**EXPLANATORY MEMORANDUM TO**

**THE PROBATE SERVICES (APPROVED BODIES) ORDER 2008**

**2008 No. Draft**

1. This Explanatory Memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

## 2. Description

2.1. This Order designates the Institute of Chartered Accountants of Scotland (ICAS) and the Council for Licensed Conveyancers (CLC) as approved bodies for the purposes of section 55 of, and schedule 9 to, the Courts and Legal Services Act 1990 (CLSA). ICAS and the CLC seek authorisation as approved bodies so that they can exempt their members from section 23 of the Solicitors Act 1974, thereby enabling their members to provide probate services for a fee.

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

3.1 None.

## 4. Legislative Background

4.1 The provisions of section 23 of the Solicitors Act 1974 make it an offence for anyone other than a solicitor, a barrister, or a duly certified notary, to provide probate services in the expectation of a fee, gain or reward.

4.2 Section 55 of the CLSA allows bodies approved by the Secretary of State to exempt their members from this prohibition thereby enabling them to provide probate services for a fee.

4.3 Section 55 of and Schedule 9 to the CLSA specify the criteria and mechanisms by which a body may become an approved body. This Order is made under section 55 (3) of and paragraph 4 of Schedule 9 to the CLSA.

4.4 As part of the approval procedure, the Secretary of State refers the application to the Legal Services Consultative Panel (the LSCP) and President of the Family Division (the President) for advice. Having considered that advice, the Secretary of State may only approve the application if satisfied that the applicant has in force suitable arrangements for training and for ensuring that any person to whom the applicant grants the exemption mentioned in section 55(1) of the CLSA will at all times, while exempt, comply with the requirements of section 55(2)(a) to (e) of the CLSA.

4.5 Probate services is defined in section 119 of the CLSA as “the drawing or preparation of any papers on which to found or oppose a grant of probate or a grant of letters of administration of the estate by a deceased person and the administration of the estate of a deceased person”.

## 5 Extent

5.1 The Order extends to England and Wales.

## 6 European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for the Ministry of Justice has made the following statement regarding Human Rights:

"In my view the provisions of the Probate Services (Approved Bodies) Order 2008 are compatible with the Convention rights."

## 7 Policy Background

7.1 In 2001, in his report *Competition in Professions*, the Director of Fair Trading recommended implementing section 55 of the CLSA. At the time, it was an offence under section 23 of the Solicitors Act 1974 for anyone other than a solicitor, barrister or a duly certified notary public to provide probate services for a fee. The Government accepted the recommendation and, following consultation, commenced section 55 of, and schedule 9 to, the CLSA on 7 December 2004. This created an opportunity for increased competition in the market for offering probate services for a fee, since section 55 allows members of bodies approved by the Secretary of State to provide probate services for a fee. To date no bodies have approved by the Secretary of State under this provision.

7.2 ICAS and the CLC are two of the first organisations to have applied to the Secretary of State for authorisation as approved bodies to allow its members to provide probate services since section 55 of, and Schedule 9 to, the CLSA was commenced. As required under the statutory approval process, the Secretary of State sought the advice of the LSCP) and the President. The LSCP and the President were content that ICAS' arrangements ensured that its members would be required to undergo specific training in probate matters and have in place suitable arrangements for protecting clients including membership of a complaints handling scheme and suitable insurance and compensation cover. They considered that ICAS' application met the requirements of section 55 of the CLSA and recommended to the Secretary of State that ICAS' application be approved.

7.3 The LSCP and the President were content with the CLC's arrangements for training, complaints handling and insurance cover in its application. They had concerns over the lack of a compensation fund and recommended approval of the CLC's application only when adequate compensation arrangements were put in place to cover the provision of probate services by licensed conveyancers. The CLC was subsequently given the power to extend its existing compensation fund by the Courts and Legal Services Act 1990 (Modification of Power to make Rules about Licensed Conveyancers) Order 2008 (SI 2008/537) which came into force on 28 March 2008. This has allowed the CLC to make rules for paying compensation to people who have suffered loss as a result of the negligence, fraud or dishonesty of licensed conveyancers in connection with the provision of probate services or as a result of their failure to

account for money received by them. The Secretary of State is satisfied that the CLC's arrangements now meet the requirements of section 55 of the CLSA.

