

## **Practice rules**

### ***Section 18 – Practice rules: general***

### ***Section 19 – Financial sanctions***

### ***Section 20 – Enforcement of duties***

47. **Section 18** gives details of what is covered by the practice rules that are to be set out in the approved regulator's regulatory scheme. **Section 19** allows practice rules to make specific provision for the financial penalties which may be imposed on licensed providers by approved regulators in relation to a breach of the regulatory scheme by, or a complaint about, a licensed provider and for appeals against their imposition. **Section 20** states that practice rules must specify that failure to comply with section 50 (setting out the key duties of licensed providers), any other duties under this Part, or duties under any other enactment, all constitute a breach of the regulatory scheme. **Section 20** also sets out requirements for licensed providers to report on and review their performance, and to have their performance and the report assessed by the approved regulator.

### ***Section 21 – Performance report***

48. This section provides that the practice rules on reviewing and reporting on the performance of licensed providers must require the Head of Practice (or Practice Committee) of a licensed provider to carry out an annual review and send a report to its approved regulator. The section also sets out certain matters that must be examined in the review.

### ***Section 22 – Accounting and auditing***

49. This section provides that practice rules must require licensed providers to have proper accounting and auditing procedures in place, and include equivalent provisions to the accounts rules in sections 35 to 37 of the 1980 Act for solicitors operating in an incorporated practice. Sections 35 to 37 require the Society to make rules regarding the separate holding of clients' funds, and the provision of an accountant's certificate to demonstrate compliance with those rules.

### ***Section 23 – Professional indemnity***

50. Under this section, practice rules must require licensed providers to have certain professional indemnity arrangements and must include equivalent provision to that on professional indemnity in section 44 of the 1980 Act in relation to an incorporated practice.
51. Section 44 of the 1980 Act provides for the Council of the Society (“the Council”) to make rules concerning indemnity for solicitors and incorporated practices against any class of professional liability (for example, for negligence in the delivery of a legal service). The rules may provide for a fund held by the Society, or for insurance with an authorised insurer held by the Society, or require solicitors to take out insurance. Currently, the Society’s rules provide that all solicitors acting as principals in private practice must be insured under a single “master policy” held by the Society (Solicitors (Scotland) Professional Indemnity Insurance Rules 2005).

### **Compensation arrangements**

#### ***Section 24 – Choice of arrangements***

52. **Section 24** requires each approved regulator to choose one of two options in order to provide for a compensation fund for the purposes of compensating clients for monetary losses suffered by reason of dishonesty on the part of its licensed providers. Approved regulators must either create a compensation fund which it must hold and administer in such a way as corresponds with the Scottish Solicitors Guarantee Fund (“the Guarantee Fund”), or use the Guarantee Fund. The approved regulator must inform the Society of its choice.

#### ***Section 25 – Compensation rules: general***

53. This section sets out the rules that approved regulators must have about the compensation option chosen under section 24. If an approved regulator chooses to set up its own fund, the compensation rules must set out:
  - the purpose of the fund;
  - the minimum amount to be contained within it;
  - the way in which the fund will be administered;
  - the criteria for making payments;
  - the procedure for making a claim, and for determining whether a claim is to be granted;
  - a requirement for licensed providers to contribute to the fund; and
  - the destination of the fund should the approved regulator cease to regulate.
54. If the Guarantee Fund is to be used by an approved regulator, the compensation rules must require licensed providers to contribute to it.

#### ***Section 26 – More about compensation arrangements***

55. This section provides that compensation rules may include further compensation arrangements if the approved regulator considers this to be necessary or expedient. It also provides the Scottish Ministers with the power to make further provision, by regulations, relating to compensation arrangements.

## **Internal governance**

### ***Section 27 – Internal governance arrangements***

56. This section requires the internal governance arrangements of an approved regulator to make provision to ensure that it acts properly and with independence, that it provides sufficient resources for its regulatory functions in relation to licensed providers and that it reviews regularly how effectively it is exercising its regulatory functions. The section sets out relevant factors (in subsection (2)) which approved regulators must have regard to in connection with the independent exercise of their regulatory functions. One of these is the need to avoid conflicts of interest where possible. In order to mitigate conflicts, there is a need for a clear demarcation of regulatory functions from any representative functions the approved regulator may have (for example, as a professional body). In relation to the Society, section 133 of the Act provides that the Society must set up a regulatory committee.
57. Internal governance arrangements are defined for the purposes of Part 2 of the Act in section 29(4), and the distinction between regulatory and representative functions is defined in section 30.

### ***Section 28 – Communicating outside***

58. [Section 28](#) provides that internal governance arrangements cannot prevent consultation and communications with persons or bodies outside the approved regulator. This section makes it clear that individuals exercising regulatory functions within an approved regulator can communicate with others involved in the regulation of legal services, and that they can notify the Scottish Ministers of any adverse impact on regulatory independence arising from the representative role of the regulator.

### ***Section 29 – More about governance***

59. [Section 29](#) provides that the Scottish Ministers may, with the agreement of the Lord President, make regulations including further provision about the internal governance arrangements of approved regulators, but only in relation to their regulatory functions. Before so doing they must consult any approved regulators that would be affected.

## **Regulatory functions etc.**

### ***Section 30 – Regulatory and representative functions***

60. [Section 30](#) defines the regulatory and representative functions of an approved regulator under the Act.
61. Subsection (3) makes clear that the Scottish Ministers are not authorised to exercise any of their functions under the Act in relation to an approved regulator's representative functions.

### ***Section 31 – Assessment of licensed providers***

62. [Section 31](#) provides that each approved regulator (or person who or body that has been delegated this function) is required to carry out periodic reviews of the performance of licensed providers at least once in every 3-year period. The 3-year period starts with the date that the particular licensed provider was issued the licence (subsection (1)). This is an external assessment which complements the annual self-assessment carried out under section 21. The assessment must consider how well the licensed provider has had regard to the regulatory objectives, adhered to the professional principles, complied with the approved regulator's regulatory scheme and the licence conditions, and any such matters as the approved regulator considers appropriate (subsection (3)).



63. Subsection (2) provides that the Scottish Ministers may require an approved regulator to assess a licensed provider at other times if requested to do so by the SLCC. The SLCC may only make the request if it has significant concerns over the handling of a complaint by a licensed provider.
64. The approved regulator is required to inform the relevant professional association if the assessment of the licensed provider in question reveals professional misconduct (or potential professional misconduct) by any of its members (subsection (7)). For example, if there were indications of misconduct by a solicitor or a chartered accountant employed by the licensed provider, the approved regulator would have to notify the Society or the Institute of Chartered Accountants of Scotland respectively. This could happen whether or not the person in question is involved in the provision of legal services within the licensed provider.
65. Under subsection (9), the Scottish Ministers can make further provisions about the assessment of licensed providers by regulations. This could be used to deal with any unforeseen circumstances, or to elaborate on the assessment procedure and requirements should this be necessary.

## **Relationship with other bodies**

### ***Section 32 – Giving information to SLAB***

66. The Board has been given the additional duty of monitoring the availability and accessibility of legal services in Scotland, inserted into the Legal Aid (Scotland) Act 1986 (“the 1986 Act”) as section 1(2A) by section 141 of the Act. This section provides that an approved regulator must provide the Board with information in relation to this function.

### ***Section 33 – Reporting to Law Society***

67. **Section 33** requires an approved regulator (but not the Society, should it be one) whose licensed providers make contributions to the Guarantee Fund under the approved regulator’s compensation rules to report to the Society:
- any breach by a licensed provider of the practice rules on accounting and auditing; or
  - any suspicion of financial impropriety which, in the opinion of the approved regulator, may result in the risk of a claim being made on the Guarantee Fund.
68. The approved regulator must make available to the Society any report of an inspection which it has carried out in relation to those practice rules or any other financial procedures regulated by the approved regulator. The approved regulator must also inform the Society of any further action it intends to take (or has taken) in relation to such breaches, suspicions or inspections.

