

ACCESS TO JUSTICE ACT 1999

EXPLANATORY NOTES

B.

PROVISION OF LEGAL SERVICES (SECTIONS 35-53)

Commentary

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.