These documents relate to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the
Scottish Parliament on 30 September 2009

LEGAL SERVICES (SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents
are published to accompany the Legal Services (Scotland) Bill introduced in the Scottish
Parliament on 30 September 2009:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 30–PM.
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"); and
• provisions to allow others to apply for rights to obtain confirmation to the estates of deceased persons.

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 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.

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 amends the 1980 Act to remove restrictions on participation by solicitors in alternative business structures, to involve non-solicitors in the governance of the Society, to establish a separation between the regulatory and representative functions of the Society, and to amend the disciplinary rules so that solicitors facing sanctions cannot avoid them by removing themselves from the roll of solicitors.

• 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 and approved regulators 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, as does 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, observe the duty of confidentiality, 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 an 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 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 that 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;

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- 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.

PART 2 – REGULATION OF LICENSED LEGAL SERVICES

CHAPTER 1 – APPROVED REGULATORS

Approved regulators

Section 5 – Approved regulators

21. 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, then 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.

22. 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

23. Section 6 provides the criteria which an applicant must meet to satisfy the Scottish Ministers before it can be approved as an approved regulator. These include, among others, being adequately resourced, capable of performing the relevant regulatory functions and exercising regulatory functions independently of any other person or interest and properly.

24. Subsection (2) allows the Scottish Ministers to approve a body as an approved regulator subject to conditions. The conditions that may be attached to the potential approved regulator’s regulatory scheme and internal governance arrangements (how the body is structured and managed) are set out in more detail in sections 8 and 20 respectively.

25. Where the Scottish Ministers indicate that an application might not be approved, or if conditions are attached, an approved regulator 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).

26. The Scottish Ministers have the power to make regulations regarding the approval process, including the approval criteria and which types of bodies may or may not become approved regulators. This power could be used to set out the approval process in more detail, and to address any unforeseen issues.
Section 7 – Authorisation to act

27. 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 where the Scottish Ministers think they might withhold or impose conditions on authorisation.

28. Subsection (2) provides that the Scottish Ministers can only give their authorisation if they are satisfied or continue to be satisfied amongst other things that the applicant is adequately resourced and capable of regulating licensed providers and that it continues to meet any criteria provided for in regulations made under section 6(7)(b).

29. 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.

30. The Scottish Ministers have the power to make regulations regarding the authorisation process, and the criteria which must be met in order for an applicant to be authorised. 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.

Regulatory schemes

Section 8 – Regulatory schemes

31. 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).

32. 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.

33. 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)).

34. 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 and 12) and the practice rules (governing how licensed providers operate – see sections 13 to 19).
35. 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 also consult with certain persons before approving any such changes. If prior approval is not given, the changes are invalid.

Section 9 – Reconciling different rules

36. 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.

37. 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 to make regulations about regulatory conflict under subsection (3).

Licensing rules

Section 10 – Licensing rules: general

Section 11 – Initial considerations

38. Sections 10 and 11 give details about what the licensing rules cover. The scheme must include these licensing rules and a consequence material in the licensing scheme is also part of the regulatory scheme as referred to in section 8. Licensing rules cover areas such as the procedure and requirements involved in becoming a licensed provider (including fees payable to the approved regulator).

39. 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. In some instances the Bill requires an approved regulator’s regulatory scheme to contain mandatory provisions. 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

40. 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.
Section 13 – Licensing appeals

41. This section provides for an appeal by a licensed provider (or an applicant to be a licensed provider) to the sheriff against a refusal to license 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

42. Section 14 gives details about what practice rules cover. Section 15 makes specific provision for the financial penalties which may be imposed on licensed providers by approved regulators under section 14(1)(f), 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 carry out reviews of their performance, and have the resulting report assessed by the approved regulator. Sections 17 to 19 set down further provision about practice rules.

Section 17 – Performance report

43. This section provides that the practice rules must require that the Head of Practice (or Practice Committee) of a licensed provider carry out an annual review and send a report to its approved regulator.

Section 18 – Accounting and auditing

44. This section requires that practice rules provide that licensed providers must be required 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

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

46. Section 44 provides for the Council of the Society (“the Council”) to make rules concerning indemnity for solicitors 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**

47. Any approved regulator must have arrangements in place which ensure it acts properly and with independence and that it provides sufficient resources for its regulatory functions in relation to licensed providers. The section sets out relevant factors (in subsection (2)) which approved regulators must have regard to in connection with the independent exercise of the regulatory function. 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.

48. 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**

49. 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**

50. Section 22 provides that the Scottish Ministers 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**

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

52. 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

53. Section 24 provides that approved regulators (or person who or body that has been delegated this function) are required to carry out periodic reviews 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)).

54. 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.

55. 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.

56. 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

57. 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

58. 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 consult with certain persons.
Section 27 – Guidance on functions

59. The Scottish Ministers are given a power to issue guidance to approved regulators, and 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 28 – Monitoring performance

60. This section gives the Scottish Ministers a power to monitor performance of approved regulators, including acting compatibly with the regulatory objectives and adopting best regulatory practice, exercise of their regulatory functions, the operation of their internal governance arrangements, and compliance with any performance targets set or required to be set, or directions given, under section 29(1).

Section 29 – Measures open to Ministers

61. 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. 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.

