EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (THE LAW SOCIETY AND THE COUNCIL FOR LICENSED CONVEYANCERS) (MODIFICATION OF FUNCTIONS) ORDER 2011

2011 No. 1716

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 The purpose of this instrument is to make changes to the functions of the Law Society ("the Society") and the Council for Licensed Conveyancers ("the Council") which are both approved regulators under the Legal Services Act 2007 ("the 2007 Act").

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

3.1. None.

4. Legislative Context

4.1 The 2007 Act sets out a framework for the regulation of legal services in England and Wales. The Act establishes the Legal Services Board ("the LSB") as the oversight regulator for this new framework. It requires that certain legal services ("reserved legal activities") may only be carried out by those who are authorised to do so, or exempt from such authorisation. It also makes provision for the regulation by approved regulators (such as the Society and the Council) of those providing such services. A list of approved regulators, together with the activities which they can regulate is set out in Part 1 of Schedule 4 to the 2007 Act. Part 2 of that Schedule allows approved regulators to apply to the LSB for designation in relation to additional reserved legal activities (or for other bodies to apply to become approved regulators). Both the Society and the Council are approved regulators by virtue of Part 1 of Schedule 4. The Council has made an application to the LSB to be approved in relation to other reserved legal activities in addition to those for which it is currently authorised.

4.2 Part 5 of the 2007 Act sets out arrangements under which licensing authorities may license firms ("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). Part 1 of Schedule 10 to the 2007 Act allows the Lord Chancellor, on the recommendation of the LSB, to designate approved regulators as licensing authorities for the purpose of Part 5. Both the Society and the Council have applied to

the LSB to become a licensing authority once the provisions are commenced.

4.3 The powers of both the Society and the Council are exercisable under statute. The 2007 Act recognises them both as approved regulators, although each has their own independent statutory basis. In the case of the Society its powers are set out in the Solicitors Act 1974 ("the 1974 Act") and the Administration of Justice Act 1985 ("the 1985 Act"). The 1985 Act (together with some provisions of the Courts and Legal Services Act 1990) sets out the powers of the Council.

4.4 Section 69 of the 2007 Act, under which this Order is made, provides a route through which changes to the powers of certain bodies may be made. It allows for an order modifying or making other provision in relation to the functions of approved regulators for certain purposes, including to allow bodies to be designated as an approved regulator in relation to particular activities, to be designated as a licensing authority, or to allow them to carry out their functions as such bodies more effectively and efficiently.

5. Territorial Extent and Application

5.1 The instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Parliamentary Secretary of State, Jonathan Djanogly has made the following statement regarding Human Rights:

"In my view the provisions of the Legal Services Act 2007 (the Law Society and the Council for Licensed Conveyancers) (Modification of Functions) Order 2011 are compatible with the Convention rights."

7. Policy Background

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

7.1 The Order contains provisions in relation to both the Society and the Council which those bodies consider will improve their regulatory arrangements, enabling them to operate more effectively and efficiently as approved regulators and, if designated, as licensing authorities. The Society also needs changes to its powers in order that it can make the compensation arrangements proposed in its application to become a licensing authority. The Council requires additional powers to allow it to make compensation rules if it is granted the power to regulate additional reserved legal activities. Because of the statutory nature of these particular powers the desired changes can only be made by legislation.

7.2 Article 4 allows the Society to make rules requiring firms of solicitors to pay periodical fees to the Society. At present section 9 of the 1985 Act, which allows the Society to regulate firms of solicitors as well as individuals, only allows the Society to require fees to be paid where they accompany an application. This provision allows the payment of fees without such an application and will allow the Society to authorise solicitors' firms on an indefinite basis (as it intends to do for licensed bodies) whilst retaining the ability to charge firms an annual fee. This is intended to make the Society more efficient and effective allowing it to operate a single system of regulation across both types of bodies.

