

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

**Summary of responses to consultation and decision
document on proposals to make a recommendation to
modify the Solicitors Act 1974 for the purposes of the Law
Society making compensation arrangements**

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Introduction

1. The Legal Services Board (the “**LSB**”) is one of the organisations created by the Legal Services Act 2007 (the “**LSA**”) and is responsible for overseeing legal regulators, (referred to as the approved regulators (“**ARs**”) in the LSA) in England and Wales. The LSB’s mandate is to ensure that regulation in the legal services sector is carried out in the public interest and that the interests of consumers are placed at the heart of the system. The LSA gives the LSB and the ARs the same regulatory objectives¹ and a requirement to have regard to the better regulation principles².
2. One of the powers that the LSB has is to make recommendations to the Lord Chancellor under section 69 of the LSA. Under that section the Lord Chancellor may by order modify, or make other provision relating to, the functions of an approved regulator.³ This can include modifying provisions made by or under any enactment, instrument or document.⁴ On 6 December 2010, the LSB published its Statement of Policy on the use of section 69 orders.⁵
3. Any order made by the Lord Chancellor under section 69 of the LSA must be made by statutory instrument⁶ and this must be through the affirmative procedure⁷ i.e. approved by both the House of Commons and the House of Lords to become law.⁸ Section 69 sets out a number of grounds on which a recommendation may be made. Section 70 requires that any modification may only be done with the consent of the bodies that the Order relates to and only after a draft of the Order has been published for comment.
4. The LSA also makes provision for approved regulators to apply to the LSB to become designated as licensing authorities (“**LAs**”). As a licensing authority they may issue licences to legal services business that have some element of non-lawyer ownership commonly referred to as alternative business structures (“**ABS**”).
5. The Law Society acting through its regulatory arm the Solicitors Regulation Authority (“**SRA**”) and the Council for Licensed Conveyancers (“**CLC**”) have been designated as LAs able to regulate ABS. This decision document relates to the statutory basis of the SRA.

¹ LSA s1(1)

² LSA s3(3) and s28(3)

³ LSA s69(1)

⁴ LSA s69(6)

⁵ http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/Statement_of_Policy-s69_Orders.pdf

⁶ LSA 2007 s204(1)

⁷ LSA 2007 s206(4)(h)

⁸ <http://www.parliament.uk/site-information/glossary/affirmative-procedure/>

6. On 14 June 2012 the LSB published a consultation document⁹ (under section 70(2) of the LSA) containing a draft section 69 order that, if passed, would enable the SRA to continue to operate a single compensation fund for ABS and non-ABS entities that it regulates. This Order would amend an Order¹⁰ made under section 69 in 2011 (the “2011 Order”) that modified the basis of the SRA’s compensation fund.

A single compensation fund for ABS and non-ABS

7. The consultation document described the proposed recommendation, outlined the justification and included a draft statutory instrument.
8. We received three responses¹¹ to the consultation paper from:
 - The Solicitors Regulation Authority (SRA)
 - The Law Society
 - ILEX Professional Standards (IPS)
9. This document sets out a summary of those responses and our consideration of them. In considering the responses and in deciding the recommendation to the Lord Chancellor, we have had regard to our Statement of Policy on the use of section 69 orders. A draft order is annexed to this recommendation at Annex A.
10. This proposal was not previously consulted on by the SRA, this is not in line with the LSB’s usual approach to section 69 Orders. Due to the lack of time before the current arrangements cease to have effect, the SRA concluded that its stakeholders would have adequate opportunity to respond to its proposals in the course of the LSB’s consultation. The LSB considers this to be appropriate given that the Order, if passed, will result in a continuation of the status quo which was consulted on in the development of the 2011 Order and was met with broad support.
11. In making the recommendation the LSB has received the required explicit consent¹² of the SRA, which has the necessary delegated authority from the Law Society as Approved Regulator.
12. The SRA already has powers to run a compensation scheme under the Solicitors Act 1974 for sole practitioner solicitors and recognised bodies. The

⁹ http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/lsb_section_70_consultation_sra_compensation_fund_13_06_2012.pdf

¹⁰ http://www.legislation.gov.uk/ukxi/2011/1716/pdfs/uksi_20111716_en.pdf

¹¹ All the consultation responses can be found on our website:
http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

¹² Required by LSA s70(1)

SRA decided that the best approach when acting as a LA was to extend the current compensation fund to cover ABS firms. Given the statutory basis for the existing compensation fund an Order¹³ was made under section 69 in 2011 (the “2011 Order”) to modify the basis of the SRA’s compensation fund so that it was also able to make rules about contributions from ABS firms and pay out compensation grants to the clients of ABS firms.

13. However, as the SRA had indicated and announced that it was undertaking a comprehensive review of the compensation fund, a “sunset” clause was included in the 2011 Order. This meant that the relevant clauses of the 2011 Order would expire on 31 December 2012, and the SRA would no longer be able to require contributions to and make grants from its compensation scheme to cover claims arising from ABS.