62. The Scottish Ministers have the power under subsection (6) to make further provisions by regulations regarding the sanctions they can impose. This could be used to give further detail around the specifics of the sanctions, 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

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

Schedule 2 – Directions

64. This schedule gives details about the procedures to be followed (including consultation and representations) when the Scottish Ministers exercise their powers to give directions to and to set performance targets for approved regulators.

Schedule 3 – Censure

65. This schedule gives further details about the procedures to be followed when the Scottish Ministers use their power to censure an approved regulator for any act or omission (including the procedures for representations).
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Schedule 4 – Financial penalties

66. 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

67. 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

68. 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

69. 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.

70. 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

71. Section 31 applies where an approved regulator’s regulatory scheme is amended so as to exclude its regulation of certain categories of 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).

72. The Bill gives the Scottish Ministers a wide direction making 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

73. 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)).

74. 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.

75. 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.

76. 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.

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

78. 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).

79. 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.

80. 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
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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

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

82. 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.

83. 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

84. 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.

CHAPTER 2 – LICENSED LEGAL SERVICES PROVIDERS

Licensed providers

Section 36 – Licensed providers

85. Section 36 provides the definition of a licensed provider. Any such body must have a licence from an approved regulator, provide legal services for a fee, gain or reward, and involve a practising solicitor (with an unrestricted practising certificate).

86. 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

87. 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.

88. 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.

89. 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).

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

91. 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 outside 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.

92. 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 is employed full-time on a fixed salary by a body corporate or employed by a law centre.

93. The Scottish Ministers have the power to make further provision by regulations about eligibility to be a licensed provider (subsection (6)). This could be used, for example, to provide further detail or expand upon the eligibility criteria if necessary. 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 by including a different type of practitioner. They 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 38 – Key duties**

94. 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.
95. 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

96. 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)).

97. Subsection (2) requires that the Head of Legal Services is to be currently qualified to practice as a solicitor and that his or her practising certificate is free of conditions. The relevant legislation on these restrictions is to be found in sections 4 and 15(1) of the 1980 Act. In the latter, there is provision for the Council (besides granting or refusing a practising certificate) to issue a practising certificate subject to such conditions that the Council thinks fit, for example, that the person should act under the supervision of another solicitor. The Scottish Ministers have a power to modify by regulations this subsection to allow an additional type of legally qualified person to become Head of Legal Services (subsection (9)(b)).

98. 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. This section also provides for what role the Head of Legal Services has when the licensed provider is failing (or has failed) to fulfil its duties (subsection (7)).

99. 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 as regards 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

100. 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).

101. 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 to add specific requirements by regulations under subsection (7). The Scottish Ministers may also make further provision by regulations about the functions of the Head of Practice.

102. 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.

103. 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

104. 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 have the power to make further provision by regulations relating to Practice Committees and their functions (subsection (5)).

Appointment to position etc.

Section 42 – Notice of appointment

105. 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

106. 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.

Section 44 – Disqualification from position

Section 46 – Conditions for disqualification

107. 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).

108. 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)).

109. 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)).

110. 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.

111. 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)).
112. 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.

113. 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)).

Section 45 – Effect of disqualification

114. 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.

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.

Designated persons

Section 47 – Designated persons

Section 48 – Listing and information

116. 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. The designation is made by the Head of Legal Services or the Head of Practice (or Practice Committee).

117. 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.

118. Section 47(4) 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.

Outside investors

Section 49 – Fitness for involvement

119. This section provides that an approved regulator must be satisfied that all outside 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.

120. 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 outside investor (as well as to a licensed provider) and the rules must explain how an outside investor’s fitness for having an interest in a licensed provider is to be determined.

121. 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. There is provision for an alleged unfit investor making representations or taking steps before the approved regulator makes its final determination and also an appeal to the sheriff.

Section 50 – Factors as to fitness

122. Section 50 provides examples of relevant factors when determining an outside investor’s fitness, such as financial position and business record. Subsection (3) sets out in what circumstances an outside 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.

123. Subsection (4) provides that solicitors qualified to practise in Scotland, Northern Ireland and in England and Wales are presumed to be fit unless there are other relevant considerations.

Section 51 – Behaving properly

124. Subsection (1) forbids an outside 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.

125. Subsection (2) provides that an outside investor in a licensed provider must not interfere 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

126. Subsection (2) gives the Scottish Ministers power to make regulations to make further provision in relation to interests in licensed providers and to make licensing rules in relation to persons with such interests. Section 52 introduces schedule 8 which contains more provision about outside investors.

127. Subsection (4) defines an “investor” and an “outside investor” in a licensed provider.

Discontinuance of services

Section 53 – Duty to warn

128. 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. The licensed provider must also take steps to prevent disruption to clients.

Section 54 – Ceasing to operate

129. 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.

130. 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

131. 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.
132. 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)).

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

Section 56 – Distribution of client account

134. 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

135. 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.

136. 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

137. 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

138. 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 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

139. 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

140. 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

141. 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

142. Section 64 requires the Scottish Ministers to investigate all complaints about approved regulators unless a complaint is considered vexatious, frivolous or without merit and unless it is about the way in which the approved regulator has handled a complaint. A complaint about how an approved regulator has handled a complaint must be referred to the SLCC (subsection (4)).