7.4 This Order therefore allows the CLC and ICAS to be designated as approved bodies who can exempt their members from the prohibition in section 23 of the Solicitors Act 1974, thereby enabling them to provide probate services for a fee.

## 8 Impact

8.1 A full Regulatory Impact Assessment (RIA) was completed for the Implementation of section 55 of, and schedule 9 to, the CLSA to open up the market for the provision of probate services. Details of the cost and business implications for new providers and impact on solicitors' firms are set out at paragraphs 23-27 of the RIA. This shows that commencing section 55 was expected to have little impact on the probate market, with new providers potentially estimated to secure less than 5% impact on the market over the next decade. There was the possibility of some impact on smaller solicitors' firms however, it was estimated that the percentage of fees derived from probate or the resulting estate administration work account for around 5% of gross fee income for solicitors' firms. The cost to new providers is expected to be similar to other professional bodies since they will be expected to have similar regulatory systems in place in terms of supervision and complaints handling. The consumer is not likely to face increased costs. In addition paragraphs 28 to 30 of the RIA set out the provisions for enforcement and sanctions for bodies approved under Section 55, including the need for an adequate complaints handling scheme. Full details of the RIA can be found at Annex A.

## 9 Contact

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# Full Regulatory Impact Assessment for Implementing Sections 54 and 55 of the Courts and Legal Services Act 1990 to open up the market for the provision of probate services

## Purpose and intended effect of measure

### Objective

1. On 24 July 2003 the Government announced its intention to implement s54 and s55 of the Courts and Legal Services Act 1990, as proposed by the Director General of Fair Trading[1]. Consistent with the provisions of the Competition Act 1998, and its obligations under EU competition law, the Government's intention is to open up the market for the provision of probate services by removing the existing restriction which reserves part of that process to solicitors, barristers, or duly certified notaries public. By "probate services" we mean the application for a Grant of Representation from the Probate Registry. Once the provisions in the 1990 Act have been commenced, banks, building societies, insurance and trust companies, and those bodies approved by the Secretary of State2 will be able to offer probate services to the public for a fee.

### Devolution

2. The proposal applies to England and Wales only.

### Background

3. When a person dies it is necessary for somebody has to deal with their estate (the money, property and possessions left) by collecting in all monies, paying any debts and distributing what is left to those people legally entitled to it. In order for a person (or persons) to get the required authority to do this, they usually need to obtain a legal document called a Grant of Representation (either a Grant of Probate or a Grant of Letters of Administration) from the Probate Registry[3].

4. Currently, under s23 of the Solicitors Act 1974, it is an offence for anyone other than a solicitor, a barrister, or a duly certified notary public (most of whom are qualified solicitors), to take instructions for reward or to draft or prepare for reward the papers on which a grant of probate or letters of administration depend. The phrase 'for reward' is important as unpaid individuals may make applications to the Probate Registry unhindered by the 1974 Act.

5. In his Report *Competition in Professions* published in March 2001[4], the Director General of Fair Trading suggested that consideration should be given to implementing s54 (which will allow banks, building societies, insurance and trust companies, to provide probate services) and s55 of the Courts and Legal Services

[1] A copy of the Press Release can be downloaded on the Government News Network at http://www.gnn.gov.uk/gnn/national.nsf
[2] By virtue of s54 and s55 of the 1990 Act respectively.
[3] Further information on the Probate Registry can be found on the Court Service website at http://www.courtservice.gov.uk/cms/3800.htm
[4] Available on the OFT website at http://www.oft.gov.uk/NR/rdonlyres/B08439C8-C5F6-4946-8AFF-71C050D34F46/0/oft328.pdf

Act 1990 (which will allow bodies approved by the Secretary of State to provide probate services)[5]. It was considered that doing so would increase competition in the market for offering probate services for a fee.

6. The Government is committed to ensure that the professions are properly subject to competition, as open and competitive markets are considered to be the most effective way of ensuring that consumers get the best possible service. Consistent with this, markets for professional legal services will be opened up to competition unless there are strong reasons to the contrary, such as evidence that real consumer detriment might result from such a change. To fulfil this commitment, the Government undertook to consult on those issues raised by the Director General of Fair Trading that fell to it to address, and published a consultation document, *In the public interest?* In July 2002. A summary of responses was published in May 2003[6]. The Government announced their decision to introduce s54 and 55 of the 1990 Act on 24 July 2003[7].

