

*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 2 – Conduct Complaints: Other Matters

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

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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

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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 not 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

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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.