143. Subsection (3) requires the Scottish Ministers to notify the complainers and the approved regulator concerned if the complaint is not investigated or 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 on their behalf to the SLCC. Subsection (7) allows the Scottish Ministers to make further provision about complaints by regulations.

Section 65 – Complaints about providers

144. 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.

145. 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.

146. 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.

147. 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.

148. 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 accord 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.

149. 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.

150. 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.

151. 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).

152. 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

153. 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).

154. 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

155. Section 68 provides that an approved regulator must keep and publish a list of the persons it has disqualified from holding a position in a licensed provider (see section 44), and those it has
determined to be unfit to be an investor in a licensed provider (see section 49). 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 about disqualified and unfit persons respectively. The Scottish Ministers must be notified of any alterations made to either list (subsection (5)).

156. 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**

157. 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**

158. 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 71 – Effect of professional or other rules**

159. 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 SERVICES**

160. 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

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

Section 73 – Approving bodies

Section 74 – Certification of bodies

162. 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).

163. 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.

164. 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.

165. The Scottish Ministers also have the power (under section 74(7)) to make regulations regarding the application process, the criteria for certification, and the types of bodies that are able to apply. This power may be used to set out the application process in more detail, and to address any issues which arise with regard to particular types of applying body.

Section 75 – Regulatory schemes

166. Section 75 requires the approving body to have a regulatory scheme which allows for individuals who meet the qualifying criteria 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

167. Section 76 makes specific provision about the financial penalties which may be imposed by an approving body on confirmation agents under section 75(2)(d)(ii), and about appeals against their imposition. Financial penalties are paid to the approving body, but must be used in the exercise of the approving body’s regulatory functions.
Section 77 – Pretending to be authorised

168. This section makes it an offence and specifies the penalty for a person who is not authorised as a confirmation agent to pretend that the person is.

Other regulatory matters

Section 78 – Revocation of certification

169. Subsections (1) and (2) allow the Scottish Ministers to revoke an approving body’s certification for failing to comply with a direction (under section 81(3)).

170. 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

171. 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.

172. 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.

173. 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

174. 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

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

176. Subsection (2)(a) requires an approving body to review its 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.

177. Subsections (4) and (5) give the Scottish Ministers powers to make provision about performance review as well as about approving bodies and confirmation agents more generally.

Section 82 – Regard to OFT input

178. 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 OFT.

Related provision

Section 83 – Complaints about agents

179. Section 83 makes provision for complaints by inserting a new Part 2B into the 2007 Act dealing with special provision for confirmation agents.

180. 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. If there is either a services or a conduct complaint about a confirmation agent, the approving body is to be regarded as the relevant professional organisation.

181. 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).

182. New section 57H(1) of the 2007 Act makes provision for the payment of the annual general levy to the SLCC.

Section 84 – Privilege and immunity

183. 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 85 – Consequential modification

184. 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

185. 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

186. 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

187. 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. The rule is also of no effect where a rule is made otherwise than by the Faculty of Advocates (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.

188. Subsections (4) and (5) makes 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

189. 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 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

190. 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.

191. 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”.

192. 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.

193. Subsection (3) amends section 31 of the 1980 Act (offence for unqualified persons to pretend to be solicitor or notary public) to ensure that a licensed provider is not deemed to be an “unqualified person”.

194. 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.

195. 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.

196. Subsection (6) amends section 65(1) of the 1980 Act (interpretation) to ensure that a licensed provider is not deemed to be an “unqualified person”.

197. 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

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

199. 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.
200. 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).

201. 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.

**The Law Society**

**Section 92 – Council membership**

202. This section amends section 3 and Schedule 1 to the 1980 Act in order to allow the appointment of non-solicitor members to the Council. The amendment includes a provision (new paragraph 3A(4) of Schedule 1 to the 1980 Act) giving the Scottish Ministers a power to specify, by regulations, additional criteria which must be met by non-solicitors (or a proportion of them) in order to be eligible for appointment to the Council. This may be used if, for example, it is felt that the non-solicitor members appointed are too closely aligned with the legal profession. The Scottish Ministers are also given a power to prescribe, by regulations, a minimum number or proportion of non-solicitor members on the Council. Appropriate consultations are required before the Scottish Ministers can make any of these regulations.

**Section 93 – Regulatory committee**

203. 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 a regulatory committee which is to include lay members.

204. 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. Lay persons are defined in subsection (8).

205. The Scottish Ministers are given a regulation-making power in subsection (5) of the new section 3B 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”.

**Section 94 – Removal from solicitors roll**

206. 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.
CHAPTER 4 – OTHER BODIES

Scottish Legal Aid Board

Section 95 – Exclusion from giving legal assistance

207. 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

208. Section 96 amends the 1986 Act in order to give the Board responsibility for monitoring the availability and accessibility of legal services in Scotland, 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

209. 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)).

