

ACCESS TO JUSTICE ACT 1999

EXPLANATORY NOTES

B.

PROVISION OF LEGAL SERVICES (SECTIONS 35-53)

Commentary

The Legal Services Consultative Panel

157. **Section 35: Replacement of ACLEC by Consultative Panel.** This section abolishes the Lord Chancellor's Advisory Committee on Legal Education and Conduct, and replaces it with a new Legal Services Consultative Panel.
158. The Lord Chancellor's Advisory Committee (ACLEC) was created by section 19 of the Courts and Legal Services Act 1990. ACLEC's replacement, the Legal Services Consultative Panel will differ from ACLEC in a number of ways but will continue to fulfil much of ACLEC's role. The Act makes no provision for the number of the Panel's membership, which will be appointed by the Lord Chancellor. The Lord Chancellor will be required to have regard to criteria setting out appropriate knowledge and experience among the Panel's membership (specified in new section 18A(2) of the 1990 Act as inserted by this section).
159. The Panel's general duty will be to provide the Lord Chancellor with any advice he requires about legal services, legal education and related matters. It will have an active role in assisting in the maintenance and development of standards in the education, training and conduct of persons offering legal services. The Panel will be required to draw up its own programme of work on these topics, to be agreed with the Lord Chancellor, and will be able to make recommendations on particular issues when appropriate. The Panel will also carry out a significant role in the system of statutory approvals set out in Schedule 5 (see below), which inserts a new Schedule 4 into the 1990 Act.
160. This section also provides that the Panel cannot be sued for defamation in respect of any advice it publishes. This is to ensure that the Panel is able to give frank advice to the Lord Chancellor, and that it need not hesitate to point out, for example, if a body applying for authorised status under the 1990 Act is corrupt or incompetently run, and therefore unsuitable to be designated an authorised body.

Rights of audience and rights to conduct litigation

161. **Section 36: Barristers and solicitors.** This section provides that every barrister and every solicitor has a right of audience before every court in relation to all proceedings. These general rights were not present for solicitors in the 1990 Act. The section also restates the current position, that all solicitors have rights to conduct litigation before all courts. These rights are not unconditional; in order to exercise them, solicitors and barristers must obey the rules of conduct of the professional bodies and must have met any training requirements that may be prescribed (such as the requirement to

complete pupillage in the case of the Bar, or to have obtained a higher courts advocacy qualification in the case of solicitors who wish to appear in the higher courts).

162. **Section 37: Rights of audience: employed advocates.** This section provides that Crown Prosecutors and other employed advocates (whether solicitors or barristers) should enjoy the same rights of audience as if they were in private practice. It does so by invalidating any professional rules that discriminate against qualified advocates on the grounds of their employment status. It does not invalidate professional rules which currently prevent employed advocates from exercising rights of audience on behalf of their employers' clients or other members of the public (although it does not prevent professional rules from being amended to allow this).
163. **Section 38: Employees of Legal Services Commission.** This section ensures that advocates and litigators employed by the Legal Services Commission, or by bodies established by the Commission to provide services, can provide their services directly to members of the public and without the need to receive instructions through a solicitor or other person acting for the client. Without this section, they might be prevented from doing so by professional rules.
164. **Section 39: Rights of audience: change of authorised body.** This section provides that an advocate who has been granted and was entitled to exercise a right of audience by one authorised body, for example the Bar Council, should retain that right if he becomes a member of a different authorised body, for example the Law Society. Without this section, they might be prevented from doing so by professional rules.
165. **Section 40: Rights to conduct litigation: barristers and legal executives.** This section gives the General Council of the Bar and the Institute of Legal Executives the power to grant their members rights to conduct litigation. There will be no requirement to grant such rights and it would be a matter for the authorised bodies to propose, subject to approval under the provisions contained in Schedule 5, whether and in what form such rights might be granted.
166. **Section 41/Schedule 5: Authorised bodies: designation and regulations and rules.** **Section 41** gives effect to Schedule 5 which replaces sections 29 and 30 of, and Schedule 4 to, the Courts and Legal services Act 1990. The new Schedule 4 contains simplified procedures by which the Lord Chancellor may:
- authorise bodies to grant rights of audience and rights to conduct litigation;
 - approve applications by such authorised bodies to alter their qualification regulations or conduct rules; and
 - revoke any authorisation of a body to grant rights of audience or rights to conduct litigation.
167. New Schedule 4 also gives the Lord Chancellor a new power to alter the qualification regulations or rules of conduct of an authorised body by order.
168. The existing procedures for approving applications by bodies for authority to grant rights of audience or rights to conduct litigation, and for approving applications by authorised bodies to alter their qualification regulations or conduct rules, have proved slow and convoluted (see paragraph 151 above).
169. The new procedures do not contain the existing requirement for each of the designated judges to approve an application before it can succeed, although the Lord Chancellor must seek, and have regard to, their advice. An applicant body will first submit its application to the Lord Chancellor. In the case of an application to become an authorised body, the Lord Chancellor must consult the Legal Services Consultative Panel (established by section 35), the Director-General of Fair Trading (DGFT), and the designated judges. In the case of an application to amend an authorised body's regulations or rules, the Lord Chancellor will decide whether he needs to consult the

