

## LEGAL SERVICES BOARD

### APPLICATION BY THE COUNCIL FOR LICENSED CONVEYANCERS FOR DESIGNATION AS AN APPROVED REGULATOR FOR CONDUCT OF LITIGATION AND EXERCISE OF RIGHTS OF AUDIENCE

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#### ADVICE

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#### **Introduction and background**

1. The CLC has applied to the LSB for designation as an approved regulator (“AR”) for the reserved legal activities of conduct of litigation and exercise of rights of audience. The CLC is a creature of statute, originally established under Part 2 of the Administration of Justice Act 1985 (“AJA 1985”) to regulate the (then) newly-created profession of licensed conveyancers. The Council is already an AR for reserved instrument activities under the grandfathering provisions of Part 1 of Schedule 4 to the Legal Services Act 2007 (“LSA 2007”). Designation as an AR for other activities requires an order by the Lord Chancellor following a recommendation of the LSB under Part 2 of that Schedule.
2. The LSB has concerns as to whether, under the current statutory scheme (which includes significant amendments made to AJA 1985 by LSA 2007), the CLC has sufficient powers to enable it to undertake effectively the functions of an AR for litigation and rights of audience. Those concerns relate in particular to the scope of the CLC’s powers to regulate entities – that is, persons other than individuals. The CLC initially responded with the opinion of Michael Pooles QC. That has resulted in further exchanges which have not, so far, resolved the issue to the LSB’s satisfaction. I am asked for my views.
3. In summary, for the reasons that follow I advise that:

- a. Section 53(1) of CLSA 1990 means what it says and confers all the necessary powers on the CLC to act as an AR in relation to the conduct of litigation and rights of audience. The existence of a mechanism for doing so is ensured by the “automatic tinkering” provision of s. 53(9).
- b. But the class who can benefit from the exercise of those powers is defined in s. 53(2) – “persons who are licensed conveyancers”. The central issue is whether that phrase is limited to individuals or whether it can include entities who provide conveyancing services under the CLC’s aegis.
- c. AJA 1985 sections 11, 32 and 32A create a firm distinction between persons who are individuals and thus “licensed conveyancers”, and persons who are “conveyancing services bodies” within s. 32A who may become “recognised bodies” under s. 32. In context, that is consistent with the usual presumed meaning of “person” as including a body corporate or unincorporated. For the purposes of this legislation, “persons” are simply subdivided into the categories of individuals and others and are treated differently.
- d. In both the pre- and post- LSA 2007 s. 53(2), Parliament has expressly used the term “licensed conveyancer” – referring to the individuals licensed by the CLC under AJA 1985 -- and it is a strained reading of that expression to treat it as including recognised bodies.
- e. A strained reading may be preferred if it gives effect to the statutory purpose. But that requires a sufficiently clear indication of that purpose in the language actually used. Here, the language of the statutory scheme overall reinforces the conclusion that Parliament intended “licensed conveyancer” in the post-2007 CLSA 1990 s. 52(2) to have the same meaning as in the post- (and pre-) 2007 s. 11.
- f. While another interpretation may be arguable, I cannot advise with any degree of confidence that it is correct.
- g. So an amendment to the legislation would be necessary to extend to entities the CLC’s powers under s. 53 to become an AR for litigation and

rights of audience in relation to individual licensed conveyancers. That could properly be achieved by an order under LSA 2007 s. 69.

## **Legislative framework**

### Overview

4. The legislative framework governing the CLC's powers and functions in the context of regulation of reserved legal activities involves a complex interaction between AJA 1985, LSA 2007 and the Courts and Legal Services Act 1990 ("CLSA 1990"). This complexity is itself one of the reasons for the lack of agreement so far. Before examining the detail of the key provisions, it is sensible to survey the statutory scheme in overview, with an eye to the way it has developed since 1985.
5. Under the AJA 1985 as enacted, conveyancing services (defined in AJA 1985 s. 11(3)) could be provided by a non-solicitor if the person providing the services was a licensed conveyancer as a result of holding a licence issued by the CLC under Part 1. Section 11 refers to a "person" holding a licence. In addition, under s. 32, the Council had power to make rules for "recognised bodies", corporate bodies providing conveyancing services and managed and controlled by either licensed conveyancers or by a mixture of licensed conveyancers and other persons.
6. CLSA 1990 made provision for the regulation of professional activities consisting of the conduct of litigation and the exercise of a right of audience. Essentially a person could only carry on those activities if granted the right to do so by an authorised body. The Law Society and Bar Council were made authorised bodies, and other bodies could be authorised by Order in Council: s. 27(9).
7. Several provisions CLSA 1990 affected the regulatory regime for licensed conveyancers. The Act contemplated that the CLC might become an authorised body under ss. 27 and 28. Section 53 provided that the CLC was to "have the powers necessary to enable it to become" an authorised body to grant rights to conduct litigation and rights of audience (and to become an "approved body" for the purpose of preparation of probate papers), but "only with respect to persons who are licensed

conveyancers”: see s. 53(1) and (2). By subs. (9), the provisions of Part 2 of AJA 1985 were to apply “with the necessary modifications” to various elements of the regulation of licensed conveyancers’ conduct of litigation and exercise of rights of audience. One of those elements, by subs. (9)(e), was:

“(e) the management and control by licensed conveyancers (or by licensed conveyancers together with persons who are not licensed conveyancers) of bodies corporate carrying on businesses which include the provision of advocacy, litigation or probate services.”

