

To:	Legal Services Board	
Date of Meeting:	12 October 2011	Item: Paper (11) 69

Title:	Application by Council for Licensed Conveyancers to regulate conduct of litigation and rights of advocacy
Workstream(s):	Widening access to the Legal Services Market
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Status:	Protect

Summary:
The purpose of this paper is to update the Board about the status of the application by Council for Licensed Conveyancers (CLC) to regulate conduct of litigation and rights of advocacy.

Recommendation(s):
The Board is invited: <ul style="list-style-type: none"> (1) to note the current position on the application (2) to endorse the Executive's approach to analysing the hurdles at paragraph 3 (3) to endorse further exploration of all the options for resolution with CLC (4) to invite the Executive to return to the Board once progress has been made and ahead of the requirement for a formal decision.

Risks and mitigations	
Financial:	N/A.
Legal:	The immediate issues are based on an analysis of legislation. We are keen to ensure that understanding is shared with CLC. They have taken counsel's advice and will share the information with us.
Reputational:	Our treatment of CLC needs to be fair to them, and others. Options will be assessed against criteria consistent with other applications.
Resource:	N/A.

Consultation	Yes	No	Who / why?
Board Members:	✓		Barbara Saunders and Andrew Whittaker.
Consumer Panel:		✓	N/A.
Others:	N/A.		

Freedom of Information Act 2000 (FoI)		
Para ref	FoI exemption and summary	Expires
3, 11 and 24-39	s36(2)(b) – publication of these paragraphs would inhibit (or be likely to inhibit): (i) the free and frank provision of advice; and (ii) the exchange of views for the purposes of deliberation.	Tbc.

LEGAL SERVICES BOARD

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Application by Council for Licensed Conveyancers to regulate conduct of litigation and rights of advocacy

Executive Summary

1. This paper provides the Board with an update on the status of CLC's application to be designated with the reserved legal activities of rights of audience and conduct of litigation.
2. Three issues with CLC's application have been identified:
 - a. Do they have the legal basis for their designation for wider rights?
 - Section 15 of the Legal Services Act 2007 (**LSA 07**) requires entities and individuals to be authorised to carry out reserved legal activities
 - Section 53 of the Court and Legal Services Act 1990 (**CLSA 90**) expressly gives CLC the powers to become designated as an Approved Regulator (**AR**) for the exercise of a right of audience and the conduct of litigation
 - It also says wider rights can only be given to those already authorised as licensed conveyancers
 - Section 32(1)(ba) of the Administration of Justice Act 1985 (**AJA 85**) allows CLC to make rules for reserved legal activities but only in relation to reserved instrument activities or the administration of oaths
 - It is the absence of the permission to create rules for entities which causes the problem for the application.
 - b. Do they have the appropriate regulatory arrangements to support them?
 - Currently the proposed regulatory arrangements do not put in place restrictions to limit the circumstances in which it can use these wider rights. Our limited analysis suggests that their regulatory arrangements do not support the wider rights.
 - c. Do they have the capacity and capability to regulate them?
 - We are starting the assessment process but still have substantial work to do.

Background

3. CLC submitted this application in February 2011, along with its application to become a Licensing Authority (**LA**) and its rule changes to introduce a new handbook to deliver outcome focused regulation. CLC has described the three applications as part of its strategy for expansion as an AR. We advised CLC

that we would consider its application for designation separately from that to become an LA and introduce a new handbook.

4. In April, the Board approved a recommendation to the Lord Chancellor to designate CLC as an LA for probate, reserved instrument activities and the administration of oaths. It also approved a new Handbook and related frameworks as a change to CLC's regulatory arrangements. In both of these applications, it was made clear that these decisions were separate from any decisions that might be made on its application for designation for wider rights.

