

LEGAL SERVICES (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Regulation of Licensed Legal Services

Chapter 2 – Licensed Legal Services Providers

Licensed providers

Section 47 – Licensed providers

101. **Section 47** provides the definition of a licensed provider. Any such body is a business entity which provides legal services for a fee, gain or reward under a licence issued by an approved regulator. In order to be eligible to be a licensed provider a body must have within it a practising solicitor (with a valid practising certificate that is free from conditions).
102. Subsection (3) states that a licensed provider may not be regulated by more than one approved regulator at the same time.

Section 48 – Eligibility criteria

Section 49 – Majority ownership

103. These sections describe some possible models of licensed provider and give details of what criteria make and do not make an entity eligible to be a licensed provider.
104. Licensed providers need not have any particular business structure and need not be a body corporate, but they must be a recognisable business entity (such as a company). It is possible that a business which is involved in matters with no link to legal services might in future have a stake in a licensed provider. In such a situation, subsection (3)(b) requires that there should be a distinct business entity within that organisation which operates as the licensed provider. This will prevent approved regulators from having to regulate matters which are not related to the broad definition of legal services in section 3.
105. The definition of licensed provider excludes existing forms of legal business structures. These will continue to be regulated as now (primarily by the Society and the Faculty). The existing “traditional” forms of business structure for solicitors are set out in section 48(4).
106. The first is a solicitor operating as, in effect, a sole trader (sometimes known as a sole practitioner).
107. The second, the traditional practice, means either a partnership made up entirely of solicitors, or an “incorporated practice”. An incorporated practice is a form of solicitors’ practice with no non-solicitor ownership or control, which trades as a body corporate,

and which may benefit from limited liability. Such practices are governed by the Solicitors (Scotland) (Incorporated Practices) Practice Rules 2001.

108. The third, law centres, are also already provided for in the 1980 Act. Section 65 of the 1980 Act defines “law centre” as “a body (a) established for the purposes of providing legal services to the public generally as well as to individual members of the public, and (b) which does not distribute any profits made either to its members or otherwise, but reinvests any such profits for the purposes of the law centre”. Such law centres typically have an arrangement with a solicitors’ firm which provides the legal services for the centre. Section 26(2) of the 1980 Act provides that the offence of acting as agents for unqualified persons does not apply to solicitors, registered foreign lawyer or registered European lawyer pursuing professional activities within the meaning of the European Communities (Lawyer’s Practice) (Scotland) Regulations 2000 who are employed full-time on a fixed salary by a body corporate or employed by a law centre.
109. The Scottish Ministers have the power to make regulations about eligibility to be a licensed provider (subsection (6)). Those regulations may specify other types of entity that are or are not eligible to become licensed providers and make further provision about the criteria for eligibility to be a licensed provider. This subsection also gives the Scottish Ministers power to modify by regulations section 47(2) which currently requires an entity to include at least one solicitor in order to be eligible to be a licensed provider, so that in future it may be possible for a licensed provider to be eligible if it includes a different type of practitioner. Scottish Ministers also have the power to modify the list of legal practitioners in subsection (5). This power could be used to add any types of legal practitioner which are created in the future, thus keeping the provision up to date.
110. **Section 49** provides that an entity is only eligible to be a licensed provider if it is at least 51% owned, managed or controlled by solicitors, firms of solicitors or incorporated practices or members of other regulated professions. It should be noted that section 147 provides that this percentage may be amended or section 49 may be repealed. In either case, the Scottish Ministers must have the agreement of the Lord President before making the necessary regulations. Such an entity must also have at least one solicitor in possession of a practising certificate free of conditions. An entity is not eligible to become a licensed provider if it is wholly owned, managed or controlled by solicitors, firms of solicitors or incorporated practices.
111. **Section 49(3)** defines “regulated profession”. Subsection (4) requires the Scottish Ministers to make regulations specifying what is or what is not to be regarded as a “regulated profession” and allows them to make regulations about what is or what is not a professional association, professional activities (or qualifications) or membership of a profession. Before making such regulations, the Scottish Ministers must have the agreement of the Lord President and must also consult the Society, every approved regulator, the OFT and other organisations appearing to them to represent the interests of consumers, and any other persons and bodies they consider appropriate.

