LEGAL SERVICES (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, this document is published to accompany the Legal Services (Scotland) Bill (introduced in the Scottish Parliament on 30 September 2009) as amended at Stage 2.

Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sideling in the right margin.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

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

SUMMARY OF BILL PROVISIONS

4. The principal effect of the Legal Services (Scotland) Bill (“the Bill”) is to liberalise the legal services market in Scotland by allowing solicitors who offer legal services to operate using certain business models which are currently prohibited. It will do this by making amendments to the Solicitors (Scotland) Act 1980 (“the 1980 Act”) to remove restrictions on solicitors entering into business relationships with non-solicitors, allowing investment by non-solicitors and external ownership (see sections 90 and 91), and by creating a regulatory framework in which the new types of business will operate (see Parts 1 and 2). It is enabling rather than prescriptive legislation, as the traditional business models will remain an option for those solicitors who choose to carry on practising within those structures.

5. The Bill will create a tiered regulatory framework in which the Scottish Government will be responsible for approving and licensing regulators (“approved regulators”), who in turn will regulate licensed legal services providers (“licensed providers”), as shown below:

- firstly, the Scottish Ministers will license and regulate approved regulators.
- secondly, the approved regulators will license and regulate licensed providers.
- thirdly, a licensed provider, as a regulated body, will have obligations to manage and oversee people in the entity – including lawyers, other professionals and non-professionals – in a way which is compatible with the regulatory regime imposed by the approved regulator.

6. The Bill also includes:

- regulatory objectives and professional principles which will apply to legal professionals, whether or not they choose to join licensed providers;
- measures to reflect changes in the governance of the Law Society of Scotland (“the Society’’);
- statutory codification of the framework for the regulation of the Faculty of Advocates (“the Faculty”);
- provisions enabling the Scottish Legal Aid Board (“the Board”) to monitor the availability and accessibility of legal services in Scotland, with assistance from approved regulators and others;
• a new regulatory complaint that will be dealt with by the Scottish Legal Complaints Commission (“SLCC”);
• provisions to allow others to apply for rights to obtain confirmation to the estates of deceased persons;
• a new scheme for the regulation of non-lawyer will writers; and
• provisions to allow lay representatives to make oral submissions in civil cases

OVERVIEW OF STRUCTURE OF BILL

7. This Bill has 102 sections and 9 schedules. Section 101 contains definitions used in the Bill and schedule 9 is an index of expressions used in the Bill. The Bill is structured into 5 Parts, and these Explanatory Notes are divided into 5 Parts reflecting that structure. A brief overview is set out below which is followed by a detailed description of the sections of the Bill in the commentary on the sections. Terms are defined when first used but not otherwise. An explanation to accompany each schedule is contained within the section that introduces the schedule.

8. Part 1 sets out the regulatory objectives and principles that will govern regulators, the professional principles that will be required of practitioners, and a definition of legal services.

9. Part 2 establishes the regulatory framework within which approved regulators and licensed providers will operate.
   • Chapter 1 sets out the requirements to be met by any organisation seeking to become an approved regulator, and the role of the Scottish Ministers in approving and authorising regulators and in overseeing the regulatory system thereafter.
   • Chapter 2 sets out the requirements and duties placed on licensed providers.
   • Chapter 3 contains further details of the regulatory framework, including the application of the regulatory objectives and professional principles to approved regulators, the role of the OFT, how complaints against licensed providers and approved regulators should operate, and various registers and lists which must be maintained.

10. Part 3 contains provisions relating to confirmation agents and non-lawyer will writers
   • Chapter 1 creates a new process by which bodies may apply to authorise professionals who are not solicitors to prepare documentation in relation to confirmation – part of the process of winding up the estate of a deceased person.
   • Chapter 2 creates a new process by which bodies may apply to authorise non-lawyer will writers, and amends the Solicitors (Scotland) Act 1980 to make it an offence for non-lawyers to provide will writing services for fee, gain or reward without such authorisation
11. Part 4 contains provisions affecting the regulation of individual legal professionals (as opposed to licensed providers) and modifying the duties of other public bodies.

- Chapter 1 imposes duties on the Society, the Faculty and others involved in the regulation of legal professionals with regard to the regulatory objectives in Part 1.
- Chapter 2 creates a statutory basis for the regulation of the Faculty.
- Chapter 3 makes various amendments to the 1980 Act. Amendments are also made to the Court of Session Act 1988 and the Sheriff Courts (Scotland) Act 1971 to allow rules of court to be made to permit lay representatives to make oral submissions to the Court.
- Chapter 4 creates new responsibilities for the Board and makes adjustments to the legislation governing the SLCC.

12. Part 5 contains general and ancillary provisions.

- Schedules 1 to 6 set out how various powers and sanctions open to the Scottish Ministers in respect of approved regulators should operate.
- Schedule 7 sets out the procedure for surrender of authorisation of an approved regulator.
- Schedule 8 makes provision in relation to investors in licensed providers.
- Schedule 9 contains an index of expressions used in the Bill.

COMMENTARY ON SECTIONS

PART 1 – THE REGULATORY OBJECTIVES ETC.

Section 1 – Regulatory objectives

Section 2 – Professional principles

13. Section 1 provides for the six regulatory objectives which the Scottish Ministers, approved regulators, approving bodies, and other regulators of legal services must comply with and promote in exercising their functions. Section 4 sets out the responsibilities of the Scottish Ministers in relation to the regulatory objectives. Section 62 does the same for approved regulators, section 75 for approving bodies for confirmation agents, section 81D for approving bodies of non-lawyer willwriters, and section 86 for other legal services regulators.

14. The regulatory objectives include promoting and maintaining adherence to the professional principles (set out in section 2). There are six such principles to which persons providing legal services should adhere. These principles do not differ substantially from the professional principles by which solicitors and other legal professionals act, and are intended to ensure that the current standard of quality in the delivery of legal services is safeguarded. Licensed providers would be expected to “act in the best interests of their clients” meaning that they should, for example, avoid conflicts of interest and safeguard a client’s money and property. Licensed providers would be expected to maintain good standards of work, meaning that they should act competently, communicate effectively, be diligent and show respect and courtesy. Under section 38 licensed providers must have regard to the regulatory objectives and adhere to
the professional principles. The Head of Legal Services is responsible for securing that adherence (section 39).

15. The regulatory objectives also include encouraging equal opportunities within the legal profession. While equal opportunities is a topic which is generally reserved to the UK Government (Section L2 of Part II of Schedule 5 to the Scotland Act 1998), there is a exception to this and that is the encouragement of equal opportunities, and in particular of the observance of the equal opportunity requirements. The Scottish Parliament may impose duties on the Scottish Government and Scottish public bodies to make arrangements to secure that their functions are carried out with due regard to the need to meet the equal opportunity requirements.

16. The Bill does not rank these objectives or the principles in order of importance, so there is no hierarchy within them. The Scottish Ministers, the approved regulators and the other legal service regulators (section 86(2)) will need to consider how they balance these competing objectives in any particular circumstances.

Section 3 – Legal services

17. This section defines legal services for the purposes of this Bill. The definition is broad, and includes services currently provided by people other than solicitors and advocates (for example, tax and planning specialists, and voluntary bodies providing advice on social welfare issues). However, the Bill does not seek to regulate all these various service providers. Apart from Part 3 (confirmation and will writing services), the Bill is restricted to legal services provided by businesses involving legal professionals (meaning solicitors, advocates, licensed conveyancers and executry practitioners, and those with rights to conduct litigation and/or rights of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (“the 1990 Act”)). In particular, a body can only be a licensed provider if a solicitor is involved (see section 36).

18. Subsection (2) sets out exclusions from the definition of legal services for the purposes of this Bill. Judges are excluded as are persons who exercise judicial functions. Arbitrators also fit within this exclusion as do chairs of tribunals.

Section 4 – Ministerial oversight

19. Section 4 provides that the Scottish Ministers, in relation to their functions under this Bill, must, as far as practicable, act in a way which is compatible with the regulatory objectives and which they consider most appropriate with a view to meeting those objectives. The phrase “so far as is practicable” is added because it is recognised that the duties are broad and compliance may not be able to be objectively measured. In particular, there may be tensions between objectives, and a reasonable balance will need to be struck between them.

20. The Scottish Ministers must also have regard to the principles of best regulatory practice under which (in particular) regulatory activities should be carried out effectively and in a way that is transparent, accountable, proportionate, consistent, and targeted. These are the “five
principles of good regulation” first laid out in a report by the UK Better Regulation Task Force in 2005\(^1\). These guidelines state that regulation should be:

- proportionate: regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised;
- accountable: regulators must be able to justify decisions, and be subject to public scrutiny;
- consistent: Government rules and standards must be joined-up and implemented fairly;
- transparent: regulators should be open, and keep regulations simple and user friendly; and
- targeted: regulators should be focused on the problem, and minimise side effects.

**Section 4A – Consultation by Minister**

21. Section 4A places a general requirement on the Scottish Ministers to consult in relation to the exercise of any of their functions under the Bill. Where they consider it appropriate to do so, Ministers are required to consult with such persons or bodies that appear to them to have a significant interest in the subject matter to which the exercise of the function relates. This general consultation requirement applies whether or not there is any other particular consultation requirement.

