

EXPLANATORY MEMORANDUM TO
THE LEGAL SERVICES ACT 2007 (COMMENCEMENT NO.4,
TRANSITORY AND TRANSITIONAL PROVISIONS AND APPOINTED
DAY) ORDER 2009

2009 No. 503 (C. 34)

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the Instrument**
 - 2.1 This Instrument commences a range of provisions in the Legal Services Act 2007 ('the 2007 Act').
 - 2.2 This Instrument is made under sections 30(4), 204, 208(2) and (4) and 211(2) of the 2007 Act. These sections enable provisions in the 2007 Act to come into force on such a day as may be appointed by order of the Lord Chancellor and also enable transitory and transitional provision, necessary prior to the full regulatory regime of the 2007 Act coming into force.
 - 2.3 Of particular note is the commencement in this Order of paragraphs 81 and 82 of Schedule 16 to the 2007 Act which amend section 9 of, and introduce a new section 9A to, the Administration of Justice Act 1985 ('the 1985 Act'). These provisions will allow new types of legal practice to form, known as legal disciplinary practices ('LDPs') in which non-solicitors may have an interest and which will be approved and regulated as recognised bodies by the Law Society.
 - 2.4 A key part of the 2007 Act is to facilitate Alternative Business Structures ('ABS') which permit lawyers and non-lawyers to work together in a practice and which allow for non-lawyer ownership. In advance of full ABS, the 2007 Act amends sections 9 of, and inserts section 9A into, the 1985 Act to expand the types of bodies and ownership structures that may be approved and regulated by the Law Society.
 - 2.5 This Instrument commences provisions in Schedules 16 and 17 which amend the existing regulatory structure of the provision of legal services found in the 1985 Act, the Solicitors Act 1974 ('the 1974 Act') and the Courts and Legal Services Act 1990 ('the 1990 Act'). The amendments will:
 - 2.5.1 enable the Law Society to regulate, as recognised bodies under section 9 of the 1985 Act, legal services bodies which can provide only legal services, but may have up to 25% non-lawyer owners who must be managers of the body. Non-lawyer

managers must be individuals and must be approved as suitable by the Law Society.

- 2.5.2 amend the statutory provisions relating to the Law Society's Compensation Fund as found in the 1974 Act. This fund enables claims for compensation from a fund established and maintained by the Law Society to be made where a loss has been (or is likely to be) suffered by a person through an act or omission of a solicitor or their employee. The amendments change the way in which contributions are made to the fund and ensure that compensation claims can be made in respect of loss occasioned by solicitors and their employees.
- 2.5.3 enhance the information powers available to the Law Society under the 1974 Act. These changes will allow the Law Society to require, by notice, the production of information by solicitors, employees of solicitors, recognised bodies, employees or managers of recognised bodies or any person with an interest in a recognised body. The provisions also allow the Law Society to require a person to attend, at a time and place specified, to explain any documents or information required. They also make it an offence to falsify or conceal information required for an investigation by the Law Society.
- 2.5.4 insert a power into the 1974 Act which allows the Law Society to rebuke and fine solicitors or their employees who have failed to comply with a requirement or where incidents of misconduct are found.
- 2.5.5 amend the 1985 Act to enable the Council for Licensed Conveyancers ('the CLC') to regulate conveyancing services bodies which can provide conveyancing services and other relevant legal services, and which must have one partner, director or member who is a licensed conveyancer.
- 2.5.6 amend the 1985 Act to alter the way in which applications to practise as licensed conveyancers are made, specifically: extending the number of days the CLC has to consider applications from 21 to 42 days; removing the maximum length of time for which a licence may be granted; removing the distinction between a 'full' and 'limited' licence; allowing the CLC to levy an additional fee where an applicant has failed to submit an accountant's report on time; and allowing a licensed conveyancer to apply to the CLC to have conditions varied or removed from a licence.
- 2.5.7 amend the 1985 Act to make changes to the disciplinary action that can be taken by the CLC, specifically: extending the circumstances in which the CLC can intervene in a licensed conveyancer's practice (including extending this to acting in the interests of beneficiaries of a trust); allowing the Investigating Committee to hear and determine allegations and order fines or recover costs of investigation; removing the £3,000 limit on the Discipline and Appeals Committee's fining power; and removing the requirement that in all proceedings

the Discipline and Appeals Committee must be advised by an assessor of 10 years experience.