Key duties and positions

Section 50 – Key duties

112. **Section 50** sets out the key duties applicable to all licensed providers, including their obligations with respect to the regulatory objectives, professional principles, their approved regulator’s regulatory scheme and licence terms and conditions. Licensed providers must also ensure compliance with any professional code of conduct applicable to persons within the licensed provider – whether or not such codes are directly incorporated within the approved regulator’s scheme.
113. Because a licensed provider is an intangible entity, the Act provides that all such providers must have identifiable individuals responsible for securing compliance with the key duties, namely a Head of Legal Services (see section 51) and either a Head of

Practice (see section 52) or Practice Committee (see section 53). The two posts have distinct but overlapping duties. Broadly, the Head of Legal Services is responsible for ensuring compliance with regulatory objectives and professional principles, while the Head of Practice is responsible for the broader compliance with the relevant regulatory scheme, and licence terms and conditions.

Section 51 – Head of Legal Services

114. **Section 51** describes the position of Head of Legal Services, along with the requirements, duties and responsibilities associated with the role. This position must be filled in a licensed provider otherwise there is a risk that the licensed provider's licence will be revoked (see section 69). As stated above, the Head of Legal Services is responsible for ensuring compliance with regulatory objectives and professional principles. The Scottish Ministers have the power to make further provision about this position and its function by regulations (subsection (9)(a)).
115. Subsection (2) requires that the Head of Legal Services is to be currently qualified to practice as a solicitor and that he or she has a valid practising certificate, free of conditions. The relevant legislation on practising certificates and conditions is to be found in sections 4, 15(1) and 53(5) of the 1980 Act. The Scottish Ministers, following consultation with the Lord President, have a power to modify by regulations this subsection to allow an additional type of legally qualified person to become Head of Legal Services (subsections (9)(b) and (10)).
116. The Head of Legal Services is personally responsible for securing the licensed provider's compliance with the regulatory objectives, its adherence to the professional principles, and its fulfilment of its other duties, and to take such reasonable steps (such as issuing of instructions, establishing appropriate arrangements for training, monitoring and supervision of staff, and internal audit) for these purposes. The Head of Legal Services is also responsible for managing designated persons (subsections (4) to (6)). This section also provides for the action to be taken by the Head of Legal Services where it appears to him or her that the licensed provider is failing to fulfil its duties.
117. Subsection (8) provides that where any function falls to both the Head of Legal Services and the Head of Practice they are jointly and severally responsible for exercising the function. It will be noted that the Act gives a “whistle blowing duty” to both the Head of Legal Services (section 51(7)) and Head of Practice (section 52(6)), the difference being that the Head of Legal Services is required to report to the Head of Practice and the Head of Practice to the approved regulator. Another joint function is to ensure that designated persons in the licensed provider meet their professional obligations (sections 51(5)(b) and 52(4)(b)). Other joint functions may be provided for at a later date through the regulation-making power in sections 51(9) and 52(7).

Section 52 – Head of Practice

118. **Section 52** describes the position of Head of Practice, along with the eligibility requirements, and the duties and responsibilities associated with the role. As stated above, the Head of Practice is responsible for broader compliance with the relevant regulatory scheme. This position must be filled in a licensed provider otherwise there is a risk that the licensed provider's licence will be revoked (see section 69).
119. Subsection (2) gives details of the criteria that are required for a person's appointment as its Head of Practice. Unlike the Head of Legal Services, no particular qualification is stipulated, although it is possible for the Scottish Ministers, following consultation with the Lord President, to add specific requirements by regulations under subsection (7). Such regulations may also make further provision about the functions of the Head of Practice.
120. Subsection (3) states the Head of Practice has the function of securing the licensed provider's compliance with its approved regulator's regulatory scheme and the terms

and conditions of its licence. The duty is both to ensure compliance by the organisation as a whole, and to manage those working within the organisation to ensure they take account of the regulatory scheme. Whereas the Head of Legal Services managerial oversight is restricted to designated persons (i.e. those involved in the delivery of legal services – see section 59), the Head of Practice has oversight of everyone in a licensed provider.