### ***Section 34 – Steps open to Society***

69. **Section 34** makes provision for the situation where the Society suspects that the approved regulator of a licensed provider making contributions to the Guarantee Fund is failing in its enforcement role in relation to the financial procedures of the licensed provider. In those circumstances, the Society must first make representations to the approved regulator in question. If it is not satisfied with the response (or none has been received within a reasonable time), the Society may refer the matter to the Scottish Ministers. In such a referral, the Society may request that the Scottish Ministers take such action as they consider appropriate.
70. The Society may also seek the consent of the Scottish Ministers to inspect a licensed provider’s documents, records, and other information at its premises which relate to the licensed provider’s client account or any other financial account held by it. The Society

may only seek the consent if it suspects that the approved regulator's failure is risking a claim being made on the Guarantee Fund. The Scottish Ministers may only give their consent where they are satisfied that the Society's suspicions are reasonable and that the inspection is necessary.

### ***Section 35 – Financial inspection by Society***

71. **Section 35** sets out certain requirements relating to the inspections which the Society may carry out under section 34. In particular, before carrying out an inspection the Society must consult the approved regulator and give at least 48 hours notice to the licensed provider in question. Following the inspection, the Society must report its findings to the Scottish Ministers and the approved regulator. In such a report, the Society can request that the Scottish Ministers take such action as they consider appropriate. Finally, the licensed provider must co-operate with the Society in relation to any inspection.

## **Performance and measures**

### ***Section 36 – Review of own performance***

72. **Section 36** requires an approved regulator to review its own performance annually and provides for the matters to be covered by the review. A report on the review must be submitted to the Scottish Ministers, who must lay a copy before the Scottish Parliament. It also allows the Scottish Ministers to make further provision by regulations relating to both the review and the report.

### ***Section 37 – Monitoring by Ministers***

73. This section gives the Scottish Ministers a power to monitor performance of approved regulators. It sets out matters which may be included in the monitoring (section 37(2)) and requires an approved regulator to provide information in relation to its regulatory scheme to the Scottish Ministers (section 37(3)).

### ***Section 38 – Measures open to Ministers***

74. **Section 38** describes the options open to the Scottish Ministers should they feel that an approved regulator is not performing its functions adequately. Subsection (4) sets out the measures which can be taken, which include the rescission of a regulator's authorisation to regulate. The measures in (4)(a), (b), (c), (e) and (f) can only be taken by the Scottish Ministers if they have the agreement of the Lord President.
75. More detail as to when these measures will apply and on the procedures relating to these measures can be found in schedules 1 to 6 to this Act.
76. The Scottish Ministers, with the agreement of the Lord President, have the power under subsection (7) to make further provision by regulations regarding the measures that may be taken in relation to approved regulators. This could be used to give further detail around the specifics of the measures, and the procedure involved. This subsection also gives the Scottish Ministers the power to specify, by regulations, additional measures which can be taken should this be considered necessary. Before making regulations under subsection (6), the Scottish Ministers must consult every approved regulator.

### ***Schedule 1 – Performance targets***

77. This schedule gives details and the procedures to be followed when the Scottish Ministers set performance targets for approved regulators and also provides a procedure for representations to the Scottish Ministers by the approved regulator.

### ***Schedule 2 – Directions***

78. This schedule gives details about the procedures to be followed (including consultation and representations) when the Scottish Ministers exercise their power to give directions to an approved regulator.

### ***Schedule 3 – Censure***

79. This schedule gives further details about the procedures to be followed when the Scottish Ministers, with the consent of the Lord President, use their power to censure an approved regulator for any act or omission (including the procedures for representations).

### ***Schedule 4 – Financial penalties***

80. This schedule gives further details about the procedures to be followed when the Scottish Ministers use their power to impose a financial penalty on an approved regulator (including the procedures for representations, amounts of financial penalties, appeals, and interest).

### ***Schedule 5 – Amendment of authorisation***

81. This schedule gives further details about the procedures to be followed when the Scottish Ministers amend the authorisation of an approved regulator (including the procedures for representations).

### ***Schedule 6 – Rescission of authorisation***

82. This schedule gives further details about the procedures to be followed when the Scottish Ministers use their power to rescind an approved regulator's authorisation (including the procedures for representations).

## **Ceasing to regulate**

### ***Section 39 – Surrender of authorisation***

83. [Section 39](#) deals with the situation where an approved regulator ceases to regulate. It allows an approved regulator to surrender its authorisation, with the prior agreement of the Scottish Ministers, under the procedure in [schedule 7](#). Subsection (3) provides that an approved regulator must take all reasonable steps to ensure that the effective regulation of its licensed providers is not interrupted by the surrender of its authorisation. For example, this may involve ensuring that the licensed providers have sufficient time to find and transfer to an alternative approved regulator before authorisation is surrendered.
84. Subsection (4) states that if an approved regulator surrenders its authorisation to regulate, it also loses its status as an approved regulator. This reflects the two-stage process involved in a body becoming a functioning approved regulator – it must first be approved ([section 7](#)), and then given authorisation to regulate by the Scottish Ministers ([section 10](#)). In giving up authorisation, both authorisation and approval are removed.

### ***Section 40 – Cessation directions***

85. [Section 40](#) applies where an approved regulator's regulatory scheme is amended so as to exclude its regulation of certain categories of licensed provider or legal services, or its authorisation is (or is to be) amended under [section 38\(4\)\(e\)](#), rescinded under [section 38\(4\)\(f\)](#), or surrendered under [section 39\(1\)](#).
86. [Section 40\(2\)](#) gives the Scottish Ministers a wide power to direct an approved regulator to take such action as they consider necessary or expedient for the purpose of providing continued effective regulation of affected licensed providers. This might include,

for example, requiring an approved regulator to alter the timing of its surrender of authorisation to ensure that another approved regulator was in a position to accept its former licensed providers.

### **Section 41 – Transfer arrangements**

### **Section 42 – Extra arrangements**

87. These sections cover the situation whereby licensed providers may be forced to transfer from one approved regulator to another approved regulator. For example, this would occur if an approved regulator surrendered its authorisation or had its authorisation rescinded, or amended an authorisation so it was no longer regulating particular categories of licensed provider or legal services. In such circumstances, the approved regulator must inform its licensed providers of the situation, and notify those which will have to transfer to another approved regulator (section 41(2) and (3)).
88. Subsections (4) and (5) of section 41 set out the process and timescales involved in moving from one approved regulator to another. The changeover period refers to the period of time during which a licensed provider which has been forced to transfer may continue to operate according to the regulatory scheme of its previous regulator, whilst being regulated by the new regulator. There is a requirement on the licensed provider to comply with the new regulator's rules within the 6-month changeover period.
89. For example, suppose an approved regulator "X" notifies a licensed provider that it is ceasing to exist as an approved regulator, and that a transfer is therefore necessary. The licensed provider would identify a new approved regulator "Y", and arrange to transfer to it within 28 days (or as soon as was practicable). Starting from the date on which Y took over responsibility for regulating the licensed provider in question, it would have 6 months in which to adopt Y's regulatory scheme. During the 6-month "changeover" period, the licensed provider is free to continue to comply with only X's regulatory scheme, but on the day that the changeover period is completed, it must comply fully with Y's scheme.
90. This process requires the new approved regulator to regulate the licensed provider using the previous approved regulator's regulatory scheme for the duration of the changeover period.
91. Section 42 gives the Scottish Ministers the power to make regulations relating to transfer arrangements.
92. This power can be used to address any unforeseen circumstances which might occur in the transfer process described in section 41. However, regulations may be used in two particular cases, described in subsection (2).
93. The first of these (subsection (2)(a)) is where a licensed provider has not transferred to a new approved regulator despite being required so to do. In this case, the Scottish Ministers can arrange for the licensed provider in question to be regulated by an approved regulator of their choice (subject to that approved regulator's consent). This may be necessary to ensure continuity of regulation where a licensed provider has failed, for whatever reason, to identify a new regulator within a reasonable time.
94. The second case (subsection (2)(b)) is where there is a need to recover fees paid to the former approved regulator, in relation to the current licence of the licensed provider. This may be necessary where, for example, a licensed provider is forced to move to a new regulator whilst having paid an annual fee to its former regulator less than 12 months previously and is unable to recover the outstanding portion of the fee.

## **Change of regulator**

### ***Section 43 – Change of approved regulator***

95. **Section 43** provides for a voluntary transfer by a licensed provider to a new regulator, and sets out the timescale and requirements involved.
96. The new approved regulator must consent for the transfer to take effect. The licensed provider must give notice to the former approved regulator and to the Scottish Ministers. The licensed provider must explain why it is transferring and specify the new regulator. It must also specify the date on which the transfer will occur (which must be within 28 days of the notice) and provide a copy of the new approved regulator's consent to the transfer.
97. The Scottish Ministers have the power (under subsection (6)) to make, by regulations, further provisions relating to such transfers.

