

# **LEGAL PROFESSION AND LEGAL AID (SCOTLAND) ACT 2007**

---

## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act. 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 schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **SUMMARY AND BACKGROUND TO THE ACT**

3. The Act establishes the Scottish Legal Complaints Commission and provides for its main function to be the handling of consumer complaints about the service provided by legal practitioners which cannot be resolved at source. The Act also brings in the first stage of a planned programme of measures in the delivery of all forms of publicly funded legal assistance in Scotland, provided by both lawyers and non-lawyers.

### **COMMENTARY ON SECTIONS**

#### **PART 1 – THE SCOTTISH LEGAL COMPLAINTS COMMISSION**

##### **Section 1: The Scottish Legal Complaints Commission**

4. Section 1 provides for the establishment of the Scottish Legal Complaints Commission and Schedule 1 makes provision about its status, constitution, proceedings etc.

##### **Section 2: Receipt of complaints: preliminary steps**

5. The Commission is to act as the gateway for all complaints about either the service provided by a legal practitioner or the conduct of a legal practitioner, where it has not been possible for the practitioner or the practitioner's firm to resolve the complaint at source. The range of practitioners subject to the jurisdiction of the Commission is set out in section 46 which defines the term "practitioner". Relevant professional organisations which receive a complaint direct from a complainer are required by section 33 to send it to the Commission without delay.

6. Section 2 sets out the preliminary steps which the Commission must take on receipt of a complaint. The Commission may receive complaints about either the conduct of a legal practitioner which may involve either professional misconduct or the new concept of unsatisfactory professional conduct (defined in section 46) on the one hand or the adequacy of the professional services provided by a legal practitioner on the other (referred to, respectively, as “conduct complaints” or “service complaints”). On receipt of complaints, the Commission’s initial function is (a) to determine whether or not they are eligible and (b) to reject those which it determines to be frivolous, vexatious, totally without merit or otherwise ineligible in terms of the Commission’s rules. The Commission must give notice in writing to the complainer and the practitioner that the complaint has been rejected.

7. Any person may make a complaint alleging either professional misconduct or unsatisfactory professional conduct. The Commission will not however deal with a complaint where any element of the complaint involves the conduct of a practitioner acting in a judicial capacity in a court or tribunal specified by order by the Scottish Ministers. The purpose of this exclusion is to preserve judicial independence, particularly where legal practitioners sit as part-time sheriffs or tribunal chairs. In addition, the Commission will not deal with a complaint that has been made prematurely or outwith the prescribed time limit for making a complaint.

8. Persons who may make a complaint alleging inadequate professional services are those who appear to the Commission to have been directly affected by the services which are the subject of the complaint. So the Commission is not required to (and should not) take forward a complaint made by someone who does not appear to have been directly affected – unless the person is one of those listed in subsection (2)(b)(ii) to (viii). Under subsection (2)(b), certain public bodies and office holders and any relevant professional organisation may make a services complaint: the public bodies and office holders are the Lord Advocate, the Advocate General for Scotland, any judge (including a sheriff), the Auditor of the Court of Session, the auditor of any sheriff court, and the Scottish Legal Aid Board. These public bodies and office holders may come across unsatisfactory practices in the course of their work and may have a legitimate public interest basis for reporting these. The relevant professional organisations are defined in section 46.

### **Section 3: Existence of specified regulatory scheme**

9. The complaints handling framework established by the Act covers services and conduct complaints generally, but certain Scottish lawyers will be subject to more specific regulatory schemes in respect of some areas of their practices. An example would be solicitors for whom investment business is a core activity, and who may be subject to the Financial Services Ombudsman Scheme in respect of that work.

10. Where any element of a complaint covers an area of work which is capable of being dealt with under a specific regulatory scheme, section 3 prevents the Commission from dealing with that element of the complaint. The specific regulatory schemes are to be specified by the Scottish Ministers by order. The Commission is required to notify all parties in such circumstances. The Commission will be able to deal with any other element of the complaint and section 3 does not preclude the findings or orders of another scheme being used as a basis of a conduct complaint.

#### **Section 4: Complaint not made timeously or made prematurely**

11. Section 4 prevents the Commission from taking the preliminary steps under section 2(4) in relation to a complaint which is made after the expiry of the time limit for the making of a complaint, which is fixed by the Commission's rules. The Commission may extend the time limit in circumstances specified in its rules.

12. Section 4 also provides that the Commission need not take steps under section 2(4) or take any further action in relation to premature complaints. Premature complaints are defined as those which the complainer has not sought to resolve at local level by communicating the substance of the complaint to the legal practitioner (or firm or employer) concerned (thus giving the practitioner, firm or employing practitioner a reasonable opportunity to deal with it) and in relation to which there are no rules which would require the Commission to take further steps. Although section 4(2) gives the Commission discretion as to whether to progress a premature complaint (by taking the further steps), rules made under section 32 (see paragraph 2(c) of schedule 3) may set out circumstances in which, in effect, the discretion is overridden (and further steps are to be taken). So where no such rules are made, or do not apply to a particular set of circumstances, the Commission will have the discretion.

13. The Commission is required to give the complainer and practitioner notice in writing where it decides not to take further action in relation to a complaint which has not been made timeously or has been made prematurely. In the case of premature complaints such notice must specify whether or not the Commission is proceeding to take the preliminary steps referred to in section 2(4).

#### **Section 5: Determining nature of complaint**

14. Section 5 provides that where the Commission decides that a complaint is eligible and not frivolous, vexatious or totally without merit, it is then to determine whether the complaint is a conduct complaint or a services complaint or both. Where it appears that the complaint may have both conduct and service elements, section 5(2) requires the Commission to consult, co-operate and liaise with the relevant professional organisation and have regard to any views the organisation expresses before making a final decision. Section 5(3) requires the relevant professional organisations to co-operate and liaise with the Commission in this process.

## **Section 6: Complaint determined to be conduct complaint**

15. Section 6 provides that where the Commission determines that a complaint is a conduct complaint, it is to remit the complaint and any accompanying material to the relevant professional organisation to deal with. The Commission must give the complainer and the practitioner notice that it has remitted the complaint, specifying the reasons for the determination and confirming that the relevant professional body is under a duty to deal with the conduct complaint. Section 47 places a duty on each relevant professional organisation to investigate a remitted conduct complaint.

16. The Council of the Law Society of Scotland and the Scottish Solicitors' Discipline Tribunal retain their substantive roles in relation to dealing with professional misconduct under the Solicitors (Scotland) Act 1980 ("the 1980 Act"). The Council will continue to be able to prosecute professional conduct complaints against solicitors before the Tribunal by virtue of section 51(1) of the 1980 Act. The Council will also continue to have the option of determining such complaints against conveyancing and executry practitioners itself by virtue of section 20 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 ("the 1990 Act") or of prosecuting before the Tribunal under section 51(1A) of the 1980 Act. Sections 53 and 54 of the Act amend the 1980 and 1990 Acts to give the Council powers in relation to unsatisfactory professional conduct by solicitors and conveyancing and executry practitioners respectively.

17. The Faculty of Advocates deals with complaints on an administrative, non-statutory basis; its disciplinary rules set out the constitution and procedures of the Faculty's Complaints Committees and Disciplinary Tribunal. The Act does not change the existing role of the Faculty of Advocates in relation to determining complaints alleging professional misconduct by advocates. It gives the Faculty a new role in relation to complaints about unsatisfactory professional conduct but does not give the Faculty statutory powers. So the Faculty will deal with these complaints on an administrative, non-statutory basis.

## **Section 7: Services complaint: notice**

18. Section 7 provides that where, or to the extent that, the Commission determines that a complaint is a services complaint, it must give the complainer and the practitioner notice to that effect and specify the reasons for the determination.

## **Section 8: local resolution or mediation**

19. Where a complaint has been made by a person who appears to the Commission to have been directly affected by alleged inadequate professional services and the Commission has determined the complaint to be a services complaint, the Commission may refer the complaint back to the legal practitioner or the legal practitioner's firm or employing practitioner when it considers the complaint to have been made prematurely, as defined in section 4(4). It may also refer a complaint back where it considers the legal practitioner, the legal practitioner's firm or employing practitioner has made no attempt, or an insufficient attempt, to achieve a negotiated settlement with the complainer.

20. The Commission may offer to mediate between the complainer and the practitioner, but only if both consent. The Commission must discontinue mediation in relation to a complaint if either the complainer or the practitioner withdraws consent and may discontinue mediation for any other reason. If mediation is discontinued, the Commission must give notice in writing to the complainer and the practitioner of the reason for terminating mediation.

### **Section 9: Services complaint: Commission's duty to investigate and determine**

21. Section 9(1) requires the Commission to investigate a services complaint and, having given the complainer and the practitioner an opportunity to make representations, to determine the complaint by reference to what the Commission considers is fair and reasonable in the circumstances. This requirement applies in circumstances where (a) other forms of resolution (mediation by the Commission or local resolution by practitioner and complainer) have either not been attempted or have been attempted but failed; or (b) where the services complaint is made under section 2(2)(b)(ii) to (viii) by a public body or public office holder or relevant professional organisation.

22. Section 9(2) requires the Commission however to propose a settlement to the complainer and practitioner which it considers fair and reasonable in the circumstances. If accepted by both parties, the proposed settlement becomes binding. Where the practitioner is employed by another practitioner (such as a solicitor employed by a firm), section 9(3) requires that the employing practitioner also agrees to the proposed settlement. Section 9(4) requires that where the proposed settlement is accepted, the Commission is not to proceed to formally determine the complaint.

23. The only exception to the requirement for the proposal of a provisional settlement is where the complaint has been made in the public interest by a public body or public officeholder or relevant professional organisation under section 2(2)(b). As there will be no personal dispute between the parties in that type of case, it would not be appropriate for the Commission to propose an informal settlement. In these circumstances the complaint in question will proceed straight to a determination committee of the Commission for formal determination.

### **Section 10: Commission upholds services complaint**

24. Section 10 provides that where the Commission makes a determination under section 9(1) upholding a services complaint, it may take certain steps to provide redress for the complainer which it considers fair and reasonable in the circumstances.

25. The steps are (a) to determine the amount of fees or outlays to which the practitioner is entitled for the services provided to the client - the amount determined can be nil, and the Commission can require the practitioner to waive or refund fees and outlays; (b) to direct the practitioner to rectify at the practitioner's own expense any error, omission or other deficiency arising in connection with the services as the Commission may specify; (c) to direct the practitioner to take at his or her own expense such other action in the interests of the complainer as the Commission may specify; (d) where the Commission considers that the complainer has been directly affected by the inadequate

professional services, to direct the practitioner to pay the complainer by way of compensation for loss, inconvenience or distress such amount not exceeding £20,000 as the Commission may specify; and (e) where the Commission considers that the practitioner does not have sufficient competence in relation to any aspect of the law or legal practice, to report the matter to the relevant professional organisation. Where the practitioner is an employee solicitor, the Commission will issue a copy of such a report to the employing solicitor.

26. In determining what form of redress is appropriate, the Commission must take into account any of the following steps that may already have been taken in respect of the subject matter of the complaint: any previous award of compensation that it has directed the practitioner to pay; any award of damages made to the complainer by a court; any other compensation ordered by a tribunal or professional body.

27. Where the practitioner is an employee of an employing solicitor, then any direction by the Commission in respect of a services complaint ordering a reduction of fees or outlays or the carrying out of remedial work will be made against the employing practitioner and not the employee. It also provides that a direction to pay compensation may be made to the employing practitioner; or the employee practitioner; or both - if both, then the compensation payment should be allocated between them as the Commission considers appropriate.

28. Before determining whether or not to reduce the amount of fees or outlays to which the practitioner is entitled for the services which have been the subject of the complaint, the Commission may submit the practitioner's accounts for the fees and outlays in question to the Auditor of the Court of Session for taxation.

29. The Scottish Ministers, after consultation with the relevant professional organisations and such consumer interest groups as the Scottish Ministers consider appropriate, may by order (subject to the affirmative resolution procedure) amend the maximum level of compensation which the Commission may award under section 10(2)(d).

### **Section 11: Fair and reasonable : matters to be taken into account by Commission**

30. The Commission is required by section 9(1) to determine services complaints according to what is fair and reasonable in the circumstances and by section 10(1) to apply the same criterion to its decisions on redress. In considering what is fair and reasonable in the circumstances section 11 requires the Commission to take into account relevant law (including levels of damages awarded by courts in similar circumstances) and relevant codes of practice, professional rules, standards and guidance. While this will not bind the Commission to follow judicial decisions on the law of negligence, it should ensure that awards made by the Commission are broadly in line with what would have been awarded by the court in the same circumstances.

### **Section 12: Services complaint: notice where not upheld or upheld**

31. The Commission must give notice in writing of services complaint determinations (whether upheld or not) and of any determination, direction or report issued by it in connection with redress. The Commission is to give such notice by sending the complainer, every practitioner mentioned in it and, where appropriate, the employing practitioner a copy of the determination, direction or, as the case may be, the report.

32. Where a complaint is determined by one of the Commission's determination committees, then the Commission is required to give the reasons for the determination.

