EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (APPEALS FROM LICENSING AUTHORITY DECISIONS) ORDER 2011

2011 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. Purpose of the Instrument

2.1 This instrument makes provision for the First-tier Tribunal to act as the appellate body for the purpose of appeals from decisions made by the Council for Licensed Conveyancers ("the Council") in its capacity as a licensing authority which are appealable under either Part 5 of the Legal Services Act 2007 ("2007 Act") or the Council's own licensing rules. It also sets out the Orders that the First-tier Tribunal may make on an appeal from the licensing rules and modifies provisions of the 2007 Act to reflect the provision in the Tribunals, Courts and Enforcement Act 2007 for the review of decisions of the First-tier Tribunal to lie to the Upper Tribunal.

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. The 2007 Act establishes the Legal Services Board ("the LSB") as the oversight regulator for this new framework. It requires that certain legal services ("reserved legal activities") may only be carried out by those who are authorised to do so or exempt. It also makes provision for the regulation by approved regulators of those providing such services. A list of approved regulators is set out in Part 1 of Schedule 4 to the 2007 Act and includes the Council.

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 allows the Lord Chancellor, on the recommendation of the LSB, to designate approved regulators as licensing authorities for the purpose of Part 5.

4.3 The LSB may not grant an application (which would then be recommended to the Lord Chancellor) to become a licensing authority

in relation to a reserved legal activity unless it is satisfied that there would be a body with the power to hear and determine appeals (paragraph 11 of Schedule 10).

4.4 Section 80 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. As noted above, this Order makes provision for the First-tier Tribunal to hear appeals from the Council in its capacity as a licensing authority. The First-tier Tribunal was created by the Tribunals, Courts and Enforcement Act 2007 and is divided into chambers with functions allocated by the Lord Chancellor and Senior President of Tribunals. It is intended that appeals from licensing decisions will be allocated (by the Senior President of Tribunals) to the General Regulatory Chamber of the First-tier Tribunal, whose members have experience of regulatory matters. Part 1 of the Tribunals, Courts and Enforcement Act 2007 makes provision for appeals from the First-tier Tribunal (which lie principally to the Upper Tribunal).

5. Territorial Extent and Application

5.1 The instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Parliamentary 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) Order 2011 are compatible with the convention rights."

7. Policy Background

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

7.1 This Order gives the First-tier Tribunal the power to hear appeals from decisions of the Council under Part 5 of the 2007 Act and its licensing rules. It also sets out the Orders that the First-tier Tribunal may make on appeals from decisions made under licensing rules. This mirrors the provision which is made in the 2007 Act itself in relation to appeals under that Act. In addition, the Order modifies the 2007 Act so that the onward appeal route for decisions of the First-tier Tribunal is to the Upper Tribunal.

7.2 The Order is necessary to enable the Lord Chancellor, if he decides to do so, to designate the Council as a licensing authority under Part 5 since, as explained above, such designation cannot take place without an appropriate appeals mechanism.

7.3 Two options were available to the Council in relation to appeals from its licensing decisions: the Discipline and Appeals Committee of the Council ("the DAC") which is the existing appeals mechanism for certain decisions made by the Council in its capacity as an approved regulator, or the First-tier Tribunal. The LSB proposed the First-tier Tribunal as the appropriate appellate body to hear appeals about the decisions of the Council, with the functions allocated to the General Regulatory Chamber (GRC). A number of functions have been allocated by the Senior President to the GRC including immigration services, gambling and claims management services.

7.4 The LSB considered that the First-tier Tribunal had more relevant expertise than the DAC in relation to the complex issues of ownership and regulatory discipline that are likely to arise in relation to licensing appeals. It also considered that the jurisdiction of the First-tier Tribunal could be expanded in the future if additional licensing authorities are designated (subject to their consent).

7.5 The Council has consented to the proposal to use the First-tier Tribunal as its appellate body for the purposes of Part 5 of the 2007 Act on the basis that this is likely to provide a more efficient service. The Council has agreed to meet the costs associated with the establishment of, and the annual running costs of the appeal mechanism, which will be incorporated as an element of the licence fee charged to licensed bodies. A Memorandum of Understanding between the Tribunals Service and the Council will be put in place should the Council be designated as a licensing authority.

- ***Consolidation***

7.6 This is the first Order made under section 80 of the 2007 Act. There are therefore no earlier Orders to consolidate.

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 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 initially 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. The consultation documents and responses are available on the LSB's website (http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm).

8.3 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 Law Society and the Council. The Order was accompanied by a further consultation paper on the underlying policy. This consultation closed in November 2010. Six responses were received. The Law Society and the Solicitors Disciplinary Tribunal opposed the LSB's proposals. The Solicitors Regulation Authority ("SRA") expressed concerns about aspects of the proposals although it concluded that the GRC of the First-tier Tribunal would be an appropriate appellate authority. 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. The LSB asked the Tribunal Procedure Committee ("the Committee") to consider changes to its costs rules but on 1st March 2011, the Committee came to the preliminary view that the rules in their current form were adequate to determine whether one party should pay the costs of another.

8.4 The SRA has not consented to this Order, but has proposed different arrangements which are being consulted on separately. Reference to the LSB as a licensing authority in the draft Order was also removed pending commencement of the provisions in the 2007 Act relating to the LSB acting as a licensing authority. The Council consented (as required by section 81(1)) to the recommendation and draft Order. The Tribunals Service has also consented.

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. Licensed bodies will fund the set-up and operating costs of the appeals mechanism through the licence fee. In addition, appellants and licensing authorities will need to fund their own legal costs, subject to the First-tier Tribunal's limited discretion within its procedural rules 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 Tribunals Service and the Council 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 in 2014, which will include the appeal arrangements under section 80.

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.