

# Section 69 Orders: modification of the functions of the Solicitors' Regulation Authority and the Council for Licensed Conveyancers

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**A consultation paper on a draft Statement of Policy under section 50 of the Legal Services Act 2007 on the use of section 69 powers**

This consultation will close on **8 November 2010**

**A consultation paper under section 70 of the Legal Services Act 2007 on proposals to modify the functions of two approved regulators**

This consultation will close on **20 December 2010**

## Contents

Introduction .....	1
The LSB's open letter on the use of section 69 orders.....	2
Section 50 Consultation .....	7
How to respond.....	10
Section 70 consultation .....	11
Introduction .....	11
How to respond.....	11
Proposed changes to primary legislation .....	13
Issues that apply to both the SRA and the CLC .....	13
Issues that apply to the SRA only .....	16
Issues that apply only to the CLC .....	18
Annex A – comparison of open letter and draft Statement of Policy .....	23
Annex B – draft section 69 order.....	26
Annex C – list of questions.....	35
Annex D – draft impact assessment.....	36

## 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 – including an objective to promote competition within the provision of legal services - 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 licenses to legal services business that have some element of non-lawyer ownership commonly referred to as alternative business structures (“**ABS**”).
3. 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>
4. 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>
5. This document is arranged into three parts. The first considers responses to the open letter<sup>7</sup> that we published in February outlining our view on when and how section 69 orders should be considered. The second section sets out a draft Statement of Policy about how the LSB will consider requests for section 69 orders. The third part consults (under section 70 of the LSA) on a particular section 69 order that draws together a number of requests from the Solicitors Regulation Authority (SRA) and the Council for Licensed Conveyancers (CLC)

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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/>

<sup>7</sup> [http://www.legalservicesboard.org.uk/news\\_publications/latest\\_news/pdf/FINAL\\_LSB\\_open\\_letter\\_on\\_s69\\_orders.pdf](http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/FINAL_LSB_open_letter_on_s69_orders.pdf)

that, amongst other things, aim to make ready the framework for the regulation of alternative business structures. In the context of this consultation, any recommendation that the LSB makes to the Lord Chancellor will be to enable the SRA and the CLC to carry out their role as an approved regulator (or licensing authority) more effectively or efficiently.<sup>8</sup>

## The LSB's open letter on the use of section 69 orders

6. The Legal Services Board considers that the powers given under section 69 of the LSA should be used sparingly and only in a proportionate and targeted way.<sup>9</sup> On 3 February 2010 we published an open letter on our website that outlined our thinking on when these powers should be used. We sought responses to this letter by 30 March 2010; six responses were received.<sup>10</sup> In the open letter we identified three principles to establish whether an order is necessary:

- Is there existing legislation or other requirements that provide for the same or similar outcomes?
- Is there provision within the LSA that enables the AR/LA to regulate without the proposed change?
- Is the proposed order a proportionate way to deal with the problem that has been identified?

7. We proposed some factors that we would expect in the analysis of an approved regulator who was seeking a change under section 69:

- 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;

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<sup>8</sup> LSA 2007 s69(3)(c)

<sup>9</sup> The use of these powers was one of the subjects of a recent speech by Lord Judge, Lord Chief Justice of England and Wales. See <http://www.judiciary.gov.uk/docs/speeches/lcj-speech-for-lm-dinner-13072010.pdf>

<sup>10</sup> Responses were received from:

- the Bar Standards Board,
- the Council for Licensed Conveyancers,
- the General Council of the Bar,
- the Law Society,
- the Solicitors Regulation Authority, and
- the Institute of Legal Executives and ILEX Professional Standards in a joint response.

- 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.

## **Responses to LSB's open letter on the use of section 69 orders**

8. Of the six responses we received to our open letter, five of them were broadly supportive of the approach outlined.
9. In its response the CLC stated that: "we agree with the general direction of travel, namely that an application for a section 69 order should be a point of last, rather than first, resort". It did, however, go on to say that there should be sufficient flexibility to allow section 69 orders to be made for uncontroversial amendments without unnecessary costs being incurred.
10. In its response the Bar Standards Board (BSB) took the view that "all other avenues should be exhausted before such an order is made, in the interest of using everyone's time and resources effectively and efficiently". The BSB went on to note that a section 69 order need not be instigated by an AR, the LSB could initiate a change with the consent of the affected AR.
11. The Bar Council hoped that the need for section 69 orders would be rare as ARs should already have powers to amend or add to their own rules. The Bar Council also noted that it would be useful to clarify whether the LSB's position of using section 69 orders sparingly applied to all changes or just those made under section 69(3)(c) to allow a body to carry out its role as an approved regulator (including its role if any as a licensing authority) more efficiently or effectively. The Bar Council also considered that where there were changes to primary legislation, there needed to be particularly compelling justification as "the amendment will not be fully considered or debated by Parliament". The Bar Council raised concerns over the statement in the open letter that a section 69 order might be justified if "there were issues so great and unique to the legal market that they justify a separate or enhanced protective regime". Its position is that if there were a change to consumer protection, it should be enacted through primary legislation or secondary legislation rather than through a section 69 order.
12. The SRA, in its response to the open letter, supported the policy intention, "particularly the commitment to the use of section 69 orders, as provided in the LSA, to help Approved Regulators carry out their roles '...more efficiently or effectively'". The SRA went on to note that it may be useful to use section 69 orders to "resolve anomalies in what is a very substantial body of inter-connected legislation".

13. The combined response from the Institute of Legal Executives (ILEX) and ILEX Professional Standards Ltd. (IPS) made a number of points. They saw section 69(6) which allows an order to modify any primary or secondary legislation as a very wide clause that should not be used lightly. They also noted that there may be situations where there may be a case for a section 69 order but the changes were of such magnitude that full parliamentary scrutiny through a legislative process would be more appropriate. They also suggested that the LSB issue clear guidance requiring ARs to state what mechanism is appropriate or necessary to achieve a proposed change.
14. The Law Society's view was that it is the wrong approach to present a section 69 order to the Lord Chancellor only in cases where there is no other way of achieving the stated goal. The Law Society believed that section 69 orders should be used if "a regulator shows that the order is desirable in order to ensure that they can carry out their duties in the best and most efficient way".
15. The Law Society stated that through the passage of the LSA it lobbied the Ministry of Justice to include provisions to ensure that the powers under which the SRA regulates ABS and non-ABS were the same. It says that this was "accepted on all sides and is a fundamental plank underpinning the Law Society's overall support for implementing ABS". The Law Society says in its response that "MoJ officials decided that it was impractical, given the very large amount of last minute drafting...[and]...the matter should be dealt with after the LSA had become law, by means of an order under Section 69".
16. The Law Society supports the LSB providing guidance on the way in which ARs request section 69 orders but suggested that we should publish some client care standards on how we will respond to a request. Furthermore, if a request is rejected the Law Society proposes that the LSB:
  - Discloses why the request has been rejected;
  - Lays out how the request inhibits the objectives of the LSA;
  - States how the LSB believes that AR should deal with the consequences of not making an order; and
  - Explain in what circumstances, if any, the LSB would be prepared to make the order.

### **LSB's view on responses**

17. In line with the view taken by the majority of those who responded, the LSB considers that section 69 orders should normally be used as a last resort. We agree with ILEX, IPS and the Bar Council that there may be changes that are of such significance as to require full parliamentary consideration through the normal legislative process. Proposals to change the consumer protection

framework may fall into this category, but all proposals for change will have to be considered on a case by case basis.