### **Section 13: Services complaints: reports**

33. The Commission may, if it considers it appropriate to do so, publish reports on services complaints which have reached a conclusion and their outcomes. The Commission may also publish reports of mediation where the mediation has been successful. Such reports may be helpful in informing practitioners and the public about how the Commission handles key issues, and in highlighting to practitioners matters which may give rise to complaints. The Commission is not permitted to identify the complainer or the practitioner in such a report without his or her consent. It will however be possible to name the practitioner without consent if the case is an exceptional one and the Commission believes it is in the public interest for the practitioner to be identified. The Commission must give the practitioner at least 4 weeks notice of the intention to publicise its decision, specifying the reasons for its decision.

### **Section 14: Determination under section 9(1) or taking of steps under section 10(2): effect in relation to proceedings**

34. Section 14 provides that neither a determination upholding a complaint under section 9(1) nor a decision by the Commission to take any of the steps in relation to redress under section 10(2) may be founded upon in any court proceedings. In other words, when the Commission upholds a complaint, the Commission's decision or determination cannot subsequently be relied upon as proving in court any aspect of the original complaint.

35. Any award of compensation by the Commission is not to prejudice the right of the complainer to take court proceedings against the practitioner for damages in respect of any loss which the complainer alleges he or she has suffered. Any amount awarded by the Commission may however be taken into account in the computation of any award of damages made to the complainer in any such proceedings.

### **Section 15: Complaint appears during mediation or investigation to fall within different category**

36. Section 15 sets out the procedure to be followed where a complaint which has initially been categorised as either a conduct or services complaint later appears to fall wholly or partly within the other category in the course of mediation or investigation by the relevant professional organisation or by the Commission. In such circumstances the

Commission or the professional body should suspend the mediation or investigation, consult, co-operate and liaise with each other, send a copy of the complaint along with other material to the other, consult the other on the matter and give the complainer and practitioner notice of its actions.

37. The Commission must then either confirm or alter its original determination of category and notify the practitioner, complainer and professional organisation of the outcome of its review of the original determination and specify the reasons for the determination. The Commission is required to remit any complaint, or part of a complaint, reassessed to be a conduct complaint to the professional organisation to deal with. The Commission's duties to deal with services complaints are applicable in relation to a complaint or part of a complaint which has been re-assessed to be a services complaint.

#### **Section 16: Power to monitor compliance with directions under section 10(2)**

38. Where the Commission has directed a practitioner to provide redress to a client under section 10(2), it must request from the practitioner an explanation of the steps the practitioner has taken to comply with the direction. The practitioner must reply before the period specified in the notice expires (a minimum of 21 days must be specified) unless the practitioner appeals against the direction – in which case the Commission's request will be suspended pending the outcome of the appeal.

#### **Section 17: Power to examine documents and demand explanations in connection with conduct or services complaints**

39. Section 17 empowers the Commission to require a complainer, a practitioner, or the firm or any employer of a practitioner, (a) to produce or deliver documents in their possession or control which relate to matters relevant to a complaint, and/ or (b) to provide an explanation of the matters raised by the complaint within a period specified in the notice of not less than 21 days.

40. Documents include all books, accounts, deeds, securities, and papers in the possession or control of the complainer, the practitioner, the firm or employer. The Commission may also require such documents to be produced or delivered where they relate to (a) any trust of which the practitioner is the sole trustee, or a co-trustee only with one or more of the practitioner's partners or employees, or where the practitioner is an incorporated practice, (b) any trust of which the practice or one of its employees is a sole trustee or the practice is a co-trustee only with one or more of its employees.

41. Schedule 2 makes further provision about the powers of the Commission to examine documents and demand explanations in connection with complaints.

### **Section 18: Power of the Commission to recover certain expenses**

42. This section enables the Commission to recover from practitioners costs reasonably incurred in obtaining documents and information from them, when these are not supplied on demand and the Commission requires to obtain a court order for their disclosure. Once the Commission receives the documents or information it must serve notice on the practitioner giving particulars of what has been caught by the order, and the practitioner then has 14 days in which he or she may seek to persuade the court that documents or information should be returned to him or her. If such an application is successful then costs will not be recoverable.

### **Section 19: Documents and information from third parties**

43. This section enables the Commission to obtain documents and information from third parties who are not parties to the complaint in question. If not handed over voluntarily, the Commission may apply for a court order for disclosure. Such an order will only be granted where the court considers that the material is relevant to the investigation concerned and disclosure would be in the public interest

### **Section 20: Enforcement of Commission direction under section 10(2)**

44. Where the Commission upholds a services complaint and directs a practitioner to provide redress for the client by way of remission of fees, payment of compensation or otherwise under section 10(2), section 20 provides that it may enforce such a direction through standard court procedure.

### **Section 21: Appeals**

45. Section 21 permits the complainer, the practitioner to whom the complaint relates, the practitioner's firm, the employing practitioner, and the relevant organisation to appeal to the Court of Session, with the leave of that court, against any decision of the Commission under Part 1 of the Act – meaning any determination, direction or other decision made by the Commission under the Part or any report under section 10(2)(e). The appeal must be made within 28 days of notice of the Commission's decision. The grounds for appeal are that the Commission's decision was based on an error of law; that there has been a procedural impropriety in the conduct of any hearing by the Commission on the complaint; that the Commission has acted unreasonably in the exercise of its discretion; and that the Commission's decision was not supported by the facts found to be established by the Commission. The Commission is to be a party to the appeal.

### **Section 22: Appeals: supplementary provision**

46. On appeal, the court may take whatever action it thinks fit – such as overturning the Commission's decision; upholding the Commission's decision but applying an additional or substitute form of redress; or making an ancillary order. The decision of the court is final.

**Section 23: Handling by relevant professional organisations of conduct complaints: investigation by Commission**

47. Section 23 provides that the Commission may investigate complaints about the manner in which a professional organisation has dealt with a conduct complaint (referred to as “handling complaints”). In general, it may not do so where the organisation has not completed its investigation of the conduct complaint or where the handling complaint is made after the expiry of 6 months from the date on which the professional organisation determined the conduct complaint. The Scottish Ministers may by order amend the period of time referred to above.

48. The Commission may however investigate a conduct complaint before the professional organisation has completed its own investigation where (a) the handling complaint is that the body has acted unreasonably in failing to start an investigation into the complaint or, having started such an investigation, has failed to complete it within a reasonable time; or (b) the Commission considers that an investigation by the Commission is justified. In such circumstances, the Commission must give notice in writing to the complainer, the practitioner and the relevant professional organisation of its decision to investigate and the reasons for that decision.

49. The Commission may decide not to investigate a handling complaint or to discontinue the investigation of a handling complaint. In such circumstances the Commission must give notice in writing of its decision and specify the reasons for the decision to the person who made the handling complaint, the practitioner and the relevant professional organisation. Where the Commission decides to make a written interim report on an investigation it is conducting into a handling complaint, it must send a copy of any such report to the person who made the handling complaint, the relevant professional organisation and the practitioner concerned in the conduct complaint to which the handling complaint relates.

**Section 24: Investigation under section 23: final report and recommendations**

50. Section 24 requires the Commission on completion of its investigation into a handling complaint to make a written report of its conclusions, and copy the report to the person who made the handling complaint, the relevant professional organisation and the practitioner concerned in the conduct complaint to which the handling complaint relates.

51. The Commission’s report may include one or more of the following recommendations:

- (a) that the relevant professional organisation provides to the person making the handling complaint such information about the conduct complaint to which the handling complaint relates, and how it was dealt with, as the Commission considers appropriate;
- (b) that the conduct complaint be investigated further by the professional organisation;
- (c) that the conduct complaint be reconsidered by the professional organisation;

- (d) that the professional organisation consider exercising its powers in relation to the practitioner concerned;
- (e) that the professional organisation pay compensation of such amount, not exceeding £5000, as the Commission may specify to the person making the handling complaint for loss, inconvenience or distress caused to the person resulting from the way in which the conduct complaint was handled by the organisation (the Scottish Ministers, after consulting (a) the relevant professional organisation and (b) such groups of persons representing consumer interests as they consider appropriate, may vary the maximum level of compensation by affirmative resolution order);
- (f) that the professional organisation pay to the person making the handling complaint an amount specified by the Commission by way of reimbursement of the cost, or part of the cost, of making the handling complaint.

52. The Commission's report must give its reasons for making particular recommendations. The professional organisation must have regard to the conclusions and recommendations set out in the report which relate to it, and within 3 months from the date on which the report was sent, notify the Commission and the person who made the handling complaint of (a) the action it has taken either to comply with the recommendations or in consequence of its further consideration of the matter; and (b) its reasons for any decision not to comply wholly with a recommendation.

53. Where the professional organisation notifies the Commission of its decision not to comply wholly with a recommendation or the Commission believes that the organisation has not complied wholly with a recommendation by the end of the 3 month period, the Commission may at its discretion direct the organisation to comply with the recommendation in question, after first giving the organisation an opportunity to make representations; and the organisation must comply with the direction. For the purposes of this provision, "recommendation" refers only to the types of recommendation referred to in sub-paragraphs (a), (c), (e) and (f) of paragraph 51 above.

### **Section 25: Failure to comply with recommendation**

54. Section 25 provides an enforcement mechanism for cases in which the Commission directs a professional body to comply with a direction under section 24(6), but the professional body still does not do so. This section permits the Commission in such circumstances to apply to the Court of Session by petition for the court to order the professional body to comply with the relevant recommendation. This would permit a fine or other sanctions to be imposed by the court if the professional body then failed to comply with the court's order.

## **Section 26: Abolition of Scottish legal services ombudsman**

55. Section 26 provides a power for Scottish Ministers to completely abolish the office of the Scottish legal services ombudsman by order once the Ombudsman has no exercisable functions left. By virtue of section 26(3), the exercisable functions of the Ombudsman are limited to those regarding reserved advice, services and activities. The abolition will proceed once appropriate Westminster legislation has secured competence for the Commission to deal with service complaints relating to reserved services as set out in section 77.

## **Section 27: Annual general levy**

56. Section 27 requires an annual general levy to be paid to the Commission in respect of each financial year by solicitors holding a practising certificate, advocates practising as such, conveyancing or executry practitioners and persons exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The levy is to be collected from its members by each relevant professional organisation and paid to the Commission.

57. The Commission may recover any unpaid sum and the interest due for late payment as a debt from the professional organisation liable to pay it. The professional organisation may recover any unpaid levy and the interest as a debt from the practitioner who has not paid. Late payment or a failure to pay the levy by a practitioner may be treated as professional misconduct or unsatisfactory professional conduct.

## **Section 28: Complaints levy**

58. Section 28 sets out the circumstances in which a practitioner can be required to pay a levy to the Commission in respect of a complaint about the services provided by that practitioner which is dealt with by the Commission. The levy is payable in respect of a complaint where either (a) the outcome of mediation by the Commission has been accepted by both the complainer and the practitioner; or (b) the complaint has been investigated by the Commission and an informal settlement has been accepted by both parties; or (c) the Commission has determined and upheld the complaint.

59. The Commission may charge interest on any unpaid complaints levy at a rate to be specified by the Scottish Ministers by order. The total sum due may be recovered by the Commission as a debt from the practitioner. Non-payment or late payment of the complaint levy by a practitioner may give rise to a complaint of misconduct or unsatisfactory professional conduct.

60. The levy is not payable therefore where the Commission determines a complaint to be frivolous, vexatious, totally without merit or otherwise ineligible in terms of its rules or where the Commission determines a complaint but does not uphold it. The levy will also not require to be paid where the Commission has determined the levy as nil or has waived the requirement to pay it in accordance with its rules made under section 32(1).

### **Section 29: Amount of levies and consultation**

61. Section 29 enables the Commission to determine the amount of the annual general levy and the complaints levy in respect of each financial year. The Commission is required to consult the professional organisations and their members in January each year on its proposed budget for the following financial year and to have regard to any views expressed in its consultation. The Commission must, no later than 31 March in each year, publish the responses it has received to its annual consultation exercise. However, the duty to publish will not apply where the consultee has expressly requested confidentiality. Its budget must include its estimated resource requirements for the following year and its proposals for the amount of the annual general levy and the complaints levy.

62. To enable the Commission to determine the amount of the annual general levy, the professional organisations are required to provide an estimate of the numbers of their members that they anticipate will be eligible to pay the annual general levy in the following financial year. The amount of the annual general levy is a flat rate except in circumstances where the Commission may waive a portion of the levy, for example where a practitioner starts or ceases to practise in the course of the financial year. The Commission has power to set different amounts for the complaints levy in different circumstances including an amount of nil.

63. The proposed budget must also be accompanied by information on the Commission's projected work plan for the next financial year. The Commission is obliged to ensure that the levies are set at a level which will be reasonably sufficient to meet its expenditure, taking one financial year with another. The Commission must lay a copy of the final budget before the Scottish Parliament no later than 30 April in each year.

### **Section 30: Grants or loans by the Scottish Ministers**

64. Section 30 enables the Scottish Ministers to make grants to the Commission on such terms and conditions (including conditions as to repayment) as they consider appropriate. The Scottish Ministers may also lend sums to the Commission for the purpose of the exercise of any of its duties or powers and make directions about how the Commission is to repay any such loan and interest on the loan and the rates of interest applying to the loan.

### **Section 31: Guarantees**

65. Section 31 authorises the Scottish Ministers to guarantee the discharge of any financial obligation in connection with any sums borrowed by the Commission and requires the Scottish Ministers to lay a statement of the guarantee before the Parliament immediately after giving it. Where the Scottish Ministers pay out a sum in fulfilment of a guarantee, the section requires the Commission to make payments in or towards repayment of the sum in accordance with Ministers directions in relation to the amount of such payments and the applicable rate of interest.

