

Regulation of Legal Services (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Regulation of Legal Services (Scotland) Bill, introduced in the Scottish Parliament on 20 April 2023.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 25–FM);
 - a Policy Memorandum (SP Bill 25–PM);
 - a Delegated Powers Memorandum (SP Bill 25–DPM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 25–LC).
3. 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.
4. 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.

The Bill

Overview

5. The Bill reforms the regulation of legal services. It introduces measures that allow for more competition and innovation in the regulation and provision of legal services. It also helps to ensure that the regulation of legal services is carried out independently from other activities.
6. Existing regulatory bodies retain their regulatory functions but with a requirement for these functions to be performed independently from other functions (such as

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representing the interests of the body's members). New bodies can also apply to regulate the provision of legal services.

7. New arrangements are put in place for the regulation of legal businesses (which are distinct from the frameworks for regulating individual members of the legal profession). In addition, some restrictions on how legal businesses may be structured are removed. The Bill also creates new offences relating to pretending to be a regulated provider of legal services, and it modifies the arrangements for dealing with complaints connected with the provision of legal services.

8. Part 1 deals with the overarching regulatory framework and has three Chapters—

- Chapter 1 looks at the objectives of regulating legal services, the professional principles and other overarching material,
- Chapter 2 sets rules for all regulators of legal services. In doing so, it divides regulators into two categories and imposes different conditions based on the category to which a regulator is assigned,
- Chapter 3 provides for new regulators to enter the market and their members to acquire rights to provide legal services. While much of this is a restatement of material from the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the rights to provide legal services are broader.

9. Part 2 introduces a requirement for category 1 regulators (at present just the Law Society of Scotland) to create and apply a set of rules for the regulation of legal services at a business level (for example, to require traditional firms of solicitors etc. to be regulated as firms as opposed to as a collection of solicitors).

10. Part 3 reconstitutes the Scottish Legal Complaints Commission as the Scottish Legal Services Commission, adjusts its powers and provides for an updated complaints regime.

11. Part 4 makes provision in relation to a range of other matters, including—

- changing the ownership requirements for licensed legal services providers (sometimes referred to as alternative business structures) which don't have to be wholly owned by solicitors and adjusting the restrictions on their businesses,
- removing certain practising restrictions for charities and third sector organisations,
- creating a range of offences in connection with people pretending to be regulated providers of legal services or using particular titles etc. that would infer that they are regulated in a certain way,
- conferring power on the Scottish Ministers to require more (or fewer) legal services to be provided only by regulated persons.

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12. Part 5 deals with a number of general matters.

Index of expressions used in these notes

13. In these notes, the following expressions are used—

- “1980 Act” means the [Solicitors \(Scotland\) Act 1980](#),
- “1990 Act” means the [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1990](#),
- “2007 Act” means the [Legal Profession and Legal Aid \(Scotland\) Act 2007](#),
- “2010 Act” means the [Legal Services \(Scotland\) Act 2010](#),
- “the Commission” means the Scottish Legal Services Commission (i.e. the new name to be given by the Bill to the Scottish Legal Complaints Commission),
- “the Faculty” means the Faculty of Advocates,
- “the Guarantee Fund” means the Scottish Solicitors Guarantee Fund as established by section 43 of the 1980 Act,
- “the Law Society” means the Law Society of Scotland,
- “legal services provider” is defined in section 6 of the Bill (see also paragraphs 33 to 36 below),
- “licensed legal services provider” (and “licensed provider”) are forms of legal business which are not wholly owned by solicitors. See Part 2 of the 2010 Act,
- “the Lord President” means the Lord President of the Court of Session.

Background

The existing regulators

14. The Lord President has a general supervisory role in respect of the regulation of legal services in Scotland. In addition, the Lord President has a variety of statutory responsibilities in connection with, among other things, the creation of rules for legal professionals and the admission of new regulators.

15. The Law Society is the primary regulator of legal services in Scotland, with responsibility for regulating solicitors, notaries public, conveyancing and executry services, registered foreign lawyers and some powers to regulate incorporated practices. The Law Society has also been approved to regulate licensed legal services providers (being an alternative business structure) though this system is not yet operational. The Law Society is a statutory body (originally established in 1949) and its constitution and functions are now contained in the 1980 Act.

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16. In general terms, the 1980 Act sets out the functions of the Law Society in relation to promoting the interests of the solicitors' profession and the public in relation to that profession. The functions include oversight of the admission of solicitors to the profession, keeping of the roll of solicitors and responsibility for producing rules as to professional practice, conduct and discipline. It also puts in place a number of safeguards designed to protect the clients of solicitors, such as the maintenance of the Guarantee Fund and requirements in relation to professional indemnity insurance.

17. The Faculty is the regulator for advocates. It performs this function on behalf of the Court of Session which holds ultimate responsibility for the admission of persons to the office of advocate and for regulating the professional practice, conduct and discipline of advocates.

18. Section 120 of the 2010 Act made this a statutory responsibility, though the Faculty has been regulating its members for much longer than that. The Lord President also has a statutory role in relation to the admission and regulation of advocates which is also set out in the same section.

19. The Association of Commercial Attorneys is a body which acquired rights to conduct litigation and rights of audience for its members under the 1990 Act. It is the only body to have done so.

Part 1 – Regulatory framework

20. This Part sets out the new regulatory framework for the regulation of legal services. In doing so, the framework brings together several existing pieces of legal regulation, categorises regulators and imposes a set of requirements that will apply to those regulators according to the category into which they are assigned.

21. Part 1 of schedule 1 of the Bill contains a range of amendments to the 1980 Act to adjust the constitution and functions of the Law Society to reflect that it is assigned as a category 1 regulator. However, it is necessary to read both the Bill and the 1980 Act to get the full picture as to the Law Society's obligations.

Chapter 1 – Objectives, principles and key expressions

22. This Chapter sets out the objectives of legal services regulation and the professional principles to which persons providing legal services should adhere. It also deals with how these can be amended. It also defines legal services and other key expressions used in the Part.

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Overview of Part

Section 1 – Overview of the regulatory framework

23. This section gives an overview of the provisions in Part 1 to help readers navigate them and understand the framework more readily.

Regulatory objectives

Sections 2 and 3 – The regulatory objectives and their application

24. Section 2 sets out the objectives of the regulation of legal services. These are referred to as “the regulatory objectives” throughout the Bill.

25. The regulatory objectives are a high-level statement of both what the regulation of legal services is to achieve and how it is to be achieved. While section 2 sets out the objectives, section 3 sets out how they are to be applied. The two sections must be read together as section 3 elaborates on several of the concepts that are contained in section 2.

26. While some of the regulatory objectives are the same as those that were originally set in section 1 of the 2010 Act, they have been added to and now incorporate key aspects of the Better Regulation Principles,¹ the Consumer Principles² and Human Rights (PANEL) Principles.³ These can be found in section 2(1)(b) to (d) (as read with section 3(2) to (4)).

27. In general terms, a regulatory authority must exercise its regulatory functions in a way that is compatible with the regulatory objectives and in a way that it considers most appropriate to meet those objectives. Later provisions in the Bill deal with what happens where a regulator does not exercise its regulatory functions in such a way.

28. The regulatory authorities to which these objectives apply are set out in section 3(5). These are the Court of Session, the Lord President, the Commission, and category 1 and category 2 regulators (which include those bodies, such as the Law Society and the Faculty that directly regulate legal services providers). It also includes approved regulators of licensed providers under Part 2 of the 2010 Act.

¹ These are the principles set out at [section 6\(3\)\(a\)](#) of the Regulatory Reform (Scotland) Act 2014.

² See [Consumer principles \(scottishlegalcomplaints.org.uk\)](#).

³ See [Human Rights Based Approach | Scottish Human Rights Commission](#).

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Professional principles

Section 4 – Professional principles

29. This section sets out high-level principles for any person who is providing legal services.

30. The practice rules of authorised legal businesses (see Part 2) must include a rule requiring these entities to adhere to them and section 50 of the 2010 Act requires licensed providers to do so. In addition, the Law Society and the Faculty, as the main regulators of individual legal services providers, will need to promote and maintain adherence by those they regulate with these principles as part of their own regulatory schemes (as this forms part of the regulatory objectives). In each case, non-compliance could have consequences for the legal services provider's continued authorisation to provide legal services.

Power to amend regulatory objectives and professional principles

Section 5 – Power to amend the regulatory objectives and professional principles

31. This section provides the Scottish Ministers with a power to amend the regulatory objectives and professional principles. This power specifically enables the Scottish Ministers, after consultation with the Lord President, the Commission, the independent advisory panel of the Commission, the Competition and Markets Authority and each of the regulators, to adjust the regulatory objectives and professional principles. This is designed to reflect that best regulatory practice can change over time and it may become appropriate to adjust the objectives or principles to reflect that. The power enables such changes to be made without the need for primary legislation.

32. Regulations under this section are subject to the affirmative procedure (as set out in section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010).

Meaning of key expressions

Section 6 – Meaning of “legal services” and “legal services provider”

33. This section defines, for the purposes of the Bill, what is meant by the expressions “legal services” and “legal services providers”.

34. The definition of legal services is intended to be broad and describes a range of legal activities, many of which are capable of being provided by people or bodies who are not qualified as solicitors or advocates (section 32 of the 1980 Act limits the drawing of certain documents to solicitors and other legal professionals). The definition is the same as that used in the 2010 Act.

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35. For the purposes of the Bill, a legal services provider is defined as being a person or body that provides legal services (whether or not directly to the public and whether or not those services are regulated). This therefore includes solicitors and advocates as well as in-house lawyers, paralegals, conveyancing practitioners etc. It also includes bodies providing legal services such as traditional legal partnerships, other forms of legal business and licensed legal services providers.

36. People who provide legal services but are not regulated are also covered by this definition. This therefore extends the scope of legal regulation beyond the traditional practitioners. This is particularly relevant in the context of services complaints, but it is also important for the changes made in respect of new regulators of legal services where it provides a route for people other than solicitors and advocates to offer regulated legal services provision.

Section 7 – Meaning of regulatory functions

37. This section defines, for the purposes of the Bill, what is meant by a reference to the regulatory functions of a regulatory authority. This definition is used in several places in the Bill and is of particular importance in situations where an organisation, such as the Law Society, has both regulatory and representative functions. In those circumstances, the Bill requires the organisation to discharge its regulatory functions independently of its representative ones and put in place appropriate structures to support that.

Chapter 2 – Regulators

38. This Chapter provides for two new categories of regulator for the regulation of legal services providers and assigns the existing regulators to those categories. The use of the categories allows for the creation of an overarching regulatory framework into which the existing (and future) regulators may be allocated and therefore become subject to the same requirements. Category 1 regulators are intended to be those with a significant membership or whose members provide largely consumer-facing services. Category 2 regulators are intended to be those whose membership is more specialist in nature in terms of the legal work undertaken and whose membership is comparably smaller in number.

39. Thereafter the Chapter sets out the requirements that must be met by each category of regulator. It is worth noting though, that the regime for licensed legal services providers is separate and governed by the 2010 Act.⁴ This is due to the extra considerations arising from non-legally qualified investors being involved in those businesses (for example, a licensed provider may be a company owned by a solicitor

⁴ A licensed legal services provider is a business entity which provides legal services for a fee, gain or reward under a licence issued by an approved regulator under the 2010 Act. In order to be eligible to be a licensed provider a body must have within it a practising solicitor (with a valid practising certificate that is free from conditions). For a more detailed explanation of licensed legal services providers, see Chapter 2 of the Explanatory Notes to the 2010 Act (available here: [Legal Services \(Scotland\) Act 2010 – Explanatory Notes \(legislation.gov.uk\)](https://www.legislation.gov.uk/explanatory-notes/2010-act)).

