

EXPLANATORY MEMORANDUM TO
THE LEGAL SERVICES ACT 2007 (COMMENCEMENT NO.8
TRANSITORY AND TRANSITIONAL PROVISIONS) ORDER 2010

2010 No. 2089 (C.107)

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 are necessary for the Office for Legal Complaints (OLC) to assume its main statutory functions and enable it to become fully operational from 6 October 2010. The OLC will become the single, independent complaints handling body for complaints about the provision of services by legal professionals.

2.2 The instrument makes provision for the winding down of the existing complaints handling system, and abolishes the offices of the Legal Services Ombudsman (LSO) and the Legal Services Complaints Commissioner (LSCC). It also makes the necessary transitional arrangements to ensure a smooth transition to the new complaints handling system.

2.3 In summary, the instrument:

2.3.1 commences provisions in Part 6 of the 2007 Act relating to the jurisdiction and powers of the OLC and its ombudsman scheme;

2.3.2 commences other provisions in the 2007 Act relating to the OLC, including amendments to statutory provisions relating to the Law Society, the LSO, the LSCC and the Council for Licensed Conveyancers (including repeals);

2.3.3 makes transitional provisions for the resolution of complaints received but not concluded by approved regulators and the LSO at 6 October 2010;

2.3.4 abolishes the offices of the LSO and the LSCC.

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

3.1. None.

4. Legislative Context

4.1 The instrument is made under sections 157(3), 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 to commence the relevant provisions in the 2007 Act.

4.2 To date, seven commencement orders have been made under sections 204, 208 and 211 of the 2007 Act. The purpose of these orders has been to establish a new oversight regulator, the Legal Services Board (LSB), and a new regulatory regime for the provision of legal services. The orders have made provision for the establishment of the OLC and its ombudsman scheme. Provision has also been made for the introduction of alternative business structures (ABS). A table of these earlier commencement orders is included in the notes to this commencement order.

4.3 Of the previous seven orders, four relate to the OLC. These are:

- *the Legal Services Act 2007 (Commencement No.1 and Transitory Provisions) Order 2008 (No.222)*
- *the Legal Services Act 2007 (Commencement No.3 and Transitory Provisions) Order 2008 (No.3149)*
- *the Legal Services Act 2007 (Commencement No.6 Transitory, Transitional and Savings Provisions) Order 2009 (No.3250).*
- *the Legal Services Act 2007 (Commencement No.7) Order 2010 (No. 1118)*

4.4 This instrument completes the commencement of statutory provisions necessary for the OLC to assume its full statutory functions.

4.5 The instrument will be laid using the power in section 157 (3) of the 2007 Act. As section 157 (3) does not come into force until 2 August 2010, the instrument cannot be laid before 3 August 2010. As commitments have been made that the OLC will become operational on 6 October 2010, it is important that the instrument is laid as soon as practicable after the 3 August 2010 so that it will be in force by 6 October 2010. This is why the instrument is being laid during recess.

5. Territorial Extent and Application

5.1 The 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 and Wales. It establishes the LSB as oversight regulator for the legal profession in England and Wales. It establishes the OLC, a new independent complaints handling body. The 2007 Act also introduces ABS.