18. We consider that the test proposed by the Law Society (that the order should ensure that the AR/LA can carry out their duties “in the best and most efficient way”) exceeds what is required by the LSA. The LSA allows an order to be made if it would enable a body to carry out its role “more effectively or efficiently” and proposed changes should be analysed against that test, not whether it is the best or most efficient way to achieve the desired outcome.
19. We are always prepared to discuss with AR/LAs and other parties our views on whether a section 69 order is appropriate. We consider that it will be appropriate in many circumstances for those discussions to be confidential to ensure free discussion of the issues raised prior to consultation. If there are issues of such significance being raised in confidential discussions that we consider it is appropriate to consult on revised guidance then we will do so. However, if we consult on a section 69 order and proposals are made to add to or remove issues from the order, we will always explain our final decision publicly and fully.
20. The open letter referred only to section 69 orders that are “proposed to enable a body to carry out its role [...] more efficiently or effectively” (ie section 69(3)(c)).
21. The LSB has considered whether approach to section 69 orders should be set out in a Statement of Policy under section 49 of the LSA. We see Statements of Policy as a tool for binding the LSB (subject to the public law duty to consider exceptions) whereas guidance would more usually be addressed to others. Clarity on how the LSB will consider requests for section 69 orders is therefore more appropriate in a Statement of Policy.
22. The LSA requires the LSB to consult on a draft of any proposed Statement and therefore the next section of this document sets out our draft Statement of Policy on the use of section 69 orders. In preparing this Statement we have taken into account our statutory duties under the LSA, including the need to have regard to the principles of better regulation and the principle that our principal role is the oversight of ARs.
23. Although you are welcome to respond to any aspect of the draft Statement, since it has been prepared with the benefit of responses to our open letter, there is no need to submit a response unless you wish to raise new points, or unless you disagree with the view we have come to following that consultation.

24. Since the publication of the open letter the LSB has discussed with the CLC and the SRA what changes it may be appropriate to make using a section 69 order. During that process we have found the provision of suggested drafting changes very helpful since it is the AR that has expertise in its own sector-specific legislation and therefore the knowledge about what changes need to be made in order to achieve the desired policy outcome. Having worked through the issues, we have been able to develop a set of requirements that are justifiably the subject of changes to legislation through the s69 process. The third part of this document and Annex C outline those changes.



## Section 50 Consultation

### **Draft Statement of Policy under s49 of the LSA – circumstances in which 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**

#### **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?*

25. 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?*

26. 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 1/1/2010 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).
27. 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.

28. 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.
29. 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”*
30. 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 ARs 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 approved regulators and licensing authorities. 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?***

31. 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***

32. 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.
33. In some cases it may not be necessary to include all of these issues, for example where the change is needed to bring an approved regulator into compliance with rules made by the LSB.
34. 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. In some cases it may be appropriate for the consultation to be carried out as part of the LSA section 70 consultation. We expect that the outcome of a consultation process will inform the analysis in support of the request.
35. 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.
36. If, having decided not to recommend a section 69 order in a particular case, there is a successful challenge to the approved regulator'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.

Question:

What are your views on the proposed statement of policy?

### How to respond

37. 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.
38. 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:** Michael Mackay  
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)

39. The consultation period will end at 5pm on **8 November 2010 - 6 weeks from date of publication**. In accordance with section 50(2) of the Legal Services Act 2007, you are given notice that any representation about the proposed Statement of Policy must be made to the Board by the end of this period. We have reduced the consultation period to 6 weeks since all the issues have been consulted on previously and the consultation is a technical requirement under the LSA for any Statement of Policy.
40. 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).

## Section 70 consultation

### Introduction

41. The Law Society acting through its regulatory arm the Solicitors Regulation Authority (SRA) and the Council for Licensed Conveyancers (CLC) have both indicated a desire to become licensing authorities able to regulate alternative business structures (ABS).
42. These two bodies also have the most extensive legislative basis of all the ARs. In addition to the LSA, 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 recognised bodies. In addition to the LSA, the regulation of licensed conveyancers is based on powers in the AJA and the Courts and Legal Services Act 1990 (“**CLSA**”). The LSB has worked closely with the CLC and the SRA to ensure that the proposed changes to legislation are required, well justified against the regulatory objectives and sufficient to meet the needs of the regulatory framework.
43. This consultation document describes the proposed changes, outlines the justification and includes the statutory instrument that would make the change (at Annex C). We welcome comments on all these parts of the draft section 69 order. We consider that the proposals here are consistent with the approach outlined in our draft Statement of Policy which has in turn been informed by responses to our open letter on section 69 orders.

### How to respond

44. 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.
45. 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:** Michael Mackay  
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)

46. The consultation period will end at 5pm on **20 December 2010 12 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.
47. 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)

## Proposed changes to primary legislation

### The LSA framework for regulating ABS

48. 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. These broad powers enable approved regulators in their roles as licensing authorities to set out a range of rules (or outcomes, or principles) to enable them to regulate individuals that work in an ABS as well as the ABS entity in the same way that they regulate non-ABS individuals and entities.
49. We have held a number of discussions with the SRA about the regulation of sole solicitors. While this issue is not addressed in this consultation paper we are continuing to work with them to ensure that there is a robust and enforceable legislative basis for the regulation of all providers of legal services.

### Issues that apply to both the SRA and the CLC

50. The SRA and the CLC have identified areas where they are not able to implement the necessary changes as part of their regulatory arrangements or licensing rules and that therefore a section 69 order is needed. Some of the issues identified relate directly to the regulation of ABS, others will enable some aspects of the regulatory approach to ABS to be applied to non-ABS. For the reasons given below, we consider that implementation of these changes through a section 69 order would enable the SRA and CLC to carry out their functions as a licensing authority (if they are designated as one) more efficiently and effectively.

## Proposed changes that relate directly to the regulation of ABS

### Seeking information from third parties

51. The aim of this part of the order is to ensure that incriminating evidence cannot be put beyond the regulator's hands. Currently the SA<sup>11</sup> allows the SRA to apply to the High Court for permission to seek information from third parties to inform a disciplinary investigation.<sup>12</sup> The CLC does not have this power. The LSA provides LAs with powers to seek information from licensed bodies, any manager or employee (or former manager/employee) and any non-authorised 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 it. For example, a bank may

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<sup>11</sup> Solicitors Act s44BB

<sup>12</sup> An investigation is not the same as an intervention. The latter is when the SRA intervenes to take over the running of a law firm. Schedule 14 to the LSA provides a route for the SRA to obtain information from third parties when it has intervened.

have information about a client account which the LA considered important to inform a money laundering investigation. A LA has no powers to obtain information from these bodies, although the SRA does currently have these powers for non-ABS law firms.

52. It is not possible for a LA 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. In this proposal, safeguards are provided to the third party because a LA could only be granted the power to request information by the High Court – this is not a general power to gather information.
53. We have considered whether it would be appropriate to extend the power to all licensing authorities. However, a section 69 order can only be made with the consent of the body concerned. We therefore propose to consider on a case by case basis as other bodies apply to be licensing authorities whether they need similar powers since we would not want to create a weaker regulatory regime for one LA compared to others. However it may be that other ARs currently have sufficient powers to be able to obtain information from third parties if they start to regulate ABS.
54. This issue is covered specifically in paragraphs 2 of Schedules 2 and 3 to the draft order.

Question 1

What are your views on the proposal to enable the SRA and CLC to obtain information from third parties about ABS by application to the High Court?

Do you have any comments about the drafting of the SI on this issue?

***Recovery of investigation costs***

55. The aim of this part of the order is to allow the SRA and CLC to recover the cost of investigations that lead to disciplinary action against licensed bodies when action is taken. This mirrors the current powers that it has against non-ABS firms achieved through the AJA and rules made regarding the circumstances costs are payable. The CLC does not currently have this power. Without this change, the cost of all investigations would be spread across all those regulated whether or not they were subject to disciplinary action. The LSA does allow a LA to recover the cost of interventions but there is no ability to recover the cost of investigations.
56. An intervention may take place when the LA is satisfied that one or more of the terms of a licence have not been complied with and the breach is



significant to warrant such action. Investigations take place prior to that and are conducted by the LA for the purpose of ascertaining the existence and nature of any such non-compliance. This means that in the absence of an equivalent power for ABS, costs of investigations that fall short of direct intervention but nevertheless lead to disciplinary action cannot be recovered. It is not proposed that costs would be payable unless the investigation resulted in disciplinary action, however, it is proposed that the power is kept broader and rules are used to limit the application in line with the approach under the AJA.

57. It does not seem appropriate for licence conditions to cover this issue. In seeking to recover costs in the absence of a statutory power, the LA would be exposing itself to a risk of administrative law challenge. Case law suggests that these types of charges cannot be made unless the power to do so is given by express words or necessary implication. It does not appear that a charge to recover costs can be implied. This is reinforced by the fact that the AJA/SA provide express powers to charge and recover investigation costs and the LSA itself provides an express power to recover intervention costs. In any case, the lack of certainty in this respect is clearly undesirable and risks inhibiting licensing authorities' ability to conduct appropriate investigations.
58. We have considered whether it would be appropriate to extend this power to all licensing authorities. However, a section 69 order can only be made with the consent of the body concerned. We therefore propose to consider on a case by case basis as other bodies apply to be licensing authorities whether they need similar powers although it is for approved regulators to decide the manner in which they recover the cost of investigations. The relevant provisions are set out in paragraphs 3 of Schedules 2 and 3 to the draft order.

