

ACCESS TO JUSTICE ACT 1999

EXPLANATORY NOTES

B.

PROVISION OF LEGAL SERVICES (SECTIONS 35-53)

Commentary

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

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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.