Legal barriers to designation

5. There is a fundamental legal issue with CLC's application. Legislation that provides for CLC's statutory framework allows it to apply for wider rights in relation to individuals and entities, but does not allow it to make rules to authorise entities. It also requires individuals to be authorised as licensed conveyancers before they can be authorised with wider rights.
6. CLC is a creature of statute. It was established by the AJA 85 which allowed it to regulate individuals and bodies. Its functions were amended by the CLSA 90 and then again by LSA 07.
7. Section 53 of the CLSA 90 expressly gives CLC the powers to become designated as an AR for the exercise of a right of audience and the conduct of litigation. Section 32(1)(ba) of the AJA 85 allows it to make rules for reserved legal activities but only in relation to reserved instrument activities or the administration of oaths. It is the absence of the permission to create rules for entities which causes the problem for the application.
8. Section 53 CLSA 90 also requires that if CLC is designated with wider rights it is only allowed to authorise persons for them if they are already authorised as licensed conveyancers.


The origin of CLC functions and the views of Parliament and others

9. Reviewing the policy debate that led to the various amendments within the 1990 and 2007 legislation produces a muddled picture of policy-makers' intentions for CLC. The White Paper published in advance of the CLSA Bill talks about the ability to regulate being granted to bodies "if [they] can demonstrate that they can set and maintain appropriate standards of competence and conduct...The Law Society will be designated in the statute as being able to grant such rights...Other bodies might be so authorised in the future¹". The 1990 Bill proposed that CLC be given the ability to be designated to regulate rights of audience, conduct of litigation and probate with the Attorney General saying that the purpose of allowing it to regulate these activities was to place CLC "on the same footing as other bodies able to seek authorisation in due course."

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¹ Legal Services: *A Framework for the Future* (White Paper) July 1989

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11. Looking at those Bills as they subsequently passed into statute suggests that it was Parliament's intention to limit the scope of CLC's activities. It is the case that both restrictions were added to AJA 85 and CLSA 90 by the LSA 07. The requirement that CLC could only authorise individual who were authorised as licensed conveyancers was deliberate and this intention is supported by informal correspondence with officials involved in the parliamentary process around the Legal Services Bill. However, in passing s69 of the LSA 07, Parliament also clearly intended to provide a mechanism to overcome statutory restrictions, by the making of secondary legislation, to enable a body to become an AR.

CLC designation for wider rights

12. If it was to be granted the ability to regulate the full scope of the reserved legal activities in question, CLC "recognise that granting authorisations to conduct litigation and exercise rights of audience without any form of further limitation would, in most cases, be inappropriate." It proposes an incremental permissions framework. This has three elements
- a. Authorisation to carry on the reserved legal activity
 - b. The grant of permission to practise associated with that permission
 - c. Limitations on the context within which such authorisations and permissions could be exercised.
13. CLC describe the limitations on its proposals.
- a. A litigation licence would only be granted to a licensed conveyancer
 - b. An advocacy licence would only be granted to a litigation licence holder
 - c. No individual or body would be permitted to carry on a new reserved legal activity in the criminal courts
 - d. A body would only be authorised for a new reserved legal activity if at least one individual who is an employee or manager is an authorised person already in respect of the activity
 - e. Practising entitlements would usually be limited to defined contexts such as legal practice area (property, personal injury, family law) type of court proceedings, and in the case of advocacy, the type of hearing
14. CLC provide several examples of the type of practise entitlements that might be acquired. For example, an established licensed conveyancer might study and undertake practical training to gain a litigation licence which might be limited to property law and County Court work. Over time, the individual might seek to expand the scope to encompass High Court proceedings as well or other practice areas.
15. CLC has currently identified personal injury/clinical negligence; property litigation and advocacy; immigration litigation and advocacy; employment litigation and advocacy and High Court civil litigation and advocacy as specialist stages for CLC Civil Litigators. These would be optional stages

available post-licensing as a licensed conveyancer. CLC is also contemplating that aspects of the specialist stages might be absorbed into the core academic programme or incorporating conveyancing and/or probate with litigation and advocacy into a single programme of study.

16. Under the current proposals, the regulatory arrangements do not put in place restrictions to limit the circumstances in which it can use these wider rights. On designation, CLC will have the right to regulate the full suite of services related to litigation and advocacy. This means that for its application to be successful, it has to show its competence now in relation to all these services. If, on the other hand, its regulatory arrangements restricted the scope of the designation to specific groups, areas of law or types of court, then the question of its competence would be narrower in focus.

