

To:	Board	
Date of Meeting:	25 January 2012	Item: Paper (12) 08

Title:	CLC litigation and rights of audience designation application	
Workstream(s):	Section 2A Developing Regulatory Standards (see <u>Business Plan 2011/12</u>)	
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Status:	Protect	

Summary:
<p>This paper provides the Board with an update on the LSB's consideration of the CLC's application to be designated as an Approved Regulator and Licensing Authority for reserved legal activities of the conduct of litigation and exercise rights of audience. It covers:</p> <ul style="list-style-type: none"> • The current situation on the assessment of the legal position • The proposed site visit to the CLC offices • The next steps.

Recommendation(s):
The Board is invited to note the current status on the assessment of the CLC application

Risks and mitigations	
Financial:	N/A
Legal: Reputational: [FoIA s36(2)(b) applies]	<p>There is a risk that the CLC does not have the vires to authorise and regulate entities for the conduct of litigation and rights of audience. LSB are seeking external input on the analysis provided by CLC.</p> <p>If we conclude that this application should not be granted, there is a risk that questions will be raised on the earlier decision to grant the licensing authority application. In granting that application we took into consideration the fact that the CLC were seeking to become a licensing authority in relation to the reserved legal activities for which it was already and approved regulator. We noted that the CLC were already regulating bodies that would become licensable once ABS were introduced and that the additional controls that would be introduced (e.g. HoLP and HoFA) by the CLC when acting as a licensing authority would strengthen the regulation of these firms.</p> <p>However, these are subtle issues and could easily be misunderstood or misinterpreted.</p>

Resource: There is a fairly limited time in which to bring a conclusion and recommendation to the Board. Resources are being made available internally to ensure that they statutory timetable can be met though this may have an impact on the delivery of some other projects.

Consultation	Yes	No	Who / why?
Board Members:		√	Who / why?
Consumer Panel:	√		Statutory requirement to consult before issuing a notice extending the Decision Period (see paragraphs 13 and 14).
Others:	The Lord Chief Justice and the Office of Fair Trading - Statutory requirement to consult before issuing a notice extending the Decision Period (see paragraphs 13 and 14).		

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Reputational risk section of this cover report	S36 (2)(b) - Inhibit (or likely to inhibit): (i) the free and frank provision of advice, or (ii) the exchange of views for the purposes of deliberation. At this stage, disclosure of this risk assessment might be misinterpreted as meaning that we are considering not granting this application and no such determination has been made,	On publication of the decision on this application

LEGAL SERVICES BOARD

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Application by the Council for Licensed Conveyancers (CLC) to be designated as an Approved Regulator and Licensing Authority for the reserved legal activities of the conduct of litigation and exercise of rights of audience

Background

1. The CLC submitted this application in February 2011 alongside its application to be designated as a licensing authority (which was given priority given the time constraints for the introduction of alternative business structures). The application if granted, would allow the CLC to authorise and regulate entities and individuals to conduct litigation and exercise rights of audience in relation to range of legal areas – the application includes property, personal injury and clinical negligence, commercial and employment law.
2. The Legal Services Board must consider the application and decide whether to make a recommendation to the Lord Chancellor that CLC should be so designated. The application is still being considered by LSB. This report provides the Board with an update on the vires issue, the proposed site visit to the CLC and the next steps.

Vires

3. The Board will recall from the Chief Executive's Report in November that there were ongoing discussions with the CLC about their vires to authorise and regulate entities (as opposed to individuals) for these new activities. We have now received a written submission from the CLC's Legal Adviser which seeks to set out how the various statutes work together to permit this. This written submission followed a meeting at which this was the sole subject and an Opinion from Mr Michael Pooles QC.
4. In summary, the CLC's contention is that the term licensed conveyancer can be interpreted to include both individuals and entities, notwithstanding that the CLC's regulatory arrangements have not been structured in this way. The rationale for this conclusion has not been consistently expressed across the two written submissions and during the meeting and we are not yet satisfied that the arguments are sufficiently robust to allow us to make a recommendation to the Lord Chancellor for designation. Moreover, this reading of the Act does not, on our current information, appear to inform how they currently design their regulatory arrangements in practice. The CLC is arguing that we should take a purposive approach to interpretation, to facilitate an expansion of their reserved legal activities.
5. We recognise that this is a matter of interpretation and have therefore decided that the most appropriate course of action is to seek our own opinion on whether the two opinions and the information given at the meeting collectively give us sufficient confidence to proceed with a recommendation (subject to all other criteria being satisfied).
6. The Opinion should be submitted to LSB before the Board meeting. An oral update will be provided at the meeting.

Site Visit

7. The Board may only make a designation recommendation to the Lord Chancellor if it is satisfied that the CLC would “be competent, and have sufficient resources, to perform the role of approved regulator in relation to the reserved legal activity at that time” (Schedule 4, part 2. Paragraph 13(2)(a)).
8. To inform our assessment of the CLC’s competence and capacity to authorise and regulate these activities, we will be conducting a one-day site visit to the CLC offices on 18 January 2012.
9. The objective of the visit is to develop a better understanding of how the CLC currently delivers regulation, how the arrangements will need to be adapted if this application is granted and the preparedness of the organisation for these new activities. In drawing a conclusion on the arrangements, we will refer to the criteria developed for Regulatory Standards self-assessment which explain what a competent regulator should be capable of delivering.
10. The CLC have submitted a range of pre-visit information covering organisation and governance, role descriptions, performance reporting to the CLC Council and risk reporting. We requested a copy of the implementation plan (and associated risk reporting) but no specific plan has been drawn up, CLC preferring to rely instead on its Strategic and Business Plans. We also requested copies of any reports by external assurance providers though none were available beyond that submitted with the application and the papers on the vires issue (covered above).
11. The visit will be a combination of interviews and sitting alongside people as they go about their day-to-day activities. The interviews will be with a Council Member (who is also on the Audit Committee), the Chief Executive, all Executive Directors and a Legal Practice Inspector. The purpose of sitting alongside people is to see how policies and procedures deliver effective regulation in practice and to see how the people on the ground are trained (particularly in risk assessment) and how they are being prepared for the wider rights. This will cover the authorisation process, desk based-supervision, practice inspections and complaints handling.

Decision Period and next steps

12. The Act imposes a time limit of deciding a designation application of twelve months which can be extended to 16 months. The first twelve months for this application expires on 2 February 2012.
13. Having completed the necessary consultation with the Lord Chief Justice, the Office of Fair Trading and the Legal Services Consumer Panel (none of whom raised any objections) we have issued a Notice extending the Decision Period to 1 June 2012.
14. Our intention is to complete the consideration of the application (including all outstanding issues and the conclusion from the site visit) by the end of February and bring a report and recommendation on whether the application should be granted to the Board in March.

12.01.2012