**PART 2 – REGULATION OF LICENSED LEGAL SERVICES**

**CHAPTER 1 – APPROVED REGULATORS**

*Approved regulators*

**Section 5 – Approved regulators**

22. This section sets out how a professional or other body can become an approved regulator. This is framed as a two-stage process – the first stage is to obtain approval and the second to obtain authorisation. Essentially this is by application to the Scottish Ministers and this section details what information an application must include. If an application for approval is granted, this means that the body can now call itself an approved regulator. It is only after successfully being granted an application for authorisation that the approved regulator can regulate its licensed providers.

23. Subsection (6) gives the Scottish Ministers a regulation making power to prescribe fees they can charge. This could allow a charge for each application or an annual regulatory charge or both.

**Section 6 – Approval of regulators**

24. Section 6 provides the criteria in relation to which the Scottish Ministers must be satisfied before approving an applicant as an approved regulator. These include, among others, that the

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applicant has the necessary expertise as regards the provision of legal services, a thorough knowledge and understanding of the regulatory objectives and professional principles and is adequately resourced. Scottish Ministers must also be satisfied that the applicant would always exercise its regulatory functions independently of any other person or interest and otherwise properly, that the applicant’s regulatory scheme is adequate (with reference to section 8) and that its internal governance arrangements (how it is structured and managed) are suitable (with reference to section 20). The Scottish Ministers must have the consent of the Lord President before approving a body.

25. The Scottish Ministers, with the consent of the Lord President, can approve a body as an approved regulator subject to conditions. Conditions may, for example, restrict an approving body to regulating a particular type of licensed provider, and can be imposed indefinitely or for a period of at least 3 years. Provision is made for the amendment, addition or deletion of approval conditions with the consent of the Lord President. Subsections (2A) refers to a provision that was not ultimately inserted at stage 2.

26. Scottish Ministers are required to consult the OFT and any other person or body that they consider appropriate before approving an applicant as an approved regulator.

27. Where the Scottish Ministers indicate that an application might not be approved, or if conditions are attached, the applicant can make representations within a 28-day period or take such other steps as it considers necessary (for example, by modifying its application or scheme).

28. The Scottish Ministers have the power to make regulations regarding the approval process, including the approval criteria. This power, which must relate to the applicants’ capability to act as approved regulators, can only be exercised after consultation with the Lord President.

Section 7 – Authorisation to act

29. Authorisation is the second stage of the process. Having been approved by the Scottish Ministers as an approved regulator, the body may not exercise any of its regulatory functions unless authorised so to do by the Scottish Ministers (subsection (1)). The section also makes provision in relation to the restrictions and conditions that may be placed on authorisation.

30. Subsection (2) provides that the Scottish Ministers can only give their authorisation if they are satisfied or continue to be satisfied as to the matters mentioned in section 6(1) and that it continues to meet any criteria provided for in regulations made under section 6(7)(b).

31. Authorisation may be with or without conditions, may be subject to a time limitation and may also be restricted to particular types of legal services or legal service provider. A restriction in relation to a particular type of legal services may be appropriate where an approved regulator has expertise in a specialised area. One example is a body which regulates accountants which might seek to regulate mixed practices of accountants and lawyers, but not other forms of multi-disciplinary practice.
32. The Scottish Ministers have the power to make regulations regarding the authorisation process. This power could be used to set out the process for authorisation in more detail, and to address any issues which arise with regard to the criteria used.

Section 7A – Request

33. This section allows requests for authorisation to be made at any reasonable time and to be withdrawn. It requires the Scottish Ministers to notify the applicant and to give reasons if they intend to withhold authorisation or impose conditions. If such notification is given, the applicant, or the approved regulator, may within 28 days make representations and take any other steps it considers expedient. There is a duty on the approved regulator or applicant to provide the Scottish Ministers with any information they reasonably require.

Regulatory schemes

Section 8 – Regulatory schemes

34. Section 8 sets out the approved regulator’s responsibility to create and implement a regulatory scheme for its licensed providers, and describes what must be included in the scheme. (This is regulation of licensed providers as entities – individuals within the entities who are regulated by professional bodies will continue to be so regulated by them. For example, solicitors will be regulated by the Society).

35. The Scottish Ministers have the power to specify by regulations additional matters which the regulatory schemes must cover. This power could be used to address unforeseen issues with the regulatory schemes which may arise once the system is in operation.

36. The scheme should relate to the provision of legal services, as defined in section 3, however, the Scottish Ministers have the power to make regulations which authorise regulatory schemes to deal with other services in addition to legal services (subsection (5)).

37. Subsection (2) requires the scheme to include details about two sets of rules – the licensing rules (that is, rules relating to the application process and the issuing or renewal of licences – see sections 10 to 12) and the practice rules (governing how licensed providers operate – see sections 14 to 19).

38. Subsection (4) allows the approved regulator to amend fully or in part its regulatory scheme but any material change requires prior approval of the Scottish Ministers, who must have the consent of the Lord President and consult any other person or body they consider appropriate. If prior approval is not given, the changes are invalid.

Section 9 – Reconciling different rules

39. Section 9 provides that the approved regulator’s regulatory scheme must include appropriate provision which prevents or resolves regulatory conflicts, as well as avoids unnecessary duplication of regulatory rules. Regulatory conflict is conflict between the regulatory scheme and any professional or regulatory rules of any other body which regulates the provision of legal or other services. For example, conflict between a regulatory scheme and the Society’s rules or professional regulatory code of an accountant.
40. The Bill does not prescribe that one set of rules would automatically “trump” another in the event of any conflict. It will be for approved regulators to identify and address any potential conflicts, and for the Scottish Ministers to consider whether this has been done adequately in assessing any application for approval or authorisation under sections 6 and 7. However, it will be possible for the Scottish Ministers with the consent of the Lord President to make regulations about regulatory conflict under subsection (3).

**Licensing rules**

**Section 10 – Licensing rules: general**

**Section 11 – Initial considerations**

41. Sections 10 and 11 give details about what the licensing rules, that are to be contained in an approved regulator's regulatory scheme, cover. Licensing rules cover areas such as the procedure and requirements involved in making an application to become a licensed provider (including fees payable to the approved regulator).

42. The general approach of the Bill is to set out a broad framework and allow approved regulators the flexibility to devise an appropriate set of rules as best fits the services being regulated and which follows best regulatory practice. However, in some instances the Bill requires certain mandatory provisions to be contained in the licensing rules. The rules must include provision for consultation with the OFT (see section 11(2)) where there may be an effect of preventing or restricting or distorting competition within the legal services market, and must set out how the regulator would deal with an application where it believes there would be a material and adverse effect on the provision of legal services (section 11(1)(b)).

**Section 12 – Other licensing rules**

43. This section provides for the possibility of provisional licences to allow a licensed provider to operate in anticipation of the full licence application being granted. This may be used, for example, in a situation where a licensed provider is transferring from one approved regulator to another. This section also requires licensing rules to make provision in relation to non-compliance with, or breaches of, the regulatory scheme.

**Section 13 – Licensing appeals**

44. This section provides for an appeal by a licensed provider (or an applicant to be a licensed provider) to the sheriff against a refusal of its application for a licence or to renew its licence, attach conditions or restrictions to its licence, or to suspend or revoke its licence.
Practice rules

Section 14 – Practice rules: general

Section 15 – Financial sanctions

Section 16 – Enforcement of duties

45. Section 14 gives details about what the practice rules, that are to be contained in the approved regulator’s regulatory scheme, cover. Section 15 allows practice rules to make specific provision for the financial penalties which may be imposed on licensed providers by approved regulators in relation to a breach of the regulatory scheme by, or a complaint about, a licensed provider and for appeals against their imposition. Section 16 states that practice rules must specify that failure to comply with section 38 (setting out the key duties of licensed providers), any other duties under this Part, or duties under any other enactment, all constitute a breach of the regulatory scheme. Section 16 also sets out requirements for licensed providers to report on and review their performance, and to have their performance and the report assessed by the approved regulator.

Section 17 – Performance report

46. This section provides that the practice rules on reviewing and reporting on the performance of licensed providers must require the Head of Practice (or Practice Committee) of a licensed provider carry out an annual review and send a report to its approved regulator. The section also sets out certain matters that must be examined in the revie.

Section 18 – Accounting and auditing

47. This section provides that practice rules must require licensed providers to have proper accounting and auditing procedures in place, and include equivalent provisions to the accounts rules in sections 35 to 37 of the 1980 Act for solicitors operating in an incorporated practice. Sections 35 to 37 require the Society to make rules regarding the separate holding of clients’ funds, and the provision of an accountant’s certificate to demonstrate compliance with those rules.

Section 19 – Professional indemnity

48. Under this section, practice rules must require licensed providers to have certain professional indemnity arrangements and must include equivalent provision to that on professional indemnity in section 44 of the 1980 Act in relation to an incorporated practice.

