EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (WARRANT) (APPROVED REGULATOR) REGULATIONS 2015

2015 No. [DRAFT]

AND

THE LEGAL SERVICES ACT 2007 (WARRANT) (LICENSING AUTHORITY) REGULATIONS 2015

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1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments (JCSI).

2. Purpose of the instrument

2.1 The Legal Services Act 2007 ("the 2007 Act") permits the Legal Services Board ("the LSB") to apply for a warrant in certain circumstances authorising it to enter and search the premises of an approved regulator or licensing authority. The power is contained in sections 42 and 48 of the 2007 Act for approved regulators and section 79 for licensing authorities, and those sections also provide that the Lord Chancellor must make regulations, (a) specifying further matters of which a judge or justice of the peace must be satisfied, or must have regard to, before issuing a warrant, and (b) regulating the exercise of a power conferred by a warrant. That is the purpose of these two sets of regulations, one of which relates to approved regulator warrants and one to licensing authority warrants.

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

3.1 The Legal Services Act 2007 (Warrant) (Approved Regulator) Regulations 2015 ("the AR regulations") replace an earlier draft which was laid in Parliament on 10th February 2010 and then withdrawn. The intervening time period has been used to re-draft the regulations, to consult twice with stakeholders on the technical content of the regulations and amend the draft in response to their representations, and to draft the Legal Services Act 2007 (Warrant) (Licensing Authority) Regulations 2015 ("the LA regulations") for making at the same time as the AR regulations.

4. Legislative Context

4.1 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. 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. The term "approved regulator" under the 2007 Act encompasses both representative and regulatory functions, as defined in section 27 of that Act.

4.2 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 (ABS), 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 statutory provisions relating to licensing authorities and licensed bodies.

4.3 Part 2 of the 2007 Act established the LSB as the oversight regulator with responsibility for overseeing the approved regulators. Under the 2007 Act, approved regulators are under a duty to act in a way that is compatible with the regulatory objectives set out in section 1 of the 2007 Act.

4.4 Sections 42 and 48 of the 2007 Act allows the LSB, or a person nominated by it or appointed by it to act on its behalf, to apply to a judge of the High Court, Circuit judge or justice of the peace ("a judicial officer") for a warrant to enter and search the premises of an approved regulator and seize written or electronic records found there. This applies to any premises of the approved regulator. Warrants can only be issued where an intervention direction has effect under section 41 of the 2007 Act, in the case of a warrant issued under section 42, or in the interests of continuing regulation following the cancellation of an approved regulator's designation under section 45 of the 2007 Act, in the case of a warrant issued under section 48.

4.5 Section 79 of the 2007 Act allows a person, appointed by the LSB to act on its behalf, to apply to a judicial officer for a warrant to enter and search the premises of a former licensing authority and take possession of any written or electronic records found on the premises. As with sections 42 and 48, this applies to any premises of a former licensing authority. This provision applies where a body has had its designation as a licensing authority cancelled, either automatically under section 75 of the 2007 Act because its designation as an approved regulator has been cancelled under section 45, or by an order made by the Lord Chancellor under section 76.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Minister of State for Justice, Lord Faulks QC, has made the following statement regarding Human Rights:

"In my view the provisions of the Legal Services Act 2007 (Warrant) (Approved Regulator) Regulations 2015 and the Legal Services Act 2007

(Warrant) (Licensing Authority) Regulations 2015 are compatible with the Convention rights."

7. Policy background

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

7.1 Regulation 2 of each instrument (conditions for issuing a warrant) lists matters that a judicial officer must be satisfied of before issuing a warrant. A judicial officer must be satisfied that the LSB has made reasonable attempts to obtain the records sought by other means, or if not, that attempts to obtain the information by other means would be likely to result in the material being removed, hidden, tampered with or destroyed. These factors are an important safeguard to ensure that the issue of a search warrant is a last resort, therefore preventing unnecessary incursions on the premises of approved regulators. There is also a requirement that a warrant may only be issued if no judicial officer has refused to issue a warrant based on an application that is in substance the same, thus preventing repeat applications which are substantively identical if a warrant application has already been refused.

7.2 Regulation 3 of each instrument (execution of a warrant) makes provision regulating the exercise of a power conferred by a warrant, including that a warrant must be executed within a period of one month beginning on the date of issue and at a reasonable hour, unless the purpose of entry would otherwise be frustrated; a requirement for the person exercising the power conferred by a warrant to show evidence of identity; and requirements in connection with endorsing the warrant with results of a search.