### **Section 32: Duty of Commission to make rules as to practice and procedure**

66. Section 32 requires the Commission to make and publish rules as to its practice and procedure, including rules setting out requirements and procedures in relation to the annual general levy and the complaints levy. Schedule 3 expands on matters in relation to which the rules either must or may make provision. The Commission is required to keep its rules under review and vary the provisions of the rules whenever it considers it appropriate to do so. The Commission must consult with the Lord President of the Court of Session, the Scottish Ministers and with bodies representing the interests of consumers and the relevant professional organisations on its draft rules (including any variation of its rules).

### **Section 33: Duty of relevant professional organisations to forward complaints to Commission**

67. Section 33 requires a relevant professional organisation to send to the Commission any conduct or services complaint, or any complaint about its handling of a conduct complaint, which it receives directly. It must also send the Commission any material accompanying the complaint. This will allow the Commission to act as a single gateway for all complaints, while not inconveniencing complainants who may have complained directly to the relevant professional bodies in error, and will also allow the Commission to monitor all complaints for the purposes of making reports under section 36.

### **Section 34: Commission's duty to provide advice**

68. Section 34 requires the Commission to provide advice to any person on the process of making a services complaint or a handling complaint. Where a complainer brings a complaint to the Commission about the conduct of a firm or incorporated practice, the Commission is required to assist the complainer so far as is reasonably practicable in reformulating the complaint so that it is about a named practitioner. This will ensure that the public are adequately informed about these processes. The requirements are subject to a reasonableness test. The Commission is also required to provide information by any particular means preferred by the person requesting it, again subject to a reasonableness test. The Commission's advice would not extend to advice about the merits of the complaint.

### **Section 35: Services complaints: monitoring, reports, protocols and information sharing**

69. Section 35 requires the Commission to monitor practice and trends in practice on matters which give rise to service complaints, and publish reports on any trends which it identifies at such intervals as it considers appropriate. The Commission and the professional organisations are required to enter into protocols to share information with each other on such matters as the number of services complaints and identifiable trends, the level of provisional settlements accepted by both parties, the substance of any services complaints which might reveal a possible abuse of legal aid, and determinations upholding services complaints. These provisions will assist the Commission to disseminate best practice in dealing with clients and complaints handling at local level and ensures that the

Commission will bring to the attention of the professional bodies any abuses of legal aid which it uncovers.

### **Section 36: Conduct complaints: monitoring, reports, guidance and recommendations**

70. Section 36 requires the Commission to monitor practice and identify trends in practice on matters which give rise to conduct complaints and on the way in which the relevant professional organisations have dealt with conduct complaints, and to publish reports on any such trends as it identifies and as it considers appropriate. The Commission is also empowered to give the professional organisations guidance on timescales for dealing with conduct complaints and to make recommendations to the professional organisations about their complaints handling procedures. Each professional organisation is required to consider such recommendations and notify the Commission of the results of its consideration and of any action it has taken or proposes to take in response. The Commission is empowered to carry out audits of the complaints handling records held by the professional organisations.

### **Section 37: Obtaining of information from relevant professional organisations**

71. Section 37 empowers the Commission to obtain information or documents from the professional organisations, or from individual practitioners where such information is not within the knowledge of the relevant professional organisation, in order to allow the Commission to carry out its conduct complaints handling functions under sections 23 and 24 and its monitoring function under section 36 (including the function of carrying out audits). The information or documents may include information obtained from a practitioner in the course of the relevant professional body's investigation of a conduct complaint. The professional organisation or the practitioner is required to comply with a requirement to provide such information or documents. However, in making a request for information, the Commission is not given the right to override the existing rules of legal privilege.

72. Schedule 2 makes further provision about the powers of the Commission to examine documents and demand explanations in connection with complaints.

### **Section 38: Efficient and effective working**

73. To minimise any unnecessary duplication of effort in relation to any investigation or report which they undertake under the Act, this section places the Commission and the professional organisations under a duty to liaise with each other. This duty will be particularly important in relation to complaints which have both services and conduct elements.

**Section 39: Monitoring effectiveness of guarantee funds etc.**

74. Section 39 provides that the Commission may monitor the effectiveness of (a) the Scottish Solicitors Guarantee Fund maintained by the Law Society of Scotland, the purpose of which is to compensate any person who suffers pecuniary loss by reason of dishonesty on the part of a Scottish solicitor; (b) professional indemnity insurance arrangements made under section 44(2) of the Solicitors (Scotland) Act 1980 (the current arrangements taking the form of a “Master Policy” the premiums for which are met by Scottish solicitors); and (c) any other funds or arrangements maintained by any relevant professional organisation for purposes analogous to the Guarantee Fund or the professional indemnity arrangements. The Commission has an interest in these arrangements as they are an integral part of the overall mechanisms for providing redress for clients who have suffered as a result of the dishonesty or poor service of a legal practitioner.

75. The power may be used to monitor the turnaround times for the making of settlements from these sources. The Commission may make recommendations to the relevant professional organisation about the effectiveness of such funds or arrangements and may request information from that organisation relevant to its functions under this section. Where a relevant professional organisation fails to provide such information, it is required to give reasons to the Commission in respect of that failure.

**Section 40: How practitioners deal with complaints: best practice notes**

76. Section 40 empowers the Commission to issue guidance about how practitioners deal with complaints about professional conduct or professional services. Such guidance may include recommendations about standards for complaints handling systems, reflecting the interest of the Commission in the dissemination of best practice about local complaints handling systems generally.

**Section 41: Power by regulations to amend duties and powers of Commission**

77. Section 41 enables the Scottish Ministers by regulations to adjust the duties imposed on, or the powers conferred on, the Commission. Before making any such adjustment, the Scottish Ministers must consult the Commission, the relevant professional organisations and such other persons or groups of persons as they consider appropriate. A draft of such regulations has to be laid before, and approved by resolution of, the Parliament (section 79(3)). The regulations may contain such incidental, supplemental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient.

**Section 42: Reports: privilege**

78. Section 42 provides for certain reports made by the Commission to be privileged for the purposes of the law of defamation; this will prevent such reports from being made the basis of an action for defamation unless the publication is proved to have been made with malice. The reports in question are interim and final reports on investigations; reports on trends in practice as respects the way in which practitioners have dealt with matters resulting in service complaints being dealt with by the Commission; reports on

trends in practice as respects the way in which practitioners have dealt with matters that result in conduct complaints and on the way in which the relevant professional organisations have dealt with conduct complaints; and reports on the discharge by the Commission of its functions.

### **Section 43: Restriction upon disclosure of information: Commission**

79. This section prohibits the Commission, any of its employees or any person acting on its behalf from disclosing information obtained by it in connection with a complaint, except for the purposes of enabling or assisting the Commission to exercise any of its functions or where disclosure is required by law. Any person employed or acting on the behalf of the Commission who knowingly discloses information obtained is guilty of an offence and liable to be fined.

### **Section 44: Exemption from liability in damages**

80. This section provides protection for the Commission and its members and employees from liability in damages from anything done in the discharge of the Commission's functions. This will ensure that they will not have to act in an unduly defensive way. The exemption does not apply however where an individual acts in bad faith, and it will not prevent an award of damages being made under the Human Rights Act 1998.

### **Section 45: Giving of notices etc. under Part 1**

81. Section 45 provides for any notice which is required to be given in writing under Part 1 to be treated as being in writing if it is received in a form which is legible and capable of being used for subsequent reference.

82. If notice is required to be given to any person, it is duly given (i) where the person is not an incorporated practice, if left at or delivered or sent by post to a person's last known place of business or residence; (ii) in the case of an incorporated practice, if it is left at or delivered or sent by post to the registered office of the practice; (iii) where the person is a practitioner who is a firm of solicitors or an incorporated practice, if it is sent to the person by electronic means (but only if the practitioner agrees to that means of sending); (iv) where the person is an individual, if it is sent to the person by electronic means but only if the individual agrees to that means of sending; (v) to any person, if it is given in such other manner as may be prescribed by regulations by the Scottish Ministers.

83. Where notice is sent by electronic means, it is deemed to be delivered on the next working day which follows the day on which the notice is sent, unless the contrary is proved.

84. As explained in paragraph 82, the section also creates a power for the Scottish Ministers to prescribe by regulations other ways of giving notice to any person in addition to those prescribed in subsection (2)(a)(i) to (iv). Subsection (3) clarifies that where notice is required to be given to a person who is not an individual, the regulations may permit the notice to be given to that person by addressing or sending it instead to someone who is appointed by that person to receive the notice or such other person falling within such other categories prescribed in the regulations as appear appropriate to the Scottish Ministers. This provision might for example be used to enable a named complaints partner in a law firm to receive such a notice. “Working day” is defined to mean any day other than a Saturday or Sunday or bank holiday in Scotland.

#### **Section 46: Interpretation of Part 1**

85. Section 46 defines what is meant by expressions used in Part 1. Most of the definitions are straightforward, but the following are of note:

“client” is defined to include (in relation to any matter in which the practitioner has been instructed) any person on whose behalf the person who gave the instructions was acting; and where the practitioner is an employee of a person who is not a practitioner, to include (in relation to any matter in which the practitioner has been instructed by the employer) the employer. This definition thus allows an employer of an in-house lawyer to complain against that lawyer.

“complainer” is defined to mean the person who makes the complaint and, where the complaint is made by the person on behalf of another person, includes that other person.

“complaint” is widely defined to include any expression of dissatisfaction.

“inadequate professional services” are defined to mean professional services which are in any respect not of the quality which could reasonably be expected of a competent advocate/solicitor/conveyancing or executry practitioner etc; and to include any element of negligence in respect of or in connection with the services.

“the court” means the Court of Session.

“practitioner” is defined widely to cover—

- (a) an advocate and includes any advocate whether or not a member of the Faculty of Advocates at the time when it is suggested the conduct complained of occurred or the services complained of were provided and notwithstanding that subsequent to that time the advocate has ceased to be such a member;
- (b) a conveyancing practitioner and includes any such practitioner, whether or not registered at that time and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;
- (c) an executry practitioner and includes any such practitioner, whether or not registered at that time and notwithstanding that subsequent to that time the practitioner has ceased to be so registered;
- (d) a firm of solicitors, whether or not since that time there has been any change in the firm by the addition of a new partner or the death or resignation of an existing partner or the firm has ceased to practise;

- (e) an incorporated practice, whether or not since that time there has been any change in the persons exercising the management and control of the practice or the practice has ceased to be recognised by virtue of section 34(1A) of the Solicitors (Scotland) Act 1980 or has been wound up;
- (f) a person exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and includes any such person, whether or not the person had acquired the right at that time and notwithstanding that subsequent to that time the person no longer has the right;
- (g) a solicitor, whether or not the solicitor had a practising certificate in force at that time and notwithstanding that subsequent to that time the name of the solicitor has been removed from or struck off the roll or the solicitor has ceased to practise or has been suspended from practice.

“unsatisfactory professional conduct” is a new concept which is defined to mean professional conduct which is not of the standard which could reasonably be expected of a competent and reputable advocate, solicitor, conveyancing or executry practitioner etc but which does not amount to professional misconduct and which does not comprise merely inadequate professional services.

86. As Crown Counsel and procurators fiscal are independent public prosecutors and do not act on the instructions of a client, section 46(2) makes clear for the avoidance of doubt that they are not subject to the services complaints regime for the work they do in that capacity. (By virtue of section 2 of the Act, legal services need to have been instructed by a client before they can be the subject of a services complaint.) The provision thereby eliminates the possibility of any attempt to challenge convictions or decisions whether to prosecute by using the services complaint route.

87. Section 46(3) makes clear for the avoidance of doubt that exercises of prosecutorial discretion are not in themselves capable of constituting professional misconduct or unsatisfactory professional conduct. Misconduct which does not form part of legitimate prosecutorial discretion can however be the subject of a valid conduct complaint.

## **PART 2 – CONDUCT COMPLAINTS: OTHER MATTERS**

### **Section 47: Conduct complaints: duty of relevant professional organisations to investigate etc.**

88. Section 47 places a duty on professional organisations to investigate a conduct complaint remitted to them by the Commission. After investigation professional organisations are required to make a written report to the complainer and the practitioner of the facts of the matter as found by the organisation and the action the organisation proposes to take, or has taken, in the matter.

89. Professional organisations are required to ensure that their procedures for dealing with conduct complaints do not conflict with their duties under section 24(4) or (5) to have regard to the conclusions and recommendations so far as relating to the organisation set out in the Commission’s reports on handling complaints.

**Section 48: Conduct complaints and reviews: power of relevant professional organisations to examine documents and demand explanations**

90. Section 48 gives powers to relevant professional organisations to examine documents and demand explanations from a practitioner, a practitioner's firm or an employing practitioner where they are satisfied they need to do so, either to investigate a conduct complaint or review a decision by them in relation to a conduct complaint. The procedure set out requires the organisations to give notice in writing to the practitioner requiring the production or delivery to them of documents relevant to the complaint, or an explanation regarding the matters to which the complaint relates. The documents in question are those listed in subsection (3).