49. Section 44 provides for the Council of the Society (“the Council”) to make rules concerning indemnity for solicitors and incorporated practices against any class of professional liability (for example, for negligence in the delivery of a legal service). The rules may provide for a fund held by the Society, or for insurance with an authorised insurer held by the Society, or require solicitors to take out insurance. Currently, the Society’s rules provide that all solicitors acting as principals in private practice must be insured under a single “master policy” held by the Society (Solicitors (Scotland) Professional Indemnity Insurance Rules 2005).
Internal governance

Section 20 – Internal governance arrangements

50. The section requires the internal governance arrangements of an approved regulator to make provision to ensure that it acts properly and with independence, that it provides sufficient resources for its regulatory functions in relation to licensed providers and that it reviews regularly how effectively it is exercising its regulatory functions. The section sets out relevant factors (in subsection (2)) which approved regulators must have regard to in connection with the independent exercise of their regulatory functions. One of these is the need to avoid conflicts of interest where possible. In order to mitigate conflicts, there is a need for a clear demarcation of regulatory functions from any representative functions the approved regulator may have (for example, as a professional body). In relation to the Society, section 93 of the Bill provides that the Society must set up a regulatory committee.

51. Internal governance arrangements are defined for the purposes of Part 2 of the Bill in section 22(4), and the distinction between regulatory and representative functions is defined in section 23.

Section 21 – Communicating outside

52. Section 21 provides that internal governance arrangements cannot prevent consultation and communications with persons or bodies outside the approved regulator. This section makes it clear that individuals exercising regulatory functions within an approved regulator can communicate with others involved in the regulation of legal services, and that they can notify the Scottish Ministers of any adverse impact on regulatory independence arising from the representative role of the regulator.

Section 22 – More about governance

53. Section 22 provides that the Scottish Ministers with the consent of the Lord President may make regulations including further provision about the internal governance arrangements of approved regulators, but only in relation to their regulatory functions. Before so doing they must consult any approved regulators that would be affected.

Regulatory functions etc.

Section 23 – Regulatory and representative functions

54. Section 23 defines the regulatory and representative functions of an approved regulator under the Bill.

55. Subsection (3) makes clear that the Scottish Ministers are not authorised to exercise any of their functions under the Bill in relation to an approved regulator’s representative functions.

Section 24 – Assessment of licensed providers

56. Section 24 provides that approved regulators (or person who or body that has been delegated this function) are required to carry out reviews of the performance of licensed providers at least once in every 3-year period. The 3-year period starts with the date that the
particular licensed provider was issued the licence (subsection (1)). This is an external assessment which complements the annual self-assessment carried out under section 17. The assessment must consider how well the licensed provider has had regard to the regulatory objectives, adhered to the professional principles, complied with the approved regulator’s regulatory scheme and the licence conditions, and any such matters as the approved regulator considers appropriate (subsection (3)).

57. Subsection (2) provides that the Scottish Ministers may require an approved regulator to assess a licensed provider at other times if requested to do so by the SLCC. The SLCC may only make the request if it has significant concerns over the handling of a complaint by a licensed provider.

58. The approved regulator is required to inform the relevant professional association if the assessment of the licensed provider in question reveals professional misconduct (or potential professional misconduct) by any of its members (subsection (7)). For example, if there were indications of misconduct by a solicitor or a chartered accountant employed by the licensed provider, the approved regulator would have to notify the Society or the Institute of Chartered Accountants of Scotland respectively. This could happen whether or not the person in question is involved in the provision of legal services within the licensed provider.

59. Under subsection (9), the Scottish Ministers can make further provisions about the assessment of licensed providers by regulations. This could be used to deal with any unforeseen circumstances, or to elaborate on the assessment procedure and requirements should this be necessary.

Section 25 – Giving information to SLAB

60. The Board has been given the additional duty of monitoring the availability and accessibility of legal services in Scotland, as inserted into the Legal Aid (Scotland) Act 1986 (“the 1986 Act”) as section 1(2A) by section 96 of the Bill. This section provides that an approved regulator must provide the Board with information in relation to this function.

Section 26 – Additional powers and duties

61. This section gives a power to the Scottish Ministers to make regulations conferring additional functions on approved regulators. Before making such regulations, the Scottish Ministers must have the consent of the Lord President and must consult with certain persons.

Section 27 – Guidance on functions

62. The Scottish Ministers are given a power to issue guidance to approved regulators, and all regulators must have regard to this guidance. Where the Scottish Ministers issue guidance, this section also provides that they are required to publish it.
Performance

Section 27 – Review of own performance

63. Section 27A requires an approved regulator to review its own performance annually and provides for the matters to be covered by the review. A report on the review must be submitted to the Scottish Ministers, who must lay a copy before the Scottish Parliament. It also allows the Scottish Ministers to make further provision by regulations relating to both the review and the report.

Section 28 – Monitoring performance

64. This section gives the Scottish Ministers a power to monitor performance of approved regulators. It sets out matters which may be included in the monitoring (section 28(2) and requires an approved regulator to provide information in relation to its regulatory scheme to the Scottish Ministers (section 28(3)).

Section 29 – Measures open to Ministers

65. Section 29 describes the options open to the Scottish Ministers should they feel that an approved regulator is not performing its functions adequately. Subsection (4) sets out the measures which can be taken, which include the rescission of a regulator’s authorisation to regulate. The measures in (4)(a), (b), (c), (e) and (f) can only be applied by the Scottish Ministers if they have the consent of the Lord President.

66. More detail as to when these measures will apply and on the procedures relating to these measures can be found in schedules 1 to 6 to this Bill.

67. The Scottish Ministers, with the consent of the Lord President, have the power under subsection (6) to make further provisions by regulations regarding the measures that may be taken in relation to approved regulators. This could be used to give further detail around the specifics of the measures, and the procedure involved. This subsection also gives the Scottish Ministers the power to specify, by regulations, additional measures which can be taken should this be considered necessary.

Schedule 1 – Performance targets

68. This schedule gives details and the procedures to be followed when the Scottish Ministers set performance targets for an approved regulator and also provides a procedure for representations to the Scottish Ministers by the approved regulator.

Schedule 2 – Directions

69. This schedule gives details about the procedures to be followed (including consultation and representations) when the Scottish Ministers exercise their power to give directions to an approved regulator.
Schedule 3 – Censure
70. This schedule gives further details about the procedures to be followed when the Scottish Ministers, with the consent of the Lord President, use their power to censure an approved regulator for any act or omission (including the procedures for representations).

Schedule 4 – Financial penalties
71. This schedule gives further details about the procedures to be followed when the Scottish Ministers use their power to impose a financial penalty on an approved regulator (including the procedures for representations, amounts of financial penalties, appeals, and interest).

Schedule 5 – Amendment of authorisation
72. This schedule gives further details about the procedures to be followed when the Scottish Ministers amend the authorisation of an approved regulator (including the procedures for representations).

Schedule 6 – Rescission of authorisation
73. This schedule gives further details about the procedures to be followed when the Scottish Ministers use their power to rescind an approved regulator’s authorisation (including the procedures for representations).

Ceasing to regulate
Section 30 – Surrender of authorisation
74. Section 30 deals with the situation where an approved regulator ceases to regulate. It allows an approved regulator to surrender its authorisation, with the prior agreement of the Scottish Ministers, under the procedure in schedule 7. Subsection (3) provides that an approved regulator must take all reasonable steps to ensure that the effective regulation of its licensed providers is not interrupted by the surrender of its authorisation. For example, this may involve ensuring that the licensed providers have sufficient time to find and transfer to an alternative approved regulator before authorisation is surrendered.

75. Subsection (4) states that if an approved regulator surrenders its authorisation to regulate, it also loses its status as an approved regulator. This reflects the two-stage process involved in a body becoming a functioning approved regulator – it must first be approved (section 6), and then given authorisation to regulate by the Scottish Ministers (section 7). In giving up authorisation, both authorisation and approval are removed.

Section 31 – Cessation directions
76. Section 31 applies where an approved regulator’s regulatory scheme is amended so as to exclude its regulation of certain categories of licensed provider or legal services, or its authorisation is (or is to be) amended under section 29(4)(e), rescinded under section 29(4)(f), or surrendered under section 30(1).
Section 31(2) gives the Scottish Ministers a wide power to direct an approved regulator to take such action as they consider necessary or expedient for the purpose of providing continued effective regulation of affected licensed providers. This might include, for example, requiring an approved regulator to alter the timing of its surrender of authorisation to ensure that another approved regulator was in a position to accept its former licensed providers.

Section 32 – Transfer arrangements

Section 33 – Extra arrangements

These sections cover the situation whereby licensed providers may be forced to transfer from one approved regulator to another approved regulator. For example, this would occur if an approved regulator surrendered its authorisation or had its authorisation rescinded, or amended an authorisation so it was no longer regulating particular categories of licensed provider or legal services. In such circumstances, the approved regulator must inform its licensed providers of the situation, and notify those which will have to transfer to another approved regulator (section 32(2) and (3)).

