

# 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.

## ***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.