- 2.5.8 amend the 1985 Act to provide for members of the CLC to be appointed rather than elected or nominated.
- 2.5.9 set an appointed day for the purpose of section 30(4) of the 2007 Act. This section obliges the Board to make “internal governance rules” for the purpose of ensuring that approved regulators maintain an effective and efficient split between their regulatory and representative functions. Section 30(4) states that a date must be set for the first set of rules to be made by the Board. The appointed day is 31 December 2009.
- 2.5.10 make transitory provision to preserve certain practising rights of individuals who currently enjoy those rights by virtue of an exemption from prosecution for committing an offence under sections 22 and 23 of the 1974 Act. The transitory provision replaces “officer” with “manager” and will ensure that employees or officers of recognised bodies do not lose their practising rights by becoming a manager.

- 2.6 This Instrument also makes transitory provision to ensure that certain provisions will have effect prior to the 2007 Act being fully commenced. For example, references to “authorised person” are given transitional definition by virtue of paragraph 15 of Schedule 22, until such time as the term is commenced for the purposes of/active in the new authorisation scheme envisaged by Part 1, including section 13 and 18, of the 2007 Act is commenced.

3. Matters of special interest to the Joint Committee on Statutory Instrument

- 3.1 None

4. Legislative Context

- 4.1 This Instrument commences provisions of the 2007 Act which received Royal Assent on 30 October 2007. To date, three commencement orders have been made under sections 204, 208 and 211 of the 2007 Act. These were the Legal Services Act 2007 (Commencement No. 1 and Transitory Provisions) Order 2008 (S.I. 2008/ 222), the Legal Services Act 2007 (Commencement No. 2 and Transitory Provisions) Order 2008 (S.I.2008/1436) and the Legal Services Act 2007 (Commencement No. 3 and Transitory Provisions) Order 2008 (S.I.2008/3149).
- 4.2 The Legal Services Act 2007 (Functions of a Designated Regulator) Order 2008 (S.I. 2008/3074) made amendments to section 9A of the 1985 Act (as inserted by paragraph 82 of Schedule 16 to the 2007 Act) in order to remove an unintended restriction on the number of tiers of corporate ownership permissible for a law firm. This Instrument will

commence paragraph 82 of Schedule 16 to the 2007 Act (and therefore section 9A of the 1985 Act) as amended by S.I 2008/3074.

- 4.3 This Instrument is made under sections 30(4), 204, 208(2) and (4) and 211(2) of the 2007 Act which enable provisions in the 2007 Act to come into force on such day as may be appointed by order of the Lord Chancellor; enable transitory and transitional provision, necessary prior to the full regime of the 2007 Act coming into force; and permit the Lord Chancellor to appoint a day by which rules must be made under section 30(4) of the 2007 Act.

5. Territorial Extent and Application

- 5.1 This Instrument applies to England and Wales

6. European Convention on Human Rights

- 6.1 As the Instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- ***What is being done and why?***