91. The professional organisations may also give notice to the complainer requiring the production or delivery of books, accounts, deeds, securities, papers or other documents in the possession or control of the complainer; or an explanation regarding the matters to which the complaint relates.

92. Subsection (6) introduces schedule 4 which sets out further powers of relevant professional organisations in this context.

**Section 49: Conduct complaints: financial impropriety**

93. Section 49 provides powers for a relevant professional organisation to apply to the court for an order freezing bank accounts held in the name of a practitioner or firm where it has reasonable cause to believe that the practitioner or firm has been guilty of financial impropriety. No payment is to be made from such bank accounts without the leave of the court.

94. This provision thus extends to all the relevant professional organisations the statutory power to freeze bank accounts which was previously only available to the Law Society of Scotland (under section 38 of the Solicitors (Scotland) Act 1980).

**Section 50: Power of relevant professional organisations to recover certain expenses**

95. Section 50 entitles relevant professional organisations to recover from practitioners any expenditure they might reasonably incur in respect of action taken on their part to obtain documents or explanations. Notice must have been served under the terms set out in schedule 4.

**Section 51: Powers in relation to documents and information from third parties**

96. Section 51 allows a professional organisation to apply for a court order where a person who is a third party and not a party to the complaint in question refuses or fails to produce documents or information which the professional organisation has requested.

97. Subsection (3) extends to relevant professional organisations the same powers that the Commission has in sections 19(3) to (7) to seek a court order in similar circumstances. Such an order will only be granted where the court considers that the material is relevant to the investigation or report concerned and disclosure would be in the public interest. The law of legal professional privilege is left unaltered and will continue to apply, so a third party lawyer will not be forced to disclose confidential communications with a client unless that client consents.

### **Section 52: Restriction upon disclosure of information: relevant professional organisations**

98. This section prohibits relevant professional organisations, any of their employees or any person acting on their behalf from disclosing information contained in a conduct complaint or obtained in the course of considering or investigating such a complaint – except for the purpose of enabling the professional body to exercise any of its functions in relation to such a complaint or where disclosure is required by law. Any person employed by or acting on behalf of a professional organisation who knowingly discloses information obtained is guilty of an offence and liable to be fined.

### **Section 53: Unsatisfactory professional conduct: solicitors**

99. Section 53 amends the Solicitors (Scotland) Act 1980 (“the 1980 Act”) to create duties of and powers for the Council of the Law Society of Scotland and the Scottish Solicitors Discipline Tribunal in relation to unsatisfactory professional conduct by a solicitor. The expression “unsatisfactory professional conduct” is defined by section 46 in relation to a solicitor to mean “professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor, but which does not amount to professional misconduct.”

100. Section 53 inserts new sections 42ZA, 42ZB, 53ZA, 53ZB, 53ZC, 54A and 55A in the 1980 Act.

### **Section 42ZA of the 1980 Act**

101. New section 42ZA is inserted into the 1980 Act to provide that when a complaint of unsatisfactory professional conduct is remitted to the Council by the Commission under section 6(a) or 15(5)(a) of the Act, the Council must investigate the complaint and, having given the solicitor an opportunity to make representations, make a determination. In considering the complaint, the Council may take account of the outcome of any previous unsatisfactory professional conduct or professional misconduct complaint against the solicitor determined by it, the court or the Scottish Solicitors Discipline Tribunal. The Council must similarly investigate and determine (after giving the solicitor the opportunity to make representations) complaints remitted to it by the Scottish Solicitors Discipline Tribunal under new section 53ZA of the 1980 Act.

102. Where the Council upholds an unsatisfactory professional conduct complaint, it must censure the solicitor. The Council may also take any of the following steps which it considers appropriate: (a) where the Council considers that the solicitor does not have sufficient competence in relation to any aspect of the law or legal practice, direct the solicitor to undertake such education and training as regards the law or legal practice as it considers appropriate; (b) direct the solicitor to pay a fine not exceeding £2,000; and (c) where the Council considers that the complainer has been directly affected by the conduct, direct the solicitor to pay the complainer compensation of up to £5,000.

103. The Council may not direct payment of a fine where, in relation to the subject matter of the complaint, the solicitor has been convicted by any court of an act involving dishonesty and sentenced to a term of imprisonment of at least 2 years. This is akin to the double jeopardy rule. In any circumstances where a fine is applied, it will be treated as if it were a fine imposed in the High Court for the purposes of section 211(5) of the Criminal Procedure (Scotland) Act 1995 and will thus be payable to and recoverable by the Treasury.

104. The Council is required to intimate its determination and any direction or censure to both the complainer and the solicitor by sending them a copy. The Council must also give them reasons for its determination and any direction it makes.

105. The solicitor has a right of appeal to the Scottish Solicitors' Discipline Tribunal against the Council's determination or direction.

106. The complainer has a right to appeal to the Tribunal within 21 days against (a) a determination by the Council not to uphold the complaint, (b) a decision by the Council when upholding the complaint not to direct the solicitor to pay compensation, or (c) the amount of compensation which the Council has directed the solicitor to pay.

#### **Section 42ZB of the 1980 Act**

107. This new section requires the Council to monitor compliance with directions issued by it. When a direction is made by the Council or varied/ confirmed by the court or Tribunal, the Council must request from the solicitor an explanation of the steps which he or she has taken to comply with the direction. The solicitor must respond to the Council within 21 days of the date specified in notice. The request will however be suspended for the duration of any appeal by the solicitor or the complainer.

#### **Section 53ZA of the 1980 Act**

108. New Section 53ZA provides that where the Tribunal has considered a complaint of professional misconduct and does not uphold the complaint and considers that the solicitor may be guilty instead of unsatisfactory professional conduct, then the Tribunal must remit the complaint to the Council. In so doing, the Tribunal may make available to the Council its findings in fact.

**Section 53ZB of the 1980 Act**

109. This new section sets out the powers of the Scottish Solicitors' Discipline Tribunal in relation to appeals made to it by solicitors or complainers against Council determinations or directions in unsatisfactory professional conduct cases, as follows.

110. Where a solicitor appeals a Council determination upholding a complaint or appeals a consequent direction requiring remedial education or training or the payment of a fine or compensation, the Tribunal may (a) quash or confirm the determination being appealed against (and if it quashes the determination it must also quash the censure which accompanied it); (b) quash, confirm or vary the direction being appealed against; (c) direct the solicitor to undertake such education or training as regards the law or legal practice as the Tribunal considers appropriate; (d) fine the solicitor an amount not exceeding £2000; or (e) where the Tribunal considers the complainer to have been directly affected by the conduct, direct the solicitor to pay compensation of up to £5,000 in respect of resulting loss, inconvenience or distress.

111. Where a complainer appeals a Council determination not to uphold a complaint, the Tribunal may quash the Council determination and uphold the complaint; may direct the solicitor to pay compensation of up to £5,000 for loss, inconvenience or distress, where the Tribunal considers the complainer to have been directly affected by the conduct; or may confirm the determination.

112. Where the Council upholds a conduct complaint but does not direct the solicitor to pay compensation, a complainer may appeal to the Tribunal against the Council's decision not to direct payment of compensation. The Tribunal may, where it considers the complainer to have been directly affected by the conduct, direct the solicitor to pay compensation of up to £5,000 for loss, inconvenience or distress.

113. Where a complainer appeals to the Tribunal against the amount of compensation which the Council has directed a solicitor to pay, the Tribunal may quash, confirm or vary the direction being appealed against.

114. The Tribunal may not direct the solicitor to pay a fine where in relation to the subject matter of the complaint the solicitor has been convicted of an act involving dishonesty and sentenced to a term of imprisonment of at least two years. This is akin to the double jeopardy rule.

115. Any fine imposed by the Tribunal is to be payable to and recoverable by the Treasury.

116. A direction of the Tribunal under the section is enforceable in the same manner as an extract registered decree arbitral in favour of the Council.

### **Section 53ZC of the 1980 Act**

117. New section 53ZC provides that, where a solicitor fails to comply with a direction given by the Council, the direction, as confirmed or varied on appeal by the Tribunal or court, is to be enforced in like manner as an extract decree arbitral in favour of the Council bearing a warrant for execution issued by a sheriff court.

### **Section 54A of the 1980 Act**

118. New section 54A provides a right of appeal to the Court of Session for a solicitor or complainer in respect of decisions made by the Tribunal in unsatisfactory professional conduct cases.

119. A solicitor is provided with a right to appeal against decisions by the Tribunal under new section 53ZB(1), (2), (3) or (4). So for example, a solicitor may appeal against a Tribunal decision confirming the Council's upholding of the complaint or the Tribunal's decision itself to uphold the complaint (where the Council did not uphold it); a Tribunal decision confirming or varying a Council direction, or itself imposing a direction, as to education or training, a fine or payment of compensation.

120. A complainer has the right to appeal against the following decisions by the Tribunal – a decision quashing the Council's determination to uphold the complaint or confirming the Council's decision not to uphold the complaint; quashing the Council's direction that the solicitor pay compensation or varying the amount the Council directed to be paid; confirming the Council's decision not to direct payment of compensation; itself directing or not directing the solicitor to pay compensation (where the Council did not direct payment).

121. Having heard an appeal by the solicitor or complainer, the court is empowered by new section 54A to give such directions in the matter as it thinks fit, including directions as to the expenses of the court proceedings or any order by the Tribunal relating to expenses. The decision of the court is final.

### **Section 55A of the 1980 Act**

122. New section 55A supplements the general power in new section 54A(4). It provides the court with the following powers in respect of unsatisfactory professional conduct by a solicitor: (a) to fine the solicitor an amount not exceeding £2000; (b) where the court considers the complainer to have been directly affected by the conduct, to direct the solicitor to pay compensation of up to £5,000 for loss, inconvenience or distress resulting from the conduct; and (c) to find the solicitor liable in any expenses which may be involved in the proceedings before it. The decision of the court is final. The maximum level of fine which the court may impose is variable by order by the Scottish Ministers under the negative resolution procedure, in line with inflation. The maximum level of compensation which the court may award is variable under the affirmative resolution procedure following consultation with the Council of the Law Society and such consumer groups as the Scottish Ministers consider appropriate.

**Section 54: Unsatisfactory professional conduct: conveyancing or executry practitioners etc.**

123. Section 54 amends the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (“the 1990 Act”) to create duties of and powers for the Council and for the Tribunal in relation to unsatisfactory professional conduct by conveyancing or executry practitioners. Unlike the position regarding solicitors, the Council may deal with professional misconduct by these practitioners itself but also has discretion whether to make a complaint to the Tribunal.

124. The expression “unsatisfactory professional conduct” is already defined by section 46 to mean as respects a conveyancing or executry practitioner “professional conduct which is not of the standard which could reasonably be expected of a competent and reputable conveyancing practitioner or, as the case may be, a competent and reputable executry practitioner, but which does not amount to professional misconduct.”

125. Section 54 inserts new sections 20ZA, 20ZB, 20ZC, 20B, 20C, 20D and 20E into the 1990 Act.

**Section 20ZA of the 1990 Act**

126. Where the Tribunal has considered a complaint of professional misconduct and does not uphold the complaint and considers that the practitioner in question may be guilty instead of unsatisfactory professional conduct, then the Tribunal must remit the complaint to the Council. In so doing, the Tribunal may make available to the Council its findings in fact.

**Section 20ZB of the 1990 Act**

127. New section 20ZB mirrors new section 42ZA of the 1980 Act (inserted by section 53). Where a complaint of unsatisfactory professional conduct is remitted to the Council by the Commission under section 6(a) or 15(5)(a) of the Act, or by the Tribunal under section 20ZA (2) of the 1990 Act, and the Council has investigated, determined and upheld the complaint, it must censure the conveyancing or executry practitioner. The Council may also take any of the following steps which it considers appropriate: (a) where the Council considers that the practitioner does not have sufficient competence in relation to conveyancing law or legal practice, or as the case may be, executry law or legal practice, to direct the practitioner to undertake such education and training as regards the relevant law or legal practice concerned as it considers appropriate; (b) to direct the practitioner to pay a fine not exceeding £2,000; and (c) where it considers that the complainer has been directly affected by the conduct, to direct the practitioner to pay the complainer compensation of up to £5,000 for loss, inconvenience or distress resulting from the conduct.

128. In considering the complaint, the Council may take account of any previous determination by it, the court or the Tribunal upholding a complaint against the practitioner of unsatisfactory professional conduct. The Council may not impose a fine where, in relation to the subject matter of the complaint, the practitioner has been convicted by any court of an offence involving dishonesty and sentenced to a term of imprisonment of at least 2 years. This is akin to the double jeopardy rule. Any fine is to be payable to and recoverable by the Treasury, as if it were a fine imposed in the High Court for the purposes of section 211(5) of the Criminal Procedure (Scotland) Act 1995.

129. The Council is required to intimate its determination and any direction or censure to both the complainer and the practitioner by sending them a copy. The Council must also give them reasons for its determination and any direction it makes.

130. Practitioners are given a right of appeal to the Scottish Solicitors' Discipline Tribunal against a determination or direction by the Council. Complainers are given a right of appeal to the Tribunal against a Council determination not to uphold a complaint, or against a Council decision not to award compensation or against the amount of compensation awarded.

131. The Scottish Ministers may, after consultation with the Council and such consumer interest groups as they consider appropriate, vary by affirmative order the maximum level of compensation payable. The Scottish Ministers may also, by order subject to negative procedure, adjust the maximum amount of fine in line with inflation.