8. In addition, Part 1 of Schedule 8 conferred specific new powers on the CLC, in anticipation of its authorisation under s. 27. These enabled the Council to grant litigation and advocacy licences and making provision about issue, revocation of licences and so forth. Sch. 8 para. 11 provided:

“Section 32 of [AJA 1985] (provision of conveyancing services by recognised bodies) shall have effect as if the references to conveyancing services included references to advocacy, litigation or probate services.”

9. LSA 2007 created a new regime for regulation of reserved legal activities. Persons can carry on such activities only if authorised or exempt (s. 13). An “authorised person” is either a person authorised by an AR to carry on an activity, or a licensable body licensed to do so by a licensing authority: s. 18(1)(a) and (b). Various existing regulatory bodies, including the Law Society and Bar Council, were grandfathered into the new regime as ARs in relation to specified reserved legal activities under Part 1 of Schedule 4. As noted above, the CLC benefited from that Part in relation to reserved instrument activities. “Licensable body” is defined in s. 72 and essentially means a body with an element of non-lawyer (that is, non- authorised person) control, generally known as an ABS.
10. It is worth pausing here to observe that quite clearly, an “authorised person” within s. 18(1)(a) need not be a single individual. A partnership consisting of, or body corporate controlled by, authorised individuals can be authorised to carry on reserved legal activities by virtue of s. 18(1)(a). So an entity other than an ABS – such as a company consisting entirely of lawyers authorised by a single AR, or an LDP consisting of

lawyers from mixed disciplines – can derive its authorisation from an AR under LSA 2007 Part 4 and need not engage with the ABS licensing regime under Part 5.

11. Comparably with the position under CLSA 1990, other bodies may apply to become ARs. An existing AR in relation to a reserved legal activity (whether by designation or grandfathering) may also apply to become an AR in relation to additional reserved legal activities.
12. Like CLSA 1990, LSA 2007 contained various provisions affecting the licensed conveyancing regime: see s. 182 and Sch 17. LSA 2007 carried over from CLSA 1990 Parliament’s expectation that the CLC might apply to extend the scope of its regulatory domain. Part 1 of Sch. 17 made extensive amendments to AJA 1985. Among other things, these:
  - a. inserted into s. 11(1) references to services other than conveyancing services and to recognised bodies;
  - b. extended the meaning of “conveyancing services” in s. 11(2) to refer to reserved instrument activities;
  - c. inserted additional provisions in relation to the Council’s powers regarding licences (including its investigative and disciplinary powers);
  - d. made a number of amendments to s. 32. Those included insertion of new paragraph (ba) in subs. (1) relating to authorisation of recognised bodies to carry on reserved instrument activities under LSA 2007; and deletion of the adjective “corporate” in subss. (2) and (6), enabling unincorporated bodies to become recognised bodies within s. 32;
  - e. inserted new s. 32A, introducing the concept of a “conveyancing services body” — a body at least partially controlled by one or more licensed conveyancers and providing either conveyancing services only or “conveyancing services and other relevant legal services”.
13. Part 2 of that Schedule made a number of amendments to CLSA 1990. These included significant changes to s. 53, introducing a number of the provisions at the centre of the present debate. Key among these was new s. 53(1), which – in terms similar to the

original s. 53(1) – boldly provides that the CLC “has the powers necessary to enable it to become designated” as an AR in relation to the reserved legal activities of (see subs. 1A) exercise of a right of audience, conduct of litigation, and probate activities. New subs (2), following the pattern of the original subs. (2), limited the CLC’s power as AR to authorising a person to carry on one of those activities “only if the person is a licensed conveyancer”. Subsection (9)(e) (see above) was repealed.