### ***Section 44 – Step-in by Ministers***

98. **Section 44** makes provision to allow the Scottish Ministers to ensure that licensed providers are regulated in the absence of a suitable approved regulator. The Scottish Ministers may by regulations either establish a new regulator (subsection (1)) or set themselves up as an approved regulator (subsection (2)) where necessary or expedient in order to ensure that there is effective regulation of the provision of legal services by licensed providers. No regulations may be made unless the Scottish Ministers have the agreement of the Lord President and they believe that their intervention under this section is necessary as a last resort.

## **Additional functions etc.**

### ***Section 45 – Additional powers and duties***

99. This section gives a power to the Scottish Ministers to make regulations conferring additional functions on approved regulators. Before making such regulations, the Scottish Ministers must have the agreement of the Lord President and must consult with every approved regulator and any other person or body they think appropriate.

### ***Section 46 – Guidance on functions***

100. All approved regulators must have regard to any guidance issued by the Scottish Ministers to approved regulators in relation to Part 2 of the Act. Before issuing such guidance, the Scottish Ministers must consult all approved regulators and other persons or bodies as they consider appropriate. Any guidance issued must also be published.

## ***Chapter 2 – Licensed Legal Services Providers***

### **Licensed providers**

#### ***Section 47 – Licensed providers***

101. **Section 47** provides the definition of a licensed provider. Any such body is a business entity which provides legal services for a fee, gain or reward under a licence issued by an approved regulator. In order to be eligible to be a licensed provider a body must have within it a practising solicitor (with a valid practising certificate that is free from conditions).
102. Subsection (3) states that a licensed provider may not be regulated by more than one approved regulator at the same time.

## **Section 48 – Eligibility criteria**

### **Section 49 – Majority ownership**

103. These sections describe some possible models of licensed provider and give details of what criteria make and do not make an entity eligible to be a licensed provider.
104. Licensed providers need not have any particular business structure and need not be a body corporate, but they must be a recognisable business entity (such as a company). It is possible that a business which is involved in matters with no link to legal services might in future have a stake in a licensed provider. In such a situation, subsection (3)(b) requires that there should be a distinct business entity within that organisation which operates as the licensed provider. This will prevent approved regulators from having to regulate matters which are not related to the broad definition of legal services in section 3.
105. The definition of licensed provider excludes existing forms of legal business structures. These will continue to be regulated as now (primarily by the Society and the Faculty). The existing “traditional” forms of business structure for solicitors are set out in section 48(4).
106. The first is a solicitor operating as, in effect, a sole trader (sometimes known as a sole practitioner).
107. The second, the traditional practice, means either a partnership made up entirely of solicitors, or an “incorporated practice”. An incorporated practice is a form of solicitors’ practice with no non-solicitor ownership or control, which trades as a body corporate, and which may benefit from limited liability. Such practices are governed by the Solicitors (Scotland) (Incorporated Practices) Practice Rules 2001.
108. The third, law centres, are also already provided for in the 1980 Act. Section 65 of the 1980 Act defines “law centre” as “a body (a) established for the purposes of providing legal services to the public generally as well as to individual members of the public, and (b) which does not distribute any profits made either to its members or otherwise, but reinvests any such profits for the purposes of the law centre”. Such law centres typically have an arrangement with a solicitors’ firm which provides the legal services for the centre. Section 26(2) of the 1980 Act provides that the offence of acting as agents for unqualified persons does not apply to solicitors, registered foreign lawyer or registered European lawyer pursuing professional activities within the meaning of the European Communities (Lawyer’s Practice) (Scotland) Regulations 2000 who are employed full-time on a fixed salary by a body corporate or employed by a law centre.
109. The Scottish Ministers have the power to make regulations about eligibility to be a licensed provider (subsection (6)). Those regulations may specify other types of entity that are or are not eligible to become licensed providers and make further provision about the criteria for eligibility to be a licensed provider. This subsection also gives the Scottish Ministers power to modify by regulations section 47(2) which currently requires an entity to include at least one solicitor in order to be eligible to be a licensed provider, so that in future it may be possible for a licensed provider to be eligible if it includes a different type of practitioner. Scottish Ministers also have the power to modify the list of legal practitioners in subsection (5). This power could be used to add any types of legal practitioner which are created in the future, thus keeping the provision up to date.
110. **Section 49** provides that an entity is only eligible to be a licensed provider if it is at least 51% owned, managed or controlled by solicitors, firms of solicitors or incorporated practices or members of other regulated professions. It should be noted that section 147 provides that this percentage may be amended or section 49 may be repealed. In either case, the Scottish Ministers must have the agreement of the Lord President before making the necessary regulations. Such an entity must also have at least one solicitor

in possession of a practising certificate free of conditions. An entity is not eligible to become a licensed provider if it is wholly owned, managed or controlled by solicitors, firms of solicitors or incorporated practices.

111. **Section 49(3)** defines “regulated profession”. Subsection (4) requires the Scottish Ministers to make regulations specifying what is or what is not to be regarded as a “regulated profession” and allows them to make regulations about what is or what is not a professional association, professional activities (or qualifications) or membership of a profession. Before making such regulations, the Scottish Ministers must have the agreement of the Lord President and must also consult the Society, every approved regulator, the OFT and other organisations appearing to them to represent the interests of consumers, and any other persons and bodies they consider appropriate.

## **Key duties and positions**

### ***Section 50 – Key duties***

112. **Section 50** sets out the key duties applicable to all licensed providers, including their obligations with respect to the regulatory objectives, professional principles, their approved regulator’s regulatory scheme and licence terms and conditions. Licensed providers must also ensure compliance with any professional code of conduct applicable to persons within the licensed provider – whether or not such codes are directly incorporated within the approved regulator’s scheme.
113. Because a licensed provider is an intangible entity, the Act provides that all such providers must have identifiable individuals responsible for securing compliance with the key duties, namely a Head of Legal Services (see section 51) and either a Head of Practice (see section 52) or Practice Committee (see section 53). The two posts have distinct but overlapping duties. Broadly, the Head of Legal Services is responsible for ensuring compliance with regulatory objectives and professional principles, while the Head of Practice is responsible for the broader compliance with the relevant regulatory scheme, and licence terms and conditions.

### ***Section 51 – Head of Legal Services***

114. **Section 51** describes the position of Head of Legal Services, along with the requirements, duties and responsibilities associated with the role. This position must be filled in a licensed provider otherwise there is a risk that the licensed provider’s licence will be revoked (see section 69). As stated above, the Head of Legal Services is responsible for ensuring compliance with regulatory objectives and professional principles. The Scottish Ministers have the power to make further provision about this position and its function by regulations (subsection (9)(a)).
115. Subsection (2) requires that the Head of Legal Services is to be currently qualified to practice as a solicitor and that he or she has a valid practising certificate, free of conditions. The relevant legislation on practising certificates and conditions is to be found in sections 4, 15(1) and 53(5) of the 1980 Act. The Scottish Ministers, following consultation with the Lord President, have a power to modify by regulations this subsection to allow an additional type of legally qualified person to become Head of Legal Services (subsections (9)(b) and (10)).
116. The Head of Legal Services is personally responsible for securing the licensed provider’s compliance with the regulatory objectives, its adherence to the professional principles, and its fulfilment of its other duties, and to take such reasonable steps (such as issuing of instructions, establishing appropriate arrangements for training, monitoring and supervision of staff, and internal audit) for these purposes. The Head of Legal Services is also responsible for managing designated persons (subsections (4) to (6)). This section also provides for the action to be taken by the Head of Legal Services where it appears to him or her that the licensed provider is failing to fulfil its duties.

117. Subsection (8) provides that where any function falls to both the Head of Legal Services and the Head of Practice they are jointly and severally responsible for exercising the function. It will be noted that the Act gives a “whistle blowing duty” to both the Head of Legal Services (section 51(7)) and Head of Practice (section 52(6)), the difference being that the Head of Legal Services is required to report to the Head of Practice and the Head of Practice to the approved regulator. Another joint function is to ensure that designated persons in the licensed provider meet their professional obligations (sections 51(5)(b) and 52(4)(b)). Other joint functions may be provided for at a later date through the regulation-making power in sections 51(9) and 52(7).

