EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (APPEALS FROM LICENSING AUTHORITY DECISIONS) (No.2) ORDER 2011

2011 No. [XXXX]

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 This instrument makes provision for the Solicitors Disciplinary Tribunal ("the SDT") to act as the appellate body in relation to appeals from decisions made by the Law Society ("the Society") in its capacity as a licensing authority which are appealable under either Part 5 of the Legal Services Act 2007 ("2007 Act") or the Society's own licensing rules. It applies and modifies provisions of the Solicitors Act 1974 ("the 1974 Act") which apply in relation to the existing functions of the SDT to take account of this additional jurisdiction. It also provides the SDT with a power to award costs on an appeal to which this Order applies, sets out the orders which the SDT may make on an appeal made under the Society's licensing rules and provides for onward appeals to the High Court.

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

3.1. None.

4. Legislative Context

4.1 The 2007 Act sets out a framework for the regulation of legal services in England and Wales and establishes the Legal Services Board ("the LSB") as the oversight regulator for this new framework. It provides for certain legal services ("reserved legal activities") to be carried out only by those who are authorised to do so or exempt. "Authorised persons" must be authorised by an approved regulator or licensed by a licensing authority. A list of approved regulators is set out in Part 1 of Schedule 4 to the 2007 Act and includes the Society.

4.2 Part 5 of the 2007 Act sets out arrangements under which licensing authorities may license firms ("licensed bodies") which are partly or wholly owned or controlled by non-lawyers to provide legal services (or a mixture of legal and non-legal services). Part 1 of Schedule 10 to the 2007 Act provides for the Lord Chancellor, on the recommendation of the LSB, to designate approved regulators as licensing authorities.

4.3 The LSB may grant an application (which would then be recommended to the Lord Chancellor) to become a licensing authority only if satisfied that there would be a body with the power to hear and determine appeals under Part 5 of the 2007 Act or the applicant's proposed licensing rules (paragraph 11 of Schedule 10).

4.4 Section 80 of the 2007 Act allows the Lord Chancellor, on the LSB's recommendation, to establish appellate bodies or modify the functions of existing bodies to allow them to hear licensing appeals. An Order can only be made under section 80 with the consent of the body from which appeals are to be made and the body to which the appeals are to be made under the Order. As noted above, this Order makes provision for the SDT to hear appeals from the Society in its capacity as a licensing authority. The SDT is a statutory body created by the Solicitors Act 1974. Its primary function is to hear and determine allegations of professional misconduct against solicitors and legal services bodies regulated by the Law Society.

5. Territorial Extent and Application

5.1 The instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary of State, Jonathan Djanogly, has made the following statement regarding human rights:

"In my view the provisions of the Legal Services Act 2007 (Appeals from Licensing Authority Decisions) (No.2) Order 2011 are compatible with the convention rights."

7. Policy Background

- ***What is being done and why***

7.1 Article 4 of the Order provides for the SDT to hear and determine appeals from decisions made by the Society under Part 5 of the 2007 Act and under its licensing rules. It also makes provision for the SDT to make Orders for costs on an appeal to which this Order applies and applies relevant provisions of the 1974 Act in relation to such appeals. Article 5 makes provision for the orders that the SDT may make on appeals from decisions made by the Society under its licensing rules. This mirrors the provision which is made in the 2007 Act itself in relation to appeals under that Act. Article 5 also makes provision for onward appeals from the SDT to the High Court.

7.2 The Order is necessary to enable the Lord Chancellor, if he decides to do so, to make an order designating the Society as a licensing authority under Part 5 of the 2007 Act since, as explained above, such

designation cannot take place without an appropriate appeals mechanism.

7.3 The Society proposed that it use the SDT as its appellate body for the purposes of Part 5 of the 2007 Act. It considered that this would ensure a consistent approach was taken to the treatment of licensed bodies and 'traditional' law firms, and allow for a wide discretion to award costs.

7.4 The LSB has accepted this proposal and made its recommendation to the Lord Chancellor accordingly, with the consent of Society and the SDT. It is proposed that new rules of procedure will be made by the SDT to govern the exercise of its licensing jurisdiction.

- ***Consolidation***

7.5 There are no consolidation issues.

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 on the recommendation of the LSB. Under section 81 of the 2007 Act, that recommendation may only be made 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 its final recommendation to the Lord Chancellor, the LSB must publish its recommendation with a draft Order and a notice seeking representations within a specified period. The LSB must have regard to any representations made and must publish a revised draft of the Order and a statement detailing the changes if it differs materially from the original draft published.