7. The intended effect is to increase competition (and thus consumer choice) by encouraging new providers to enter the probate market. Doing so should benefit consumers by increasing their choice of providers, apply downward pressure on prices and upward pressure on the quality of service.

8. We understand from the British Bankers Association that banks typically pass this work to firms of solicitors for reasons of relative cost. Commencing s54 would allow banks, building societies, insurance and trust companies (should they wish to do so) to prepare papers in house. This may increase the amount of administrative work they do themselves, and would therefore be a factor when considering whether or not to offer probate services (and may be a factor for consumers when looking for the best price).

**Risk assessment**

9. The level of increased competition will be entirely dependent on the number of organisations that wish to offer probate services to their customers.

10. The vast majority of the 9,000 solicitors' firms in England and Wales provide probate services to some extent. These firms are generally found on the high streets of towns and offer a wide range of services including probate. According to the Law Society the average solicitors' firm in England and Wales derives around 5-10% of their income from probate, wills and trusts work[8]. It should also be noted that a significant proportion of this 10% would be fees from trusts work that is not necessarily derived from probate work, and which is likely to be only marginally affected by the proposal.

11. The value of all probate, wills and trusts work undertaken by solicitors and their firms accounts for some £750m annually. Of this, we estimate that some £40m

[5] Chapter XV of the Report.
[6] The full report can be downloaded on the Department for Constitutional Affairs website at http://www.dca.gov.uk/consult/general/oftrept.htm. The response to the consultation is also available at http://www.dca.gov.uk/consult/general/oftreptconc.htm.
[7] http://www.gnn.gov.uk/gnn/national.nsf
[8] Law Society Strategic Research Unit http://www.lawsociety.org.uk/dcs/pdf/solfirm01_v2.pdf

relates to the preparation of papers, to which the present restriction applies, and a further £400m comes from the associated, and often "follow on", work of administering estates. Commencing s54 and s55 of the 1990 Act should have little effect on the administration of estates.

12. A potential risk faced by consumers, may be that new providers make mistakes when preparing the papers required to obtain the grant of probate from the Probate Registry. The Government considers that the risk of mistakes being made is minimal, as all applications for a grant of probate are properly scrutinised by the Probate Registry dealing with the application. Those applications that do contain mistakes are returned. Once the probate market has been opened up, the Probate Registry will scrutinise applications, not just from solicitors and those individuals preparing papers on their own behalf, but also from those preparing papers for reward under s54 and s55 of the 1990 Act.

13. However, it should not be assumed that new entrants would necessarily make errors, or that solicitors' work is currently error free, such that implementation might put standards at risk. We asked the Probate Registry to conduct a survey of cases dealt with in English District Probate Registries in what might be taken as a typical week. We found that 1,157 applications received from solicitors in the week sampled were stopped because of errors or omissions. This amounts to nearly one third of the applications received by solicitors. Stopping gives an opportunity for the solicitors concerned to make good errors and omissions, which helpfully protects clients from the consequences of their mistakes.

14. Between 1 January 2003 and 31 December 2003 there were 195,855 grants of probate issued. Nearly 30 per cent of applications came from persons, who prepared the necessary papers required for a grant of representation themselves with the help of published guides (i.e. the guide by the Probate Registry, available on the internet[9] as well as in print). The guidance covers complex cases, for instance where there are complicated family trees, and high worth estates where there are a range of assets to value. This increase in personal applications has occurred despite an increasing and potentially offsetting tendency of consumers to employ providers of legal services, as in many other areas, as family incomes and wealth have increased. A general growth in confidence in using internet based guidance might point to continued growth in the proportion of personal applications.

**Options**

15. **Option 1** – No Change.

16. **Option 2** – Implement s54 and s55 of the Courts and Legal Services Act 1990 which would provide for the Secretary of State for Constitutional Affairs and Lord Chancellor (henceforth Secretary of State) to authorise *banks, building societies, insurance and trust companies,* and *professional or other bodies* to grant their members rights to prepare for reward papers seeking the Grant of Probate.

[9] http://www.courtservice.gov.uk/cms/3801.htm

17. Section 54 allows banks, building societies, insurance and trust companies to prepare papers for probate providing they have established a scheme to deal with any subsequent complaints, and that they comply with any regulations made by the Secretary of State in matters relating to these complaints. Section 55 allows the Secretary of State to authorise a professional body's members to prepare papers for probate if they are fit and proper, they are suitably trained and the risk of any subsequent claims made against professionals are covered.

