

EXPLANATORY MEMORANDUM TO
THE LEGAL SERVICES ACT 2007 (COMMENCEMENT NO.6,
TRANSITORY, TRANSITIONAL AND SAVINGS PROVISIONS) ORDER
2009

2009 No. 3250 C.143

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 purpose of this instrument is to commence provisions in the Legal Services Act 2007 (“the 2007 Act”) that give effect to the legal services regulatory regime established by that Act.

2.2 The instrument is made under sections 204, 208(2) and (4) and 211(2) of the 2007 Act which allow the Lord Chancellor to make statutory instruments under the negative resolution procedure that commence provisions within the Act relating to the new regime (and allow necessary transitional and savings provisions and revocations). Principally, the provisions will recognise the list of reserved legal activities and approved regulators, make it a requirement that persons must be authorised by those approved regulators if they are to carry on the reserved legal activities (or be exempt under the Act) and commence fully the Legal Services Board’s powers (as set out in the Act) to enable it to operate properly as the oversight regulator of the regime.

2.3 The instrument also makes transitional and transitory provisions to ensure that existing powers and terminology fit correctly within the new regulatory regime; to ensure a smooth transition to the new regulatory framework; to allow the existing complaints handling arrangements to continue operating until the Office for Legal Complaints is established; and to ensure applications by existing regulators to amend their regulatory arrangements are properly considered.

2.4 In summary, this instrument:

2.4.1 commences provisions recognising the reserved legal activities under Schedule 2;

2.4.2. commences provisions recognising the approved regulators under Schedule 4;

2.4.3. commences section 13 which makes it a requirement for persons to be authorised by an approved regulator (or be exempt under the Act) if they are to carry on reserved legal activities. Failure to be so entitled will result in an offence being committed under section 14;

2.4.4. commences the remaining powers of the Legal Services Board, allowing it to receive applications for new approved regulator status or for amendments to regulatory arrangements, and to exercise its

regulatory powers where the existing regulatory arrangements appear to be failing

2.4.5. commences the majority of remaining provisions relating to approved regulators, including amendments to statutory provisions relating to the Law Society and Council for Licensed Conveyancers and amendments to the transfer of the register of trade mark and patent attorneys to the Institute of Trade Mark Attorneys and Chartered Institute of Patent Attorneys respectively.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Legal Services Act 2007 makes three fundamental changes to the way in which legal services are regulated in England and Wales. First, it establishes the Legal Services Board, 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.

4.2 The *Legal Services Act 2007 (Commencement No 1 and Transitory Provisions) Order 2008* commenced provisions in the 2007 Act that established the LSB and OLC and provided for the appointment of board members and staff. The *Legal Services Act 2007 (Commencement No 3 and Transitory Provisions) Order 2008* commenced further powers under the 2007 Act allowing the LSB to set up and maintain a Consumer Panel and make rules about the exercise of the representative and regulatory functions of approved regulators and the exercise of its own regulatory powers. That order also commenced the majority of sections 173, 174 and 175, which establish the regime under which a levy is to be imposed on leviable bodies to cover the cost of the new regulatory regime.

4.3 The *Legal Services Act 2007 (Commencement No 2 and Transitory Provisions) Order 2008*, *Legal Services Act 2007 (Commencement No 4, Transitory and Transitional Provisions and Appointed Day) Order 2009* and the *Legal Services Act 2007 (Commencement No 5, Transitory and Transitional Provisions) Order 2009* commenced provisions relating to the current regulators such as the Law Society and Council for Licensed Conveyancers in order to allow them to update their regulatory arrangements ahead of the introduction of the new regulatory regime and to provide for a limited form of alternative business structure, known as legal disciplinary practices (or “LDPs”). Finally, *the Legal Services Act*

2007 (Consequential Amendments) Order 2009 and *the Legal Services Act 2007 (Functions of an Approved Regulator) Order 2009* are due to come into force by 1 January 2010. They make necessary amendments to the Legal Services Act and other legislation in order to ensure consistency of existing legislation with the new framework so that the 2007 Act can be commenced properly.