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and an investor who is a member of another regulated profession, such as an accountant). This is made clear in section 8 (discussed further below).

40. However, a category 1 or category 2 regulator may also be an approved regulator of licensed providers. The Law Society has been approved to regulate licensed providers and will be subject to both the provisions of the Bill as a category 1 regulator in relation to solicitors and their firms etc. and an approved regulator under Part 2 of the 2010 Act in relation to licensed providers.

Regulatory categories

Section 8 – Regulatory categories

41. This section provides for—

- two categories of regulator (category 1 and category 2) for the regulation of legal services providers (the requirements imposed on category 1 regulators are more onerous and reflect that they are responsible for legal services providers that typically provide a broad range of legal services directly to the public),
- the regulation of licensed providers to continue under the 2010 Act,
- each of the three existing regulators of legal services to be assigned to a category, and
- a power to be conferred on the Scottish Ministers to change the category to which a regulator is assigned and to specify the category to which a new regulator is assigned.

42. The three existing regulators of legal services in Scotland are assigned as follows—

- the Law Society is assigned to category 1,
- the Faculty is assigned to category 2,
- the Association of Commercial Attorneys is assigned to category 2.

43. Any new regulator that has an application for accreditation approved under Chapter 3 of Part 1 of the Bill will be assigned to either category 1 or category 2. The Scottish Ministers must, as soon as reasonably practicable, make the regulations necessary to assign it to a category (as they are required to do under section 29). In the meantime, the new regulator is deemed a category 2 regulator.

44. Subsection (6) sets out the factors that the Scottish Ministers must consider when assigning a regulator to a category. These relate to the type and range of legal services that are to be regulated, whether the services are to be provided directly to the public and how many legal services providers the regulator is likely to regulate. The Bill does not specify particular types of legal services, or a number of providers, that will lead to a particular regulator being categorised as a category 1 regulator. However, the

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bigger the regulator, the more services provided directly to members of the public and the more significant the legal services, the more likely it is that a body will be categorised as a category 1 regulator.

45. Before making regulations under this section, the Scottish Ministers must consult the bodies listed in subsection (8) and thereafter the regulations are subject to the affirmative procedure.

Requirements of category 1 regulators

Section 9 – Exercise of regulatory functions

46. This section requires a category 1 regulator to exercise its regulatory functions independently of its other functions or activities, and properly in all respects. This reflects that a body should carry out its regulatory functions separately from its other functions, especially any representative functions it may have, and do so in a manner that is appropriate for a regulator. The regulatory functions are instructive here as they point to what regulation is for and how regulators are to carry out that function. Where the regulator has functions other than regulatory functions, it must establish and maintain an independent regulatory committee to discharge its regulatory functions. It must also ensure that its governing body does not interfere with the committee's discharge of these functions.

Section 10 – Regulatory committee: composition and membership

47. This section sets out the requirements that apply in relation to the composition of a regulatory committee of a category 1 regulator. At least 50% of the members must be lay members. A person cannot be a member if the person is, or has been for at least two years, involved in the governance of the regulator or the exercise of its non-regulatory functions. Nor can a person be a member if the person's right to practise has been removed as a result of a finding of misconduct by a professional or disciplinary body or the person is otherwise suspended from practising by such a body.

48. While it is generally for a regulatory committee to appoint its members, there may be situations where a regulatory committee is unable to do so and, in those circumstances, the regulator may appoint members to its regulatory committee. The Bill gives the most obvious example of appointing the first members of the regulatory committee (as they could not appoint themselves). However, after that point, it covers the unlikely event that the regulatory committee isn't quorate or able to appoint new members for some other reason.

49. Subsection (7) requires a regulator to publish guidance (most likely prepared or updated by the committee itself) about how it applies subsection (4) (as read with subsection (6)). This is to enable it to provide more details about the specific bodies it regards as being relevant.

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Section 11 – Regulatory committee: lay and legal members

50. This section sets out the criteria which must be satisfied if a person is to be appointed as a lay member or a legal member of the regulatory committee of a category 1 regulator. A lay member is a person who is not providing legal services in some way or who has not done so for at least 10 years. They must also be qualified to represent the interests of the public in relation to the provision of legal services in Scotland or be otherwise suitable with regard to the operation of regulatory functions, for example, an expert in consumer issues.

51. Subsection (4) sets out who qualifies as a legal member. In subsection (4)(a), the reference to a person training to become a solicitor means a trainee solicitor and in subsection (4)(b) the reference to a person having matriculated as an intransit means a person (often referred to as a 'devil') undergoing training by the Faculty to be admitted to the office of advocate. Conveyancing and executry practitioners are persons who are not solicitors but have met the requirements to be registered in the appropriate register maintained by the Law Society and are therefore entitled to provide services in connection with conveyancing or executries.

Section 12 – Regulatory committee: convenor, sub-committees and minutes

52. This section sets out the arrangements for appointing a convenor of the regulatory committee of a category 1 regulator and for otherwise chairing its meetings and any sub-committee. It also requires a copy of the minutes of a meeting of the regulatory committee to be provided on request.

Section 13 – Annual reports of category 1 regulator

53. This section requires a category 1 regulator (or, where it has non-regulatory functions, its regulatory committee) to prepare an annual report on the exercise of its regulatory functions. Subsection (2) sets out a range of material that must be contained in the report including information relating to compliance with the regulatory objectives, strategic priorities, accounts, payments from its compensation and details of the steps it has taken in relation to its regulated providers.

54. Where the category 1 regulator has a regulatory committee, the report must contain relevant information about the committee's internal governance arrangements and the relationship between the committee and the regulator's governing body. Subsection (3) places a duty on the regulator to make information available to the committee for the preparation of the report.

55. When preparing an annual report, the regulator or committee (as the case may be) must consult the Lord President (of the Court of Session) and the independent advisory panel of the Commission.⁵ A copy of the annual report must be sent to the

⁵ The independent advisory panel of the Commission operates under the name of the "Consumer Panel". The Bill and these notes, however, refer to it by its description in paragraph 11A of schedule 1 of the 2007 Act.

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Scottish Ministers who must then lay a copy of the annual report before the Scottish Parliament and publish a copy of the report.

Section 14 – Compensation funds

56. This section requires a category 1 regulator to establish and maintain a fund for the purpose of making grants to compensate persons who suffer financial loss by reason of dishonesty by a legal services provider regulated by the regulator (or a provider it regulated at the time the dishonesty occurred). If the regulator has non-regulatory functions, the fund must be under the management and control of its regulatory committee including in respect of decisions about making payments from the fund. The regulator or the committee (as the case may be) must have rules which, among other things—

- require contributions from the legal services providers that are being regulated,
- specify the criteria for making a grant from the fund, and
- state the minimum amount of money to be kept in the fund.

57. The Scottish Ministers may by regulations make further provision in connection with funds established under this section and the rules that the regulator or the committee must have for them. Before doing so, they must consult the Lord President, each category 1 regulator or, if applicable, its regulatory committee and the independent advisory panel of the Commission.

Requirements of category 2 regulators

Section 15 – Exercise of regulatory functions

58. This section requires a category 2 regulator to exercise its regulatory functions independently of its other functions or activities, and properly in all respects. The regulator's internal governance arrangements must include provision with a view to ensuring that it—

- always exercises its regulatory functions in this way,
- allocates sufficient resources to the exercise of these functions, and
- regularly reviews how effectively it is exercising them.

59. This is less prescriptive than the requirements imposed on a category 1 regulator which must set-up a regulatory committee to discharge its regulatory functions.

Section 16 – Annual reports of category 2 regulator

60. This section requires a category 2 regulator to prepare an annual report on the exercise of its regulatory functions. Subsection (2) sets out a range of material that must be contained in the report including information relating to compliance with the

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regulatory objectives, strategic priorities, costs and details of the steps it has taken in relation to its regulated providers. Each report must be published by the regulator.

Requirements of both category 1 and category 2 regulators

Section 17 – Register of regulated legal services providers

61. This section requires each category 1 and category 2 regulator to establish and maintain a register of the legal services providers that it regulates which are authorised to provide legal services. Subsection (6) makes it clear that a solicitor holding a practising certificate is authorised to provide legal services and must be registered, as must a practising advocate and an authorised legal business. It would likewise apply in a similar manner to a member of the Association of Commercial Attorneys or a person who is regulated by an accredited regulator (see Chapter 3 of Part 1).

62. The register must also contain the details of any person or body that it regulates who is not authorised to provide legal services but would be entitled to be authorised to do so and wishes to appear in the register. A person who is suspended or disqualified from practice is not entitled to be authorised and the register should not therefore include such a person. But if, for example, a solicitor chooses not to renew their practising certificate for a period of time and wishes to remain registered, the Law Society must include their details in its register (the roll of solicitors). Similarly, an advocate who works in-house or becomes a judge often chooses to become a non-practising member of the Faculty.

63. Members of the public must have free access to the register and be able to search it. The requirement for it be made available by such electronic means as the regulator considers appropriate is most likely to be satisfied by the regulator putting the register on its website. However, it is possible that it may use some other means such as an app to achieve that outcome.

64. The roll of solicitors kept by the Law Society under section 7 of the 1980 Act is expected to be the register for the purposes of this section. The Faculty also maintain a website showing practising and non-practising members.

Section 18 – Professional indemnity insurance

65. This section requires each category 1 and category 2 regulator to have rules concerning indemnity for the legal services providers it regulates against any kind of professional liability. A failure to comply with them may be treated as professional misconduct or unsatisfactory professional conduct. The Lord President must agree to the making of them and any amendments. While regulators are afforded some discretion in relation to how this is achieved, it ensures that insurance is in place to cover situations where the actions of a legal services provider results in a client suffering loss or damage.

Powers of the Scottish Ministers in relation to regulators

Section 19 – Review of regulatory performance by the Scottish Ministers

66. This section allows the Scottish Ministers to review the performance of a category 1 or category 2 regulator if requested to do so by the Scottish Parliament, the Competition and Markets Authority or Consumer Scotland. A request may be made only where the requesting body is concerned that the regulator is failing to exercise its regulatory functions in a manner that is compatible with the regulatory objectives or in the public interest.

67. When a review is being carried out it is to be done with a focus on, but not limited to, the regulator's compliance with the regulatory objectives and professional principles, the exercise of its regulatory functions, the operation of its regulatory committee (where relevant) or other internal governance arrangements and its compliance with any measures applied to it under section 20 of the Bill or any direction from the Commission under the 2007 Act.

68. Following any such review, the Scottish Ministers must prepare and publish a report detailing the findings and any measures they intend to take under section 20. But they can delegate the review to someone else.

Section 20 – Measures open to the Scottish Ministers

69. This section allows the Scottish Ministers to take specified measures in relation to a category 1 or category 2 regulator. The Lord President's agreement is required to set performance targets, direct that action be taken, publish a statement of censure, or change the regulatory functions of the regulator. The Scottish Ministers may by regulations specify other measures that may be taken by them and make further provision about the measures that they may take. This may involve a completely new form of sanction or action or adjusting an existing measure, perhaps by adding further procedural requirements.

