EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (GENERAL COUNCIL OF THE BAR) (MODIFICATION OF FUNCTIONS) 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 modify the functions of the General Council of the Bar ("the Bar Council") in relation to its regulatory arrangements, within the meaning of section 21 of the Legal Services Act 2007 ("the 2007 Act").

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 Section 69 of the 2007 Act, under which this Order is made, allows the Lord Chancellor to make an Order modifying the functions of an approved regulator or other body. The purposes for which the LSB may make a recommendation to the Lord Chancellor to make an Order are set out in section 69(3), and include (amongst other things) to allow the regulator to carry out its functions more effectively and efficiently. The LSB has issued a statement of policy setting out the circumstances in which it is likely to consider it appropriate to make such a recommendation[1]. This Order also uses the powers in section 64, which lists some of the matters which can be included in a section 69 Order.

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:

6.2 In my view the provisions of the Legal Services Act 2007 (General Council of the Bar) (Modifications of Functions) Order 2018 are compatible with the Convention rights.

[1] This statement can be found at http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/Statement_of_Policy-s69_Orders.pdf or obtained from Consultation Co-ordinator, Legal Services Board, One Kemble Street, London WC2B 4AN

7. Policy background

What is being done and why

7.1 At present, the Bar Standards Board's regulatory regime is non-statutory, with barristers, in effect, consenting to be bound by the rules of the Bar Standards Board (BSB), establishing a contract between them. This arrangement is underpinned by a series of agreements between the Bar Council, the Inns of Court, the Bar Tribunals and Adjudication Service and the BSB. The BSB believes that some of its regulatory functions, including in relation to individual barristers, should be put on a statutory footing, to enable it to regulate the whole profession more effectively and efficiently, and this is what this Order seeks to achieve.

7.2 Article 3 of this Order enables the Bar Council to make rules or regulations providing for appeals to the First-tier Tribunal against decisions made by the Bar Council as an approved regulator and as a licensing authority. The Bar Council is required by the LSB to have appeal routes in place as part of its regulatory arrangements and currently the appeal route for all regulatory and disciplinary decisions is the High Court, as provided for in section 24 of the Crime and Courts Act 2013. Although article 3(1) confers a power on the Bar Council to provide for appeals to the First-tier Tribunal, it does not require the Bar Council to make such a provision. This is because the intention of the BSB is to use article 3 for appeals about authorisation and licensing decisions, whereas it will use section 24 of the 2013 Act to provide for appeals about disciplinary decisions. 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.

7.3 Article 4 of this Order gives the Bar Council the same intervention powers when acting as an approved regulator as it already has when acting as a licensing authority. Intervention powers, amongst other things, enable the BSB to enter a premises, seize relevant papers and prevent persons from practising. This has been done by applying Schedule 14 to the 2007 Act to the Bar Council in its capacity as an approved regulator with the modifications listed in paragraphs (2) to (4) of article 4. The BSB recognises that it is important for it to have the ability to take prompt action when issues arise in order to protect the consumer interest. It is also appropriate that the Bar Council should have consistent powers in its role as both an approved regulator and licensing authority, so as to be able to take action if necessary regardless of the business model of the entity or individual being regulated.

7.4 Article 5 of this Order enables the Bar Council to make rules requiring an authorised person it regulates to provide information and documents for the purpose of ascertaining whether or not any rules, regulation or code made or issued by the Bar Council are being complied with. These powers are similar to powers available to the Bar Council as a licensing authority under sections 93 and 94 of the 2007 Act. Should the BSB wish to make such rules it would need to seek approval from the LSB. The 2007 Act makes it clear that amendments to regulatory arrangements must be approved by the LSB.

7.5 Article 6 of this Order enables the Bar Council to make disciplinary arrangements. The arrangements include the possibility of imposing fines not exceeding £50m on

individuals and fines not exceeding £250m on entities. The broad intention is for greater consistency. The Bar Council, in its role as a licensing authority, already has the ability to impose fines to these maximum levels, as do all other licensing authorities, by virtue of rules made by the LSB under section 95 of the 2007 Act (S.I. 2011/1659). The BSB may consider it appropriate to have similar disciplinary powers to deal with breaches by any authorised person, regardless of the business model involved, whether an entity, licensed body or individual. Article 7 enables the disciplinary arrangements to include the power of disqualification if the disqualification conditions are met. Again, any rules on disciplinary arrangements would need to be approved by the LSB before they could be implemented.

7.6 Article 8 enables the Bar Council to make practice rules requiring persons it regulates to consider the list of disqualified persons before engaging an individual to carry out relevant activities, and to seek permission of the Bar Council before engaging a disqualified person. The implementation of such arrangements in rules and regulations would need to be approved by the LSB.

7.7 This Order also enables the Bar Council to make compensation arrangements, and allows the Bar Council to make rules to establish and maintain a compensation fund and to require those it regulates to contribute to that fund (article 9). Compensation arrangements may be needed if clients lose funds as a result of a barrister or barrister entity failing to comply with rules, or being unable to continue in practice. Such rules may also require persons it regulates to take out and maintain insurance, and require persons it regulates to contribute to insurance taken out and maintained by the Bar Council. Again, rules establishing a compensation fund cannot be implemented unless the LSB grants approval.

Consolidation

7.8 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 There are procedural requirements relating to consultation in sections 69 and 70 of the 2007 Act. The Lord Chancellor may make an Order only if the LSB has made a recommendation under section 69, annexing a draft Order. Before making the recommendation to the Lord Chancellor, the LSB must publish the proposed recommendation and draft Order and have regard to any representations made.

8.2 The LSB therefore consulted on a draft of the Order between 30 August 2016 and 22 November 2016.[2] Responses were received from the Council of the Inns of Court, The Institute of Barristers' Clerks, and the Bar Council. These responses raised a number of concerns. After careful consideration and review, the LSB took the view that the proposed modifications to the functions of the BSB were proportionate and necessary. Following receipt of the LSB's recommendation, and having taken into account the available evidence, we believe it is appropriate for the regulator of barristers to be given the power to make rules and regulations as provided for in this

[2] The consultation document can be found at http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/2016/2016_08_30_BSB_s69_order_consultation_FINAL.pdf or obtained from Consultation Co-ordinator, Legal Services Board, One Kemble Street, London WC2B 4AN

Order. This will improve consumer protection and will enable the regulator to carry out its role more effectively and efficiently.

9. Guidance

9.1 No other public guidance or other publicity is necessary in connection with this Order. The changes will affect individuals and firms regulated by the Bar Council and the Bar Council will publicise these as necessary.

10. Impact

10.1 Any business impact will relate to the Bar Council and those it regulates and is likely to be minimal. Should the Order be made, and then should the BSB seek to amend its regulatory arrangements and gain approval from the LSB for these amendments, the new arrangements will, in the main, replace existing arrangements. The draft Order will enable the BSB to introduce a compensation fund. Should it seek to do so, and if this is approved by the LSB, there would be small additional costs for those regulated by the BSB to contribute to a compensation fund. Our analysis is that these would be minimal. A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

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 any new arrangements made, should this Order be made, will, in the main, replace existing arrangements.

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.