### **Section 20ZC**

132. New section 20ZC and new section 42ZB of the 1980 Act (inserted by section 53) provide for the Council by notice in writing to require practitioners specified in a direction to give an explanation within 21 days of the notice of the steps taken to comply with that direction. The notice ceases to have effect pending the outcome of any appeal.

### **Section 20B of the 1990 Act**

133. New section 20B and new section 53ZB of the 1980 Act (inserted by section 53) provide powers for the Scottish Solicitors' Discipline Tribunal in relation to appeals made to it by conveyancing or executry practitioners or complainers against Council determinations or directions made in unsatisfactory conduct cases.

134. Where a conveyancing or executry practitioner appeals a Council determination upholding a complaint or appeals a consequent direction requiring remedial education or training or the payment of a fine or compensation, the Tribunal is given powers (a) to quash or confirm the determination being appealed against (and if it quashes the determination it must also quash the censure which accompanied it); (b) to quash, confirm or vary the direction being appealed against; (c) to direct the practitioner to undertake such education as regards the law or legal practice as the Tribunal considers appropriate; (d) to fine the practitioner a sum of up to £2,000; or (e) where the Tribunal considers the complainer to have been directly affected by the conduct, to direct the practitioner to pay compensation of up to £5,000 in respect of resulting loss, inconvenience or distress. The

maximum amounts of the fine and compensation mentioned above may be varied by Scottish Ministers by order.

135. Where a complainer appeals a Council determination not to uphold a conduct complaint, the Tribunal may quash the Council determination and uphold the complaint; may direct the practitioner to pay compensation of up to £5,000 for loss, inconvenience or distress, where the Tribunal considers the complainer to have been directly affected by the conduct; or may confirm the determination.

136. Where the Council upholds a conduct complaint but does not direct the solicitor to pay compensation, a complainer may appeal to the Tribunal against the Council's decision not to direct payment of compensation. The Tribunal may, where it considers the complainer to have been directly affected by the conduct, direct the solicitor to pay compensation of up to £5,000 for loss, inconvenience or distress.

137. Where a complainer appeals to the Tribunal against the amount of compensation which the Council has directed a practitioner to pay, the Tribunal may quash, confirm or vary the direction being appealed against.

138. The Tribunal may not direct the solicitor to pay a fine where in relation to the subject matter of the complaint the solicitor has been convicted of an act involving dishonesty and sentenced to a term of imprisonment of at least two years. This is akin to the double jeopardy rule. Any fine imposed by the Tribunal is to be payable to and recoverable by the Treasury.

#### **Section 20C of the 1990 Act**

139. Where a practitioner fails to comply with a direction given by the Council, new section 20C and new section 53ZC of the 1980 Act (inserted by section 53) provide for the direction, as confirmed or varied on appeal by the Tribunal or the court, to be enforced in like manner as an extract decree arbitral in favour of the Council bearing a warrant for execution issued by a sheriff court.

#### **Section 20D of the 1990 Act**

140. Section 20D mirrors section 54A of the 1980 Act and provides a right of appeal to the Court of Session for a conveyancing or executry practitioner or complainer in respect of decisions made by the Tribunal in unsatisfactory professional conduct cases.

- A conveyancing or executry practitioner may appeal against decisions by the Tribunal under new section 20B(1), (2), (3) or (4) so for example the practitioner may appeal against a Tribunal decision confirming the Council's upholding of a complaint or the Tribunal's decision itself to uphold the complaint (where the Council did not uphold it); a Tribunal decision confirming or varying a Council direction, or itself imposing a direction, as to education or training, a fine or payment of compensation.

- A complainer may appeal against the following decisions of the Tribunal – a decision quashing the Council’s determination upholding the complaint or confirming the Council’s decision not to uphold the complaint; quashing the Council’s direction that the practitioner pay compensation or varying the amount the Council directed to be paid; confirming the Council’s decision not to direct payment of compensation or itself directing or nor directing the practitioner to pay compensation (where the Council did not direct payment).

141. Having heard an appeal by the practitioner or complainer, new section 20D empowers the court to give such directions in the matter as it thinks fit, including directions as to the expenses of the court proceedings or any order by the Tribunal relating to expenses. The decision of the court is to be final.

### **Section 20E of the 1990 Act**

142. Section 20E provides the Court of Session with the following powers in respect of an appeal in relation to unsatisfactory professional conduct: (a) to fine the conveyancing or executry practitioner a sum of up to £2,000; (b) where the court considers the complainer to have been directly affected by the conduct, to direct the practitioner to pay compensation of up to £5,000 for loss, inconvenience or distress resulting from the conduct; and (c) to find the practitioner liable in any expenses which may be involved in the proceedings before it. The decision of the court is to be final. The maximum amounts of the fine and compensation mentioned above may be varied by order by Scottish Ministers subject to parliamentary approval.

### **Section 55: Report by Commission to Council under section 10(2)(e)**

143. Section 10(2)(e) of the Act provides a power for the Commission when upholding a services complaint to make a report to the relevant professional organisation where it considers the practitioner concerned lacks competence in an area of law or legal practice. In view of the responsibility of the professional bodies for legal education and training, the decision on whether or not remedial education or training is actually required rests with the professional organisation.

144. Section 55 inserts provisions into the 1980 Act and the 1990 Act to provide powers for the Council to deal with reports from the Commission indicating that a solicitor or a conveyancing or executry practitioner does not have sufficient competence in relation to any aspect of the law or legal practice.

### **Sections 42ZC of the 1980 Act and 20ZD of the 1990 Act**

145. Where the Council receives such a report about a solicitor, it may direct the solicitor to undertake such education or training as regards the law or legal practice as it considers appropriate in the circumstances. In the case of conveyancing or executry practitioners, the Council’s direction would relate to education or training as regards conveyancing law or legal practice or, as the case may be, executry law or legal practice.

146. The Council must intimate such a direction to the solicitor or the conveyancing or executry practitioner by notice in writing and require the solicitor or conveyancing or executry practitioner to give an explanation within 21 days of the steps taken to comply with the direction. The notice ceases to have effect pending the outcome of any appeal against the direction.

#### **Sections 42ZD of the 1980 Act and 20ZE of the 1990 Act**

147. Solicitors or conveyancing or executry practitioners have a right of appeal within 21 days to the Scottish Solicitors' Discipline Tribunal against such a direction. The Tribunal may quash, confirm or vary the direction. The solicitor or conveyancing or executry practitioner will be able to appeal to the Court of Session against the Tribunal's decision. The Court will be able to give such directions in the matter as it thinks fit and its decision will be final.

#### **Section 56: Powers to fine and award compensation for professional misconduct etc**

148. Section 56(1) amends the 1980 Act to enable the Scottish Solicitors' Discipline Tribunal to direct a solicitor found guilty of professional misconduct to pay compensation of up to £5,000 to any person the Tribunal considers to have suffered loss, inconvenience or distress as a direct result of the professional misconduct. The Scottish Ministers may, after consultation with the Council and such consumer interest groups as they consider appropriate, vary by affirmative resolution order the maximum level of compensation which the Tribunal may award in such circumstances.

149. Section 56(2) amends section 55 of the 1980 Act to provide that on an appeal relating to a complaint of professional misconduct against a solicitor, the Court of Session may impose a fine of up to £10,000 on the solicitor and order him or her to pay compensation of up to £5,000 to the complainer. The maximum amounts of the fine and compensation mentioned above may be varied by the Scottish Ministers by order subject to parliamentary approval.

150. Section 56(3) amends section 20(2) of the 1990 Act to allow the Council to direct the payment of compensation of up to £5000 to a complainer in cases where a conveyancing or executry practitioner has been found guilty of professional misconduct or where the practitioner has been convicted of a criminal offence rendering him no longer a fit and proper person to provide conveyancing and/ or executry services. Similarly, the Tribunal is also now empowered to direct payment of compensation of up to £5,000 in cases of professional misconduct. The maximum amounts of the compensation may be varied by the Scottish Ministers by order after consultation with the Council and such consumer interest groups as they consider appropriate, and subject to parliamentary approval. Section 20(2) is also amended to allow the Council to impose a fine of up to £2000.

**Section 57: Review of and appeal against decisions on remitted conduct complaints:  
cases other than unsatisfactory professional conduct**

151. Section 57 inserts new provisions into section 54 of the 1980 Act which set out rights in relation to appeals to the Court of Session against decisions of the Scottish Solicitors' Discipline Tribunal in conduct cases other than unsatisfactory professional conduct, i.e. professional misconduct and failure by incorporated practices to comply with any provisions of the Solicitors (Scotland) Act 1980.

152. Section 57(1) amends section 54 of the 1980 Act to set out in detail the rights of the different parties involved to appeal from the Tribunal to the Court of Session. As well as the practitioner, the Council of the Law Society is able to appeal, although not against any award of compensation to the complainer. The complainer may now appeal against a decision refusing to award compensation or awarding an amount of compensation regarded by the complainer as insufficient. Provision is also made for an appeal by the practitioner against any ruling that the restriction, suspension or revocation of an investment business certificate takes effect immediately from the date on which the Tribunal's order is intimated to the practitioner.

153. Section 54(1) of the 1980 Act cannot be repealed in the Act because this provision applies to reserved as well as devolved legal services. Repeal will ultimately be achieved through the Legal Services Bill introduced in the UK Parliament on 23 November 2006. In the meantime, section 54(1) is restricted to cases relating to reserved legal services and activities.

154. Section 57(2) makes corresponding provision in relation to professional misconduct appeals involving conveyancing and executry practitioners. Subsection (2) takes account of the fact that under the 1990 Act there are different routes for making disciplinary decisions against such a practitioner : either a decision by the Council of the Law Society, which may be reviewed by the Council and then appealed to the Scottish Solicitors' Discipline Tribunal and onwards to the Court of Session; or a first instance decision by the Tribunal itself, with onward appeal to the court. The changes made by section 57(2) are integrated into this existing structure.

155. Subsection (2) also includes provision for appeals against findings that the circumstances in section 20(1)(d) of the 1990 Act apply. Section 20(1)(d) is peculiar to the 1990 Act and the circumstances are that the Council is satisfied that a conveyancing or executry practitioner has been convicted of a criminal offence rendering him or her no longer a fit and proper person to offer conveyancing or executry services. Currently such a finding cannot be appealed (although the steps taken on the back of such a finding can).

### **PART 3 – LEGAL PROFESSION: OTHER MATTERS**

#### **Section 58: Constitution of Scottish Solicitors' Discipline Tribunal**

156. Section 58 makes changes to the constitution of the Scottish Solicitors' Discipline Tribunal. It is to consist of not more than 28 members with equal numbers of solicitor and non-lawyer members. This adjusts the requirement for the Tribunal to have not less than 10 and not more than 14 solicitor members and 8 non-lawyer members. A vacancy in the membership of the Tribunal or a defect in the appointment of a member are not to affect the validity of any of its proceedings – this is the usual position adopted by statutory bodies. The Scottish Ministers may by negative resolution order vary the maximum number of members of the Tribunal, but not the proportion of solicitor and non-lawyer members.

#### **Section 59: Scottish Solicitors Guarantee Fund: borrowing limit**

157. Section 59 increases the borrowing limit available to the Law Society of Scotland in respect of the Guarantee Fund from £20,000 to £1.25m. Under paragraph 2(2) of schedule 3 to the 1980 Act the Society may borrow money for the purposes of the Guarantee Fund in such manner and on such security as it may determine. The reasons for this increase are:

- The Scottish Solicitors Guarantee Fund has no cap on claims arising from dishonesty, but does have insurance cover for losses from £2m through to £5m which means that the Fund has to pay losses up to £2m from its own resources.
- The Society does not hold £2m as assets of the Fund, but would expect to be able to finance between £0.8m and £1m.
- On that basis it is considered that an overdraft limit of £1.25m would be sufficient to cover the shortfall.

#### **Section 60: Safeguarding interests of clients**

158. Section 60 amends section 45 of the 1980 Act to provide for a client account held in the name of a solicitor or solicitor's firm to vest in the Law Society of Scotland where a sole practitioner has been restricted from acting as a principal (either by the Scottish Solicitors' Discipline Tribunal or as a result of an order of the court).

159. The changes made by section 60 provide that until such time as the Council has approved the arrangements for the transfer of a client account in such circumstances, the client account vests in the Society. The purpose of the amendment is to enable the Society to protect the client account, as section 45 of the 1980 Act (prior to amendment by section 60) does not cover the situation where the solicitor subject to the restriction has been a sole practitioner. Vesting the right to operate the client account in the Society in such circumstances protects the client from any risk and is a temporary arrangement until such time as the Council has approved acceptable other arrangements in respect of the client account.

### **Section 61: Offence for unqualified persons to prepare certain documents**

160. Section 61 amends section 32 of the 1980 Act to remove a difficulty which would otherwise prevent an extension of rights to conduct litigation as envisaged by sections 25 to 29 of the 1990 Act. Section 32 of the 1980 Act makes it an offence for any unqualified person to draw or prepare any writ relating to any action or proceedings in any court. Sections 25 to 29 of the 1990 Act for their part provide for rights to conduct litigation (and rights of audience) to be granted to members of professional or other bodies, subject to the approval in each case of a scheme prescribing safeguards in relation to such matters as the training requirements to be imposed on members, the provision required for professional indemnity insurance and the arrangements for handling complaints against members.