Scottish Legal Complaints Commission

Section 98 – Minor amendments

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

FINANCIAL MEMORANDUM

INTRODUCTION

211. This document relates to the Legal Services (Scotland) Bill introduced in the Scottish Parliament on 28 September 2009. It has been prepared by the Scottish Government on behalf of Kenny MacAskill MSP, who is the member in charge of the Bill, to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

212. The Policy Memorandum which is published separately explains in detail the policy intention of the Legal Services (Scotland) Bill. The purpose of this Financial Memorandum is to set out the costs associated with the reform measures introduced by the Bill, and as such it
should be read in conjunction with the Bill, the other accompanying documents, and the regulatory impact assessment (RIA).\(^2\)

**BACKGROUND**

213. The Legal Services (Scotland) Bill will remove restrictions on solicitors entering into business relationships with non-solicitors and will allow investment by non-lawyers and external ownership. Thus it will allow solicitors, should they so choose, to enter into any type of licensed legal services provider (“licensed provider”). The Bill will provide for the licensing and regulation of such entities.

214. The Bill will also modify aspects of the governance of the Law Society of Scotland (“the Society”) and codify the regulatory framework that governs relationships between the Lord President and the Court of Session and the Faculty of Advocates (“the Faculty”). As this does not involve any change in the current regulation of advocates, there are no costs involved for any of these parties, nor for Government, nor for local government, nor for other stakeholders. The Society is modernising its governance arrangements irrespective of the Bill. Because of this, the financial implications for the changes to its governance required are likely to be cost-neutral. Detailed costs relating to the Bill are not available as yet.

215. Full details of the background, objectives and effect of the Bill’s provisions can be found in the accompanying Policy Memorandum. This also contains details of the consultation that the Scottish Government undertook early in 2009. A copy of the responses to the consultation (other than those given in confidence) have been made available on the Scottish Government’s website.\(^3\) A summary and analysis of these responses will be available at www.scotland.gov.uk/publications in October 2009. Copies of these documents will also be placed in the Scottish Government library with further copies in the Parliament’s Information Centre.

**COSTS ON THE SCOTTISH GOVERNMENT**

216. The approach taken by the Scottish Government is that the Bill will provide the regulatory framework for licensed providers and confirmation agents in Scotland. The Scottish Government does not intend to create a super-regulatory body (such as the Legal Services Board in England and Wales) and therefore there will be no costs involved in setting up and maintaining such a body.

217. Instead, it is intended that the Scottish Government will license and regulate approved regulators of licensed providers, and approving bodies of confirmation agents. These will be professional or other bodies that, on application to be approved regulators/approving bodies, will be required to set down a scheme by which they will regulate licensed providers/confirmation agents. The Scottish Government will incur costs in dealing with these applications. It is anticipated that these will possibly start in the financial year 2010/2011, but are more likely in the financial year 2011/2012. It is not intended to charge applicants and so these costs will not

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\(^3\) Available at: [http://www.scotland.gov.uk/Publications/2009/09/15151225/0](http://www.scotland.gov.uk/Publications/2009/09/15151225/0)
be recoverable (though the Bill provides the Scottish Ministers with a power to charge a fee should they wish to do so in the future).

218. It is anticipated that between one and six bodies may apply to be approved regulators, and one or two to be approving bodies. There will be an initial loading on the Scottish Government whilst dealing with the first applications and it is estimated that this will last for 12 to 24 months. In addition, it is the intention that the team dealing with licensing and regulation will also be concerned with issues of policy.

Applications to be approved regulators

219. It is anticipated that this Bill will initially require the following staff for a one- to two-year period in order to process applications to be approved regulators. The staff costs are based on the Scottish Government pay scales for August 2009. A mid-range figure has been taken for each grade and band with 33% added for pensions and national insurance. The range of figures is dependent on how many applications are being dealt with at one time.

<table>
<thead>
<tr>
<th></th>
<th>1-2 applications</th>
<th>3-4 applications</th>
<th>5-6 applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 x A3 (10%)</td>
<td>£2,150</td>
<td>1 x A3 (20%)</td>
<td>£4,300</td>
</tr>
<tr>
<td>1 x B1 (25%)</td>
<td>£7,500</td>
<td>1 x B1 (30%)</td>
<td>£9,000</td>
</tr>
<tr>
<td>1 x B2 (60%)</td>
<td>£21,960</td>
<td>1 x B2 (90%)</td>
<td>£32,940</td>
</tr>
<tr>
<td>1 x C1 (10%)</td>
<td>£6,100</td>
<td>1 x C1 (15%)</td>
<td>£9,150</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£37,710</strong></td>
<td><strong>Total</strong></td>
<td><strong>£55,390</strong></td>
</tr>
</tbody>
</table>

220. It is anticipated that these costs will be met from within existing budgets with the team that will implement the Act dealing with the applications, regulation and policy. The regulators/approving bodies can be licensed for unlimited periods or for a period stipulated by the Scottish Government and which can be renewed. The latter will put a greater burden on the Scottish Government, but it is anticipated that the work involved in renewal of a licence will be considerably less than for the initial licence and that it can be absorbed by the team dealing with regulation.

221. The Bill will also require the Scottish Government to monitor the approved regulators and their performance apply sanctions for breaches of the regulatory objectives and principles. The estimated staffing will be as follows. These figures represent the staffing requirements and costs after the initial bout of applications.