18. The 1990 Act requires those offering probate services under s55 to have a complaints handling scheme in place and be subject to any regulations made by the Secretary of State relating to the complaints scheme. Schedule 9 to the Courts and Legal Services Act 1990 sets out the procedure by which a professional body under s55 can apply to become authorised to provide probate services.

19. Other options are not available as these sections of the 1990 Act can either be implemented or not. They cannot be implemented in part.

**Who would potentially be affected**

- Consumers
- Solicitors' firms
- Bodies approved by the Secretary of State
- Banks, building societies and trust companies

**Benefits**

**Option 1 – No Change**

21. Consumers are familiar with the present system and trust existing providers. Those who do not wish to employ a solicitor may continue to undertake the work themselves using the guidance available from the Probate Service.

**Option 2 – Implement Sections 54 and 55 of CLSA 1990**

22. There are two main benefits of implementing s54 and s55 of the 1990 Act. Firstly, doing so removes a barrier for competition in the legal service marketplace. Such a move is consistent with the Government's commitment to ensure that the professions are properly subject to competition and thus addresses the specific recommendations of the Director General of Fair Trading.

23. The second benefit stems from the first. It is hoped that new providers of probate services (competing directly with existing providers) should exert pressure on the market towards improving efficiency and/ or a lowering of fees.

24. The extent to which this will occur will be entirely dependent on the share of the market that passes from solicitors to new providers. The Department's consultation exercise showed some interest from a limited number of potential new providers.

25. To the extent that solicitors may lose market share, they might seek to compete more efficiently among themselves for other work, again to the benefit of consumers. The main effect, however, is likely to be consumers benefiting directly from lower fees and more efficient service from remaining incumbents and successful new entrants. More broadly, productivity in the supply of legal

services should increase. Again, the level to which this happens will be driven by the degree of take up.

**Costs**
**Option 1 – No Change**

**Option 2 – Implement Sections 54 and 55 of CLSA 1990**
*Cost to existing providers*

26. It is impossible to determine what level of take up there will be from those able to provide probate services under s54 and s55 over the next few years. However, to understand how the market for probate services might develop, we can draw a parallel with the impact of licensed conveyancers on the market for conveyancing. Licensed conveyancers have secured only 5% of this market by value since 1990, when the first of them began business. This figure may be in part or in whole due to the increased competition in the conveyancing market. Allowing for inflation, and using data from the Law Society's 1999 research paper on conveyancing, the average cost of conveying a £65,000 house had fallen by a quarter by 1998. Our discussions with the providers of legal services suggest to us that implementing s54 and s55 is unlikely to have even a 5% impact on the market over the next decade.

27. What overall effect might commencing s54 and s55 have together, as the Government intends? We estimated that some £440m of solicitors' gross fee earnings comes from preparing letters for probate and administering estates. We also drew a parallel to the conveyancing market and considered that it was unlikely that more than 5% per cent of this market would shift to new providers.

28. It is therefore considered that commencing the two sections together would be unlikely to impact on solicitors' gross fees by more than £22m after a decade because of loss of market share.

29. The impact on some smaller firms who depend to a greater extent on probate and the administration of estates could be more significant, especially for firms that have built their business around this type of work. But this should not be exaggerated. Law Society data shows on average that firms with between 2 and 12 solicitors derive between 10 and 11 per cent of their gross fee income from probate, wills and trusts, as compared with 7 per cent for all firms of solicitors. So the bias towards smaller firms specialising in this type of work is not great, and the figures are likely to be influenced by the considerable amount of commercial work done by the largest practices. Again, it should be noted that some of these fees will not be derived from probate or the resulting estate administration, the percentage for probate and the resulting work will most likely be nearer 5%.

*Cost to new providers*

30. Professional bodies and their members who provide these services will need to have in place a regulatory system similar to solicitors both in terms of supervision of members and in complaints handling and will therefore bear similar costs. However, the regulations these bodies face will be different to those of solicitors, as they will not be regulated on the broad range of services solicitors offer. Financial organisations will have different requirements, but as well as meeting

the regulations to become a financial organisation, they will need to have a proper complaints handling system in place and comply with the Secretary of State's wishes in matters relating to those complaints. The biggest regulator of this market is the Probate Registry, who all providers will have to deal with. The more lucrative estate administration, which follows on from the grant of probate, will remain unregulated for all providers, except to the extent that the providers are supervised by their profession or regulating body. As discussed earlier, commencing s54 and s55 should have little effect on the amount of administration of estates work undertaken.