161. The offence in section 32 of the 1980 Act is not however disapplied by the 1990 Act in relation to a member of a professional or other body which has acquired rights to conduct litigation. A member of such a body who sought to exercise such rights in good faith would therefore be guilty of an offence. Section 61 resolves the difficulty by adding an exception to the offence in section 32 of the 1980 Act in respect of a member of a body which has made a successful application under section 25 of the 1990 Act, but only to the extent to which the member is exercising rights acquired by virtue of section 27 of the 1990 Act.

### **Section 62: Notaries public to be practising solicitors**

162. Section 62 amends section 57 of the 1980 Act to provide that only an enrolled solicitor who holds a practising certificate may apply to the Court of Session to be admitted as a notary public. Sections 57(2A) and (2B) (of the 1980 Act) provide a limited exception to this, in that they permit a person who is applying for admission as a solicitor, and who will therefore not yet be enrolled or have a practising certificate, to include in that petition an application for admission as a notary public. Section 62(3) amends section 58 of the 1980 Act to provide that where a person who is a solicitor and notary no longer has a current practising certificate, the Council is to remove the person's name from the register of notaries public. The person's name must be restored to that register on acquisition of a current practising certificate.

### **Section 63: Regulation of notaries public**

163. Section 63 inserts a new section after section 59 of the 1980 Act. The new section provides the Council of the Law Society of Scotland with powers to make rules regulating the admission, enrolment and professional practice of notaries public. The procedure which the Council has to follow is to consult notaries public on a draft of the rules, take account of any representations made and submit the rules to the Lord President of the Court of Session for approval. Failure to comply with the rules may be treated as professional misconduct or unsatisfactory professional conduct on the part of the solicitor who is the notary public.

## **PART 4 – LEGAL AID**

### **Section 64: Criminal legal aid in solemn proceedings**

164. Section 64 repeals the provisions in section 23 of the Legal Aid (Scotland) Act 1986 ('the 1986 Act') which provide that applications for criminal legal aid in solemn proceedings are made to the court and transfers the power to grant criminal legal aid in such proceedings to the Scottish Legal Aid Board ('the Board'). It does not change the criteria by which such applications are determined. Section 64 inserts a new section 23A which provides that the Board can make criminal legal aid available to a person being prosecuted under solemn procedure only if it is satisfied, after consideration of the person's financial circumstances, that the expenses of the case cannot be met without undue hardship to the person or his dependants. It further stipulates that the Board shall establish a procedure whereby a person who has been refused criminal legal aid in solemn proceedings may apply to the Board for a review of their application.

165. New section 23A of the 1986 Act provides that the Board may make grants of legal aid in solemn cases subject to such conditions as it considers expedient. It provides that the Board may impose conditions at any time and require recipients to comply with such conditions. This will enable the Board to satisfy itself that the undue hardship test continues to be met and that it is reasonable for legal aid to continue to be received. It further stipulates that the Board shall establish a procedure whereby a person whose award of legal aid in solemn proceedings is made subject to conditions may apply to the Board for a review of the decision to make those conditions.

166. Section 64 also makes consequential amendments to the 1986 Act so that all references made to the provision concerning criminal legal aid in solemn proceedings do so with reference to the relevant new provisions.

### **Section 65: Criminal legal aid: conditions and reviews**

167. Section 24 of the 1986 Act deals with the availability of criminal legal aid in summary proceedings and, at subsection (2), enables the Board to require a person to comply with conditions once legal aid has been granted. This allows the Board to satisfy itself from time to time that it is in the interests of justice for legal aid to continue to be received. Section 65 amends that section so as to provide that the Board may be able to impose conditions when making such grants of legal aid.

168. Section 65 inserts subsection (1A) in section 24 of the 1986 Act to provide that the Board may make legal aid available subject to such conditions as it considers expedient and that these conditions may be made at any time, including when first making legal aid available. Subsection (2) of section 24, the pre-existing condition-making power, is amended to provide that the Board may impose conditions in relation to the continued application of the financial eligibility test. Such conditions may include the requirement that the assisted person provide full financial information to the Board at any stage in the case and will allow legal aid to be made available subject to case specific conditions including the reaching of a procedural step. The new subsection (5A) provides that the Board shall establish a procedure whereby an assisted person whose grant of criminal legal aid is subject to a condition made under the new subsection (1A) may apply to the Board

for a review of that condition. An amendment is also made to subsection (6) of section 24. This provides that, in cases where at the trial diet there is no legal aid in place as a result of the grant of legal aid ceasing due to the operation of a condition, the court may adjourn the trial diet to allow an application to be made to the Board if it considers that, owing to the exceptional circumstances of the case, it would be inequitable to proceed with the trial without representation.

169. Section 65 also amends section 25 of the 1986 Act. This concerns the availability of legal aid in connection with appeals against conviction, sentence, other disposal or acquittal in criminal proceedings. There is a pre-existing condition-making power at section 25(3) which allows the Board to require a person in receipt of legal aid to comply with conditions. Section 65 inserts a new subsection (2C) which provides that conditions may be imposed at any time, including at the time legal aid is made available. This will allow legal aid to be made available subject to case specific conditions including the reaching of a procedural step. It also inserts a new subsection (2B) which provides that the High Court can determine that legal aid should be made available for an appeal where the court thinks that it is in the interests of justice for it to do so in cases where the Board has terminated a grant because it is no longer satisfied that this is the case. This is an extension of the High Court's powers. There is an existing provision under section 25(2A) where the High Court can make a similar determination where an application for criminal legal aid for an appeal has been refused by the Board on the basis that it was not satisfied that it was in the interests of justice for it to be made available. Section 65 also inserts new subsections (3A) and (3B) in section 25 to provide that the Board shall establish a review procedure so that a person whose application for criminal legal aid in an appeal is refused or granted subject to conditions may apply to the Board for a review of the refusal or a review of the decision to make such conditions.

170. Section 65 also amends section 25AB of the 1986 Act. This concerns the availability of legal aid in connection with references, appeals or applications for special leave to appeal to the Judicial Committee of the Privy Council (JCPC). It inserts new subsections (2A), (3A) and (3B) to provide that the Board may grant legal aid in such cases subject to such conditions it considers expedient, that these conditions may be imposed at any time and that it shall establish a review procedure so that a person whose application for legal aid in connection with proceedings before the JCPC is either refused or granted subject to conditions may apply to the Board for a review of the refusal or a review of the decision to make such conditions.

**Section 66: Criminal Legal Assistance Register: removal of name following failure to comply with code**

171. Section 25D of the 1986 Act enables the Board to remove the name of a firm or solicitor from the register of those able to provide criminal legal assistance if it is satisfied that the firm or solicitor is not complying with the code of practice provided for by section 25B in relation to the provision of criminal legal assistance. Section 66 amends section 25D to enable the Board to act in situations where it suspects that a firm or solicitor has committed a breach of the code of practice in the past but has resumed compliance at the time of the Board's investigation. It adds a new subsection (4A) to section 25D which provides that the Board may, after carrying out the appropriate investigation, remove the name of a firm or solicitor from the register if it is satisfied that the firm or solicitor has in

the past not complied with the code in a material regard. It may only do so after allowing the firm or solicitor concerned the opportunity to make representations and to remedy any defect in their or his compliance with the code within such time as it may specify.

### **Section 67: Register of advice organisations: advice and assistance**

172. Section 67(2) amends section 4(2)(a) of the 1986 Act to enable the Board to make payments out of the Legal Aid Fund in respect of certain categories of advice and assistance to registered organisations in the same way as it is able to do in respect of solicitors and counsel.

173. Section 67(3) amends section 6 of the 1986 Act which provides for a number of definitions of terms used in the 1986 Act. It amends the definition of “advice and assistance” so as to extend it to include oral or written advice provided by an adviser, qualifies the definition of “assistance and assistance by way of representation” to include advice and assistance as provided by an adviser but only to the extent to which it is competent for the adviser to perform such steps and inserts a definition of “adviser” into subsection (2).

174. Section 67(4) amends section 10 of the 1986 Act by adding appropriate references to “advisers” to its provisions which relate to the providers of advice and assistance and their responsibilities in respect of the financial limits which apply to the scheme. Section 10(3) is amended to provide that the cost of providing advice and assistance shall include the outlays incurred and the fees properly chargeable by the registered organisation which approved the adviser. Section 67(5) amends section 12 of the 1986 Act which specifies that payment may be made from the Legal Aid Fund for the fees and outlays of providers of advice and assistance only after any client contributions, expenses or any property recovered or preserved are exhausted. The amendment means that registered organisations can receive such payments from client contributions, expenses or, as the case may be, from property recovered or preserved and that they can make claims to the Board for payment from the Fund where these other sources of payment are either not available or where they do not fully cover the amount due to them by way of outlays incurred and fees properly chargeable.

175. Section 67(6) inserts new sections 12A and 12B into the 1986 Act. Section 12A provides that a register of advice organisations is to be established and maintained by the Board. This register will consist of organisations which have been approved by the Board to provide advice and assistance as advisers. It is specified that solicitors, advocates, conveyancing practitioners, executry practitioners or persons who have a right to conduct litigation or right of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 may not be approved by a registered organisation as an adviser.

176. New section 12B enables regulations to be made which specify the categories of circumstances in which an adviser approved by a registered advice organisation may provide advice and assistance. It provides that the regulations may specify different categories for different purposes. It qualifies the definitions of “advice and assistance”

and “assistance by way of representation” in relation to advisers. An adviser may assist or represent a person only to the extent to which it is competent for the adviser to so act.

177. Section 67(7) amends section 33 of the 1986 Act which deals with the payment of fees and outlays to solicitors and counsel. It inserts a new subsection (1A) which provides that fees and outlays incurred by advisers shall be paid to the registered organisation which had approved them as persons who may provide advice and assistance. It also amends subsection (2) of section 33. This deals with the Scottish Ministers’ ability to make appropriate provision by regulations in respect of the fees and outlays of solicitors and counsel in relation to proceedings for which legal aid has been made available and to cases in which advice and assistance is provided. The amendment specifies that the Scottish Ministers may also make such provision under this section in respect of the fees and outlays of advisers providing advice and assistance.

178. Section 67(8) adds definitions of “adviser”, “adviser code”, “the register of advice organisations” and “registered organisation” to section 41, the interpretation provision, of the 1986 Act.

179. Section 67(9) inserts a new Schedule 1A to the 1986 Act which makes further provision regarding the register of advice organisations. The Schedule makes general provision regarding the register of advice organisations and specifies the process by which an advice organisation may apply to be registered; the terms and conditions of the adviser code for advisers and registered advice organisations which the Board is to prepare, submit to Ministers for approval, lay before the Scottish Parliament and publish; the requirement of the Board to monitor both the compliance with the adviser code by registered organisations and the provision of advice and assistance and related activities by advisers approved by registered organisations; the procedures whereby the Board may remove an organisation from the register; and, the procedures by which an organisation may appeal against a decision of the Board to either refuse its application for registration or to remove its name from the register.

### **Section 68: Scottish Legal Aid Board: grants for certain purposes**

180. Section 68 of the Act amends section 4 of the 1986 Act, which deals with the establishment and management of the Legal Aid Fund, so that the Board will be able to use the Fund to provide grants. It inserts a new section 4A which makes provision as to the Board’s power to make grants available. Subsection (1) provides that the Board may, on an application made to it by any person, make grants of such amount and subject to such conditions, including conditions as to repayment, as it may determine to the person in respect of any of the matters mentioned in subsection (2) and in respect of any of the purposes mentioned in subsection (3). Subsection (2) provides that grants can be made in respect of advice and assistance in relation to civil matters or civil legal aid work undertaken by a solicitor or counsel; advice and assistance work in relation to civil matters undertaken by any adviser; or advice or assistance or representation in connection with civil matters which are not otherwise covered. Subsection (3) provides that the grants can be made in respect of work to facilitate, support and develop the provision of the matters set out in subsection (2). Subsection (10) provides that applications made to the Board under subsection (1) must include such information as the Board may reasonably require.

181. Subsections (4) and (5) of the new section 4A specify that the Scottish Ministers must set a financial limit to the total amount of grant that may be paid out of the Fund and a specific period of time to which that limit applies. Subsections (7), (8), (9) and (11) set out the process by which the Board will prepare and publish a plan of the criteria that it must apply when considering grant applications by virtue of subsection (6), that the plan is to be submitted to Scottish Ministers for approval and that Ministers may approve such a plan with or without being subject to modification. Subsection (9) provides that the Scottish Ministers may, at any time, approve a modification of an approved plan proposed by the Board or withdraw the approval of such a plan or modification and may require the Board to prepare and publish a plan. Subsection (11) provides that the Board, when preparing and publishing a plan, must do so in accordance with such directions as the Scottish Ministers may give.

182. Subsection (12) specifies that grant payments are to be made from the Legal Aid Fund. So as to prevent duplication of payment, subsection (13) provides that work which is funded by a grant will not also be funded under the advice and assistance or civil legal aid schemes.

183. Subsection (14) defines, for the purposes of the section, the term “approved plan”. Subsection (15) specifies that the term “person”, insofar as it is used in section 4A, should be taken to include individuals acting as organisations as well as natural persons. Elsewhere in the 1986 Act the term is generally used to refer to natural persons.