Special rule changes

Section 21 – Power to direct special rule changes

70. This section allows a regulator, on the application of a legal services provider that it regulates, to disapply or modify any rule of the regulator in relation to the applicant. The regulator makes this change by giving a direction.

71. But a direction cannot change a rule that regulates conduct or discipline, or the handling of complaints. In addition, a direction may be given only if the regulator considers it—

- desirable for the purpose of enabling a new or alternative way of providing or regulating legal services to be piloted (“the first purpose”), or

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- reasonable and proportionate for the purpose of avoiding a regulatory conflict, removing an unnecessary rule, or making a rule less onerous (“the second purpose”).

72. By virtue of subsection (7)(c), a direction may only have effect for up to five years. Before any such direction ceases to have effect, a regulator may give a new direction to make the same changes for up to another five years. This can be done any number of times. But a direction may specify that it ceases to have effect earlier than the five-year limit.

73. A regulator must exercise this power of direction in accordance with section 3(1). This is because the power is a regulatory function of a regulator. The power must therefore be exercised in a manner which is compatible with the regulatory objectives in section 2(1) and in a manner which the regulator considers most appropriate to meet those objectives.

Section 22 – Powers to amend or revoke directions

74. This section allows a regulator to amend or revoke a direction given by it under section 21. But it can only amend a direction on the application of the legal services provider to whom it relates. The Lord President may also revoke a direction given under section 21 at any time.

Section 23 – Reports on directions

75. This section requires a regulator to prepare up to two reports on each direction given by it. The reporting requirements apply only if a direction is in force. An initial report must be given to the Lord President after the first two years, and a further report after another two years. Each report must state and explain whether the direction is still in accordance with section 21(2)(a) or (b), compatible with the regulatory objectives, and most appropriate to meet those objectives. A direction is still in accordance with section 21(2)(a) or (b) if the regulator considers that it is still—

- desirable for the purpose of enabling a new or alternative way of providing or regulating legal services to be piloted, or
- reasonable and proportionate for the purpose of avoiding a regulatory conflict, removing an unnecessary rule or making a rule less onerous.

Section 24 – Register of directions

76. This section requires a regulator to establish and maintain a register of directions given by it under section 21 that are still in force. The register must contain a copy of the application for the direction, the direction, any application to amend it, any amendments made, and any report on the direction under section 23. It must also specify the day when each direction ceases to have effect. A regulator must redact information from any document to be contained in the register if satisfied that its disclosure would or would be likely to breach data protection legislation. The regulator may also redact information if satisfied that its disclosure would or would be likely to prejudice substantially the

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commercial interests of any person or breach an obligation of confidence owed by any person.

Chapter 3 – New regulators of legal services

77. This Chapter makes provision for new regulators of legal services. It replaces similar provisions that were contained in sections 25 to 29, section 42 and schedule 2 of the 1990 Act which enabled persons to obtain rights to conduct litigation and rights of audience.

Applications

Section 25 – Right to provide legal services

78. This section allows a body to apply to the Lord President and the Scottish Ministers for the purpose of enabling the body to become accredited to authorise persons to acquire the right to exercise (any or all of)—

- rights to conduct litigation on behalf of members of the public,
- rights of audience in courts,
- the right to provide other types of legal service or services.

79. Only natural persons may acquire rights to conduct litigation or rights of audience. This means companies and other bodies which have legal personality cannot apply for authorisation for these rights.

80. The application must include, in particular, a draft regulatory scheme.

Section 26 – Regulatory scheme

81. This section sets out that a draft regulatory scheme under section 25 must—

- specify the rights and legal services that it proposes persons authorised by the body may acquire,
- contain the body's proposed authorisation rules, practice rules, and (if applicable) its rules for authorising and regulating legal businesses for the purposes of Part 2,
- set out how the body will exercise its regulatory functions compatibly with the regulatory objectives,
- set out the regulatory category to which the body thinks it should be assigned, and
- deal with such other regulatory matters as the Scottish Ministers may by regulations specify (and in such manner as the regulations may specify).

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82. It also states what authorisation rules and practice rules are about, and what they must include. Where relevant, such as in the case of professional indemnity, these rules will have to take account of the requirements that will apply to the body depending on whether it is assigned as a category 1 or category 2 regulator.

83. The authorisation rules will set out the requirements an applicant must meet in order to become a provider that is regulated by the body and the process for seeking that authorisation. This may include granting authorisation subject to conditions (such as restricting the types of, or manner in which, services are to be provided) and how decisions can be reviewed. In particular, the authorisation rules must contain a rule that only fit and proper persons may be authorised and that the authorisation is to be withdrawn if any such person is not complying with the general regulatory scheme or other pertinent rules of professional practice.

84. The practice rules will cover the standards to be met by authorised persons when providing legal services as well as requirements in relation to accounting, auditing and professional indemnity. Practice rules will also set out how complaints are to be handled and the consequences for where there is a breach of the regulatory scheme that doesn't merit the withdrawal of authorisation. This might, for example, be in the form of fines or being required to take remedial action within a set period. Subsection (8) sets out some particular rules that are required in respect of the exercise of rights of audience. These reflect the requirements imposed on other officers of the court (such as solicitors and advocates).

85. The practice rules must also contain a requirement to publish decisions in relation to conduct complaints about professional misconduct that have been referred to the Commission.

Section 27 – Publication of draft regulatory scheme and representations

86. This section requires an applicant under section 25 to advertise the draft regulatory scheme included in its application. The applicant must also make the scheme available electronically for a period of six weeks beginning with the date on which the application was made. During this period, any person may make written representations to both the Lord President and the Scottish Ministers.

Consideration and grant

Section 28 – Consideration of applications

87. This section sets out how applications under section 25 are to be considered by the Lord President and the Scottish Ministers. The Lord President and the Scottish Ministers are to do this together and must consult each other while considering the applications and share responses. This reflects that the Lord President has particular responsibilities in relation to the court and the overarching regulation of legal services and the Scottish Ministers also have a role in relation to the legal market generally and the performance of regulators.

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88. Subsections (7) and (8), however, limit the role of the Scottish Ministers where the application relates to rights to conduct litigation and rights of audience. In those circumstances, the Scottish Ministers are to consider only the rules which would limit an authorised provider's ability to prepare and present the case. This is a restatement of section 26(5) of the 1990 Act and reflects that the Lord President has responsibility for the other practice rules pertaining to the exercise of the rights to conduct litigation and rights of audience.

89. The application may not be considered if the Lord President and Scottish Ministers are not satisfied that the requirements of section 27 have been, and are being, complied with. They may make preliminary observations and, if the scheme is adjusted in response, they must consider the adjusted scheme. They must have regard to whether the scheme would achieve and maintain appropriate standards of conduct and practice by persons who may acquire the rights sought.

Section 29 – Approval of application and giving effect to the regulatory scheme

90. This section provides that if the Lord President and the Scottish Ministers are satisfied with a draft regulatory scheme included in an application under section 25 (having considered it in accordance with section 28), the Lord President must approve the application. If they are not satisfied, the Lord President must refuse it. Where the application is approved, the Scottish Ministers must by regulations give effect to the draft regulatory scheme and lay before the Scottish Parliament draft regulations to assign the applicant as a category 1 or category 2 regulator. A body which has had its application (and regulatory scheme) approved under this section is referred to as an accredited regulator.

Exercise of the acquired rights

Section 30 – Exercise of rights to provide legal services

91. This section provides that where a regulatory scheme of an accredited regulator has been given effect to, by virtue of section 29(4), a legal services provider may be authorised by the regulator to exercise the right or rights to provide legal services specified and described in the scheme. To be authorised, a provider will (among other things) require to be a fit and proper person (see section 26(4)). It also makes provision in connection with, among other things, the exercise of a right of audience.

92. In practical terms, this means that a person who wishes to provide legal services that are regulated by an accredited regulator can apply to the regulator for authorisation to provide those services. This is distinct from persons who wish to be solicitors or advocates and is more likely to relate to specialist areas, for example commercial or employment law.

93. Subsections (3) and (5) to (7) deal with particular rights that arise where the rights being exercised relate to court practice. Subsection (3) preserves the inherent

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jurisdiction of the court to hear or refuse to hear any person (though it must give reasons if it refuses to do so). Subsection (5) obliges a person with a right of audience to prioritise work before the court over other business and subsections (6) and (7) provide the same protections to an authorised provider in relation to the conduct of litigation as exist for officers of the court.

Section 31 – Surrender of rights

94. This section allows an accredited regulator to apply to the Lord President and the Scottish Ministers to surrender some or all of the rights acquired (for example, if they no longer have a sufficient number of providers to make the running of the body feasible). It requires the Scottish Ministers to consult each of the body’s authorised providers of legal services. The Lord President and the Scottish Ministers (acting together) may give directions as to the requirements which a body wishing to surrender any such rights will have to comply. If they are satisfied that a body has complied, or will comply, with any such directions, the Lord President must grant the application in respect of any such right and by notice specify when it takes effect. From the date specified in the notice, persons authorised by the body may not exercise the right.

Section 32 – Offence of pretending to have acquired rights

95. This section provides for an offence of pretending to have acquired rights. In this section, an “acquired right” means the right or rights to provide legal services specified and described in a regulatory scheme given effect to under section 29. A person who commits the offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale (currently £2,500).

Review of regulatory scheme

Section 33 – Review of regulatory schemes

96. This section allows an accredited regulator to review its regulatory scheme and propose any appropriate revisions in light of the review, and requires the body to carry out such a review at the joint request of the Lord President and the Scottish Ministers. If the Lord President and the Scottish Ministers are satisfied with a body’s proposed revisions, the Lord President must approve the revised scheme and the Scottish Ministers must make provision by regulations to give effect to it. If they agree that other revisions are required, the Scottish Ministers may direct the body to apply these other revisions and must make provision by regulations to give effect to the revised scheme. In any other case, the scheme continues to have effect as it did before. This reflects the need for both the Lord President and the Scottish Ministers to agree to changes to the regulatory scheme that has previously been approved.

Section 34 – Revocation of acquired rights

97. This section allows the Scottish Ministers to revoke the approval of an application under section 29 where it appears to them that the body that made the application has failed to comply with a direction under section 33.

Miscellaneous

Section 35 – Replacement regulatory arrangements for authorised providers

98. This section allows the Scottish Ministers to make provision by regulations—
- establishing a body with a view to it becoming a regulator for the purposes of regulating the authorised providers of a discontinuing regulator (as defined in subsection (9)),
 - amending the regulatory functions of a particular category 1 or category 2 regulator to enable it to regulate the authorised providers of a discontinuing regulator, or
 - specifying circumstances under which the Scottish Ministers or a body specified in the regulations may directly authorise and regulate the authorised providers of a discontinuing regulator.

99. This is designed to cover situations where an accredited regulator gets into difficulty in some way. This may be a financial collapse or it may be as a result of regulatory failures and the imposition of measures. In such circumstances, the remaining providers of the regulator may find that they are unable to continue to provide services without some form of intervention which could have a range of impacts depending on the numbers involved and the type of services in question. For example, ongoing court cases might be disrupted or transactions put into difficulty. To avoid this (or respond to it) the Scottish Ministers may intervene to create a body to become a new regulator, have another regulator (like the Law Society) step in to take over the regulation or even regulate the providers themselves (or nominate a body to do so).

100. There are two procedures available for regulations under this section. The first is the affirmative procedure. The second (set out in subsections (5) to (8)) is what is sometimes referred to as the ‘made-affirmative’ procedure which enables the Scottish Ministers to make regulations under this section before the Scottish Parliament has a vote to affirm them. Subsection (5) sets out that this is intended to cover the situation where an accredited regulator fails and there is a need to put in place alternative arrangements as a matter of urgency.

