

# **Section 69 Orders: Decision document Statement of Policy on the use of section 69 orders**

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**A decision document setting out a Statement of Policy on  
the use of the Legal Services Act 2007 section 69 powers**

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## Introduction

1. The Legal Services Board (the “**LSB**”) is the organisation created by the Legal Services Act 2007 (the “**LSA**”) and is responsible for overseeing legal regulators, (referred to as the approved regulators (“**ARs**”) in the LSA) in England and Wales. The LSB’s mandate is to ensure that regulation in the legal services sector is carried out in the public interest and that the interests of consumers are placed at the heart of the system. The LSA gives the LSB and the ARs the same regulatory objectives – including an objective to promote competition within the provision of legal services - and a requirement to have regard to the better regulation principles.
2. One of the powers that the LSB has is to make recommendations to the Lord Chancellor under section 69 of the LSA. Under that section the Lord Chancellor may by order modify, or make other provision relating to, the functions of an approved regulator.<sup>1</sup> This can include modifying provisions made by or under any enactment, instrument or document.<sup>2</sup>
3. This type of power enables primary legislation to be amended or repealed by secondary legislation with or without further parliamentary scrutiny.<sup>3</sup> Any order made by the Lord Chancellor under section 69 of the LSA must be made by statutory instrument<sup>4</sup> and this must be through the affirmative procedure<sup>5</sup> i.e. approved by both the House of Commons and the House of Lords to become law.<sup>6</sup>

## Consultation on the LSB’s draft Statement of Policy on the use of section 69 orders

4. On 27 September 2010 the LSB published a consultation document on a draft Statement of Policy that set out how it proposed to assess proposals that it should recommend to the Lord Chancellor making an order under section 69 of the LSA. This followed an earlier open letter on its approach.
5. There is currently a separate but related consultation on proposed changes to the Solicitors Act 1974, the Legal Services Act 2007 and the Administration of Justice Act 1985 that would modify the functions of the SRA and the CLC. That consultation closes on 20 December 2010. Finalising the LSB’s Statement of Policy for section 69 orders now will enable it to have regard to it when considering the responses to the consultation about these specific legislative changes.

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<sup>1</sup> LSA 2007 s69(1)

<sup>2</sup> LSA 2007 s69(6)

<sup>3</sup> <http://www.parliament.uk/site-information/glossary/henry-viii-clauses/>

<sup>4</sup> LSA 2007 s204(1)

<sup>5</sup> LSA 2007 s206(4)(h)

<sup>6</sup> <http://www.parliament.uk/site-information/glossary/affirmative-procedure/>

6. The LSB received two responses to its consultation:
- a. The SRA stated that it was content with the draft Statement of Policy and emphasised the importance of “an open and pragmatic dialogue” between the LSB and an AR about proposed changes. The SRA recognises that the section 69 provisions enable changes to legislation that would otherwise mean it would have to regulate different entities in different ways “with the potential for negative impacts on competition within the market or confusion for consumers”. It considers that using section 69 powers to enable underlying inconsistencies to be remedied is consistent with the regulatory objectives in the LSA.
  - b. The Law Society said that at the time the Legal Services Bill was before Parliament it was recognised that orders under section 69 would be desirable “to ensure that approved regulators’ powers in relation to ABS, and other law firms, respectively were for practical purposes identical”. Although it agrees that provisions in primary legislation should not be lightly amended by this type of rule making power, the Law Society does not think that “there can be a presumption of a very restrained use of the power in the circumstances where change is needed to align the regulatory regimes for ABS and other law firms” and that there is, in any event, a very strong public interest in aligning those regimes. It considers that the LSB should recommend a section 69 order to align regulatory powers wherever there is “a realistic doubt” about the approved regulator’s ability to ensure alignment under its existing powers.

