

# Section 69 Order: modification of the Solicitors' Regulation Authority Compensation Fund

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**A consultation paper under section 70 of the Legal Services Act 2007 on proposals to modify the Solicitors Act 1974 for the purposes of the Law Society making compensation arrangements**

This consultation will close on **13 July 2012**

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## Introduction

1. The Legal Services Board (the “**LSB**”) is one of the organisations 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 and a requirement to have regard to the better regulation principles.
2. The LSA also makes provision for approved regulators to apply to the LSB to become designated as licensing authorities (“**LAs**”). As a licensing authority they may issue licences to legal services business that have some element of non-lawyer ownership commonly referred to as alternative business structures (“**ABS**”).
3. The Law Society acting through its regulatory arm the Solicitors Regulation Authority (“**SRA**”) and the Council for Licensed Conveyancers (“**CLC**”) have been designated as LAs able to regulate ABS. This consultation relates to the statutory basis of the SRA.
4. 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>
5. Any order made by the Lord Chancellor under section 69 of the LSA must be made by statutory instrument<sup>3</sup> and this must be through the affirmative procedure<sup>4</sup> i.e. approved by both the House of Commons and the House of Lords to become law.<sup>5</sup> Section 69 sets out a number of grounds under which a recommendation may be made. Section 70 requires that any modification may only be done with the consent of the bodies that the order relates to and only after a draft of the Order has been published for comment. This consultation contains a draft Order at Annex A.

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

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

<sup>3</sup> LSA 2007 s204(1)

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

<sup>5</sup> <http://www.parliament.uk/site-information/glossary/affirmative-procedure/>

## Proposed changes to primary legislation

6. The Law Society (acting through the SRA) has powers under the Solicitors Act 1974 (“**SA**”) and the Administration of Justice Act 1985 (“**AJA**”) to regulate solicitors and solicitor’s firms (recognised bodies). On becoming a LA the SRA received more powers that related to the regulation of ABS.
7. Prior to the SRA applying for designation as a LA the LSB worked closely with the SRA to ensure that the underlying legislation is sufficient to meet the needs of the regulatory framework. The requirements of the regulatory framework is set out in the Legal Services Act 2007 and includes a requirement to have suitable compensation arrangements.
8. The SRA already has powers to run a compensation scheme under the SA for sole practitioner solicitors and recognised bodies. The SRA decided that the best approach when acting as a LA was to extend the current compensation fund to cover ABS firms. Given the statutory basis for the existing compensation fund an Order was made under section 69 in 2011 (the “**2011 Order**”) to modify the basis of the Law Society’s compensation fund so that it was also able to receive contributions from ABS firms and pay out compensation grants to the clients of ABS firms.
9. However, as the SRA had indicated and announced that it was undertaking a comprehensive review of the compensation fund, a “sunset” clause was included in the 2011 Order. This meant that the relevant clauses of the 2011 Order would expire on 31 December 2012, and the Law Society would no longer be able to extend its compensation scheme to cover claims arising from ABS. The SRA consented to this time limited extension.
10. After further consideration the SRA decided that its review should be delayed until it was able to gather robust evidence on the types and scale of claims on the compensation fund that ABS firms would be likely to cause. In order for the current compensation arrangements to remain in place after 31 December 2012 a new order is required to be passed this year.
11. Given the need for a new Order to replace the expiring 2011 Order, two options were considered. The first was to extend the time period of the current sunset clause to allow more time for the SRA to complete its review. The other option was to remove the time based element of the order and make the change permanent. The second option is preferred.
12. There are two reasons for favouring a permanent change. The first is that there will need to be some statutory basis for the compensation fund on an ongoing basis. The LSB is beginning work to look at the wider issue of the statutory basis for compensation funds across current and future regulators. This will require policy work needed to understand the different needs of the

different regulators and how these can best be delivered. This may result in a different set of powers that may be preferred to underpin the SRA's compensation fund and other regulator's compensation funds.

13. The second is that while the review will take place over the next two years outcome may lead to various changes, the timing of which cannot be predicted ahead of the review. The SRA has stated that it requires further information on the nature and risks of the ABS it will regulate before it can properly assess the claim profile of the compensation fund. The compensation fund may also need to be revised if the SRA begins regulating non-solicitor authorised persons.
14. Given the uncertainty surrounding the timing of the SRA's review and the ongoing need for adequate compensation arrangements, the LSB is of the view that the best proposal is to continue the current arrangements until an alternative is developed.
15. This proposal has not been consulted on by the SRA, as would be in line with our usual approach to section 69 Orders. Due to the lack of time before the current arrangements cease to have effect, the SRA concluded that its stakeholders would have adequate opportunity to respond to its proposals in the course of the LSB's consultation. The LSB considers this to be appropriate given that the change is a continuation of the status quo which was consulted on in the development of the 2011 Order and was met with broad support.
16. The draft statutory instrument that would make the change (at Annex A). We welcome comments on all parts of the draft section 69 order. The Ministry of Justice has advised us that no impact assessment is required for this Order.
17. We consider that this consultation satisfies the requirements of s70 of the Legal Services Act 2007 to publish a draft Order before making a recommendation.