4.4 In summary, the purpose of the commencement orders laid to date has principally been to make statutory preparations for the Legal Services Board and approved regulators to carry out their regulatory functions properly under the new authorisation regime when it comes into force. They have also made provision for the establishment of the OLC, although not for the OLC to assume its full statutory functions.

4.5 This instrument completes the commencement of statutory provisions necessary for the new regulatory framework for reserved legal activities, except that the Office for Legal Complaints will not yet assume its full statutory functions and the licensing regime for alternative business structures will not yet be commenced.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales only.

6. European Convention on Human Rights

6.1 As the instrument is subject to 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 and Wales. The aims of the Act are:

- to simplify the existing regulatory framework by establishing an oversight regulator, the LSB,
- to improve consumer confidence and the way in which complaints are dealt with by establishing an independent complaints handling body, the Office for Legal Complaints (“the OLC”), and
- to provide for alternative business structures in which lawyers can work together with non-lawyers in firms that provide a range of legal and non-legal activities.

7.2 As the Act establishes three distinct components of the regulatory regime, it was considered appropriate to commence each part separately, with the main regulatory regime coming into effect first, (principally the section 13 requirement to be entitled to conduct a reserved legal activity and the LSB’s oversight of approved regulators). This will be followed by the assumption of legal

complaints handling by the OLC, and finally the commencement of the alternative business structure provisions. Under the broader timeframe commitments made both during the passage of the Act and since, it has been decided that the main regulatory regime will come into force at the beginning of 2010. The OLC provisions are anticipated to come into effect later in 2010, with ABS following in 2011.

7.3 Preparatory provisions relating to the Legal Services Board and approved regulators required in advance of the new regime have already been commenced. This instrument commences all remaining provisions required for the new regulatory regime to come into force on 1 January 2010.

7.4 The key provisions being commenced that give effect to the new regime are:

- the list of reserved legal activities in Schedule 2, which consolidates legal activities that are subject to statutory control in existing legislation such as the Courts and Legal Services Act 1990, and the ability to add or remove activities from that list,
- the list of approved regulators in Schedule 4, which consolidates regulators who are able to grant rights to members in respect of those activities under existing legislation, and the ability to add or remove approved regulators from that list,
- section 13 of the Act which requires a person to be entitled if they are to carry out reserved legal activities. A person will be entitled if they are either exempt under the Act, or they are authorised by an approved regulator. Section 14 makes it an offence for persons to carry on reserved legal activities when not entitled,
- the replacement of terminology in existing legislation relating to a person's ability to carry on legal activities or to their professional title, with references to the new authorisation regime
- section 21, which prescribes arrangements of approved regulators that are deemed to be regulatory arrangements, and a new procedure under Schedule 4 to approve the regulatory arrangements. The existing procedure whereby rules and regulations of regulators are approved by the Secretary of State following the advice of the Legal Services Consultative Panel and Designated Judges will be replaced by LSB approval of regulatory arrangements,
- section 22 and Schedule 5 which give transitional continuity of rights to existing legal professionals so that they can be transposed into the new regime,
- the requirement for approved regulators to promote the regulatory objectives under section 28, and the requirement for the LSB to make rules about the separation of an approved regulator's regulatory and representative functions under section 30,
- the regulatory powers of the LSB under sections 31 to 48. The LSB must set a maximum financial penalty with the consent of the Lord Chancellor under section 37 before it can impose a penalty, and the Lord Chancellor must make regulations regulating the issuing of

warrants before the LSB can intervene in an approved regulator under section 41, or cancel an approved regulator's designation under section 45,

- powers for competition matters to be investigated by the Office of Fair Trading, LSB and Competition Commission under sections 57 to 61,
- the ability for the LSB to raise a levy on the legal profession to meet the expenditure of itself and the OLC
- the transfer of the registers of patent attorneys and trade mark attorneys from Government to the Chartered Institute of Patent Attorneys and Institute of Trade Mark Attorneys