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4 The Society has indicated to Government its interest and ICAS has discussed its interest with members of the Bill Reference Group. Other possibilities are the Royal Institution of Chartered Surveyors (RICS), the Royal Institute of British Architects (RIBA), the Financial Services Authority (FSA), and the Funeral Planning Authority.

5 Percentages refer to the estimated proportion of the staff member’s time which would be spent on the relevant tasks.
These documents relate to the Legal Services (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 30 September 2009

<table>
<thead>
<tr>
<th>1-2 approved regulators</th>
<th>3-4 approved regulators</th>
<th>5-6 approved regulators</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 x A3 (10%)</td>
<td>1 x A3 (15%)</td>
<td>1 x A3 (20%)</td>
</tr>
<tr>
<td>£2,150</td>
<td>£3,225</td>
<td>£4,300</td>
</tr>
<tr>
<td>1 x B1 (10%)</td>
<td>1 x B1 (20%)</td>
<td>1 x B1 (30%)</td>
</tr>
<tr>
<td>£3,000</td>
<td>£6,000</td>
<td>£9,000</td>
</tr>
<tr>
<td>1 x B2 (50%)</td>
<td>1 x B2 (65%)</td>
<td>1 x B2 (80%)</td>
</tr>
<tr>
<td>£18,250</td>
<td>£23,725</td>
<td>£29,200</td>
</tr>
<tr>
<td>1 x C1 (10%)</td>
<td>1 x C1 (10%)</td>
<td>1 x C1 (10%)</td>
</tr>
<tr>
<td>£6,100</td>
<td>£6,100</td>
<td>£6,100</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>Total</strong></td>
<td><strong>Total</strong></td>
</tr>
<tr>
<td><strong>£29,500</strong></td>
<td><strong>£39,050</strong></td>
<td><strong>£48,600</strong></td>
</tr>
</tbody>
</table>

222. It is anticipated that these costs will be met from within existing Scottish Government budgets with the team that will implement the Bill and deal with policy issues monitoring the approved regulators/approving bodies.

223. It is not anticipated that there will be any other costs which will fall on the Scottish Government as a result of the provisions of the Bill unless it has temporarily to fulfil the function of an approved regulator.

224. If an approved regulator was unable to fulfil its functions, the Scottish Government may have to take over the role of the approved regulator for a limited time whilst alternative arrangements were put in place or a situation investigated. The options for alternative arrangements would be to transfer the regulation of the licensed providers to another approved regulator, the setting up of a new NDPB, or the use of an existing NDPB. The Scottish Government favours the first option. The cost of any interim regulation would depend on the number of entities to be regulated and the length of time that the Government had to directly regulate those entities. This is difficult to estimate as Government might be required to directly regulate fewer than 10 or more than 200 entities, depending on the number of licensed providers regulated by the approved regulator. The intention is that the team that will implement the Bill will be responsible for this short-term regulation. If the approved regulator involved was responsible for a large number of licensed providers, it may be necessary to temporarily employ an extra member of staff at B2 level at £36,600 a year.

Applications to be approving bodies

225. It is anticipated that this Bill will initially require the following staff for a one- to two-year period in order to process applications to be approving bodies. Again, the staff costs are based on the Scottish Government pay scales for August 2009. A mid-range figure has been taken for each grade and band with 33% added for pensions and national insurance.

<table>
<thead>
<tr>
<th>1-2 applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 x A3 (10%)</td>
</tr>
<tr>
<td>1 x B1 (20%)</td>
</tr>
<tr>
<td>1 x B2 (25%)</td>
</tr>
<tr>
<td>1 x C1 (3%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
</tr>
</tbody>
</table>
226. It is anticipated that these costs will be met from within existing budgets with the team that will implement the Act dealing with the applications, regulation and policy. The approving bodies can be licensed for unlimited periods or for a period stipulated by Government and which can be renewed. The latter will put a greater burden on Government, but it is anticipated that the work involved in renewal of a licence will be considerably less than for the initial licence and that it can be absorbed by the team dealing with regulation.

227. The Bill will also require the Government to monitor the approving bodies and apply sanctions for breaches of the regulatory objectives and principles, and of the regulatory scheme. The estimated staffing will be as follows. These figures represent the staffing requirements and costs after the initial bout of applications.

<table>
<thead>
<tr>
<th>1-2 approving bodies</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 x A3 (5%)</td>
<td>£1,075</td>
</tr>
<tr>
<td>1 x B1 (10%)</td>
<td>£3,000</td>
</tr>
<tr>
<td>1 x B2 (20%)</td>
<td>£7,300</td>
</tr>
<tr>
<td>1 x C1 (3%)</td>
<td>£1,818</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£13,193</strong></td>
</tr>
</tbody>
</table>

228. It is anticipated that these costs will be met from within existing Scottish Government budgets with the team that will implement the Bill and deal with policy issues monitoring the approved regulators/approving bodies.

**POTENTIAL PAYMENTS TO THE SCOTTISH GOVERNMENT**

229. Under schedule 4 (which is introduced by section 29(3)), the Scottish Ministers can impose a financial penalty on an approved regulator where the regulator fails to:
   - adhere to its internal governance arrangements (including, in particular, those relating to the independent and effective exercise of its regulatory functions), or
   - comply with a direction given in accordance with schedule 2.

