

## **Legal Services Act Section 69**

### **The Law Society response to the Legal Services Board's consultation**

1. The Law Society is pleased to have the opportunity to respond to the Legal Services Board's consultation on the way the LSB proposes to exercise its functions in relation to the powers contained in Section 69 of the Legal Services Act, concerning modification of functions of approved regulators.
2. This response deals with the LSB's draft Statement of Policy. The Society will respond in due course to the proposals made in respect of the functions of the Solicitors Regulation Authority.

#### Background

3. Section 69 of the Legal Services Act provides as follows:-

#### **Modification of the functions of approved regulators etc**

- (1) The Lord Chancellor may by order modify, or make other provisions relating to, the functions of an approved regulator or any other body (other than the Board).
- (2) The Lord Chancellor may make an order under subsection (1) only if –
  - (a) the Board has made a recommendation under this section,
  - (b) a draft order was annexed to the recommendation, and
  - (c) the order is in the same form as, or a form not materially different from that draft order.
- (3) The Board may make a recommendation under this section only with a view to an order being made which enables the body to which it relates to do one or more of the following –
  - (a) to become designated by an order under Part 2 of Schedule 4 as an approved regulator, or designated by an order under Part 1 of Schedule 10 as a licensing authority, in relation to one or more reserved legal activities;
  - (b) to authorise persons or any category of persons (whether corporate or unincorporated) to carry on one or more activities which are reserved legal activities in relation to which the body is (at the time the authorisation has effect) designated as an approved regulator, or to make regulatory arrangements;
  - (c) to carry out its role as an approved regulator (including its role, if any, as a licensing authority) more effectively or efficiently;
  - (d) to become a qualifying regulator under Part 1 of Schedule 18;
  - (e) if it is a designated qualifying regulator under section 86A of the Immigration and Asylum Act 1999 (c.33), to authorise persons to provide any additional advice or services the provision of which amounts to the provision of immigration advice or immigration services.
- (4) Subsections (2) other than paragraph (a)), (3) and (4) of section 64 apply in relation to an order under this section as they apply in relation

to an order under section 62(1)(b) in relation to the Board.

- (5) An order under this section also may make provision in relation to –
- (a) the provision of immigration advice or immigration services, and
  - (b) persons authorised to provide such advice and services by the body to which the order relates,

corresponding to the provision which may be made by virtue of section 64(2) to (4) in relation to reserved legal activities and persons authorised to carry on those activities.

- (6) An order under this section may modify provisions made by or under any enactment (including this Act or any Act passed after this Act), prerogative instrument or other instrument or document.
- (7) Any provision made by an order under this section may be expressed to be conditional upon –
- (a) the body to which the order relates being designated by an order under Part 2 of Schedule 4 as an approved regulator, or by an order under Part 1 of Schedule 10 as a licensing authority, in relation to one or more reserved legal activities specified in the proposed draft order, or
  - (b) the body to which the order relates becoming a designated qualifying regulator under section 86A of the Immigration and Asylum Act 1999 (c. 33).
- (8) The powers to make an order conferred by this section are without prejudice to any powers (statutory or non-statutory) which an approved regulator or other body may have apart from this section.

4. The legislative provision is thus of quite wide application, enabling modifications of primary legislation to be made wherever that is appropriate in order to enable an approved regulator to carry out its role more effectively and efficiently.
5. However, it was recognised at the time the Legal Services Act was before Parliament that there was one particular purpose for which orders under Section 69 would be desirable, namely to ensure that approved regulators powers in relation to ABS, and other law firms, respectively were for practical purposes identical. From the Society's perspective, it might in theory have been possible to do this in the Act itself, through appropriate amendments to the Solicitors Act provisions (or to the powers in respect of ABS firms). But the pressures on Parliamentary time - and on resources both for Parliamentary Counsel, and the Ministry of Justice - meant that that was not a practical proposition. Furthermore, sorting the issue out in respect of the Law Society would not have been sufficient, since there are other approved regulators in respect of which the same issues arise.

#### The current consultation

6. That background informs the Law Society's thinking on one particular point. We recognise that, as a general principle, care needs to be taken to ensure

that provisions in primary legislation are not lightly amended by rule making powers of this sort. But we do not think there can be a presumption of a very restrained use of the power in the circumstances where change is needed to align the regulatory regimes for ABSs and for other law firms respectively. We say that for two main reasons. First, it was clearly understood at the time of the Act that Section 69 would be used for purpose of aligning the regulatory regimes. Secondly there is in any event a very strong public interest in ensuring that those regulatory regimes are aligned.

7. We are pleased that the Legal Services Board's draft Statement of Policy goes some way towards recognising that, and in particular that the draft Order (on which we will respond fully in a separate response) appears to recognise the need to make appropriate provision.
8. We would, however, invite the Legal Services Board to look again at the approach they suggest in cases where there is an uncertainty about an approved regulator's powers. The draft Statement of Policy says that:-

"if, having decided not to recommend a Section 69 order in a particularly case, there is a successful challenge to an 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."
9. That is not a satisfactory approach. It is quite wrong to expect approved regulators to operate on the basis of a view of their powers which is subject to some uncertainty, when there is a vehicle – Section 69 – specifically designed to resolve any such uncertainty. In the Law Society's view, the Legal Services Board's approach should be to recommend a Section 69 order to align regulatory powers wherever there is a realistic doubt about the approved regulator's ability to ensure alignment under its existing powers.

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5 November 2010