Subsections (4) and (5) of section 32 set out the process and timescales involved in moving from one approved regulator to another. The changeover period refers to the period of time during which a licensed provider which has been forced to transfer may continue to operate according to the regulatory scheme of its previous regulator, whilst being regulated by the new regulator. There is a requirement on the licensed provider to comply with the new regulator’s rules within the 6-month changeover period.

For example, suppose an approved regulator “X” notifies a licensed provider that it is ceasing to exist as an approved regulator, and that a transfer is therefore necessary. The licensed provider would identify a new approved regulator “Y”, and arrange to transfer to it within 28 days (or as soon as was practicable). Starting from the date on which Y took over responsibility for regulating the licensed provider in question, it would have 6 months in which to adopt Y’s regulatory scheme. During the 6-month “changeover” period, the licensed provider is free to continue to comply with only X’s regulatory scheme, but on the day that the changeover period is completed, it must comply fully with Y’s scheme.

This process requires the new approved regulator to regulate the licensed provider using the previous approved regulator’s regulatory scheme for the duration of the changeover period.

Section 33 gives the Scottish Ministers the power to make regulations relating to transfer arrangements.

This power can be used to address any unforeseen circumstances which might occur in the transfer process described in section 32. However, regulations may be used in two particular cases, described in subsection (2).

The first of these (subsection (2)(a)) is where a licensed provider has not transferred to a new approved regulator despite being required so to do. In this case, the Scottish Ministers can arrange for the licensed provider in question to be regulated by an approved regulator of their choice (subject to that approved regulator’s consent). This may be necessary to ensure
continuity of regulation where a licensed provider has failed, for whatever reason, to identify a new regulator within a reasonable time.

85. The second case (subsection (2)(b)) is where there is a need to recover fees paid to the former approved regulator, in relation to the current licence of the licensed provider. This may be necessary where, for example, a licensed provider is forced to move to a new regulator whilst having paid an annual fee to its former regulator less than 12 months previously and is unable to recover the outstanding portion of the fee.

Miscellaneous

Section 34 – Change of approved regulator

86. Section 34 provides for a voluntary transfer by a licensed provider to a new regulator, and sets out the timescale and requirements involved.

87. The new approved regulator must consent for the transfer to take effect. The licensed provider must give notice to the former approved regulator and to the Scottish Ministers. The licensed provider must explain why it is transferring and specify the new regulator. It must also specify the date on which the transfer will occur (which must be within 28 days of the notice) and provide a copy of the new approved regulator’s consent to the transfer.

88. The Scottish Ministers have the power (under subsection (6)) to make, by regulations, further provisions relating to such transfers.

Section 35 – Step-in by Ministers

89. Section 35 makes provision to allow the Scottish Ministers to ensure that licensed providers are regulated in the absence of a suitable approved regulator. The Scottish Ministers may by regulations either establish a new regulator (subsection (1)) or set themselves up as an approved regulator (subsection (2)) where necessary or expedient in order to ensure that there is effective regulation of the provision of legal services by licensed providers. No regulations may be made unless the Scottish Ministers believe that their intervention under this section is necessary as a last resort.

CHAPTER 2 – LICENSED LEGAL SERVICES PROVIDERS

Licensed providers

Section 36 – Licensed providers

90. Section 36 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)

91. Subsection (3) states that a licensed provider may not be regulated by more than one approved regulator at the same time.
Section 37 – Eligibility criteria

92. This section describes some possible models of licensed provider and gives details of what criteria make and do not make an entity eligible to be a licensed provider.

93. 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.

94. The definition of licensed provider excludes existing forms of legal business structure. These will continue to be regulated as now (primarily by the Society and Faculty). The existing “traditional” forms of business structure for solicitors are set out in section 37(4).

95. The first is a solicitor operating as, in effect, a sole trader.

96. The second, the traditional practice, means either a partnership made up only 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.

97. 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

98. 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 36(2) (licensed providers) 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.
Section 37A – Majority ownership

99. Section 37A 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. 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.

Section 38 – Key duties

100. Section 38 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.

101. Because a licensed provider is an intangible entity, the Bill provides that all such providers must have identifiable individuals responsible for securing compliance with the key duties, namely a Head of Legal Services and either a Head of Practice (see section 40) or Practice Committee (see section 41). 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.

Operational positions

Section 39 – Head of Legal Services

102. Section 39 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 54). 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)).

103. 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)).

104. 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.

105. 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 Bill gives a “whistle blowing duty” to both the Head of Legal Services (section 39(7)) and Head of Practice (section 40(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 39(5)(b) and 40(4)(b)). Other joint functions may be provided for at a later date through the regulation-making power in sections 39(9) and 40(7).

Section 40 – Head of Practice

106. Section 40 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 54).

107. 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

108. 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 47), the Head of Practice has oversight of everyone in a licensed provider.

109. 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 41 – Practice Committee

110. Section 41 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 Bill. 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 42 – Notice of appointment

111. 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 43 – Challenge to appointment

112. Section 43 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 (6A), the licensed provider or the aggrieved person may appeal to the sheriff within 3 months of the date of the direction.

Section 44 – Disqualification from position

Section 45 – Effect of disqualification

113. Disqualification may be limited in terms of the time period (for all disqualified persons) or the activities which may not be carried out, or carried out without supervision (in the case of designated persons). However, a disqualification does not only apply to the particular position – it applies to the same position in every licensed provider, including licensed providers who may operate under a different approved regulator.

114. Subsection (3A) 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.

115. 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.

Section 46 – Conditions for disqualification

116. Section 44(1) indicates that sections 45 and 46 should be read in conjunction with section 44. Section 46 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 47 for the definition of a designated person).
117. 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 46 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 45(3)).

118. Section 44(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 46(2)).

119. Section 44(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 46(3)). The approved regulator may disqualify someone from being a designated person on the same grounds.

120. Section 44(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 46(4)).

121. Section 44(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 the maximum of level 3 on the standard scale or has been sentenced to imprisonment for a term of two years or more and the approved regulator is satisfied that this makes that person unsuitable (the fourth condition in section 46(5)). The approved regulator may disqualify someone from being a designated person on the same grounds.

122. Section 44(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 Bill, 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 46(6)).
Designated persons

Section 47 – Designated persons

Section 47A – Workingcontext

123. Section 47A 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 Bill 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.

Section 48 – Listing and information

124. Section 47 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) or an investor in it. The designation is made in writing by the Head of Legal Services or the Head of Practice (or Practice Committee).

125. 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. The procedures for disqualification in sections 44 to 46 allow approved regulators to take action against persons who should not be involved in the provision of legal services.

Outside investors

Section 49 – Fitness for involvement

126. 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 50.

127. 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.

128. 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 49A – Exemption from the fitness test

129. Section 49A 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 50 – Factors as to fitness

130. Section 50 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 46(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 substantial influence in or controlling its affairs. It means that the fitness for involvement test cannot be avoided by investors within a company.

Section 50A – Ban for improper behaviour

131. This section requires the approved regulator to disqualify a non-solicitor investor from acting in that capacity should he or she contravene section 51(1) or (2) of the Bill. 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 51 – Behaving properly

132. 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 Bill, 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 Bill and under any other legislation.

133. 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 52 – More about investors

134. Section 52 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. Subsection (2B) gives further detail about the provision that may be made in these regulations, including provision about the requirements to which a licensed provider or an investor in it is subject, provision specifying when an investor it presumed to be fit, and provision about what counts as an interest or stake in a licensed provider including further provision about family, business, and other associations.

135. Subsection (2A) gives the Scottish Ministers further regulation making powers, with the consent of the Lord President, to amend the percentage threshold for exemption from the fitness for involvement test in section 49A(4) and the notification requirements in paragraph 3A(3) of schedule 8, and to amend a definition in subsection (4).

136. Subsection (4) defines an “investor” and a “non-solicitor investor” in a licensed provider.

Discontinuance of services

Section 53 – Duty to warn

137. Section 53 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 54 – Ceasing to operate

138. 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 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.

139. Unless the situation is temporary and there are sufficient arrangements in place to safeguard the interests of clients, a licence will be revoked. The situation will 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. In connection with a revocation, the licensed provider must notify without delay its approved regulator and provide information that the regulator requires.

Section 55 – Safeguarding clients

140. Section 55 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.

141. 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)).

142. Subsection (10) gives the Scottish Ministers a regulation making power to make further provision regarding the steps to be taken to safeguard the interests of clients in the circumstances described in subsection (1).

**Section 56 – Distribution of client account**

143. 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 57 – Employing disqualified lawyer**

144. Section 57 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 37(5)) who has been either struck off, or suspended or disqualified from practising; or
- an incorporated practice whose certificate of recognition has been revoked.

145. 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 58 – Concealing disqualification

146. Section 58 applies to the same persons as in section 57. 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 59 – Pretending to be licensed

147. Section 59 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 60 – Professional privilege

148. 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, or law firm or incorporated practice. Such a communication is to be treated as if it were a communication made by a solicitor for the purposes of disclosure. This 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.

CHAPTER 3 – FURTHER PROVISION

Achieving regulatory aims

Section 61 – Input by the OFT

149. Section 61 concerns the occasions when the Scottish Ministers and approved regulators consult with the OFT and sets out what they must do. Such consultation should be in relation to competition issues. The Scottish Ministers and approved regulators must take into consideration any advice given by the OFT.