### ***Section 52 – Head of Practice***

118. **Section 52** describes the position of Head of Practice, along with the eligibility requirements, and the duties and responsibilities associated with the role. As stated above, the Head of Practice is responsible for broader compliance with the relevant regulatory scheme. This position must be filled in a licensed provider otherwise there is a risk that the licensed provider’s licence will be revoked (see section 69).
119. Subsection (2) gives details of the criteria that are required for a person’s appointment as its Head of Practice. Unlike the Head of Legal Services, no particular qualification is stipulated, although it is possible for the Scottish Ministers, following consultation with the Lord President, to add specific requirements by regulations under subsection (7). Such regulations may also make further provision about the functions of the Head of Practice.
120. Subsection (3) states the Head of Practice has the function of securing the licensed provider’s compliance with its approved regulator’s regulatory scheme and the terms and conditions of its licence. The duty is both to ensure compliance by the organisation as a whole, and to manage those working within the organisation to ensure they take account of the regulatory scheme. Whereas the Head of Legal Services managerial oversight is restricted to designated persons (i.e. those involved in the delivery of legal services – see section 59), the Head of Practice has oversight of everyone in a licensed provider.
121. Subsection (6) creates a “whistle blowing” duty. It provides that, if it appears to the Head of Practice that the licensed provider or any person having an interest in the licensed provider is failing (or has failed) to fulfil any of its duties, or that any such person is behaving (or has behaved) improperly in relation to the licensed provider or to any person within it, the Head of Practice must report the matter to the licensed provider’s approved regulator.

### ***Section 53 – Practice Committee***

122. **Section 53** describes the composition and responsibilities of the Practice Committee, which licensed providers can choose to have instead of the Head of Practice. They have the same functions under the Act. The Practice Committee must have as one of its members a person who would be eligible to be the Head of Practice (if the licensed provider had decided to have a Head of Practice). The members of a Practice Committee are to be jointly and severally responsible as regards the Committee’s functions. The Scottish Ministers, following consultation with the Lord President, have the power to make further provision by regulations relating to Practice Committees and their functions (subsections (5) and (6)).

### **Appointment to position etc.**

### ***Section 54 – Notice of appointment***

123. This section contains requirements for notification by licensed providers to approved regulators of the details of the appointment of a Head of Legal Services and Head of Practice or Practice Committee, or any changes to these appointments.



### ***Section 55 – Challenge to appointment***

124. **Section 55** gives an approved regulator the power to challenge any appointment to the posts of Head of Legal Services, Head of Practice or as a member of a Practice Committee. The section sets down the specific grounds of challenge: a challenge can only be made if an approved regulator believes that person to be ineligible or unsuitable, or on other reasonable grounds. After allowing representations, it is open to an approved regulator to direct that an appointment be rescinded. Under subsection (7), the licensed provider or the aggrieved person may appeal to the sheriff within 3 months of the date of the direction.

### ***Section 56 – Disqualification from position***

#### ***Section 58 – Conditions for disqualification***

125. **Section 56(1)** indicates that sections 57 and 58 should be read in conjunction with section 56. Section 58 lists conditions which may or will result in the disqualification of someone from the positions of Head of Legal Services, or Head of Practice, or from being a member of the Practice Committee, or from being a designated person (see section 59 for the definition of a designated person).
126. In all cases, disqualification depends on a decision by the approved regulator that the matter which gives rise to the disqualification makes the person unsuitable for the appointment. In other words, although specific grounds in any of the conditions in section 58 may be met, the disqualification is never automatic since the approved regulator must be also satisfied that the person is unsuitable for the position. Further, before any disqualification occurs, the approved regulator must allow the licensed provider and the person to take such steps as are expedient or to make representations (section 57(3)).
127. **Section 56(2)** indicates that an approved regulator must disqualify a person from being Head of Practice or member of the Practice Committee if that person is insolvent and the approved regulator is satisfied that this makes that person unsuitable (the first condition in section 58(2)).
128. **Section 56(3)** indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services or Head of Practice or Practice Committee member if that person is subject to a bankruptcy restrictions order or undertaking under the Bankruptcy (Scotland) Act 1985 (or corresponding legislation) and the approved regulator is satisfied that this makes that person unsuitable (the second condition in section 58(3)). The approved regulator may disqualify someone from being a designated person on the same grounds.
129. **Section 56(4)** indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member if that person is subject to a disqualification order or undertaking under the Company Directors Disqualification Act 1986 (or corresponding legislation) or has been disqualified by a court from holding a position of business responsibility and the approved regulator is satisfied that this makes that person unsuitable (the third condition in section 58(4)).
130. **Section 56(5)** indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member if that person has been convicted of an offence involving dishonesty or has been fined for an offence a sum equivalent to level 4 on the standard scale or more, or has been sentenced to imprisonment for a term of 12 months or more and the approved regulator is satisfied that this makes that person unsuitable (the fourth condition in section 58(5)). The approved regulator may disqualify someone from being a designated person on the same grounds.

131. **Section 56(6)** indicates that an approved regulator may disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member, or designated person if that person has failed to fulfil any of his or her duties as stated in this Part of the Act, or has caused (or substantially contributed to a breach) of the terms or conditions relating to the licensed provider's licence, and the approved regulator is satisfied that this makes that person unsuitable (the fifth condition in section 58(6)).

### ***Section 57 – Effect of disqualification***

132. Any disqualification under section 56 may be for an indefinite period or for a specified time period. In addition, designated persons may have a limit put on particular activities, or be prevented from carrying out certain activities without supervision. If someone is disqualified from a particular position in one licensed provider, that disqualification has the effect of disqualifying them from the same position in any other licensed provider, including a licensed provider which may operate under a different approved regulator.
133. Subsection (4) requires licensing rules to stipulate that a licensed provider's licence may be revoked or suspended if it wilfully disregards the disqualification of someone from the position of Head of Legal Services or Head of Practice, or from being a member of the Practice committee or from being a designated person.
134. Because of the potentially serious consequences of disqualification from a particular post, representations must be allowed before a disqualification occurs; there must be a procedure for review within the practice rules; and there is also a subsequent right of appeal to the sheriff.

### **Designated persons**

#### ***Section 59 – Designated persons***

#### ***Section 61 – Listing and information***

135. **Section 59** defines what is meant by “designated person” and indicates who designates such a person. A designated person is a person (whether or not a legal professional, and whether or not paid) who carries out legal work in connection with the provision of legal services by a licensed provider. In order to be eligible to be a designated person the person must be an employee of the licensed provider (or work in it under another arrangement). The designation is made in writing by the Head of Legal Services or the Head of Practice (or Practice Committee).
136. The Head of Practice must keep a list of all such persons and provide a copy to the approved regulator if requested to do so, under section 61. The procedures for disqualification in sections 56 to 58 allow approved regulators to take action against persons who should not be involved in the provision of legal services.

#### ***Section 60 – Working context***

137. **Section 60** makes the Head of Legal Services responsible for ensuring that designated persons carrying out legal work are adequately supervised in doing so, and ensures that only designated persons can carry out legal work within a licensed provider. It also provides that nothing in this Part of the Act affects the provisions in any other enactment as to who may (or may not) carry out any particular sort of legal work. See, for example, the restrictions in section 32 of the 1980 Act which make it an offence for unqualified persons to draw or prepare certain writs in relation to property, court action, and executries. Also, it does not affect rules of professional practice, conduct or discipline to which those in licensed providers might be subject.

## **Non-solicitor investors**

### ***Section 62 – Fitness for involvement***

138. This section provides that an approved regulator must be satisfied that all non-solicitor investors are fit to have an interest in the licensed provider at the licensing and renewal stages. The approved regulator must monitor the fitness of all investors at other times. Fitness to be an investor is to be determined in all these cases, with reference to the factors set out in section 64.
139. The approved regulator's licensing rules in relation to applications and renewals for, terms of, and revocation and suspension of, licences may relate to any non-solicitor investor (as well as to a licensed provider) and the rules must explain how a non-solicitor investor's fitness for having an interest in a licensed provider is to be determined.
140. An entity must not be licensed (or a licensed provider must have its licence revoked or suspended) if the approved regulator determines that an investor is unfit to have an interest. This does not apply, however, where the licensed provider can demonstrate within a reasonable time appointed by the approved regulator, that the investor no longer has a relevant interest in the entity. There is provision for an alleged unfit investor to make representations or take other steps before the approved regulator makes its final determination and also for an appeal to the sheriff.