121. Subsection (6) creates a “whistle blowing” duty. It provides that, if it appears to the Head of Practice that the licensed provider or any person having an interest in the licensed provider is failing (or has failed) to fulfil any of its duties, or that any such person is behaving (or has behaved) improperly in relation to the licensed provider or to any person within it, the Head of Practice must report the matter to the licensed provider’s approved regulator.

Section 53 – Practice Committee

122. **Section 53** describes the composition and responsibilities of the Practice Committee, which licensed providers can choose to have instead of the Head of Practice. They have the same functions under the Act. The Practice Committee must have as one of its members a person who would be eligible to be the Head of Practice (if the licensed provider had decided to have a Head of Practice). The members of a Practice Committee are to be jointly and severally responsible as regards the Committee’s functions. The Scottish Ministers, following consultation with the Lord President, have the power to make further provision by regulations relating to Practice Committees and their functions (subsections (5) and (6)).

Appointment to position etc.

Section 54 – Notice of appointment

123. This section contains requirements for notification by licensed providers to approved regulators of the details of the appointment of a Head of Legal Services and Head of Practice or Practice Committee, or any changes to these appointments.

Section 55 – Challenge to appointment

124. **Section 55** gives an approved regulator the power to challenge any appointment to the posts of Head of Legal Services, Head of Practice or as a member of a Practice Committee. The section sets down the specific grounds of challenge: a challenge can only be made if an approved regulator believes that person to be ineligible or unsuitable, or on other reasonable grounds. After allowing representations, it is open to an approved regulator to direct that an appointment be rescinded. Under subsection (7), the licensed provider or the aggrieved person may appeal to the sheriff within 3 months of the date of the direction.

Section 56 – Disqualification from position

Section 58 – Conditions for disqualification

125. **Section 56(1)** indicates that sections 57 and 58 should be read in conjunction with section 56. Section 58 lists conditions which may or will result in the disqualification of someone from the positions of Head of Legal Services, or Head of Practice, or from being a member of the Practice Committee, or from being a designated person (see section 59 for the definition of a designated person).
126. In all cases, disqualification depends on a decision by the approved regulator that the matter which gives rise to the disqualification makes the person unsuitable for the appointment. In other words, although specific grounds in any of the conditions in section 58 may be met, the disqualification is never automatic since the approved regulator must be also satisfied that the person is unsuitable for the position. Further,

before any disqualification occurs, the approved regulator must allow the licensed provider and the person to take such steps as are expedient or to make representations (section 57(3)).

127. **Section 56(2)** indicates that an approved regulator must disqualify a person from being Head of Practice or member of the Practice Committee if that person is insolvent and the approved regulator is satisfied that this makes that person unsuitable (the first condition in section 58(2)).
128. **Section 56(3)** indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services or Head of Practice or Practice Committee member if that person is subject to a bankruptcy restrictions order or undertaking under the Bankruptcy (Scotland) Act 1985 (or corresponding legislation) and the approved regulator is satisfied that this makes that person unsuitable (the second condition in section 58(3)). The approved regulator may disqualify someone from being a designated person on the same grounds.
129. **Section 56(4)** indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member if that person is subject to a disqualification order or undertaking under the Company Directors Disqualification Act 1986 (or corresponding legislation) or has been disqualified by a court from holding a position of business responsibility and the approved regulator is satisfied that this makes that person unsuitable (the third condition in section 58(4)).
130. **Section 56(5)** indicates that an approved regulator must disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member if that person has been convicted of an offence involving dishonesty or has been fined for an offence a sum equivalent to level 4 on the standard scale or more, or has been sentenced to imprisonment for a term of 12 months or more and the approved regulator is satisfied that this makes that person unsuitable (the fourth condition in section 58(5)). The approved regulator may disqualify someone from being a designated person on the same grounds.
131. **Section 56(6)** indicates that an approved regulator may disqualify a person from being appointed as (or acting as) Head of Legal Services, or Head of Practice, or Practice Committee member, or designated person if that person has failed to fulfil any of his or her duties as stated in this Part of the Act, or has caused (or substantially contributed to a breach) of the terms or conditions relating to the licensed provider's licence, and the approved regulator is satisfied that this makes that person unsuitable (the fifth condition in section 58(6)).