#### Question 2

What are your views on the proposal to enable the SRA and CLC to recover the cost of investigations that lead to disciplinary action against ABS from those parties that are the subject of the investigation?

Do you have any comments about the drafting of the SI on this issue?

#### ***Protection of client money***

59. The aim of this part of the order is to 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 in satisfaction of a liability owed to the bank by the ABS. This protection is currently provided by the Solicitor's Act 1974 (section 85) for clients of non-ABS firms, but there

is no equivalent protection for clients of ABS. The CLC does not currently have this power.

60. There are two main reasons why these protections should be provided in statute rather than the 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 therefore offer a lesser protection to banks than primary legislation.
61. We have considered whether it would be appropriate to extend this power to all licensing authorities. However, a section 69 order can only be made with the consent of the body concerned. We therefore propose to consider on a case by case basis as other bodies apply to be licensing authorities whether they need similar powers since we would not want to create a weaker regulatory regime for one LA compared to others. However it may be that other ARs currently have sufficient powers to be able to protect client money in ABS.
62. This issue is covered specifically in paragraphs 4 of Schedules 2 and 3 to the draft order.

Question 3

What are your views on the proposal to extend the protection of client money to ABS for the SRA and CLC?

Do you have any comments about the drafting of the SI on this issue?

### **Issues that apply to the SRA only**

#### ***A single compensation fund for ABS and non-ABS***

63. The statutory basis of the current compensation fund for traditional law firms means that, without alterations to the Solicitors Act 1974, the SRA cannot extend its use to provide protection for consumers who use ABS. The SRA is currently conducting a wide-ranging review of its PII and compensation fund arrangements as a result of a variety of problems that have arisen in relation to the current provisions for traditional law firms. It expects to have implemented fully the outcomes of that review by October 2012. Although the SRA could establish a separate fund for ABS this is likely to involve increased costs and act as a barrier to entry which, given the current review, would be inefficient. The SRA's review will ensure that any new arrangements are appropriate for ABS. In the meantime the SRA wants to use its existing fund

to fulfil the requirement to have compensation arrangements for ABS. ABS would be required to contribute to the fund.

64. The SRA intends to consult in October 2010 on the rules that it will operate pending the outcome of the review. This consultation will include consideration of the key client financial protection issues arising from the use of the existing compensation fund.
65. The proposed order provides, amongst other things, that until 31 December 2012:
  - Compensation claims can be paid for the acts or omissions of ABS from the existing fund.
  - The SRA can make rules requiring contributions (and additional contributions) from ABS to the existing fund
66. The draft order contains a sunset clause that will mean that it will only remain in force until 31 December 2012. This will mean consumers of ABS in the first year from 6 October 2011 will have access to the compensation fund and it will give time for an alternative solution to be identified and implemented.
67. This issue is covered specifically in paragraphs 3 and 4 of Schedule 1 to the draft order.

Question 4

What are your views on the proposal to enable the SRA to operate a single compensation fund for ABS and non-ABS?

Do you have any comments about the drafting of the SI on this issue?

## **SRA - proposed changes that do not relate directly to the regulation of ABS**

### ***Collecting periodic fees from non-ABS regulated by the SRA***

68. The aim of this part of the order is to allow the SRA to collect periodic fees without a concurrent requirement for an annual renewal process. Currently the SA and AJA do not contain any stand-alone power to collect periodic fees. This means that, in the absence of a power to collect periodic fees, the SRA will need to maintain an annual renewal process for recognised bodies and sole practitioners simply in order to collect its fees. If the SRA had the power to collect periodic fees (without a linked renewal process) it could reduce costs for both the SRA and those it regulates. It would therefore be able to carry out its functions more effectively and efficiently.

69. In the guidance to Licensing Authorities on the regulation of alternative business structures<sup>13</sup> we recommended that ABS licences are issued for an indefinite period. The effect of the order is to enable the SRA to also do this for traditional law firms. Whilst the SRA will continue to require periodic as well as event-driven information returns, it sees no justification for maintaining a full annual renewal process since it would entail maintaining two systems and is likely to lead to higher costs for non-ABS compared to ABS firms.
70. This issue is covered specifically in Article 2 of the draft order.

Question 5

What are your views on the proposal to enable the SRA to collect periodic fees without an annual renewal process?

Do you have any comments about the drafting of the SI on this issue?

**Issues that apply only to the CLC**

71. The Council for Licensed Conveyancers has made requests for changes that fall into two categories. The first set of changes relate to the introduction of ABS; the second set concern changes to the constitution of the Council, currently specified in the Administration of Justice Act 1985 (AJA) and the functioning of the CLC as a regulatory body.

**Proposed changes that relate directly to the regulation of ABS**

***Enable grants to be made out of the compensation fund for other regulated entities***

72. This aim of this part of the order is to enable the CLC to carry out its functions more effectively and efficiently as it would ensure that it provides protection for all consumers, both for ABS and non-ABS.
73. The CLC compensation fund, like that of the SRA, has a statutory basis. In order to allow compensation grants to be paid to consumers of ABS the remit of the compensation fund needs to be widened.
74. This amendment ensures that the CLC has the power to make rules permitting grants to be made out of its Compensation Fund in respect of any legal services regulated by the CLC as it is currently able to do in respect of conveyancing and probate services. If this amendment is not made, the level of protection afforded to clients of licensed conveyancers would be determined by the particular legal services provided.

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<sup>13</sup>[http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/abs\\_guidance\\_on\\_licensing\\_rules\\_guidance.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/abs_guidance_on_licensing_rules_guidance.pdf)

75. This issue is covered specifically in Article 6 of the draft order.

Question 6

What are your views on the proposal to expand the coverage of the CLC's compensation fund?

Do you have any comments about the drafting of the SI on this issue?

### **Proposed changes that do not relate directly to the regulation of ABS**

#### ***Constitution of the Council***

76. The Council for Licensed Conveyancers has requested a number of changes relating the constitution of the Council. The CLC considers that these changes, taken together, will enable the CLC to comply more appropriately with what it considers to be best practice in terms of regulating for consumers and to be able more efficiently and effectively to protect and promote the interests of consumers. Since the Council's constitution is specified in statute, there is no other way to amend it other than by using a s69 order.

#### ***Extending the definition of "licensed conveyancer" member of the Council***

77. This aim of this part of the order is to enable the CLC to carry out its functions more effectively and efficiently, in particular to protect and promote the interests of consumers.
78. This order extends the definition of a "licensed conveyancer" member of the Council to include an approved person in an entity regulated by the CLC. This will mean that where the CLC regulates an ABS which is a firm in which Approved Persons (other than licensed conveyancers) are employees or managers then they will be eligible to be on the Council. It also reduces (from eleven to ten) the number of non-lay members of the Council in order to ensure a lay majority.
79. This proposal (together with the next one (which would change the definition of "lay member") aims to maximise the number of people who can apply to be licensed conveyancer members of the Council. The CLC considers that this will help to ensure that its regulatory decisions are informed by the widest possible range of experience. It considers that this will ensure that regulation is not unduly influenced by provider interest thereby enabling it to carry out its functions more effectively and efficiently. To maximise the number of people who can apply to be licensed conveyancer members of the Council, the definition of licensed conveyancer member of the Council should be extended to all authorised persons who work in entities regulated by the CLC. The term "entity" as opposed to "practice" is used to ensure that authorised persons in licensed bodies (ABS) regulated by the CLC can apply to be members of the

Council, and not just authorised persons in licensed conveyancer practices regulated by the CLC as an approved regulator.

80. The CLC's Appointment Regulations 2009 (approved by the LSB)<sup>14</sup> provide for the appointment of a total of 9 Council members including the Chair (note that this is restricted below the largest possible size of 21 members). The licensed conveyancers must exceed by one the number of non licensed conveyancer members. Given that there is to be a lay majority on Council the CLC considers that the maximum number of lay members should exceed by one the maximum number of licensed conveyancer members.
81. This issue is covered specifically in Article 7 of the draft order.