14. So in general terms, the current regime fits together as follows:
  - a. AJA 1985 remains the basic statute constituting the CLC and providing for licensing of conveyancing services by individuals and recognised bodies (which can be either corporate or unincorporated), and for that purpose setting out the CLC’s regulatory powers. Some of its current content derives from CLSA 1990, some from LSA 2007.
  - b. LSA 2007 provides the overall framework for regulation of reserved legal activities by ARs and licensing bodies, and for any application by CLC to become an AR in respect of any activity other than reserved instrument activities (for which it is already AR) is governed by this Act.
  - c. CLSA 1990 s. 53 was originally the provision bridging the CLC’s regulation of licensed conveyancing under AJA 1985 to its possible acquisition (by authorisation under the CLSA 1990 machinery) of regulatory functions in relation to rights of audience and rights to conduct litigation. Now, amended by LSA 2007, it bridges the CLC’s regulation of licensed conveyancing under AJA 1985 to possible acquisition (by designation under the LSA 2007 machinery) of regulatory functions in relation to those rights as reserved legal activities.
15. That provides the context for the central provisions that now need to be set out fully.

AJA 1985

16. Sections 11, 32 and 32A in their current form provide as follows:

**“11 Provision of conveyancing services by licensed conveyancers**

- (1) The provisions of this Part shall have effect for the purpose of regulating the provision of conveyancing services and other services by persons who hold licences in force under this Part or who are recognised bodies.
- (2) In this Part—
  - "licence" means a licence to practise as a licensed conveyancer;
  - "licensed conveyancer" means a person who holds a licence in force under this Part;and references in this Part to practising as a licensed conveyancer are references to providing, as the holder of such a licence, conveyancing services in accordance with the licence.
- (3) References in this Part to conveyancing services are references to—
  - (a) the preparation of transfers, conveyances, contracts and other documents in connection with, and other services ancillary to, the disposition or acquisition of estates or interests in land, and
  - (b) any other activities which are reserved instrument activities for the purposes of the Legal Services Act 2007 (see section 12 of and Schedule 2 to that Act).
- (3A) For the purposes of subsection (3)—
  - (a) "disposition"
    - (i) does not include a testamentary disposition or any disposition in the case of such a lease as is referred to in section 54(2) of the Law of Property Act 1925 (short leases), but
    - (ii) subject to that, includes in the case of leases both their grant and their assignment, and
  - (b) "acquisition" has a corresponding meaning.

*Recognised bodies*

**32 Provision of conveyancing services by recognised bodies**

- (1) The Council may make rules—
  - (a) making provision as to the management and control of conveyancing services bodies;
  - (b) prescribing the circumstances in which such bodies may be recognised by the Council as being suitable bodies to undertake the provision of conveyancing services or other relevant legal services;

- (ba) prescribing the Council's arrangements for authorising recognised bodies, for the purposes of the Legal Services Act 2007, to carry on reserved instrument activities, or the administration of oaths, within the meaning of that Act;
  - (c) prescribing the requirements which (subject to any exceptions provided by the rules) must at all times be satisfied by bodies so recognised if they are to remain so recognised; and
  - (d) regulating the conduct of the affairs of such bodies.
- (2) In this Part "recognised body" means a body for the time being recognised under this section.
- (3) Rules made by the Council may also make provision—
- (a) for the manner and form in which applications for recognition under this section, or for the renewal of such recognition, are to be made, and for the payment of fees in connection with such applications;
  - (aa) for the payment of fees in connection with other applications under the rules;
  - (b) for regulating the names that may be used by recognised bodies;
  - (c) about the time when any recognition granted under this section, or renewal of such recognition, takes effect and the period for which it is (subject to the provisions of this Part) to remain in force;
  - (ca) for the suspension or revocation of any such recognition, on such grounds and in such circumstances as may be prescribed in the rules;
  - (cb) about the effect on the recognition of a partnership or other unincorporated body ("the existing body") of any change in its membership, including provision for the existing body's recognition to be transferred where the existing body ceases to exist and another body succeeds to the whole or substantially the whole of its business;
  - (e) for the keeping by the Council of a register containing the names and principal places of business of all bodies which are for the time being recognised under this section and such other information relating to those bodies as may be specified in the rules;
  - (ea) for information (or information of a specified description) on such a register to be made available to the public, and about the manner in which and times at which, information is to be made so available;
  - (f) for rules made under any other provision of this Part to have effect in relation to recognised bodies with such additions, omissions or other modifications as appear to the Council to be necessary or expedient;
  - (fa) about the education and training requirements to be met by managers and employees of recognised bodies;
  - (fb) for rules made under any other provision of this Part to have effect in relation to managers and employees of recognised bodies with such additions, omissions or other modifications as appear to the Council to be necessary or expedient;