7.3 Article 5 and the Schedule to the Order provide the Society with the power to make compensation rules in relation to licensed bodies for a transitional period by extending its existing powers under sections 36 and 36A of the 1974 Act. This will allow the Society to manage a single compensation fund in relation to all those whom it regulates and to make rules for contributions to, and payments from, that fund in relation to those solicitors which it regulates as an approved regulator and to licensed bodies. The provisions in the Order apply in relation to a transitional period which ends on 31st December 2012. This is because the Society is currently reviewing its compensation arrangements. Further, long term provision will be made following that process. Whilst the Society could become a licensing authority without such provisions in place, it would require the development of an additional set of compensation arrangements which is considered to be disproportionate and inefficient.

7.4 Articles 6 and 10 make provision for the Society and the Council respectively to make rules about the recovery of the costs of its investigations into compliance with the requirements of licensing arrangements. Such rules only allow costs to be recovered from the licensed body itself or from those people who are connected to it and are listed in the article. The Society already has similar powers in relation to the firms which it regulates as an approved regulator. The purpose of these provisions is to extend those powers to it in its capacity as a licensing authority. They also make the same powers available to the Council in its capacity as a licensing authority although it does not have such powers in relation to authorised persons which it regulates. This reflects the intention that licensed bodies should, so far as possible, be regulated within a consistent framework, irrespective of who is regulating them.

7.5 Article 7 allows the Council, when specifying the period for which a licence is issued, to specify that it lasts for an indefinite period. The purpose of this provision is to allow the Council to regulate existing firms in a similar fashion to its planned approach for licensed bodies. This is expected to make the Council operate more efficiently and effectively by allowing it to operate a single system of regulation across both types of bodies.

7.6 Article 8 extends the power of the Council to make rules about compensation arrangements for any activity in relation to which it has the statutory power to act as a regulator, if it has made a successful application to the LSB for designation as an approved regulator in relation to that activity. At present the Council has the power to regulate its members in relation to the provision of conveyancing services and probate activities. The Council has applied to the LSB to be designated as an approved regulator in relation to the conduct of litigation and the exercise of rights of audience for some purposes. The article will ensure that, if either or both of those applications are successful, the Council will have the power to make compensation arrangements in relation to those areas of practice. This is essential if it is to become a regulator of these activities.

7.7 Article 9 makes amendments to the constitution of the Council. Firstly it changes the balance of membership so that there will be a lay majority on the Council. This is consistent with what is considered to be best regulatory practice and the practice expected by the LSB in its internal governance rules for approved regulators. It also makes two important changes to the definitions of who may be appointed in each category. Firstly it changes the definition of "lay member" so that lawyers who are not licensed conveyancers will no longer be eligible for appointment to the Council in that category. Secondly it allows any lawyer (and not, as previously, only licensed conveyancers) who practices in a business regulated by the Council to be appointed as a lawyer member of the Council. Finally, the amendments remove the former requirement that two people on the Council are appointed specifically to represent consumer interest. This is to allow the Council more flexibility in the range of interests which are represented in its lay membership whilst allowing the interests of consumers to continue to be considered.

- ***Consolidation***

7.8 There are no earlier orders under s69 of the 2007 Act dealing with the same subject matter as this order and there is therefore no possibility of consolidation.

8. Consultation Outcome

8.1 There is a requirement under section 69(2) of the 2007 Act, that the Lord Chancellor may make an order under section 69 only if the LSB has made a recommendation that he does so. Under section 70 of the 2007 Act, that recommendation may be made only with the consent of the approved regulator or other body to which it relates. Before making the recommendation, the LSB must publish the proposed recommendation and draft order and have regard to any representations made.

8.2 From September to December 2010, the LSB consulted on proposals to modify the functions of the Society and the functions of the Council, following close liaison with both bodies. A draft instrument was included in the consultation. This consultation generated five responses (from: the Society, the Solicitors Regulation Authority ("the SRA") the regulatory body set up by the Society, the Council, Institute of Legal Executive's ("ILEX") regulatory body ILEX Professional Standards ("IPS"), and the National Bench Chairmen's Forum). Overall, the respondents were broadly in support of the proposals. Some specific comments were made about the proposals.