Panel and/or the DGFT, but he will be required to consult the designated judges. He may not refuse an application without having consulted the Panel. As now, new authorised bodies will be designated by Order in Council, subject to Parliamentary approval by the affirmative resolution procedure.

170. The Lord Chancellor currently has power to revoke a body's authorisation, although this has never been used. This power only applies to those bodies designated by Order in Council (currently only the Institute of Legal Executives). At present, if the Lord Chancellor believes there are grounds for revoking authorisation, he must seek ACLEC's advice. (ACLEC may also advise the Lord Chancellor on its own initiative to revoke an authorisation.) The Lord Chancellor must then consult the designated judges, each of whom must approve any proposed revocation.
171. The Act amends the revocation procedure to remove the requirement for each of the designated judges to approve any proposed revocation before an Order in Council can be made, and to refer to the Panel rather than ACLEC. The Lord Chancellor will also be required to obtain the advice of the DGFT. An Order in Council revoking a body's authorisation will continue to be subject to Parliamentary approval by affirmative resolution.
172. The Schedule will confer on the Lord Chancellor a new power to amend the qualification regulations or rules of conduct of an authorised body by order, if he considers that they place unreasonable restrictions on rights of audience or rights to conduct litigation, or the exercise of those rights. He will be required to consult the Panel, the DGFT and the designated judges before doing so; and his order will be subject to Parliamentary approval by the affirmative resolution procedure.
173. **Section 42: Overriding duties of advocates and litigators.** This section imposes on advocates and litigators a statutory duty to the court to act with independence in the interests of justice; and a duty to comply with their professional bodies' rules of conduct. Those duties override any other civil law obligation which a person may be under, including the duty to the client or a contractual obligation to an employer or to anyone else. A barrister, solicitor or other authorised advocate or authorised litigator must refuse to do anything required, either by a client or by an employer, that is not in the interests of justice (eg. suppress evidence). The purpose of this section is to protect the independence of all advocates and litigators.
174. **Section 43/Schedule 6: Minor and consequential amendments.**Section 43 gives effect to Schedule 6 which makes minor and consequential amendments to other Acts. Paragraphs 1 to 3 of the Schedule provide that where an alteration to the Law Society's rules has been approved by the Lord Chancellor under the new procedure which will be inserted into the Courts and Legal Services Act 1990, the alteration concerned needs no further approval under the Solicitors Act 1974. Paragraph 5 gives the Lord Chancellor a new power to impose reasonable time limits on the giving of advice under the 1990 Act; this is in order to avoid the delays which have affected some applications for the approval of rule alterations under the current procedure. The Schedule makes several amendments which are intended to improve and clarify the drafting of the 1990 Act, in particular it redefines 'right of audience' and 'right to conduct litigation' in order to reflect the fact that it is possible to have a right in principle which cannot be exercised in practice.
175. **Part III of Schedule 14** makes transitional provisions. Paragraph 13 enables the Lord Chancellor by order to make provisions in connection with the abolition of ACLEC. Paragraphs 14 and 15 provide that the existing rules and regulations of the Bar Council and the Law Society are deemed to have been approved, and that all existing barristers and solicitors are deemed to have been granted full rights of audience before all courts on their call or admission to the profession. Paragraph 16 preserves the effect of section 83 of the Supreme Court Act 1981, which enables solicitors who have not obtained the Law Society's higher courts qualifications to exercise certain rights of audience before the Crown Court when it sits in areas specified in directions by the Lord