Question 7

What are your views on the proposed changes to the CLC's Council?

Do you have any comments about the drafting of the SI on this issue?

***Change the definition of "lay member" of the Council***

82. The aim of this part of the order is to enable the CLC to carry out its functions more effectively and efficiently by enabling it to comply with what it considers is best practice to have a lay majority on its Board.
83. Taken with the proposal above, this would bring the definition of lay member in line with lay member in the LSA for the Legal Services Board. Under the current definition in the AJA the CLC may appoint authorised persons (other lawyers) to the Council. Although they are lawyers, at the moment they are treated as non-licensed conveyancer 'lay' members of the Council. The CLC wants to ensure that its lay members cannot be lawyers so that it has an appropriate range of experience on its Council.
84. This issue is covered specifically in Article 7 of the draft order.

Question 8

What are your views on the change of definition of lay member of the Council?

Do you have any comments about the drafting of the SI on this issue?

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<sup>14</sup> <http://www.clc-uk.org/OpenFile.asp?FilePath=yogiP/Rules/CLCAppointmentRegulationsapprovedbyLSB2009.pdf>

### ***Require a lay majority on the Council***

85. The aim of this part of the order is to enable the CLC to carry out its functions more effectively and efficiently by enabling it to comply with what it considers is best practice to have a lay majority on its Board.
86. This issue is covered specifically in Article 7 of the draft order.

#### Question 9

What are your views on the change to require a lay majority on the Council?

Do you have any comments about the drafting of the SI on this issue?

### ***Change the requirements for consumer representatives***

87. The aim of this part of the order is to enable the CLC to carry out its functions more effectively and efficiently as it would be able to incorporate a wider remit of consumer representation on its Council if it considered it appropriate to do so.
88. Currently the AJA requires the Council to have two people who represent the consumer interest. The CLC has proposed that the explicit requirement in the AJA is removed. While it is undoubtedly important to have a strong consumer voice on the governance bodies of approved regulators the CLC has argued that the current requirements are outdated and that the requirements in the LSA for appointments to the LSB's Board are a more appropriate approach to ensuring proper consumer representation on its Council.
89. In the Legal Services Act, when appointing members to the Legal Services Board, the Lord Chancellor must have regard for the desirability of securing members who have experience in or knowledge of a range of issues including consumer affairs and the differing needs of consumers.<sup>15</sup> The CLC's appointment regulations<sup>16</sup> (rule 3.4) include a requirement that copies that of the LSA.
90. This issue is covered specifically in Article 7 of the draft order.

#### Question 10

What are your views on the proposed change to consumer representation on

<sup>15</sup> LSA 2007 Schedule 1 Paragraph 3

<sup>16</sup> <http://www.clc-uk.org/OpenFile.asp?FilePath=yogiP/Rules/CLCAppointmentRegulationsapprovedbyLSB2009.pdf>

the Council?

Do you have any comments about the drafting of the SI on this issue?

***Enable the Council to issue licences for indefinite periods***

91. This aim of this part of the order is to enable the CLC to carry out its functions more effectively and efficiently as it would not have to set up different processes to deal with granting licences to ABS and non-ABS firms.
92. In the guidance “Alternative Business Structures – Approaches to licensing”<sup>17</sup> the LSB has stated that “Licences should not be time-limited (other than if a temporary licence is issued)”. Whilst that guidance relates to ABS, the CLC considers that the basis for regulating authorised persons and licensed bodies (ABS) should, as far as possible, be the same. The CLC wishes therefore to be able to be able to issue licences to licensed conveyancers which are not time limited. This is not currently possible since AJA (section 15(4)) prevents it.
93. Whilst the CLC will continue to require periodic as well as event-driven information returns, removing the requirement for a full annual renewal process for non-ABS will reduce the cost to those businesses.
94. This issue is covered specifically in Article 5 of the draft order.

Question 11

What are your views on the proposal to enable the CLC to issue licences for indefinite periods?

Do you have any comments about the drafting of the SI on this issue?

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<sup>17</sup>[http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/abs\\_guidance\\_on\\_licensing\\_rules\\_guidance.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/abs_guidance_on_licensing_rules_guidance.pdf)



## Annex A – comparison of open letter and draft Statement of Policy

Changes in the draft Statement of Policy from the Open Letter following consultation. Additions are underlined, deletions are struck through. This Annex is for information only, some changes (eg to abbreviations) may not be fully reflected here.

### **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?*

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 the approved regulator (including its role as a licensing authority) 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?*

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 1/1/2010 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).

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.

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.

The LSA is drafted in a way that gives broad powers to approved regulators and licensing authorities 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 s69 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”

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 s69 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 approved regulators and licensing authorities. 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 s69 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?*

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

In general we will require the following analysis to support ~~we propose~~ that 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.

In some cases it may not be necessary to include all of these issues, for example where the change is needed to bring an approved regulator into compliance with rules made by the LSB.

~~We also~~ 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. In some cases it may be appropriate for the consultation to be carried out as part of the LSA section 70 consultation.

We will, in all cases, require the body requesting the s69 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.

If, having decided not to recommend a section 69 order in a particular case, there is a successful challenge to the approved regulator'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 B – draft section 69 order

*Draft Order laid before Parliament under section 206(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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**2010 No.**

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

### **The Legal Services Act 2007 (The Law Society and The Council for Licensed Conveyancers) (Modification of Functions) Order 2010**

*Made*

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*Coming into force in accordance with article 1(2) to (6)*

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

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 consultation requirements in section 70(2) to [(5)] of that Act.

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

#### **Citation, commencement and interpretation**

**1.—a)** This Order may be cited as the Legal Services Act 2007 (The Law Society and The Council for Licensed Conveyancers) (Modification of Functions) Order 2010.

(1) This article comes into force on the day after the day on which this Order is made.

(2) Article 3 and Schedule 1 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.

(3) Articles 2 and 4 and Schedule 2 come into force on [6th October 2011] or, if later, the day referred to in paragraph (3).

(4) Articles 5 to 7 come 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.

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(a) 2007 c.29.

(5) Article 8 and Schedule 3 come into force on [6th October 2011] or, if later, the day referred to in paragraph (5).

(6) In this Order—

“the 1985 Act” means the Administration of Justice Act 1985<sup>(a)</sup>;

“the 2007 Act” means the Legal Services Act 2007.

(7) In this Order—

“the 1985 Act” means the Administration of Justice Act 1985<sup>(b)</sup>;

“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<sup>(c)</sup> (which makes provision as to the recognition and regulation of recognised bodies), 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;”.

#### **Power to make compensation rules in relation to licensed bodies**

3. Schedule 1 to this Order (which provides for compensation rules to extend to licensed bodies in respect of a transitional period) has effect.

#### **Additional licensing authority functions of the Law Society**

4. Schedule 2 to this Order (which makes new provision as to the functions of the Law Society in its capacity as licensing authority) has effect.

#### *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)(d), after subsection (4) insert—

“(4A) The period specified in a licence under subsection (4) may be a fixed or indefinite period.”.

#### **Compensation payments relating to all licensed practices of conveyancers**

6. In section 21 of the 1985 Act (professional indemnity and compensation), 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 that are referred to in subsection (2B) as it applies to their practices as licensed conveyancers.

(2B) The practices are the practices carried on by virtue of a licence granted under section 53 of the Courts and Legal Services Act 1990 (advocacy, litigation or probate licences).”.

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(a) 1985 c.61.

(b) 1985 c.61.

(c) 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.

(d) 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.

## Constitution of the Council

7.—(1) Schedule 3 to the 1985 Act (the Council for Licensed Conveyancers: supplementary provisions)<sup>(a)</sup> is amended as follows.

(2) For paragraph 2(1) (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 holding a licence in force under Part 2 of this Act or under section 53 of the Courts and Legal Services Act, or

(ii) other persons practising as authorised persons in the course of a business 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.

(1A) 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).”.

(3) 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.”.

## Additional licensing authority functions of the Council for Licensed Conveyancers

8. Schedule 3 to this Order (which makes new provision as to the functions of the Council for Licensed Conveyancers in its capacity as licensing authority) has effect.

Signed by authority of the Lord Chancellor

Date

*Name*  
Parliamentary Under Secretary of State  
Ministry of Justice

## SCHEDULES

### SCHEDULE 1

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<sup>(b)</sup>;

“transitional period” means the period which—

(a) begins on the date on which this Schedule comes into force; and

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(a) 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.