#### **Section 69: Financial limit: advice and assistance**

184. Section 10 of the 1986 Act deals with the financial limits in relation to authorised expenditure for advice and assistance. Advice and assistance is granted by solicitors or, in categories of cases as specified by regulations, by advisers, rather than by application to the Board. The Board’s approval is needed before the authorised limit for advice and assistance applicable under section 10 can be exceeded. Section 69 amends section 10 of the 1986 Act, by inserting new subsections (1A) and (1B), to enable the Board to approve increases in advice and assistance retrospectively in cases where the advice and assistance required to be given urgently and where it was not possible to seek the prior approval from the Board.

185. Section 69 also inserts new subsections (4) and (5) in section 10 of the 1986 Act to provide that applications to exceed the financial limit cannot be made, either in advance or retrospectively, in cases where the matter with which the advice and assistance is concerned is not specified in regulations made under the 1986 Act as being a distinct matter for the purposes of advice and assistance or is not being treated as such by the Board by virtue of such regulations.

**Section 70: Further provision in relation to the Fund: advice and assistance**

186. Section 12(3) of the 1986 Act sets out the order by which the various sources of payments in relation to fees or outlays are to be applied. It provides that the costs of proceedings should be met from client contributions, awards of expenses or property recovered or preserved, in such order, before a claim may be made from the Legal Aid Fund. In some cases more than sufficient property may be recovered on behalf of the assisted person to meet the entire costs of the legal fees and outlays. Where this is the case the excess is paid to the assisted person. Section 70 of this Act inserts a new subsection (2)(ba) into section 4 of the 1986 Act and inserts a new section 12C which applies where advice and assistance has been provided either through the Board's grant funding power or through a solicitor employed by the Board and where payments have been made into the Legal Aid Fund in respect of client contributions, awards of expenses or property recovered. In such cases the costs of proceedings will have been met through the overall costs of employing the solicitor or the award of grant to fund the advice provision, although the costs of individual proceedings could be calculated. The new sections 4(2)(ba) and 12C enable the Board to repay to the assisted party any sums which would have been due to them through the operation of section 12(3) had the advice and assistance been provided through a private sector solicitor funded on a case by case basis.

**Section 71: Availability of civil legal aid for defamation or verbal injury**

187. Part II of Schedule 2 to the 1986 Act provides that civil legal aid shall not be available for certain specified proceedings including those which are wholly or partly concerned with defamation or verbal injury. This exception is not absolute and can be waived where it would otherwise require the withdrawal of legal aid from an assisted person as a result of their opponent lodging a claim for defamation against them. Section 71 of this Act amends Schedule 2, and section 14 of the 1986 Act, which deals with the availability of civil legal aid, to provide that civil legal aid can be made available by the Board to pursuers or defenders in defamation proceedings where exceptional circumstances are shown to exist.

188. Section 71 inserts new subsections (1C), (1D) and (1E) into section 14 of the 1986 Act. New subsection (1C) provides that the Board must be satisfied that further criteria, in addition to those which are required to be met in accordance with the existing statutory tests provided by sections 14 and 15, are met before legal aid may be made available in defamation cases. Subsection (1C) specifies that the relevant criteria will be set out by the Scottish Ministers in directions issued to the Board and enables the Board to make legal aid available in cases where it is satisfied that the criteria as set down in the directions are satisfied. Subsection (1D) provides that the directions may include criteria which the Board requires to satisfy itself and provides that the directions may make different provision for different purposes and be varied or revoked at any time. Subsection (1E) provides that the Board must comply with directions and that the Scottish Ministers must arrange for their publication.

189. Section 71 also amends Part II of Schedule 2. It removes the reference in paragraph 2 in that part of the Schedule to the granting of legal aid for the purposes of defending a counterclaim for defamation or verbal injury will allow the new test as set down in the directions to apply to applications for legal aid made in connection with counterclaims for defamation. This will enable a consistent approach to be taken in respect of the eligibility criteria for legal aid in all defamation proceedings.

### **Section 72: Civil legal aid: conditions and reviews**

190. Section 72 amends section 14 of the 1986 Act. This deals with the availability of civil legal aid. It inserts new subsections (1F) and (1G) in section 14 to enable the Board to impose any conditions which it considers expedient to grants of civil legal aid and requires the Board to establish a procedure whereby persons in receipt of legal aid made subject to conditions may apply to it for a review of any such conditions. These conditions may be set down at any time including at the time the Board makes legal aid available. This is an extension of the Board's pre-existing condition-making powers which it has under section 14(2) of the 1986 Act. This amendment allows the Board to set such conditions at any time, to include at the time civil legal aid is approved.

191. Section 72 also amends section 29 of the 1986 Act. This deals with the availability of legal aid in certain proceedings relating to children. It inserts new subsections (5A), (6A) and (6B) in section 29 to enable the Board to impose any conditions which it considers expedient to grants of legal aid in such proceedings and to do so at any time, including at the time the Board first makes legal aid available. The new subsections also require the Board to establish procedures whereby a person whose application for legal aid under section 29 has been refused, or has been granted subject to conditions, may apply to the Board for a review of the application or a review of any such conditions.

### **Section 73: Availability of legal aid: Judicial Committee of the Privy Council**

192. Section 25AB of the 1986 Act provides for the availability of legal aid in references, appeals or applications for special leave to appeal made to the Judicial Committee of the Privy Council (JCPC). These proceedings are in terms of paragraph 11 and 13(a) of Schedule 6 to the Scotland Act 1998. Section 73 amends section 25AB so that legal aid will also be available, subject to the applicant's eligibility, in relation to cases raising a devolution issue which are referred within the terms of paragraph 33 of Schedule 6 to the Scotland Act 1998. Section 73 also adds such proceedings to paragraph 1 of Part 1 of Schedule 2 of the 1986 Act, which sets out the proceedings for which civil legal aid may be made available.

193. Section 73 also provides that legal aid may be available, subject to an applicant's eligibility, for any devolution issues arising in judicial proceedings in the House of Lords which are, in terms of paragraph 32 of Schedule 6 to the Scotland Act 1998, referred to the JCPC. It does so by adding such proceedings to paragraph 1 of Part 1 of Schedule 2 of the 1986 Act.

#### **Section 74: Solicitors employed by the Scottish Legal Aid Board**

194. Subsection (1) of section 74 amends section 4 of the 1986 Act to allow for payments to be made out of the Legal Aid Fund in respect of expenses incurred by the Board in connection with the employment by the Board of solicitors who provide advice and assistance in relation to civil matters, civil legal aid or who work with advice organisations and provide the services as are mentioned in section 26(2). Section 4 of the 1986 Act already provides the Board with the ability to pay such expenses in respect of solicitors employed to provide advice on criminal matters.

195. Subsection (2) of section 74 amends section 26 of the 1986 Act by removing the reference to “local” in the definition of organisations with which the Board may employ solicitors to work in partnership. It also amends the reference to the organisation’s “function of giving advice” so that this need only be part of the organisation’s role and not its sole or main function.

196. Subsection (3) of section 74 amends section 27 of the 1986 Act to clarify the powers of the Board in relation to the employment of staff and the setting of their terms and conditions of employment. Paragraph 8 of Schedule 1 of the 1986 Act sets out these powers which apply not only to the administrative staff employed by the Board but also, by virtue of section 28A(4), to solicitors employed by the Board to provide criminal legal assistance. Subsection (3) of section 74 replicates section 28A(4) in section 27 of the 1986 Act so that the Board’s powers set out in paragraph 8 of Schedule 1 will also apply to solicitors employed to provide assistance on civil matters.

197. Subsection (3) of section 74 also repeals section 27(2) and (3) of the 1986 Act. Section 27(2) disapplies section 32(a) which prohibits payment from another source where payment has been made from the Legal Aid Fund and section 27(3) prevents solicitors who are employed by the Board to provide assistance on civil matters from being paid from the Legal Aid Fund altogether. Repealing both of these subsections allows the Board to pay solicitors employed by them out of the Legal Aid Fund and not from any other source.

#### **Section 75: Contributions, and payments out of property recovered**

198. Section 75 amends section 4 of the 1986 Act, which sets out the purposes for which money may be paid into and out of the Legal Aid Fund, and section 17 of the 1986 Act, which deals with contributions, and payments out of property recovered.

199. Section 75(4) inserts new subsections (2C) to (2I) into section 17 of the 1986 Act. Subsection (2C) provides that, in relation to proceedings in respect of which a person has been granted civil legal aid, if the total contribution made by a person exceeds the net liability then the excess shall be repaid to the person. Subsection (2D) makes similar provision in respect of sums paid to the Board from property preserved or recovered; where these are no longer required to meet the net liability on the Fund having taken into account an award of or agreement to expenses, the excess shall be repaid to the assisted party. Section 75(2) inserts new subsections (aba) and (abb) into section 4(2) which

enable sums to be paid out of the Legal Aid Fund in respect of new subsections 17(2C) and (2D).

200. Subsection (2E) provides that the provisions in subsection (2B) requiring any net liability to be met from property preserved or recovered do not prejudice the court's ability to allow an opponent to set-off an award of expenses or damages in that person's favour against any damages or expenses awarded to the person in receipt of civil legal aid.

201. Subsection (2F) re-inserts a definition of "net liability of the Fund" into section 17 of the 1986 Act. The definition was removed as the result of a repeal made by the Legal Aid Act 1988 although "net liability of the Fund" is referred to in section 17(2B) of the 1986 Act. Subsection (2F) provides that a "net liability of the Fund" is the aggregate amount of the sums paid or payable to a solicitor or counsel out of the Fund in respect of proceedings, including any sums in relation to advice and assistance given by a solicitor, counsel or adviser approved by a registered organisation in connection with the proceedings, which are not recouped by the Fund from expenses or as a result of any right of indemnity against such expenses. It is intended that this will reduce the likelihood of confusion or disagreement about the limit of the amount which the Board is required to recover in terms of section 17(2A) and (2B) of the 1986 Act.

202. Subsections (2G), (2H) and (2I) make provision in relation to cases where civil legal aid or advice and assistance has been provided either by virtue of a grant made by the Board under section 4A or by a solicitor employed by the Board under Part V of the 1986 Act. They provide that the sums referred to in the definition of net liability at subsection (2F) should be taken to include sums which would have been payable had the assistance been provided by a privately employed solicitor, counsel or adviser funded on a case by case basis. This enables the net liability to be calculated and any excess to be repaid to the assisted party where sums have been paid from the Legal Aid Fund to meet the costs of providing an advice service rather than directly to a solicitor, counsel or adviser in respect of the assisted party's case.

203. Section 75(3) inserts new subsections 3(ca) and 3(cb) into section 4 of the 1986 Act to enable money to be paid into the Legal Aid Fund in respect of expenses or property recovered or preserved in proceedings where advice and assistance has been provided either by virtue of a grant made by the Board under section 4A or by a solicitor employed by the Board under Part V of the 1986 Act.

### **Section 76: Regulations under section 36 of the 1986 Act**

204. Section 36 of the 1986 Act is a regulation making power and allows the Scottish Ministers to make such regulations as appear to them necessary or desirable so as to give effect to or prevent abuses of the 1986 Act. Regulations made under the section may also make different provision in relation to legal aid and advice and assistance respectively and for different cases or classes of case. Section 76 amends that section by inserting new subsections (2)(ca) and (2A) which provide the Board with extended powers. Subsection (2)(ca)(i) enables the Scottish Ministers to make regulations which allow the Board to determine a list of distinct matters for which advice and assistance may be provided by solicitors, advisers and, where appropriate, counsel. Subsection (2)(ca)(ii) allows

regulations to be made which provide the Board with the power to treat a matter not on the list as if it was included there.

205. Subsection (2A)(a) requires that the Board may only determine the matters which are or are not to be treated as distinct matters for the purposes of advice and assistance following consultation with the Law Society of Scotland. Subsection (2A)(b) provides that the Board is required to seek the approval of the Scottish Ministers before it may determine that a matter which has been determined by the Board to be treated as a distinct matter is no longer to be so treated.

## **PART 5 – GENERAL**

### **Section 77: Advice, services or activities to which Act does not apply**

206. Regulation of the legal profession in Scotland is not reserved unlike the regulation of architects<sup>1</sup> or the regulation of insolvency practitioners<sup>2</sup>. Although the regulation of the legal profession is devolved, there are certain discrete areas where the Law Society of Scotland or the Faculty of Advocates is the regulatory body or co-regulatory body in terms of a UK statute, the subject matter of which is reserved. Therefore section 77 provides that nothing in the Act applies to complaints about, or the provision of advice, services or activities in relation to (a) activities carried out by virtue of a group licence under the Consumer Credit Act 1974; (b) activities of an insolvency practitioner within the meaning of the Insolvency Act 1986; (c) complaints about solicitors under the Financial Services Act 2000 1986 (the Law Society of Scotland retains the function of dealing with complaints about solicitors in relation to investment business carried on under the 1986 Act, as this function of recognising professional bodies was saved on repeal of the 1986 Act); (d) immigration advice or immigration services within the meaning of the Immigration and Asylum Act 1999; (e) regulated activities within the meaning of section 22 of the Financial Services and Markets Act 2000 in relation to which the Law Society of Scotland has been delegated a regulatory role by the Financial Services Authority (the activities covered include such matters as dealing or arranging deals in investment, managing investments or giving investment advice); and (f) financial services constituting exempt regulated activities under the Financial Services and Markets Act 2000.

