

14 April 2011

LSB CONSULTATION STATEMENT - DRAFT ORDER TO BE MADE UNDER SECTION 69 LEGAL SERVICES ACT 2007 (the Act)

This consultation period will end at 2pm on Thursday 21 April 2011

1. In September 2010 the LSB published a consultation document on proposals to modify the functions of the Solicitors Regulation Authority (the SRA) and the Council for Licensed Conveyancers (the CLC). The consultation was accompanied by a draft order. Having considered responses to the consultation, the Board agreed to recommend to the Lord Chancellor that he should use the powers in section 69 of the Act to change certain powers of the Solicitors Regulation Authority (SRA) and the Council for Licensed Conveyancers (CLC) in order to ensure that they can carry out their functions (both as approved regulators and, if so designated, licensing authorities for ABS) more effectively or efficiently. The LSB has recently been told by the MoJ that it does not consider that section 69 provides the power to include some of the measures in a section 69 order but that it will introduce these separately (see paragraph 3).
2. The new draft order contains the following (NB all these issues have been consulted on previously):

a) Issues that apply to the Law Society/Solicitors Regulation Authority only

Collecting periodic fees from non-ABS firms regulated by the SRA (Article 2); and

Enabling the SRA to establish a single compensation fund for ABS and non-ABS (Article 3 and the Schedule).

b) Issues that apply to Law Society/Solicitors Regulation Authority and the Council for Licensed Conveyancers

- The power to make rules to recover investigation costs (Article 4 and Article 8)

c) Issues that apply to the Council for Licensed Conveyancers only

- Enabling the Council to issue licences for indefinite periods (Article 5);
- Enabling the Council to make rules about the compensation fund for other regulated entities (Article 6); and
- Changes to the constitution of the Council (Article 7):
 - Extending the definition of “licensed conveyancer” member of the Council;
 - Change the definition of “lay member” of the Council;
 - Require a lay majority on the Council; and

– Change the requirements for consumer representatives.

3. Two powers included in the previous consultation have now been removed from the section 69 order. MoJ has confirmed that it will include these powers as part of any process to designate the SRA and/or the CLC as licensing authorities. These are powers that the SRA currently has as an approved regulator; extending them to the SRA and the CLC as licensing authorities will ensure that there is a level playing field between ABS and non-ABS, as well as between licensing authorities. The powers are:

- Enabling the SRA and CLC to apply to the High Court for permission to seek information from third parties

This will ensure that incriminating evidence cannot be put beyond the regulator's hands. The LSA provides licensing authorities with powers to seek information from licensed bodies, any manager or employee (or former manager/employee) and any non-authorized person with an indirect or material interest. But important information pertaining to a licensed body's compliance with its licence obligations may be held by banks, insurers, clients, other regulators and any other organisations or individuals having dealings with it. A licensing authority has no powers to obtain information from these bodies, although the SRA does currently have these powers for non-ABS law firms. It is not possible for a licensing authority under its licensing rules or other regulatory arrangements to compel a third party to produce information since it does not regulate them and so does not have any powers over them. Safeguards are provided to the third party because a licensing authority could only be granted the power to request information by the High Court – this is not a general power to gather information.

- To ensure that client money held by banks is protected from third party claims

This will protect client money held by banks from third party claims (for example from insolvency practitioners); it also prevents banks from having any recourse to the money in client accounts. This needs to be provided in statute rather than licensing rules: firstly, licensing rules cannot bar banks' statutory right of set off in insolvency legislation, and secondly, banks would need clear protection from third party claims in order to cooperate with interventions by a regulator to protect client money. Licensing rules only apply to the licensee and are unlikely to usurp any private rights of clients. They would therefore offer a lesser protection to banks than primary legislation.

1. We therefore intend to withdraw the previous recommendation and submit a new one. Because the proposed new order includes fewer powers than the one consulted on in September, we consider that it is appropriate to allow 7 days to make representations. Those powers that are included were all included in the previous consultation.

2. **The consultation period will end at 2pm on Thursday 21 April 2011, 7 days after publication.** In accordance with section 70(3) of the

Legal Services Act 2007, you are given notice that any representations about the proposed section 69 order and recommendation must be made to the Board by the end of this period. We would prefer to receive responses electronically (in Microsoft Word or pdf format), but hard copy responses by post or fax are also welcome. Responses should be sent to:

Email: consultations@legalservicesboard.org.uk

Post: Michael Mackay,
Legal Services Board,
7th Floor, Victoria House,
Southampton Row,
London WC1B 4AD

Fax: 020 7271 0051

We intend to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our decision document. We are also keen to engage in other ways and we would welcome contact with stakeholders during the consultation period.

