

Article

The Legal Services Act, 2020 and the Insurance Industry

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The Legal Services Act, 2020 (the “LSA”) was gazetted on 7 January 2021 and is expected to come into force once the Regulations have been finalised and a commencement order issued before the end of February this year. The LSA has been a long time in the making. The legislation seeks to repeal and replace the Legal Practitioners Act (2015 Revision); to regulate the practice of Cayman Islands law; to provide for a system of legal education; to provide for a system to deal with professional misconduct; and for incidental and connected purposes.

The enactment of the LSA will assist in protecting and promoting the reputation of the Cayman Islands as a leading international financial centre, where legal, corporate, and professional services are provided in accordance with international regulatory standards, and in compliance with the jurisdiction’s domestic legislation and international obligations in relation to anti-money laundering and terrorist financing.

The LSA now provides a comprehensive legal framework that will ensure that Cayman Islands law is only practised by lawyers that are properly qualified, regulated and accountable. The LSA also seeks to strike a balance between a variety of public policy considerations and regulatory objectives involving the Cayman Islands legal profession.

Whereas the introduction of the LSA should be a welcome development and have a positive impact for international businesses and licensed entities all corporate and professional service providers doing business in, and with, the Cayman Islands should take careful note of the following requirements to ensure that they do not inadvertently fall foul of the LSA and associated Regulations.

Subject to some limited exceptions, the LSA prohibits the practice of Cayman Islands law either within the Islands, or in any other jurisdiction, unless the relevant professional is duly qualified, admitted and holding a current practicing certificate as a Cayman Islands attorney-at-law. Any person who is found to be practicing Cayman Islands law in contravention of the LSA commits an offence and is liable on summary conviction to a fine of one hundred thousand dollars or to imprisonment for a term of two years, or to both.

For these purposes a person is deemed to be practicing Cayman Islands law if, for or in expectation of gain or reward, the person provides legal services in respect of Cayman Islands law or in the Islands; or holds himself or herself as qualified to provide legal services in respect of Cayman Islands law or in the Islands for gain or reward. “Legal services” for these purposes means:

- a) giving legal advice or assistance;
- b) the exercise of rights of audience before a court, tribunal or inquiry;
- c) preparing a document on behalf of another person for use in a court, tribunal or inquiry;
- d) preparing an instrument governed by law that relates to real, personal or intangible property; or
- e) preparing evidence for, or giving evidence in a court or tribunal or inquiry as to the effect of law.

Notwithstanding the above, under section 24(5) of the LSA a person shall not be taken as practicing Cayman Islands law if that person carries out any of the activities set out in the schedule hereto.

For insurance industry licensees and professional service providers considering the application of the LSA in daily practice, it would be prudent to approach the definition of “legal services” as being broad in scope, with the exceptions listed in the schedule as being restrictive by comparison, given the range of sanctions that may be imposed for a breach of the LSA. By way of example, there are two exceptions under section 24(5) which often come up in the context of captive insurance companies managed by regulated Cayman Islands insurance managers, and advised by foreign legal counsel in the jurisdiction of the captive’s investors.

Section 24(5)(f) exempts a person licensed or registered under a regulatory law which includes the Insurance Act, 2010 (the “**Insurance Act**”), the Companies Management Act (2021 revision) (the “**CMA**”) and the Companies Act (2021) (the “**Companies Act**”), where that person carries out a licensed activity. This exception provides some comfort and protection for regulated insurance managers when performing activities specifically listed or contemplated under the applicable regulatory laws such as the provision of registered office services under the CMA and the associated filings which are required under the Companies Act and the Insurance Act. These activities would include, for example, the following:

- a) providing the registered office or business address;
- b) maintaining the registers and minute books of the company;
- c) making annual filings;
- d) filing statutory forms, resolutions, returns and notices;
- e) filing economic substance notifications and reports on the instruction of the client (but not advising on the law itself); and
- f) providing officers or directors for the company (such as the corporate secretary).