Section 62 – Role of approved regulators

Section 63 – Policy statement

150. Section 62 sets out the responsibilities of approved regulators with regard to the regulatory objectives and the adoption of best regulatory practice. Section 63 provides that an approved regulator must prepare and issue (and may revise and re-issue) a policy statement detailing how it will meet these responsibilities. It must obtain the approval of the Scottish Ministers for any version and also must publish it.
Complaints

Section 64 – Complaints about regulators

151. Section 64 requires that complaints against approved regulators must be made to the Scottish Legal Complaints Commission (“the SLCC”). The SLCC is responsible for determining the nature of the complaint and whether it is “frivolous, vexatious or totally without merit”. If the Commission determines that a complaint is frivolous, vexatious or totally without merit it is not required to take further action and must notify the complainer and the approved regulator. Complaints about how an approved regulator has dealt with a regulatory complaint are to be investigated by the Commission by virtue of section 57D(1) of the Legal Profession and Legal Aid (Scotland) Act 2007 (as inserted by section 65 of the Bill). All other categories of complaint must be referred by the Commission to the Scottish Ministers and the Scottish Ministers must investigate any complaint that is referred to them.

152. Subsection (3) requires the Scottish Ministers to notify the complainers and the approved regulator if the complaint is not upheld and give reasons for their decision. Subsection (5) requires the Scottish Ministers to notify both parties concerned if the complaint is upheld and give reasons for their decision. They may decide to take any of the measures or sanctions open to them (see section 29), including direction, censure or ultimately rescinding authorisation. Subsection (6) allows the Scottish Ministers to delegate the function of investigating a complaint to the SLCC. Subsection (7) allows the Scottish Ministers to make further provision about complaints by regulations.

Section 64A – Levy payable by regulators

153. Section 64A provides that approved regulators must pay an annual levy to the SLCC. A complaints levy must also be paid in the event that the SLCC investigates a complaint against an approved regulator (having had this function delegated to it under subsection (6) of section 64) and that complaint is upheld. The amount of the annual and complaints levy is set by the SLCC, following consultation with every approved regulator and the Scottish Ministers.

Section 65 – Complaints about providers

154. Section 65 amends the Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”) by inserting a new Part 2A making special provision for licensed providers in respect of complaints.

155. The basic approach of the 2007 Act, which the Bill retains, is that all complaints about legal professionals or law firms are initially considered by the SLCC, but the only complaints which are investigated by the SLCC are those found to be about inadequate professional services (“services complaints”) or about how other complaints have been handled (“handling complaints”). Complaints which are found to be about the professional conduct of a legal professional (“conduct complaints”) are referred to the relevant professional organisation (e.g. the Society or Faculty) for investigation and possible disciplinary action.

156. New section 57A of the 2007 Act provides that conduct complaints may not be made about licensed providers, although they can be made about legal professionals working in the
licensed provider. Services complaints may be made about either the licensed provider or individual practitioners within the provider.

157. Various duties apply to the relevant professional organisation in the 2007 Act, for example, to liaise with the SLCC if a complaint being dealt with as a conduct complaint appears on investigation to be a services complaint (section 15 of the 2007 Act), and to provide the SLCC with information (section 37 of the 2007 Act). These duties are also imposed on approved regulators by sections 57A and 57B of the 2007 Act in relation to services complaints against licensed providers and the new regulatory complaints.

158. New section 57B of the 2007 Act introduces a new type of complaint – a “regulatory complaint” which can be made about a licensed provider alleging that it has not acted in accordance with the regulatory objectives, the professional principles, the approved regulator’s regulatory scheme, or the conditions of its licence. These complaints will be referred by the SLCC to the approved regulator to deal with, in accordance with the regulatory scheme. The procedures and functions of the SLCC are essentially the same as in respect of a conduct complaint.

159. New section 57C(1) and (2) of the 2007 Act deal with the levy to be paid by a licensed provider to the SLCC. In addition to any levy paid by individual practitioners in the entity, the licensed provider must itself pay an annual general levy, which might be a different amount from that paid by individual practitioners and might differ depending on the type of licensed provider. This gives the SLCC the discretion to impose an additional levy on licensed providers if the cost of regulating complaints against such providers is disproportionately high. However, it is possible for this annual levy to be set at nil – meaning only the legal professionals in the licensed provider would pay the normal general levy. It would also be possible for the SLCC to reduce the levy in respect of professionals in a licensed provider under the provisions of section 29(2) of the 2007 Act. The SLCC is required to consult with approved regulators and licensed providers each year in relation to its budget for the next financial year. Approved regulators are required to provide the SLCC with an estimate of the number of licensed providers it regulates and which should be liable to pay the levy in the relevant financial year.

160. New section 57C(3) of the 2007 Act requires the SLCC to provide advice about making a regulatory complaint if requested and gives the SLCC power to issue guidance to approved regulators and licensed providers about how the latter should deal with regulatory complaints.

161. New section 57CA of the 2007 Act requires approved regulators to collect the annual general levy due to the SLCC from its licensed providers (under new section 57C of the 2007 Act, inserted by section 65 of the Bill), and to pay the total amount of the levies collected to the SLCC. This requirement is equivalent to that placed on professional organisations (i.e. the Law Society of Scotland, the Faculty of Advocates, and the Association of Commercial Attorneys) under section 27 of the 2007 Act.

162. The provisions of the 2007 Act in relation to the failure to pay and late payments of levies are applied to the levies payable by licensed providers (section 57CA(2) to (5)).
163. New section 57D of the 2007 Act indicates that a handling complaint about a regulatory complaint is dealt with in the same way as a handling complaint about a conduct complaint (see sections 23 to 25 of the 2007 Act).

164. New section 57E of the 2007 Act ensures that certain terms used in the new Part 2A of the 2007 Act have the same meanings as in the Bill.

 Registers and lists

Section 66 – Register of approved regulators

Section 67 – Registers of licensed providers

165. Section 66 provides that the Scottish Ministers must keep and publish a register of approved regulators and that it should include information such as contact details, the date on which the regulator was given approval under section 6, the date on which it was given the relevant authorisation (see section 7), the categories of legal services covered by each authorisation, and details of any measures or sanctions taken by the Scottish Ministers (section 29).

166. Similarly, section 67 provides that approved regulators must keep and publish a register of their licensed providers, and lists the information which is to be included. In section 67(5) the Scottish Ministers have the power by regulations to make further provision about the information which must be held in the registers of licensed providers and set out how these registers are to be kept and published.

Section 68 – Lists of disqualified persons

167. Section 68 provides that an approved regulator must keep and publish lists of the persons it has disqualified from holding a position in a licensed provider (see section 44) and of those it has determined to be unfit to be an investor in a licensed provider (see section 49) or disqualified from being an investor (see section 50A). These provisions may, for example, assist in ensuring that disqualified persons do not seek similar positions in businesses regulated by another approved regulator. Subsections (2) and (4) list the information to be recorded in those lists. Subsection 4A provides that the lists must not contain information relating to persons who have had their determination or disqualification reversed on appeal or in respect of whom the determination or disqualification no longer applies. The Scottish Ministers must be notified of any alterations made to either list (subsection (5)).

168. Subsection (6) gives the Scottish Ministers a regulation-making power to make further provision regarding the information to be contained in the lists and to prescribe how these are kept and published.

Miscellaneous

Section 69 – Privileged material

169. Section 69 provides that any publication of any advice, report, or notice or of other material under Part 2 of this Bill is privileged in relation to the law on defamation unless there was malicious intent in publishing the material.
Section 70 – Immunity from damages

170. Section 70 provides that an approved regulator is (and those who work in it are) not liable for any damages for any act or omission in the exercise of their functions, provided the act or omission was not in bad faith.

Section 70A – Appeal procedure

171. This section deals with appeals to the sheriff under Part 2 of the Bill (regulation of licensed legal services). It provides that an appeal to the sheriff is to be by summary application, details what the sheriff may do with regard to an appeal and provides that the sheriff’s determination is final.

Section 71 – Effect of professional or other rules

172. This section makes it clear that the Bill does not affect any professional rules which regulate professional practice, conduct or discipline of persons (other than solicitors and advocates) who provide professional services. In other words, if the rules of any other profession contain provisions which would forbid or restrict their operating in a business alongside legal professionals, they would not be able to participate in licensed providers unless and until those rules were changed. Sections 88(5) and 91(3) of the Bill deal with the effect of professional rules of solicitors and advocates.

PART 3 – CONFIRMATION AND WILL WRITING SERVICES

CHAPTER 1 – CONFIRMATION SERVICES

173. Currently, the power to prepare papers on which to found or oppose an application for grant of confirmation in favour of executors, in the winding up of a deceased person’s estate, is restricted to solicitors, by virtue of section 32 of the 1980 Act. However it is possible for others to seek to be granted such rights by virtue of an application for the right to conduct litigation and have a right of audience by virtue of section 27 of the 1990 Act. Part 3 of this Bill provides a more direct route by which other professional groups (such as accountants) might be authorised to deal with executries, without seeking a wider power to conduct litigation.