Chancellor. Paragraph 17 provides that Orders in Council designating other authorised bodies (for example, the Institute of Legal Executives), and any alterations made in the rules of such bodies which have been approved under the current provisions of the Courts and Legal Services Act 1990 will continue to have effect once those provisions have been replaced.

Barristers and solicitors

176. **Section 44: Barristers employed by solicitors etc.** This section enables a barrister employed in a solicitors' firm to provide legal services, including full rights of audience, direct to his employer's clients. At present, solicitors employed by firms of solicitors are treated by the Law Society's rules as being in private practice. They may therefore offer their services to the public and, if they have the necessary qualifications, may exercise full rights of audience.
177. In contrast, barristers employed by firms of solicitors are classified under Bar Council rules as "non-practising". This means that they may offer limited legal services to members of the public but they have no rights of audience in any court under the Bar's rules, no matter how well qualified they are, and no matter how many years they may have spent as barristers in private practice.
178. **Section 44** disapplies Bar Council rules which impose a prohibition or limitation on the provision of legal services by barristers employed by solicitors (or other authorised litigators). It also provides that barristers employed by solicitors etc. are able to provide legal services directly to the public, without the need to receive instructions through a solicitor or other person acting for the client.

By virtue of section 40, the Institute of Legal Executives is authorised to grant its members rights to conduct litigation. It is possible that others, such as Patent Agents, may become authorised litigators in future.

179. **Section 45: Fees on application for appointment as Queen's Counsel.** This section provides for the Lord Chancellor to introduce a fee, payable by applicants for the rank of Queen's Counsel, to meet the cost of the appointment system.
180. Currently, the only power to charge a fee in relation to Queen's Counsel relates to the Crown Office and its costs. These costs, which in 1999 were about £10,000, are limited to the actual grant of Letters Patent to successful applicants.
181. However, most of the cost of the appointment system relates to the work involved in processing applications and providing feedback to unsuccessful candidates who request it. Indeed, most applications are unsuccessful - during the competition for 1998/99, only 69 of 553 applications were successful. Providing feedback is an increasing burden; so far, over twice the number of unsuccessful applicants in the 1998/99 competition have requested it, as in the whole of the previous year.
182. Handling the applications and giving feedback to applicants, many of whom have applied on previous occasions, is a time-consuming process, costing about £185,000 in 1998/99. The Government intends to set a fee of £335 for the 1999/2000 competition and, subject to any unexpected changes in the cost of running the competition or the number of applicants, to review that figure every three years.
183. **Section 46: Bar practising certificates.** This section enables the Bar Council to require barristers to hold a certificate in order to practise, and to charge for those certificates. At present the Bar Council has no power to levy a compulsory subscription from its members. The Government considers it right in principle that a regulatory body should be able to charge fees to those who benefit from its regulation.
184. **Section 46** enables the Bar Council to make rules prohibiting barristers from practising unless authorised by a practising certificate. The rules could require the payment of fees to the Bar Council for the issue of the certificates; these fees could vary according

to the circumstances of the individual barrister, for example whether he or she was employed or in private practice. The Bar Council's rules on practising certificates have to be approved by the Lord Chancellor.