7.5 Commencement of these provisions completes the transfer from the current regulatory regime which is provided for under a range of existing legislation such as the Solicitors Act 1974, Administration of Justice Act 1985, Courts and Legal Services Act 1990 and Access to Justice Act 1999, and which involves a number of governmental and judicial post-holders including the Lord Chancellor, Lord Chief Justice and Master of the Rolls, to the new regulatory regime in which matters relating to the regulatory regime are overseen by the LSB, with some Lord Chancellor approval and designation functions.

7.6 An effect of the transfer of the authorisation regime is that references in existing legislation to existing authorisation, such as being deemed a legal representative through a professional title, or by authorisation under the Courts and Legal Services Act 1990, are replaced by references to the 2007 Act. Schedule 21 makes such amendments to primary legislation, however in order to ensure all references in secondary legislation have been captured, a draft order (The Legal Services Act 2007 (Consequential Amendments) Order 2009) has been laid in Parliament under the affirmative procedure to make these amendments as well as other consequential amendments necessary for the new regime to come into effect.

7.7 Another effect of changes to the authorisation regime is that the jurisdictions of the Legal Services Ombudsman (LSO) and Legal Services Complaints Commissioner (LSCC), who currently have jurisdiction over bodies that authorise persons under existing terminology, need to be amended to refer to jurisdiction over the same bodies, under the new terminology. This is provided for in this instrument by a transitional provision to give the LSO and LSCC jurisdiction in respect of the new terminology until the OLC becomes fully operational.

7.8 Finally, approval provisions such as Schedules 4 and 9 to the Courts and Legal Services Act 1990, which prescribe the current process for approving applications from bodies seeking to become designated to grant rights to members or applications to amend the rules and regulations of those bodies, are to be replaced by the process established in Schedule 4 to the 2007 Act. This order makes transitional provision so that bodies that have started an application

under the current arrangements have their applications considered in full either under the existing provisions, or by the Legal Services Board under the new Schedule 4 provisions in the 2007 Act.

- **Consolidation**

7.9 This instrument commences provisions under the 2007 Act. A number of provisions in existing legislation are being replaced by a single set of reserved legal activities in Schedule 2 and approved regulators in Schedule 4. Aside from these provisions, there are no issues relating to consolidation.

8. Consultation outcome

8.1 This instrument commences provisions within the 2007, which have therefore already received parliamentary scrutiny. However, as the instrument brings into effect important changes to the regulatory environment, and has an impact on regulated persons and regulators, the approved regulators and LSB have been involved in the commencement process and have agreed the content of the instrument.

9. Guidance

9.1 The LSB, as oversight regulator of the approved regulators, has in place mechanisms to guide approved regulators through the new regime. In turn, the approved regulators are responsible for issuing guidance to their members.

10. Impact

10.1 A full regulatory impact assessment 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 This instrument brings into effect a new regulatory regime that applies to individuals, bodies and regulators. The provisions in the Act were supported by the Federation of Small Businesses during the Act's passage. This order brings those provisions into effect. Furthermore, separate work has been carried out on the impact of the Act on regulatory burdens, and it is anticipated that regulatory burdens on small businesses should be reduced in a number of ways. For example,

amendments to the Solicitors Act 1974 to relax postal billing and billing sign-off requirements and allow electronic billing will have a significant beneficial impact on small firms by providing a faster process for processing each bill.

12. Monitoring & review

12.1 Section 31 provides a specific power for the LSB to monitor a performance target it has set. However, in order to ensure to carry out its duty under section 3 of promoting the regulatory objectives, it will need to continually monitor the regulatory environment established by this instrument, and take action where appropriate.

13. Contact

Geraint Davies (Tel: 020 3334 4218 or Email: Geraint.Davies@justice.gsi.gov.uk) can answer any queries regarding this instrument.