### ***Section 63 – Exemption from fitness test***

141. **Section 63** provides that an approved regulator is not required to satisfy itself as to the fitness of an investor where that investor is an "exemptible investor". Investors are exemptible if they have less than a 10% stake in the ownership or control of a licensed provider. Licensing rules must explain the circumstances in which the approved regulator will apply an exemption and its reasons for so doing. The licensing rules must also explain any threshold for exemption that the approved regulator will apply which is lower than 10%.

### ***Section 64 – Factors as to fitness***

142. **Section 64** provides examples of relevant factors when determining a non-solicitor investor's fitness, such as financial position and business record, and family business and other associations. Subsection (3) sets out in what circumstances a non-solicitor investor is presumed to be unfit. These conditions are similar to those found in the first, second, third and fourth conditions in section 58(2) to (5) in relation to disqualification from positions within a licensed provider. It also sets out that if the non-solicitor investor is a body, the approved regulator should consider the fitness of that body and of those having ownership, control, or any material interest in it and its affairs. It means that the fitness for involvement test cannot be avoided by investors within a company.

### ***Section 65 – Ban for improper behaviour***

143. This section requires the approved regulator to disqualify a non-solicitor investor from acting in that capacity should he or she contravene section 66(1) or (2) of the Act. It sets out that such disqualification can be permanent, or for a fixed period and that it extends to every licensed provider, not just those regulated by the same approved regulator. The approved regulator must allow the investor in question to make representations to it and there is provision for a disqualified person to appeal to the sheriff. An approved regulator must make provision in practice rules in relation to the procedure for disqualification and for review of a disqualification

### ***Section 66 – Behaving properly***

144. Subsection (1) forbids a non-solicitor investor from acting in a way which is incompatible with the regulatory objectives and the professional principles in the

Act, the licensed provider's duties in relation to these objectives and principles, the regulatory scheme, the terms and conditions of the licence, and its other duties under Part 2 of the Act and under any other legislation.

145. Subsection (2) provides that a non-solicitor investor in a licensed provider must not interfere improperly in the provision of legal or other professional services by the licensed provider. Moreover he or she must not seek to exert undue influence over, or solicit unlawful or unethical conduct by, or otherwise behave improperly in relation to any designated or other person within the licensed provider.

### ***Section 67 – More about investors***

146. **Section 67** introduces schedule 8 which contains more provision about non-solicitor investors. Subsection (2) gives the Scottish Ministers power to make further provision by regulations in relation to interests in licensed providers and to make licensing rules in relation to persons with such interests.
147. Subsection (3) gives the Scottish Ministers further regulation making powers, with the agreement of the Lord President, to amend the percentage threshold for exemption from the fitness for involvement test in section 63(4) and the notification requirements in paragraph 3(4) of schedule 8, and to amend a definition in subsection (6)
148. Subsection (4)(c) extends the Scottish Ministers' regulation making powers to consideration of what counts as an interest or stake in a licensed provider including further provision about family, business, and other associates and (4)(d) allows regulations to include further provision setting out, where a body holds an interest in a licensed provider, what interest in the body counts towards an interest held by it in the licensed provider and the extent to which that interest so counts.
149. Subsection (6) defines an "investor" and a "non-solicitor investor" in a licensed provider.

### **Discontinuance of services**

#### ***Section 68 – Duty to warn***

150. **Section 68** requires that the licensed provider gives as much warning as possible to the approved regulator where it is in serious financial difficulty or in the case that it is likely to or intends to stop providing legal services (except in the cases of revocation or suspension, when the approved regulator would already be aware). The licensed provider must also take steps to prevent disruption to clients.

#### ***Section 69 – Inability to operate***

151. This section covers certain situations (as described in subsection (1)) where the approved regulator must revoke a licensed provider's licence, unless the approved regulator is satisfied that the conditions described in subsection (3) are met. These are situations where the licensed provider does not meet the eligibility criteria in sections 48 or 49, or the business is in the process of being wound up, or does not have someone who can be a Head of Legal Services or Head of Practice, or for some other reason a licensed provider stops providing legal services. In such circumstances, the licensed provider must notify its approved regulator without delay, and within 7 days.
152. Unless the situation is temporary and there are sufficient arrangements in place to safeguard the interests of clients, a licence will be revoked. In temporary situations, the approved regulator can allow the licensed provider to continue to operate or suspend its licence as it considers appropriate. The situation must be reviewed every 14 days (or more frequently) to ensure that a decision on whether or not to revoke the licensed provider's licence is made promptly to minimise the period of uncertainty for the licensed provider's clients.

### ***Section 70 – Safeguarding clients***

153. **Section 70** makes provision to safeguard the interests of clients of a licensed provider which is ceasing, or has already ceased (see subsection (11)) to provide legal services. It sets out the requirements placed on the licensed provider in question, and allows the approved regulator to issue directions (subsection (3)) to it in order to protect the interests of clients. Such directions may concern making certain documents and information, or money held on behalf of clients or in trust, available. For example, where the licensed provider has ceased to exist, clients may find it difficult or time consuming to gain access to documents, information, or money, not least if the former point of contact is no longer available. The approved regulator's ability to compel the licensed provider (or former licensed provider) to take such actions as it considers necessary could be used therefore to mitigate the impact on clients.
154. Subsection (6) allows recourse to the Court of Session should the licensed provider fail to comply with any directions given by the approved regulator. The Court may make various orders to preserve the clients' positions, such as varying the approved regulator's directions as it sees fit, or impose conditions, or freezing bank accounts. The Court, following consideration of the circumstances must be satisfied that the action is appropriate and must consider any relevant input from those with an interest in the situation before making an order (see subsection (7)).
155. Subsection (10) gives the Scottish Ministers a regulation making power to make further provision regarding the steps taken to safeguard the interests of clients in the circumstances described in subsection (1).

### ***Section 71 – Distribution of client account***

156. This section indicates that, should a licensed provider go into administration, or be wound up, or have a provisional liquidator, liquidator, receiver or judicial factor appointed, or should it pass a winding up order (unless it does so simply for the purposes of reconstruction or amalgamation with another licensed provider), any client's monies of the kind indicated in section 42 of the 1980 Act must be distributed in the way that section 42 of that Act requires. Section 42 deals with the distribution of sums in client bank account kept by a solicitor or an incorporated practice.

### **Professional practice etc.**

### ***Section 72 – Employing disqualified lawyer***

157. **Section 72** applies to:
- a solicitor who has been struck off the roll or suspended from practice;
  - a European or foreign lawyer who has been suspended or whose registration has been withdrawn;
  - an individual practitioner (as defined in section 48(5)) who has been either struck off, or suspended or disqualified from practising; or
  - an incorporated practice whose certificate of recognition has been revoked.
158. The licensed provider, knowing that a person is so disqualified, must not employ or pay that person (subsection (2)), unless the approved regulator has given permission so to do (subsection (3)), which it may do for a specified period and with conditions attached (subsection (4)). Subsections (5) and (6) provide for appeals to the Court of Session in certain situations. Subsection (7) provides that if a licensed provider knowingly and deliberately employs a disqualified person, or wilfully contravenes any conditions, its licence may be revoked or suspended.

### ***Section 73 – Concealing disqualification***

159. **Section 73** applies to the same persons as in section 72. It provides that a person (or incorporated practice) who has been disqualified will be guilty of an offence if, while disqualified, that person seeks or accepts employment by a licensed provider without informing it of the disqualification. The offence may lead to summary conviction and a fine not exceeding level 5 on the standard scale.

### ***Section 74 – Pretending to be licensed***

160. **Section 74** provides that a person commits an offence if that person pretends to be a licensed provider, or takes or uses any name, title, addition or description falsely implying that the person is a licensed provider. The offence may lead to summary conviction and a fine not exceeding level 5 on the standard scale.

### ***Section 75 – Professional privilege***

161. Legal professional privilege protects the confidentiality of communications between a solicitor and the solicitor's client that were conducted for the purpose of receiving legal advice, both oral and in writing, and of documents that are created for the main purpose of gathering evidence for use in legal proceedings. This section ensures that the clients of licensed providers have essentially the same legal professional privilege as they would have had if they had instructed a traditional sole practitioner, a law firm, or an incorporated practice. A communication made to or by a licensed provider in its provision of legal services or by a designated person acting in connection with those services and at the direction or under the supervision of a solicitor is to be treated as if it were a communication made by a solicitor for the purposes of disclosure. This reproduces the effect which exists under common law in relation to clients of solicitors and which exists in statute for incorporated practices and registered foreign lawyers in, respectively, sections 33A and 33B of the 1980 Act.