230. It is estimated that such financial penalties will be imposed only rarely, and under exceptional circumstances.

231. Under sections 5(6) and 73(6), the Scottish Ministers have the power to impose a fee on applicants for the position of approved regulator or approving body, and to approved regulators on an ongoing basis. However, it is not the intent of the Scottish Government to charge such bodies in the first instance – this power will only be used if required to protect public funds should the number of applicants or the resources required to administer the process be higher than expected. If such fees were to be charged, they would only be set at such a level to recover the administrative costs of regulating those bodies.
232. Any penalties or fees will be paid into the Scottish Consolidated Fund.

COSTS ON LOCAL AUTHORITIES

233. The Scottish Government does not expect local authorities to incur any additional costs as a result of the changes provided for in this Bill.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Approved regulators

234. There are two aspects to the cost of being an approved regulator. Firstly, the costs of applying to be an approved regulator and, secondly, the costs involved in fulfilling the functions of an approved regulator.

235. The first thing to note is that, as mentioned in paragraph 231, the Scottish Ministers have the power to impose fees on approved regulators and applicants for that position. If this power were to be used, it would result in a cost to approved regulators.

236. As previously stated, it is anticipated that licensed providers will be regulated by one to six approved regulators. It is difficult to estimate how many licensed providers are likely to be established. The Scottish Government considers that in time it may be in the range of 150 to 250.6 The numbers of entities regulated by each approved regulator will differ and it is again difficult to give any estimates as an approved regulator may regulate only a few licensed providers, or it could regulate a large number.

237. Two bodies have shown interest in applying for approved regulator status.7 The Society has publicly expressed its intention to apply, while ICAS has indicated that it may be minded so to do and to adapt its own regulatory model of regulated non-members. Of course, it is not known at this stage whether either will, in fact, apply, nor whether either will be licensed as approved regulators. It is expected that the majority of licensed providers will come from the present medium-sized and large solicitor firms and it is anticipated that they would mostly opt to be regulated by the Society. It is also anticipated that there will be some interest in becoming licensed providers from firms of chartered accountants which, under this legislation, would be able to appoint a lawyer as a partner and offer legal services. Such firms may well opt to be

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6 The Society has produced the following table of the breakdown of solicitor firms in Scotland.

<table>
<thead>
<tr>
<th>Year</th>
<th>Sole practitioner</th>
<th>2-4 partners</th>
<th>5-9 partners</th>
<th>10+ partners</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>571 46%</td>
<td>506 40%</td>
<td>111 9%</td>
<td>62 5%</td>
<td>1250</td>
</tr>
<tr>
<td>2006</td>
<td>559 45%</td>
<td>512 41%</td>
<td>110 9%</td>
<td>65 5%</td>
<td>1246</td>
</tr>
<tr>
<td>2007</td>
<td>569 46%</td>
<td>502 40%</td>
<td>111 9%</td>
<td>65 5%</td>
<td>1247</td>
</tr>
<tr>
<td>2008</td>
<td>569 46%</td>
<td>496 40%</td>
<td>112 9%</td>
<td>61 5%</td>
<td>1238</td>
</tr>
</tbody>
</table>

It is thought that medium to large solicitor firms are most likely to be interested in becoming licensed providers. The estimate is based on this and the likelihood that there will be other non-solicitor professional firms that might be interested in employing solicitors to offer legal services as licensed providers together with some interest shown by the supermarkets.

7 See footnote 4 above.
regulated by ICAS, but it is anticipated that the numbers of such firms would be small compared with the number of solicitor firms. Thus, the Society may require considerably more staff to regulate licensed providers than ICAS.

238. The above means that the number of licensed providers that an approved regulator will regulate could be between 10 and 200. Some economies of scale in the cost of regulation for the larger numbers is expected, but this might be negated if there is a requirement to rent more office space to accommodate staff involved in licensing and regulation.

239. Approved regulators will incur various costs associated with licensing. Costs will be incurred in the initial consideration of applications from businesses that wish to become licensed providers and then, further into the future, costs will be incurred with process of renewal of the licences. There will also be the costs of regulating those entities. The Government will require that each licensed provider provide the approved regulator with an annual self-assessment audit. In addition, the approved regulators should undertake spot-check audits on all entities within a given time period. Should either of these audits give rise to concern, resources will have to be devoted to investigation and possible enforcement measures.

240. The financial penalties possible under schedule 4 are a potential cost for approved regulators. However, it is expected that this provision will be used infrequently, and only under exceptional circumstances.

241. It is very difficult to estimate what the costs for approved regulators would be as it is not known which bodies will apply to become approved regulators (and therefore their current resources) or what, if any, charges it will apply to its licensed providers. The bodies applying to be approved regulators will be asked to provide an indication of the fees they will charge to licensed providers. It is anticipated that they will charge an initial application fee8 to each applicant, and an ongoing annual fee to each licensed provider. However, there will be no compulsion either to fund licensing and regulation in this way9 or to charge any fee whatsoever.

242. In order to give an estimate,10 consideration was given to what the potential cost would be for the Scottish Legal Complaints Commission (“the SLCC”) to be used as a regulator instead of the approved regulators envisaged (see paragraphs 243 and 244 for details). The assumption was made that a large approved regulator would incur similar start-up and regulatory costs. Set-up costs were estimated at £100,000, and the annual running costs at between £103,000 and £173,000. It should be noted that these figures relate to an existing body taking on the regulatory functions of an approved regulator – if a new body were to be created, the set up costs would be considerably greater.