Regulation of confirmation agents

Section 72 – Confirmation agents and services

174. Section 72 defines “confirmation services” and “confirmation agent” for the purposes of this Bill.

Section 73 – Approving bodies

Section 74 – Certification of bodies

175. Approving bodies are able to authorise individuals to provide confirmation services, and are responsible for regulating those individuals which they have so authorised (see section 75).
176. These sections set out the process and criteria for becoming an approving body of confirmation agents. Section 73 covers the requirements of the application to the Scottish Ministers, which must include (among other things) the applicant’s proposed regulatory scheme. Section 74 sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body. It also requires that the Lord President’s consent is required before the Scottish Ministers certify a body. This certification may be subject to conditions which the Scottish Ministers may, with the consent of the Lord President, amend, add or delete after consultation with the approving body.

177. The Scottish Ministers have a regulation making power (under section 73(6)) to prescribe fees that they may charge applicants for the position of approving body.

178. The Scottish Ministers also have the power (under section 74(7)) to make regulations regarding the application process and, in relation to capability to act as an approving body, the criteria for certification. This power may be used to set out the application process in more detail.

Section 75 – Regulatory schemes

179. Section 75 requires the approving body to have a regulatory scheme which allows for individuals who meet the qualifying criteria to be given the right to provide confirmation services, and which regulates those members in the provision of those services. Subsection (2) gives details of what the regulatory scheme must include – a description of training, a code of practice for confirmation agents, sufficient arrangements for professional indemnity, rules about complaints and sanctions. Subsection (3) gives details of what must be included in that code of practice. Subsection (4) sets out the ability of the confirmation agent to appeal against a decision by the approving body to revoke, suspend, or attach conditions to their right to provide confirmation services. Subsection (5) requires the approving body, so far as practicable, to observe the regulatory objectives in section 1 of the Bill.

Section 76 – Financial sanctions

180. Section 76 makes specific provision allowing rules under section 75(2)(d)(ii) to provide for financial penalties which may be imposed by an approving body on confirmation agents and about appeals against their imposition. Financial penalties are paid to the Scottish Ministers, though the approving bodies may collect the penalties on their behalf.

Section 76A – Review of own performance

181. Section 76A requires an approving body to review its own performance annually. The review is to cover its compliance with section 75(5) (observing the regulatory objectives), the exercise of its functions in relation to its regulatory scheme, and its compliance with any measures applying to it by virtue of section 81(3). It must also send a report of its review, including a copy of its accounts, to the Scottish Ministers who must lay a copy of the report before the Scottish Parliament. The Scottish Ministers may make further provision in regulations about the review of approved bodies’ performance, and reports on reviews of their performance.
Section 77 – Pretending to be authorised

182. This section makes it an offence for a person to pretend to be a confirmation agent and specifies the penalty for that offence.

Other regulatory matters

Section 78 – Revocation of certification

183. Subsections (1) and (2) allow the Scottish Ministers to revoke an approving body’s certification if it fails to comply with a direction (under section 81(3)). Scottish Ministers may also order the approving body to take specified action in connection with the revocation.

184. Under subsection (3), such revocation means that the approving body’s confirmation agents will no longer be authorised to provide confirmation services from the date the revocation takes effect.

Section 79 – Surrender of certification

185. Section 79 deals with the situation where an approving body wishes to cease regulating. This section allows an approving body to surrender its certification, with the agreement of the Scottish Ministers. The approving body in question is expected to reduce as far as possible the disruption to clients of its confirmation agents caused by this surrender, for example by ensuring that any ongoing work can be completed or passed to another qualified agent prior to the surrender taking effect.

186. The Scottish Ministers can direct approving bodies to take a particular action; this may occur, for example, where an approving body has not taken sufficient steps to mitigate disruption to clients.

187. As with revocation, surrender means that the approving body’s confirmation agents will no longer be authorised to provide confirmation services from the date the surrender takes effect.

Section 80 – Register and list

188. This section requires the Scottish Ministers to keep and publish a register of approving bodies including their contact details and date of certification, and approving bodies to keep a list of confirmation agents. Approving bodies must provide a copy of the list and information on confirmation agents to the Scottish Ministers on request.

Ministerial functions

Section 81 – Ministerial intervention

189. Subsection (1) requires an approving body to provide, within 21 days, such information about its performance as the Scottish Ministers may reasonably request.

190. Subsection (2)(a) requires an approving body to review its regulatory scheme if the Scottish Ministers direct it so to do. It must report on the review and inform the Scottish
Ministers if it proposes any amendment(s) as a result of the review. Subsection (2)(b) allows an approving body to amend its regulatory scheme, but it requires the Scottish Ministers’ approval before any amendment takes effect. Without approval, the amendment is invalid.

191. Subsection (3A) requires the approving body to review annually the performance of its confirmation agents and send a report to the Scottish Ministers.

192. Subsection (5) gives the Scottish Ministers powers to make further provision in regulations about the performance review and about the functions of approving bodies and confirmation agents if they deem it necessary for safeguarding the interests of clients of confirmation agents.

CHAPTER 2 – WILL WRITING SERVICES

193. Under the 1980 Act, will writing is an unreserved activity by virtue of section 32(3)(a), which provides that wills do not count as “writs”. As a result, unqualified individuals are currently able to provide will writing services with no requirements for training, professional indemnity insurance or other safeguards. This chapter introduces regulation of such non-lawyer will writers.

Regulation of will writers

Section 81A – Will writers and services

194. Section 81A defines “will writing services” and “will writer” for the purposes of the Bill. Will writers are persons who have been authorised to provide will writing services by an approving body, in accordance with that body’s regulatory scheme. This term does not include solicitors, who provide the same services but are regulated by the Law Society of Scotland.

Section 81B – Approving bodies

Section 81C – Certification of bodies

195. Approving bodies are able to authorise individuals to provide will writing services, and are responsible for regulating those individuals which they have so authorised (see section 81D).

196. These sections set out the process and criteria for becoming an approving body of will writers. Section 81B covers the requirements of the application to the Scottish Ministers, which must include (among other things) the applicant’s proposed regulatory scheme. Section 81C sets out the conditions which must be met before the Scottish Ministers can certify a body as an approving body. This certification may be subject to conditions which the Scottish Ministers may amend, add or delete after consultation with the approving body.

197. The Scottish Ministers have a regulation making power (under section 81B(6)) to prescribe fees that they may charge an applicants to be approving body.

198. The Scottish Ministers also have the power (under section 81C(7)) to make regulations regarding the application process and, in relation to their capability to act as an approving body,
the criteria for certification. This power may be used to set out the application process in more detail.

Section 81D – Regulatory schemes

199. Section 81D requires the approving body to have a regulatory scheme which allows for individuals who meet the qualifying criteria to be given the right to provide will writing services, and which regulates those members in the provision of those services. Subsection (2) gives details of what the regulatory scheme must include – a description of training, a code of practice for will writers (and persons acting on their behalf), sufficient arrangements for professional indemnity, and rules about complaints and sanctions. Subsection (3) gives details of what must be included in that code of practice. Subsection (4) sets out the ability of the will writer to appeal against a decision by the approving body to revoke, suspend, or attach conditions to their right to provide will writing services. Subsection (5) requires the approving body, so far as practicable, to observe the regulatory objectives in section 1 of the Bill.

Section 81E – Financial sanctions

200. Section 81E makes specific provision allowing rules made under section 81D(2)(d)(ii) to provide for the imposition of a financial penalty by an approving body on a will writer. Financial penalties are paid to the Scottish Ministers, though the approving bodies may collect the penalties on their behalf. Provision is also made in relation to appeals against such financial penalties.

Section 81F – Review of own performance

201. Section 81F requires an approving body to review its own performance annually, with particular reference to its compliance with section 81D(5) (observing the regulatory objectives), the exercise of its functions in relation to its regulatory scheme, and its compliance with any measures applying to it by virtue of section 81K(3). It must also send a report of its review, including a copy of its accounts, to the Scottish Ministers who must lay a copy of the report before the Scottish Parliament. The Scottish Ministers may make further provision in regulations about the review of approved bodies’ performance, and reports on reviews of their performance.

Section 81G – Pretending to be authorised

202. This section makes it an offence to pretend to be a will writer, and specifies the penalty for such an offence.

Other regulatory matters

Section 81H – Revocation of certification

203. Subsections (1) and (2) allow the Scottish Ministers to revoke an approving body’s certification if it fails to comply with a direction (under section 81K(3)). Scottish Ministers may also order the approving body to take specified action in connection with the revocation.
204. Under subsection (3), such revocation means that the approving body’s will writers will no longer be authorised to provide will writing services from the date the revocation takes effect.

Section 81I – Surrender of certification

205. Section 81I deals with the situation where an approving body wishes to cease regulating. This section allows an approving body to surrender its certification, with the agreement of the Scottish Ministers. The approving body in question is expected to reduce as far as possible the disruption to clients of its will writers caused by this surrender, for example by ensuring that any ongoing work can be completed or passed to another qualified will writer prior to the surrender taking effect.