7.3 Regulation 4 of each instrument (legal privilege) provides that the powers conferred by a warrant must not be exercised to take possession of or copy any record subject to legal privilege, within the meaning of section 10 of the Police and Criminal Evidence Act 1984. Any privileged records taken in error must be returned, and copies destroyed, as soon as they are identified as privileged.

7.4 Regulation 5 of each instrument (notice and return of records taken) prescribes when records must be returned to the approved or former regulator. It also provides that the person who exercises the warrant must provide the approved or former regulator with a list of all of the records that have been taken within a reasonable time, which must be no longer than 21 days after the record was taken.

7.5 In respect of warrants issued under section 42 of the 2007 Act, one of three time periods for the return of a record will apply, depending on the factual circumstances. Firstly, if the approved regulator makes a request for the return of a record stating that the record that is needed to discharge a regulatory function, the appointed person must return that record within 7 days of receipt of the request. This provision caters for cases where the approved regulator requires access to certain records in order to continue any regulatory functions which are not the subject of an intervention direction. Secondly, the appointed

person must return records when the intervention direction is revoked under section 44 of the 2007 Act. If neither of these circumstances is applicable, records must be returned within 3 months of the date on which the person exercising the power conferred by the warrant took possession of them. Whichever is the earliest of these return dates is the one which will apply.

7.6 In respect of warrants issued under section 48 after an approved regulator's designation has been cancelled, neither regulation 5(b)(ii) or (iii) is relevant, so the requirement is for records to be returned within 3 months. Records taken by virtue of a warrant issued under section 79 must also be returned within 3 months of the date on which possession was taken of them. All of these time periods are subject to the approved or former regulator agreeing otherwise in writing.

7.7 Regulation 6 of each instrument (copying of records) makes provision about the copying of records, including that a person exercising the power conferred by the warrant may produce legible records from an electronic record in order to determine whether a record may be copied in accordance with the purposes set out in section 42(4), 48(4), or 79(4) of the 2007 Act.

7.8 Regulations 7 and 8 of each instrument make provision about giving notice of copies and retention of copies, including that copies may not be retained for longer than is necessary in all the circumstances.

- ***Consolidation***

7.9 As each of these instruments are stand-alone instruments, no question of consolidation arises.

8. Consultation outcome

8.1 Although there has been no public consultation on these regulations, the AR regulations have been the subject of two consultations with regulatory stakeholders (the LSB and all of the approved regulators/licensing authorities). Firstly, the draft regulations were the subject of a consultation from 10 July to 24 July 2012. Six responses were received. As a result of that consultation, several significant changes were made to the draft regulations.

8.2 Secondly, in 2014, given the changes to the draft AR regulations, the fact that new approved regulators and licensing authorities had been designated since 2012, and the fact that the LA regulations had since been drafted, both sets of regulations were subject to a further technical consultation with stakeholders (from 24 October to 14 November 2014).

8.3 Seven responses to the 2014 consultation were received. The consultation responses were largely content with the revised regulations, although some suggestions for amendment were made. The draft regulations have been amended in line with responses where appropriate.

8.4 The Lord Chancellor has also formally consulted the LSB about the making of these regulations in accordance with sections 42(8)(b), 48(8)(b) and 79(8)(b)of the 2007 Act.

9. Guidance

9.1 The LSB has published a statement of policy on its use of intervention directions and cancellation of designation. It has also made rules under sections 42(10) and 48(9) of the 2007 Act concerning the persons it may appoint to execute warrants. 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 negligible. A warrant only authorises the LSB to take possession of documents already in the possession of approved regulators or licensing authorities and not directly from professionals or businesses. Such documents may relate to the individuals and entities that the approved regulators or licensing authorities are or were regulating. However, the intention in exercising a warrant under section 42, 48 or 79 will be to provide continuity of regulation. Therefore there should be no direct impact on legal practices or legal professionals resulting from the LSB's exercise of a warrant for search and entry.

10.2 The impact on the public sector is negligible.

10.3 An Impact Assessment is attached to this memorandum. It identified benefits associated with the proposals and did not find any unjustified costs. The Impact Assessment sets out the identified benefits. Specifically, allowing the LSB or a person appointed by it to apply for warrants as part of its enforcement strategy should assist the smooth functioning of the regulatory system, providing benefits for the consumers of legal services.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The impact of the regulations will be evaluated by the Ministry of Justice within three years of their implementation, in consultation with the LSB and approved regulators.

13. Contact

13.1 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.