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8 This would be a fee to cover the cost in processing the application to be a licensed provider.
9 It would be possible for the Society, for example, to raise the revenue for regulation through an increase in the practising fee for all solicitors.
10 The Society has commissioned research into assessing the costs involved in licensing and regulating licensed providers but as yet no figures are available.
243. If the SLCC were to be used to fulfil the role of approved regulator, it is considered that the current accommodation is such that it could absorb the extra staff without increasing its accommodation costs. The estimated costs would be as in the table below.

<table>
<thead>
<tr>
<th>Core staff</th>
<th>With incremental staff</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 caseworker/policy adviser</td>
<td>1 caseworker/policy adviser</td>
</tr>
<tr>
<td>£38,000</td>
<td>£38,000</td>
</tr>
<tr>
<td>1 caseworker</td>
<td>3 caseworkers</td>
</tr>
<tr>
<td>£35,000</td>
<td>£105,000</td>
</tr>
<tr>
<td>1 admin support</td>
<td>1 admin support</td>
</tr>
<tr>
<td>£20,000</td>
<td>£20,000</td>
</tr>
<tr>
<td>IT, stationery and other costs</td>
<td>IT, stationery and other costs</td>
</tr>
<tr>
<td>£10,000</td>
<td>£10,000</td>
</tr>
<tr>
<td><strong>Total cost</strong></td>
<td><strong>Total cost</strong></td>
</tr>
<tr>
<td><strong>£103,000</strong></td>
<td><strong>£173,000</strong></td>
</tr>
</tbody>
</table>

244. In addition, set-up costs of £100,000 would be expected, made up as follows:

- Recruitment & HR £20,000
- Legal advice £30,000
- IT and telephony £10,000
- Training £15,000
- Website £5,000
- Miscellaneous and contingencies £20,000

245. If an approved regulator were to regulate 200 licensed providers, the £100,000 set-up costs could be recovered through a licensing fee of £500, and the annual running costs of between £103,000 and £173,000 through a regulatory fee of between £515 and £865. It is expected that the unit cost of regulation would be higher if the operation was on a smaller scale. However, the Government does intend to reserve the right to consider the fees in relation to an approved regulator’s costs and to be able to make an order capping the fee if it considers that regulator’s fee to be unreasonable.

246. In summary, it is not anticipated that licensing and regulation costs will be a burden on approved regulators as they will have the ability to recover their costs through licensing and annual fees charged to the licensed providers.

**Approving bodies for confirmation agents**

247. It is anticipated that one or two bodies may apply to become approving bodies for confirmation agents.

248. As with approved regulators, approving bodies will incur various costs associated with licensing. Costs will be incurred in the initial consideration of applications from individuals who wish to become confirmation agents and then, further into the future, costs will be incurred in relation to the renewal of licences.
249. In addition, the Scottish Ministers have the power to require approving bodies to carry out annual reviews of the performance of confirmation agents, and prepare a report on this. Should this power be used, there will obviously be a cost involved to the approving bodies.

250. As the regulatory framework for confirmation agents is both simpler and more narrowly focussed than that for licensed providers, the costs involved for the approving body are expected to be considerably lower. In addition, it is not anticipated that there will be a new class of professionals exclusively carrying out the functions of confirmation agents. It is more likely that an existing profession (such as chartered accountants) may seek to incorporate this activity into their existing professional role, and that the approving body will be their existing professional body. In this case, the ongoing regulatory costs will largely be absorbed into the wider professional regulatory costs.

251. It is anticipated that those costs will be recouped by the approving body from the members seeking to be confirmation agents.

252. As mentioned in paragraph 231, the Scottish Ministers have the power to impose an application fee on bodies seeking to become approving bodies. If this power were to be used, it would result in an additional cost to approved regulators.

253. In summary, it is not anticipated that licensing and regulation costs will be a burden on approving bodies as they will have the ability to recover their costs through licensing and annual fees charged to the confirmation agents. They in turn will only seek to be licensed as agents if they can recoup more than the likely costs of authorisation from the new business they are able to undertake.

254. As a comparison, the current registration costs for a conveyancing and executry practitioner are £430 per year if independent, and £115 per year if non-independent. Because the numbers are small, the regulation by the Society of this group of professionals is financially supported by the Scottish Government. This year, the Government has budgeted to provide £45,000 to the Society for this function (for the avoidance of doubt, no similar Government involvement in funding the regulation of confirmation agents is proposed).

**Licensed providers**

255. The consequence of the Bill’s provisions is that there will be costs imposed on licensed providers in terms of licensing fees, annual regulatory fees, and the cost of compliance with regulation. However, it is anticipated that these costs will be outweighed by the economic benefits of operating as licensed providers, which would not be possible without the Bill.