185. Subsection (2)(b) provides that the total amount raised by the Bar Council from the issue of practising certificates should not exceed that applied by the Council for the purposes of the regulation, education and training of barristers. The Government does not believe that barristers should be obliged to pay subscriptions for other non-regulatory functions which they may not support. Subsection (3) gives the Lord Chancellor, after consulting the Bar Council, power to make an order subject to Parliamentary approval under the affirmative resolution procedure, to extend the purposes for which the Council might apply money generated from practising certificates.
186. **Section 47: Fees for solicitors' practising certificates.** This section enables the Lord Chancellor, after consulting the Master of the Rolls and the Law Society, to make an order amending the Solicitors Act 1974 to limit the purposes for which the Law Society may use its income from practising certificate fees. The use of fees could be limited solely to the regulation, education and training of solicitors, or could include any other purposes that the Lord Chancellor considers appropriate. Any order would require an affirmative resolution of both Houses of Parliament. The Law Society already has a power under section 11 of the 1974 Act to charge compulsory fees for the issue of practising certificates. At present, the use the Society may make of this income is not restricted. The Government has announced that it will not restrict the purposes for which the Law Society may use its income from practising certificate fees for at least 18 months after Royal Assent.
187. **Section 48/Schedule 7: Law Society's powers in relation to conduct of solicitors etc.**Section 47 gives effect to Schedule 7 which extends the powers of the Law Society in relation to the practice, conduct and discipline of solicitors and clerks.
188. **Paragraph 1** amends section 31 of the Solicitors Act 1974 which gives the Law Society the power to make rules as to professional practice, conduct and discipline. This amendment will give the Society the power to monitor compliance by solicitors with the rules made under this section whether or not there has been a complaint about a particular case.
189. **Paragraph 3** inserts a new section 33A into the Solicitors Act which will allow the Law Society to make rules, with the concurrence of the Master of the Rolls, requiring solicitors to provide details of bank accounts operated in connection with their practice or any trust of which they are or were a trustee. Currently, the Society only has the power to make rules concerning client accounts.
190. **Paragraph 6** will allow the Law Society to close down a solicitors' firm that has been the subject of frequent and serious complaints about inadequate professional service. At present, the Society can only do this in cases of dishonesty or financial impropriety.
191. **Paragraph 7** concerns non-qualified employees of solicitors found guilty of dishonesty. It will allow the Law Society and the Solicitors Disciplinary Tribunal to order that such a person may not be employed by any solicitors' firm. There would be right of appeal against such an order made by the Society to the Tribunal. There is also a new power allowing the Society to direct such a person to pay towards the costs of investigating the matter.
192. **Paragraph 11** amends section 44B of the Solicitors Act 1974 which gives the Law Society the power to examine solicitors' files. At present, the Society can only require access to a solicitor's papers where a complaint about a particular case has been received. However, the Society often receives general information about unsatisfactory solicitors' firms. Paragraph 11 will allow the Society (in the shape of the OSS) to require solicitors to produce documents and files when there are reasonable grounds to suspect

that there has been professional misconduct by a solicitor or a breach of the Society's rules, or the professional services provided by a solicitor are not of an adequate quality.

193. **Paragraph 13** gives the Law Society a new power to direct solicitors to pay any costs incurred during the course of an investigation of professional misconduct or failure to comply with rules. Currently the Society has power to order costs against solicitors only in cases of inadequate professional service, not in more serious disciplinary matters.
194. The other provisions of Schedule 7 make equivalent amendments to the Administration of Justice Act 1985 (incorporated practices), and other minor, technical amendments to the 1974 and 1985 Acts.

