

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

# **LEGAL PROFESSION AND LEGAL AID (SCOTLAND) ACT (ASP 5) WHICH RECEIVED ROYAL ASSENT ON 19 JANUARY 2007**

---

## **EXPLANATORY NOTES**

### **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.

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

*which received Royal Assent on 19 January 2007*

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

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

*which received Royal Assent on 19 January 2007*

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.

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

**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

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

*which received Royal Assent on 19 January 2007*

- 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.

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

*which received Royal Assent on 19 January 2007*

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

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

*which received Royal Assent on 19 January 2007*

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

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



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

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

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

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

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

*which received Royal Assent on 19 January 2007*

### ***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

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

*which received Royal Assent on 19 January 2007*

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

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

*which received Royal Assent on 19 January 2007*

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;

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

*which received Royal Assent on 19 January 2007*

- (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.