

# **COUNCIL OF THE LAW SOCIETY OF SCOTLAND ACT 2003 (asp 14)**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Council of the Law Society of Scotland (“the Council”) on behalf of David McLetchie, MSP, the member in charge of the Council of the Law Society of Scotland Bill. They have been prepared in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

### **THE ACT**

3. The Act arises from three proposals by the Council to remove any doubt about the powers of the Council—

- to delegate their statutory functions to a committee or sub-committee or some other person;
- to provide for the appointment of sub-committees in the scheme for the constitution of the Council; and
- to provide in that scheme for the appointment of lay persons to be members of a committee or sub-committee and for the lay persons so appointed to form a majority in the committee or sub-committee to which they have been appointed.

4. The Law Society of Scotland (“the Society”) is a statutory body corporate established by the Solicitors (Scotland) Act 1980 (c.46) (“the 1980 Act”). Under section 1 of the 1980 Act, the Society has as its objects the promotion of—

- the interests of the solicitors’ profession in Scotland; and
- the interests of the public in relation to that profession.

The Society regulates the profession of solicitors in Scotland and every practising Scottish solicitor is a member of the Society. The 1980 Act confers functions upon the Society but provides that the business of the Society is conducted by the Council and the Council may generally act for and in the name of the Society (section 3(1) and Schedule 1, paragraph 11). The

Council consists of members elected by the Society. The constitution of the Council and of their committees is regulated by a scheme made by the Council and approved by the Society (Schedule 1, paragraphs 2-5). Statutory functions are conferred upon the Council by the 1980 Act and by other enactments, including in particular the functions under sections 42A-C of the 1980 Act of determining and dealing with complaints made by a member of the public about inadequate professional services provided by a solicitor.

5. The background to the first proposal is that, prior to 1999, committees and sub-committees of the Council used to discharge certain functions of the Council with the approval of the Council. However, in 1999, questions arose as to whether the Council had power to delegate or arrange for the discharge of their statutory functions by some other person or body. These questions arose because of the common law rule that, where statutory functions are conferred upon a person, that person cannot generally delegate those functions to be discharged by someone else unless that person is authorised to do so either expressly or by necessary implication. This common law rule is not absolute and is subject to certain qualifications and exceptions but it may be argued that the functions of the Council do not fall within those qualifications and exceptions. There is no express provision in the 1980 Act which enables the Council to delegate their functions, even to their own committees or to a member of the staff of the Society. It may also be difficult to imply such a power, in view of the statutory precedents which exist where express powers to delegate are conferred upon a body, including, in particular, the powers conferred upon the Council of the Law Society of England and Wales to delegate their functions in section 79 of the Solicitors Act 1974 (c.47), as amended by paragraph 16(2) of Schedule 18 to the Courts and Legal Services Act 1990 (c.41).

6. In these circumstances, the Council decided in 1999 that, on balance and until a suitable legislative opportunity could be found to rectify the position, the safer course would be to discontinue the previous practice of delegating their functions and to make arrangements for all of their functions to be discharged by the Council. However, the burden of doing so is adversely affecting the Council's ability to provide speedy and effective regulation of the profession. The Act, therefore, remedies this in section 1 by inserting a new section 3A into the 1980 Act which provides expressly that the Council may delegate or arrange for the discharge of their functions (other than excepted functions) by a committee, sub-committee or an individual. There are ancillary provisions enabling a committee or a sub-committee to sub-delegate the functions delegated to them but only with the approval of the Council. In order to avoid any possible difficulties with the European Convention on Human Rights, these powers are not made retrospective. However, it is expressly provided in the new section 3A(10) that the new powers are without prejudice to any other power which the Council may have to delegate their functions. This is intended to preserve whatever arguments there may be for saying that the Council may already have powers to delegate their functions or at least certain of their functions.

