EXPLANATORY MEMORANDUM TO

THE REGISTERED FOREIGN LAWYERS 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 This instrument is made, in part, pursuant to amendments introduced to the regulatory regime for solicitors by the Legal Services Act 2007 ("the 2007 Act"), to align the regulation of solicitors and registered foreign lawyers. This instrument also extends the regulatory powers of the Law Society in regulating registered foreign lawyers, to ensure an appropriate level of regulation in both protecting consumers and the integrity of the legal profession as a whole. This is achieved largely through the application of provisions in the Solicitors Act 1974 ("the 1974 Act") to registered foreign lawyers.

2.2 In summary, this instrument:

2.2.1 aligns certain procedures and powers of the Law Society in respect of the registration of foreign lawyers and solicitors' applications for practising certificates;

2.2.2 aligns the procedure and powers of the Law Society with regard to the imposition of conditions and suspension of the registration of foreign lawyers and solicitors' applications for practising certificates;

2.2.3 prohibits foreign lawyers who have been struck off the register from being employed in a legal practice without approval of the Law Society and prohibits a foreign lawyer from failing to disclose the fact of having been struck off the register in seeking employment in a legal practice;

2.2.4 aligns the jurisdiction of the Solicitors Disciplinary Tribunal in respect of solicitors and registered foreign lawyers;

2.2.5 extends the disciplinary and information powers of the Law Society in respect of registered foreign lawyers. Most notably, this instrument enables the Law Society to request documentation pursuant to an investigation into alleged misconduct by a registered foreign lawyer by written notice, extends powers to rebuke or fine and extends the offence of prohibiting the destruction, concealment or falsification of documents required in the investigation of a registered foreign lawyer;

2.2.6 enables the Law Society to inspect a registered foreign lawyer's bank accounts and;

2.2.7 amends legislation to ensure that foreign lawyers are provided with the same routes of appeal against decisions of the Law Society as those afforded to solicitors.

2.3 This instrument is timed to come into force in conjunction with the commencement of the relevant provisions of the 2007 Act. These are scheduled to be commenced in July 2009.

2.4 The Schedule to this instrument incorporates modifications to the provisions listed to ensure that they are technically operative in respect of registered foreign lawyers.

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

3.1 None.

4. Legislative Context

4.1. The purpose of this instrument is to extend and strengthen the regime of regulation of registered foreign lawyers by the Law Society. This instrument is made, in part, pursuant to amendments made to the regulation of legal services by the 2007 Act.

4.2 Registered foreign lawyers are members of a legal profession of another jurisdiction, not covered by the Lawyers' Establishment Directive, who register with the Law Society. There is no obligation on foreign lawyers to register with the Law Society, however, a foreign lawyer may not participate in the ownership or control of a legal practice based in England and Wales in the event that they are unregistered. A foreign lawyer's registration with the Law Society does not extend the individual's rights to conduct legal activities, save where certain positions in legal practices enable registered foreign lawyers to conduct unreserved immigration work.

4.3 The Courts and Legal Services Act 1990 ("the 1990 Act") makes specific provision for the registration of foreign lawyers and their regulation by the Law Society. Section 89(1) establishes that the Law Society shall maintain a register of foreign lawyers. Section 89(3) establishes that certain categories of rules made by the Law Society by virtue of the 1974 Act shall apply to registered foreign lawyers as they apply to solicitors. These rules include conduct rules, accounts rules, rules relating to accountants' reports together with provisions associated with professional indemnity and compensation grants. Schedule 14 to the 1990 Act makes further provision in respect of registered foreign lawyers.

4.4 This instrument is made under section 89(5) and (6) of the 1990 Act. These provisions empower the Lord Chancellor, by order, to provide for those instruments having effect with respect to registered foreign lawyers as they have effect with respect to solicitors. This instrument revokes the previous order made, the Registered Foreign Lawyers Order 1991, establishing a new regulatory regime for registered foreign lawyers.

4.5 This instrument is also made under section 208 of the 2007 Act. This provision facilitates the amendment of legislation other than the 2007 Act itself, where the amendment is as a consequence of the 2007 Act's reforms. Such an amendment was required to ensure registered foreign lawyers were equipped with appropriate statutory routes of appeal against certain decisions of the Law Society.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales

6. European Convention on Human Rights

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

In my view the provisions of the Registered Foreign Lawyers 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 & Wales, the Act having received Royal Assent on 30th October 2007. The aims of the Act are to simplify the existing regulatory framework by establishing an oversight regulator, the Legal Services Board ("the Board") and improving consumer confidence and the way in which complaints are dealt with by establishing an independent complaints handling body; the Office for Legal Complaints.

7.2 The 2007 Act also provides greater choice and flexibility for consumers, and a more innovative and efficient organisation of legal practices by providing for alternative business structures ("ABS"). The ABS framework set out in Part 5 of the 2007 Act permits different kinds of lawyers and non-lawyers to work together, and allows for external investment. This will be subject to a licensing regime set out by the Board.

