EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (CHARTERED INSTITUTE OF LEGAL EXECUTIVES) (APPEALS FROM LICENSING AUTHORITY DECISIONS) ORDER 2020

2020 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 Chartered Institute of Legal Executives, 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.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons

3.2 This entire instrument applies to England and Wales only.

3.3 The instrument does not have any minor or consequential effects outside England and Wales.

3.4 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, 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 The Department has reached this view because it considers that the primary purpose of the Order relates to the regulation of the legal profession and/or the provision of legal services, which is within the devolved legislative competence of both of the devolved legislatures. The primary purpose of the subject matter is not within Schedule 5 to the Scotland Act 1998, or it is included as an exception to the reservation of the regulation of anti-competitive practices etc in paragraph C3 of Schedule 5 to that Act, and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act). The primary purpose of the subject matter of the Order is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act).

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is set out in Section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business" (English Votes for English Laws).

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State, Chris Philp MP, has made the following statement regarding Human Rights: "In my view the provisions of the Legal Services Act 2007 (Chartered Institute of Legal Executives) (Appeals from Licensing Authority Decisions) Order 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 The 2007 Act sets out a framework for the regulation of legal services in England and Wales. In doing so, it established the Legal Services Board ("the LSB") as the oversight regulator for this framework.

6.2 Section 12 of the 2007 Act sets out six reserved legal activities which may only be carried on by those persons who are authorised to do so, or who are exempt from the requirement to be authorised. These reserved activities are the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths.

6.3 The 2007 Act makes provision for the regulation and authorisation, by approved regulators, of those persons providing reserved legal activities. The approved regulators and the reserved legal activities in relation to which they are designated to regulate are set out in Part 1 of Schedule 4 to the 2007 Act, and in designation Orders made under Schedule 4.

6.4 The Chartered Institute of Legal Executives ("CILEx") 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. CILEx has delegated its regulatory functions to CILEx Regulation Ltd. The Order refers to CILEx as it is the statutory approved regulator under the 2007 Act.

6.5 The 2007 Act also introduced Alternative Business Structures ("ABS") and the regulatory and licensing arrangements for them. An ABS is a law firm which is partly or wholly owned or controlled by non-lawyers to carry out reserved legal activities. ABS are also known as "licensable bodies".

6.6 Schedule 10 to the 2007 Act provides that an approved regulator may be designated by the Lord Chancellor as a licensing authority. Licensing authorities may authorise and regulate ABS. Part 5 of the 2007 Act sets out arrangements under which licensing authorities may regulate such bodies.

6.7 CILEx 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. 2019/166, which came into force on 1 April 2019.

6.8 The 2007 Act also requires the LSB's rules to provide that it may only grant an application (which would then be recommended to the Lord Chancellor) to become a licensing authority if it is satisfied that there would be a body with the power to hear and determine appeals against licensing and regulatory decisions. In relation to CILEx,

interim appeals arrangements approved by the LSB are currently in force, but there is a need for more permanent arrangements.

6.9 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. This Order makes provision for the First-tier Tribunal to hear and determine appeals from CILEx in its capacity as a licensing authority.

7. Policy background

What is being done and why?

7.1 Currently, CILEx has temporary appeal arrangements in place under which three members of CILEx Regulation Ltd's existing Appeals Panel are ring-fenced to act as the appellate body for appeals against licensing and regulatory decisions made by CILEx. The LSB recommended to the then Lord Chancellor in January 2019 that the General Regulatory Chamber of the First-tier Tribunal be made the relevant appellate body on a permanent arrangement, and the Lord Chancellor agreed to make this Order.

7.2 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 General Council of the Bar, 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.

7.3 The Order therefore gives the First-tier Tribunal the power to hear and determine appeals from decisions made by CILEx, in its capacity as a licensing authority. The decisions are those which are appealable under Part 5 of the 2007 Act and CILEx's licensing rules. The 2007 Act gives a direct statutory right of appeal in relation to two types of decisions; the imposition of a financial penalty on ABS or individuals within it, and decisions made under Schedule 13 to the 2007 Act in relation to the ownership of an ABS. Examples of other types of appeals that may be made under CILEx's licensing rules include appeals against decisions to refuse to grant a licence, or against decisions to only grant a licence subject to certain conditions. The Order also sets out the powers of the First-tier Tribunal in relation to appeals from decisions made under licensing rules.

7.4 Section 83 of the 2007 Act defines licensing rules as rules about the licensing and regulation of ABS.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This is a standalone order which does not make amendments to any other SI (although it does make modifications to the 2007 Act), so no question of consolidation arises.

10. Consultation outcome

10.1 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.

10.2 The LSB consulted on its draft application (including a draft of the Order) for 4 weeks between 19 October 2018 and 16 November 2018.[1] The consultation received one response from CILEx, 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 be made.

11. Guidance

11.1 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.

12. Impact

12.1 This Order has no impact on charities or voluntary bodies, as the Order simply enables the First-tier Tribunal to hear and determine appeals against licensing decisions.

12.2 Although HM Courts and Tribunals Service ("HMCTS") will face additional costs associated with a potential increase in cases to be determined by the First-tier Tribunal, CILEx Regulation Ltd will meet the set up and operating costs, so there will be no net financial impact on the public sector.

12.3 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.

13. Regulating small business

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

14. Monitoring & review

14.1 Under the 2007 Act, the LSB has oversight responsibility for all the approved regulators, including CILEx, and the LSB has a statutory duty to promote the regulatory

[1] https://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/2018/Final%20S80%20Order%20Consultation%20CILEX%20Reg.pdf

objectives of the 2007 Act. As part of their ongoing work the LSB will monitor and review the effectiveness of this measure.

14.2 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.

15. Contact

15.1 Ruksana Begum at the Ministry of Justice, Telephone: 07719099645 or email: Ruksana.Begum@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Amelia Wright, Deputy Director for legal services policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Chris Philp MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.