EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (APPROVED REGULATORS) ORDER 2011

2011 No. 1118

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 Order designates the Institute of Legal Executives (ILEX) as an approved regulator for the purpose of the conduct of litigation. This will enable ILEX to permit properly qualified and trained members to conduct litigation in line with its regulatory arrangements.

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

3.1. There are no matters of special interest to the Committee.

4. Legislative Context

4.1 This instrument is made under paragraph 17(1) of Schedule 4 to the Legal Services Act 2007 ('the 2007 Act'), which allows the Lord Chancellor to make an Order in accordance with a recommendation by the Legal Services Board (under paragraph 16(2) of Schedule 4) that an Order be made designating an applicant as an approved regulator in relation to a specified reserved legal activity or activities. This is the first occasion on which this power has been used, although the Table of Approved Regulators has previously been amended using the transitional power contained in paragraph 5(2) of Schedule 22 to the 2007 Act.

4.2 Schedule 4 to the 2007 Act provides for bodies wishing to authorise persons to carry out a reserved legal activity to apply to the Legal Services Board to become an approved regulator for the specified activity or activities. The approval procedure for such applications is set out in Schedule 4.

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 has made the following statement regarding Human Rights:

"In my view the provisions of the Legal Services Act 2007 (Approved Regulators) Order 2011 are compatible with the Convention rights."

7. Policy Background

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

7.1 ILEX is already an approved regulator for rights of audience. The effect of this Order will be to grant ILEX a right to regulate the conduct of litigation by its members. However, the Order is made on the basis that this designation will, in practice, be limited through ILEX's regulatory framework such that the conduct of litigation can only be carried out by Associate Prosecutors (APs) employed by the Crown Prosecution Service (CPS). The regulatory framework submitted by ILEX and approved by the Legal Services Board in support of this Order reflects this restriction.

7.2 Section 12(1) of the 2007 Act defines the conduct of litigation as a reserved legal activity. Under the provisions of section 13(2) of the 2007 Act, a reserved legal activity may only be carried on by persons who are either "authorised" or "exempt", as defined in Schedule 3 to the 2007 Act.

7.3 At present, APs fall within the definition of "exempt" persons because they have a right to conduct litigation under section 7A of the Prosecution of Offences Act 1985. This was amended by section 55 of the Criminal Justice and Immigration Act 2008 (the 2008 Act) to extend the powers available to APs, subject to their designation by the Director of Public Prosecutions (DPP). As a result of the conditions of the DPP's designation, APs must all be members of (and are therefore regulated by) ILEX.

7.4 The amendments introduced by the 2008 Act enable APs to conduct criminal proceedings in magistrates' courts in trials other than the trial of either way offences, or offences which are punishable with imprisonment in the case of persons aged 21 or over. The Attorney General's power under the 2008 provisions to remove the limitation to cases involving persons aged 21 and over has not been exercised, and the CPS has indicated that he has no plans to do so. The regulatory framework approved by the LSB in support of this Order therefore reflects the statutory restriction on the type of cases which APs can conduct.

7.5 Under the provisions of the 2008 Act, the designation of APs by the DPP is terminated with effect from 1 May 2011. The intention when this provision was enacted was that regulatory arrangements would be established instead to enable ILEX to grant the necessary litigation rights to APs with effect from that date. This would also formalise the current voluntary arrangement between the CPS and ILEX, established following the 2008 Act, under which ILEX provides independent regulation and training for APs. This Order gives effect to that policy intention.

7.6 In order to be able to grant litigation rights to APs, ILEX must first be designated as an approved regulator in relation to the conduct of litigation, under the provisions of Schedule 4 to the 2007 Act. These provide for the LSB to make a recommendation to the Lord Chancellor that an Order should be made for this purpose. The LSB does not have the power to make a recommendation for a limited purpose (ie in relation to APs only) and can only do so in terms of a general designation in relation to the specified reserved legal activity. Similarly, the Lord Chancellor cannot make an Order which limits the designation of rights in any way. However, as explained in paragraph 7.1, the rules approved by the LSB in relation to the designation of these new rights to ILEX limit their exercise to APs only, and mirror the current designation of such rights to APs by the DPP.

7.7 Should ILEX wish to broaden the scope of its designation, it would be necessary for its regulatory framework to be amended accordingly. Any such amendments would be subject to approval by the LSB under the process set out in Schedule 4 to the 2007 Act.

Consolidation

7.8 There are no issues relating to consolidation.

8. Consultation Outcome

8.1 ILEX consulted publicly on its application for litigation rights between 17 February and 6 April 2010. The nine responses received (two from other legal regulatory bodies, five from legal representative bodies and two from independent bodies) were broadly supportive of this Order. The LSB is content that all the issues raised have been satisfactorily addressed in ILEX's designation application.