Mandatory consultees

17. The Act requires that we consult the mandatory consultees, which are the Lord Chief Justice, OFT and the Consumer Panel. The paragraphs below provide a summary of their advice to us and CLC's response to the advice.

Lord Chief Justice

18. The comments made by the Lord Chief Justice in his response to the CLC application to be an LA indicated that, in addition to being opposed to it, he would also be against the extension of wider rights to them.
19. This position was confirmed in his formal response to this application where he said the conduct of litigation and rights of advocacy were activities which lay outside the proper sphere of activity of a licensed conveyancer. He was concerned that CLC "lacked the necessary experience to regulate litigation and advocacy work and to set and maintain appropriate standards for those gaining qualification through its schemes". Granting AR status to an organisation which lacks the requisite expertise would put at risk the regulatory objectives of promoting the public interest and supporting the constitution principle of the rule of law.

OFT

20. OFT reiterated its default position as a mandatory consultee. It would be unlikely to express concern unless there was compelling evidence to show significant detriment to competition through foreclosure and/or substantial degradation of consumer protection. OFT said that it could find no evidence or theory to suggest that CLC becoming a regulator of wider rights would (or would be likely to) prevent, restrict or distort competition within the market. Designating CLC with wider rights may strengthen competition. OFT suggested that CLC could act as an alternative supply to solicitors in the conduct of litigation and solicitors and barristers for advocacy services in court proceedings. This could potentially place competitive pressure on the pricing of services and broaden access to justice.

Consumer Panel

21. The Consumer Panel welcomed the incremental approach taken by CLC to widening the type activity to be undertaken only once sufficient experience had been gained. It said that targeting permissions would allow CLC to exercise greater quality control. They welcomed the fact that CLC intends to regulate relevant aspects of non reserved legal activity. The Panel said that

this would reduce the risks faced by consumers. They asked how CLC intended to monitor the competence of licence holders. They also drew parallels between the CLC's proposals and QAA (QASA). Expressing some concern about QASA, it said that if it was to achieve its aims it hoped that CLC's arrangements would become fully integrated into it. The Panel said it was important to avoid consumer confusion which would be exacerbated by a plethora of schemes.

CLC response to mandatory consultees

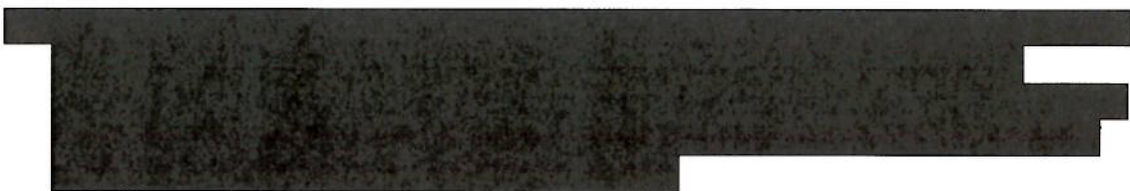
22. CLC responded to the mandatory consultees in July. It welcomed the general support of the OFT and Consumer Panel and rejected the Lord Chief Justice's objections.
23. Responding to the comment that litigation and advocacy is "outside the proper sphere of activity of a licensed conveyancer", CLC said that legislation makes specific provision for CLC to extend its regulatory remit. It rejected the view that there is not a strong public interest in extending its regulatory scope. It cites definitions of public interest offered by the LSB Regulatory Objectives² paper and a recent paper by Stephen Mayson³ and its view that its application is consistent with them.

Discussion

Plurality is a feature of legal services regulation

24. The LSA 07 supported and anticipates change in legal services regulation. We have an important role in supporting this plurality. What CLC wants to do is not fundamentally different to what other ARs have achieved – the points below set out some examples of this:
 - a. Solicitors Regulation Authority is designated to regulate the exercise of rights of audience and we have solicitor advocates as an alternative to traditional barristers.
 - b. Institute of Legal Executives (ILEX) has recently been designated to regulate Associate Prosecutors.
 - c. Bar Standards Board has widened the circumstances under which direct access to the Bar can take place.
25. It is also worth noting that CLC was designated by Ministry of Justice (MoJ) for the wider right of probate activities. This took place just before the LSB was conferred with its powers under the LSA 07 to approve ARs' rules and designations at the beginning of January 2010.

