

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.