

**EXPLANATORY MEMORANDUM TO**  
**THE LEGAL SERVICES ACT 2007 (APPROVED REGULATORS) ORDER 2009**

**2009 No. 3233**

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 modifies the list of approved regulators in the table in paragraph 1 of Schedule 4 to the Legal Services Act 2007 (the 2007 Act) to include the Institute of Chartered Accountants of Scotland (ICAS) and the Association of Chartered Certified Accountants (ACCA) in respect of probate activities. It also adds probate activities to the list of reserved legal activities which the Council for Licensed Conveyancers (CLC), already included in the list as an approved regulator, can regulate. Schedule 5 to the 2007 Act is also amended so that members of ICAS, the CLC and ACCA can continue to provide probate activities as authorised persons under the 2007 Act.
  - 2.2 These amendments will ensure that those granted exemptions to provide probate services by ICAS, the CLC and ACCA will be able to continue to provide probate activities to the public under the supervision of the new oversight regulator, the Legal Services Board (LSB), when Schedules 4 and 5 to the 2007 Act are commenced in the sixth Legal Services Act commencement order, anticipated in early 2010.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None
4. **Legislative Context**
  - 4.1 This instrument is made under section 208(2) of, and paragraph 5(2) and (5)(b) of Schedule 22 to, the 2007 Act. Section 208(2) allows the Lord Chancellor to make by order any supplementary, incidental or consequential provision and any transitory, transitional or saving provision, necessary prior to the full regime provided for by the 2007 Act coming into force. Paragraph 5(2) of Schedule 22 allows the Lord Chancellor to make an order to modify the table in paragraph 1 of Schedule 4 to the 2007 Act to insert new bodies to the list of approved regulators or add new reserved legal activities to the relevant approved regulator already listed in the table. Paragraph 5(5)(b) allows that any order made under paragraph (5)(2)(b) may modify Part 1 of Schedule 5 to ensure that those individuals authorised to provide probate services by the bodies can continue to exercise those rights when the new regime comes into force.
  - 4.2 The Lord Chancellor makes this instrument having made two previous affirmative resolution Orders: The Probate (Approved Bodies) Order 2008 (S.I. 2008/1865) and The Probate (Approved Bodies) Order 2009 (S.I. 2009/1588) under section 55(3) of, and paragraph 4 of Schedule 9 to, the Courts and Legal Services Act 1990 (the CLSA). The former designates ICAS and the CLC and

the latter the ACCA as approved bodies for the purposes of exempting their members to provide probate activities for a fee.

- 4.3 This instrument is linked to the implementation of the new regulatory regime being introduced in the 2007 Act under which the LSB, the new oversight regulator, will assume its statutory functions; the approved regulators will be recognised in statute; and persons will only be able to carry on reserved legal activities if they are entitled to do so (by being exempt or being authorised by the approved regulators).

## **5. Territorial Extent and Application**

- 5.1 This instrument applies to work undertaken by members of ICAS, the CLC and ACCA in England and Wales.

## **6. European Convention on Human Rights**

- 6.1 This instrument is subject to negative resolution procedure although it amends primary legislation as a consequence of provisions in the two earlier orders referred to in paragraph 4.2. The amendments made reflect the policy intention of the 2007 Act.

- 6.2 The Parliamentary Under Secretary of State has made the following statement regarding Human Rights:

In my view the provisions of the Legal Services Act 2007 (Approved Regulators) Order 2009 are compatible with the Convention rights.

## **7. Policy background**

- *What is being done and why*

- 7.1 The 2007 Act makes three fundamental changes to the way in which legal services are regulated in England and Wales. First, it establishes the LSB, an oversight regulator whose duty is to ensure the regulatory objectives established under the Act are adhered to by all in the legal profession. Second, it establishes the Office for Legal Complaints, an independent complaints handler that will deal with all complaints about the services provided by legal professionals. Finally it allows for the establishment of alternative business structures, through which lawyers and non-lawyers can work together in entities that provide legal and non-legal services.

