EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (CONSEQUENTIAL AMENDMENTS) ORDER 2009

2009 No.

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 amend both primary and secondary legislation as a result of the commencement of provisions in the Legal Services Act 2007 ("the 2007 Act").

2.2 In summary, this instrument:

2.2.1 amends legislation that contains terminology that will be made redundant upon the commencement of certain provisions of the 2007 Act;

2.2.2 amends legislation to make terminological changes relating to the assessment of bills of costs;

2.2.3 amends the definition of "qualified lawyer" in secondary legislation by removing the requirement to be "employed" by a solicitor's practice. This is to ensure that members of the Institute of Legal Executives ("ILEX"), who are managers of Legal Disciplinary Practices ("LDPs"), are able to continue to advise on compromise agreements.

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

3.1 None

4. Legislative Context

4.1 This instrument is made under sections 208(2) and 208(3) of the 2007 Act. These sections enable the Lord Chancellor, by order, to make consequential amendments to legislation passed before or in the same session as the 2007 Act.

4.2 Amendments in this instrument to secondary legislation passed after the 2007 Act (Mental Health Review Tribunal for Wales Rules 2008 and the Judicial Appointments Order 2008) are made under section 78 of the Mental Health Act 1983 and section 51 of the Tribunals, Courts and Enforcement Act 2007 respectively.

4.3 This instrument makes consequential amendments to existing legislation as a result of the 2007 Act which received Royal Assent on 30th October 2007. To date, five commencement orders have been made under sections 204, 208 and 211 of the 2007 Act. Those are *the Legal Services Act 2007 (Commencement No.1 and Transitory Provisions) Order 2008*, *the Legal Services Act 2007 (Commencement No.2 and Transitory Provisions) Order 2008, the Legal Services Act 2007 (Commencement No.3 and Transitory Provisions) Order 2008, the Legal Services Act 2007 (Commencement No.4, Transitory and Transitional Provisions and Appointed Day) Order 2009* and *the Legal Services Act 2007 (Commencement No.5 Transitory and Transitional Provisions) Order 2009*.

4.4 This instrument makes a number of consequential amendments to existing legislation and is linked to the implementation of the new regulatory regime under which the Legal Services Board ("the Board") will assume its statutory functions; the approved regulators will be recognised in statute; and persons will only be able to carry on reserved legal activities if they are entitled to do so (by being exempt or being authorised by the approved regulators). When these provisions of the Legal Services Act 2007 are commenced, a number of amendments, repeals and revocations to existing legislation will be needed to facilitate the new regulatory regime. This instrument makes these consequential amendments to legislation not already covered by Schedule 21 to the 2007 Act.

4.5 Where this Order amends secondary legislation made after the passing of the 2007 Act, we are relying on powers in the parent legislation of those statutory instruments (instead of the power to make consequential amendments in section 208 of the 2007 Act). As a consequence, it has been necessary for the Lord Chancellor to consult the Administrative Justice and Tribunals Council in accordance with paragraph 24(1) of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007 and the Lord Chief Justice of England and Wales and the Judicial Appointments Commission in accordance with section 51(9) of that Act.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales only.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State, Bridget Prentice, has made the following statement regarding Human Rights:

"In my view the provisions of the Legal Services Act 2007 (Consequential Amendments) Order 2009 are compatible with the convention rights."

7. Policy background

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

7.1 The 2007 Act reforms the way in which legal services are regulated in England and Wales. The aims of the Act are to simplify the existing regulatory framework by establishing an oversight regulator, the Board, and to improve consumer confidence and the way in which complaints are dealt with by establishing an independent complaints handling body, the Office for Legal Complaints ("the OLC").

7.2 When the new regulatory regime is commenced, persons may only carry on one or more of the reserved legal activities if entitled to do so (either by being exempt or being authorised by an approved regulator). In turn the approved regulators (set out in Schedule 4) will be overseen by the Board. As the new regime consolidates existing legislation and recognises a person's entitlement to carry on reserved legal activities, it repeals existing references to professional titles, replacing instead with references to a person's entitlement under the 2007 Act.

7.3 Together with these broader reforms, the 2007 Act amended existing legislation, particularly with reference to the Law Society's regulatory powers. This included the Law Society's powers in respect of disciplinary action and powers of investigation into alleged misconduct. Some of these reforms were necessary to enable the Law Society to effectively regulate LDPs. The regime for LDPs was commenced by *the Legal Services Act* 2007 (*Commencement No.4, Transitory and Transitional Provisions and Appointed Day) Order 2009*, which came into force on 31st March 2009. LDPs enable the collaboration of different types of lawyers and non-lawyers in the management and control of law firms, whilst their activities are limited to the provision of 'solicitor services and other relevant legal services." In light of these reforms, one purpose of this instrument is to amend the definitions of "qualified lawyer" in secondary legislation to remove references to "employed by a solicitor's practice" to encompass ILEX Fellows who are also managers of LDPs.

7.4 This instrument amends definitions of "legal representative", "solicitor", "supplier" and "professional legal adviser" to reflect the new regulatory regime of authorisation introduced by Part 3 of the 2007 Act. Part 3 sets out which legal activities are subject to the new regime and who can be authorised to carry out such activities. This instrument also makes changes to the Family Proceedings Rules 1991, and the Court of Protection Rules 2007 to include managers of legal disciplinary practices, as well as employees of solicitors, within the definition of "legal representative". This is to ensure that all those covered by the previous definition continue to be covered by the new definition, but also to reflect the changes brought about by the Legal Disciplinary Practices ("LDPs") regime.