7. The background to the second and third proposals arises out of the fact that the Council is required by paragraph 2 of Schedule 1 to the 1980 Act to prepare a scheme providing for "(d) the appointment and constitution of committees". The scheme containing the Constitution of the Law Society of Scotland (see Green's Solicitors Professional Handbook page F415) only provides, in paragraph 22, that "The Council shall establish such Committees as it considers necessary". No reference is made to the appointment of sub-committees even although they have been appointed in the past. Equally, no reference is made as to whether persons other than members of the Council or the Society (i.e. non-solicitors) can be members of such committees

or sub-committees, even although some have been appointed in the past. In order to remove any doubt about the position, section 2 of the Act confers express powers upon the Council to make provision for such matters in the scheme and to enable lay persons to form a majority upon any committee or sub-committee to which they are appointed.

8. The provisions in the Act are modelled upon those which apply to the Council of the Law Society in England and Wales in section 79 of the Solicitors Act 1974 (c.47), as amended by paragraph 16(2) of Schedule 18 to the Courts and Legal Services Act 1990 (c.41).

## **COMMENTARY ON SECTIONS**

### **Section 1: Discharge of functions of the Council of the Law Society of Scotland**

#### *General*

9. Section 1 inserts a new section 3A into the 1980 Act which makes provision for the discharge of the functions of the Council.

10. Subsection (1) of the new section 3A enables the Council to delegate any of their functions to any committee or sub-committee of the Council or to any individual.

11. There are, however, certain functions which cannot be delegated. These are called “excepted functions” and are defined in subsection (10) of the new section 3A. The excepted functions are essentially the legislative functions of the Council under the 1980 Act. They consist of any power of the Council to make rules or regulations under that Act and the power under paragraph 2 of Schedule 1 to that Act to prepare a scheme for the constitution of the Council.

12. Where any function has been delegated to a committee, subsection (2) of the new section 3A enables that committee to sub-delegate that function to a sub-committee of that committee or to an individual. Similarly, where any function has been delegated to a sub-committee, subsection (3) of the new section enables that sub-committee to sub-delegate that function to an individual. These powers of sub-delegation can only be exercised with the approval of the Council.

13. Subsection (4) of the new section 3A makes it clear that, when exercising their powers of delegation or sub-delegation, the Council, committee or sub-committee may impose restrictions or conditions upon the body or person to whom the function is delegated. This will enable them, for example, to impose conditions as to how the function should be exercised or as to when they should be consulted or their approval sought.

14. The functions of the Council may be delegated or sub-delegated to an individual who may be, but need not be, a member of the staff of the Society.

15. Subsection (5) of the new section 3A prevents the Council, a committee or a sub-committee from delegating certain functions to an individual. The functions in question are those concerned with upholding or dismissing complaints about inadequate professional services in section 42A(1) and (2) of the 1980 Act or complaints under section 33 of the Law Reform

(Miscellaneous Provisions) (Scotland) Act 1990 (c.40) that a solicitor has been guilty of professional misconduct or provided inadequate professional services and complaints against conveyancing practitioners and executry practitioners under the 1990 Act.

#### *Delegation to an individual*

16. A question arose in England and Wales under section 74 of the Solicitors Act 1974 (c.47) as to whether the Council was required to delegate to a named individual rather than simply to the holder of a particular office from time to time, such as the director and assistant director of the Solicitors Complaints Bureau. The Court of Appeal held that the latter was sufficient in **R v The Law Society ex parte Curtin 1993 TLR 620** but it is not clear whether this was because the function involved in that case was a regulatory function as distinct from a disciplinary function. In order to avoid such a question arising under this Act, subsection (6) of the new section 3A provides that the individual to whom functions may be delegated may be identified by name or by reference to the post or office which that individual holds. This will enable the functions to be delegated to, for example, the Secretary or Director of the Society, without naming that person.

#### *Society's functions*

17. Subsection (7) of the new section 3A makes it clear that the functions which may be delegated are not confined to the functions which are conferred upon the Council but include the functions of the Society which are exercisable by the Council in accordance with the 1980 Act. Section 3(1) of the 1980 Act provides that the business of the Society is conducted by the Council and, in terms of paragraph 11 of Schedule 1 to that Act, the Council may generally act for and in the name of the Society.