If you have any questions about this consultation, please contact Chris Baas, Regulatory Project Manager by telephone (020 7271 0055), e-mail (Christopher.baas@legalservicesboard.org.uk) or by post at the address above.

Recommendation to the Lord Chancellor and revised draft section 69 order

Proposed recommendation

The Legal Services Board recommends to the Lord Chancellor that he makes the following order under section 69 of the Legal Services Act 2007.

Proposed section 69 order

Draft Order laid before Parliament under section 206(4) and (5) of the Legal Services Act 2007 (c. 29), for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2011 No.

LEGAL SERVICES, ENGLAND AND WALES

The Legal Services Act 2007 (The Law Society and The Council for Licensed Conveyancers) (Modification of Functions) Order 2011

Made - - - - - *******

Coming into force in accordance with article 1(2) to (5)

The Lord Chancellor makes the following Order in exercise of the powers conferred by sections 69 and 204(3)(a), (b), (c) and (e) and (4)(a) of the Legal Services Act 2007⁽¹⁾.

In accordance with section 69(2) of that Act, the Order is made following a recommendation made by the Legal Services Board.

The Legal Services Board has made the recommendation with the consents required by section 70(1) of that Act and after complying with the requirements in section 70(2) to (4) of that Act.

A draft of this Order has been approved by a resolution of each House of Parliament pursuant to section 206(4) and (5) of that Act.

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Legal Services Act 2007 (The Law Society and The Council for Licensed Conveyancers) (Modification of Functions) Order 2011.

(2) Subject to paragraphs (3), (4) and (5), this Order comes into force on the day after the day on which this Order is made.

(3) Articles 3 and 4 and the Schedule come into force on the day on which an order comes into force designating the Law Society as a licensing authority under Part 1 of Schedule 10 to the 2007 Act in relation to one or more reserved legal activities.

⁽¹⁾ 2007 c.29.

(4) In article 7—

- (a) paragraphs (1), (2) and (4) come into force on 30th September 2011; and
- (b) paragraph (3) comes into force on whichever is the later of—
 - (i) 30th September 2011, and
 - (ii) the day mentioned in paragraph (5) below.

(5) Article 8 comes into force on the day on which an order comes into force designating the Council for Licensed Conveyancers as a licensing authority under Part 1 of Schedule 10 to the 2007 Act in relation to one or more reserved legal activities.

(6) In this Order—

- “the 1985 Act” means the Administration of Justice Act 1985⁽²⁾;
- “the 2007 Act” means the Legal Services Act 2007.

Functions of the Law Society

Power to charge periodical fees for recognised bodies

2. In section 9 of the 1985 Act (which makes provision as to the recognition and regulation of recognised bodies)⁽³⁾, in subsection (2), after paragraph (aa), insert—

- “(ab) requiring recognised bodies, or descriptions of recognised body, to pay periodical fees of such amount as the Society may from time to time determine;”.

Extension of the power to make compensation rules for a transitional period

3. The Schedule to this Order (which provides for compensation rules to extend to licensed bodies in respect of a transitional period) has effect.

Power to make licensing rules to require payment of certain costs

4.—(1) Licensing rules made by the Law Society may make provision requiring a relevant person to pay charges to the Law Society in respect of costs incurred by the Law Society in ascertaining whether—

- (a) the terms of a licensed body’s licence are being, or have been, complied with; or
- (b) the relevant person otherwise complies, or has complied, with any requirement imposed on the person by or under the 2007 Act or by licensing rules made by the Law Society.

(2) The provision which may be made under paragraph (1) includes provision as to the circumstances in which—

- (a) charges may be imposed on a relevant person;
- (b) the whole or part of any charge payable under the licensing rules is to be repaid.

(3) Any charge which a relevant person is required to pay under licensing rules made under paragraph (1) is recoverable by the Law Society as a debt due to the Law Society from the relevant person.

(4) In this article—

- (a) references to the Law Society are to the Law Society in its capacity as a licensing authority;
- (b) references to a licensed body are to a licensed body which holds a licence granted by the Law Society; and
- (c) references to a relevant person, in relation to a licensed body, are to—
 - (i) the licensed body;
 - (ii) any employee or manager (or former employee or manager) of the licensed body;
 - (iii) the Head of Legal Practice⁽⁴⁾ of the licensed body;

⁽²⁾ 1985 c.61.