- (g) for empowering the Council to take such steps as it considers necessary or expedient to ascertain whether or not any rules applicable to recognised bodies or managers or employees of such bodies by virtue of this section are being complied with;
  - (h) for the manner of service on recognised bodies of documents authorised or required to be served on such bodies under this Part.
- (3A) Rules made by the Council may provide for the Council to grant a body recognition under this section subject to one or more conditions.
- (3B) At any time while a body is recognised under this section, the Council may, in such circumstances as may be prescribed, direct that the body's recognition is to have effect subject to such conditions as the Council may think fit.  
"Prescribed" means prescribed by rules made by the Council.
- (3C) The conditions which may be imposed under subsection (3A) or (3B) include—
- (a) conditions restricting the kinds of conveyancing services that may be provided by the body;
  - (b) conditions imposed by reference to criteria of general application;
  - (c) conditions requiring the body to take any specified steps that will, in the opinion of the Council, be conducive to the body carrying on an efficient business;
- and conditions may be imposed despite the fact that they may result in expenditure being incurred by the body.
- (3D) On an application made by a recognised body, the Council may, in such circumstances as may be prescribed, direct—
- (a) the removal of a condition subject to which the body's recognition has effect;
  - (b) the variation of such a condition in the manner described in the application.
- (3E) For the purposes of subsection (3D)—
- (a) section 14 applies in relation to an application under that subsection as it applies in relation to an application for a licence under this Part of this Act, and
  - (b) "prescribed" means prescribed by rules made by the Council.
- (3F) Rules under subsection (3A) or (3B) may make provision about when conditions imposed take effect (including provision conferring power on the Council to direct that a condition is not to have effect until the conclusion of any appeal in relation to it).
- (3G) Rules under this section may contain such incidental, supplemental, transitional or transitory provisions or savings as the Council considers necessary or expedient.

- (6) A certificate signed by an officer of the Council and stating—
  - (a) that any body is or is not, or was or was not at any time, a recognised body; or
  - (b) that a body's recognition under this section does not have effect subject to any conditions or has effect subject to any particular conditions,
 shall, unless the contrary is proved, be evidence of the facts stated in the certificate; and a certificate purporting to be so signed shall be taken to have been so signed unless the contrary is proved.
- (7) Schedule 6 shall have effect with respect to recognised bodies.
- (8) In this section "conveyancing services body" and "relevant legal services" have the meaning given by section 32A.
- (9) The Council is capable of being designated as a licensing authority for the purposes of, and subject to, Part 5 of the Legal Services Act 2007 (alternative business structures).

### **32A Conveyancing services bodies**

- (1) For the purposes of section 32 a "conveyancing services body" means a body (corporate or unincorporate) in respect of which—
  - (a) the management and control condition, and
  - (b) the services condition,
 are satisfied.
- (2) The management and control condition is satisfied in the case of a partnership if at least one of the partners is a licensed conveyancer.
- (3) The management and control condition is satisfied in the case of an unincorporated body (other than a partnership), or a body corporate which is managed by its members, if at least one of those members is a licensed conveyancer.
- (4) The management and control condition is satisfied in the case of any other body corporate if at least one director of the body is a licensed conveyancer.
- (5) The services condition is satisfied in respect of a body if the body is carrying on a business consisting of the provision of—
  - (a) conveyancing services, or
  - (b) conveyancing services and other relevant legal services.
- (6) For the purposes of this section—
  - "authorised person" means an authorised person in relation to an activity which is a reserved legal activity (within the meaning of the Legal Services Act 2007);
  - "relevant legal services", in relation to a body, means—
    - (a) conveyancing services, and

- (b) where authorised persons are managers or employees of, or have an interest in, the body, services such as are provided by individuals practising as such authorised persons (whether or not those services involve the carrying on of reserved legal activities within the meaning of the Legal Services Act 2007);

and a person has an interest in a body if the person has an interest in the body within the meaning of Part 5 of the Legal Services Act 2007 (see sections 72 and 109 of that Act).”

## CLSA 1990

### 17. Section 53 in its current form provides:

*“Licensed conveyancers*

#### **53 The Council for Licensed Conveyancers**

- (1) The Council for Licensed Conveyancers has the powers necessary to enable it to become designated as an approved regulator in relation to one or more of the reserved legal activities within subsection (1A).
- (1A) The reserved legal activities to which this subsection applies are—
  - (a) the exercise of a right of audience;
  - (b) the conduct of litigation;
  - (c) probate activities.
- (2) If the Council becomes an approved regulator in relation to one or more of those activities, it may, in that capacity, authorise a person to carry on a relevant activity only if the person is a licensed conveyancer.
- (3) Where the Council authorises a licensed conveyancer to carry on a relevant activity, it is to do so by issuing a licence to the licensed conveyancer.
- (4) Any such licence may be granted as a separate licence or as part of a composite licence comprising the licensed conveyancer's licence issued under Part II of the Administration of Justice Act 1985 and any other licence which the Council may grant to the licensed conveyancer concerned.
- (6) Where the Council exercises any of its powers in connection with—
  - (a) an application for designation as an approved regulator in relation to a reserved legal activity within subsection (1A), or
  - (b) the authorising of a person to carry on a relevant activity,it is to do so subject to any requirements to which it is subject in accordance with the provisions of the Legal Services Act 2007.
- (7) Schedule 8 makes further provision in connection with the powers given to the Council by this section and the provision made by the Act of 1985 in relation to licensed conveyancers, including amendments of Part II of that Act.
- (8) The Lord Chancellor may by order make such—