Section 57 – Effect of disqualification

132. Any disqualification under section 56 may be for an indefinite period or for a specified time period. In addition, designated persons may have a limit put on particular activities, or be prevented from carrying out certain activities without supervision. If someone is disqualified from a particular position in one licensed provider, that disqualification has the effect of disqualifying them from the same position in any other licensed provider, including a licensed provider which may operate under a different approved regulator.
133. Subsection (4) requires licensing rules to stipulate that a licensed provider's licence may be revoked or suspended if it wilfully disregards the disqualification of someone from the position of Head of Legal Services or Head of Practice, or from being a member of the Practice committee or from being a designated person.
134. Because of the potentially serious consequences of disqualification from a particular post, representations must be allowed before a disqualification occurs; there must be a procedure for review within the practice rules; and there is also a subsequent right of appeal to the sheriff.

Designated persons

Section 59 – Designated persons

Section 61 – Listing and information

135. **Section 59** defines what is meant by “designated person” and indicates who designates such a person. A designated person is a person (whether or not a legal professional, and whether or not paid) who carries out legal work in connection with the provision of legal services by a licensed provider. In order to be eligible to be a designated person the person must be an employee of the licensed provider (or work in it under another arrangement). The designation is made in writing by the Head of Legal Services or the Head of Practice (or Practice Committee).
136. The Head of Practice must keep a list of all such persons and provide a copy to the approved regulator if requested to do so, under section 61. The procedures for disqualification in sections 56 to 58 allow approved regulators to take action against persons who should not be involved in the provision of legal services.

Section 60 – Working context

137. **Section 60** makes the Head of Legal Services responsible for ensuring that designated persons carrying out legal work are adequately supervised in doing so, and ensures that only designated persons can carry out legal work within a licensed provider. It also provides that nothing in this Part of the Act affects the provisions in any other enactment as to who may (or may not) carry out any particular sort of legal work. See, for example, the restrictions in section 32 of the 1980 Act which make it an offence for unqualified persons to draw or prepare certain writs in relation to property, court action, and executries. Also, it does not affect rules of professional practice, conduct or discipline to which those in licensed providers might be subject.

Non-solicitor investors

Section 62 – Fitness for involvement

138. This section provides that an approved regulator must be satisfied that all non-solicitor investors are fit to have an interest in the licensed provider at the licensing and renewal stages. The approved regulator must monitor the fitness of all investors at other times. Fitness to be an investor is to be determined in all these cases, with reference to the factors set out in section 64.
139. The approved regulator’s licensing rules in relation to applications and renewals for, terms of, and revocation and suspension of, licences may relate to any non-solicitor investor (as well as to a licensed provider) and the rules must explain how a non-solicitor investor’s fitness for having an interest in a licensed provider is to be determined.
140. An entity must not be licensed (or a licensed provider must have its licence revoked or suspended) if the approved regulator determines that an investor is unfit to have an interest. This does not apply, however, where the licensed provider can demonstrate within a reasonable time appointed by the approved regulator, that the investor no longer has a relevant interest in the entity. There is provision for an alleged unfit investor to make representations or take other steps before the approved regulator makes its final determination and also for an appeal to the sheriff.

Section 63 – Exemption from fitness test

141. **Section 63** provides that an approved regulator is not required to satisfy itself as to the fitness of an investor where that investor is an “exemptible investor”. Investors are exemptible if they have less than a 10% stake in the ownership or control of a licensed provider. Licensing rules must explain the circumstances in which the

approved regulator will apply an exemption and its reasons for so doing. The licensing rules must also explain any threshold for exemption that the approved regulator will apply which is lower than 10%.