#### *Effect of delegation*

18. Subsections (8) and (9) of the new section 3A clarify the effect of any delegation of functions under that section.

19. Subsection (8) provides that any of the functions delegated under that section should be exercised in the name of the Council. However, where the function in question is a function of the Society, it should be exercised in the name of the Society. This is intended to make it clear that, although the function is exercised by the person to whom it had been delegated, it is as if it was being exercised by the Council or, as the case may be, the Society.

20. This effect is underlined by subsection (9)(a), which makes it clear that, despite the delegation, the Council remains responsible for the exercise of the function and any liabilities which arise from its exercise.

21. Subsection (9)(b) and (c) also make it clear that any delegation:

- does not prevent the Council from exercising the function which has been delegated; and
- may be revoked at any time by the Council or, in the case of any sub-delegation by a committee or sub-committee, by that committee or sub-committee.

### *Saving*

22. The effect of subsection (11) of the new section 3A is to provide that the powers of delegation conferred by that section are without prejudice to any other power which the Council may have to delegate their functions. This is intended to preserve whatever arguments there may be for saying that the Council may already have powers to delegate their functions.

23. Subsection (12) is designed to ensure dovetailing of the Act with the coming into force of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4) and to ensure that the statutory references are correct.

### **Section 2: Committees and sub-committees of the Council of the Law Society of Scotland**

24. Section 2 amends Schedule 1 to the 1980 Act to give effect to the second and third proposals mentioned above.

25. The Council is required by paragraph 2 of Schedule 1 to prepare a scheme providing for various matters including the constitution, election and proceedings of the Council and “(d) the appointment and constitution of committees”. Paragraph 3 of that Schedule allows the scheme to contain certain other matters. In terms of paragraph 4 of that Schedule, a scheme requires to be approved by a majority of the members present in person or by proxy at a general meeting of the Society before it can come into effect.

26. Subsection (2) of section 2 amends paragraph 2(d) of that Schedule so as to require the scheme to provide for the appointment and constitution not only of committees but of sub-committees as well. The existing scheme for the constitution of the Council will require to be amended to provide for such matters and, when this is done, this will remove any doubt about the power of the Council to provide for the appointment of sub-committees.

27. Subsection (3) of section 2 amends paragraph 3 of that Schedule so as to enable the scheme to make provision for the appointment of non solicitors to be members of a committee or sub-committee of the Council. It should be noted that non-solicitors feature as members of the Society’s committees at the moment but it is thought appropriate to provide this statutory power. It also enables provision to be made for such non-solicitors to form a majority of the members of the committee or sub-committee. The existing scheme for the constitution of the Council may therefore be amended to provide for such matters and, when this is done, this will remove any doubt about the power of the Council to provide for the appointment of such non-solicitors.

### **Section 3: Short title and commencement**

28. The Act comes into force one month after Royal Assent. This period will enable the Council to prepare arrangements for the delegation of their functions. It is also intended that the Council will prepare appropriate amendments to the scheme for the constitution of the Council to give effect to the provisions of the Act which will be submitted for approval by the members at the next general meeting of the Society following the coming into force of the Act.

## **PARLIAMENTARY HISTORY OF COUNCIL OF THE LAW SOCIETY OF SCOTLAND ACT 2003**

29. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports were published and the references to those Reports.

<b>Proceedings and Reports</b>	<b>Reference</b>
<i>Introduction</i>	
6 September 2002	SP Bill 60 (Session 1)
<i>Stage 1</i>	
<i>(a) Justice 1 Committee</i>	
39th Meeting, 2002	19 November 2002, cols 4227 - 4252
42nd Meeting, 2002	10 December 2002 (in private)
12th Report 2002 (20 December 2002): Stage 1 Report on the Council of the Law Society of Scotland Bill	SP Paper 724
<i>(b) Consideration by the Parliament</i>	
9 January 2003	cols 16799 – 16826
<i>Stage 2</i>	
<i>Justice 1 Committee</i>	
4th Meeting, 2003	18 February 2003, cols 4593 – 4596
<i>Stage 3</i>	
<i>Consideration by the Parliament</i>	
26 March 2003	cols 19938 – 19944
Royal Assent – 1 May 2003	