- (a) amendments of, or modifications to, the provisions of Part II of the Act of 1985; or
  - (b) transitional or consequential provision,  
as he considers necessary or expedient in connection with the provision made by this section and Schedule 8.
- (9) Subject to any provision made by this section, Schedule 8 or any order made by the Lord Chancellor under subsection (8), the provisions of Part II of the Act of 1985 shall, with the necessary modifications, apply with respect to—
- (a) any application for an advocacy, litigation or probate licence;
  - (b) any such licence;
  - (c) the practice of any licensed conveyancer which is carried on by virtue of any such licence;
  - (d) rules made by the Council under Schedule 8;
  - (f) any other matter dealt with by this section or Schedule 8,
- as they apply with respect to the corresponding matters dealt with by Part II of that Act.
- (10) For the purposes of this section—
- (a) "right of audience", "conduct of litigation", "probate activities" and "reserved legal activity" have the same meaning as in the Legal Services Act 2007;
  - (b) references to designation as an approved regulator are to designation as an approved regulator—
    - (i) by Part 1 of Schedule 4 to the Legal Services Act 2007, by virtue of an order under paragraph 5 of Schedule 22 to that Act, or
    - (ii) under Part 2 of Schedule 4 to that Act;
  - (c) "relevant activity" means an activity which is a reserved legal activity—
    - (i) which is within subsection (1A), and
    - (ii) in relation to which the Council is designated as an approved regulator by Part 1 of Schedule 4 to that Act (by virtue of an order under paragraph 5 of Schedule 22 to that Act) or under Part 2 of that Schedule.”

### LSA 2007

18. By s. 69(1), the Lord Chancellor may by order “modify, or make other provision relating to, the functions of an approved regulator or any other body...”. By subs. (3) the LSB may recommend an order:

“...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 unincorporate) 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...

19. S. 207 includes the following:

**207 Interpretation**

(1) In this Act, except where the context otherwise requires—

...

“person” includes a body of persons (corporate or unincorporate);”

20. The Interpretation Act 1978 contains a similar definition. By s. 5:

**“5 Definitions**

In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule.”

Schedule 1 contains this entry:

““Person” includes a body of persons corporate or unincorporate.”

**Analysis**

21. A number of the key provisions of AJA 1985 and CLSA 1990 in their present form derive from LSA 2007. So one should attempt to read them as a coherent whole, bearing in mind that the purpose of the amendments to the earlier statutes was to enable the statutory scheme to operate consistently with the overall regulatory framework established by LSA 2007.

22. As noted above, the regime for authorisation under LSA 2007 Part 4 envisages that individuals and entities alike (other than ABSs) may benefit from authorisation by an AR. So, in construing provisions that deal with the scope of entity regulation, it is right to bear in mind that general feature of the system in mind. However, where

specific provisions deal with a particular part of the regulatory system, the starting point is to ascertain the meaning of those provisions, albeit in their wider context and without adopting an overly restrictive approach.

23. Earlier versions of the amended provisions may also be relevant insofar as the contrast between the present and former language sheds light on what the draftsman was seeking to achieve in making the amendments, and (if ambiguity remains) on what Parliament in 2007 thought the earlier provisions meant.
24. With those considerations in mind, I begin with CLSA 1990 s. 53. S. 53(1) means what it says, and is effective to confer on the CLC any power necessary, but otherwise lacking, to become an AR for the three additional reserved activities (ie. over and above reserved instrument activities) set out in subs. (1A). On any sensible reading that must include not just *vires* to accept designation, but also power to discharge the essential functions of an AR including the grant of authorisation to those seeking to carry on those activities. However, that raises – or at least does not answer -- the question: to which of those seeking to carry on those activities can the CLC grant authorisation? That is the point subs. (2) seeks to answer. So the meaning of that subsection is absolutely central to the question that has arisen.
25. The effect of subs. (2) is that the Council cannot exercise the subs. (1) to “authorise a person to carry on” any of those activities unless “the person is a licensed conveyancer”. The term “licensed conveyancer” appears again in subs. (3), (4), (7) and (9), as do at least two references to AJA 1985 Part II. So it is natural to read s. 53 as amended should be read alongside the material provisions of AJA 1985 as amended, and if possible to give “licensed conveyancer” – and indeed the phrase “person is a licensed conveyancer” – a consistent meaning in both statutes.
26. When AJA 1985 ss. 11, 32 ad 32A are read together, it is clear they draw a distinction between those who acquire entitlement to provide conveyancing services by virtue of a licence issued by the Council – and thus become “licensed conveyancers” – and those who acquire that entitlement by virtue of recognition by the Council under s. 32. It is

equally clear that these are two mutually exclusive categories, the first consisting entirely of individuals and the second entirely of bodies corporate or unincorporated.

