

# LEGAL SERVICES (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **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.