101. No regulations (under either procedure) can be made without the agreement of the Lord President.

Section 36 – Consequential amendments and repeals

102. This section amends and repeals provisions of the 1990 Act in consequence of other provisions of this Chapter.

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Section 37 – Transitional and saving provision for regulators approved under the 1990 Act

103. This section makes transitional and saving provision for regulators approved under the 1990 Act. In particular, it provides for the review and updating of the regulatory scheme of any body that is approved under that Act and before Chapter 3 of Part 1 of the Bill comes into force and also provides a way for those bodies to surrender their acquired rights or have them revoked.

Part 2 – Regulation of legal businesses

104. This Part makes provision for category 1 regulators to authorise legal businesses to provide legal services.

Introductory

Section 38 – Overview of Part

105. This section gives an overview of the provisions in Part 2 to help readers navigate them.

Requirement to be authorised to provide legal services

Section 39 – Requirement for legal businesses to be authorised to provide legal services

106. This section defines what constitutes a legal business (and associated expressions) for the purpose of Part 2. It also makes it an offence for a person to own or operate a legal business which provides legal services to the public for fee, gain or reward without that business being authorised in accordance with this Part. A person who commits an offence under this section is liable on summary conviction to a fine not exceeding £20,000. The Scottish Ministers may by regulations substitute a different sum.

107. A legal business is any business entity that provides (or offers to provide) legal services to the public for fee, gain or reward that is either wholly owned by a solicitor or solicitors or a qualifying individual or qualifying individuals. Qualifying individuals are other persons who are regulated by a category 1 regulator. At the time these Notes were prepared, there are no qualifying individuals, but it is anticipated that they may be some form of specialist provider of legal services (not being a solicitor) like tax specialists, financial advisors or legal executives.⁶ As this Part only applies to category 1 regulators, they are likely to provide legal services directly to the public and operate at a reasonably large scale.

⁶ These providers might also operate as a licensed legal services provider if they are offering a broad range of non-legal services and wish to have other investors in their business.

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108. Accordingly, a legal business may include sole traders, partnerships and corporate bodies, including those which are regulated as incorporated practices under the 1980 Act. A licensed legal services provider under the 2010 Act is not a legal business for these purposes as it can be owned by persons who are neither solicitors nor, as the case may be, qualifying individuals. Law centres and charities which provide legal services and other forms of charitable or third sector providers are also not included as they do not offer their services for fee, gain or reward.

109. In the event of a new regulator coming to the market, or an existing category 2 regulator being reassigned as a category 1 regulator, the offence will not bite until such time as the regulator is confirmed as a category 1 regulator and the persons that it regulates are regulated as such. Appropriate transitional processes will be put in place to ensure that any businesses that will become legal businesses under such a regime will have time to acquire authorisation before the regulator is formally assigned to category 1.

Section 40 – Offence of pretending to be an authorised legal business

110. This section makes it an offence for a person to, with intent to deceive—

- take or use any name, title, addition or description implying that the person is an authorised legal business, or
- otherwise pretend to be an authorised legal business.

111. A person who commits an offence under this section is liable on summary conviction to a fine not exceeding £20,000. The Scottish Ministers may by regulations substitute a different sum.

Regulation of authorised legal businesses

Section 41 – Rules for authorised legal business

112. This section requires a category 1 regulator to prepare and operate a set of rules to authorise and regulate legal businesses. For the purposes of the Bill they are called, collectively, the ALB rules. The ALB rules may relate to one or more types of legal business, and some or all legal services. They must contain authorisation rules and practice rules, include provision for reconciling different sets of regulatory rules, and deal with such other matters as the Scottish Ministers may by regulations specify.

113. A regulator may amend its ALB rules, but a material amendment requires the prior approval of the Scottish Ministers (and the agreement of the Lord President). Where a regulator is making or amending its ALB rules it must consult its members, the Lord President, the Competition and Markets Authority, the Commission, the independent advisory panel of the Commission and any other persons or bodies it thinks is appropriate.

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114. The Scottish Ministers may by regulations give authority for the rules of a regulator to also deal with the provision of particular non-legal services (for example where they offer ancillary services like estate agency, accountancy or tax advice).

Section 42 – Authorisation rules

115. This section sets out what authorisation rules under section 41 are generally to make provision about, and sets out some particular matters that they must include (such as grounds for non-renewal, suspension or withdrawal of authorisation where the provider is breaching the regulatory scheme⁷ of the regulator). For the purposes of Part 2, a legal business that is authorised under any such rules is referred to as an authorised legal business.

Section 43 – Appeals in relation to authorisation decisions

116. This section allows for appeals to a sheriff against a decision taken under authorisation rules (made in pursuance of Part 2) to—

- refuse an application for authorisation of a legal business,
- refuse an application for renewal of a legal business’s authorisation,
- attach conditions or restrictions to the grant of its authorisation (for example, which may limit the services that can be provided in some way), or
- suspend or withdraw its authorisation.

117. An appeal may be made by an applicant for authorisation, or by a legal business that has been authorised, under any such rules.

Section 44 – Practice rules

118. This section states what practice rules under section 41 are about and sets out some particular matters that they must include, such as the operation and administration of authorised legal businesses, the standards they must meet and operational positions within them. The practice rules must also include rules on accounting and auditing, professional indemnity and the making and handling of complaints. They must set out the measures that a category 1 regulator may take where an authorised legal business has breached the regulatory scheme or a complaint against it is upheld.

119. The rules must also require authorised legal businesses to have regard to the regulatory objectives and adhere to the professional principles.

Section 45 – Financial sanctions

120. This section allows practice rules under section 44 to provide for the imposition of a financial penalty. The Scottish Ministers may by regulations specify the maximum

⁷ The regulatory scheme of a regulator may be wider than just its ALB rules.

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amount, but they can only make such regulations with the agreement of the Lord President. An authorised legal business may appeal to a sheriff against any such financial penalty (or the amount of it).

Section 46 – Reconciling different rules

121. This section sets out what rules under section 41 must include as regards provision for reconciling different sets of regulatory rules. The Scottish Ministers may by regulations make further provision about such regulatory conflicts, but they can only make such regulations with the agreement of the Lord President.

122. This requirement (which should be read with the regulatory objectives) places an obligation on category 1 regulators to minimise duplication or unnecessary difference in the rules it makes. For example, many authorised legal businesses are already regulated by the Law Society as incorporated practices⁸ in terms of section 34 of the 1980 Act. While a wider range of legal businesses will now require to be regulated, in making ALB rules the Law Society will be required to consider how best to avoid duplicating those rules unnecessarily in relation to incorporated practices. To assist them in that regard, section 48 gives the Law Society discretion as to which powers it uses to create the rules in question and schedule 1 adjusts section 34 of the 1980 Act to facilitate that.

Section 47 – Monitoring of performance of authorised legal businesses

123. This section deals with how a category 1 regulator is to monitor and investigate the performance of authorised legal businesses. A category 1 regulator must review the performance of each of its authorised legal businesses as it considers appropriate, or when requested to do so by the Lord President. Following a review, the regulator must prepare a report on its review and send a copy of its report to the authorised legal business to which it relates. If the review was requested, the regulator must also send a copy of its report to the Lord President.

Miscellaneous

Section 48 – Law Society of Scotland

124. This section—

- requires the Law Society to prepare its rules for authorising and regulating legal businesses under section 41 within such period (not exceeding three years) as it may agree with the Lord President, and
- allows the Law Society to use its powers to make rules under the 1980 Act (as amended by Part 2 of schedule 1) to authorise and regulate legal businesses under Part 2.

⁸ An incorporated practice is defined in section 34(1A) of the 1980 Act. It relates to bodies corporate (e.g. companies).

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Section 49 – Powers of the Scottish Ministers to intervene

125. This section allows the Scottish Ministers to, by regulations, establish a body with a view to it becoming a category 1 regulator or otherwise specify circumstances under which the Scottish Ministers may directly authorise and regulate legal businesses. Any such regulations can only be made with the agreement of the Lord President, and the Scottish Ministers must believe that they are necessary (as a last resort) to ensure that the provision of legal services is regulated effectively.

Section 50 – Entities changing regulatory regime

126. This section caters for circumstances in which a licensed legal services provider (under Part 2 of the 2010 Act) becomes an authorised legal business under Part 3 of the Bill, and circumstances in which the opposite happens. A body might need to change its regulatory regime in this way if, for example, it changes the way it is owned. By default, the body is deemed to continue to be regulated under the original regime for 90 days, but the new regulator may end the regulatory arrangement earlier than this. This arrangement also ends if the body ceases to be regulated under the new regime (whatever the reason might be). This allows for a smooth regulatory handover from the original regime to the new regime.

Part 3 - Complaints

127. The Scottish Legal Complaints Commission was established in 2008 to provide independent oversight of the handling of complaints about the provision of legal services (or the conduct of legal professionals), and to act as a single gateway for the receipt of all such complaints.

128. This Part of the Bill makes changes to the procedure for handling complaints under the 2007 Act. As part of this, the Commission gains some new functions and is renamed the Scottish Legal Services Commission. In particular, the Commission's powers are extended so that it can deal with services complaints relating to individuals or bodies who are not regulated by a regulator but who provide legal services to the public for fee, gain or reward.

129. The Commission will continue to oversee the handling of complaints by bodies that regulate the provision of legal services (currently the Law Society, the Faculty and the Association of Commercial Attorneys). But the changes made by this Part will allow the Commission to initiate a complaint itself, allow regulators to initiate and investigate certain complaints, and allow a category 1 regulator to investigate a failure by an authorised legal business to comply with a relevant duty or rule (as a "regulatory complaint").

130. The changes made to the 2007 Act by this Part also give the Commission more flexibility to develop a proportionate, risk-based and more responsive approach to dealing with complaints. It confers powers on the Commission to make rules about how a complaint is to be handled depending on how the complaint is categorised. A

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complaint (or an element of it) will be categorised as either a “services complaint”, a “conduct complaint” or a “regulatory complaint”. The Commission will have more flexibility around setting the criteria for each category, and for setting out how complaints which involve more than one such category are to be dealt with. Where a complaint is dealt with by a regulator, the Commission will be able to set minimum standards for how this should be done.

131. It will still be for regulators to investigate conduct complaints against members of the legal profession that they regulate, and the Commission will retain its power to investigate a complaint about how a regulator dealt with a conduct complaint (known as a “handling complaint”). The Commission will also be able to investigate how a category 1 regulator dealt with any regulatory complaint about an authorised legal business (which will become an additional type of “handling complaint”).

132. Rather than allow appeals to the Court of Session against any decision of the Commission in relation to services complaints, the Commission’s decisions will be final (albeit it may be referred to the Commission’s review committee). Any such decision would remain open to judicial review. By contrast, for complaints involving professional conduct, the relevant professional discipline tribunal will retain oversight, and existing routes of appeal remain. But the powers of the Law Society, the Scottish Solicitors’ Discipline Tribunal and the Court of Session under the 1980 Act to award compensation in relation to conduct complaints is removed, as the process is only intended to address poor behaviour.