⁽³⁾ Section 9 was amended by paragraph 54 of Schedule 18, and Schedule 20, to the Courts and Legal Services Act 1990 (c.41), Part 2 of Schedule 15 to the Access to Justice Act 1999 (c.22) and paragraph 81 of Schedule 16, and Schedule 23, to the Legal Services Act 2007; and by S.I. 2000/1119 and 2001/1090.

- (iv) the Head of Finance and Administration⁽⁵⁾ of the licensed body;
- (v) any person who has an interest or an indirect interest, or holds a material interest, in the licensed body.

Functions of the Council for Licensed Conveyancers

Power to issue licence for fixed or indefinite period

5. In section 15 of the 1985 Act (issue of licences by Council)⁽⁶⁾, after subsection (4) insert—
“(4A) The period specified in a licence under subsection (4) may be a fixed or indefinite period.”.

Compensation payments

- 6.—(1) Section 21 of the 1985 Act (professional indemnity and compensation)⁽⁷⁾ is amended as follows.
(2) For subsections (2A) and (2B) substitute—
“(2A) The power of the Council to make rules under subsection (2) shall apply in relation to the practices of licensed conveyancers referred to in subsection (2B) as it applies to their practices as licensed conveyancers.
(2B) The practices referred to in this subsection are the practices of licensed conveyancers which consist of carrying on a relevant activity by virtue of a licence issued under section 53 of the Courts and Legal Services Act 1990 (which provides for the Council to authorise the carrying on of certain reserved legal activities in relation to which the Council is designated as an approved regulator).
(2C) For the purposes of subsection (2B) “relevant activity” has the same meaning as in section 53 of the Courts and Legal Services Act 1990.”.

Constitution of the Council

- 7.—(1) Schedule 3 to the 1985 Act (the Council for Licensed Conveyancers: supplementary provisions)⁽⁸⁾ is amended as follows.
(2) For paragraph 2 (membership of the Council for Licensed Conveyancers) substitute—
“2.—(1) The Council shall consist of—
(a) not more than ten persons who are either—
(i) licensed conveyancers; or
(ii) other persons practising as authorised persons in the course of a business which is carried on by a recognised body; and
(b) not more than eleven persons who are lay persons,
being persons appointed as members of the Council in accordance with a scheme under paragraph 4.
(2) The Council shall in accordance with any such scheme appoint one of its members to be chairman of the Council.
(3) In sub-paragraph (1)—
“authorised person” has the meaning given by section 32A;
“lay person” has the same meaning as in Schedule 1 to the Legal Services Act 2007 (see paragraph 2 of that Schedule);
“licensed body” has the same meaning as in the Legal Services Act 2007 (see section 71).”.

⁽⁴⁾ Paragraphs 11 and 12 of Schedule 11 to the Legal Services Act 2007 make provision for the Head of Legal Practice.

⁽⁵⁾ Paragraphs 13 and 14 of Schedule 11 to the Legal Services Act 2007 make provision for the Head of Finance and Administration.

⁽⁶⁾ Section 15 was amended by paragraph 23 of Schedule 8 to the Courts and Legal Services Act 1990 and paragraph 4 of Schedule 17, and Schedule 23, to the Legal Services Act 2007.

⁽⁷⁾ Section 21 was amended by S.I. 2001/3649 and 2008/537.

⁽⁸⁾ Paragraph 2(1) of Schedule 3 was amended by paragraph 29(2) of Schedule 17 to the Legal Services Act 2007. Paragraph 4(2) of Schedule 3 was amended by paragraph 29(7) of Schedule 17 to the Legal Services Act 2007.

(3) In paragraph 2(1)(a)(ii), as substituted by paragraph (2) above, for the words “by a recognised body” substitute “either by a recognised body or by a licensed body which holds a licence granted by the Council”.

(4) For paragraph 4(2) (requirements applying to scheme for appointment of Council members) substitute—

“(2) A scheme under this paragraph shall secure that (except during any casual vacancy) the total number of persons appointed for the purposes of paragraph (b) of paragraph 2(1) exceeds by one the total number of persons appointed for the purposes of paragraph (a) of that provision.”.

Power to make licensing rules to require payment of certain costs

8.—(1) Licensing rules made by the Council for Licensed Conveyancers may make provision requiring a relevant person to pay charges to the Council in respect of costs incurred by the Council in ascertaining whether—

- (a) the terms of a licensed body’s licence are being, or have been, complied with; or
- (b) the relevant person otherwise complies, or has complied, with any requirement imposed on the person by or under the 2007 Act or by licensing rules made by the Council for Licensed Conveyancers.