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 a limited form of ABS, known as Legal Disciplinary Practices ('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[1], which came into force on 31st March 2009. In contrast, full ABS must await the Board assuming its statutory functions under the 2007 Act. 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.' In light of these reforms, one purpose of this instrument is to amend the regime of regulation of registered foreign lawyers to ensure consistency in the Law Society's regulatory powers. This instrument extends the Law Society's powers with respect of registered foreign lawyers to

[1] 2009 No. 503 (C. 34)

acknowledge the new regulatory risks resulting from the emergence of LDPs and ultimately ABS firms.

7.4 This instrument extends investigatory powers of the Law Society, ordinarily applicable to solicitors, to registered foreign lawyers. It will enable the Law Society to require the provision of information or documentation, by notice, pursuant to an investigation into alleged misconduct of a registered foreign lawyer. This instrument will also extend offences associated with the concealment or falsification of such information or documentation in the course of investigations of registered foreign lawyers. Powers of the Law Society to rebuke and/or fine a solicitor up to £2,000 for misconduct or failure to comply with a requirement are also extended to registered foreign lawyers, together with the statutory routes of appeal against such decisions. This instrument will extend Law Society's rules relating to the inspection of bank or building society accounts to apply to registered foreign lawyers and enable disclosure of information relating to accounts to assist in the investigation of the possible commission of an offence by a registered foreign lawyer. This instrument also extends certain Law Society regulations to registered foreign lawyers, specifically those prescribing information that must be provided to the Law Society.

7.5 This instrument further extends certain elements of the regime of solicitors' practising certificates and fees to the registration of foreign lawyers. This includes the extension of appeal routes available to solicitors to registered foreign lawyers. This instrument ensures that a foreign lawyer's registration is suspended upon conviction of an offence of dishonesty or an indictable offence, in the same way that a solicitor's practising certificate is suspended. This instrument will also enable foreign lawyers to appeal to the High Court in the event that their registration is suspended by virtue of an adjudication in bankruptcy.

7.6 This instrument broadens the grounds on which the Law Society may intervene in the practice of a registered foreign lawyer to include breaches of professional practice, conduct and discipline rules. Such rules are applicable to registered foreign lawyers by virtue of section 89(3)(a)(i) of the 1990 Act. This aligns the intervention powers of the Law Society in respect of registered foreign lawyers with its powers to intervene in solicitors' practices, this power having been extended in respect of solicitors by the Access to Justice Act 1999[2].

7.7 This instrument extends provisions prohibiting the employment of solicitors who have been suspended or struck off the roll to registered foreign lawyers who have been suspended or struck off the register. Further statutory provisions are extended to registered foreign lawyers, including provisions relating to the service of documentation on registered foreign lawyers, the Law Society's ability to inspect papers in bankruptcy proceedings, bills of costs and minor extensions to the powers of the Solicitors Disciplinary Tribunal with regard to registered foreign lawyers.

[2] c. 22

7.8 Finally, this instrument amends paragraph 14 of Schedule 14 to the 1990 Act. This amendment is required to ensure that foreign lawyers have an appeal route to the High Court in the event that the Law Society removes their name from the register. This could occur, in accordance with Law Society regulations, in the event of an error of the Law Society or fraud on the part of the foreign lawyer in applying for registration.

- ***Consolidation***

7.9 This Instrument revokes and replaces the Registered Foreign Lawyers Order 1991 and there are therefore 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[3], and published a report into competition and regulation in the legal services market.[4] In 2003, Sir David Clementi was appointed by the Government to conduct an independent review of the regulation of legal services[5], 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 to the White Paper are included in section 2 of the Regulatory Impact Assessment ('RIA') which is attached to this memorandum. 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.

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

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

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

8.4 In the course of preparing this instrument, the Law Society and its regulatory arm, the Solicitors Regulation Authority ("the SRA") have been consulted and support of the amendments proposed.

9. Guidance

9.1 The SRA will be responsible for issuing guidance relating to rules applicable to registered foreign lawyers, as it continues to do so in respect of its regulatory activities.

10. Impact

10.1 A full regulatory impact assessment was prepared for the Legal Services Bill in November 2006, and a supplementary memorandum was published in June 2007. The full RIA can be found at http://www.dca.gov.uk/risk/ria-legal-services.pdf and the supplementary memorandum 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.

11. Regulating small business

11.1 This instrument relates to the regulation of foreign lawyers who register with the Law Society and will therefore impact upon those legal practices in which registered foreign lawyers operate.

11.2 In developing the wider reforms of the 2007 Act, the regulation of small business 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

12.1 Certain rules made by the Law Society are subject to the approval of the Lord Chancellor, pending the Legal Services Board assuming its statutory functions in this regard.

12.2 The regulation and registration of foreign lawyers will be monitored throughout the process of implementation and commencement of the 2007 Act.

13. Contact

Alexander Faulkner at the Ministry of Justice (Tel: 020 3334 4226 or email: Alex.Faulkner@justice.gsi.gov.uk) can answer any queries regarding the instrument.