27. Thus s. 32 envisages that the bodies which are capable of being recognised are the “conveyancing services bodies” defined by s. 32A, which are either bodies “corporate or unincorporated” (s. 32A(1)) – not, therefore, single individuals. Section 32A in turn prescribes the membership or control requirements for unincorporated and corporate bodies in terms of licensed conveyancers: see subss. (2) (at least one partner to be a licensed conveyancer), (3) (at least one managing member to be a licensed conveyance) and (4) at least one director to be a licensed conveyancer”. While it may be possible to conceive of bodies in which (say) the members, or partners, are themselves legal rather than natural persons (as is permitted by the SRA regulatory arrangements for solicitors’ partnerships), the language and overall scheme and flavour of these provisions gives a very strong indication that Parliament had in mind two discrete categories.
28. Thus under the AJA 1985 scheme, a conveyancing services body simply cannot be a “licensed conveyancer”, and an individual cannot be “recognised” to provide conveyancing services. I would be surprised if the CLC were to contest that interpretation which is, as I understand it, consistent with the way their regulatory functions have always been carried out.
29. There is no inconsistency between that construction and the presumptive definition of “person” in IA 1978 Sch 1 and LSA 2007 s. 207(1). The phrase appearing in AJA 1985 s. 11(1) is “persons who hold licences in force under this Part or who are recognised bodies”. That is, the subsection refers to “persons who hold licences” (each of whom then meets the subs. (2) definition of “licensed conveyance”) and “persons who are recognised bodies”. In subs. (1) the draftsman has taken the set of “persons”, adopting its usual inclusive meaning of individuals and (to use the language commonly applied to the LSA 2007 regime) entities; but then divided it into two distinct subsets for the purposes of this legislation. The “or” in s. 11(1) is an exclusive “or”.

30. So, looking back at s. 53(2), the only “persons” who may be authorised by the CLC as AR are those in the first subset, *viz.* those who are licensed conveyancers in the s. 11(1) and (2) sense of individuals holding a licence to provide conveyancing services. The phrase “person is a licensed conveyancer” cannot be read to mean “person is a licensed conveyancer *or recognised body*” without either reading in those words, or assuming that the draftsman intended that the concept of a person who is a licensed conveyancer was intended to differ significantly as between s. 53(2) on the one hand and s. 11(1) and (2) on the other. That would therefore be a strained and, on the face of it, unlikely reading, which should not be adopted unless there are clear indications that it should be preferred to the more natural and logical reading.
31. I therefore turn to various potential indications of meaning, including those canvassed in the discussions to date, including:
- a. The repeal of the opening words “Subject to subsection (2)” in the original CLSA 1990 s. 53(2);
  - b. The opening words of s. 53(9) (“Subject to any provision made by this section...”) and the repeal of s. 53(9)(e);
  - c. The insertion of AJA 1985 s. 32(1)(ba);
  - d. General consistency with the entity regulation regime under LSA 2007.
32. The repeal of the original proviso to s. 53(1) is not significant in my view. Drafting techniques are under constant evolution, and express provisos nowadays tend to be disfavoured. The removal of those words strikes me as an example of the draftsman’s usual “carpentry” when amending or replacing older provisions. The particular language of the original ss. 53(1) and (2) – “shall have the powers”, but “may exercise the powers.. only...” perhaps invited a proviso in a way the replacement language (“has the powers necessary”... but “may... authorise a person... only if...” does not.
33. Section 53(9) – described in discussions as the “automatic tinkering” provision -- is an important component of the operation of the s. 53 regime, but in my view has little to say about the issue dealt with by subs. (2). It simply acknowledges that the provisions



about the listed matters – licence applications, licenses, practising arrangements, rules, and so on – contained in AJA 1985 Part II were framed primarily with conveyancing in mind. The draftsman in 1990 employed a neat and effective technique for ensuring those provisions would work in the new world of litigation and rights of audience without needing to set out the modifications at length. The “necessary modifications” may well affect provisions of AJA 1985 that relate to the CLC’s authorisation of a person to carry on the subs. (1A) activities; but only in those cases where the CLC can grant such authorisation, and those are defined by subs. (2), not subs. (9). Subsection (9) cannot, in bootstrap fashion, enlarge or reduce the scope of its own operation.

