

# LEGAL SERVICES (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **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

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

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;

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

- 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.

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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.