31. Approved new providers of these services would need to invest in the necessary skills, training, office space and equipment to provide these services. They would presumably do so only if they expected to operate at a profit. Incumbents who lost market share and were prompted to operate more efficiently could similarly be expected to release resources.

*Cost to consumers*

32. It is unlikely that consumers would face any increased costs.

**Enforcement and sanctions**

33. New providers would need to ensure they have adequate complaints handling schemes, and that they comply with any additional regulations made by the Secretary of State in respect of those schemes. For professional or other bodies authorised under Section 55, there would be additional measures in relation to professional standards, ethics, training etc, which would also need to be complied with.

34. Solicitors' clients are protected from the risk of malpractice by a regulatory framework, which includes complaints procedures and recourse to the Legal Services Ombudsman. The Department for Constitutional Affairs intends to protect consumers from any possible malpractice consistent with the provisions of s54 and s55. The Legal services Ombudsman has agreed to provide oversight of complaints handling under s55 and a statutory instrument has been laid in parliament to extend her remit to cover probate services accordingly.

35. The Department for Constitutional Affairs will make appropriate arrangements to secure compliance.

**Consultation with small business: the Small Firms' Impact Test**

36. Small firms of solicitors were among those who responded on these options in the consultation *In the public interest?*. Asked whether there was likely to be an impact on solicitors' firms, especially on smaller practices, many respondents, among whom solicitors predominated, said that significant probate work could go to new providers, and that there could be a significant impact on solicitors firms. Some thought larger firms would centralise their operations in main conurbations, and that many high street or rural offices might be forced to close. However, others responding to the consultation said it was difficult to see why other new providers would be interested.

37. We consider that those responses suggesting a high impact on existing providers are exaggerated. As mentioned in paragraph 24, discussions with providers of legal services suggest a similar, slight, impact on the market for probate services, and perhaps by less than 5% of gross fee earnings over the next decade. Similar arguments were deployed before restrictions in the market for conveyancing were introduced, when in reality the loss of share by solicitors in that market has been slight. Even though prices have fallen quite sharply, almost two thirds of solicitors' firms responding to the Law Society's 2001 Business Survey said that this kind of work was still profitable and it is our view that evidence from our research suggests that it would remain profitable, even when subject to the levels of additional competition envisaged by implementing s54 and s55.

**Competition assessment**

38. The proposal under Option 2 will impact on the market for probate services. The market for probate services is already open, to some extent, as there are no restrictions on an individual preparing papers and applying for grant of probate themselves so long as this is not done for reward (ie payment). At present, 30% of all applications are conducted in this way.

39. However, there is a restriction on who may do the work for reward, which this proposal aims to relax. The aim is to increase competition, and do so in the manner suggested by the Director General for Fair Trading in his report '*Competition in the Professions*' published in March 2001.

**Monitoring and Review**

40. How these arrangements are working will be reviewed within 3 years of implementation. As applications for authorised body status (under s55) must be approved by the Secretary of State, the Department will develop an ongoing understanding of how the market evolves in this area.

**Social/ Environmental Impact Test**

41. Not applicable.

**Summary and recommendation**

42. The proposal to implement s54 and s55 of the Courts and Legal Services Act 1990 would open the market for probate services so that solicitors would face competition other than from personal applicants (who cannot charge for their services). Personal applicants presently make 30% of applications for probate.

43. We do not expect that solicitors would lose more than 5% of the remaining market share, which is worth some £440m a year, also counting in the administration of estates (often linked with probate work and accounting for the bulk of the £440m). As we have seen in respect of conveyancing, opening up a 5% market share to new providers may have led to reduced prices for consumers. We expect a similar development in respect of probate but of course recognise that this is entirely dependent on the level of take-up.

44. We therefore recommend that s54 and s55 of the 1990 Act be commenced as soon as is practicable.

**Declaration**

45. I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed…… (***This remains blank until the legislation is to be sent to Parliament. It then becomes a final RIA.***

**Date**

David Lammy, Parliamentary Under-Secretary of State, Department for Constitutional Affairs.

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