206. The Scottish Ministers can direct approving bodies to take a particular action; this may occur, for example, where an approving body has not taken sufficient steps to mitigate disruption to clients.

207. As with revocation, surrender means that the approving body’s will writers will no longer be authorised to provide will writing services from the date the surrender takes effect.

Section 81J – Register and list

208. This section requires the Scottish Ministers to keep and publish a register of approving bodies including their contact details and date of certification, and approving bodies to keep a list of their will writers. Approving bodies must provide a copy of the list and information on will writers to the Scottish Ministers on request.

Ministerial functions

Section 81K – Ministerial intervention

209. Subsection (1) requires an approving body to provide, within 21 days, such information about its performance as the Scottish Ministers may reasonably request.

210. Subsection (2)(a) requires an approving body to review its regulatory scheme if the Scottish Ministers direct it so to do. It must report on the review and inform the Scottish Ministers if it proposes any amendment(s) as a result of the review. Subsection (2)(b) allows an approving body to amend its regulatory scheme, but it requires the Scottish Ministers’ approval before any amendment takes effect. Without approval, the amendment is invalid.

211. Subsection (4) requires an approving body to review annually the performance of its nonlawyer will writers and send a report to the Scottish Ministers.

212. Subsection (5) gives the Scottish Ministers powers to make provision about the performance review and about the functions of approving bodies and non-lawyer will writers if they deem it necessary for safeguarding the interests of clients of such will writers.
Section 81L – Step-in by Ministers

213. Section 81L provides that the Scottish Ministers may, if they believe that intervention is necessary as a last resort in order to ensure that the provision of will writing services is regulated effectively, make regulations to establish a body with a view to its becoming an approving body, or make regulations to allow them to act as an approving body themselves.

Section 82 – Regard to OFT input

214. This section provides that there is an obligation on the Scottish Ministers to take account of any advice given by the OFT within the relevant timescale when they consult the it in respect of an application to be an approving body of either confirmation agents or will writers.

Related provision

Section 83 – Complaints about agents and writers

215. Section 83 makes provision for complaints by inserting a new Part 2B into the 2007 Act making special provision for confirmation agents and will writers.

216. New section 57F of the 2007 Act provides for Parts 1 and 2 of that Act to apply to complaints about confirmation agents. If they consider it necessary, the Scottish Ministers may modify the way these Parts operate in relation to complaints about confirmation agents and will writers. If there is either a services or a conduct complaint about a confirmation agent or will writer, the approving body is to be regarded as the relevant professional organisation.

217. New section 57G of the 2007 Act provides for the sections in the 2007 Act relating to complaints about the handling of conduct complaints (sections 23 to 25) to be applied to approving bodies (with whatever modification the Scottish Ministers may make by regulation should they consider it necessary).

218. New section 57H of the 2007 Act makes provision for the payment of the annual general levy and, if arising, the complaints levy to the SLCC. It also applies provisions of the 2007 Act so that the SLCC is required to consult with approving bodies, confirmation agents and will writers each year in relation to its budget for the next financial year and so that approving bodies are required to provide the SLCC with an estimate of the number of confirmation agents or will writers it regulates and which should be liable to pay the levy in the relevant financial year.

219. New section 57I in the 2007 Act requires approving bodies to collect the annual general levy due to the SLCC from their confirmation agents or will writers. The provisions of the 2007 Act in relation to the failure to pay and late payments of levies are applied to the levies payable by confirmation agents and will writers (section 57I(2) to (5)).

Section 84 – Privilege and immunity

220. Section 84 provides that any publication of any material under Part 3 of this Bill is privileged in relation to the law on defamation unless there was malicious intent in publishing the material. An approving body (and those who work in them) are not liable for any damages.
for any act or omission in the exercise of their functions unless the act or omission was in bad faith.

Section 84A – Appeals procedure

221. This section deals with appeals to the sheriff under Part 3 of the Bill (confirmation and will writing services). It provides that an appeal to the sheriff is to be by summary application, details what the sheriff may do with regard to an appeal and provides that the sheriff’s determination is final.

Section 85 – Consequential modification

222. These changes to the provision of services relating to confirmation require modification to other legislation (specifically, the Confirmation of Executors (Scotland) Act 1858, the 1980 Act, the 1986 Act, and the 2007 Act) and the Bill makes such provision in this section.

PART 4 – THE LEGAL PROFESSION

CHAPTER 1 – APPLYING THE REGULATORY OBJECTIVES

Section 86 – Application by the profession

223. This section requires regulators of the legal profession (as listed in subsection (2)) when carrying out their regulatory functions (as defined in subsection (3)) to act in a way which is compatible with the regulatory objectives of the Bill.

CHAPTER 2 – FACULTY OF ADVOCATES

Section 87 – Regulation of the Faculty

224. Section 87 sets out in statute the existing position regarding regulation of advocates, namely that the Court of Session is responsible for admitting and removing persons from the public office of advocates (including setting the criteria for admission and prescribing the procedure) and for regulating the professional practice, conduct and discipline of advocates. It can delegate any of this except the actual admitting and removal to the Lord President or the Faculty. In practice, the bulk of regulation is currently delegated to the Faculty and the Dean, including rules of professional conduct and disciplinary procedures.

Section 88 – Professional rules

225. Subsection (2) requires that all rules or changes to rules made by the Faculty relating to the criteria or procedure for admission or removal of advocates, and relating to regulating the professional practice, conduct and discipline of advocates must be approved by the Lord President and be published by the Faculty. If these requirements are not met then the rule is of no effect. Where a rule is made otherwise than by the Faculty of Advocates, it is of no effect unless the Faculty has been consulted on it (subsection (3)). If the Court of Session makes or changes these rules it must be by Act of Sederunt. If the Lord President makes or changes these rules, he must publish them.
226. Subsections (4) and (5) make it clear that this section does not change any rule relating to the professional practice, conduct and discipline of advocates that was in force at the time this section comes into force and that those rules regulating the professional practice of advocates (particularly relating to their involvement in and with licensed providers) still apply unless some other necessary step is taken, such as revocation of a rule.

Section 89 – Particular rules

227. Section 89 requires that the Scottish Ministers must consult the OFT and approve a change in any professional practice, conduct or disciplinary rule which prevents advocates from forming legal relationships, such as partnerships, before such a rule can have effect. It supersedes a similar rule in section 31 of the 1990 Act (which is repealed by section 89(4) of the Bill).

CHAPTER 3 – SOLICITORS AND OTHER PRACTITIONERS

Removal of practising restrictions

Section 90 – Qualified persons

228. Section 90 makes various amendments to the 1980 Act to remove certain practising restrictions so as to allow the formation of licensed providers and remove particular offences

229. Subsection (1) amends section 26 of the 1980 Act (offence for solicitors to act as agents for unqualified persons) to ensure that a licensed provider is not deemed to be an “unqualified person”.

230. Subsection (2) amends section 30 the 1980 Act (liability for fees of other solicitor) so that when a solicitor (or incorporated practice) acting on behalf of a client employs a licensed provider, the solicitor (or incorporated practice) is responsible for the licensed provider’s fees unless other arrangements to the contrary have been made.

231. Subsection (3) amends section 31 of the 1980 Act (offence for unqualified persons to pretend to be solicitor or notary public) to require that a licensed provider has the Law Society’s written permission before they can call themselves solicitors or a firm of solicitors. The Council of the Law Society is required to make rules setting out the procedure for obtaining permission and the grounds on which it may be refused.

232. Subsection (4) amends section 32 of the 1980 Act (offence for unqualified persons to prepare certain documents) so that it is clear that a licensed provider can prepare writs relating to moveable or heritable estate, writs relating to actions or proceedings in court, and papers relating to an application for grant of confirmation in favour of executors.

233. Subsection (5) amends section 33 of the 1980 Act (unqualified persons not entitled to fees, etc.) which deals with unqualified persons not being entitled to fees or other reward or expenses to ensure that this section does not apply to licensed providers.
234. Subsection (6) adds certain definitions to section 65(1) (interpretation) of the 1980 Act in relation to the amendments made by the Bill.

235. Subsection (7) amends section 17 of the 1990 Act (qualified conveyancers) to ensure that independent qualified conveyancers can provide conveyancing services upon the account of, or for the profit of, licensed providers.

Section 91 – Changes as to practice rules

236. As with section 90 of the Bill, this section amends the 1980 Act to remove restrictions which would prevent the formation of licensed providers.

237. Section 34 of the 1980 Act is concerned with the practice rules made by the Council in respect of the professional practice, conduct and discipline of solicitors.

238. Subsection (1) inserts a new section 33C into the 1980 Act to ensure that any rules made under section 34 of that Act do not unduly restrict the involvement of solicitors in or with a licensed provider, or the employment of solicitors by a licensed provider. Subsection (2) makes various amendments to the 1980 Act consequential on subsection (1).

239. Subsection (2) also amends the 1980 Act and the 1990 Act to remove references to multi-disciplinary practices. Multi-disciplinary practices will be an available business option for licensed providers under this Bill.