- 7.1 The 2007 Act reforms the way in which legal services are regulated in England & Wales. The aims of the Act are to simplify the existing regulatory framework by establishing, as an oversight regulator, the Legal Services Board, and improving consumer confidence and the way in which complaints are dealt with by establishing an independent complaints handling body; the OLC.
- 7.2 The 2007 Act also introduces ABS (see Part 5 of the 2007 Act) which permit lawyers and non-lawyers to work together in multi-disciplinary practices and which allow for external investment. This will be subject to a licensing regime set out by the Board.
- 7.3 The provisions in the 2007 Act permitting full ABS are not anticipated for commencement before the Legal Services Board is fully operational, expected in 2010. This Instrument commences provisions in Schedule 16 to allow the Law Society to begin regulating a limited form of ABS; legal services bodies (also known as Legal Disciplinary Practices or LDPs). At present, law firms must be wholly owned by lawyers and there are restrictions on the type of practice through which solicitor services may be provided. For example, it is not currently possible for a solicitor and a legal executive to enter into partnership together.
- 7.4 Schedule 16 amends the existing regulatory remit of the Law Society and the Solicitors Disciplinary Tribunal (SDT) to include non-lawyers

who are involved in a legal services body and to employees of solicitors and recognised bodies. In addition, Schedule 16 permits “firm-based” regulation by the Law Society. This extends the application of the Law Society’s regulatory powers to a firm as an entity in addition to the regulation of individual solicitors.

- 7.5 Part of this extension of the Law Society’s regulatory powers gives them the ability to rebuke or fine solicitors or employees for matters of less serious misconduct. The Law Society have an obligation to consult the SDT when making rules about which matters it can and cannot determine, and those rules must be concurred by both the Lord Chancellor and the Master of the Rolls. Once the Legal Services Board is fully operational, it will be the body responsible for approving the rules and the concurrence of the Lord Chancellor and the Master of Rolls in this respect will cease to have effect.
- 7.6 This Instrument also commences paragraphs in Schedule 17 to allow the CLC to regulate conveyancing services bodies. There are currently no statutory provisions relating to the ability of the CLC to authorise externally owned bodies, so this Instrument makes amendments to sections 32 and 32A of the 1985 Act in order to clarify the ownership structures that the CLC is permitted to regulate under the 1985 Act and 2007 Act. Conveyancing services bodies can provide conveyancing and other legal services, and need only have one partner, director or member who is a licensed conveyancer.
- 7.7 The Instrument also updates the statutory framework within which the CLC operates. This has not been significantly modified since the commencement of the 1990 Act. The 2007 Act provided an opportunity to modernise and streamline the statutory powers under which licensed conveyancers are regulated. Changes to the procedure for applying for licences, alterations to the CLC’s disciplinary powers and amendments to the way the CLC’s members are appointed all fall within this category.
- 7.8 The Order also ensures that persons who are currently able to carry out certain activities under supervision in recognised bodies in section 9 of the 1985 Act, do not lose their ability to do so during the transitional period. At present, any unauthorised person carrying out probate activities or preparing certain instruments relating to estates and land, commits an offence under sections 22 and 23 of the 1974 Act. However, sections 22 and 23 contain an exemption from prosecution for persons who are carrying out those services under the direct supervision of, or under the direction of, a person who is authorised to carry out those services. Section 9 of the 1985 Act applies that exemption to persons in a recognised body. When amended by this order, recognised bodies under section 9 will also include managers, so this order applies the sections 22 and 23 exemption to those managers.

- **Consolidation**

7.9 This Instrument commences provisions in the 2007 Act and there are therefore no issues relating to consolidation.

8. Consultation outcome

8.1 The 2007 Act is the result of extensive consultation both before and during the Parliamentary process. The key groups that were consulted were consumer organisations, regulatory bodies, other professional representative bodies and other key stakeholders, such as the Offices of the Legal Services Ombudsman and Legal Services Complaints Commissioner. In particular, the Government consulted following the 2001 report on competition in the professions by the Office of Fair Trading¹, and published a report into competition and regulation in the legal services market.² Further to that, in 2003, Sir David Clementi was appointed by the Government to conduct an independent review of the regulation of legal services³, which was the basis for the proposals set out in the Government's White Paper, *The Future of Legal Services: Putting Consumers First*, published in October 2005. A summary of the responses to the White Paper are included in section 2 of the Regulatory Impact Assessment ('RIA') which is attached to this memorandum. A supplementary RIA was prepared in June 2007, updating and supplementing the full Impact Assessment of November 2006.

