

EXPLANATORY MEMORANDUM TO
THE LEGAL SERVICES ACT 2007 (COMMENCEMENT NO.5,
TRANSITORY AND TRANSITIONAL PROVISIONS) ORDER 2009

2009 No. 1365 (C. 74)

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 The instrument commences a range of provisions in the Legal Services Act 2007 (“the 2007 Act”).
 - 2.2 This instrument commences provisions found in Schedule 16 to the 2007 Act which amend the existing regulatory framework found in the Solicitors Act 1974 (“the 1974 Act”) and the Courts and Legal Services Act 1990 (“the 1990 Act”). The amendments will:
 - 2.2.1 Enhance the Law Society’s regulatory control over sole solicitors;
 - 2.2.2 Transfer the routes of appeal against decisions made by the Law Society or the Solicitors’ Disciplinary Tribunal from the Master of the Rolls to the High Court. This instrument also makes transitional provision for appeals made to the Master of the Rolls before 1 July 2009 to continue to be heard by him;
 - 2.2.3 Update the Law Society’s powers to make regulations about admission as a solicitor, the keeping of the roll of solicitors, solicitors’ practising certificates, sole solicitor endorsements and the keeping of the register of holders of practising certificates. This instrument makes transitory provision enabling the Law Society’s powers to make regulations to be exercised by the Master of the Rolls with the concurrence of the Secretary of State and Lord Chief Justice until paragraph 19 of Schedule 4 to the 2007 Act is commenced (which provides for the Legal Services Board to approve the Law Society’s regulatory arrangements);
 - 2.2.4 Simplify the requirements of the 1974 Act for the keeping of the roll of solicitors and transfers the responsibility for keeping that roll from the Master of the Rolls to the Law Society;
 - 2.2.5 Update and streamline the regime for considering and issuing practising certificates to solicitors including the power to impose conditions and suspend or revoke a practising certificate (including where issued in error or as a result of a fraudulent application);
 - 2.2.6 Remove the statutory prohibition on solicitors defending or commencing proceedings while in prison. This prohibition will now be included in the Solicitor’s Code of Conduct, which is currently approved under Schedule 4 to the Courts and Legal

Services Act. Once the Legal Services Board is fully operational, it will approve amendments to the Code of Conduct under Schedule 4 to the 2007 Act; and

2.2.7 Amend the regime for the setting of practising certificate fees and fees for sole solicitor endorsements. It provides that those fees may be used for the purposes of (among other things) regulating and accrediting solicitors, participating in law reform and the legislative process, pro-bono work, the protection of human rights and the promotion of the professional interest of solicitors.

2.3 It is proposed that this instrument will come into force on 1 July 2009.

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, four commencement orders have been made under sections 204, 208 and 211 of the 2007. These were *the Legal Services Act (Commencement No. 1 and Transitory Provisions) Order 2008 (S.I. 2008/ 222)*, *the Legal Services Act (Commencement No. 2 and Transitory Provisions) Order 2008 (S.I.2008/1436)*, *the Legal Services Act 2007 (Commencement No. 3 and Transitory Provisions) Order 2008 (S.I.2008/3149)* and *the Legal Services Act (Commencement No. 4, Transitory and Transitional Provisions and Appointed Day) Order 2009 (S.I.2009/503)*.

4.2 This instrument is made under sections 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 and also enable transitory and transitional provision, necessary prior to the full regime of the 2007 Act coming into force.