34. That would be the position regardless of the proviso at the beginning of subs. (9); but the proviso if anything reinforces it.
35. The text of former paragraph (e) of subs. (9) marginally reinforces the observations made above about the distinction between “licensed conveyancers” on the one hand and the bodies they may manage or control on the other, a distinction I consider equally clear in the pre-1990 AJA 1985 ss. 11 and 32 as in the post-2007 ss. 11, 32 and 32A. But since it is already clear enough that the present s. 53 is meant to be read in conjunction with these provisions, the repeal of paragraph (e) is of little significance.
36. I suspect that the real reason for repealing paragraph (e) was that LSA 2007 inserted into AJA 1985 s. 32 extensive provision dealing with what appears to be much the same subject-matter (see LSA 2007 Sch 17 para. 20, and above), so it was no longer necessary, in relation to the CLC authorising licensed conveyancers to carry on other reserved activities, to rely on the “automatic tinkering” approach. This also appears to be the CLC’s view: see RPC’s note of 12 December 2011 paras. 25 and 26. Doubtless CLSA 1990 Sch. 8 para. 11 was repealed for the same reason. At all events, paragraph (e) seems too remote from the question of scope of s. 53(2) to provide much of a clue to the answer.
37. AJA 1985 s. 32(1)(ba), inserted by LSA 2007 Sch 17, presupposes that the CLC has power to authorise a recognised body to carry on reserved instrument activities and

administer oaths. That implies a contrast with other reserved legal activities, for which no corresponding provision was inserted. But I do not regard the implication particularly strong. Parliament may well have taken the view that a specific provision was appropriate in relation to reserved instrument activities in particular, because the CLC is grandfathered as an AR in relation to that activity, whereas in relation to the mere possibility that it would become an AR in relation to other activities, it was sufficient to fall back on CLSA 1990 s. 53(1) read with s. 53(9)(d). But again, that provides little help with the s. 53(2) question of which sorts of person might benefit from the CLC's 53(1) power to regulate those new activities.

38. The question of general compatibility with the LSA 2007 comes down to this: can it be said that as entity regulation is ordinarily a part of an AR's role in relation to the reserved activities within its remit, Parliament must have intended that s. 53 should enable the CLC to act as AR in relation to "persons" in the generic LSA 1990 s. 207(1) sense, and that justifies what would otherwise be, for the reasons already explained, an unnatural or strained reading of s. 53(2). In my view the answer is no for these reasons.
39. First, s. 53 is a specific provision, and on ordinary rules of construction if its meaning is sufficiently clear, one should be slow to conclude that a general provision such as LSA 2007 s. 18 contradicts it.
40. Second, in enacting s. 53 in 1990, and adopting it with amendments into the 2007 scheme, Parliament evidently intended to provide a flexible method for empowering the CLC to participate in the successive new regimes for litigation and rights of audience. Hence the width and generality of s. 53(1) and (9). But, equally evidently, Parliament recognised that this flexibility was not limitless, and that further, tailored adjustments would likely be needed to the legislative scheme to bring the powers and functions of the CLC and (in 2007) other bodies into line with the requirements of the successive new systems. Hence s. 53 included the Lord Chancellor's order-making power under subs. (8). More pertinently, LSA 2007 s. 69(3) envisaged that an order under that section could be recommended so as:

(b) to authorise persons or any category of persons (whether corporate or unincorporate) 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...

[emphasis added]

41. That provision fits comfortably with the distinction drawn by s. 53(2) between “categories of persons”. It also indicates that there is no overriding reason to adopt a strained construction of s. 53(2) to give effect to Parliament’s overall object. That object simply did not go so far as requiring that every potential AR spring into being on commencement of LSA 2007 equipped with a fully-formed panoply of powers. On the contrary, the object included ensuring that further legislative adjustments could be made to cope with the position of individual regulators.
42. The alternative construction of s. 53(2) suggested at para. 14 of RPC’s note of 12 December 2011 also strikes me as strained. It is correct that if both instances of “person” are read as “individual”, then subs. (2) could be read as a limited exclusion from s. 53(1), leaving the CLC free to grant authorisation for the subs. (1A) activities to (a) any “person” who is a body corporate or unincorporated and (b) only those individuals who are licensed conveyancers. But that is not a natural or obvious reading. It is also inconsistent with the way “person”, in its usual broad sense, is employed in the amended AJA 1985 s. 11(1). Far from the context requiring “person” to be read as “individual”, it tends to reinforce the natural sense of s. 53(2) as referring to that sub-category of all “persons” who are licensed conveyancers and thus, necessarily, individuals. For the reasons just explained, RPC’s suggested reading is unnecessary to give effect to the statutory object.
43. As ever, a contrary view is possible. I do not suggest that the possible alternative readings of s. 53(2) considered at paragraphs 30 and 42 are impermissible or unarguable. But they are linguistically improbable, and unsupported by context and purpose. So I cannot advise that it would be appropriate for the LSB to exercise its powers on the basis of those readings of the legislation.