Section 64 – Factors as to fitness

142. Section 64 provides examples of relevant factors when determining a non-solicitor investor's fitness, such as financial position and business record, and family business and other associations. Subsection (3) sets out in what circumstances a non-solicitor investor is presumed to be unfit. These conditions are similar to those found in the first, second, third and fourth conditions in section 58(2) to (5) in relation to disqualification from positions within a licensed provider. It also sets out that if the non-solicitor investor is a body, the approved regulator should consider the fitness of that body and of those having ownership, control, or any material interest in it and its affairs. It means that the fitness for involvement test cannot be avoided by investors within a company.

Section 65 – Ban for improper behaviour

143. This section requires the approved regulator to disqualify a non-solicitor investor from acting in that capacity should he or she contravene section 66(1) or (2) of the Act. It sets out that such disqualification can be permanent, or for a fixed period and that it extends to every licensed provider, not just those regulated by the same approved regulator. The approved regulator must allow the investor in question to make representations to it and there is provision for a disqualified person to appeal to the sheriff. An approved regulator must make provision in practice rules in relation to the procedure for disqualification and for review of a disqualification

Section 66 – Behaving properly

144. Subsection (1) forbids a non-solicitor investor from acting in a way which is incompatible with the regulatory objectives and the professional principles in the Act, the licensed provider's duties in relation to these objectives and principles, the regulatory scheme, the terms and conditions of the licence, and its other duties under Part 2 of the Act and under any other legislation.
145. Subsection (2) provides that a non-solicitor investor in a licensed provider must not interfere improperly in the provision of legal or other professional services by the licensed provider. Moreover he or she must not seek to exert undue influence over, or solicit unlawful or unethical conduct by, or otherwise behave improperly in relation to any designated or other person within the licensed provider.

Section 67 – More about investors

146. Section 67 introduces schedule 8 which contains more provision about non-solicitor investors. Subsection (2) gives the Scottish Ministers power to make further provision by regulations in relation to interests in licensed providers and to make licensing rules in relation to persons with such interests.
147. Subsection (3) gives the Scottish Ministers further regulation making powers, with the agreement of the Lord President, to amend the percentage threshold for exemption from the fitness for involvement test in section 63(4) and the notification requirements in paragraph 3(4) of schedule 8, and to amend a definition in subsection (6)
148. Subsection (4)(c) extends the Scottish Ministers' regulation making powers to consideration of what counts as an interest or stake in a licensed provider including further provision about family, business, and other associates and (4)(d) allows regulations to include further provision setting out, where a body holds an interest in a licensed provider, what interest in the body counts towards an interest held by it in the licensed provider and the extent to which that interest so counts.

149. Subsection (6) defines an “investor” and a “non-solicitor investor” in a licensed provider.

Discontinuance of services

Section 68 – Duty to warn

150. Section 68 requires that the licensed provider gives as much warning as possible to the approved regulator where it is in serious financial difficulty or in the case that it is likely to or intends to stop providing legal services (except in the cases of revocation or suspension, when the approved regulator would already be aware). The licensed provider must also take steps to prevent disruption to clients.

Section 69 – Inability to operate

151. This section covers certain situations (as described in subsection (1)) where the approved regulator must revoke a licensed provider’s licence, unless the approved regulator is satisfied that the conditions described in subsection (3) are met. These are situations where the licensed provider does not meet the eligibility criteria in sections 48 or 49, or the business is in the process of being wound up, or does not have someone who can be a Head of Legal Services or Head of Practice, or for some other reason a licensed provider stops providing legal services. In such circumstances, the licensed provider must notify its approved regulator without delay, and within 7 days.
152. Unless the situation is temporary and there are sufficient arrangements in place to safeguard the interests of clients, a licence will be revoked. In temporary situations, the approved regulator can allow the licensed provider to continue to operate or suspend its licence as it considers appropriate. The situation must be reviewed every 14 days (or more frequently) to ensure that a decision on whether or not to revoke the licensed provider’s licence is made promptly to minimise the period of uncertainty for the licensed provider’s clients.