8.2 The draft Legal Services Bill was published in May 2006 and was subject to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament. The Joint Committee reported in July 2006, and the Government published its response to this in September of the same year.

8.3 The Secretary of State's Consumer Advisory Panel was also established in 2005 to advise on the development of the 2007 Act, and it continues to advise on the implementation of the legislation. In addition, the Government continues to consult with relevant stakeholders during the commencement of the legislation and has set up the Implementation Working Group (established in April 2006) which includes representatives from existing legal regulators and consumer groups, amongst others.

¹ Office of Fair Trading, 2001, *Competition in the Professions – A Report by the Director General of Fair Trading*

² Department for Constitutional Affairs, 2003, *Competition and Regulation in the Legal Services Market – A Report Following the Consultation “In the Public Interest?”*

³ Clementi, Sir David, 2004, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*

8.4 The Solicitors Regulation Authority has undertaken a series of consultations relating to the provisions in this Instrument.

8.5 These consultations, and any relevant responses, can be found here: <http://www.sra.org.uk/sra/legal-services-act/lisa-feedback.page>.

8.6 The CLC have consulted on their draft Corporate Strategy for 2009-2014. This consultation incorporates the impact and effect the 2007 Act is likely to have on licensed conveyancers in the coming years and can be found here:
<http://www.conveyancer.org.uk/yogiP/UploadFiles/DraftCorporateStrategy2009Consultation.pdf>

9. Guidance

9.1 The Instrument relates to an order that amends the statutory framework of the Law Society and the CLC, allowing these bodies, amongst other things, to regulate new forms of business structures.

9.2 The Law Society and Solicitors Regulation Authority will be issuing their own guidance to members about the effect of the new provisions and accompanying rules.

10. Impact

10.1 A full Regulatory Impact Assessment ('RIA') was prepared for the Legal Services Bill in November 2006, and a supplementary memorandum was published in June 2007. The full RIA can be found at <http://www.dca.gov.uk/risk/ria-legal-services.pdf> and the supplementary memorandum can be found at <http://www.justice.gov.uk/docs/RIA-Supplement-v021.pdf>. The full RIA includes sections 4-6, which examine the options considered and our reasoning for the final recommendations which were brought forward in the 2007 Act.

10.2 Chapter 5 of the RIA contains a benefits and costs analysis for legal services bodies and in particular paragraphs 5.21-5.26 contain the anticipated benefits of allowing LDPs to form. These include increased access to justice, more choice for consumers and greater opportunities for people from under-represented groups to become part-owners of law firms.

11. Regulating small business

11.1 This Instrument relates to recognised bodies, which include small businesses. Section 9 of the Administration of Justice Act amends the scope of bodies that may be recognised by the Law Society, however there is no obligation for those bodies to change the way in which they

operate. Further, this Instrument makes similar provision in respect of the CLC's regulation of conveyancing services bodies.

- 11.2 In developing the wider reforms of the 2007 Act, the regulation of small business was considered in detail. Section 7 of the full RIA sets out the Small Firms Impact Test, in particular relating to the Board and ABS. In developing the Impact Test, the Small Business Service and Federation of Small Businesses were consulted and were content with the approach.

12. Monitoring & review

- 12.1 The Lord Chancellor and the Master of the Rolls will be responsible for approving or concurring certain rules formulated by powers commenced by virtue of this Instrument.

- 12.2 The Legal Services Board will ultimately have oversight functions in respect of the Law Society and CLC. Prior to the Legal Services Board assuming its full oversight functions under the 2007 Act the impact and effect of these reforms will be monitored by the Department and relevant stakeholders will be consulted throughout.

13. Contact

Malcolm Lusby at the Ministry of Justice (Tel: 020 3334 4257 or email: malcolm.lusby@justice.gsi.gov.uk) can answer any queries regarding the Instrument.