(b) 1974 c.47.

- (b) ends on 31st December 2012.

*Application*

2. The modifications made by this Schedule have effect in respect of any act or omission, or exercise of power, which—

- (a) falls within any of paragraphs (a) to (f) of section 36(1), as modified in accordance with paragraph 3 of this Schedule; and  
(b) occurs in the transitional period.

*Compensation rules*

3.—(1) The following modifications of section 36 of the 1974 Act<sup>(a)</sup> (compensation claims) have effect in accordance with paragraph 2 of this Schedule.

(2) 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) the exercise by the Society of any powers under Schedule 14 to the Legal Services Act 2007.”.

(3) 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;”.

(4) 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) or (e)”.

(5) 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.”.

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

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

4.—(1) The following modifications of section 36A of the 1974 Act<sup>(b)</sup> (compensation funds) have effect in accordance with paragraph 2 of this Schedule.

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

to make, in respect of the transitional period, 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.

(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 which may be done in relation to the fund in accordance with this Act or the 2007 Act (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.”.

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

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

(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);”

## SCHEDULE 2

Article 4

### Licensing authority functions of the Law Society

#### *Interpretation*

1. In this Schedule—

- (a) references to a licensed body are to a licensed body which holds a licence granted by the Law Society; and
- (b) references to the Law Society are to the Law Society in its capacity as a licensing authority.

#### *Provision of information as to compliance with licensed body’s licence*

2.—(1) The High Court, on the application of the Law Society, may order a person who does not fall within section 93(2) of the 2007 Act (information)—

- (a) to produce information, or information of a description, specified in the order; or
- (b) to produce documents, or documents of a description, specified in the order.

(2) The High Court may make an order under this paragraph only if it is satisfied—

- (a) that it is likely that the information or document is in the possession or custody of, or under the control of, the person; and
- (b) that there is reasonable cause to believe that the information or document is likely to be of material significance for the purpose of enabling the Law Society to ascertain whether the terms of a licensed body’s licence are being, or have been, complied with.

(3) An order under this paragraph may direct the Law Society to pay to a person specified in the order such reasonable costs as may be incurred by that person in connection with the provision of any information, or production of any document, by that person pursuant to the order.

(4) An order under this paragraph—

- (a) may specify the time and place at which, and the manner and form in which, the information is to be provided or the document is to be produced;
- (b) must specify the period within which the information is to be provided or the document produced;
- (c) may require the information to be provided, or the document to be produced, to the Law Society or to a person specified in the order.

(5) Paragraphs 10, 12, 13 and 15 to 17 of Schedule 14 to the 2007 Act apply in relation to an order under this paragraph as they apply in relation to an order under paragraph 9 of that Schedule, except that for this purpose, each reference to the licensing authority in paragraph 13(1) and (2) of that Schedule is to be construed as including a reference to any person specified under sub-paragraph (4)(c) of this paragraph.

(6) References in this paragraph to a document, and the production of a document, are to be construed in accordance with section 201 of the 2007 Act (documents).



*Power to make licensing rules to require payment of certain costs*

**3.—**(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 is otherwise complying, 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 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 licensing rules made under this paragraph is to be repaid.

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

(4) "Relevant person" means—

- (a) the licensed body in question;
- (b) any employee or manager (or former employee or manager) of the licensed body;
- (c) the Head of Legal Practice of the licensed body;
- (d) the Head of Finance and Administration of the licensed body;
- (e) any person who has an interest or an indirect interest, or holds a material interest, in the licensed body.

*Bank accounts of licensed bodies*

**4.—**(1) This paragraph applies where a licensed body keeps an account with a bank or a building society in accordance with licensing rules made by the Law Society.

(1) The bank or building society—

- (a) does not incur any liability;
- (b) is not under any obligation to make any inquiry;
- (c) is not deemed to have any knowledge of any right of any person to any money paid or credited to the account,

which it would not incur, or be under, or be deemed to have, in the case of an account kept by a person entitled absolutely to all the money paid or credited to it.

(2) The bank or building society has no recourse or right against money standing to the credit of the account, in respect of any liability of the licensed body to the bank or society, other than a liability in connection with the account.

(3) In this paragraph—

"bank" means—

- (a) the Bank of England;
- (b) a person (other than a building society) who under Part 4 of the Financial Services and Markets Act 2000(a) has permission to accept deposits;
- (c) an EEA firm of the kind mentioned in paragraph 5(b) of Schedule 3 to that Act that has permission under paragraph 15 of that Schedule (as a result of qualifying for authorisation under paragraph 12(1) of that Schedule) to accept deposits;

"building society" means a building society incorporated (or deemed to be incorporated) under the Building Societies Act 1986(b).

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(a) 2000 c.8.  
(b) 1986 c.53.

## Licensing authority functions of the Council for Licensed Conveyancers

## PART 1

## Functions as a licensing authority

*Interpretation***1.** In this Schedule—

- (a) references to a licensed body are to a licensed body which holds a licence granted by the Council for Licensed Conveyancers; and
- (b) references to the Council for Licensed Conveyancers are to the Council for Licensed Conveyancers in its capacity as a licensing authority.

*Provision of information as to compliance with licensed body's licence***2.**—(1) The High Court, on the application of the Council for Licensed Conveyancers, may order a person who does not fall within section 93(2) of the 2007 Act (information)—

- (a) to produce information, or information of a description, specified in the order; or
- (b) to produce documents, or documents of a description, specified in the order.

## (2) The High Court may make an order under this paragraph only if it is satisfied—

- (a) that it is likely that the information or document is in the possession or custody of, or under the control of, the person; and
- (b) that there is reasonable cause to believe that the information or document is likely to be of material significance for the purpose of enabling the Council for Licensed Conveyancers to ascertain whether the terms of a licensed body's licence are being, or have been, complied with.

(3) An order under this paragraph may direct the Council for Licensed Conveyancers to pay to a person specified in the order such reasonable costs as may be incurred by that person in connection with the provision of any information, or production of any document, by that person pursuant to the order.

## (4) An order under this paragraph—

- (a) may specify the time and place at which, and the manner and form in which, the information is to be provided or the document is to be produced;
- (b) must specify the period within which the information is to be provided or the document produced;
- (c) may require the information to be provided, or the document to be produced, to the Council for Licensed Conveyancers or to a person specified in the order.

(5) Paragraphs 10, 12, 13 and 15 to 17 of Schedule 14 to the 2007 Act apply in relation to an order under this paragraph as they apply in relation to an order under paragraph 9 of that Schedule, except that for this purpose, each reference to the licensing authority in paragraph 13(1) and (2) of that Schedule is to be construed as including a reference to any person specified under sub-paragraph (4)(c) of this paragraph.

(6) References in this paragraph to a document, and the production of a document, are to be construed in accordance with section 201 of the 2007 Act (documents).

*Power to make licensing rules to require payment of certain costs***3.**—(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 is otherwise complying, 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 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 licensing rules made under this paragraph is to be repaid.
- (3) Any charge which a relevant person is required to pay under licensing rules made under this paragraph is recoverable by the Council for Licensed Conveyancers as a debt due to the Council from the relevant person.
- (4) “Relevant person” means—
- (a) the licensed body in question;
  - (b) any employee or manager (or former employee or manager) of the licensed body;
  - (c) the Head of Legal Practice of the licensed body;
  - (d) the Head of Finance and Administration of the licensed body;
  - (e) any person who has an interest or an indirect interest, or holds a material interest, in the licensed body.

*Bank accounts of licensed bodies*

4.—(1) This paragraph applies where a licensed body keeps an account with a bank or a building society in accordance with licensing rules made by the Council for Licensed Conveyancers.

- (2) The bank or building society—
- (a) does not incur any liability;
  - (b) is not under any obligation to make any inquiry;
  - (c) is not deemed to have any knowledge of any right of any person to any money paid or credited to the account,

which it would not incur, or be under, or be deemed to have, in the case of an account kept by a person entitled absolutely to all the money paid or credited to it.

(3) The bank or building society has no recourse or right against money standing to the credit of the account, in respect of any liability of the licensed body to the bank or society, other than a liability in connection with the account.

