EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (LICENSING AUTHORITY) (No. 2) ORDER 2014

2014 No. 3077

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 Chartered Institute of Patent Attorneys ("CIPA") and the Institute of Trade Mark Attorneys ("ITMA") as licensing authorities for the reserved legal activities of the exercise of a right of audience, conduct of litigation, reserved instrument activities and the administration of oaths. This will allow CIPA and ITMA to license bodies that are partly or wholly owned by non-lawyers as alternative business structures ("ABS") to carry on those activities.

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") sets out a framework for the regulation of legal services in England and Wales. It established the Legal Services Board ("the LSB") as the oversight regulator for this framework and requires that reserved legal activities may only be carried out by those who are authorised to do so, or exempt. It makes provision for the regulation by approved regulators of those carrying on reserved legal activities. A list of approved regulators is set out in Part 1 of Schedule 4 to the 2007 Act and includes CIPA and ITMA.

4.2 Under Part 5 of the 2007 Act an approved regulator may be designated as a licensing authority. A licensing authority may license bodies ("licensed bodies") which are partly or wholly owned or controlled by non-lawyers to provide legal services (or a mixture of legal and non-legal services).

4.3 Schedule 10 to the 2007 Act provides for approved regulators to apply to the LSB to become a licensing authority in relation to one or more reserved legal activities. The Lord Chancellor may only make an Order on the recommendation of the LSB and under paragraph 15 of Schedule 10 must give the applicant notice of, and publish, the decision to make such an Order.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to a negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

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

7.1 The 2007 Act sets out 8 regulatory objectives, which include protecting and promoting the interests of consumers and promoting competition in the provision of legal services. The Government believes that designating CIPA and ITMA as new licensing authorities will assist in ensuring these objectives are met. This Order will designate CIPA and ITMA as licensing authorities for the exercise of a right of audience, the conduct of litigation, reserved instrument activities and the administration of oaths in order to enable them to regulate ABS which include patent and trade mark attorneys, as set out in Part 5 of the 2007 Act. The Lord Chancellor has agreed to make this Order on the recommendation of the LSB. In making its recommendation, the LSB has completed a detailed review of the applications of CIPA and ITMA.

7.2 CIPA is responsible, pursuant to sections 275 and 275A of the Copyright, Designs and Patents Act 1988, for maintaining a register of patent attorneys and for regulating persons on that register. ITMA is responsible pursuant to sections 83 and 83A of the Trade Marks Act 1994 for maintaining a register of trade mark attorney and for regulating persons on that register. Both bodies are designated under the 2007 Act as approved regulators of the following reserved legal activities: the exercise of a right of audience, the conduct of litigation, reserved instrument activities and the administration of oaths. In this capacity, each body authorises its registrants to carry on such activities. Together CIPA and ITMA carry out their regulatory arrangements under the title of the Intellectual Property Regulation Board (IPReg).

7.3 CIPA and ITMA have made a joint application through their regulatory arm, IPReg, to the LSB to be designated as licensing authorities for the reserved legal activities of the exercise of a right of audience, the conduct of litigation, reserved instrument activities and the administration of oaths.

7.4 A draft Order under section 69 of the 2007 Act was laid on 20th October and proposes changes to the functions of ITMA and CIPA acting as approved regulators and, by virtue of this Order, in their capacity of licensing authorities. The changes proposed by the draft Order will ensure parity between the two

functions of the bodies acting in the capacity of an approved regulator and licensing authority.

- ***Consolidation***

7.5 This is a stand-alone Order which does not make any amendments to any other statutory instrument, so no question of consolidation arises.

8. Consultation outcome

8.1 In June 2012, the regulatory arm of CIPA and ITMA, the Intellectual Property Regulation Board ("IPReg") consulted on their regulatory arrangements and approach to regulating licensed bodies as part of their application to the LSB (in May 2013) to become a licensing authority. The consultation received a total of 15 responses from members who welcomed the thrust of the proposals.

8.2 IPReg consulted the Office of Fair Trading ("OFT"), the Legal Services Consumer Panel ("Consumer Panel") and the Lord Chief Justice. Although the then Lord Chief Justice expressed some concerns, LSB were satisfied with CIPA and ITMA's response to these concerns.

8.3 The Consumer Panel did not have any major policy concerns with the application but did make a number of more in-depth points. In particular, the Consumer Panel expressed concerns about the lack of detail in relation to CIPA and ITMA's plans for Continuing Professional Development ("CPD"). Having considered the Consumer Panel's view on this, the Lord Chief Justice proposed that CIPA and ITMA put together a detailed programme of continuing education in line with those that exist elsewhere in the profession.

8.4 IPReg, on behalf of CIPA and ITMA, explained in its response to the Consumer Panel that in fact, CIPA and ITMA have detailed CPD regulations, guidance and procedures but did not include these in the application, since it did not consider them to be directly relevant to an application for CIPA and ITMA to become licensing authorities. Following the raising of the issue, CIPA and ITMA provided their detailed CPD Rules to the LSB who were satisfied that CIPA and ITMA have adequate CPD arrangements in place and is also content with their overall approach to CPD in the context of their licensing authority application.

8.5 In response to the Consumer Panel comments CIPA and ITMA amended their Rules of Conduct to place a requirement on those they regulate to provide assistance to the Legal Ombudsmen. This ensures that CIPA and ITMA satisfy the requirements of section 145 of the 2007 Act in relation to the duties of authorised persons to co-operate with ombudsman investigations.

8.6 After considering the application in detail, the LSB is satisfied that the approved regulators, CIPA and ITMA, are competent and have sufficient resources in place

to become licensing authorities. CIPA and ITMA have already demonstrated experience and competence regulating the reserved legal activities of patent and trade mark attorneys, including experience of authorising firms. CIPA and ITMA have planned and will introduce increased but proportionate resource provision (both permanent staff and access to external resource). This will be done by estimating demand through previous experience, research and information such as annual practising fee returns, to enable them to assess size and number of firms likely to apply for licensing and require supervision.

9. Guidance

9.1 No guidance is proposed in respect of this Order due to the straightforward nature and effect of the Order.

10. Impact

10.1 This Order has no impact on charities or voluntary bodies. Any business impact will relate to CIPA and ITMA and their registrants as either registered bodies (non-ABS) or licensed bodies (ABS) who undertake patent and trade mark work.

10.2 There will be no impact on the public sector.

10.3 An Impact Assessment has not been carried out for this Order as its provisions are consistent with the policy of the 2007 Act and do not impose additional burdens on the private and voluntary sector. A full regulatory impact assessment (RIA) was prepared for the Legal Services Bill in November 2006 and can be found at http://www.dca.gov.uk/risk/ria-legal-services.pdf. A further full RIA, together with a detailed Equality Impact Assessment, was prepared in relation to S.I. 2011/2196 which commenced Part 5 of the 2007 Act, and this can be found at: http://www.legislation.gov.uk/uksi/2011/2196/introduction/made.

11. Regulating small business

11.1 This instrument is not expected to have any disproportionate impact on small firms.

12. Monitoring & review

12.1 As the instrument makes changes to legislation to modify some of the functions of the CIPA and ITMA, specific monitoring and review will not be necessary. However, the LSB, as the oversight regulator of the legal services industry, will keep the regulatory arrangements under review.

13. Contact

Please contact Mel Panteli at the Ministry of Justice (Tel: 0203 334 6147 or email: Mel.Panteli5@justice.gsi.gov.uk) about any queries regarding this instrument.