- 7.2 As the 2007 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, followed by the OLC's complaints-handling regime and finally the full commencement of ABS. To this end, the LSB assumed its full statutory functions on 1 January 2010 and this instrument gives effect to the full statutory powers of the OLC, which was established on 1 July 2009. ABS is not yet fully operational. It is hoped to enable ABS to become operational in the Autumn of 2011.
- 7.3 The establishment of the OLC is a result of the recommendations made by Sir David Clementi in his independent and wide-ranging review of the regulation of the legal services market in England and Wales. In his final report, published in 2004, one of the main recommendations was the introduction of a single body to handle complaints relating to legal professionals. The key reason for this recommendation was that the current system in which complaints are handled by bodies run by lawyers was inefficient and detrimental to consumer confidence.
- 7.4 At the moment, each approved regulator¹ (of which there are 10) has a system in place for dealing with all complaints about the services and conduct of their members. A client wishing to complain about a person providing them with a legal service can make a complaint to the relevant approved regulator – for example, if a solicitor has provided legal services and a client is unhappy, they can complain to the Law Society's complaints handling body, the Legal Complaints Service. If, once an approved regulator has investigated a complaint, the complainant remains unhappy about the outcome, the complaint can be referred to the LSO, who is independent from the legal profession. The LSO will only look at the way in which the complaint has been dealt with by the approved regulator. The LSO has limited powers of redress and can recommend that:
- a) the complaint is reconsidered by the approved regulator;
 - b) the approved regulator should consider if disciplinary action should be considered; or
 - c) compensation is paid for the inconvenience or distress caused to the complainant either by the person providing the service or approved regulator.
- 7.5 In contrast to the existing system, when the provisions in Part 6 are commenced the OLC will become the new single legal complaints handling body. It will be an independent body that will provide a consistent and efficient complaints handling service with the power to award redress of up to £30,000 to consumers. The OLC has set up an ombudsman scheme to provide consumers with a single point of entry for service complaints.

¹ Approved regulators are listed in the table in paragraph 1 of Schedule 4 to the Legal Services Act 2007 as amended by the Legal Services Act 2007 (Approved Regulators) Order 2009 (SI 2009No.3233).

- 7.6 The ombudsman scheme will only deal with complaints relating to inadequate professional service and forward any matters relating to conduct to the appropriate approved regulator. Approved regulators will continue to handle complaints relating to the conduct of the professionals whom they regulate as they have the necessary disciplinary procedures in place to deal with breaches of professional conduct.
- 7.7 Initial provisions relating to the OLC and approved regulators have already been commenced. Preparations for the full operation of the OLC on 6 October 2010 have already been made. Its Chief Ombudsman, Board members, ombudsmen and executive management team have been appointed and the OLC's office in Birmingham was officially opened on 25 March 2010. The ombudsman scheme that the OLC will operate will be known as the Legal Ombudsman. The Legal Ombudsman has consulted on its Scheme Rules and Case fees, both of which will be in place by 6 October 2010. The Legal Ombudsman has also begun recruiting and training staff in advance of becoming fully operational so that it is ready to start handling complaints immediately on 6 October 2010.
- 7.8 The key provisions being commenced that give effect to the new complaints handling regime are:
- Section 112, which provides that approved regulators must require the authorised persons they regulate to maintain in-house complaints procedures and make provision for the enforcement of this requirement;
 - Section 113, which provides an overview of the new complaints handling system;
 - Sections 125 – 135, which define the powers of the OLC and its ombudsmen. Section 125 defines what types of person are eligible to bring complaints to the OLC, who may be the subject of a complaint, and what types of complaints can be brought to the OLC;
 - Sections 137 – 141, which set out the ombudsman's power to determine a complaint, the criteria for a complainant to notify the ombudsman of whether or not he accepts the ombudsman's decision, and makes provision for an ombudsman's determination to be enforced;
 - Section 143, which makes provision for an ombudsman to report possible misconduct to an approved regulator;
 - Section 144, which imposes a duty to share information on the OLC and approved regulators;
 - Section 145-153, which enable an ombudsman to require information from parties to a complaint, and set out what information the OLC may disclose about the complaints it handles;
 - Section 157, which prohibits approved regulators from making provision relating to redress in their regulatory arrangements;
 - Section 159, which abolishes the Offices of the LSO and the LSCC;

- Sections 164-166, which enable the OLC to establish a voluntary complaints scheme separate from the ombudsman scheme under Part 6.

7.9 The instrument makes provision to ensure a smooth transition from the existing complaints handling system to the new regime. Although all new complaints relating to inadequate professional service will be dealt with by the Legal Ombudsman from 6 October 2010, it is important to ensure that those complaints which pre-date the new system are resolved effectively and that consumers who have made complaints before 6 October 2010 are not disadvantaged by the changes being made. The transition from the existing system to the new system will therefore be managed in stages as set out below:

- At 6 October 2010, any complaint which has been received and has not been determined by an approved regulator will remain with, and be dealt with by, the relevant approved regulator under its existing processes. For service complaints only, a complainant who is not content with the outcome of the approved regulator's investigation will be able to refer the complaint to the LSO who will deal with it under her existing procedures and powers as set out in the Courts and Legal Services Act 1990 (the 1990 Act). However, the LSO will not deal with referrals concerning the way an approved regulator has dealt with a conduct complaint - this will be a matter for the approved regulator.
- From 1 January 2011, the LSO will no longer have the power to refer complaints back to the approved regulators for reconsideration. However, the LSO will continue to handle complaints and will retain her powers to recommend that the approved regulator take disciplinary action or award compensation. This will help to reduce the number of complaints that need to be completed by the approved regulators.
- From 1 April 2011, approved regulators will cease dealing with all service complaints. Any outstanding service complaints will instead be treated as a complaint that has been properly made to the LSO and will be investigated substantively by the LSO using her powers under section 22 of the 1990 Act. This will ensure that complainants are not disadvantaged by the changes to the complaints handling system. During this time, the LSO will continue her usual function of handling appeals from complainants whose service complaints have already been investigated and determined by approved regulators under the existing complaints handling system.
- The LSO function will cease operation by 31 December 2011. Any service complaints that remain uncompleted at that date will be treated as a complaint which falls within the jurisdiction of the Legal Ombudsman and considered as a new complaint in accordance with its scheme rules and Part 6 of the 2007 Act. It is anticipated that there will be a very small number of complaints, if any, outstanding at this point.

Consolidation

7.10 There are no issues relating to consolidation.

8. Consultation Outcome

8.1 The instrument commences provisions within the 2007 Act which have already received Parliamentary scrutiny. It brings into effect important changes to the legal services regulatory environment and impacts on authorised persons and approved regulators. For this reason it has been drafted in consultation with the approved regulators and the OLC who have agreed the content of the instrument.

8.2 Approved regulators and the LSO have also been consulted on the transitional arrangements to ensure that they can manage the closing down of their complaints handling functions efficiently, effectively and without detriment to consumers or the legal profession.

9. Guidance

9.1 The OLC Scheme Rules set out how the new complaints handling system will operate, including who can complain and what types of complaints are eligible. The Scheme Rules can be found at http://www.legalombudsman.org.uk/downloads/OLC_Scheme%20Rules.pdf.

9.2 The LSB, as oversight regulator for the approved regulators, has in place mechanisms to guide approved regulators through the new regime. In addition, the approved regulators are responsible for issuing new guidance to their members. The LSB has released guidance on first-tier complaints handling and has announced that approved regulators must ensure that those they regulate provide clear information to clients about their right to complain about the service they receive and the process for doing so, including their right to complain to the Legal Ombudsman and how to do so. This guidance is available online and can be accessed on the LSB website at: http://www.legalservicesboard.org.uk/Projects/pdf/2010_05_20_signposting_requirements.pdf

9.3 The approved regulators will ensure that consumers are aware of the changes to the complaints-handling regime and will amend their literature and online content accordingly.

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>

The supplementary memorandum can be found at:
<http://www.justice.gov.uk/docs/RIA-supplement-v021.pdf>.

- 10.2 Section 6 of the full RIA examines the options considered and our reasoning for the final recommendations relating to the OLC which were brought forward in the 2007 Act.

11. Regulating small business

- 11.1 The instrument brings into effect a new regulatory regime that applies to individuals, bodies and regulators. The provisions in the 2007 Act were supported by the Federation of Small Businesses during the 2007 Act's passage through Parliament.

12. Monitoring and review

- 12.1 The OLC will be subject to annual Parliamentary scrutiny as section 118 requires the OLC to prepare an annual report which must be laid before Parliament by the Lord Chancellor under section 118 (6). In addition, section 120 allows the LSB to require the OLC to prepare a report on any specified matter relating to its functions and section 121 enables the LSB to set performance targets relating to the OLC's functions.
- 12.2 The OLC also has powers to monitor authorised persons and section 146 enables it to report to the appropriate approved regulator any authorised person who is failing to cooperate with its investigations. It may also report to the approved regulator a failure to produce information or documents required under the provisions of section 148.

13. Contact

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regarding any queries about this instrument.