Section 91A – Citizens advice bodies

240. Section 91A amends section 26 of the 1980 Act so that it is not an offence for solicitors to be employed by citizens advice bodies to give legal advice to third parties. This is similar to the exemption given to law centres in the same section of that Act. A “citizens advice body” is defined in section 65(1) of the 1980 Act as a non-profit making body that has the sole or primary objective of providing legal and other advice (including information) to the public without charge. There is also provision of a power for the Scottish Ministers to modify the definition of “citizens advice body” by regulations after consulting with the Lord President, the OFT, and other appropriate organisations.

Section 91B – Court of Session Rules

241. Section 91B adds a section 5(ef) to the Court of Session Act 1988. This extends the Court of Session’s power to make rules to include rules permitting a lay representative, when appearing along with a party at a hearing in any type of case to make oral submissions to the Court on the party’s behalf. It also inserts new section 5A after section 5 of the 1988 Act, which defines the term “lay representative” and provides that the new rules:

- only apply if the party is not otherwise represented;
- may specify conditions as to when the rules apply; and
- are subject to any other enactment that makes special provision about lay representation in a particular type of case.
Section 91C – Sheriff court rules

242. Section 91C adds a new section 32(1)(n) to the Sheriff Courts (Scotland) Act 1971. This gives the Court of Session the power to make rules to permit a lay representative, when appearing along with a party at a hearing in any type of civil case to make oral submissions to the sheriff on the party’s behalf. It also inserts new section 32A after section 32 of the 1971 Act, which defines the terms “lay representative” and provides that the new rules

- only apply if the party is not otherwise represented;
- may specify conditions as to when the rules apply;
- does not affect the operation of section 36(1) (procedure in summary causes) of the 1971 Act; and
- are subject to any other enactment other than section 36(1) that makes special provision about lay representation in a particular type of case.

Section 91D – Use of Guarantee Fund

243. This section amends section 43 of the 1980 Act to allow licensed providers to be covered by the Guarantee Fund, so that the clients of licensed providers have the same protection in the event of loss owing to fraud whilst in receipt of legal services as clients of traditional firms. This section was inserted by amendment at Stage 2 of the Bill. It refers to other related amendments which were not inserted.

Section 91E – Contributions to the Fund

244. This section amends Schedule 3 to the 1980 Act to require licensed providers to contribute to the Guarantee Fund on the same entity-based model as incorporated practices. The scales for incorporated practices must take into account the number of solicitors that the entity has as directors or employees. The scales for licensed providers must take into account the number of solicitors that the entity has as investors or employees.

Section 91F – Cap on individual claims

245. Section 91F amends Schedule 3 to the 1980 Act by making provision for a cap on individual claims on the Guarantee Fund and giving the Scottish Ministers power, by regulations, to vary the cap after consultation with the Council of the Law Society of Scotland. The cap on each claim on the Guarantee Fund is £1.25 million.

The Law Society

Section 91G

246. This section inserts a new section 1A into the 1980 Act which allows the Law Society of Scotland to act as an approved regulator within the meaning of Part 2 of the Bill and to do anything that is necessary or expedient for the purposes of so doing.
Section 92 – Council membership

247. This section amends section 3 and Schedule 1 to the 1980 Act in order to allow the co-option (as well as election) of solicitor members and the appointment of non-solicitor members to the Council. It provides the criteria for such election, co-option, or appointment.

Section 93 – Regulatory committee

248. This section amends the 1980 Act by inserting a new section 3B to establish that the regulatory functions of the Council must be carried out on its behalf by an independent regulatory committee, at least 50% of the membership of which must be lay persons.

249. Subsection (3) of the new section 3B provides some rules that apply to the regulatory committee, in particular, rules relating to its composition regarding solicitors and lay members (lay members are defined in subsection (8)). It also provides that sub-committees of the regulatory committee are subject to the same rules as the regulatory committee itself (set out in new section 3B (3)) and that sub-committees may be formed without the approval of the Council.

250. Subsection (4) of the new section 3B ensures that the regulatory committee can still function where the number of lay members is temporarily lower than it should be and no decisions are invalid because of such a temporary shortfall.

251. The Scottish Ministers are given a regulation-making power in subsection (5) of the new section 3B to prescribe the maximum size of the regulatory committee, to make further provision about the Council’s regulatory functions if necessary to ensure the regulatory functions are exercised independently and properly, and also to modify in certain respects the definition of the Council’s “regulatory functions”. Before making such regulations, the Scottish Ministers must consult the Council (subsection (6)).

252. Subsection (9) defines the Council’s regulatory functions.

Section 93A – Keeping the solicitors roll etc.

253. Section 93A inserts new subsections after section 7(2) and section 12A(2) of the 1980 Act. These require the Council of the Law Society to enter on the roll of solicitors, the address of the place of business of every enrolled solicitor and registered European lawyer.

Section 93B – Removal from the roll etc.

254. Section 93B amends sections 9 and 12C of the 1980 Act so that the Council of the Law Society must be satisfied that the solicitor or registered European lawyer has made adequate arrangements for any outstanding business before removing his or her name from the roll/register.
Section 94 – Removal from solicitors roll

255. Section 94 amends sections 10 and 53 of the 1980 Act. The effect of these two amendments is that the Scottish Solicitors’ Discipline Tribunal has the power to order that a solicitor, who has voluntarily removed his or her name from the roll, is prohibited from having his or her name restored to the roll except by order of that Tribunal.

Section 94A – Notification if suspension lifted

256. Section 94A of the Bill inserts new subsections into sections 19 and 24G of the 1980 Act that require a solicitor or registered European lawyer to notify the Council when:

- their practising/registration certificate, which had ceased to have effect because they were bankrupt or they had granted a trust deed, comes back into effect again on their discharge; or
- their practising/registration certificate, which had ceased to have effect because they have been detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 or a guardian is appointed under the Adults with Incapacity (Scotland) Act 2000, comes back into effect again on their discharge;
- their practising/registration certificate, which had ceased to have effect because a judicial factor had been appointed on their estate under section 41 of the 1980 Act comes back into effect again on the judicial factor being granted his discharge.

CHAPTER 4 – OTHER BODIES

Scottish Legal Aid Board

Section 95 – Exclusion from giving legal assistance

257. This section amends section 31 of the 1986 Act. Currently, the Society and the Faculty have the power to prevent solicitors and advocates respectively (on the grounds of their conduct) from being instructed by a client to whom legal aid or advice and assistance is available. This amendment transfers the current powers of the Society and the Faculty to the Board. There is an appeal under the 1986 Act to the Court of Session.

Section 96 – Availability of legal services

258. Section 96 amends the 1986 Act in order to give the Board responsibility for monitoring the availability and accessibility of legal services in Scotland, including by reference to any relevant factors relating particularly to rural or urban areas, and for giving advice to the Scottish Ministers regarding this. This is linked to the regulatory objective of promoting access to justice, as well as the objectives of promoting the interests of consumers, competition in the provision of legal services, and an independent, strong, varied and effective legal profession.
Section 97 – Information about legal services

259. Section 97 requires the Society, the Faculty, and the Scottish Courts Service to provide information that the Board might reasonably require in monitoring the availability and accessibility of legal services in Scotland. This is similar to the duty placed on approved regulators (section 25(1)). In addition, for the purposes of the Board’s functions of excluding legal practitioners from giving legal assistance under section 31(3) of the 1986 Act, the Law Society, the Faculty of Advocates and the Scottish Legal Complaints Commission must inform the Board when they uphold conduct or services complaint about a solicitor or an advocate, and give it a summary of the relevant facts.

260. For the purposes of the Board’s functions of excluding legal practitioners from giving legal assistance under section 31(3) of the 1986 Act, the Law Society, the Faculty of Advocates and the Scottish Legal Complaints Commission must inform the Board when they uphold conduct or services complaint about a solicitor or an advocate, and give it a summary of the relevant facts.

Scottish Legal Complaints Commission

Section 98 – Minor amendments

261. This section makes several minor amendments to the 2007 Act.

Section 98A – The 2007 Act: further provision

262. Section 98A amends section 78 of the 2007 Act which provides for the power of the Scottish Ministers to make ancillary provision by order in relation to the provisions of that Act. The scope of the existing power was limited following changes made by the Legal Services Act 2007 which affected the 2007 Act. This section inserts a new subsection (1A) into section 78 of the 2007 Act, and a reference to that new subsection in section 79 of the 2007 Act, which allows the order making power to be used as intended, including in areas altered by the Legal Services Act 2007.

PART 5 – GENERAL

Section 99A – Further modification

263. Section 99A allows the Scottish Ministers by regulations to vary the percentage specified in section 37A(1)(a) (majority ownership), or to repeal the section. In exercising this function, the Scottish Ministers must believe that the amendment or repeal is compatible with the regulatory objectives and otherwise appropriate. Before making regulations, they must consult, amongst others, the Lord President and the Law Society of Scotland. Furthermore, the regulations are subject to the affirmative resolution procedure.
LEGAL SERVICES (SCOTLAND) BILL  
[AS AMENDED AT STAGE 2]  

REVISED EXPLANATORY NOTES