- 7.2 Since the 2007 Act was passed, three organisations have become approved bodies for the purposes of section 55 of, and Schedule 9 to, the CLSA. Section 55 allows bodies approved by the Secretary of State to exempt their members from the prohibition imposed by section 23 of the Solicitors Act 1974, thereby enabling them to provide probate services for a fee. ICAS, the CLC and ACCA have successfully completed the application process and received Parliamentary approval. ICAS and the CLC became approved bodies with effect from 1 August 2008 and ACCA became an approved body with effect from 1 August 2009.

- 7.3 Paragraph 5 of Schedule 22 to the 2007 Act provides a mechanism by which those organisations which received authorisation between the 2007 Act receiving Royal Assent and the new regulatory regime coming into force are incorporated into the new regime, subject to the oversight of the LSB. The new regulatory regime is anticipated to come into force in early 2010, when the sixth Legal Services Act commencement order comes into force.
- 7.4 Under the new regulatory regime persons may only carry on one or more of the reserved legal activities if entitled to do so (either by being authorised by an approved regulator or exempt). The list of approved regulators and the reserved legal activities which they can authorise their members to carry out under the new regime are set out in the table at paragraph 1 of Schedule 4 to the 2007 Act. Schedule 5 to the 2007 Act makes provision for members of authorised bodies (either individuals or entities) to continue to provide those reserved legal services under the new regime as authorised persons.
- 7.5 This instrument therefore updates the 2007 Act as follows. ICAS and ACCA are added to the table of approved regulators set out in paragraph 1 of Schedule 4 in respect of probate activities only. The entry for the CLC, which is already listed in the table in paragraph 1 of Schedule 4 as an approved regulator, is amended to include probate activities in the list of reserved legal activities which it can authorise its members to carry out. This ensures that ICAS, the CLC and ACCA are subject to the oversight of the LSB and must comply with their rules and regulations in respect of the provision of probate services, in line with other approved regulators.
- 7.6 Part 1 of Schedule 5 to the 2007 Act is also amended. The provisions in Part 1 of Schedule 5 are intended to ensure that where the appropriate authorised body under the CLSA becomes an approved regulator under the 2007 Act, any rights granted by the body under the CLSA prior to the coming into force of the relevant provisions of the 2007 Act continue under the new regime. This ensures that the regulatory bodies do not have to grant individual members new authorisations to carry on these activities. When the 2007 Act was passed, no bodies were approved to grant exemptions under section 55 of, and Schedule 9 to, the CLSA, so no specific transition provisions were needed in relation to probate rights. Schedule 5 is now amended to include transition provisions for ICAS, the CLC and ACCA so that they do not need to re-grant authorisation to their members in order for them to continue to provide probate activities under the 2007 Act.
- 7.7 Transitional provisions are also being made to reflect the policy of the 2007 Act, which is that individuals and the bodies in which they work must either be authorised or exempt persons. Part 1 of Schedule 5 makes provisions for individual members of ICAS, the CLC and ACCA to be authorised to provide probate activities but does not do so for the bodies in which they operate. If no provision were made to this effect, then the authorised members of ICAS, the CLC and ACCA would not be able to continue to provide probate activities in the same way as they currently do, thereby restricting their ability to provide probate activities in the new regulatory regime.
- 7.8 The aim of this Instrument is not to restrict the way in which members of ICAS, the CLC and the ACCA operate, but to allow them to continue to provide probate activities by making similar provisions to existing approved regulators. The transitional provisions included in the Order, therefore make the bodies in

which authorised members of ICAS, the CLC and ACCA work “exempt persons” which means that the bodies can provide probate activities but only if they do so by virtue of an employee being authorised. To provide probate services whilst neither authorised nor exempt would mean that they were committing an offence under section 14 of the 2007 Act. These transitional provisions will commence when Schedule 5 is commenced and end by Order of the Lord Chancellor, by which time the bodies will need to be authorised by an approved regulator in order to continue to provide probate activities in the new regulatory regime.