8.3 The Society commented about some aspects of the proposed compensation fund changes. It supported the principle of allowing the SRA to operate a single fund, although it was unknown what approach the SRA would adopt. In its response document, the LSB agreed that before the SRA can establish a single compensation fund, it will have to finalise how this will operate in practice.

8.4 The SRA had comments on the detail of the compensation arrangements provided by the draft. As a result the drafting was modified to allow the Society to make compensation rules in relation to the acts and omissions of owners and former owners of licensed bodies. It also expressed concern that it should be able to recover contributions to its compensation fund in relation to events occurring during the transitional period, after that period had come to an end. The draft Order has been amended to reflect this concern.

8.5 In relation to the recovery of investigation costs, IPS noted that there were no details about the limit of costs that could be recovered. The LSB response was that it did not consider it necessary to impose a limit as each investigation will vary in length and complexity, but each licensing authority would be expected to show it had calculated the cost. IPS also expressed the view that it might be suitable if at least one Council member has experience of consumer issues although this should not be a mandatory requirement.

8.6 The SRA also made suggestions about additional matters which it felt could be included in the Order. The LSB did not think it was either appropriate or necessary to make the provision suggested.

8.7 Taking on board comments from the consultation, the LSB made a recommendation to the Lord Chancellor for an order to be made. However, upon considering the recommendation, the Ministry of Justice was concerned about whether there were powers to include some of the provisions in the proposed order and suggested that there might be other, more suitable powers, to make that provision. Therefore, the LSB conducted a further short focussed consultation with a revised draft in April 2011, which also included some changes to the drafting of the other provisions of the Order. Three consultation responses were received, all of which supported the new draft without

suggesting any further amendments. The consultation process has ensured that the instrument has been prepared with the benefit of extensive consideration.

8.8 The consultation and response documents issued by the LSB can be found on the LSB website at: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

9. Guidance

9.1 As the oversight regulator for approved regulators, the LSB has issued a Statement of Policy setting out the circumstances in which the LSB is likely to consider it appropriate to make a recommendation to the Lord Chancellor under section 69(3)(c) of the 2007 Act. The Statement can be found on the LSB website at: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

9.2 This Statement sets out the LSB's principles for assessing whether a section 69(3)(c) order is required. It sets out that consideration first needs to be given to whether:

- there is existing legislation or other requirements that provide for the same or similar outcomes.
- there is provision within the 2007 Act that enables the approved regular to regulate without the proposed change.
- the proposed order is a proportionate way to deal with the problem that has been identified.

The LSB would also require the body requesting an order to have carried out its own analysis to support its request, and in most instances for the body to consult on the proposals.

10. Impact

10.1 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 supplementary memorandum was published in June 2007 and can be found at http://www.justice.gov.uk/docs/RIA-supplement-v021.pdf.

10.2 An Impact Assessment (IA) has been prepared specifically for this instrument. The IA is attached and will be published alongside this Explanatory Memorandum on www.legislation.gov.uk

10.3 The IA shows that the costs relating to the changes made by this instrument are difficult to quantify fully, but that it would be considerably more complex, resource intensive and therefore costly for legal regulators and the Government to achieve the regulatory arrangement necessary without this instrument.

10.4 The principal benefit identified is to enable the Society and the Council to each perform its role as an existing approved regulator (and if designated, as a licensing authority) more effectively and efficiently. This means consumers would benefit from an equal level of protection whether using the services of a licensed body or a traditional law firm. There is also a longer term positive effect on the quality and robustness of the regulatory arrangements specifically for licensed bodies and more widely for the legal services market. A well regulated legal services market is overall better equipped to protect consumer interests.

11. Regulating small business

11.1 The preparation of an IA has shown that this instrument is not expected to have any disproportionate impact on small firms.

12. Monitoring and review

12.1 As the instrument makes changes to legislation to modify some of the functions of the Society and the Council, 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 Surinder Sawali at the Ministry of Justice (Tel: 020 3334 3142 or Email: surinder.sawali@justice.gsi.gov.uk) about any queries regarding this instrument.