EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (THE LAW SOCIETY) (MODIFICATION OF FUNCTIONS) ORDER 2015

2015 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 removes the requirement on a solicitor who is a sole practitioner to have to obtain an annual endorsement on their practising certificate and so establishes a single method of authorisation and regulation of all solicitors. This also has the effect of removing the differences in the way in which the regulatory arm of the Law Society, the Solicitors Regulation Authority (SRA), can take regulatory action where a difficulty arises with a sole practitioner.

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

3.1 None.

4. Legislative Context

4.1 The Legal Services Act 2007 ("the 2007 Act") governs the regulation of legal services in England and Wales. Under the 2007 Act, only a person who is authorised by an approved regulator, or who is exempt from the requirement to be authorised, may carry on a reserved legal activity as defined in section 12 of that Act. Approved regulators are responsible for ensuring that the persons authorised by them act in a way that is consistent with the regulatory objectives set out in the 2007 Act. Part 2 of the 2007 Act established the Legal Services Board ("the LSB") as the oversight regulator with responsibility for approved regulators. 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. Part 2 of Schedule 4 allows for bodies to apply to the LSB to be recommended to the Lord Chancellor for designation as an approved regulator in relation to one or more of the reserved legal activities. The Law Society is an approved regulator for these reserved legal activities: the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities and the administration of oaths.

4.2 Schedule 10 of the 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 Law Society is a licensing authority for these reserved legal activities: the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities and the administration of oaths.

4.3 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 or 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].

5. Territorial Extent and Application

5.1 The instrument applies to England and Wales only.

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary of State, Shailesh Vara MP, has made the following statement regarding Human Rights

"In my view the provisions of the Legal Services Act 2007 (The Law Society) (Modification of Functions) Order 2015 are compatible with the Convention rights."

7. Policy background

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

7.1 The Law Society of England and Wales is an approved regulator under the 2007 Act. The SRA is the independent regulatory arm of the Law Society which regulates all forms of solicitor's practices and Alternative Business Structures. Section 9 of the Administration of Justice Act 1985 ("the 1985 Act") allows the Law Society to make rules making provision as to the management and control of legal services bodies and prescribing the circumstances in which legal services bodies may be recognised by the Society (therefore these are known as recognised bodies). One type of solicitor's practice is known under SRA rules as a recognised sole practitioner.

7.2 Therefore the SRA currently regulates three different types of practices: recognised bodies, Alternative Business Structures and sole practices. The first two are subject to the same authorisation process, which is a one-off

[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

authorisation followed by ongoing supervision. In contrast, sole practitioners require annual endorsement of their practising certificates.

7.3 A sole practitioner firm is like any other traditional law firm, except that it has only has one principal, who can be either a solicitor or a registered European lawyer. The practice of sole solicitors is currently governed by the Solicitors Act 1974 ("the 1974 Act") and recognition as a sole practitioner is obtained by way of an endorsement on an individual's practising certificate. All other firms which the SRA regulates are subject to one initial authorisation and unlimited "licences." This results in regulatory inefficiencies and increased costs for both sole practitioner firms and the SRA. The current differences in regulation also make it more difficult for solicitors to move between one type of practice and another. There are also differences in the way in which the SRA can take regulatory action where difficulty arises with a sole practitioner firm as compared with other firms.

7.4 This Order amends both the 1974 Act and the 1985 Act and creates the concept of "recognised sole solicitors' practices", which would be subject to the same type of authorisation and ongoing supervision process as recognised bodies and alternative business structures.

7.5 Part 1 of Schedule 1 amends the 1974 Act to remove the concept of sole solicitors. It repeals the requirement that a solicitor may not practise as a sole solicitor without an endorsement on the solicitor's practising certificate and makes minor and consequential amendments. Section 31 of the Act is amended to require rules under that section to provide that a solicitor may not practise as a sole solicitor unless the sole solicitor's practice is recognised under section 9 of the 1985 Act.

7.6 Part 2 of Schedule 1 amends section 9 of the 1985 Act to introduce the concept of the "recognised sole solicitors' practice", as well as making other related amendments to the 1985 Act. It also amends Schedule 2 to the 1985 Act to allow the Law Society to intervene if a solicitor practising as a sole principal dies or becomes incapacitated.

- ***Consolidation***

7.7 Although some amendments are made to another Statutory Instrument (the European Communities (Lawyer's Practice) Regulations 2000, S.I. 2000/1119), these are consequential, and we believe there is no need for consolidation at this stage. The changes made to primary legislation are not so substantial as to lead us to consolidate at this stage.

8. Consultation outcome

8.1 The SRA first consulted publicly on its proposals to modernise the authorisation of sole practitioner firms between 14 December 2010 and 8 March 2011[2]. All respondents supported the proposal to remove the endorsement mechanism for sole practitioner firms and treat sole practitioner

[2] http://www.sra.org.uk/sra/consultations/sole-practice-authorisation.page

firms as a form of recognised body. However the proposal was not taken forward at that time. The SRA has now revisited this proposal and issued a policy statement[3] in March 2014. The proposal was again supported by those who commented on it.

8.2 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.

8.3 The LSB consulted on the draft Order between 16 April 2014 and 28 May 2014[4]. There was one response from the Sole Practitioners Group, which supported the proposals. Following this the LSB recommended to the Lord Chancellor that an Order under section 69 of the 2007 Act be made, so that the requirement, currently contained in the Solicitors Act 1974 for sole practitioner solicitor firms to have to be authorised annually, is removed.

9. Guidance

9.1 No other public guidance or other publicity is necessary in connection with this Order. The changes affect solicitors firms and the SRA has published on its website the consultation paper, consultation responses and a detailed explanation of the new authorisation process. The changes will also be reflected in the SRA Handbook.

10. Impact

10.1 There is no impact on charities or voluntary bodies. In relation to the impact on businesses the sole practitioner group contains a disproportionate number of small firms (although sole practitioner firms are not necessarily small firms, as they can be enterprises of considerable size in terms of both numbers of employees and turnover). However, overall it is expected that sole practitioner firms will benefit from this proposal.

10.2 There will be no impact on the public sector.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

[3] The policy statement can be found at http://www.sra.org.uk/sppolicy

[4] The consultation document can be found at http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/20140416_Consultation_S69_Sole_Practitioners.pdf or obtained from Consultation Co-ordinator, Legal Services Board, One Kemble Street, London WC2B 4AN

11. Regulating small business

11.1 This measure is deregulatory as it will remove unnecessary authorisation and regulation and so will reduce costs for sole practitioner firms and also for the SRA.

12. Monitoring and review

12.1 Under the 2007 Act, the LSB has oversight responsibility for all the approved regulators, including the Law Society, 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.

13. Contact

13.1 Please contact John Russell (tel: 020 3334 3626 or email: John.Russell2@justice.gsi.gov.uk) at the Ministry of Justice regarding any queries about this instrument.