## ***Chapter 3 – Further Provision***

### **Achieving regulatory aims**

#### ***Section 76 – Input by the OFT***

162. **Section 76** concerns the occasions when the Scottish Ministers and approved regulators consult with the OFT and sets out what they must do. Such consultation should be in relation to competition issues. The Scottish Ministers and approved regulators must take into consideration any advice given by the OFT.

#### ***Section 77 – Role of approved regulators***

#### ***Section 78 – Policy statement***

163. **Section 77** sets out the responsibilities of approved regulators with regard to the regulatory objectives and the adoption of best regulatory practice. **Section 78** provides that an approved regulator must prepare and issue (and may revise and re-issue) a policy statement detailing how it will meet these responsibilities. It must obtain the approval of the Scottish Ministers for any version and also must publish it.

### **Complaints**

#### ***Section 79 – Complaints about regulators***

164. **Section 79** requires that complaints against approved regulators must be made to the SLCC. The SLCC is responsible for determining the nature of the complaint and whether it is "frivolous, vexatious or totally without merit". If the Commission determines that a complaint is frivolous, vexatious or totally without merit it is not

required to take further action and must notify the complainer and the approved regulator. Complaints about how an approved regulator has dealt with a regulatory complaint are to be investigated by the Commission by virtue of section 57D(1) of the Legal Profession and Legal Aid (Scotland) Act 2007 (as inserted by section 81 of the Act). All other categories of complaint must be referred by the Commission to the Scottish Ministers and the Scottish Ministers must investigate any complaint that is referred to them.

165. Subsection (5) requires the Scottish Ministers to notify the complainers and the approved regulator if the complaint is not investigated or not upheld and give reasons for their decision. Subsection (6) requires the Scottish Ministers to notify both parties concerned if the complaint is upheld and give reasons for their decision. They may decide to take any of the measures or sanctions open to them (see section 38), including direction, censure or ultimately rescinding authorisation. Subsection (7) allows the Scottish Ministers to delegate the function of investigating a complaint on their behalf to the SLCC. Subsection (8) allows the Scottish Ministers to make further provision about complaints by regulations.

### ***Section 80 – Levy payable by regulators***

166. **Section 80** provides that approved regulators must pay an annual levy to the SLCC. A complaints levy must also be paid in the event that the SLCC investigates a complaint against an approved regulator (having had this function delegated to it under section 79(7) and that complaint is upheld. The amount of the annual and complaints levy is set by the SLCC, following consultation with every approved regulator and the Scottish Ministers.

### ***Section 81 – Complaints about providers***

167. **Section 81** amends the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”) by inserting a new Part 2A making special provision for licensed providers in respect of complaints.
168. The basic approach of the 2007 Act, which the Act retains, is that all complaints about legal professionals or law firms are initially considered by the SLCC, but the only complaints which are investigated by the SLCC are those found to be about inadequate professional services (“services complaints”) or about how other complaints have been handled (“handling complaints”). Complaints which are found to be about the professional conduct of a legal professional (“conduct complaints”) are referred to the relevant professional organisation (e.g. the Society or Faculty) for investigation and possible disciplinary action.
169. New section 57A of the 2007 Act provides that conduct complaints may not be made about licensed providers, although they can be made about legal professionals working in the licensed provider. Services complaints may be made about either the licensed provider or individual practitioners within the provider. If an approved regulator receives a conduct complaint or a services complaint about a practitioner in one of its licensed providers, it must send the complaint and any relevant material to the SLCC without delay (unless the complaint came from the SLCC).
170. Various duties apply to the relevant professional organisation in the 2007 Act, for example, to liaise with the SLCC if a complaint being dealt with as a conduct complaint appears on investigation to be a services complaint (section 15 of the 2007 Act), and to provide the SLCC with information (section 37 of the 2007 Act). These duties are also imposed on approved regulators by sections 57A and 57B of the 2007 Act in relation to services complaints against licensed providers and the new regulatory complaints.
171. New section 57B of the 2007 Act introduces a new type of complaint – a “regulatory complaint” which can be made about a licensed provider alleging that it has not acted in accordance with the regulatory objectives, the professional principles, the approved

regulator's regulatory scheme, or the conditions of its licence. These complaints will be referred by the SLCC to the approved regulator to deal with, in accordance with the regulatory scheme. The procedures and functions of the SLCC are essentially the same as in respect of a conduct complaint.

172. New section 57C(1) and (2) of the 2007 Act deal with the levy to be paid by a licensed provider to the SLCC. In addition to any levy paid by individual practitioners in the entity, the licensed provider must itself pay an annual general levy, which might be a different amount from that paid by individual practitioners and might differ depending on the type of licensed provider. This gives the SLCC the discretion to impose an additional levy on licensed providers if the cost of regulating complaints against such providers is disproportionately high. However, it is possible for this annual levy to be set at nil – meaning only the legal professionals in the licensed provider would pay the normal general levy. It would also be possible for the SLCC to reduce the levy in respect of professionals in a licensed provider under the provisions of section 29(2) of the 2007 Act. The SLCC is required to consult with approved regulators and licensed providers each year in relation to its budget for the next financial year. Approved regulators are required to provide the SLCC with an estimate of the number of licensed providers it regulates and which should be liable to pay the levy in the relevant financial year.
173. New section 57C(5) of the 2007 Act requires the SLCC to provide advice about making a regulatory complaint if requested and gives the SLCC power to issue guidance to approved regulators and licensed providers about how the latter should deal with regulatory complaints.
174. New section 57D of the 2007 Act requires approved regulators to collect the annual general levy due to the SLCC from its licensed providers (under new section 57C of the 2007 Act, inserted by section 65 of the Act), and to pay the total amount of the levies collected to the SLCC. This requirement is equivalent to that placed on professional organisations (i.e. the Society, the Faculty, and the Association of Commercial Attorneys) under section 27 of the 2007 Act.
175. The provisions of the 2007 Act in relation to the failure to pay and late payments of levies are applied to the levies payable by licensed providers (section 57D(2) to (5)).
176. New section 57E of the 2007 Act indicates that a complaint about how an approved regulator has handled a conduct complaint is dealt with in the same way as a complaint about how a conduct complaint has been handled by a relevant professional organisation (see Parts 1 and 2 of the 2007 Act).
177. New section 57F allows the SLCC to monitor the effectiveness of any compensation fund set up by an approved regulator, in the same way as it may monitor the effectiveness of the Guarantee Fund under section 39 of the 2007 Act.
178. New section 57G of the 2007 Act ensures that certain terms used in the new Part 2A of the 2007 Act have the same meanings as in the Act.

## **Registers and lists**

### ***Section 82 – Register of approved regulators***

### ***Section 83 – Registers of licensed providers***

179. **Section 82** provides that the Scottish Ministers must keep and publish a register of approved regulators and that it should include information such as contact details, the date on which the regulator was given approval under section 7, the date on which it was given the relevant authorisation (see section 10), the categories of legal services covered by each authorisation, and details of any measures or sanctions taken by the Scottish Ministers (section 38).



180. Similarly, section 83 provides that approved regulators must keep and publish a register of their licensed providers, and lists the information which is to be included. In section 83(5) the Scottish Ministers have the power by regulations to make further provision about the information which must be held in the registers of licensed providers and set out how these registers are to be kept and published.

#### ***Section 84 – Lists of disqualified persons***

181. **Section 84** provides that an approved regulator must keep and publish lists of the persons it has disqualified from holding a position in a licensed provider (see section 56) and of those it has determined to be unfit to be an investor in a licensed provider (see section 62) or disqualified from being an investor (see section 65). These provisions may, for example, assist in ensuring that disqualified persons do not seek similar positions in businesses regulated by another approved regulator. Subsections (2) and (4) list the information to be recorded in those lists. Subsection (5) provides that the lists must not contain information relating to persons who have had their determination or disqualification reversed on appeal or in respect of whom the determination or disqualification no longer applies. The Scottish Ministers must be notified of any alterations made to either list (subsection (6)(b)).
182. Subsection (7) gives the Scottish Ministers a regulation-making power to make further provision regarding the information to be contained in the lists and to prescribe how these are kept and published.