133. The arrangements by which the legal complaints system is funded by a levy on the legal profession will continue, but this Part ensures that the Commission will be allowed to set different, and more proportionate, levies for individual legal practitioners and legal businesses. In addition, legal services providers who are not regulated by a regulator may choose to be registered in a voluntary register to be kept by the Commission and, in that case, they will be liable to pay an annual contribution. In any event, if a services complaint against an unregulated provider is successful, the provider will be liable to pay a complaints contribution to the Commission and the amount of that may be lower to take account of any annual contributions paid by the provider.

134. This Part also deals with some related matters including adjustments to other legislation.

Section 51 – Change of name to the Scottish Legal Services Commission

135. This section changes the name of the Scottish Legal Complaints Commission to the Scottish Legal Services Commission and makes some other adjustments to the 2007 Act to reflect this.

Section 52 – Receipt of complaints: preliminary steps

136. This section amends section 2 of the 2007 Act (receipt of complaints: preliminary steps).

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137. Subsection (3)(a) requires the Commission to deal with—

- complaints (i) suggesting that professional services were inadequate where they were provided by a practitioner in connection with a matter instructed by a client or (ii) suggesting that legal services were inadequate where they were provided by a person other than a practitioner to the public for fee, gain or reward (these being types of “services complaint”),
- complaints suggesting that an authorised legal business is failing (or has failed) to comply with (i) the practice rules forming part of the rules for authorising and regulating the legal business made by the relevant profession organisation under (or for the purposes of) section 41(1)(a), or (ii) the terms of its authorisation by the relevant professional organisation (these being a type of “regulatory complaint”).

138. Subsection (3)(b) makes it clear that a complaint suggesting that legal services provided by a person other than a practitioner (to the public for fee, gain or reward) were inadequate may include a suggestion that the manner in which legal services were provided was inadequate. But if the Commission considers that the provision of legal services was merely incidental to the provision of non-legal services, the complaint is not to be treated as an eligible services complaint that may be considered by the Commission. It also provides that if a complaint is made about a practitioner who is an individual, the section allows the Commission to also, or instead, treat the complaint as if it were made against the practitioner’s firm or the practitioner who employs the practitioner against whom the complaint was made (“the employing practitioner”).

139. Subsection (3)(c) requires the Commission to determine whether complaints received by it constitute a conduct complaint, a services complaint, a regulatory complaint, or a combination of these categories of complaint. Where a complaint comprises more than one element, it also gives the Commission more flexibility about how to categorise each element. (Complaints were previously required to be divided into either conduct complaints or services complaints, and a single element of a complaint could not be categorised as both a conduct complaint and a services complaint).

140. Subsection (3)(d) ensures that a regulatory complaint may be made by any person. Subsection (3)(e) repeals provisions that are redundant as a result of the other changes. Subsection (3)(f) allows the Commission itself to initiate a conduct complaint, services complaint or regulatory complaint against a practitioner.

Section 53 – Ineligible or premature complaints

141. This section amends section 4 of the 2007 Act (complaint not made timeously or made prematurely). Subsection (3) ensures that the Commission does not need to take any further action in relation to a complaint referred to in section 2(1) of the 2007 Act that it considers is not an eligible complaint. Rules made by the Commission under section 32 of the Act set out the criteria for this. Subsection (4) ensures that the Commission does not need to take any further action in relation to a complaint referred

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to in section 2(1) of the 2007 Act that is made prematurely. Subsections (5) and (6) repeal provisions that are redundant as a result of the other changes.

Section 54 – Commission process relating to complaints

142. This section amends the 2007 Act.

143. Subsection (2) amends section 6 (complaint determined to be conduct complaint) to ensure that where a complaint is (or includes an element which is) a conduct complaint, the Commission must send it to the relevant professional organisation to deal with.

144. Subsection (4) amends section 8 (services complaint: local resolution or mediation). The changes ensure that, where the Commission decides that a complaint is wholly or partly a services complaint (i) that has been made prematurely or (ii) in relation to which an insufficient attempt has been made to achieve a negotiated settlement, it may refer the complaint back to try to achieve a negotiated settlement with the complainer. A complaint is made prematurely, within the meaning of section 4(4) of the 2007 Act, where a complainer has not notified the practitioner of the substance of the complaint in question and given the practitioner an opportunity to deal with it or any prior step required under Commission rules (made under section 32(1)) has not been taken.

145. Subsection (5) amends section 9 (services complaint: Commission's duty to investigate and determine) to give the Commission discretion to propose a settlement as respect a complaint. Previously the Commission was obliged to propose a settlement in respect of services complaints where the complainer had been directly affected by the suggested inadequate professional services.

146. The section also repeals various provisions that are no longer needed as a result of other changes. For example, section 7 of the 2007 Act which requires the Commission to give notice of its determination that a complaint is a services complaint or that it is frivolous etc., is no longer needed because rules made under section 32(1) will set out what the notice requirements are, allowing for a more flexible approach to the notice to be given by the Commission.

Section 55 – Regulatory complaints against authorised legal businesses

147. This section amends the 2007 Act.

148. Subsection (2) inserts new section 7A (complaint determined to be a regulatory complaint). The new section ensures that where a complaint is (or includes an element that is) a regulatory complaint, the Commission must send it to the relevant professional organisation to deal with. This requirement applies in the circumstances where the Commission has previously determined that a complaint (or an element of it) is a services complaint but, having investigated it, subsequently determines that it is in fact a regulatory complaint.

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149. Subsection (3) inserts new section 52B (regulatory complaints: duty of approved regulator to investigate etc.) and new section 52C (regulatory complaints: application of powers and restriction under sections 48 to 52). The new sections ensure that, where the Commission sends a regulatory complaint to a relevant professional organisation, the organisation investigates and reports on it.

150. New section 52B(2) requires that, following the investigation of a regulatory complaint, the relevant professional organisation must send a written report to the complainer, practitioner and the Commission outlining the facts of the complaint and any action which will be taken.

Section 56 – Services complaint: sanctions

151. This section amends the 2007 Act.

152. Subsection (2) amends section 10 (Commission upholds services complaint) so that a direction made to an employing practitioner under section 10(2)(c) may require action in relation to systems operated by the employing practitioner that affect the provision of legal services generally. This enables the Commission to ensure that action can be taken to fix issues which contribute more generally to services complaints against the employing practitioner, including by improving system-wide procedures or training.

153. Subsection (3) inserts new section 12A (services complaint upheld: failure to refund fees and outlays). The new section applies, in some circumstances, where the Commission requires a practitioner or an employing practitioner to refund an amount of fees or outlays to a client, and the practitioner or employing practitioner fails to do so due to death of the practitioner, or due to the insolvency or involuntary cessation of trade of the business. Where the new section applies, the unpaid amount is treated, for the purposes of the practitioner's or the employing practitioner's professional indemnity insurance, as if it were compensation that the Commission directed be paid to the complainer. This means that the unpaid amount can then be paid from the practitioner's or the employing practitioner's professional insurance up to a maximum of £35,000 (when combined with other compensation under section 10(2)(d) of the 2007 Act).

154. The section makes other amendments as a result of changes elsewhere to the 2007 Act.

Section 57 – Decision making and delegation

155. This section amends paragraph 13(2) (delegation of functions) of schedule 1 of the 2007 Act to change some of the restrictions on the delegation of the Commission's functions. For example, the following functions are no longer exercisable only by a review committee (previously a determination committee): determining a services complaint under section 9, determining fees and outlays under section 10, reporting on a services complaint under section 13, or deciding a handling complaint under section

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23. Some of the other changes are consequential on removing the Commission's duty to take the preliminary steps mentioned in section 2(4) of the 2007 Act.

Section 58 – Review committee

156. This section amends the 2007 Act.

157. Subsection (2) amends section 13 (service complaint: reports). It ensures that, where a complaint under section 9(1) or a direction or report under section 10(2) of the 2007 Act is not upheld on review under section 20A(1) of the Act (inserted by subsection (3)), the Commission has no power to publish a report on the matter under section 13 of the Act. It also ensures where such decisions are upheld on review, the Commission may report on it.

158. Subsection (3) inserts new section 20A (applications to review committee). The new section makes provision for certain persons to be able to apply for a review of a decision by the Commission in relation to a complaint mentioned in subsection (3) of the new section. A decision of a review committee is final.

159. The section makes other modifications as a result of the other changes made to the 2007 Act.

Section 59 – Services complaints: reports

160. This section amends section 13 of the 2007 Act (service complaints: reports). It allows the Commission to publish a single report in relation to multiple services complaints against a person. The report may name or otherwise identify the practitioner involved only if the practitioner consents or the circumstances or number of complaints is exceptional.

Section 60 – Disclosure of information by practitioners etc. to the Commission and relevant professional organisations

161. This section amends sections 17, 37 and 48 of the 2007 Act which confer various powers to obtain documents and information. It ensures that these powers do not require the provision of documents or information that are subject to legal privilege and would, in legal proceedings, be protected from disclosure. But they do not prevent the powers from being used to obtain a document or information that is subject to any other right of confidentiality.

Section 61 – Power of Commission to request practitioner's details in connection with complaint

162. This section inserts new section 17A (power of Commission to request practitioner's details in connection with complaint) into the 2007 Act. The new section enables the Commission to obtain a practitioner's contact details from the relevant

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professional organisation for certain purposes where it considers this necessary in relation to a complaint.

Section 62 – Services complaints: special provision for complaints against unregulated persons

163. This section inserts new section 22A (services complaints: special provision for complaints against unregulated persons) into the 2007 Act. The new section applies various provisions of the 2007 Act (with some modifications) in relation to a services complaint against a person who was not a practitioner at the time when the services were provided but who was providing legal services to the public for fee, gain or rewards. This ensures that the Commission has functions to oversee services complaints in relation to such unregulated persons.

Section 63 – Handling complaints

164. This section amends sections 23, 24 and 25 of the 2007 Act (which relate to the handling by relevant professional organisations of conduct complaints). The changes made to section 23 extend the meaning of a “handling complaint” so that it also includes a complaint which relates to the way in which a regulatory complaint has been dealt with by a relevant professional organisation (this section previously only covered complaints about the manner in which conduct complaints were dealt with by relevant professional organisations).

165. Changes to section 24 enable the Commission, when reporting on its conclusions following an investigation into a handling complaint, to include directions (which must be complied with by the relevant professional organisation to which the complaint relates). Other changes to sections 24 and 25 are consequential on this or on the new category of regulatory complaints introduced by other provisions in Part 3 of the Bill.

Section 64 – Annual general levy and complaints levy

166. This section amends sections 27, 28 and 29 of the 2007 Act (which relate to levies payable by practitioners in relation to complaints handling by the Commission). The changes to sections 27 and 28 introduce a levy requirement for practitioners which are corporate bodies (previously the levy was only payable by individual practitioners, for example solicitors and advocates). They also ensure that the levy is payable by authorised providers of accredited regulators (see Chapter 3 of Part 1). The amendments to section 28 also provide increased flexibility to the Commission to decide when the complaints levy should become chargeable to the practitioner.

167. The changes made to section 29 allow for the setting of the amount of “the annual contribution” by the Commission (for context, see also the explanatory notes on section 65). They also give the Commission discretion to, in relation to the annual general levy, set different amounts for different persons, and allow it to make rules setting out circumstances in which the Commission may waive a portion of the levy. In addition, the changes ensure that the Commission can get the information it needs to set the levy.

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Section 65 – Unregulated providers of legal services: voluntary register, annual contributions and complaints contributions

168. This section inserts new sections 28A and 28B into the 2007 Act (which relate to a voluntary register, annual contributions and complaints contributions concerning unregulated providers of legal services).