(4) In this paragraph—

“bank” means—

the Bank of England;

- (a) a person (other than a building society) who under Part 4 of the Financial Services and Markets Act 2000<sup>(a)</sup> has permission to accept deposits;
- (b) an EEA firm of the kind mentioned in paragraph 5(b) of Schedule 3 to that Act that has permission under paragraph 15 of that Schedule (as a result of qualifying for authorisation under paragraph 12(1) of that Schedule) to accept deposits;

“building society” means a building society incorporated (or deemed to be incorporated) under the Building Societies Act 1986<sup>(b)</sup>.

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<sup>(a)</sup> 2000 c.8.  
<sup>(b)</sup> 1986 c.53.

## **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”). It also confers new functions on Society and the Council in their capacity as licensing authorities.

Articles 2 to 4 make provision relating to the Society.

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

Article 3 and Schedule 1 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 cover bodies licensed under Part 5 of the Legal Services Act 2005 (c.29). Such rules may apply only in respect of losses that are suffered in connection with licensed bodies which occur in a transitional period.

Article 4 and Schedule 2 confer additional functions on the Society in its capacity as a licensing authority. Paragraph 2 of the Schedule provides that, if certain conditions are met, the Society may apply to the High Court for an order to require persons specified in the order to produce documents or information likely to be of material significance in determining whether the terms of a licensed body’s licence is being complied with. Paragraph 3 of the Schedule 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 certain persons connected with a licensed body, are complying with the terms of the licensed body’s licence or with other requirement to which they may be subject. Paragraph 4 of the Schedule makes provision in relation to licensed bodies for the protection of client money which is held in an account at a bank or building society in accordance with licensing rules.

Articles 5 to 8 make provision relating to the Council.

Article 5 amends section 15 of the 1985 Act. It enables 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. Rules may be made for the compensation arrangements to cover all licensed activities carried on by licensed conveyancers. In addition to conveyancing and probate activities carried on of licensed conveyancers, the compensation arrangements may extend to their advocacy and litigation activities.

Article 7 amends provisions of Schedule 1 to the 1985 Act which deal with the constitution of the Council. It makes changes to the provisions about who may be members of the Council and it requires that there be a majority of lay members.

Article 8 and Schedule 3 confer additional functions on the Council in its capacity as a licensing authority. The provision made by this Schedule in relation to the Council is equivalent to the provision made by Schedule 2 in relation to the Society.

## Annex C – list of questions

What are your views on the proposed statement of policy?

- 1) What are your views on the proposal to enable the SRA and CLC to obtain information from third parties about ABS by application to the High Court?

Do you have any comments about the drafting of the SI on this issue?

- 2) What are your views on the proposal to enable the SRA and CLC to recover the cost of investigations that lead to disciplinary action against ABS from those parties that are the subject of the investigation?

Do you have any comments about the drafting of the SI on this issue?

- 3) What are your views on the proposal to extend the protection of client money to ABS for the SRA and CLC?

Do you have any comments about the drafting of the SI on this issue?

- 4) What are your views on the proposal to enable the SRA to operate a single compensation fund for ABS and non-ABS?

Do you have any comments about the drafting of the SI on this issue?

- 5) What are your views on the proposal to enable the SRA to collect periodic fees without an annual renewal process?

Do you have any comments about the drafting of the SI on this issue?

- 6) What are your views on the proposal to expand the coverage of the CLC's compensation fund?

Do you have any comments about the drafting of the SI on this issue?

- 7) What are your views on the proposed changes to the CLC's Council?

Do you have any comments about the drafting of the SI on this issue?

- 8) What are your views on the change of definition of lay member of the Council?

Do you have any comments about the drafting of the SI on this issue?

- 9) What are your views on the change to require a lay majority on the Council?

Do you have any comments about the drafting of the SI on this issue?

- 10) What are your views on the proposed change to consumer representation on the Council?

Do you have any comments about the drafting of the SI on this issue?

- 11) What are your views on the proposal to enable the CLC to issue licences for indefinite periods?

Do you have any comments about the drafting of the SI on this issue?

## Annex D – Draft impact assessment

<b>Title:</b> <b>Section 69 order: Modification of the functions of the SRA and CLC</b>  <b>Lead department or agency:</b> Legal Services Board  <b>Other departments or agencies:</b> Ministry of Justice	<b>Impact Assessment (IA)</b>
	<b>IA No:</b>
	<b>Date:</b> 06/09/2010
	<b>Stage:</b> Development/Options
	<b>Source of intervention:</b> Domestic
	<b>Type of measure:</b> Secondary legislation
	<b>Contact for enquiries:</b> Luke McInerney luke.mcinerney@legalservicesboard.org.uk

### Summary: Intervention and Options

#### What is the problem under consideration? Why is government intervention necessary?

This impact assessment concerns the power under s.69 of the Legal Services Act 2007 (the Act) which the Legal Services Board (LSB) has to make recommendations to the Lord Chancellor to modify, or make other provision relating to, the functions of an approved regulator or any other body. Government intervention is necessary as any order made by the Lord Chancellor must be made by statutory instrument. The Act sets out the circumstances in which an order can be made, which include enabling the body to be designated as a licensing authority and/or to carry out its role more effectively and efficiently. The LSB, the Solicitors' Regulation Authority (SRA) and the Council for Licensed Conveyancers (CLC) have identified issues that they consider merit an order being made.

#### What are the policy objectives and the intended effects?

1. For the SRA, to enable it to regulate ABS more efficiently and effectively by providing it with powers that it can use for ABS that it currently has in relation to traditional law firms; and to enable it to grant indefinite authorisation for traditional law firms.
2. For the CLC, to enable it to carry out its role more efficiently and effectively through (i) compliance with internal governance rules made by the LSB, (ii) giving it the ability to issue licences for indefinite periods and (iii) enabling its compensation fund to be used more widely.
3. For both the CLC and SRA to enable them to carry out their respective roles more efficiently and effectively so that they have powers that they can use for ABS.

#### What policy options have been considered? Please justify preferred option (further details in Evidence Base)

- The first option is to do nothing.
- Second option is not to propose a s69 order and make the changes through the respective bodies' existing regulatory arrangements or licensing rules. However, the statutory basis that both the SRA and the CLC currently regulate under means that there is substantial doubt that the necessary changes can be effected through regulatory arrangements or licensing rules.
- The third option (preferred option) is to propose a s69 order to put the necessary changes on a firm statutory footing.

**When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved?**

It will be reviewed as a part of an ABS review

**Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?**

Not applicable

# Summary: Analysis and Evidence

# Policy Option 1

## Description:

Section 69 order: Modification of the functions of the SRA and CLC

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

N/A

### Other key non-monetised costs by 'main affected groups'

N/A

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

N/A

### Other key non-monetised benefits by 'main affected groups'

N/A

### Key assumptions/sensitivities/risks

N/A

Discount rate (%)

Impact on admin burden (AB) (£m):		Impact on policy cost savings (£m):		In scope
New AB:	AB savings:	Net:	Policy cost savings:	Yes/No

## Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?	England and Wales				
From what date will the policy be implemented?	01/03/2011				
Which organisation(s) will enforce the policy?	N/A				
What is the annual change in enforcement cost (£m)?	minimal				
Does enforcement comply with Hampton principles?	Yes				
Does implementation go beyond minimum EU requirements?	Yes				
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)	<b>Traded:</b>		<b>Non-traded:</b>		
Does the proposal have an impact on competition?	No				
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?	<b>Costs:</b>		<b>Benefits:</b>		
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	<b>Micro</b>	<b>&lt; 20</b>	<b>Small</b>	<b>Medium</b>	<b>Large</b>
Are any of these organisations exempt?	No	No	No	No	No

## Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
<b>Statutory equality duties</b> <sup>31</sup> <a href="#">Statutory Equality Duties Impact Test guidance</a>	No	10
<b>Economic impacts</b>		
Competition <a href="#">Competition Assessment Impact Test guidance</a>	No	10
Small firms <a href="#">Small Firms Impact Test guidance</a>	No	10
<b>Environmental impacts</b>		
Greenhouse gas assessment <a href="#">Greenhouse Gas Assessment Impact Test guidance</a>	No	10
Wider environmental issues <a href="#">Wider Environmental Issues Impact Test guidance</a>	No	10
<b>Social impacts</b>		
Health and well-being <a href="#">Health and Well-being Impact Test guidance</a>	No	10
Human rights <a href="#">Human Rights Impact Test guidance</a>	No	10
Justice system <a href="#">Justice Impact Test guidance</a>	No	10
Rural proofing <a href="#">Rural Proofing Impact Test guidance</a>	No	10
<b>Sustainable development</b> <a href="#">Sustainable Development Impact Test guidance</a>	No	11

<sup>31</sup> Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.



## Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

### References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

No.	Legislation or publication
	<a href="#">Legal Services Act (2007)</a>
	<a href="#">LSB Consultation Paper Approaches to Licensing</a>
	<a href="#">LSB Response to Consultation</a>

### Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

#### Annual profile of monetised costs and benefits\* - (£m) constant prices

	Y <sub>0</sub>	Y <sub>1</sub>	Y <sub>2</sub>	Y <sub>3</sub>	Y <sub>4</sub>	Y <sub>5</sub>	Y <sub>6</sub>	Y <sub>7</sub>	Y <sub>8</sub>	Y <sub>9</sub>
<b>Transition costs</b>										
<b>Annual recurring cost</b>										
<b>Total annual costs</b>										
<b>Transition benefits</b>										
<b>Annual recurring benefits</b>										
<b>Total annual benefits</b>										

\* For non-monetised benefits please see summary pages and main evidence base section



Microsoft Office  
Excel Worksheet

## Evidence Base (for summary sheets)

### Problem under consideration

The Legal Services Board (LSB) was created by the Legal Services Act (LSA 2007) and is charged with the responsibility of overseeing the regulators of legal services and ensuring that its activities reflect the regulatory objectives set out in the Act. The LSB's mandate is to ensure that regulation in the legal services industry is carried out in a manner that is consistent with the public interest and that the interest of consumers is central in policy making. The Act gives the LSB and Approved Regulators (AR) the same regulatory objectives. In full these objectives are:

- Protecting and promoting the public interest;
- Supporting the constitutional principle of the rule of law;
- Improving the access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of services;
- Encouraging an independent, strong, diverse and effective legal services profession;
- Increasing public understanding of the citizen's legal rights and duties;
- Promoting and maintaining adherence to the professional principles.

The Act enables the operation of Alternative Business Structures (ABS). The Act also details the process of establishing Licensing Authorities (LAs) and their statutory basis to license Alternative Business Structures (ABS). Both the SRA and CLC have indicated that they will apply to become LAs in 2011. The issue of the wider impact from the commencement of this part of the Act will be considered in another impact assessment which will provide further detail on the economic impacts of ABS.

The problem is that in some instances the LSA does not provide sufficient powers to the SRA and the CLC to be able to ensure that the way in which they regulate is sufficient to meet the regulatory objectives. This potential problem was recognised in the course of the Act's passage, and the s.69 mechanism gives provision for this solution.

### Rationale for Intervention

In the context of the LSB's mandate, as an oversight regulatory agency of the legal services industry, the LSB is making a recommendation under s.69 for an order to be made by the Lord Chancellor for changes in the primary legislation to allow the SRA and CLC to carry out their roles more effectively and efficiently. Without the proposed changes there would be increased costs for both organisations, for those they regulate and insufficient consumer protection.

### Policy Objectives

The LSB's approach is that, wherever possible, changes should be made through existing regulatory arrangements or licensing rules. However, for the issues covered in the order, that approach would not provide sufficient certainty. The consultation paper sets out the proposals and issues in more detail. The policy objective is to ensure that, for the specific issues in the s69 order, both the SRA and the CLC have certainty going forward that their powers in relation to these issues have a firm statutory footing. This will help to provide more assurance for those being regulated. It will also provide equal consumer protection for those consumers using ABS legal service providers to those currently enjoyed by consumers using traditional law firms. In particular they will benefit from the ability to claim on the compensation fund in the event of fraud by a lawyer, and their money will be protected from third parties.

### Description of options considered (including do-nothing)

**Option 1: Do nothing** - First option is the do nothing option which would prohibit ARs from changing primary or secondary legislation.

**Option 2: Change to AR's current regulatory arrangements** - This option only allows ARs to change their current regulatory arrangements. However, the statutory basis that both the SRA and the CLC currently regulate under means that there is substantial doubt that the necessary changes can be effected through regulatory arrangements or licensing rules.

**Option 3: Section 69 order: Modification of the functions of the SRA and CLC:** The third option is to propose several specific circumstances relating to the SRA and CLC in which it is necessary to make a s.69 order so as to enable changes to legislation that otherwise cannot be made via any other means and which materially affect the efficiency and effectiveness of these regulators. This is the proposed option for this impact assessment.

### **Costs and Benefits**

The costs and benefits are very difficult to quantify fully, especially due to the fact that for the most part they are ex-ante. Many costs, especially those relating to monitoring and compliance functions of the SRA, are marginal and difficult to differentiate from current and future ABS monitoring activities. Considering the absence of reliable and sufficient data to quantify the proposed impact of the proposed changes of the SRA and CLC on the legal services market, this impact assessment primarily analyses the qualitative effects.

It is envisaged that the principal non-monetised benefits are associated with improving the effectiveness and efficiency of the SRA and CLC in their capacity as ARs. This has an indirect positive effect on the long-term quality of regulation and robustness of the regulatory frameworks established to monitor ABS and non-ABS. The LSB takes the view that a well regulated legal services market which has strong protections for consumers will place consumers at the centre of regulation and market outcomes.

Below we outline specific proposals by the SRA and CLC and the possible economic impacts of these changes.

### **Specific Proposals to make changes using a s.69 order: Costs and Benefits**

#### ***Issues identified by the SRA***

##### *Seeking information from third parties:*

The aim of this part of the order is to ensure that incriminating evidence cannot be put beyond the regulator's hands. The SA<sup>32</sup> allows the SRA and the CLC to apply to the High Court for permission to seek information from third parties to inform a disciplinary investigation. The LSA provides these LAs 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. For example, a bank may have information about a client account which the LA considers important to inform a money laundering investigation. Without this order, A LA would have no powers to obtain information from these bodies.

It is envisaged that any additional information sharing obligations may impose administrative burdens on third parties such as banks, financial institutions, etc, when complying with this regulation. There is also likely to be some marginal cost incurred by regulators when seeking information from third parties about licensed bodies. There would also be a cost involved in obtaining a High Court order. However, the extent to which these costs can be differentiated from the monitoring and compliance frameworks that LAs will introduce in relation to their regulatory activities for ABS is difficult to quantify. We would envisage the potential costs of any

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<sup>32</sup> S44BB

additional compliance to be relatively low and proportionate to overall non-compliance amongst regulated firms.

The benefits of this proposed power can be viewed as constituting wider indirect benefits for regulators and the legal services market as a whole. For example, the proposed change in legislation permitting a LA to seek information from a third party regarding a licensed body's non-compliant activity strengthens the regulatory enforcement framework, which in turn should act as a 'demonstration effect' to market participants and deter future non-compliance. Also, a strengthened regulatory enforcement framework encourages an effective and robust regulatory environment which serves to entice new entrants, bolstering competition in the market and encouraging a more dynamic and innovative market for legal services.

#### *Recovery of investigation costs*

This aspect of the order pertains to the ability of the SRA (and the CLC) to recover the cost of investigations that lead to disciplinary action against licensed bodies or their managers or employees. This mirrors the current powers that the SRA has regarding non-ABS firms. In the absence of this change being made through a s.69 order, the cost of all investigation would be spread across all those regulated whether or not they were subject to disciplinary action. This situation would result in a general policy cost incurred by all market participants, irrespective of whether they were compliant, thereby raising the average cost of doing business.

In this context a s.69 order which allows the SRA (and the CLC) to recover the cost of investigations that lead to disciplinary action would serve to concentrate this cost on non-compliant firms, thus enhancing the welfare of all compliant firms in the market. This approach ensures that intervention for a regulatory breach is appropriately dealt with in a manner consistent with the Hampton principle of meaningful and proportionate sanctions and also strengthens the regulatory enforcement regime. Qualitatively, the overall benefit of this more targeted manner in recovering the cost of investigations that lead to disciplinary action is congruent with the better regulation principle of targeted sanctions and enforcement activity, while imposing a minimal cost impact on the aggregate market; the cost impact would only be borne by the non-compliant firm.