Legal Services Ombudsman

195. **Section 49: Powers of Ombudsman.** This section extends the powers of the Legal Services Ombudsman. It will allow her to make binding orders that a professional body or individual practitioner pay compensation or costs to a complainant. At present, she can only make recommendations. Before such an order can be made, the body or practitioner will be entitled to appear before the Ombudsman to make representations.
196. **Section 50: Funding of Ombudsman by professional bodies.** This section empowers the Lord Chancellor to order a professional body to make an appropriate contribution towards the cost of the Legal Services Ombudsman's office. At present, these costs are met by the taxpayer. The usual practice elsewhere is for ombudsman schemes to be financed directly by the professions concerned. However, the Government does not intend to use this power unless or until a Legal Services Complaints Commissioner is appointed (see the commentary below on section 51).

Legal Services Complaints Commissioner

197. **Section 51: The Commissioner.** This section provides for the appointment of a Legal Services Complaints Commissioner and gives effect to **Schedule 8 (Legal Services Complaints Commissioner)** which makes detailed provision about the new post. These largely mirror the provisions for the post of Legal Services Ombudsman (in Schedule 3 to the Courts and Legal Services Act 1990) so that the two posts could be combined, if considered appropriate. The Government has announced that it does not intend to appoint a Commissioner for at least 18 months after Royal Assent, and then only if a professional body is fulfilling its responsibility for complaints inadequately. Paragraph 10 of Schedule 8 allows for the appointment of an Acting Commissioner, for example to undertake particular functions if there might be a conflict of interest if the Commissioner undertook them.
198. **Paragraphs 1 & 2** of Schedule 8 allow the Commissioner to make appropriate provision for the discharge of his or her functions, including their delegation to others, subject to any directions made and published by the Lord Chancellor. Paragraphs 3 & 4 provide for the remuneration of the Commissioner, and the appointment of staff and their pay and pensions. Paragraph 5 requires the Commissioner to make an annual report, and paragraph 6 provides for the audit of accounts.
199. Where (under section 52) the Lord Chancellor has directed the Commissioner to exercise functions in relation to a professional body, paragraph 7 empowers the Lord Chancellor to require that body to contribute towards the Commissioner's costs. It is in these circumstances that the Lord Chancellor might also require the body to contribute towards the costs of the Legal Services Ombudsman (see paragraph 196 above).
200. **Section 52: Commissioner's functions.** This section sets out the powers of the Commissioner, and provides for the Lord Chancellor to direct the Commissioner to exercise one or more of those powers in relation to a relevant professional body. (The relevant bodies are those supervised by the Legal Services Ombudsman – see paragraph 155 above). The Lord Chancellor may only make a direction when he considers that

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a body is not handling complaints against its members effectively and efficiently. This means that the Commissioner's powers might be brought into effect for some professional bodies but not others.

201. Subsection (2) lists the Commissioner's powers. These include the power to order a professional body to produce a plan for improving its complaints-handling procedures. If a body fails to produce or implement a plan, subsection (3) empowers the Commissioner to impose a penalty, proportionate to the size of the body and the number of complaints against it. The Lord Chancellor may set a maximum amount for any penalty, by order subject to Parliamentary approval under the affirmative resolution procedure (subsections (5) & (9)).

Public notaries

202. **Section 53: Abolition of scriveners' monopoly.** This section ends the statutory monopoly held by the Incorporated Company of Scriveners of London over notarial work in the central London area. This monopoly was placed on a statutory basis by section 13 of the Public Notaries Act 1801, and confirmed by section 6 of the Public Notaries Act 1843 and section 57 of the Courts and Legal Services Act 1990. Section 53 provides that a notary may practise in the City of London or within three miles of its boundaries, whether or not he is a member of the Scriveners' Company.
 - *Notaries* authenticate certain legal documents, mainly for use abroad, by signing and sealing them. They also prepare legal documents for use abroad, undertake conveyancing and probate work, translate foreign legal documents, administer oaths and take affidavits.