256. As stated previously, the costs of the licensing and annual regulatory fees are difficult to estimate. If there are 200 licensed providers regulated by an approved regulator, it is tentatively estimated that the licensing fee, if imposed by an approved regulator, will be in the region of £500 and the annual regulatory fee roughly in the range £500 to £900 (see paragraph 245).
257. In addition, the Bill will introduce a new type of legal complaint into the Legal Profession and Legal Aid (Scotland) Act 2007 – a regulatory complaint. This is a complaint about failure to have regard to the regulatory objectives or adhere to the professional principles, failure to comply with the approved regulator’s regulatory scheme, or failure to comply with licence conditions. As the SLCC will deal with services complaints, complaints about the handling of complaints, and the new regulatory complaints described above, licensed providers will be required to pay an annual levy. An additional complaints levy will be imposed in the event that a complaint is upheld.

258. The levy paid by licensed providers will be separate from and may be different from that charged to individual practitioners and may differ from provider to provider depending on the services offered. At present, solicitors with 3 years or more experience pay £275 each year. Further, if a complaint is upheld, the SLCC will charge an additional amount which varies from £500 to £2000 depending on circumstances.

259. The economic costs and benefits are discussed in the “Costs and benefits” section of the RIA, The economic benefits are considered to outweigh the economic costs.

**Confirmation agents**

260. There will be costs imposed on confirmation agents in terms of application fees, annual regulatory fees, and the cost of compliance with regulation. However, it is anticipated that these costs will be outweighed by the economic benefits of operating as confirmation agents.

261. The annual cost to a confirmation agent is extremely difficult to anticipate, as it will depend on a number of factors, for example the total number of confirmation agents.

262. Confirmation agents will also be required to pay the annual general levy to the SLCC, as well as the complaints levy where it arises.

**Solicitors in traditional firms**

263. There will be no compulsion on sole practitioners or traditional solicitor partnerships to become licensed providers. They will continue to be regulated by the Society and, except in the situation outlined below, there is unlikely to be any change in the cost of their regulation levied by the Society.

264. Until it is known how the costs of regulation of licensed providers will be levied by approved regulators, it is difficult to be certain that the costs will be borne solely by licensed providers. It would be possible for a professional body to finance licensing and regulation through an increase in fees levied on the entire profession. For example, the Society could finance the regulation through an increase in the cost of the practising certificate for all solicitors. If that were the case, all practising solicitors, including sole practitioners and those in traditional partnerships, would be contributing to the costs of regulation of licensed providers. This would be for the Society to justify to its members if they decided to impose a levy across the board.
Individuals and businesses

265. It is anticipated that increased competition and the economic benefits of licensed provider status will result in economies of scope and scale for businesses, and that the benefits will be passed on to consumers in the form of reductions in the cost of legal services (see paragraph 259).

Scottish Legal Aid Board

266. The Bill provides the Scottish Legal Aid Board (“the Board”) with a new power of being able to decide to exclude advocates or solicitors from undertaking work involving legal aid on the grounds of conduct. It also requires the Board to monitor the availability and accessibility of legal services in Scotland.

267. These new responsibilities will have a cost to the Board, but that cost is expected to be small and it is not possible at present to provide any figures. The numbers of exclusions has in the past been very small, and it is anticipated that this role will require little additional work for the Board. Similarly, the monitoring role is only likely to require the additional assessment of reports from the Society, the Faculty, and the Scottish Courts Service, probably on an annual or bi-annual basis.
**TABULAR SUMMARY**

<table>
<thead>
<tr>
<th>Costs to:</th>
<th>SG for ARs</th>
<th>SG for ABs</th>
<th>LAs</th>
<th>Approved regulators (ARs)</th>
<th>Approving bodies (ABs)</th>
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</thead>
<tbody>
<tr>
<td>Initial</td>
<td>Initial</td>
<td>Initial</td>
<td>Nil</td>
<td>Set up possibly £100,000 each</td>
<td>Currently unknown</td>
</tr>
<tr>
<td>£37,710-71,995pa</td>
<td>£18,989 - £34,372pa</td>
<td>(para 219)</td>
<td>(para 225)</td>
<td>(para 242)</td>
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<tr>
<td>Ongoing</td>
<td>Ongoing</td>
<td>Ongoing</td>
<td>Nil</td>
<td>Annual possibly £103,000 - £173,000</td>
<td>Currently unknown</td>
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<tr>
<td>£29,500-£48,600pa</td>
<td>£13,193 – £22,045pa</td>
<td>(para 221)</td>
<td>(para 227)</td>
<td>(para 242)</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Costs to:</th>
<th>Licensed providers</th>
<th>Confirmation agents</th>
<th>Traditional solicitor firms</th>
<th>SLAB</th>
<th>Individuals &amp; businesses</th>
</tr>
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<tr>
<td>Possibly £500 (licensing fee might be higher for smaller regulators)</td>
<td>Currently unknown</td>
<td>Currently unknown</td>
<td>Currently unknown</td>
<td>Reduced costs for legal services (para 259)</td>
<td></td>
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<tr>
<td>(para 256)</td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Possibly £500-£900 (annual fee might be higher for smaller regulators)</td>
<td>Currently unknown</td>
<td>Currently unknown</td>
<td>Currently unknown</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(para 256)</td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>
268. On 30 September 2009, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Legal Services (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

269. On 30 September 2009, the Presiding Officer (Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Legal Services (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
LEGAL SERVICES (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)


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