169. New section 28A allows the Commission to establish and maintain a voluntary register of unregulated providers of legal services. A provider who is entered in the register must pay a contribution (which is referred to as “the annual contribution”). A provider may opt to be included in the voluntary register as a mark of quality assurance of the legal services provided by them.

170. New section 28B requires an unregulated provider of legal services to, in circumstances specified in rules made by the Commission (such as when a complaint is upheld against the person), pay a contribution in relation to any services complaint made against it (which is referred to as “the complaints contribution”). In the same manner as section 28 (complaints levy) it will be for the Commission to determine the circumstances when the complaints contribution becomes payable.

Section 66 – Commission rules as to practice and procedure

171. This section amends section 32, and replaces paragraphs 1 and 2 of schedule 3, of the 2007 Act (which set out the rules to be made by the Commission as to practice and procedure).

172. The changes to schedule 3 ensure that the Commission’s rules under section 32 include matters which must, and matters which may, be provided for in consequence of other provision made in Part 3 of the Bill. For example, the rules must include provision about the criteria to be met for a complaint to be considered eligible, how a complaint is to be assessed with reference to the eligibility criteria, how a complaint is to be categorised, the circumstances in which the Commission may discontinue or reinstate the investigation of a complaint, the manner in which a services complaint is to be investigated and determined, evidential matters, notification requirements, membership of the review committee, determining the annual general levy and the payment of the complaint levy.

173. Section 32 is adjusted to ensure that the Commission, before making or changing the rules, also consults with the independent advisory panel established under paragraph 11A of schedule 1 of the 2007 Act and other groups of persons representing the interests of the legal profession.

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Section 67 – Conduct or regulatory complaint raised by relevant professional organisation

174. This section inserts new sections 33A and 33B of the 2007 Act (which concern conduct and regulatory complaints raised by relevant professional organisations). It also makes consequential changes to section 33 of the 2007 Act.

175. New section 33A allows a relevant professional organisation which identifies a matter of concern relating to a practitioner's conduct, in the course of carrying out its regulatory functions, to treat that matter as a conduct complaint and investigate it, without first having to remit it to the Commission. Where a relevant professional organisation initiates a complaint in this way, it must notify the Commission which will consider the issue to identify any potential services complaint. The relevant professional organisation must also have regard to the interests of any clients, or former clients, of the practitioner who may have been affected by the practitioner's conduct and notify those clients if the complaint is upheld.

176. New section 33B allows a relevant professional organisation to treat any concern it has about a failure by an authorised legal business to comply with its rules for regulating it, or the terms of its authorisation, as if the matter were a regulatory complaint. Where this concern was identified in the course of carrying out its regulatory functions, the relevant professional organisation does not need to remit the complaint to the Commission before investigating it. A regulatory complaint would include failure by the business to meet practice rules regarding accounting and auditing standards set by the business's regulator in accordance with section 44 of the Bill. Where a relevant professional organisation initiates a complaint in this way, it must notify the Commission which will consider the issue to identify any potential services complaint.

Section 68 – Conduct complaints: consideration by relevant professional organisations

177. This section amends sections 47 of, and inserts new section 52A into, the 2007 Act (both of which relate to conduct complaints). The changes to section 47 ensure that an investigation report on a conduct complaint by a relevant professional organisation is also sent to the Commission. The changes also allow a relevant professional organisation to proceed with the investigation of a conduct complaint even if the complaint is withdrawn. This ensures that concerns about a person's conduct can still be investigated and dealt with appropriately by the relevant professional organisation where a complainer decides not to continue with their complaint.

178. New section 52A ensures that the organisation, when considering what steps to take following its upholding of a conduct complaint, takes account of previous decisions by the Commission in relation to a services complaint relating to the same matter.

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Section 69 – Complaints: monitoring and setting of minimum standards by the Commission

179. This section amends sections 35, 36 and 40 of, and inserts new section 36A into, the 2007 Act (which relate to the monitoring and setting of minimum standards in relation to complaints). The changes to section 35 require the Commission to reach agreement with relevant professional organisations on how it will share information with them in relation to its functions relating to services complaints.

180. The changes to section 36 ensure that the Commission monitors practice by, and trends in the way in which practitioners, dealt with matters resulting in regulatory, as well as conduct, complaints. It removes the ability for the Commission to issue guidance in relation to those trends, as a consequence of new section 36A and the changes to section 40 set out below.

181. New section 36A allows the Commission to issue guidance to relevant professional organisations about how they are to investigate and determine conduct complaints and regulatory complaints. That guidance may relate to timescales within which relevant professional organisations should aim to complete their investigation and determination of complaints. The guidance may also set minimum standards in relation to the matters to which the guidance relates. The new section requires the Commission to consult each relevant professional organisation on initial proposals to set minimum standards, and again on draft guidance which includes the minimum standards.

182. The changes to section 40 allow the Commission to issue guidance to relevant professional organisations or to practitioners about how practitioners are to deal with regulatory complaints or conduct complaints about them or any of their employees who are practitioners. The guidance may include minimum standards for practitioners about how to deal with complaints, and for relevant professional organisations about their role in overseeing how practitioners deal with complaints. Subsection (4) also allows the Commission to set minimum standards for practitioners in terms of practices it has identified (in the way practitioners deal with matters) which contributes, in the Commission's opinion, to services, conduct or regulatory complaints being made. Where the guidance relates to relevant professional organisations, the Commission must consult each such body on initial proposals to set minimum standards, and again on draft guidance which includes the minimum standards.

Section 70 – Compensation funds: setting of minimum standards by the Commission

183. This section amends section 39 of the 2007 Act (monitoring effectiveness of guarantee funds etc.). It confers powers on the Commission to issue guidance (which may set minimum standards) for the operation and effectiveness of the Guarantee Fund and analogous compensation funds. Before issuing guidance which sets minimum standards, the Commission must consult each relevant professional organisation concerned on initial proposals to set minimum standards, and again on draft guidance which includes the minimum standards.

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Section 71 – Enforcement of minimum standards

184. This section inserts new sections 40A and 40B into the 2007 Act (enforcement of minimum standards). The new sections require relevant professional organisations and practitioners to meet minimum standards set for them by the Commission. These minimum standards are to be set out in guidance issued under the following sections of the 2007 Act—

- section 36A(1) in relation to how relevant professional organisations are to investigate and determine conduct complaints and regulatory complaints,
- section 39(1A) in relation to the operation and effectiveness of the Guarantee Fund and any analogous fund maintained by relevant professional organisations,
- section 40(3) in relation to the role of relevant professional organisations in overseeing how practitioners deal with complaints about the matters mentioned in section 40(1)(a) or (b),
- section 40(1) and (4) in relation to how practitioners are to deal with certain complaints and about practices which the Commission considers contributes to services complaints, conduct complaints and regulatory complaints being made.

185. New section 40A relates to the enforcement of minimum standards made in relation to relevant professional organisations. Subsection (4) allows for a dispute between the Commission and such a body to be submitted to arbitration for final and binding resolution. Otherwise the Commission may direct the organisation or practitioner to take steps to address the matter, and the Commission may enforce the steps required through the courts. New section 40B relates to enforcement of minimum standards set for practitioners. The Commission may direct the organisation or practitioner to take steps to address the matter, and the Commission may enforce the steps required through the courts.

Section 72 – Conduct complaints: power to impose unlimited fine and removal of power to award compensation

186. This section amends sections 42ZA, 53, 53ZB, 54 and 55 of the 1980 Act (which relate to the powers of the Law Society, the Scottish Solicitors' Discipline Tribunal and the Court of Session in connection with conduct complaints). These sections remove the powers of the Law Society, the Tribunal and the Court under the 1980 Act to require the payment of compensation, and related provision. Section 53 is also adjusted to allow the Tribunal, in applicable cases, to impose an unlimited fine.

Section 73 – Faculty of Advocates: complaint of professional misconduct and publication of decision

187. This section inserts a new subsection into section 122 of the 2010 Act (particular rules). The new subsection provides that rules regulating the discipline of advocates (whether made by the Court of Session or on its behalf by the Faculty) must include

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rules which require the publication of decisions about complaints of professional misconduct against an advocate. It also provides that the rules must require certain matters to be included in the decisions.

Section 74 – Commission membership

188. This section amends paragraphs 2 and 3 of schedule 1 of the 2007 Act (membership of the Commission and terms of appointment). Paragraph 2 requires that 4 (rather than 5) of the 8 “other members” of the Commission (i.e. not including the chairing member) are non-lawyers. The other four must be lawyer members. Each member is to be appointed for 8 rather than 5 years.

Section 75 – Role of independent advisory panel

189. This section amends paragraph 11A of schedule 1 of the 2007 Act (role of the independent advisory panel). It allows the panel to express views on such matters relevant to the Commission’s functions as the panel considers appropriate (rather than as the Commission’s directs). It also allows the panel to make recommendations to the Commission in relation to any of the Commission’s functions and to relevant professional organisations relating to any of their functions conferred by virtue of the Bill.

Section 76 – Commission reports

190. This section inserts a new sub-paragraph into paragraph 16 of schedule 1 of the 2007 Act (Commission reports). The existing paragraph requires the Commission to prepare an annual report on the discharge of its functions and the actions it proposes to take the following year. The new sub-paragraph requires each annual report of the Commission to explain how it has discharged its functions in a manner which, in accordance with section 3(1) of the Bill, is compatible with the regulatory objectives and it considers is most appropriate to meet those objectives. It also requires each report to provide details of certain directions given under the 2007 Act and to include information about compensation awarded to complainers following services complaints, and whether it has been paid.

Section 77 – Minor and consequential amendments

191. This section introduces Parts 2 and 3 of schedule 3, which contain minor and consequential amendments arising from the provisions in Part 3 of the Bill.

Part 4 – Miscellaneous and general

Licensed legal services providers

Section 78 – Removal of requirement to act for fee, gain or reward

192. This section amends section 47 of the 2010 Act (licensed providers) to remove a requirement that a business entity can only be a licensed legal services provider under

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Part 2 of the 2010 Act if it provides (or offers to provide) legal services for a fee, gain or reward. It means that a business entity that satisfies the other criteria in section 47 of the 2010 Act (including the criterion that it provides legal services under a licence issued by an approved regulator) will, for the purposes of Part 2 of the 2010 Act, be a licensed legal services provider, even if it does not provide (or offer to provide) such services for a fee, gain or reward. This will allow for third sector and community organisations to own and operate a licensed legal services provider.

Section 79 – Eligibility criteria: law centres

193. This section ensures that a law centre is no longer barred from becoming a licensed legal services provider under Part 2 of the Legal Services (Scotland) Act 2010.

194. In this context, a “law centre” means a body—

- established for the purpose of providing legal services to the public generally as well as to individual members of the public, and
- 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.

Section 80 – Majority ownership

195. This section ensures that a business entity is eligible to be a licensed legal services provider under Part 2 of the 2010 Act if the qualifying investors in it (taken together) have at least a 10% stake in the total ownership or control of the entity. A business entity was previously only eligible if the qualifying investors had at least a 51% stake.

196. In this context, a “qualifying investor” is—

- a solicitor investor, or
- an investor who is a member of another regulated profession.

Removal of certain practising restrictions

Section 81 – Removal of practising restrictions: law centres, citizens advice bodies and charities

197. Subsection (2) of this section ensures that section 26(1) of the 1980 Act (offence for solicitors to act as agents for unqualified persons) does not apply to a solicitor, 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 charity.

