EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (APPEALS FROM LICENSING AUTHORITY DECISIONS) (GENERAL COUNCIL OF THE BAR) ORDER 2018

2018 No. [XXXX]

1. Introduction

1.1 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 make provision under section 80 of the Legal Services Act 2007 ("the 2007 Act") for the General Regulatory Chamber of the First-Tier Tribunal to hear and determine appeals from decisions made by the General Council of the Bar, in its capacity as a licensing authority.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 This entire instrument applies only to England and Wales.

3.3 The instrument only applies in England and Wales because the General Council of the Bar only regulates legal services professionals and bodies in England and Wales. The instrument does not have minor or consequential effects outside England and Wales.

3.4 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

3.5 In summary, the Ministry of Justice considers that the Order would meet the two part test for certification on the basis that: (a) it relates exclusively to England and Wales; and (b) its subject matter is within the legislative competence of one or more of the devolved legislatures.

4. Legislative Context

4.1 The 2007 Act sets out a framework for the regulation of legal services in England and Wales. It establishes the Legal Services Board ("the LSB") as the oversight regulator for this framework. It requires that reserved legal activities may only be carried out by those who are authorised to do so, or who are exempt from the requirement to be authorised. It also makes provision for the regulation by approved regulators of those providing reserved legal activities. Reserved legal activities are set out in section 12 of the 2007 Act and include activities such as the exercise of a right of audience and the conduct of litigation. The approved regulators and the reserved legal activities in

relation to which they are designated are set out in Part 1 of Schedule 4 to the 2007 Act and in designation Orders made under Schedule 4.

4.2 The General Council of the Bar (the Bar Council) is an approved regulator for the reserved legal activities of the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities and the administration of oaths. The Bar Council has delegated its regulatory functions to the Bar Standards Board. It is therefore the Bar Standards Board which is seeking the modifications to its regulatory functions, but the Order is drafted in the name of the General Council of the Bar as the statutory approved regulator under the 2007 Act.

4.3 Schedule 10 to the 2007 Act provides that an approved regulator may also be designated by the Lord Chancellor as a licensing authority. Licensing authorities may authorise (license) bodies, known as alternative business structures, which are partly or wholly owned or controlled by non-lawyers to carry on reserved legal activities. Part 5 of the 2007 Act sets out arrangements under which licensing authorities may regulate such bodies. The Bar Council was designated as a licensing authority for the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities and the administration of oaths, by S.I. 2017/27, which came into force on 17 February 2017.

4.4 The LSB's rules state it may only grant an application (which is then recommended to the Lord Chancellor) to become a licensing authority in relation to a reserved legal activity if it is satisfied that there would be a body with the power to hear and determine appeals. Currently, appeals against licensing decisions made by the Bar Standards Board are determined by the High Court.

4.5 Section 80 of the 2007 Act allows the Lord Chancellor, on the recommendation of the LSB, to establish appellate bodies or to modify the functions of existing bodies to allow them to hear licensing appeals. As noted above, this Order makes provision for the First-tier Tribunal to hear appeals from the General Council of the Bar in its capacity as a licensing authority.

5. Extent and Territorial Application

5.1 This instrument extends to England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 The Lord Chancellor and Secretary of State for Justice, the Right Honourable David Lidington CBE MP, has made the following statement regarding Human Rights:

In my view the provisions of the Legal Services Act 2007 (Appeals from Licensing Authority Decisions) (General Council of the Bar) Order 2018 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 Currently appeals against licensing decisions made by the Bar Council in its capacity as a licensing authority fall to be determined by the High Court as provided for in section 24 of the Crime and Courts Act 2013. The First-tier Tribunal has judges with

experience in considering regulatory appeals and already has a jurisdiction to handle appeals relating to licensing authority decisions for the Council for Licensed Conveyancers, the Chartered Institute of Patent Attorneys, the Chartered Institute of Trade Mark Attorneys and the Institute of Chartered Accountants in England and Wales. It is more efficient and cost effective for these types of appeals to be dealt with by the First-tier Tribunal rather than the High Court.

7.2 This Order therefore gives the First-tier Tribunal the power to hear and determine appeals from decisions made by the Bar Council, in its capacity as a licensing authority. The decisions are those which are appealable under Part 5 of the 2007 Act and the Bar Council's licensing rules. It also sets out the powers of the First-tier Tribunal in relation to appeals from decisions made under licensing rules.

7.3 Licensing authorities regulate licensed bodies under the provisions of Part 5 of the 2007 Act (alternative business structures). Section 83 of the 2007 Act defines licensing rules as rules about the licensing and regulation of licensed bodies.

Consolidation

7.4 This is a standalone Order which does not make amendments to any other SI, so no question of consolidation arises.

8. Consultation outcome

8.1 Section 80(3) of the 2007 Act provides that the Lord Chancellor may make an Order under section 80 only if the LSB has made a recommendation that he does so. Under section 81 of the 2007 Act, that recommendation may be made only with the consent of the body whose decisions are to be appealed, and with the consent of the body to which appeals are to be made. Before making the recommendation, the LSB must publish the proposed recommendation and draft Order and have regard to any representations made.

8.2 The LSB consulted on its draft application (including a draft of the Order) for 8 weeks (21 January to 16 March 2016). The consultation received one response from the Bar Council who agreed that the draft Order was appropriate. Taking into account comments from the consultation, the LSB made a recommendation to the Lord Chancellor that an Order to be made.

9. Guidance

9.1 The LSB has issued guidance to licensing authorities under section 162 of the 2007 Act on the content of licensing rules. The guidance specifies those decisions which, as a minimum, the LSB considers ought to be appealable. These include: refusal of an application for a licence; imposition of conditions on a licence; modification of a licence; refusal to designate a person as a Head of Legal Practice or withdrawal of approval; disqualification from some or all roles within a licensed body; suspension and revocation of a licence; and power to modify the application of licensing rules etc. to special bodies.

10. Impact

10.1 This Order has no impact on charities, businesses or voluntary bodies, as the Order simply changes the appellate body, for licensing decisions made by the Bar Standards Board, from the High Court to the First-tier Tribunal.

10.2 Although HM Courts and Tribunals Service will face additional costs associated with a potential increase in cases determined by the First-tier Tribunal, the Bar Standards Board will meet the set up and operating costs, so there will be no net financial impact on the public sector.

10.3 A full Impact Assessment has not been prepared for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen. Experience has shown us that appeal numbers are very low. The costs being charged by HMCTS are for appeal volumes of less than 10 per year.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

11.2 This instrument is not expected to have any disproportionate impact on small firms, as the number of appeals made is likely to be low.

12. Monitoring & review

12.1 Under the 2007 Act, the LSB has oversight responsibility for all the approved regulators, including the Bar Council, and the LSB has a statutory duty to promote the regulatory objectives of the 2007 Act. As part of their ongoing work the LSB will monitor and review the effectiveness of this measure.

12.2 Having considered the Small Business, Enterprise and Employment Act 2015, a statutory review provision is not appropriate, as a review would be disproportionate taking into account the economic impact of the regulatory provision on the qualifying activity.

13. Contact

13.1 John Russell at the Ministry of Justice, Telephone: 020 3334 3626 or email: John.Russell2@justice.gov.uk can answer any queries regarding the instrument.