14. After further consideration the SRA decided that its review should be delayed until it was able to gather robust evidence on the types and scale of claims on the compensation fund that ABS firms would be likely to cause. In order for the current compensation arrangements to remain in place after 31 December 2012 a new Order is required to be in force this year.

15. The statutory basis of the current compensation fund for traditional law firms means that, without alterations to the Solicitors Act 1974, the SRA cannot continue to extend its use to provide protection for consumers who use ABS and would have to find an alternative approach. Given the SRA’s impending review that would not be an effective use of its resources.

Consultation responses

16. ILEX Professional Standards supported the proposals made in the consultation. It noted its interest in the LSB’s wider work that will look at the underlying powers of all regulators. It expressed its interest in using a section 69 Order to create a blanket permission for all regulators to make arrangements related to compensation funds. IPS had no comment on the drafting of the Order.

17. The Law Society in its consultation response set out its view that the sunset clause in the 2011 Order was included for the additional reason that it was not clear whether it was appropriate for ABS and other firms to be covered by the same compensation fund and that the inclusion of the sunset clause would ensure that the issue was specifically considered in the future. The Law Society is of the view that a requirement for a formal review should remain rather than a review at the discretion of the SRA Board.

¹³ http://www.legislation.gov.uk/ukxi/2011/1716/pdfs/ukxi_20111716_en.pdf

18. The Law Society supported the introduction of a new section 69 Order but urged the LSB to add a further two years instead of removing the sunset provision. This would have the effect of ending the current arrangements on 31 December 2014. The Law Society did not comment further on the drafting of the Order.
19. The SRA agreed with the explanation of the background of this consultation. For the short term, the SRA indicated that it was necessary for the SRA compensation fund to continue to cover ABS firms as the establishment costs of a separate fund for ABS would be prohibitively high. For the longer term, the SRA will review the body of ABS firms and the risks that may lead to compensation claims. It states that it is not in a position to set out its preferred long term arrangements for ABS compensation. It therefore concludes that making a further section 69 Order is a necessary measure.
20. The SRA strongly agreed with the LSB's preferred approach of removing the sunset clause and making the change permanent. The SRA agreed with the drafting of the Order.

LSB's decision

21. This consultation, while primarily technical, raises a number of issues about compensation funds in the legal services market. However, it remains the case that in order to ensure that there are appropriate compensation arrangements for consumers of SRA regulated ABS after 31 December 2012 an Order needs to be made.
22. The LSB has some sympathy with the Law Society's position that the current sunset clause should be replaced with another longer one. However, to try to avoid a situation where there is insufficient information to make sensible long term provision for compensation arrangements, on balance, we consider that the change should not be time bound. The legislative process required to make this type of modification would require policy decisions to be made in 2013 for implementation on 1 January 2015, this may still be too soon for long term solutions to be found. Even if a longer period was chosen there remains the possibility that the evidence for a different long term solution may not be found and may require yet another extension to the sunset clause.
23. In its response IPS highlighted the wider work the LSB is undertaking. It is right that other regulators should also be thinking about what powers they need to meet the requirements for appropriate compensation arrangements. It is likely that there will be future section 69 Orders about compensation funds,

although the IPS proposal for a general power is not possible given the requirement for consent by all the parties in LSA section 70.¹⁴

24. The LSB supports the SRA's review of the structure of its compensation arrangements and expects to see public indications of its progress against its commitments to review.

25. Given the consultation responses the Board is content to recommend that the Lord Chancellor make an Order under section 69. No comments were received about the draft Order annexed to the consultation paper and no changes have been made. The Order that the Lord Chancellor is recommended to make is attached at **Annex A** of this document.

¹⁴ LSA s70(1)

Annex A – draft section 69 order

DRAFT STATUTORY INSTRUMENTS

2012 No.

LEGAL SERVICES, ENGLAND AND WALES

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

Made - - - - - ***

Coming into force in accordance with article 2

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

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

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

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

Citation

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

Commencement

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

Interpretation

3. In this Order “the 2011 Order” means the Legal Services Act 2007 (The Law Society and The Council for Licensed Conveyancers) (Modification of Functions) Order 2011^(b).

Amendment of article 5 of the 2011 Order

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

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

^(a) 2007 c.29.

^(b) S.I. 2011/1716.

Extended power to make compensation rules: removal of transitional limitation

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

- (1) In the heading, omit “for a transitional period”.
- (2) In paragraph 1, omit the definition of “transitional period”.
- (3) In paragraph 2—
 - (a) in sub-paragraphs (a), (b) and (c), omit “which occurs during the transitional period”;
 - (b) for sub-paragraph (d) substitute—

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

Signatory text

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

EXPLANATORY NOTE

(This note is not part of the Order)

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

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