Questions

- 1) What are your views on the proposal to enable the SRA to operate a single compensation fund for ABS and non-ABS?
- 2) Do you agree with the LSB's preferred approach to the drafting of the Order?
- 3) Do you have any comments about the drafting of the SI on this issue?

### How to respond

18. The LSB plans to publish all responses received during the consultation period on its website. While the LSB is happy to discuss varying this general policy in individual cases, there is a strong presumption in favour of transparency. It will therefore note publicly that a submission has been received from an identified body which had withheld its consent for publication in the summary of the consultation.
19. 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:

**Post:** Chris Baas  
Legal Services Board 7th Floor,  
Victoria House Southampton Row  
London WC1B 4AD  
**Fax number:** 020 7271 0051  
**Email:** [Consultations@LegalServicesBoard.org.uk](mailto:Consultations@LegalServicesBoard.org.uk)

20. The consultation period will end at 5pm on **13 July 2012 4 weeks after publication**. In accordance with section 70(3) of the Legal Services Act 2007, you are given notice that any representation about the proposed section 69 order must be made to the Board by the end of this period.
21. We are happy to meet you to discuss your views on the consultation if you would find that helpful. Please send all requests to [consultations@legalservicesboard.org.uk](mailto:consultations@legalservicesboard.org.uk)

# Annex A – draft section 69 order

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

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## DRAFT STATUTORY INSTRUMENTS

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**2012 No.**

### **LEGAL SERVICES, ENGLAND AND WALES**

#### **The Legal Services Act 2007 (The Law Society) (Modification of Functions) (Amendment) Order 2012**

*Made* - - - - - **\*\*\***

*Coming into force in accordance with article 2*

The Lord Chancellor makes the following Order in exercise of the powers conferred by section 69 (1), (4) (6) and (7) of the Legal Services Act 2007<sup>(6)</sup>.

In accordance with section 69(2) of that Act, the Order is made following a recommendation made by the Legal Services Board to which was annexed a draft Order in a form not materially different from this Order.

The Legal Services Board has made the recommendation with the consent 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 the each House of Parliament pursuant to section 206(4) and (5) of that Act.

#### **Citation**

1. This Order may be cited as the Legal Services Act 2007 (The Law Society) (Modification of Functions) (Amendment) Order 2012.

#### **Commencement**

2. This Order comes into force on the day after the day on which it is made.

#### **Interpretation**

3. In this Order “the 2011 Order” means the Legal Services Act 2007 (The Law Society and The Council for Licensed Conveyancers) (Modification of Functions) Order 2011<sup>(7)</sup>.

#### **Amendment of article 5 of the 2011 Order**

4.—(1) In the heading to article 5 of the 2011 Order omit “for a transitional period”.

(2) In article 5 of the 2011 Order omit “in respect of a transitional period”.

#### **Extended power to make compensation rules: removal of transitional limitation**

5.—(1) The Schedule to the 2011 Order (which extends the power to make compensation rules in respect of acts or omissions of solicitors to include acts or omissions of licensed bodies) is amended as follows.

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<sup>(6)</sup> 2007 c.29.

<sup>(7)</sup> S.I. 2011/1716.

- (2) In the heading, omit “for a transitional period”.
- (3) In paragraph 1, omit the definition of “transitional period”.
- (4) In paragraph 2—
  - (a) in sub-paragraphs (a), (b) and (c), omit “which occurs during the transitional period”;
  - (b) for sub-paragraph (d) substitute—
    - “(d) the exercise by the Society of any of its powers under Schedule 14 to the Legal Services Act 2007.”.

Signatory text

|         |  |
|---------|--|
|         | <i>Name</i>                            |
| Address | Parliamentary Under Secretary of State |
| Date    | Department                             |

### **EXPLANATORY NOTE**

*(This note is not part of the Order)*

This Order makes amendments to the Legal Services Act 2007 (The Law Society and the Council for Licensed Conveyancers) (Modification of Functions) Order 2011 (S.I. 2001/1716) (“the principal Order”) in respect of the functions of the Law Society.

Article 5 and the Schedule to the principal order modified provisions of the Solicitors Act 1974 (c.47) so as enable the Law Society to make rules to extend compensation arrangements which apply in relation to solicitors so that the arrangements could apply, for a transitional period, in relation to bodies which are licensed under Part 5 of the Legal Services Act 2007 (c.29). Articles 4 and 5 of this Order remove the provisions of the principal order which limited the effect of this modification to the transitional period, so that the Law Society’s power to make compensation rules in relation to such licensed bodies will continue beyond the end of that period (which comes to an end on 31 December 2012).