- **Consolidation**

7.9 There are no consolidation issues relating to this Order.

## **8. Consultation outcome**

8.1 This Instrument is being made as a consequence of the Secretary of State approving three bodies under section 55 of and Schedule 9 to the CLSA. The applications by ICAS, the CLC and ACCA were subject to the statutory approval system set out at Schedule 9 to the CLSA, under which the statutory consultees (the Legal Services Consultative Panel and the President of the Family Division) provided advice to the Secretary of State. The applications were subsequently debated and approved by Parliament. Paragraph 5 of Schedule 22 to the 2007 Act was debated during the Parliamentary passage of the 2007 Act.

8.2 Before section 55 of, and schedule 9 to, the CLSA was commenced in December 2004, the Government consulted stakeholders in the consultation document “In the Public Interest”. 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 Trading<sup>1</sup>, and published a report into competition and regulation in the legal services market.<sup>2</sup> Further to that, in 2003, Sir David Clementi was appointed by the Government to conduct an independent review of the regulation of legal services<sup>3</sup>, 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’). A supplementary RIA was prepared in June 2007, updating and supplementing the full Impact Assessment of November 2006.

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

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

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

## **9. Guidance**

- 9.1 ICAS, the CLC and ACCA have been consulted and fully engaged in the preparation of this Instrument. During the application process Ministry of Justice officials have made all three bodies aware of the statutory requirements that they will be expected to fulfil as an approved body under the current regulatory framework, and as an approved regulator under the future regulatory framework supervised by the LSB.

## **10. Impact**

- 10.1 ICAS, the CLC and ACCA have been made aware of the impact of becoming an approved regulator, in advance of this instrument being prepared. The regulatory arrangements and costs involved for approved regulators were debated as part of the 2007 Act and they chosen to become approved regulators, subject to the supervision of the LSB. The LSB has also been actively engaging with the current legal professional bodies since its establishment in early 2009 in the development of its rules, regulations and procedures, so that all the legal professional bodies, including the newly approved bodies, know what arrangements they will need to have in place in order to comply with the requirements of the new regime set out in the 2007 Act.
- 10.2 A Regulatory Impact Assessment was completed for the implementation of section 55 of, and Schedule 9 to, the CLSA in December 2004. However, following criticism in the Commons debate on “The Probate (Approved Bodies) Order 2009” that some time has elapsed the initial impact assessment was undertaken, a review of this impact assessment is currently being undertaken. The original impact assessment estimated that new providers would secure less than 5% of the probate market over the next decade. Since section 55 was commenced and of the three bodies approved, neither the Institute of Chartered Accountants of Scotland, nor the Association of Chartered Certified Accountants have authorised probate licenses to their members as yet. It is expected that their members will not receive authorisation until 2010. The CLC has authorised some 26 members out of a possible 1034 licence holders. Therefore the impact to date has been minimal.
- 10.3 A Regulatory Impact Assessment was prepared for the Legal Services Bill in November 2006 and a supplementary memorandum was published in June 2007, which showed the impact of the new regulatory regime on existing and new approved regulators. 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/TIA-supplement-y021.pdf>.

## **11. Regulating small business**

- 11.1 This legislation applies to small business since members of the new approved regulators will be subject to the same costs and regulations as members of existing regulators under the 2007 Act.
- 11.2 Section 7 of the full RIA to the Legal Services Bill set out the Small Firms Impact Test. In developing the Impact Test, the Small Business Service and Federation of Small Businesses were consulted.

## **12. Monitoring & review**

- 12.1 The LSB will be responsible for ensuring that the regulators of legal services, including ICAS, the CLC and ACCA, who will remain responsible for day-to-day regulation, act to promote the eight regulatory objectives provided for in the 2007 Act. It has a range of enforcement powers that can be used to hold them to account if they act in contravention of these objectives.

## **13. Contact**

- 13.1 Dawn Sanderson at the Ministry of Justice Tel: 020 3334 4269 or email: [dawnm.sanderson@justice.gsi.gov.uk](mailto:dawnm.sanderson@justice.gsi.gov.uk) can answer any queries regarding the Instrument.