### **Miscellaneous**

#### ***Section 85 – Privileged material***

183. **Section 85** provides that any publication of any advice, report, or notice or of other material under Part 2 of this Act is privileged in relation to the law on defamation unless there was malicious intent in publishing the material.

#### ***Section 86 – Immunity from damages***

184. **Section 86** provides that an approved regulator is (and those who work in it are) not liable for any damages for any act or omission in the exercise of their functions, provided the act or omission was not in bad faith.

#### ***Section 87 – Appeal procedure***

185. This section deals with appeals to the sheriff under Part 2 of the Act (regulation of licensed legal services). It provides that an appeal to the sheriff is to be by summary application, details what the sheriff may do with regard to an appeal and provides that the sheriff's determination is final.

#### ***Section 88 – Corporate offences***

186. This section provides that if an offence under Part 2 of the Act is committed by a relevant organisation and the offence involves the connivance, consent, or negligence of a responsible official within that organisation, the official, in addition to the organisation, also commits the offence. Both "relevant organisation" and "responsible official" are defined.

#### ***Section 89 – Effect of professional or other rules***

187. This section makes it clear that the Act does not affect any professional rules which regulate professional practice, conduct or discipline of persons (other than solicitors and advocates) who provide professional services. In other words, if the rules of any other profession contain provisions which would forbid or restrict their operating in a business alongside legal professionals, they would not be able to participate in licensed

providers unless and until those rules were changed. Sections 121(5) and 124(3) of the Act deal with the effect of professional rules of advocates and solicitors.

### **Part 3 – Confirmation and Will Writing Services**

#### **Chapter 1 – Confirmation Services**

188. Currently, the power to prepare papers on which to found or oppose an application for grant of confirmation in favour of executors, in the winding up of a deceased person's estate, is restricted to solicitors, by virtue of section 32 of the 1980 Act. However it is possible for others to seek to be granted such rights by virtue of an application for the right to conduct litigation and have a right of audience by virtue of section 27 of the 1990 Act. Part 3, Chapter 1 of this Act provides a more direct route by which other professional groups (such as accountants) might be authorised to deal with executries, without seeking a wider power to conduct litigation.

#### **Regulation of confirmation agents**

##### **Section 90 – Confirmation agents and services**

189. Section 90 defines “confirmation services” and “confirmation agent” for the purposes of this Act.

##### **Section 91 – Approving bodies**

##### **Section 92 – Certification of bodies**

190. Approving bodies are able to authorise individuals to provide confirmation services, and are responsible for regulating those individuals which they have so authorised (see section 75).

191. These sections set out the process and criteria for becoming an approving body of confirmation agents. Section 91 covers the requirements of the application to the Scottish Ministers, which must include (among other things) the applicant's proposed regulatory scheme. Section 92 sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body. This certification may be subject to conditions which the Scottish Ministers may vary by addition or deletion after consultation with the approving body.

192. The Scottish Ministers have a regulation making power (under section 91(6)) to prescribe fees that they may charge applicants for the position of approving body.

193. The Scottish Ministers also have the power (under section 92(8)) to make regulations regarding the application process and, in relation to their capability to act as an approving body, the criteria for certification. This power may be used to set out the application process in more detail.

##### **Section 93 – Regulatory schemes**

194. Section 93 requires the approving body to have a regulatory scheme which allows for individuals who meet the qualifying criteria to be given the right to provide confirmation services, and which regulates those members in the provision of those services. Subsection (2) gives details of what the regulatory scheme must include – a description of training, a code of practice for confirmation agents, sufficient arrangements for professional indemnity, rules about complaints and sanctions. Subsection (3) gives details of what must be included in that code of practice. Subsection (4) sets out the ability of the confirmation agent to appeal against a decision by the approving body to revoke, suspend, or attach conditions to their right to provide confirmation services. Subsection (5) requires the approving body, so far as practicable, to observe the regulatory objectives in section 1 of the Act.

### ***Section 94 – Financial sanctions***

195. **Section 94** makes specific provision allowing rules under section 93(2)(d)(ii) to provide for financial penalties which may be imposed by an approving body on confirmation agents and about appeals against their imposition. Financial penalties are paid to the Scottish Ministers, though the approving bodies may collect the penalties on their behalf.

### ***Section 95 – Review of own performance***

196. **Section 95** requires an approving body to review its own performance annually. The review is to cover its compliance with observing the regulatory objectives under section 93(5), the exercise of its functions in relation to its regulatory scheme, and its compliance with any measures applying to it by virtue of section 100(3). It must also send a report of its review, including a copy of its accounts, to the Scottish Ministers who must lay a copy of the report before the Scottish Parliament. The Scottish Ministers may make further provision in regulations about the review of approved bodies' performance, and reports on reviews of their performance.

### ***Section 96 – Pretending to be authorised***

197. This section makes it an offence for a person to pretend to be a confirmation agent and specifies the penalty for that offence.

## **Other regulatory matters**

### ***Section 97 – Revocation of certification***

198. Subsections (1) and (2) allow the Scottish Ministers to revoke an approving body's certification if it fails to comply with a direction (under section 100(3)). Scottish Ministers may also order the approving body to take specified action in connection with the revocation.
199. Under subsection (3), such revocation means that the approving body's confirmation agents will no longer be authorised to provide confirmation services from the date the revocation takes effect.

### ***Section 98 – Surrender of certification***

200. **Section 98** deals with the situation where an approving body wishes to cease regulating. This section allows an approving body to surrender its certification, with the agreement of the Scottish Ministers. The approving body in question is expected to reduce as far as possible the disruption to clients of its confirmation agents caused by this surrender, for example by ensuring that any ongoing work can be completed or passed to another qualified agent prior to the surrender taking effect.
201. The Scottish Ministers can direct approving bodies to take a particular action; this may occur, for example, where an approving body has not taken sufficient steps to mitigate disruption to clients.
202. As with revocation, surrender means that the approving body's confirmation agents will no longer be authorised to provide confirmation services from the date the surrender takes effect.

### ***Section 99 – Register and list***

203. This section requires the Scottish Ministers to keep and publish a register of approving bodies including their contact details and date of certification, and approving bodies to keep a list of confirmation agents. Approving bodies must provide a copy of the list and information on confirmation agents to the Scottish Ministers on request.

## **Ministerial functions**

### ***Section 100 – Ministerial intervention***

204. Subsection (1) requires an approving body to provide within 21 days such information about its performance as the Scottish Ministers may reasonably request.
205. Subsection (2)(a) requires an approving body to review its scheme if the Scottish Ministers direct it so to do under the provisions of subsection (3)(a). It must report on the review and inform the Scottish Ministers if it proposes any amendment(s) as a result of the review. Subsection (2)(b) allows an approving body to amend its regulatory scheme, but it requires the Scottish Ministers' approval before any amendment takes effect. Without approval, the amendment is invalid.
206. Subsection 3(a) allows the Scottish Ministers to direct an approving body to take remedial action if, after consulting that body, they consider that its regulatory scheme is not or is no longer adequate. Subsection (3)(b) provides that the Scottish Ministers may direct an approving body to take specific remedial action if it fails to comply with any requirement imposed on it in Chapter.
207. Subsection (4) requires the approving body to review annually the performance of its confirmation agents and send a report to the Scottish Ministers.
208. Subsection (5) gives the Scottish Ministers powers to make further provision in regulations about the performance review and about the functions of approving bodies and confirmation agents if they deem it necessary for safeguarding the interests of clients of confirmation agents.

### ***Chapter 2 – Will Writing Services***

209. Will writing is an unreserved activity by virtue of section 32(3)(a) of 1980 Act which provides that wills do not count as “writs”. As a result, unqualified individuals are currently able to provide will writing services with no requirements for training, professional indemnity insurance or other safeguards. This chapter introduces regulation of such non-lawyer will writers.

## **Regulation of will writers**

### ***Section 101 – Will writers and services***

210. Section 101 defines “will writing services” and “will writer” for the purposes of the Act. Will writers are persons who have been authorised to provide will writing services by an approving body, in accordance with that body's regulatory scheme. This term does not include solicitors, who provide the same services but are regulated by the Society.

### ***Section 102 – Approving bodies***

### ***Section 103 – Certification of bodies***

211. Approving bodies are able to authorise individuals to provide will writing services, and are responsible for regulating those individuals which they have so authorised (see section 104).
212. These sections set out the process and criteria for becoming an approving body of will writers. Section 102 covers the requirements of the application to the Scottish Ministers, which must include (among other things) the applicant's proposed regulatory scheme. Section 103 sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body. This certification may be subject to conditions which the Scottish Ministers may vary by addition or deletion after consultation with the approving body.