(2) The provision which may be made under paragraph (1) includes provision as to the circumstances in which—

- (a) charges may be imposed on a relevant person;
- (b) the whole or part of any charge payable under the licensing rules is to be repaid.

(3) Any charge which a relevant person is required to pay under licensing rules made under paragraph (1) is recoverable by the Council for Licensed Conveyancers as a debt due to the Council from the relevant person.

(4) In this article—

- (a) references to the Council for Licensed Conveyancers are to the Council for Licensed Conveyancers in its capacity as a licensing authority;
- (b) references to a licensed body are to a licensed body which holds a licence granted by the Council for Licensed Conveyancers; and
- (c) references to a relevant person, in relation to a licensed body, are to—
 - (i) the licensed body;
 - (ii) any employee or manager (or former employee or manager) of the licensed body;
 - (iii) the Head of Legal Practice of the licensed body;
 - (iv) the Head of Finance and Administration of the licensed body;
 - (v) any person who has an interest or an indirect interest, or holds a material interest, in the licensed body.

Signed by authority of the Lord Chancellor

Name
Parliamentary Under Secretary of State
Ministry of Justice

Date

SCHEDULE

Article 3

Extension of Law Society’s power to make compensation rules

Interpretation

1. In this Schedule—

“the 1974 Act” means the Solicitors Act 1974⁽⁹⁾;

“transitional period” means the period which—

- (a) begins on the date on which this Schedule comes into force; and
- (b) ends on 31st December 2012.

Compensation rules

2.—(1) Section 36 of the 1974 Act (compensation claims) is modified in accordance with paragraphs (2) to (7).

(2) The modifications have effect in respect of—

- (a) any act or omission falling within any of section 36(1)(a), (b) or (d) to (f) (as so modified) which occurs during the transitional period; and
- (b) any exercise of power falling within section 36(1)(c) or (g) (as so modified) which—
 - (i) occurs during the transitional period; or
 - (ii) occurs after the end of that period but relates to anything which occurred during that period.

(3) Subsection (1) is to be read as if, after paragraph (c), there were inserted—

- “(d) an act or omission of a licensed body or former licensed body;
- (e) an act or omission of a manager or employee (or former manager or employee) of a licensed body or former licensed body;
- (f) an act or omission of a person who has an interest or an indirect interest, or holds a material interest, in a licensed body or who had such an interest at the time the act or omission occurred;
- (g) the exercise by the Society of any of its powers under Schedule 14 to the Legal Services Act 2007.”.

(4) Subsection (2) is to be read as if, after paragraph (f), there were inserted—

“(fa) for a grant to be made by way of making good a deficiency in monies held in trust by the Society under paragraph 3 or 4 of Schedule 14 to the Legal Services Act 2007;”.

(5) Subsection (3) is to be read as if, in paragraph (b), for “in a case within subsection (1)(a) or (b)” there were substituted “in a case within any of subsection (1)(a), (b), (d), (e) or (f)”.

(6) Subsection (4) is to be read as if, for that subsection, there were substituted—

“(4) For the purposes of subsection (2)(f) or (fa), there is a deficiency if the monies mentioned in the subsection in question are insufficient to satisfy the claims of all persons with a beneficial interest in the monies.”.

(7) Subsection (8) is to be read as if, after the definition of “compensation claim” there were inserted—

““indirect interest”, “interest”, “licensed body”, “manager”, “material interest” and “non-authorised person” have the same meaning as in the Legal Services Act 2007 (see index of defined expressions in Schedule 24 to that Act);”.

3.—(1) In its application—

- (a) during the transitional period, and
- (b) after the end of that period but in respect of anything which occurred during that period,

section 36A of the 1974 Act⁽¹⁰⁾ (compensation funds) is modified in accordance with paragraphs (2) to (4).

(2) Subsection (2) is to be read as if, for that subsection, there were substituted—

“(2) Compensation rules may require—

- (a) solicitors, or solicitors of a description prescribed in the rules;
- (b) licensed bodies, or licensed bodies of a description prescribed in the rules;

to make contributions to a compensation fund or funds of such amounts, at such times and in such circumstances, as may be prescribed in or determined in accordance with the rules.

⁽⁹⁾
⁽¹⁰⁾

1974 c.47.

Sections 36A was substituted by paragraph 37 of Schedule 16 to the Legal Services Act 2007.