#### *Compensation Fund*

The compensation fund provides compensation for consumers affected by solicitor fraud. The statutory basis of the current compensation fund for traditional law firms means that it cannot be used to provide protection for consumers who use ABS. The SRA is currently conducting a wide-ranging review of its Professional Indemnity Insurance (PII) and compensation fund arrangements as a result of a variety of problems that have arisen in relation to traditional law firms. Although the SRA could establish a separate fund for ABS this is likely to involve increased costs which, given the current review, would be inefficient. In addition it would increase costs for new entrants and represent a large barrier to entry for the first ABS licensees since they would have to provide large amounts of capital. That approach would also be inefficient since claims for compensation tend to be made as a result of the actions of sole practitioners. By definition, ABS will not fall into that class of lawyers and it will therefore be much less likely that claims for compensation will be caused by their actions. (ABS will, of course, have to provide sufficient PII cover to cover any claims made other than fraud.) Therefore requiring large amounts of money up front to find new compensation arrangements would represent an inefficient use of capital. The SRA's review will ensure that any new arrangements are appropriate for ABS. In the meantime the SRA wants to use its existing fund to fulfil the requirement to have compensation arrangements for ABS. ABS would be required to contribute to the fund. We consider that a sunset clause ending on 31/12/12 will ensure that

appropriate permanent and effective measures are put in place for both ABS and non-ABS by that date.

The benefits of having a compensation fund are that it provides consumer confidence in using legal services. This in turn can lead to increased use of services and provide opportunities for firms to expand or enter the market. There is a cost since there is a cross-subsidy from larger firms (and in future ABS) to those smaller firms that generate the majority of claims.

### *Protection of Client Money*

Clients of ABS need protection of client money held by banks from third party claims such as insolvency practitioners. These clients also need protection from banks having any recourse to the money in client accounts. Whilst this is provided for by the SA (s.85) for clients of non-ABS, it needs to be extended to include ABS-clients as well.

The principal benefit for this is that consumer welfare will be enhanced if this protection is extended to cover ABS-clients. Furthermore, the regulatory objectives in the LSA 2007 of protecting and promoting consumer interest will be upheld as this extension reduces possible detriment to consumers, thereby lowering possible future costs of litigation.

### *Collecting Periodic Fees from non-ABS Regulated by the SRA*

These changes will allow the collection of periodic fees without a requirement for an annual renewal process. Currently the SA and AJA do not contain any stand-alone power to collect periodic fees. This means that, in the absence of a power to collect periodic fees, the SRA will need to maintain an annual renewal process for recognised bodies and sole practitioners (who may be treated as recognised bodies) simply in order to collect its fees.

The main benefit of the proposed change is to reduce costs for non-ABS as ABS can have licences issued for an indefinite period. This approach provides consistency and would reduce the cost of having to undergo an annual renewal process to collect fees. This process diverts internal resources within the SRA, thus increasing the overall cost, and efficacy, of regulation. Though impossible to quantify, the attendant cost of undergoing an annual renewal process for non-ABS disadvantages these firms which potentially could result in flow-on costs to end consumers of legal services. A more consistent approach for both non-ABS and ABS would remove any intra-regulation advantage with collection of periodic fees from ABS and ensure a level-playing field for market participants. The marginal cost of undertaking the annual renewal process of fees would be removed for the SRA, allowing greater resource to be more efficiently deployed to risk-based regulation and other activity which contribute to overall economic welfare in the legal services market.

### ***Issues identified by the CLC that have a regulatory impact***

#### *Enable the Council to Issue Licences for indefinite periods*

This aspect of the order pertains to allowing the basis for regulating authorised persons and ABS to be the same. The CLC wishes therefore to be able to issue licenses to licensed conveyancers which are not time limited.

The benefit of this change lies primarily with making regulation more consistent, appropriate and fair. In addition, the ability to issue licences to licensed conveyances which are not time limited has a clear benefit in terms of reducing unnecessary administrative burdens on a AR, freeing up resources that can be better deployed on other aspects of compliance. This will reduce costs to the regulator and will also have a positive marginal effect on authorised persons as they will, in like-manner, have a reduced compliance burden. Also, enabling the CLC to issue licences for

an indefinite period is important to provide greater certainty to market participants about the period they can remain in the market.

### *Enable grants to be made out of the compensation fund for other regulated entities*

The proposed change relates to widening the remit of compensation grants to give the CLC the power to make grants out of its compensation fund to all legal services it regulates, not only in respect of conveyancing and probate services in relation to ABS and non ABS. Although impossible to monetise, the primary benefit for market participants would be that consumers would benefit from having protections in place for all legal services that they access. This is likely to improve consumer confidence in demanding legal services which, in turn, encourages wider provision of, and deeper market for, legal services. Increased protections for consumers is central to the regulatory objectives of the LSA 2007 and promotes a fair and balanced market structure which reduces barriers and transaction costs of consumers accessing legal services, serving to drive better market outcomes.

### **Administrative burden and policy savings calculations**

The administrative burdens imposed by the series of proposals of the SRA and CLC to make changes to primary legislation under a s.69 order are difficult to differentiate from current and future compliance and monitoring activities that these ARs undertake. While enforcement and compliance costs will be marginal as the proposed changes do not constitute large additional burdens, it is foreseeable that in some circumstances these costs will fall on both ARs and ABS (eg. SRA proposal to seek information from third parties). However, where these costs exist, the net positive non-monetised benefit will be a strengthened regulatory framework that improves the efficacy and efficiency of the ARs.

### **Wider impacts**

The wider economic impact for each proposal is set out under individual proposals in the evidence base of this impact assessment. In aggregate, the impacts are viewed as having a net positive effect on the regulated legal services market because most relate to strengthening regulatory frameworks and enhancing the ability of the SRA and CLC in undertaking their regulatory functions in an efficient and effective manner. The trade-off with these proposals is that, in some specific cases, additional costs may be imposed on regulators (ie. increased compliance) and firms (information obligations, compliance, etc) but that these additional costs relate chiefly to enhanced consumer protections. Greater consumer protections have a positive effect on the level of future demand for legal services, as well as reducing the number of complaints and recourse to litigation.

### **Summary and preferred option with description of implementation plan**

The preferred option is to use a s69 order to modify some of the functions of the SRA and CLC to allow them to carry out their functions more effectively and efficiently, amongst other things, by:

- providing equivalent consumer protection for those who use ABS and non-ABS
- allowing compliance with best practice on internal governance arrangements

Because both the SRA and the CLC are based in statute, for these particular issues, it is not possible for them to implement these changes other than by SI.

The SI sets out the dates on which each change will become operational. Once permitted by statute, the changes will be implemented by changes to the bodies' regulatory arrangements.

## **Specific Impact Tests**

### *Statutory Equality Duties*

There are no environmental effects.

### *Economic Impacts*

The economic effects are discussed in the evidence base of the impact assessment.

### *Competition*

There are no environmental effects.

### *Small Firms Impact Test*

These effects will not disproportionately impact small firms.

### *Environmental Impacts*

There are no environmental effects.

### *Social Impacts*

- Health and well-being impacts have been considered and there are no health and well-being effects.
- Human rights impacts have been considered and there are no human rights effects.
- Justice impacts have been considered and as the proposed regulation will not increase the volume of cases that will go through the court it is envisaged that there will be no effects.
- Rural proofing impacts have been considered and there are no rural-proofing impacts. The proposed regulation will be enforced throughout England and Wales and does not have a geographical bias.

### *Sustainable Development*

Sustainable development impacts have been considered and there are no sustainable development impacts.

## Annexes

### Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

**Basis of the review:** [The basis of the review could be statutory (forming part of the legislation), it could be to review existing policy or there could be a political commitment to review];

N/A

**Review objective:** [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?]

N/A

**Review approach and rationale:** [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]

N/A

**Baseline:** [The current (baseline) position against which the change introduced by the legislation can be measured]

N/A

**Success criteria:** [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]

N/A

**Monitoring information arrangements:** [Provide further details of the planned/existing arrangements in place that will allow a systematic collection systematic collection of monitoring information for future policy review]

N/A

**Reasons for not planning a PIR:** [If there is no plan to do a PIR please provide reasons here]

As the proposed entail changes to legislation that modify some of the functions of the SRA and CLC as ARs, it is not envisaged that a post-implementation review of the changes will take place. However the LSB, as the oversight regulator of the legal services industry will, through its information collection from ARs, be reviewing regulatory arrangements on an ongoing basis.