213. The Scottish Ministers have a regulation making power (under section 102(6)) to prescribe fees that they may charge an applicants to be approving body.
214. The Scottish Ministers also have the power (under section 103(8)) to make regulations regarding the application process and, in relation to their capability to act as an approving body, the criteria for certification. This power may be used to set out the application process in more detail.

#### ***Section 104 – Regulatory schemes***

215. **Section 104** requires the approving body to have a regulatory scheme which allows for individuals who meet the qualifying criteria to be given the right to provide will writing services, and which regulates those members in the provision of those services. Subsection (2) gives details of what the regulatory scheme must include – a description of training, a code of practice for will writers (and persons acting on their behalf), sufficient arrangements for professional indemnity, and rules about complaints and sanctions. Subsection (3) gives details of what must be included in that code of practice. Subsection (4) sets out the ability of the non-lawyer will writer to appeal against a decision by the approving body to revoke, suspend, or attach conditions to their right to provide will writing services. Subsection (5) requires the approving body, so far as practicable, to observe the regulatory objectives in section 1 of the Act.

#### ***Section 105 – Financial sanctions***

216. **Section 105** makes specific provision allowing rules made under section 104(2)(d)(ii) to provide for the imposition of a financial penalty by an approving body on a will writer. Financial penalties are paid to the Scottish Ministers, though the approving bodies may collect the penalties on their behalf. Provision is also made in relation to appeals against such financial penalties.

#### ***Section 106 – Review of own performance***

217. **Section 106** requires an approving body to review its own performance annually, with particular reference to its compliance with section 104(5) (observing the regulatory objectives), the exercise of its functions in relation to its regulatory scheme, and its compliance with any measures applying to it by virtue of section 111(3). It must also send a report of its review, including a copy of its accounts, to the Scottish Ministers who must lay a copy of the report before the Scottish Parliament. The Scottish Ministers may make further provision in regulations about the review of approved bodies' performance, and reports on reviews of their performance.

#### ***Section 107 – Pretending to be authorised***

218. This section makes it an offence to pretend to be a will writer, and specifies the penalty for such an offence.

#### **Other regulatory matters**

#### ***Section 108 – Revocation of certification***

219. Subsections (1) and (2) allow the Scottish Ministers to revoke an approving body's certification if it fails to comply with a direction (under section 111(3)). Scottish Ministers may also order the approving body to take specified action in connection with the revocation.
220. Under subsection (3), such revocation means that the approving body's will writers will no longer be authorised to provide will writing services from the date the revocation takes effect.

### ***Section 109 – Surrender of certification***

221. **Section 109** deals with the situation where an approving body wishes to cease regulating. This section allows an approving body to surrender its certification, with the agreement of the Scottish Ministers. The approving body in question is expected to reduce as far as possible the disruption to clients of its will writers caused by this surrender, for example by ensuring that any ongoing work can be completed or passed to another qualified will writer prior to the surrender taking effect.
222. The Scottish Ministers can direct approving bodies to take a particular action; this may occur, for example, where an approving body has not taken sufficient steps to mitigate disruption to clients.
223. As with revocation, surrender means that the approving body's will writers will no longer be authorised to provide will writing services from the date the surrender takes effect.

### ***Section 110 – Register and list***

224. This section requires the Scottish Ministers to keep and publish a register of approving bodies including their contact details and date of certification, and approving bodies to keep a list of their will writers. Approving bodies must provide a copy of the list and information on will writers to the Scottish Ministers on request.

## **Ministerial functions**

### ***Section 111 – Ministerial intervention***

225. Subsection (1) requires an approving body to provide, within 21 days, such information about its performance as the Scottish Ministers may reasonably request.
226. Subsection (2)(a) requires an approving body to review its regulatory scheme if the Scottish Ministers direct it so to do. It must report on the review and inform the Scottish Ministers if it proposes any amendment(s) as a result of the review. Subsection (2)(b) allows an approving body to amend its regulatory scheme, but it requires the Scottish Ministers' approval before any amendment takes effect. Without approval, the amendment is invalid.
227. Subsection (4) requires an approving body to review annually the performance of its will writers and send a report to the Scottish Ministers.
228. Subsection (5) gives the Scottish Ministers powers to make provision about the performance review and about the functions of approving bodies and will writers if they deem it necessary for safeguarding the interests of clients of such will writers.

### ***Section 112 – Step-in by Ministers***

229. **Section 112** provides that the Scottish Ministers may, if they believe that intervention is necessary as a last resort in order to ensure that the provision of will writing services is regulated effectively, make regulations to establish a body with a view to its becoming an approving body, or make regulations to allow them to act as an approving body themselves.

## ***Chapter 3 – Further Provision***

### ***Section 113 – Regard to OFT input***

230. This section provides that there is an obligation on the Scottish Ministers to take account of any advice given by the OFT within the relevant timescale when they consult the it in respect of an application to be an approving body of either confirmation agents or will writers.

### ***Section 114 – Complaints about services***

231. **Section 114** makes provision for complaints by inserting a new Part 2B into the 2007 Act making special provision for confirmation agents and will writers.
232. New section 57H of the 2007 Act provides for Parts 1 and 2 of that Act to apply to complaints about confirmation agents. If they consider it necessary, the Scottish Ministers may modify the way these Parts operate in relation to complaints about confirmation agents and will writers. If there is either a services or a conduct complaint about a confirmation agent or will writer, the approving body is to be regarded as the relevant professional organisation.
233. New section 57I of the 2007 Act provides that a complaint about how an approving body has handled a conduct complaint is dealt with in the same way as a complaint about how a conduct complaint has been handled by a relevant professional organisation (see Parts 1 and 2 of the 2007 Act).
234. New section 57J of the 2007 Act makes provision for the payment of the annual general levy and, if arising, the complaints levy to the SLCC. It also applies provisions of the 2007 Act so that the SLCC is required to consult with approving bodies, confirmation agents and will writers each year in relation to its budget for the next financial year and so that approving bodies are required to provide the SLCC with an estimate of the number of confirmation agents or will writers it regulates and which should be liable to pay the levy in the relevant financial year.
235. New section 57K of the 2007 Act requires approving bodies to collect the annual general levy due to the SLCC from their confirmation agents or will writers. The provisions of the 2007 Act in relation to the failure to pay and late payments of levies are applied to the levies payable by confirmation agents and will writers (section 57K(2) to (5)).

### ***Section 115 – Privilege and immunity***

236. **Section 115** provides that any publication of any material under Part 3 of this Act is privileged in relation to the law on defamation unless there was malicious intent in publishing the material. An approving body (and those who work in them) are not liable for any damages for any act or omission in the exercise of their functions unless the act or omission was in bad faith.

### ***Section 116 – Appeals procedure***

237. This section deals with appeals to the sheriff under Part 3 of the Act (confirmation and will writing services). It provides that an appeal to the sheriff is to be by summary application, details what the sheriff may do with regard to an appeal and provides that the sheriff's determination is final.

### ***Section 117 – Corporate offences***

238. This section provides that if an offence under Part 3 of the Act is committed by a relevant organisation and the offence involves the connivance, consent, or negligence of a responsible official within that organisation, the official, in addition to the organisation, also commits the offence. Both “relevant organisation” and “responsible official” are defined.

### ***Section 118 – Consequential modification***

239. These changes to the provision of services relating to confirmation require modification to other legislation (specifically, the Confirmation of Executors (Scotland) Act 1858, the 1980 Act, the 1986 Act, and the 2007 Act) and the Act makes such provision in this section.

## **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



*These notes relate to the Legal Services (Scotland) Act 2010  
(asp 16) which received Royal Assent on 9 November 2010*

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;

*These notes relate to the Legal Services (Scotland) Act 2010  
(asp 16) which received Royal Assent on 9 November 2010*

- 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.

## **Part 5 – General**

### ***Section 147 – Further modification***

288. **Section 147** allows the Scottish Ministers by regulations to vary the percentage specified in section 49(1) (majority ownership), or to repeal the section. In exercising this function, the Scottish Ministers must believe that the amendment or repeal is compatible with the regulatory objectives and otherwise appropriate. Before making regulations, they must consult, amongst others, the Lord President and the Society. Furthermore, the regulations are subject to the affirmative resolution procedure.