8.2 As required by Schedule 4 to the 2007 Act, the LSB has consulted on ILEX's application with the OFT, the Legal Services Consumer Panel (LSCP) and the Lord Chief Justice. Their responses, which are published on the LSB's website, were broadly supportive of the designation. The LSCP raised concerns in connection with quality assurance, complaints handling and training, all of which have been addressed to the LSB's satisfaction.

8.3 The Lord Chief Justice raised a concern that any potential future extension of APs' rights must be subject to full consultation with the judiciary and other interested parties. As explained in paragraph 7.7, any such extension would require the amendment of ILEX's regulatory framework which would be subject to the approval process set out in Schedule 4 to the 2007 Act.

9. Guidance

9.1 No public guidance or other publicity is necessary in connection with this Order. However, ILEX has published its application for litigation rights and has agreed a Memorandum of Understanding with the CPS in support of the application. Both are available on the ILEX website at www.ilex.org.uk. In addition, all documents relating to the LSB's consideration of ILEX's application and its consequent recommendation that this Order should be made are available on the LSB's website at www.legalservicesboard.org.uk.

10. Impact

10.1 There is no impact on charities or voluntary bodies. Any business impact will relate only to ILEX. The Ministry of Justice has considered this impact in discussion with the CPS and ILEX, and ILEX has carried out an evaluation in support of its application for designation. The number of APs is relatively small (currently 496) and, under the conditions of the DPP's current designation of rights, all are already registered as Members of ILEX. Any additional costs to ILEX arising from the regulation of their litigation rights will therefore be minimal and will, in any event, be absorbed within the cost structure for ILEX's regulation of existing advocacy rights. There are no separate registration, accreditation or monitoring requirements required in relation to APs' conduct of litigation. There will be some marginal new costs in quality assurance and liaison with the CPS as required by the Memorandum of Understanding, but this will relate to the regulation of advocacy as well as litigation rights.

10.2 The impact on the public sector is that the Order will allow the continuation of APs' role in conducting litigation connected with work of the CPS, thereby enabling the CPS to fulfil its public role in taking forward prosecutions on behalf of the Crown. The Office of Fair Trading has advised that allowing ILEX to grant litigation rights to APs, and therefore enabling the continued supply of APs' services in this way, will not have a detrimental impact on competition.

10.3 The new regulatory arrangements will give rise to some additional cost to the CPS in terms of APs' practice fees. This cost was approximately £70,000 this year and will be reviewed annually in line with ILEX's other practice and subscription fees. Registration, accreditation and monitoring and liaison costs to ILEX have not been charged separately to date, and this will be reviewed with the CPS. However, direct costs to ILEX arising from this type of regulatory activity are small (currently about £7,000 per annum). The CPS will have internal costs relating to the recruitment, training, assessment and monitoring of APs, but these relate to the practice of both litigation and advocacy and, in any event, form part of the CPS's routine staffing costs.

10.4 The potential impact of any future extension of ILEX's designation to enable it to grant litigation rights to all its appropriately qualified members is likely to form part of the LSB's consideration of any application for this purpose.

10.5 A full regulatory impact assessment (RIA) 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.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring and review

12.1 In order to demonstrate independent and effective regulation of APs, ILEX will take steps to satisfy itself that the CPS arrangements and procedures to which APs are subject in their day to day work are fit for regulatory purposes. These include arrangements for staff performance appraisal, disciplinary procedures and complaints handling. The CPS has also developed its own advocacy assurance framework. The performance of the CPS itself is subject to external assessment by HM Crown Prosecution Service Inspectorate which reports to the Attorney General.

12.2 ILEX must receive regular and sufficient information from the CPS to enable it to form its own view on standards and to take action if necessary. The Memorandum of Understanding between ILEX and the CPS reflects this by setting out the requirements for the provision of regular information; enabling ILEX to request such additional information as it needs to deliver its regulatory function; and requiring the CPS to provide that additional information. It also makes provision for ILEX to carry out its own inspections/reviews.

12.3 Additionally, in order to ensure that there is transparency and accountability of the effectiveness of these arrangements, the LSB has imposed a requirement on ILEX under section 55 of the 2007 Act to report to the LSB by 30 June 2012 on how ILEX has satisfied itself that AP members of ILEX have met the requirements of the regulatory arrangements. The scope of that report is expected to include commentary on the information which ILEX has received, its assessment of the issues and risks that have been identified, and how these have been addressed.

13. Contact

13.1 Please contact either Heather Atkinson (tel: 020 3334 4204 or email: heather.atkinson@justice.gsi.gov.uk) or Russell Bramley (tel: 020 3334 5452 or email: russell.bramley@justice.gsi.gov.uk) at the Ministry of Justice regarding any queries about this instrument.