198. Subsection (3) ensures that section 32(1)(b) of the 1980 Act (offence for unqualified persons to prepare any writ relating to any action or proceedings in any court) does not apply to a person who is, by virtue of an act of sederunt made under

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section 32 (power of Court of Session to regulate procedure) of the Sheriff Courts (Scotland) Act 1971, permitted to represent a law centre, a citizens advice body or a charity.

199. Subsection (4) ensures that section 33 of the 1980 Act (unqualified persons not entitled to fees, etc.) does not apply to a law centre, a citizens advice body or a charity in so far as the centre, body or charity (or a person within it) is providing legal services.

200. Subsection (5) inserts a new section 33BA into the 1980 Act (privilege of law centres, citizens advice bodies and charities from disclosure etc.). The new section ensures that communications involving legal advice between a law centre, a citizens advice body or a charity and a client has the same protection from disclosure in legal proceedings as would such communications between a solicitor and a client.

201. Subsection (6) inserts a new section 33D into the 1980 Act (practice rules relating to law centres, citizens advice bodies and charities). The new section disapplies any rule made by the Law Society under section 34 of the 1980 Act (rules as to professional practice, conduct and discipline) that prohibits or unduly restricts (i) the involvement of solicitors (who are authorised to provide legal services) in or with, or employment of such solicitors by, law centres, citizens advice bodies or charities, or (ii) the provision of legal services by such organisations.

Offences relating to pretending to be a regulated provider of legal services

Section 82 – Offence of taking or using the title of lawyer

202. This section makes it an offence for a person, who is not entered in a register maintained under section 17 or a licensed provider to, with intent to deceive, take or use the title of lawyer in connection with providing (or offering to provide) legal services to the public for a fee, gain or reward.

203. The offence does not apply to a person who provides (or offers to provide) such services in relation to the laws, rules, beliefs or practices of a religion, but only if the person makes it clear that the taking or using of the title relates to the provision of legal services in relation to those matters. This ensures that a person who provides legal services in relation to a religious law, including the interaction between the religious law and secular law does not commit an offence under this section if the person satisfies this requirement. Where a person also provides a legal service that does not relate to a religious law, the offence will apply to the person in the same way as it would any other person (unless the person is entered in a register maintained under section 17 or is a licensed provider when the title is taken or used).

204. A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 4 on the standard scale (currently £2,500).

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Section 83 – Offence of pretending to be a regulated legal services provider

205. This section makes it an offence for a person who is not entered in the register maintained by a category 1 or category 2 regulator to, with intent to deceive, take or use a name, title (other than that of lawyer), addition or description implying that the person is regulated by the category 1 or category 2 regulator. The offence applies only if this is done in connection with providing (or offering to provide) legal services to the public for a fee, gain or reward.

206. A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 4 on the standard scale (currently £2,500).

Section 84 – Offence of pretending to be a member of the Faculty of Advocates

207. This section makes it an offence for a person who is not a member of the Faculty to, with intent to deceive, take or use a name, title, addition or description implying that the person is a member of the Faculty or otherwise pretend to be a member of the Faculty. The offence does not require any connection with providing legal services. For the purpose of this offence, a person is a member of the Faculty if the person is entered in the register maintained by the Faculty under section 17.

208. A person who commits an offence under this section is liable on summary conviction to a fine not exceeding level 4 on the standard scale (currently £2,500).

Section 85 – Time limit for prosecution of offences

209. This section makes provision about the time limit for prosecution of offences under sections 32(1), 40(1), 82(1), 83(1) and 84(1). Proceedings must be commenced within 2 years of the commission of the offence (or in the case of a continuous contravention, after the last day on which the offence was committed) and within 6 months of the date on which evidence that the prosecutor believes sufficient to justify proceedings comes to the prosecutor's knowledge. The effect of subsection (5) is that any such proceedings are to be deemed to be commenced on the date on which a warrant to apprehend or to cite the accused is granted, if the warrant is executed without undue delay.

Power of the Scottish Ministers to adjust restricted legal services

Section 86 – Power of the Scottish Ministers to adjust restricted legal services

210. This section inserts new section 32A into the 1980 Act. Section 32 of the 1980 Act provides that it is an offence for a person other than a solicitor or certain other legal professionals or public officials to prepare certain documents. The new section enables the Scottish Ministers to amend section 32 to make provision for or in connection with it being an offence for an unqualified person to draw or prepare certain documents or

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provide certain other legal services. The section title of section 32 is adjusted to reflect this broader scope. Before making regulations under this section the Scottish Ministers must consult the Lord President, each category 1 and category 2 regulator, each approved regulator, and the Competition and Markets Authority.

Section 87 – Modification of other enactments

211. This section introduces schedule 3 which makes minor and consequential amendments.

Part 5 – General

Section 88 – Individual culpability for offending by an organisation

212. This section makes provision where offences under the Bill are committed by legal entities such as companies, partnerships, and associations. Where an offence under the Bill is committed by a “relevant organisation”, this section provides that the relevant organisation and, in some cases, a “responsible individual” in that organisation are both to be held responsible. This section ensures that those running legal entities who are responsible for the decisions leading to an offence under the Part can also be prosecuted for it.

Section 89 – Regulations

213. This section allows regulations under the Bill to include the ancillary provision listed, and to make different provision for different purposes. It does not apply to commencement regulations.

Section 90 – Ancillary provision

214. This section allows the Scottish Ministers, by regulations, to make standalone ancillary provision in relation to the Bill, once enacted, or any provision made under it. Any regulations making ancillary provision which textually amends primary legislation will be subject to the affirmative procedure; otherwise, any regulations making ancillary provision under this power will be subject to the negative procedure.

Section 91 – Interpretation

215. This section defines words and expressions for the purposes that are used in the Bill.

Section 92 – Commencement

216. This section provides for the substantive provisions of the Bill to come into force in accordance with regulations made by the Scottish Ministers. The regulations may make transitional, transitory or saving provision and may make different provision for different purposes.

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Section 93 – Short title

217. This section gives the Bill its short title (being the name by which it may be formally cited).

Schedule 1 – Law Society of Scotland

218. This schedule makes a variety of changes to the 1980 Act in respect of the Law Society becoming a category 1 regulator and the move to entity regulation. The nature of the split means that some provisions of the 1980 Act are amended in multiple places by this Bill. This is designed to dovetail with the implementation of the Bill, which may not happen all at once.

219. To make matters simpler to follow, and to enable readers to see the totality of the changes, we have therefore included a ‘keeling schedule’ which tracks all the changes made to the 1980 Act by the Bill in these Notes.

Part 1 – Category 1 regulator

220. This Part amends other enactments relating to the Law Society in consequence of the Society being a category 1 regulator.

Exercise of regulatory functions

221. Paragraphs 1 to 5 adjust sections 3A to 3G of the 1980 Act in consequence of the requirements of a category 1 regulator imposed under Chapter 2 of Part 1.

222. The main changes are to sections 3B and 3F. Section 3B requires the Council of the Law Society to delegate the regulatory functions of the Law Society to its regulatory committee and ensure that the regulatory committee is able to carry out those functions to the exclusion of the Council. Section 3F defines the regulatory functions of the Law Society. This definition follows the definition of regulator functions that applies in section 7 of the Bill and particularises it to the precise span of regulation of the Council.

223. Section 3C, which makes provision for the membership of the regulatory committee and its exercise of regulator functions, is repealed. The provisions in Chapter 2 in relation to those matters will apply instead.

224. Sections 3A and 3G of the 1980 Act are consequentially amended to reflect the other changes.

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Guarantee Fund

225. Paragraphs 6 to 8 adjust section 43 of the 1980 Act which deals with the Guarantee Fund. The primary change here is to make the regulatory committee of the Law Society responsible for the management and control of the Fund.

226. The changes in paragraph 6(3) and (4) are consequential on the provisions made in section 14(4). These enable the Fund to be used for the purpose of providing loans to judicial factors and limiting the claims that an applicant can make in relation to a particular act of dishonesty.

227. Paragraph 6(6) inserts a new section into the 1980 Act to enable the Scottish Ministers to adjust section 43 and schedule 3 of the 1980 Act in respect of the circumstances when claims can be made, the maximum amount of any grant payable and in connection with administrative matters.

228. This new section 43A is not wholly consequential on the Law Society becoming a category 1 regulator. While it may be used to adjust the provisions governing the Fund for that purpose, it may also be used for making other changes. It is included in this Part of the schedules as it sits naturally with the other changes being made to section 43.

Part 2 – Regulation of legal businesses

229. This Part of schedule 1 makes a wide range of changes to recalibrate the 1980 Act towards regulating legal businesses. As noted above, a legal business is any business entity that provides legal services to the public and includes sole traders, partnerships and the permitted forms of incorporated practice that are already regulated under the 1980 Act.

230. The changes made to schedule 1 generally remove references to firms and incorporated practices and replace them with the broader concept of the authorised legal business. In other places however, the move shifts the current regulatory provision away from the individual solicitor or practitioner onto the business. This distinction may be less obvious in the case of the sole trader but there is still a business which is distinct from the individual who runs it, and this business will require separate authorisation.

Regulatory functions

231. Paragraph 9 makes a consequential change to section 3F of the 1980 Act.

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Suspension of authorisation

232. Paragraph 10 amends section 18 of the 1980 Act to enable the authorisation of legal business to be withdrawn (as well as recognition of an incorporated practice being revoked) in the circumstances set out in section 18(1A) of the 1980 Act).

Consultants

233. Paragraph 11 amends section 21 of the 1980 Act to bring in the remaining types of authorised legal business for determining whether or not a person is a consultant.

Offence of disqualified solicitors dishonestly seeking employment

234. Paragraph 12 makes consequential changes to section 28 of the 1980 Act.

Rules as to professional practice, conduct and discipline

235. Paragraph 13 amends section 34 of the 1980 Act to permit the Law Society to make rules about professional practice, conduct and discipline in relation to all forms of legal business. This should be read with sections 41 and 48 which also make provision in connection with the making of rules for authorised legal businesses.

236. Paragraph 13(3) makes it clear that the rules can provide that where a recognition of an incorporated practice is revoked the body's authorisation as a legal business may be reviewed or withdrawn. The loss of recognition for an incorporated practice is likely to make it untenable for it to continue to be authorised. However, there may be circumstances (such as restructuring) where this isn't the case and so flexibility is left to the Law Society to put in place the appropriate rules.

Rules as to accounts etc.

237. Paragraphs 14 to 17 adjust sections 35 to 37A (which deal with accounts rules, interest on clients' money etc.) to shift the onus onto compliance with the rules by the legal business. However, provision is made for an individual solicitor (or solicitors) within each firm to have responsibility for compliance to ensure that there is direct accountability.

Powers where excessive fees etc. charged

238. Paragraph 18 makes consequential changes to section 39A of the 1980 Act.

Powers where failure to comply with rules

239. Paragraph 19 makes consequential changes to section 40 of the 1980 Act.

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Judicial factors

240. Paragraph 20 makes consequential changes to section 41 of the 1980 Act.

Distribution of sums in client bank account

241. Paragraph 21 adjusts section 42 to incorporate authorised legal businesses. In doing so, it is necessary to add to the range of events which may trigger when the powers in the section may apply.

242. The adjustment to section 42(2)(b) is for consistency and modernisation of language. It is not intended to change the legal effect of the provision.

Powers to examine documents etc.