(2A) Where compensation rules require persons within subsection (2)(a) and persons within subsection (2)(b) to make contributions into the same compensation fund, anything that may be done in relation to the fund in accordance with this Act or the Legal Services Act 2007 (or any provision made under either Act) may be done—

(a) irrespective of whether any money forming part of the compensation fund was contributed before or after the making of such compensation rules; and

(b) irrespective of the persons or description of persons who contributed the money.”.

(3) Subsection (9) is to be read as if, after paragraph (d), there were inserted—

“(da) payment of any costs, charges or expenses incurred by the Society in exercising its powers under Schedule 14 to the Legal Services Act 2007;”.

(4) Subsection (10) is to be read as if, after the definition of “compensation rules” there were inserted—

““licensed body” has the same meaning as in the Legal Services Act 2007 (see section 71);”.

4. Nothing in paragraphs 2 or 3 restricts any power under section 36 or 36A of the 1974 Act to make rules in respect of—

(a) any act or omission falling within paragraph (a) or (b) of section 36(1) of the 1974 Act which occurred before the start of the transitional period;

(b) any exercise of power falling within paragraph (c) of that provision which relates to anything which occurred before the start of that period.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision about the functions of the Law Society (“the Society”) and the Council for Licensed Conveyancers (“the Council”). It modifies the Solicitors Act 1974 (c.47) (“the 1974 Act”) and amends the Administration of Justice Act 1985 (c.61) (“the 1985 Act”).

The Order also makes provision for licensing rules made by the Society or the Council in their capacity as licensing authorities under Part 5 of the Legal Services Act 2007 (c.29) (“the 2007 Act”). This Part of the 2007 Act makes provision for the licensing and regulation of alternative business structures (“ABS”) which allow lawyers and non-lawyers to work together to deliver legal and other services. A body which proposes to regulate ABS must be designated as a licensing authority by an order made by the Lord Chancellor on the recommendation of the Legal Services Board. Once an ABS is a licensed body it may carry on reserved legal activities.

Articles 2 to 4 and the Schedule make provision relating to the Society. Articles 5 to 8 make provision relating to the Council.

Article 2 amends section 9 of the 1985 Act. It enables the Society to make rules that require legal services bodies recognised under that section to pay periodical fees to the Society.

Article 3 and the Schedule modify provisions of the 1974 Act that relate to compensation for persons who suffer loss in connection with acts or omissions by solicitors or their employees or in connection with the Society’s powers of intervention in relation to solicitors. The modifications enable the Society to make rules so that the compensation arrangements will also extend to bodies licensed under Part 5 of the 2007 Act. Such rules are to apply only during a transitional period whilst the Society undertakes a general review of its compensation arrangements.

Article 4 applies to the Society in its capacity as a licensing authority. It provides for the Society to make licensing rules to require payments to be made to the Society to cover its costs in determining whether a licensed body, or specified persons connected with a licensed body, are in compliance with the terms of the body’s licence or with other requirements to which they are subject.

Article 5 amends section 15 of the 1985 Act to enable the Council to issue licences to licensed conveyancers for an indefinite period or a fixed period.

Article 6 amends section 21 of the 1985 Act to extend the Council’s rule-making powers in relation to compensation. The amendment extends the scope of the rule-making power to include certain additional

reserved legal activities so long as the Council is designated as an approved regulator in relation to any such activity. This reflects the extension of the Council's regulatory powers in such circumstances under section 53 of the Courts and Legal Services Act 1990 (c.41). The Council is already an approved regulator in relation to probate activities, in addition to the reserved legal activities it regulates under the 1985 Act. It may apply for further designation as an approved regulator in relation to the exercise of a right of audience and the conduct of litigation.

Article 7 makes changes to provisions of Schedule 3 to the 1985 Act which deal with who may be members of the Council. It also requires that there be a majority of lay members.

Article 8 applies to the Council in its capacity as a licensing authority. It provides for the Council to make licensing rules to require payments to be made to the Council to cover its costs in determining whether a licensed body, or specified persons connected with a licensed body, are in compliance with the terms of the body's licence or with other requirements to which they are subject.

[A full regulatory impact assessment of the effect that this Order will have on the costs of business and the voluntary sector is available from the Legal Services Board, Victoria House, Southampton Row, London WC1B 4AD or at www.legalservicesboard.org.uk. It is annexed to the Explanatory Memorandum which is available alongside the instrument on www.legislation.gov.uk.]