Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

T 020 7271 0050
F 020 7271 0051

www.legalservicesboard.org.uk

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Dear Colleague

Open letter: Legal Services Act 2007 section 69 orders

Introduction

The LSB is considering what its approach should be to deciding whether or not to ask the Lord Chancellor to make an order ("a section 69 order"[1]) under the Legal Services Act 2007 ('the LSA') to change primary and secondary legislation (including the LSA) to enable an Approved Regulator ("AR") or Licensing Authority ("LA") to carry out its role more effectively or efficiently.

We consider that this power raises important issues of principle about the legal regulatory framework, in particular in what circumstances it is appropriate to amend legislation rather than change regulatory arrangements in order to secure the necessary outcomes.

This letter sets out the LSB's current view on the way in which these orders should operate. It invites you to comment before we reach a final view. Seeking views on this issue should help to ensure that the criteria by which we will assess whether a section 69 order is required are clear, and thereby facilitate any subsequent Parliamentary process.

Once the criteria are finalised, we propose to issue them as guidance to help ARs identify when section 69 orders are required as part of the annual plan that they develop setting out the modifications they propose to make to their regulatory arrangements and to use them ourselves to evaluate such proposals. This will

[1] In particular those made under LSA s69(3)(a), (b) and (c))

prevent a series of ad hoc requests and we hope that overall this approach will make the process as efficient as possible for us, MoJ, the ARs and those being regulated.

This issue is particularly relevant to the SRA and the CLC since, in addition to the LSA, their regulatory framework is governed by other Acts, in particular the Solicitors Act 1974 and the Administration of Justice Act 1985.

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, our view is that we 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, or there are issues that are so great and unique to the legal market that they justify a separate or enhanced protective regime, it may be appropriate to introduce a regulatory requirement in an AR's regulatory arrangements or a LA's licensing rules. But in order to make a case for amending legislation, an AR/LA will have to show that even an amendment to its regulatory arrangements 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:

- what the objectives of legal regulation are (section 1);
- what is regulated (section 12);
- who can do 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.

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 way to achieve the desired outcome.

Analysis expected from ARs requesting a section 69 order

We propose that requests for section 69 orders must include analysis of the following:

- 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.

We also consider it essential that the AR/LA has consulted publicly on the proposal, to try to achieve the widest possible evidence base and to assist the LSB's statutory consultation process under LSA section 70.

We would welcome your views on the approach set out in this letter by Wednesday 31 March. Please send your responses to: consultations@legalservicesboard.org.uk

Yours sincerely

Fran Gillon

Director of Regulatory Practice