

**EXPLANATORY MEMORANDUM TO
THE LEGAL SERVICES ACT 2007 (DESIGNATION AS A LICENSING
AUTHORITY) ORDER 2011**

2011 No. 2038

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 Council for Licensed Conveyancers (“the Council”) as a licensing authority for the purpose of the following reserved legal activities: reserved instrument activities; the administration of oaths and probate activities. This will allow the Council to license alternative business structures (“licensed bodies”) to provide those activities when Part 5 of the Legal Service Act 2007 (“the 2007 Act”) is commenced.

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. It establishes the Legal Services Board (“the LSB”) as the oversight regulator for this new 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 the Council.

4.2 Part 5 of the 2007 Act sets out arrangements under which approved regulators which have been designated as 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).

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. Under that Schedule the LSB must make rules specifying how it will determine such applications. 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, that decision.

5. Territorial Extent and Application

5.1 The instrument applies to England and Wales.

6. European Convention on Human Rights

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

7. Policy Background

- *What is being done and why*

7.1 This Order will designate the Council as a licensing authority in relation to those reserved legal activities for which it is already an approved regulator. This will enable it to regulate licensed bodies once the provisions of Part 5 of the 2007 Act are in force. The Lord Chancellor has agreed to make this Order on the recommendation of the LSB.

7.2 In making its recommendation the LSB has completed a detailed review of the Council's application. The Council already has some experience of regulating structures which are owned or managed by non-lawyers and has built on and adapted those arrangements to take account of the new requirements set out for licensing authorities. It has made significant revisions to its Code of Conduct which covers arrangements for the conduct, discipline and practice of all individuals and bodies regulated by the Council. The Council has also put in place arrangements to ensure that licensed bodies have appropriate indemnity arrangements in place and has extended its compensation fund to cover licensed bodies in addition to the bodies it already regulates. It will also have in place memoranda of understanding with the Office for Legal Complaints and with other regulators, both legal and non-legal, to ensure that complaints or conflicts within the licensed bodies are effectively dealt with.

7.3 The LSB is satisfied that the Council has demonstrated in its application that it has complied with the LSB's own rules and the statutory arrangements set out in Schedules 11 (licensing rules) and 13 (ownership of licensed bodies) of the 2007 Act regarding the arrangements which licensing authorities must make in their licensing rules for the purpose of considering applications and regulating licensed bodies. The Council has also established a suitable appellate body (the First-tier Tribunal). The LSB considers that the Council has the capacity and capability to be a competent licensing authority and consumers and providers will be suitably protected as a result of the measures put in place.

7.4 Article 3 of this Order and the Schedule make provision as a result of the Council being designated. Paragraphs 1 and 2 of Article 3 make provision, respectively, about information sought for the purpose of regulatory investigations and the holding of bank accounts by licensed bodies. These provisions are similar to those which already apply in relation to firms of solicitors. This will ensure that all licensed bodies are regulated to the same standard as solicitors' firms, with commensurate protection for consumers. Paragraph 3 applies to licensed bodies certain provisions of the Law of Property Act 1925, which, by virtue of section 34(2) of the Administration of Justice Act 1985 ("the 1985 Act"), already apply to conveyancing services bodies regulated by the Council in its capacity as an approved regulator. Paragraph 4 provides that The Estate Agents Act 1979 (which contains provision with respect to the carrying on of estate agency work) does not apply to licensed bodies regulated by the Council. Section 34(3) of the 1985 Act already disapplies this provision to licensed conveyancers and conveyancing services bodies.

- ***Consolidation***

7.5 This is the first Order made under Schedule 10 to the 2007 Act. There are therefore no earlier Orders to consolidate.

8. Consultation Outcome

8.1 The 2007 Act provides that the LSB must, before making its final recommendation to the Lord Chancellor, seek the advice of statutory consultees (the Lord Chief Justice, the Office of Fair Trading and the Legal Services Consumer Panel) in accordance with paragraph 3 of Schedule 10.

8.2 In accordance with paragraph 9 of that Schedule the Council was given the opportunity to make representations about those responses. The consultation responses and the Council's representations are available on the LSB's website: (http://www.legalservicesboard.org.uk/what_we_do/regulation/licensing_authority_application.htm).

8.3 The consultees made observations with regard to the standard of proof proposed to be used in disciplinary hearings. As a result the Council altered its application to the LSB so that the civil standard of proof would be applied in disciplinary hearings, as distinct from the criminal standard of proof on a sliding scale, as had previously been intended.

8.4 The Lord Chief Justice voiced concerns that the Council may be the first Approved Regulator to be designated a Licensing Authority. He expressed the view that the relative inexperience and small size of the Council compared to, for example, the Solicitors Regulation Authority, the regulatory arm of the Law Society, suggested that the latter would

be better placed to become the first licensing authority. In its response the Council emphasised its history of regulation in this area.

- 8.5 Comments were also made about the Council's approach to ensuring access to justice and its approach to the regulation of connected services, where some but not all of the service provided consisted of regulated activities. In relation to the former the Council emphasised that its approach was consistent with the LSB's guidance, whilst it asserted its commitment to keep its arrangements in relation to the latter under review.
- 8.6 A full analysis of the LSB's approach to the advice of the statutory consultees was set out in section 10 of Schedule 2 to the LSB's decisions notice in relation to this application (available at http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/clc_decision_notice.pdf). The LSB concluded, before making its decision that the issues raised in that advice had been satisfactorily addressed.

9. Guidance

- 9.1 The LSB has issued guidance to licensing authorities under section 162 of the 2007 Act on the content of the licensing rules of a licensing authority. A copy of this guidance can be found at: http://www.legalservicesboard.org.uk/what_we_do/regulation/reg_pol.htm.

10. Impact

- 10.1 There is no impact on charities or voluntary bodies, any business impact will relate to the Council.
- 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 does 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 supplementary memorandum was published in June 2007 and can be found at <http://www.justice.gov.uk/docs/RIA-supplement-v021.pdf>.
- 10.4 However, in its application to become a licensing authority the Council did consider the impact on it as an organisation. It estimates that its workload will increase 10% year on year for the next three years (based on 100 licensed body applications in 2011 rising to 120 in 2013). Expenditure as a result of becoming a licensing authority will be recovered from regulatory fees collected from licensed bodies. In addition, the Council has taken the opportunity to streamline its

regulatory systems and processes for its existing bodies and the new licensed bodies and anticipates efficiency savings as a result.

11. Regulating small business

11.1 This Order does not apply to small business.

12. Monitoring and review

12.1 In its decision notice to the Council the LSB has provided that the Council must assess the consistency of all its licensing applications. The Council will publish its licence determination time scales targets and its achievement against these. It will review its licensing determinations after the first six months of operating as a licensing authority and then once every twelve months thereafter. This aims to evaluate the consistency of the scheme and will help the Council to decide if any changes need to be made to the application process. Any changes will be made with the approval of the LSB if that is required.

13. Contact

Please contact Jo Sawyers at the Ministry of Justice (tel: 020 3334 4270 or email: joanna.sawyers.1@justice.gsi.gov.uk) about any queries regarding this instrument.