### **LSB’s response**

7. The LSB considers that the Law Society’s response reflects a difference of emphasis in the approach to aligning approved regulators’ powers, although not necessarily a different result in practice. We consider that, in general, the LSA provides approved regulators with sufficient flexibility for their licensing rules to achieve, where it is appropriate to do so, the same outcomes as their regulation of non-ABS firms. In cases where the approved regulator can show that this cannot be achieved without changes to legislation using a section 69 order, it is likely that we will accept that explanation (although not necessarily without in depth discussion and challenge) and consult on whether to propose such an order. However, we do not consider that it is appropriate to use section 69 orders to align regulatory regimes where there is not a clear case that the LSA powers are insufficient. This approach takes into consideration the fact that a section 69 order requires an affirmative resolution of both Houses of Parliament. It is therefore a process that takes some time, during which the approved regulator’s regulatory arrangements are not aligned. Changes to regulatory arrangements (such as licensing rules) to bring about

consistency can be made with the consent of the LSB and are therefore significantly quicker to implement.

8. In addition to the responses to the consultation we have also taken into account our experience over the last few months and consider that it is appropriate to clarify the proposed requirements on what we expect the approved regulator to draft. We have additionally considered whether, overall, the Statement of Policy is consistent with our role as an oversight regulator and have concluded that it is.
9. A tracked changes version of the Statement of Policy is shown at Annex A.

## **Statement of Policy under section 49 of the Legal Services Act 2007**

1. This Statement of Policy sets out the circumstances in which the Legal Services Board (the LSB) is likely to consider it appropriate to make a recommendation to the Lord Chancellor to use powers to make an order under s69(3)(c) of the Legal Services Act 2007 (the LSA). In preparing this Statement, the Board has had regard to the principle that its principal role is the oversight of approved regulators.

### **Principles for assessing whether a section 69 order is required**

#### ***Is there existing legislation or other requirements that provide for the same or similar outcomes?***

2. As a general point of principle, orders should not seek to duplicate (wholly or partly) within the legal regulatory framework existing statutory provisions or other requirements such as consumer protection legislation. However, if there is compelling evidence that the existing provisions are inadequate, either in policy substance or the ability to enforce within an appropriate timescale, and that an order is needed to enable an approved regulator (AR) (including its role as a licensing authority (LA)) to carry out its role more efficiently or effectively, it may be appropriate to recommend a section 69 order. But to make a case for amending legislation, an AR/LA will have to show that an amendment to its regulatory arrangements is not possible or will not achieve the desired outcome.

#### ***Is there provision within the LSA that enables the AR/LA to regulate without the proposed change?***

3. We consider that in order to help ensure consistency and transparency in regulatory arrangements it is appropriate, as far as possible, to keep all regulatory arrangements within the scope of the LSA. This approach should also help to achieve compliance by making it easier for those being regulated to find out their obligations. On 1 January 2010 the LSA became the primary piece of legislation governing the regulation of legal services. It now defines:
  - the objectives of legal regulation (section 1);
  - what is regulated (section 12);
  - who can carry on a reserved legal activity (sections 13 and 18); and
  - who can be an Approved Regulator/Licensing Authority (section 19 and Schedule 4).
4. The provisions for changing regulatory arrangements underpin this. Now, regardless of their origin, an AR's regulatory arrangements cannot be

changed other than in a way that is consistent with the mechanisms provided by the LSA and with the consent of the LSB.

5. We consider that in practice this means that if there are mechanisms provided by the LSA (for example introducing a licence requirement, or modifying some other part of the AR's regulatory arrangements) to implement the change then those should be used, rather than seeking to change legislation.
6. The LSA is drafted in a way that gives broad powers to ARs and LAs to include in their regulatory arrangements such issues that they consider appropriate to discharge their statutory duties. It is therefore unlikely that there will be many (if any) instances where it is necessary to use a section 69 order to introduce prescriptive drafting into the LSA. For example, the LSA requires (in section 83(5)(c)) a licensing authority to have:

*“appropriate arrangements (including conduct rules, discipline rules and practice rules) under which the licensing authority will be able to regulate the conduct of bodies licensed by it, and their managers and employees”*