207. It is intended that such advice or services should be subject to provisions analogous to those provided for by the Act in respect of the services with which it deals. The extension of the provisions of the Act to the advice and services listed in (a) to (f) above will be achieved through the Legal Services Bill which was introduced in the House of Lords on 23 November 2006.

208. The Act leaves these discrete reserved areas untouched. In schedule 5, the 1980 and 1990 Acts are amended to restrict the references to ‘inadequate professional services’ to these discrete areas. This means that, for example, the persons mentioned in section 51(3) of the 1980 Act may still make complaints to the Scottish Solicitors’ Discipline Tribunal in relation to inadequate professional services in relation to the discrete reserved areas.

---

<sup>1</sup> Head G1 of Schedule 5 to the Scotland Act 1998.

<sup>2</sup> Head C2 of Schedule 5 to the Scotland Act 1998.

209. The definition of “complaints” and “practitioners” in section 46 (which deals with the interpretation of Part 1 of the Act), is extended to the references to complaints and practitioners in section 77(1) of the Act.

*Consumer credit activities*

210. In respect of (a) (*consumer credit*), in which field the subject matter of the Consumer Credit Act 1974 is reserved (Head C7 of Schedule 5 to the Scotland Act 1998), the Law Society of Scotland has a group consumer licence in terms of section 22(1)(a) of the Consumer Credit Act 1974 granted by the Director General of Fair Trading allowing its members to carry on consumer credit activities as described in the licence.

*Insolvency*

211. In respect of (b) (*insolvency*), in which field the regulation of Insolvency Practitioners is reserved (Head C2 of Schedule 5 to the Scotland Act 1998), the Law Society of Scotland<sup>3</sup> is a recognised professional body under the Insolvency Act 1986 and issues licences to those solicitors who wish to be appointed as insolvency practitioners, supervised by the Insolvency Service, an agency of the Department of Trade and Industry. A person may act as an insolvency practitioner within the meaning of section 388(1) of the Insolvency Act 1986, if, by virtue of section 390(2)(a) of that Act, the person is a member of a professional body recognised under section 391 of that Act.

*Financial Services - 1986 Act*

212. In relation to (c) (*Financial services under the Financial Services Act 1986*), the Law Society of Scotland is still a recognised professional body under that Act. The Law Society of Scotland retains the function of dealing with complaints against solicitors in relation to investment business carried on under the 1986 Act, as this function of recognised professional bodies was saved on repeal of the 1986 Act.

*Immigration services*

213. In relation to (d) (*Immigration*), in which field Immigration and nationality (including asylum) are reserved areas in terms of head B6 of Schedule 5 to the Scotland Act 1998, the Law Society of Scotland and the Faculty of Advocates are designated professional bodies in terms of section 86 of the Immigration and Asylum Act 1999, which removes the need for Scottish solicitors and advocates who provide immigration advice to be individually registered with the Immigration Services Commissioner.

214. These bodies are designated professional bodies in terms of the Act (without any need for a designation order), but the Secretary of State, if he considers that a designated professional body has consistently failed to provide effective regulation of its members in their provision of immigration advice or immigration services, may by order de-designate a body. In the case of the Scottish bodies he has first to consult the Immigration Commissioner and the Scottish Legal Services Ombudsman in terms of section 86(4) of the Immigration and Asylum Act 1999.

---

<sup>3</sup> The Law Society of Scotland is recognised in terms of the Insolvency Practitioners (Recognised Professional Bodies) Order 1986 (S.I. 1986/1746).

*Financial services - 2000 Act*

215. In respect of (e), the Law Society has been delegated a regulatory role by the Financial Services Authority in relation to regulated activities within the meaning of section 22 of the Financial Services and Markets Act 2000. The activities covered include such matters as dealing or arranging deals in investments, managing investments or giving investment advice.

216. In relation to (f), in which field Financial Services and Financial Markets are reserved areas in terms of heads A3 and A4 of Schedule 5 to the Scotland Act 1998, the Law Society of Scotland is one of nine professional bodies designated by the Treasury under section 326 of the Financial Services and Market Act 2000<sup>4</sup>.

217. This regulatory regime covers law firms in Scotland which provide only incidental investment advice. They carry on a narrow range of regulated activities, known as “exempt regulated activities”, under the supervision of the Law Society of Scotland as a designated professional body. In contrast law firms in Scotland which provide financial and investment advice as a main stream activity are regulated directly by the Financial Services Authority in relation to those activities.

218. There are around 100 Law Society of Scotland member firms that are regulated directly by the FSA and approximately 650 other member firms operating under the regulation of the Law Society of Scotland as a designated professional body.

**Section 78: Ancillary provision**

219. Section 78 makes provision to enable the Scottish Ministers to make by order such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence of, or for giving full effect to the Act. Such an order may make different provision for different purposes and may modify any enactment, instrument or document. Such a power could, for example, be used to prescribe procedures to be followed by the Commission on its establishment in relation to services complaints not determined by a professional body at that time or handling complaints in respect of which the Scottish Legal Services Ombudsman had not completed an investigation at that time.

**Section 79: Regulations or orders**

220. Section 79 provides that any power conferred on the Scottish Ministers by the Act to make orders or regulations must be exercised by statutory instrument, and may be exercised so as to make different provision for different purposes. The section specifies that statutory instruments containing an order or regulations made under the Act are to be subject to negative resolution procedure, except -

- orders under section 10(7) or 24(8) amending the maximum amount of compensation available under those sections;

---

<sup>4</sup> This is in terms of the Financial Services and Market Act 2000 (Designated Professional Bodies) Order 2001 (S.I. 2001/1226).

- regulations under section 41(1) adjusting the duties or powers of the Commission;
- orders under section 78(1) making ancillary provision which adds to, replaces or omits any part of the text of an Act; and
- orders under paragraph 2(7) of Schedule 1 varying the numbers of members of the Commission.

which are to be subject to affirmative procedure, requiring a draft of the instrument to be laid before and approved by resolution of the Parliament.

### **Schedule 1—The Scottish Legal Complaints Commission**

221. Schedule 1 makes provision for the detailed constitution, powers and proceedings of the Scottish Legal Complaints Commission. The Commission is to consist of five non-lawyer members, one of whom is to chair it, and four lawyer members. The terms “lawyer members” and “non-lawyer members” are defined in paragraph 2 of the schedule. These numbers may be varied by order made by the Scottish Ministers, subject to the affirmative resolution procedure but there are some limitations on the power. The number of non-lawyer members is required to remain greater than that of lawyer members; the number of non-lawyer members must be no fewer than four and no greater than eight, and the number of lawyer members no fewer than three and no greater than seven. The first members of the Commission are to be appointed by the Scottish Ministers, having consulted the Lord President of the Court of Session, for an initial period of four to six years (to avoid the entire membership of the Commission ceasing to be members at the same time). Other members (i.e. all subsequent members) are appointed for a fixed period of five years and are to be eligible for reappointment for a single further period, but not before a period of three years has elapsed since the end of the member’s original term of appointment.

222. In appointing members, the Scottish Ministers are to have regard to the desirability of including persons:

- (i) who have experience of, and have shown capacity in (a) consumer affairs or complaints handling; (b) the practice and provision of legal education and training; (c) civil or criminal proceedings; (d) court procedures and practice generally; (e) the practice and provision of other legal services; (f) the monitoring of legal services; and
- (ii) persons who have such other skills, knowledge or experience as the Scottish Ministers consider to be relevant in relation to the exercise of the Commission’s functions.

The schedule provides for the qualifications for membership, for the circumstances in which members may be removed, for disqualification of MPs, MSPs and MEPs from membership, and for remuneration, pensions and allowances.

223. The schedule also provides for the appointment of a Chief Executive of the Commission, with the approval of the Scottish Ministers, and of other staff. The Chief Executive is to be the accountable officer for the Commission. The schedule makes provision for the procedure of the Commission, for the establishment of committees, for its general powers and for delegation of functions. The Commission is to be required to keep proper accounts to be audited by the Auditor General for Scotland, and to publish an Annual Report which is to be laid before Parliament by the Scottish Ministers.

224. The Commission's determination of the location of its office premises is subject to the approval of the Scottish Ministers, who may also direct the Commission as to the location of its office premises.

### **Schedule 2—Further powers of Commission under sections 17 or 37**

225. Schedule 2 expands on the Commission's powers under section 17 to require legal practitioners to produce documents and provide explanations in connection with complaints; and under section 37 to require professional bodies to provide it with information and documents for the purposes of section 23, 24 or 36. It enables the Commission to apply to the Court of Session for an order enforcing any such request by it for documents, explanations or other information and for the person who has provided documents to the Commission to apply similarly within 14 days of providing them for an order requiring their return. It also sets out procedural requirements as to the disposal by the Commission of documents required to be produced.

### **Schedule 3—Rules as to Commission's practice and procedure**

226. Schedule 3 sets out certain matters relating to practice and procedure which are to be included in the Commission's rules and also gives particular examples of other matters which may be included in them. Mandatory rules include such rules to cover procedures about the making and eligibility of complaints; the handling of complaints, including procedure for proposed settlements and membership of determination committees; the giving of reasons for determinations, directions, decisions or recommendations; the charging of interest on late payments of the annual general levy or complaints levy; and meetings procedures for the Commission and its committees (subject to schedule 1). Particular examples of other matters which may be included in the rules include time limits for the making of complaints, and the extension of such limits; the effect of procedural defects in the light of the interests of fairness; the circumstances in which the Commission may rely on the findings in fact of another body or its own previous findings in fact; the collection and recovery of the annual general levy from the relevant professional organisation and from practitioners of any complaints levy due by them; the circumstances in which any portion of annual general levy may be waived or refunded or complaints levy waived; and the calculation and notification of the total amount of the annual general levy of each professional organisation is to collect in respect of each financial year.

#### **Schedule 4: Further powers of relevant professional organisations under section 48**

227. Schedule 4 provides powers for relevant professional organisations to obtain documents by court order where either a practitioner or a complainer has refused or failed to produce or deliver them. Where such an order has been granted and the professional organisation takes possession of the documents, the organisation must without delay serve on the practitioner or the complainer from whom they were obtained a notice giving particulars and the date on which it took possession.

228. Before the expiry of 14 days from the date on which that notice was served, the practitioner or complainer may apply to the Court of Session for an order for return of the documents; and on hearing such an application the court may make the order applied for or such other order as it thinks fit. Where no such application is made to the court or where the court has directed that the documents should stay in the custody or control of the relevant professional organisation, the organisation may in due course make enquiries to ascertain who the documents belong to and deal with the documents in accordance with the directions of that person.

#### **Schedule 5—Minor and consequential modifications**

229. Schedule 5 makes a number of minor amendments and repeals and amendments and repeals consequential on the provisions of the Act to the Solicitors (Scotland) Act 1980, the Legal Aid (Scotland) Act 1986 and the Law Reform (Miscellaneous Provisions) Act 1990 and some other Acts. These are mainly concerned with the adjustment of statutory references, and the removal of unnecessary references, as a result of the introduction of the new arrangements for the handling of complaints against lawyers.

#### **PARLIAMENTARY HISTORY**

230. 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> 21 February 2006	<a href="#">SP Bill 56 (Session 2)</a>
<i>Stage 1</i> <i>Justice 2 Committee</i>	
11th Meeting, 2006	<a href="#">25 April 2006, cols. 2215-2251</a>
12th Meeting, 2006	<a href="#">2 May 2006, cols. 2254-2322</a>
13 <sup>th</sup> Meeting, 2006	<a href="#">9 May 2006, cols. 2323-2369</a>

*These notes relate to the Legal Profession and Legal Aid (Scotland) Act (asp 5)  
which received Royal Assent on 19 January 2007*

<b>Proceedings and Reports</b>	<b>Reference</b>
14 <sup>th</sup> Meeting, 2006	<a href="#">16 May 2006, cols. 2375-2541</a>
15 <sup>th</sup> Meeting, 2006	<a href="#">13 May 2006, cols. 2430-2500</a>
16 <sup>th</sup> Meeting, 2006	<a href="#">30 May 2006, cols. 2501-2550</a>
11th Report, 2006: Stage 1 Report on the Legal Profession and Legal Aid (Scotland) Bill	SP Paper 615
<b>Stage 2</b> <i>Justice 2 Committee</i>	
23 <sup>rd</sup> Meeting, 2006	<a href="#">26 September 2006, cols. 2729-2783</a>
25 <sup>th</sup> Meeting, 2006	<a href="#">3 October 2006, cols. 2786-2818</a>
26 <sup>th</sup> Meeting, 2006	<a href="#">24 October 2006, cols. 2820-2841</a>
28 <sup>th</sup> Meeting, 2006	<a href="#">31 October 2006, cols. 2873-2892</a>
As amended at stage 2	SP Paper <a href="#">56</a> (2)
<b>Stage 3</b> (a) Subordinate Legislation Committee	
(13 December 2006) Report on Legal Profession and Legal Aid (Scotland) Bill as amended at Stage 2	SP Paper 696
<i>(b) Consideration by Parliament</i>	
14 December 2006	Cols. 30358-30530
Royal Assent – 19 January 2007	

---

© Crown Copyright 2009

Printed in the UK by The Stationery Office Limited under the authority and superintendence of Carol Tullo, the Queen's Printer for Scotland.