Static regulation



² LSB *The Regulatory Objectives* July 2010

http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf

³ Stephen Mayson *Legal Services Regulation and the "public interest"* (LSI) July 2011

http://www.legalservicesinstitute.org.uk/LSI/Legal_Services_Regulation_and_the_Public_Interest/

27.



A higher hurdle to designation

28. The Act says that we “may grant an application in relation to a particular reserved legal activity if [we are] satisfied”...that a series of criteria are met. This is a more demanding test than we have in relation to a rule change which presumes acceptance by saying we can only reject an application if we are satisfied that criteria have not been met.

Capacity and capability

29. It is important that we are confident that CLC understands the market it is entering. It will be moving into an entirely new area where by definition it will have no experience – for example, does it understand why potential authorised persons would want to qualify for personal injury law via the CLC route? Has it tested the likely demand for its services? Does it understand what it is that consumers want and why they would choose a lawyer regulated by CLC? What thought has it given to whether its corporate governance structure is sufficient? This information is important to be able to determine the type of risks that will exist and whether its current skills are sufficient to deal with them or how it will acquire them if it is not.

30.



31. One option for consideration would be for it to submit a new set of regulatory arrangements which would restrict the scope of its designation alongside the current application. For example, ILEX was designated wider rights but was then limited in the circumstances in which they could be used by its regulatory arrangements in its application for associate prosecutors.

Reputational risk

32. We should also recognise the risks to our own reputation in designating an AR for wider rights. While we do not support the maintenance of professional monopolies, this should not be at the expense of taking decisions which, in the long run, may appear to have been naive or not sufficiently recognised the risks. In the event that CLC was to be designated for wider rights and failed in some way, this will damage the credibility of the LSB and undermine its work elsewhere.

Looking for added value

33. When we recently met CLC, we said that we will probe its application for the added value that it offers. For example, its application takes a very different approach to regulation to that which is currently in place for solicitors. It plans to regulate particular activities (personal injury, family law for example). This activity-based approach to regulation may allow CLC to ensure better quality control than an approach that allows all solicitors to be qualified for all areas of law. Another area for consideration is the extent to which CLC might offer additional routes into the market and encourage diversity.

Conclusion

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35. We have reassured CLC that the statutory provisions are not an immovable obstacle to its application. If we can address the legal points, we will process the application in accordance with our rules and reach an evidence-based decision. We would however probe its capacity harder than we had done on its LA application because this is about approving a new activity, whereas the LA decision was in very large part about legitimising existing activity.

Next steps

36. There are four options emerging, set out below, which we are beginning to explore (though there may be others):
- a. We could reject the application because the legal barriers are persistent
 - b. We could explore a narrow application where CLC is given the right to regulate conduct of litigation and rights of audience in relation to individuals (which may be in relation to the core of conveyancing or wider areas of law), but only where those individuals work within a firm regulated by another AR
 - c. We could explore a “narrow” s69 Order that would remove the legal barriers we have identified above but only to the extent that they might do wider rights related to their core of conveyancing. This would allow them to do litigation and advocacy in relation to property law
 - d. We could explore a wider legal resolution which may be by s69 or possibly primary legislation to remove all legal barriers and allow CLC to compete as a “full service” regulator.
37. There are issues involved with all of the options set out above. It is important that our treatment of CLC is fair to them, and others. Each of the options identified above (and any others) will be assessed against criteria consistent with other designation applications. We would need to consider the timing and

sequencing in relation to orders and designation. We have told CLC that a s69 Order would need a minimum of 12 months and there was no guarantee that, even if convinced of the policy merits, MoJ would be able to devote any resources to its passage. Finally, there is the important matter of how this activity fits with our overall objectives for making a market that works for legal services consumers.

38. We have written to CLC about the main legislative barrier. CLC has told us that it is taking counsel's opinion about the matter. We are planning to meet with CLC once it has obtained counsel's opinion. We will also keep officials at MoJ informed about this application
39. In the event that a way forward with the application is identified, the intention is to bring recommendations to the Board in January 2012.