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 Act simplifies the existing regulatory framework by establishing, as an oversight regulator, the Legal Services Board, and improving consumer confidence in the way in which complaints are dealt with by establishing an independent complaints handling body; the Office for Legal Complaints. It also introduces alternative business structures which will permit lawyers and non-lawyers to work together and allows for external investment. This will be subject to a licensing regime set out by the Board.
- 7.2 The 2007 Act also makes substantial changes to the regulatory framework under which solicitors in England and Wales operate. It does this by amending the Solicitors Act 1974, the Administration of Justice Act 1985 and the Courts and Legal Services Act 1990.¹
- 7.3 This instrument commences amendments to the regulatory regime for solicitors' practising certificates. These amendments will enable the Law Society to make regulations governing applications for practising certificates, replacing prescriptive statutory requirements. This will facilitate greater flexibility in the regime of practising certificates, enabling more fluid changes to the regime, to accommodate the evolving legal market. Further minor amendments to the Law Society's powers to impose conditions, suspend or strike off solicitors are similarly commenced. This instrument also makes transitory provision in respect of the approval of Law Society regulations, retaining the role of the Secretary of State, the Master of the Rolls and the Lord Chief Justice until the Legal Services Board assumes these functions in early 2010.
- 7.4 This instrument also facilitates reforms to appeals against decisions of the Law Society or the Solicitors' Disciplinary Tribunal by transferring the appellate function of the Master of the Rolls to the High Court. This achieves consistency in the routes of appeal available throughout the 2007 Act. Further, it ensures greater flexibility in respect of appeals, by enabling the Law Society to make rules prescribing circumstances where appeals may be heard by the Solicitors' Disciplinary Tribunal, instead of the High Court. In addition, it also makes transitional provision, enabling any appeal lodged before this Order comes into force to be heard to fruition, therefore protecting the existing rights of appeal of those regulated by the Law Society. Similarly, this instrument transfers the duty to maintain the roll of solicitors from the Master of the Rolls to the Law Society.
- 7.5 This instrument commences the regime of "sole solicitor endorsements." This regime ensures that no solicitor may practice as a sole solicitor unless their practising certificate has the requisite endorsement authorising them to do so. This new regime acknowledges the additional responsibilities and diligence required of

¹ See Schedule 16 to the Legal Services Act 2007 (c.29)

sole solicitors. This instrument also commences appeal routes in respect of determining applications for sole solicitor endorsements.

- 7.6 This instrument amends the statutory regime for practising fees, whilst also making transitory provision retaining the existing approval mechanism and statutory requirements, pending the establishment of the Legal Services Board, which will ultimately approve fee levels and make rules in respect of fees.
 - 7.7 This instrument also makes minor amendments to the existing statutory regime by removing the statutory prohibition on solicitors commencing or defending proceedings whilst in prison, since this prohibition will now form part of Law Society's rules. Further minor amendments are made to the existing framework, simplifying the regime and removing unnecessary and prescriptive statutory requirements.
 - 7.8 These reforms are necessary to ensure that the profession is operating to the highest standards and that there are clear safeguards in place to protect both consumers and the reputation of the legal profession as a whole.
- **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 Trading², and published a report into competition and regulation in the legal services market.³ Further to that, in 2003, Sir David Clementi was appointed by the Government to conduct an independent review of the regulation of legal services⁴, 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,

² Office of Fair Trading, 2001, *Competition in the Professions – A Report by the Director General of Fair Trading*

³ Department for Constitutional Affairs, 2003, *Competition and Regulation in the Legal Services Market – A Report Following the Consultation "In the Public Interest?"*

⁴ Clementi, Sir David, 2004, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*

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

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

- 8.5 In drafting this instrument, the Law Society, the Solicitors Regulation Authority, the Master of the Rolls, the Lord Chief Justice and the President of the Solicitors Disciplinary Tribunal were consulted and fully support the approach adopted.

9. Guidance

- 9.1 This instrument amends the statutory regime relating to the Law Society's regulation of its members.
- 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.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 Section 7 of the full RIA sets out the Small Firms Impact Test. In developing the Impact Test, the Small Business Service and Federation of Small Businesses were consulted and were content with the approach. This includes the amendments made by the provisions in this Order.

12. Monitoring & review

12.1 The Lord Chancellor, the Secretary of State, the Master of the Rolls and the Lord Chief Justice will be responsible for setting, approving or concurring certain rules and fees formulated by powers commenced by virtue of this instrument. As a result, the impact and effect of this instrument will be monitored throughout the implementation process.

13. Contact

13.1 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.