### **Way forward**

44. As noted above, s. 69 LSA 2007 strikes me as providing a method of addressing the problem compatibly with Parliament's aims in providing that power. I stress that this is a conclusion on the scope of the power. I make no comment on whether it would be appropriate, having regard to the LSB's policy, to recommend its exercise in any particular terms or at all.
45. I have considered whether CLSA 1990 s. 53(8) might provide an alternative. But I have some doubts whether an amendment to AJA 1985 to overcome an obstacle effectively flowing from s. 53 itself would be appropriate use of a power to make amendments "in connection with the provision made by this section".

### **Concluding remarks**

46. I emphasise that I have not approached this issue with a predisposition to reinforcing the LSB's concerns. Indeed on first blush the legislative scheme struck me as supporting CLC's position that it had acquired powers of entity regulation. But having considered the provisions in detail, I have reached the conclusions set out above.
47. I hope those instructing me will not hesitate to raise any comment or query arising out of this advice. I will be pleased to assist further if the need arises.

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## Supplemental Opinion

### **Probate activities**

As I explained, Graham's note raises some interesting and important points. I agree that if my conclusions on the proper reading of the post-2007 CLSA 1990 s. 53(2) led to something startling or absurd in the way the statutory scheme treats probate activities, that would count as a factor pointing in the opposite direction. I am grateful to you for finding the time to meet to discuss the points earlier today.

The essence of the CLC's point is that the CLC's 2008 approval for probate services under the pre-2007 CLSA 1990 s. 55 covered recognised bodies as well as individual licensed conveyancers, and it would therefore be unlikely, or a mistake, for the draftsman to have set out to confine the CLC's post-2007 powers to regulate probate services under CLSA 1990 s. 53(1), (1A) and (2) to individual licensed conveyancers.

The SA 1974 s. 23 prohibition applied equally to individual and corporate kinds of "person": see SA 1974 s. 24. CLSA 1990 s. 55 did not employ the AJA 1985 language of "licensed conveyancer" or "recognised body". It was a generic provision, referring to an approved body granting an exception to "a person who is one of its members". It was left to each body to decide who its "members" were. I do not know exactly how the CLC's then constitutional arrangements defined a "member", but I can see no obvious reason why they should not have treated both licensed conveyancers and recognised bodies as "members". Everyone seems to have assumed this was the position, so that when SI 2008/1865 came into force the s. 23 exemption was regarded as applying to both species of conveyancing services providers. No doubt it would have been neater and simpler if the 2007 regime had made provision that simply grandfathered everyone who had been "permitted" by the CLSA regime to carry on probate activities within SA 1974 s. 23 into the post-2007 authorisation regime. But that is very different from concluding that it is startling or absurd to find the new provisions do not have that effect.

On my reading, the 2007 regime in so sense precludes the CLC, as an AR, from authorising/regulating its RBs to carry on probate or the other two reserved activities within s. 53(1A). It just requires that beyond the end of the transitional period, the CLC's power to regulate conveyancing entities for probate work should flow from subordinate legislation, which in this case will have to include an order under s. 69. To that extent the position is not so different from that under the old s. 55, which also required something to be done at subordinate level, namely the making of an SI granting it approval. The need for a s.69 order is an extra layer to the onion. But the 2007 regime itself involves new layers not previously present. There is a conceptual difference, even if perhaps not visibly great in practice, between (a) merely providing an exemption from a criminal offence, and (b) enabling regulation of bodies for a defined reserved activity under the Clementi architecture. One can well see why, when the Legal Services Bill was being drafted, government might take the view that the precise mechanics for entity regulation for the s. 53(1A) activities might need to be thought through carefully rather than being made the subject of inflexible detail on the face of the Bill. Taking a power -- in the form of s. 69 -- to come up with a tailored solution later is exactly the sort of technique one often sees deployed in complex contexts like this.

So, while it is very helpful to have Graham's thoughts on these difficult questions, I am not persuaded that one is driven to a different reading of the otherwise clear s. 55(2).

**Individuals as licensed conveyancers v. "sole practitioner" recognised bodies**

I entirely accept that an individual can convert him- or herself into a sole practitioner "body" and be recognised as such. But that does not affect the fundamental distinction between licensed conveyancers and recognised bodies as different regulatory routes to providing conveyancing services, and that is the distinction picked up in the language of the post-2007 CLSA 1990 s. 53(2). "Licensed conveyancer" in that section cannot be read as "licensed conveyancer or recognised body", and the observation that an individual can constitute him- or herself a recognised body does not lead me to alter that conclusion as a matter of either language or substance.

**Repeal of CLSA 1990 s. 53(9)(e)**

Even if I am wrong at para. 37 in divining the likely reason for the repeal, I still find it difficult to see how the repeal – whatever the true reason for it – supports a reading of the all-important enables the crucial s 53(2) as including recognised bodies.

Please do feel free to share these thoughts with the CLC and RPC.

Gordon Nardell QC  
24 February 2012