

LEGAL SERVICES (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 – Confirmation and Will Writing Services

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.

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

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.