7. This broad power enables the licensing authority to set out a range of rules (or outcomes, or principles) concerning, for example, what disciplinary measures it can take against those it regulates. Similarly, the requirement in section 21 of the LSA for approved regulators to have “indemnification arrangements” provides them with the power to specify what those arrangements should be without the need for more detail in the LSA itself. In both these examples, the requirement of better regulation to consult on changes to regulatory arrangements and the fact that changes can only be made with the LSB's consent provide appropriate safeguards against abuse of these broad powers. The breadth of the powers means that a section 69 order will only be appropriate when there is an actual barrier to (or gap in) effective regulation that cannot be remedied in licensing rules or regulatory arrangements. We consider that consistency of outcomes for consumers and those being regulated should be the focus for ARs and LAs. It is not necessary to have identical statutory powers to enable regulators to do this. We therefore consider it unlikely that it will be necessary to replicate statutory powers across a range of legislation. For ABS licensing authorities, if a potential LA already has powers to carry out certain functions under other primary or secondary legislation in relation to non-ABS, then we consider that it is sufficient for it to mirror those powers to the extent it deems necessary in its licensing rules. It is not necessary for it to seek changes through a section 69 order to introduce the same requirements into the LSA since the arrangements are already likely to be appropriate and consistent with the regulatory objectives.

***Is the proposed order a proportionate way to deal with the problem that has been identified?***

8. We consider that it is important for ARs to be able to respond quickly and flexibly to problems they identify that require changes to regulatory arrangements. Implementing changes to legislation requires considerable resources both from the LSB, ARs, central government and Parliament. Our view is, therefore, that this should only be used when there is no alternative proportionate way to achieve the desired outcome.

***Analysis expected from bodies requesting a section 69 order***

9. In general we will require the following analysis to support a request for a section 69 order:
- an explanation of the desired outcome and how the proposal will achieve this;
  - any defects in the current legal position and why these are material enough to justify changes to legislation rather than changes to regulatory arrangements;
  - the adequacy of the protection provided by other regulation or legislation if the proposed change was not made;
  - the risks that other approaches raise and how the proposal mitigates them in the most efficient way;
  - how the proposed change enables the AR/LA to carry out its role more efficiently or effectively and how it is consistent with its overall approach to regulation; and
  - how the proposed change is compatible with the regulatory objectives and the principles of better regulation.
10. In some cases it may not be necessary to include all of these issues, for example where the change is needed to bring an AR into compliance with rules made by the LSB.
11. In most cases we consider it essential that the AR/LA has consulted publicly (or proposes to do so) on the proposal, to try to achieve the widest possible evidence base and to assist the LSB's statutory consultation process under LSA section 70. We expect that the outcome of a consultation process will inform the analysis in support of the request. In some cases, it may be appropriate for the consultation to be carried out as part of the LSA section 70 consultation.
12. We will, in all cases, require the body requesting the section 69 order to provide suggested drafting changes including consequential amendments since they will be familiar with their own sector-specific legislation and its interaction (if any) with the LSA. Data must also be provided that is adequate to complete an acceptable Impact Assessment of the kind that will need to



support the SI when it is submitted to MoJ. There must also be an explanation of how the proposed statutory instrument (including the explanatory memorandum and explanatory note):

- a. is within the vires of s69; and
- b. is compliant in all respects with Statutory Instrument Practice and has taken account of reports produced by the Joint Committee on Statutory Instruments.

13. If, having decided not to recommend a section 69 order in a particular case, there is a successful challenge to the AR's ability to make the change that it wants to using its existing powers, the LSB will reconsider whether it should in fact recommend an order. We consider that this is a more proportionate approach than trying to anticipate all potential issues that might arise and to seek to deal with each of them in advance by means of a section 69 order.

## Annex A – tracked changes version

NOTE: This Annex is for information only and some minor changes may not be fully reflected here.

### ~~Section 50~~ Consultation

### ~~Draft~~ Statement of Policy under section 49 of the Legal Services Act 2007 ~~LSA~~

1. This Statement of Policy sets out the circumstances in which the Legal Services Board (the LSB) is likely to consider it appropriate to make a recommendation to the Lord Chancellor to use powers to make an order under s69(3)(c) of the Legal Services Act 2007 (the LSA). In preparing this Statement, the Board has had regard to the principle that its principal role is the oversight of approved regulators.

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