Amendments in this Order also remove out of date references in secondary legislation to the Courts and Legal Services Act 1990.

7.5 The remaining amendments fall into the following broad categories:

(i) Amendments to outdated terminology relating to the taxation of a solicitor's bill. The term "taxation" has been updated by Schedule 16 to the 2007 Act, however, in order to ensure consistency throughout the various pieces of legislation, references to taxation in the Charities Act 1993 also need to be amended before the references in Schedule 16 are commenced.

(ii) Amendments to secondary legislation relating to intellectual property and consequential both to the changes in responsibility for the regulation of trade mark attorneys and patent attorneys and terminological changes to outdated references such as "agent". These amendments are required as the result of amendments made to the Copyright, Designs and Patents Act 1988 and the Trade Marks Act 1994 by sections 184 and 185 of, and Schedule 21 to, the 2007 Act.

(iii) An amendment to the reference of 'probate practitioner' in the Non-Contentious Probate Rules 1987 (S.I. 1987/2024). This amendment is required to reflect the fact that authorisation to carry out probate activities will derive from the 2007 Act instead of from provisions of the Solicitors Act 1974 and the Courts and Legal Services Act 1990, which are due to be repealed.

- ***Consolidation***

7.7 This instrument makes amendments that are consequential to the 2007 Act, therefore there are no issues relating to consolidation.

8. Consultation outcome

8.1 The 2007 Act is the result of extensive consultation both before and during the Parliamentary process. The key groups that were consulted were consumer organisations, regulatory bodies, other professional representative bodies and other key stakeholders, such as the Offices of the Legal Services Ombudsman and Legal Services Complaints Commissioner. In particular, the Government consulted following the 2001 report on competition in the professions by the Office of Fair Trading[1], and published a report into competition and regulation in the legal services market.[2] In 2003, Sir David Clementi was appointed by the government to conduct an independent review of the regulation of legal services[3], which was the basis for the proposals set out in the Government's White Paper *The Future of Legal Services: Putting Consumers First,* published in October 2005. A summary of the responses are included in section 2 of the Regulatory Impact Assessment ("RIA") which can

[1] Office of Fair Trading, 2001, *Competition in the Professions – A Report by the Director General of Fair Trading*

[2] Department for Constitutional Affairs, 2003, *Competition and Regulation in the Legal Services Market – A Report Following the Consultation "In the Public Interest?"*

[3] Clementi, Sir David, 2004, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*

be found at http://www.dca.gov.uk/risk/ria-legal-services.pdf. A supplementary RIA was prepared in June 2007, updating and supplementing the full Impact Assessment of November 2006.

8.2 The draft Legal Services Bill was published in May 2006 and was subject to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament. The Joint Committee reported in July 2006, and the Government published its response to this in September of the same year.

8.3 The Secretary of State's Consumer Advisory Panel was also established in 2005 to advise on the development of the 2007 Act, and it continues to advise on the implementation of the legislation. In addition, the Government continues to consult with relevant stakeholders during the commencement of the legislation and has set up the Implementation Working Group (established in April 2006) which includes representatives from existing legal regulators and consumer groups, amongst others.

8.4 In the course of preparing this instrument key stakeholders such as legal regulators have been consulted on the amendments proposed and are in support of this instrument. Government departments owning the affected legislation have also been consulted and have indicated their approval of the amendments.

8.5 The Lord Chief Justice of England and Wales has also been consulted and is content with the amendments to the Judicial Appointments Order 2008 and the Administrative Justice and Tribunals Council has been consulted and is content with the amendment to the Mental Health Tribunal for Wales Rules 2008.

9. Guidance

9.1 The amendments made by this instrument are purely consequential to the 2007 Act, therefore no guidance has been issued. However, guidance to the 2007 Act itself can be found in the explanatory notes of the Act at http://www.opsi.gov.uk/acts/acts2007/en/ukpgaen_20070029_en_1.htm.

10. Impact

10.1 A full regulatory impact assessment was prepared for the Legal Services Bill in November 2006 (see link in paragraph 8.1 above), and a supplementary memorandum was published in June 2007 which can be found at http://www.justice.gov.uk/docs/RIA-Supplement-v021.pdf. The full RIA includes sections 4-6, which examine the options considered and our reasoning for the final recommendations which were brought forward in the 2007 Act.

10.2 The amendments contained within the order do not amend the scope of persons carrying on legal activities, nor the bodies who regulate them.

11. Regulating small business

11.1 This instrument will not impact on the regulation of small businesses, as the amendments made are purely consequential to the 2007 Act, and does not affect the scope or rights of providers of legal services.

11.2 However, in developing the wider reforms of the 2007 Act, the regulation of small businesses was considered in detail. Section 7 of the full RIA sets out the Small Firms Impact Test, in particular relating to the Board and ABS. In developing the Impact Test, the Small Business Service and Federation of Small Businesses were consulted and were content with the approach.

12. Monitoring & review

12. Due to the nature of this instrument, monitoring and review will not be necessary.

13. Contact

Kuljeet Bath at the Ministry of Justice (Tel: 020 3334 5453 or email: kuljeet.bath@justice.gsi.gov.uk) can answer any queries regarding the instrument.