8.2 The LSB has satisfied these statutory requirements. It consulted in November 2009 on its proposal that there should be a single appellate body to hear appeals against decisions of any licensing authority. The LSB suggested that all such appeals should be allocated to the GRC of the First-tier Tribunal. In August 2010, as required by section 81 of the 2007 Act, the LSB published and invited comments on a draft Order providing that the First-tier Tribunal should be the appellate authority for decisions made by the LSB, the Society and the Council for Licensed Conveyancers (the Council). The Order was accompanied by a further consultation paper on the underlying policy. That consultation closed in November 2010 and six responses were received. The Society and the SDT opposed the LSB's proposals. The Solicitor's Regulation Authority (SRA), which is the regulatory arm of the Society, also expressed concerns about aspects of the original proposal. A principal concern was that changes were needed to the First-tier Tribunal General Regulatory Chamber rules to allow a general power to award costs.

8.3 Because agreement could not be reached to amend the First-tier Tribunal's rules on costs, the Society did not consent to the proposals, as required under section 81 of the Act, and was removed from the earlier draft Order. The Council consented to the appeal arrangements and on 11th May 2011 the LSB recommended to the Lord Chancellor that he make an order under section 80 of the Act providing for the First-tier Tribunal to hear appeals against decisions of the Council as a licensing authority. Following Parliamentary debate, that Order was made on 12 July 2011.

8.4 The Society (through the SRA) decided to put forward its application to be a licensing authority naming the SDT as its appellate body. The LSB issued a further consultation on 5th May 2011 proposing the SDT as the appropriate appellate body for the Society's licensing decisions. The proposal included a draft recommendation and Order. The consultation closed on 2nd June 2011 and three responses were received (from the Society, ILEX Professional Standards, and the City of Westminster and Holborn Law Society). The responses supported the proposal that the SDT should hear appeals against licensing decisions of the Society. The consultation documents and responses are available on the LSB's website (http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm).

8.5 On 17th August 2011 the LSB published a statement detailing the material changes to the draft Order forming the subject of its recommendation, from the version published on 5th May 2011.

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 application for a licence; imposition of conditions on a licence; modification of a licence; refusal to designate as a Head of Legal Practice or withdrawal of approval; refusal to designate as Head of Finance and Administration or withdrawal of approval; disqualification from some or all roles within a licensed body; suspension and revocation of licence; and power to modify application of licensing rules etc to special bodies.

9.2 The LSB has made rules under section 96(1) of the 2007 Act prescribing the period within which appeals may be made to the relevant appellate body. This information is available on the LSB's website (http://www.legalservicesboard.org.uk).

10. Impact

10.1 The impact on business, charities or voluntary bodies is not expected to be significant. The SRA will fund the set-up and operating costs of the appeals mechanism through the licence fee payable by licensed bodies. The licensing authority and Appellants will fund their own legal costs, subject to the SDT's ability to award costs against a party.

10.2 The impact on the public sector is expected to be minimal.

10.3 An Impact Assessment (IA) has been prepared for this instrument. The IA is attached and will be published alongside this Explanatory Memorandum on www.legislation.gov.uk. The IA identified benefits associated with the proposals and did not find any unjustified costs. The main benefit of the appeal mechanism is to provide individuals or businesses affected by certain decisions of licensing authorities with the opportunity to challenge that decision in an independent and impartial Tribunal. Ultimately, the proposal establishes a credible appeal mechanism which, as an essential part of a better regulatory system, should enhance public confidence in the legal system and produce consumer welfare benefits.

11. Regulating small business

11.1 The legislation applies to small business. The preparation of an IA has helped inform the view that this Order is not expected to have a significantly disproportionate impact on small firms.

12. Monitoring and review

12.1 The appeal arrangements will be monitored by the SDT and the SRA during the first year of operation, and then reviewed at the end of that first year to agree whether any operational adjustments are required based on experience of running the process. The LSB will carry out a post implementation review of licensing generally, including appeal arrangements in 2014. It also plans to undertake a separate, broader review of disciplinary and appeal arrangements across approved regulators during 2011/12.

13. Contact

Please contact Nalini Deen at the Ministry of Justice (tel: 020 3334 4220 or email: nalini.deen@justice.gsi.gov.uk) about any queries regarding this instrument.