243. Paragraph 22 makes consequential changes to section 42C of the 1980 Act.

Guarantee Fund

244. Paragraphs 23 to 25 make consequential changes to both section 43 and schedule 3 of the 1980 Act.

Professional indemnity

245. Paragraph 26 makes consequential changes to section 44 of the 1980 Act.

Safeguarding interests of clients

246. Paragraph 27 makes consequential amendments to section 45 of the 1980 Act.

Restrictions on employing a struck off or suspended solicitor

247. Paragraph 28 makes consequential amendments to section 47 of the 1980 Act.

Complaints

248. Paragraphs 29 to 33 amend sections 51 to 54 and schedule 4 of the 1980 Act to enable complaints to be brought against all types of authorised legal business in a manner that is similar to how incorporated practices were treated previously. This therefore means that sole traders or law firms may now face complaints for the action of their business as an entity in a way that was not previously possible.

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Protection of banks

249. Paragraph 34 makes consequential amendments to section 61 of the 1980 Act.

Recovery of Council's expenses

250. Paragraph 35 makes consequential amendments to section 62A of the 1980 Act.

Service of notices

251. Paragraph 36 makes consequential amendments to section 64 of the 1980 Act.

Interpretation

252. Paragraph 37 amends section 65 of the 1980 Act to define “authorised legal business” and “authorised” for the purposes of that Act.

Revenue powers in respect of authorised legal businesses

253. Paragraph 38 amends schedule 1 of the 1980 Act. These changes enable the Law Society to charge fees on authorised businesses. Different fees may be charged based on the financial performance of the business or its size etc. For example, this may mean that fees are set by reference to the Scottish turnover of a legal business or the number of solicitors it employs.

254. The amendments to permit the Law Society to set an annual subscription of £0 for members is to enable (but not require) the Law Society to shift to a funding model where the majority, if not all practice fees, are the responsibility of the business rather than individual solicitors.

Schedule 2 – Further provision about measures open to the Scottish Ministers

255. This schedule provides more detail on when and how the Scottish Ministers may use the measures available to them under section 20. The core procedure for all the measures is contained in Part 6 and supplemented as necessary in each of the preceding Parts.

256. The measures in this Bill are similar to those available to the Scottish Ministers under the 2010 Act in relation to approved regulators of licensed providers.

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Part 1 – Performance targets

257. This Part of the schedule provides further detail about when the Scottish Ministers may set performance targets and requires the regulator in question to comply with them.

Part 2 – Directions

258. This Part of the schedule provides further detail about when and how the Scottish Ministers may direct a regulator to take action (or refrain from doing something). The Part requires the regulator in question to comply with directions and, if it does not, enables the Scottish Ministers to apply to the Court of Session to secure compliance.

Part 3 – Censure

259. This Part of the schedule provides further detail about when and how the Scottish Ministers may censure a regulator. This involves the Scottish Ministers making and publishing a statement of censure.

Part 4 – Financial penalties

260. This Part of the schedule provides further detail about when and how the Scottish Ministers may impose a financial penalty on a regulator. The maximum amount of such a penalty is to be set out in regulations to be made by the Scottish Ministers under section 20.

261. Paragraph 14 provides things to which the Scottish Ministers must have regard when deciding what the appropriate amount of any penalty and, among other things, paragraph 15 requires them to explain how they came to that conclusion.

262. Paragraph 16 enables the penalty to be varied and paragraphs 17 to 19 deal with appeals against penalties. Paragraph 20 provides for interest to be payable on unpaid penalties (or parts) and paragraph 21 allows for recovery of the penalty (and interest) as a debt if need be.

Part 5 – Making changes to regulatory functions

263. This Part of the schedule provides further detail about when and how the Scottish Ministers may make changes to the regulatory functions of a regulator. It may only be used when the issues at hand cannot be addressed by any of the other measures available to the Scottish Ministers.

264. The particular regulator and regulatory scheme will determine how the Scottish Ministers are to make changes. This may be by direction if the regulatory scheme is capable of being changed by the regulator and by regulations if it is not (for example

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where the regulatory functions are contained in an enactment). Given the significance of such a measure, a special parliamentary procedure for the making of such regulations is set out in paragraph 26 (which comes on top of the existing procedure in Part 6 of the schedule). This gives Parliament the opportunity to see the regulations in draft alongside an explanatory document that sets out the representations made at different stages of the consultation process and any changes made to the regulations as a result.

Part 6 – Procedure for imposing a measure

Application

265. This Part of the schedule provides further detail about the procedure for the Scottish Ministers taking any measure.

Notice of intention

266. Paragraph 28 requires the Scottish Ministers to give a notice of intention setting out the type of measure and the details of what is proposed. The regulator has 28 days to make representations in respect of the proposed measure and, in the meantime, the Scottish Ministers are to publish the proposed measure and consult the Lord President and such other persons or bodies as they consider appropriate. The Lord President is to provide such advice to the Scottish Ministers on the measure proposed as the Lord President considers appropriate and, in particular, what the likely impact of taking the measure might be on the courts.

267. The Scottish Ministers must have regard to any representation made to them when deciding whether or not to proceed with the measure. If they do proceed, they have to give a decision notice to the regulator, notify the consultees and publish the notice. Paragraph 30(3) sets out that the notice must set out the reasons for taking the measure, the details of the action being taken and the date from which the measure will take effect (if appropriate).

Schedule 3 – Minor and consequential modifications of enactments

Part 1 – Regulatory framework

268. This Part makes and minor and consequential modifications of enactments in connection with regulatory objectives, professional principles and new regulators.

Regulatory objectives and professional principles

269. Paragraphs 1 and 2 make changes to the 2007 Act and the 2010 Act in consequence of the new regulatory objectives and professional principles introduced by Part 1 of the Bill. It defines each expression for the purposes of the Acts so that it has

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the same meaning as in Part 1 of the Bill. Some related provisions of the 2010 Act are also repealed or revised in consequence of Part 1.

New regulators

270. Paragraph 3 amends section 32 (offence for unqualified persons to prepare certain documents) and paragraph 1A in Part 1 of schedule 4 (constitution, procedure and powers of the Tribunal) of the 1980 Act. The change to section 32 ensures that the offence in this section does not apply to a person exercising a right to provide legal services acquired under Chapter 3 of that Part, and the changes to paragraph 1A ensures that the non-lawyer members of the Tribunal do not include such a person.

271. Paragraph 4 amends section 12A of the Legal Aid (Scotland) Act 1986 (register of advice organisations). It ensures that a person who has a right to provide legal services acquired by virtue of Chapter 3 of Part 1 of the Bill may not be approved as an advisor by an advice organisation.

272. Paragraph 5 amends sections 48, 72, 73, 119 and 149 and schedule 9 of the 2010 Act. The changes made to sections 48, 72, 73, 119 and schedule 9 replace references to an individual practitioner with references to an authorised legal services provider, with the new references being defined, by virtue of the change made to section 149, as a person having a right to provide legal services acquired by virtue of Chapter 3 of Part 1 of the Bill.

273. Paragraph 6 amends sections 95, 103 and 104 of the Courts Reform (Scotland) Act 2014. The change made to section 95 ensures that the meaning of “legal representative” includes a person having a right to provide legal services acquired by virtue of Chapter 3 of Part 1 of the Bill. The changes made to section 103 and 104 make it clear that the powers conferred by each section includes the power to make provision for or about the representation of parties to proceedings in the Court of Session, sheriff courts or Sheriff Appeal Court including persons who do not have a right to provide legal services acquired by virtue of Chapter 3 of Part 1 of the Bill.

274. Paragraph 7 amends section 36 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (power to regulate procedure etc.). This change makes it clear that the power conferred by that section includes the power to make provision for or about the representation of the procurator fiscal and participants in inquiry proceedings, including representation of participants by persons who do not have a right to provide legal services acquired by virtue of Chapter 3 of Part 1 of the Bill.

Part 2 – Renaming Scottish Legal Services Commission

275. This Part provides for the consequential amendments necessary as a consequence of renaming the Scottish Legal Services Commission.

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Part 3 – Other amendments relating to the Scottish Legal Services Commission

Solicitors (Scotland) Act 1980

276. Paragraph 23 amends sections 3A, 15, 34, 39A, 40 and 42ZA of the 1980 Act in consequence of changes made to the 2007 Act by Part 3 of the Bill. In particular, it amends section 34 (rules as to professional practice, conduct and discipline) to ensure that the Law Society consults the Commission before making any rules under that section which relate to complaints against solicitors or authorised legal businesses.

Legal Aid (Scotland) Act 1986

277. Paragraph 24 amends section 34 of the Legal Aid (Scotland) Act 1986 in consequence of changes made to the 2007 Act by Part 3 of the Bill.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

278. Paragraph 25 amends sections 20, 20ZB and 25 of the 1990 Act in consequence of changes made to the 2007 Act by Part 3 of the Bill.

Legal Profession and Legal Aid (Scotland) Act 2007

279. Paragraph 26 amends sections 2, 9, 16, 17, 23, 33, 34, 37, 43, 46, 47 and 80 and paragraph 2 of schedule 1 of the 2007 Act in consequence of other provisions of the Bill.

Legal Services (Scotland) Act 2010

280. Paragraph 27 amends section 121 of the 2010 Act (professional rules) to ensure that the Faculty consults the Commission before making any rule which relate to complaints against advocates.

Part 4 – General

Freedom of information

281. Paragraph 28 inserts new paragraph 61D into schedule 1 of the Freedom of Information (Scotland) Act 2002. This change ensures that category 1 regulators (and for present purposes, the Law Society) are subject to the 2002 Act as respects the exercise of its regulatory functions.

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Removal of special provision for confirmation agents and will writers etc.

282. Paragraphs 29 to 31 amend, respectively, the 2007 Act, the 2010 Act and the Enterprise and Regulatory Reform (Scotland) Act 2013. Paragraph 29 repeals special provision for confirmation agents and will writers, and paragraphs 30 and 31 make consequential changes to remove references relating to such agents and writers in other enactments.

Disclosure requirements in connection with new offences

283. Paragraphs 32 and 33 amend, respectively, schedule 8A of the Police Act 1997 and schedule A1 of the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013. The changes made by paragraph 32 ensure that offences under sections 32, 40, 82, 83 and 84 of the Bill must be disclosed in the circumstances required by the Police Act 1997 unless a sheriff orders otherwise. The changes made by paragraph 33 ensure that offences under sections 32, 40, 82, 83 and 84 of the Bill must be disclosed in the circumstances required by the Rehabilitation of Offenders Act 1974 (as read with the 2013 Order).

Other miscellaneous consequential and minor amendments

284. Paragraph 34 amends the 1980 Act.

285. Sub-paragraph (2) amends section 32 (offence for unqualified persons to prepare certain documents) so that the offence, insofar as it concerns an unqualified person who draws or prepares any writ relating to any action or proceedings in any court, does not apply to a person referred to in substituted paragraph (2B)(a) of that section.

286. Sub-paragraph (3) amends section 44 (professional indemnity) to adjust the meaning of an “authorised insurer” so that references to Part 4 of the Financial Services and Markets Act 2002 are substituted with references to Part 4A of that Act. These amendments are required in consequence of the insertion of Part 4A by the Financial Services Act 2012.

287. Sub-paragraph (4) amends section 61A (solicitors’ fees) so that subsection (1) of that section is without prejudice to sections 103(2)(j) and 103(2)(j) of the Courts Reform (Scotland) Act 2014.

288. Sub-paragraph (5) amends section 65 (interpretation) to insert definitions for a “category 1 regulator”, a “category 2 regulator” and “legal services”.

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Explanatory Notes

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