Section 70 – Safeguarding clients

153. Section 70 makes provision to safeguard the interests of clients of a licensed provider which is ceasing, or has already ceased (see subsection (11)) to provide legal services. It sets out the requirements placed on the licensed provider in question, and allows the approved regulator to issue directions (subsection (3)) to it in order to protect the interests of clients. Such directions may concern making certain documents and information, or money held on behalf of clients or in trust, available. For example, where the licensed provider has ceased to exist, clients may find it difficult or time consuming to gain access to documents, information, or money, not least if the former point of contact is no longer available. The approved regulator’s ability to compel the licensed provider (or former licensed provider) to take such actions as it considers necessary could be used therefore to mitigate the impact on clients.
154. Subsection (6) allows recourse to the Court of Session should the licensed provider fail to comply with any directions given by the approved regulator. The Court may make various orders to preserve the clients’ positions, such as varying the approved regulator’s directions as it sees fit, or impose conditions, or freezing bank accounts. The Court, following consideration of the circumstances must be satisfied that the action is appropriate and must consider any relevant input from those with an interest in the situation before making an order (see subsection (7)).
155. Subsection (10) gives the Scottish Ministers a regulation making power to make further provision regarding the steps taken to safeguard the interests of clients in the circumstances described in subsection (1).

Section 71 – Distribution of client account

156. This section indicates that, should a licensed provider go into administration, or be wound up, or have a provisional liquidator, liquidator, receiver or judicial factor appointed, or should it pass a winding up order (unless it does so simply for the purposes of reconstruction or amalgamation with another licensed provider), any client's monies of the kind indicated in section 42 of the 1980 Act must be distributed in the way that section 42 of that Act requires. Section 42 deals with the distribution of sums in client bank account kept by a solicitor or an incorporated practice.

Professional practice etc.

Section 72 – Employing disqualified lawyer

157. **Section 72** applies to:
- a solicitor who has been struck off the roll or suspended from practice;
 - a European or foreign lawyer who has been suspended or whose registration has been withdrawn;
 - an individual practitioner (as defined in section 48(5)) who has been either struck off, or suspended or disqualified from practising; or
 - an incorporated practice whose certificate of recognition has been revoked.
158. The licensed provider, knowing that a person is so disqualified, must not employ or pay that person (subsection (2)), unless the approved regulator has given permission so to do (subsection (3)), which it may do for a specified period and with conditions attached (subsection (4)). Subsections (5) and (6) provide for appeals to the Court of Session in certain situations. Subsection (7) provides that if a licensed provider knowingly and deliberately employs a disqualified person, or wilfully contravenes any conditions, its licence may be revoked or suspended.

Section 73 – Concealing disqualification

159. **Section 73** applies to the same persons as in section 72. It provides that a person (or incorporated practice) who has been disqualified will be guilty of an offence if, while disqualified, that person seeks or accepts employment by a licensed provider without informing it of the disqualification. The offence may lead to summary conviction and a fine not exceeding level 5 on the standard scale.

Section 74 – Pretending to be licensed

160. **Section 74** provides that a person commits an offence if that person pretends to be a licensed provider, or takes or uses any name, title, addition or description falsely implying that the person is a licensed provider. The offence may lead to summary conviction and a fine not exceeding level 5 on the standard scale.

Section 75 – Professional privilege

161. Legal professional privilege protects the confidentiality of communications between a solicitor and the solicitor's client that were conducted for the purpose of receiving legal advice, both oral and in writing, and of documents that are created for the main purpose of gathering evidence for use in legal proceedings. This section ensures that the clients of licensed providers have essentially the same legal professional privilege as they would have had if they had instructed a traditional sole practitioner, a law firm, or an incorporated practice. A communication made to or by a licensed provider in its provision of legal services or by a designated person acting in connection with those services and at the direction or under the supervision of a solicitor is to be treated as if it were a communication made by a solicitor for the purposes of disclosure. This

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

reproduces the effect which exists under common law in relation to clients of solicitors and which exists in statute for incorporated practices and registered foreign lawyers in, respectively, sections 33A and 33B of the 1980 Act.