Conversely, pending any further judicial or legislative clarification, there is a risk that the following activities would not be subject to the exception under 24(5)(f):

- a) drafting or settling company memorandum and articles of association or amendments to those documents;
- b) drafting or settling any contractual documents governed by Cayman Islands law including shareholder agreements, participation agreements, subscription agreements, policy documentation, reinsurance agreements, novation agreements and the like; or
- c) providing advice on compliance with any Cayman Islands laws or regulations (in circumstances where regulatory compliance advice usually involves legal advice, and it may not attract legal professional privilege if it is not provided by qualified lawyers).

Section 24(5)(h) exempts a person practising law in another jurisdiction, who prepares a draft of a document or instrument to be governed by Cayman Islands law, where the document or instrument will be reviewed, settled and finalised for execution purposes by a Cayman Islands law firm or affiliate.

In the world of offshore financial services, including the insurance and captive insurance industries, situations do sometimes arise where it may be appropriate for foreign lawyers to advise on the structure, form or commercial terms of an international transaction involving a legal document which ultimately needs to be governed by Cayman Islands law and would be subject to the restrictions of the LSA. Section 24(5)(f) has been introduced to provide some protection for foreign lawyers when they work closely with Cayman Islands counsel in support of international transactions. In these circumstances, however, the LSA requires the relevant Cayman Islands law document or instrument to be “reviewed, settled and finalised for execution purposes” by a local Cayman Islands law firm or an affiliate. This is designed to discourage and prohibit the use of Cayman Islands lawyers as mere ‘letterboxes’ or ‘rubber stamps’.

The new requirements of the LSA should be a welcome development for the Cayman Islands insurance industry and the Cayman Islands legal profession. It seems likely, however, that there will be increasing regulatory scrutiny as to compliance with the LSA, as well as occasional disputes arising out of allegations relating to the unauthorized practice of Cayman Islands law. All legal, professional, and corporate service providers (and their liability insurers) should prepare accordingly.

Schedule – Section 24(5) Exceptions

- a) in a matter of a legal nature, acts on the person’s own behalf or on behalf of an entity, whether or not incorporated, in which the person has an interest or by which, in the case of an individual, other than an in-house counsel, the person is employed;
- b) as a public officer, prepares a document or instrument in the course of the person’s duties;
- c) as a director or owner of a company, acts on behalf of the company whether in relation to a document, an instrument, a proceeding or otherwise if permitted by law to do so;
- d) prepares a will that does not contain trust provisions;
- e) prepares a document relating to the sale, purchase or lease of land or premises if no mortgage, charge or other form of security interest over land is involved;
- f) as a person licensed or registered under a regulatory law, as defined in the Monetary Authority Act (2020 Revision), carries out a licensed activity;

- g) is an arbitrator or counsel brought into the Islands by an attorney-at-law to act in arbitration under the Arbitration Act, 2012;
- h) being a person practising law in another jurisdiction, prepares a draft of a document or instrument to be governed by Cayman Islands law, where the document or instrument will be reviewed, settled and finalised for execution purposes by a law firm or an affiliate;
- i) is instructed by a law firm or its affiliate to obtain evidence on behalf of a person for use in a court, tribunal or inquiry in the Islands, and where the evidence will be reviewed by a law firm or its affiliate on behalf of a mutual client;
- j) being a person practising law in another jurisdiction, is instructed by a law firm or an affiliate to assist, under the supervision of that law firm or affiliate, in the preparation of a document (other than evidence or correspondence) for use in connection with proceedings in a court, tribunal or inquiry in the Islands; or
- k) being a Queen's Counsel, or equivalent and, practising as such in any court of a jurisdiction referred to in section 32(3), instructed by a law firm or an affiliate, provides advice as to Cayman Islands law or prepares a document for use in a court, tribunal or inquiry in the Islands.

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