



**LSB consultation:
Designating new approved regulators
and approving rule changes**
The CLC's response
October 2009

The CLC's response to the LSB consultation Designating new approved regulators and approving rule changes

Introduction

1. The Council for Licensed Conveyancers ("the CLC") was established under the provisions of the Administration of Justice Act 1985 as the Regulatory Body for the profession of Licensed Conveyancers. As set out at section 28 Legal Services Act 2007 the CLC must, so far as is reasonably practicable, act in a way—
 - (a) which is compatible with the regulatory objectives (set out at section 1 of the Legal Services Act 2007), and
 - (b) which it considers most appropriate for the purpose of meeting those objectives.
2. Further, the CLC must have regard to-
 - (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
 - (b) any other principle appearing to it to represent the best regulatory practice.

The purpose of the CLC

3. To set entry standards and regulate the profession of Licensed Conveyancers effectively in order to:
 - secure adequate consumer protection and redress;
 - promote effective competition in the legal services market; and
 - provide choice for consumers
4. The CLC welcomes the opportunity to respond to the LSB's consultation Compliance and Enforcement – Statement of Policy.

Section 2

Question 1 - What are your views on the LSB's proposed compliance and enforcement strategy? If you think we should have other or additional aims, please say what you think they should be and explain why you think we should have them.

The CLC agrees the LSB's proposed compliance and enforcement strategy.

Section 3

Question 2 - What are your views on the matters that the LSB proposes to take into account in deciding whether (and if so what) action is appropriate? In particular, what are your views on how the LSB should judge whether an Approved Regulator's acts or omissions have been unreasonable?

The CLC has no further matters to add.

Question 3 - What are your views on the informal resolution process and the timescales set out above? If you have alternative suggestions please say what

they are and why you consider they are more appropriate.

The CLC agrees the approach suggested for an informal resolution process. Whilst it acknowledges that issues raised by the LSB must be addressed as quickly as possible, the CLC is concerned that there may be occasions where it is not possible for an Approved Regulator realistically to be able to assess an issue within five working weeks. The CLC consider that a default timescale of eight working weeks (subject to change by agreement) would be more realistic.

Question 4 - What should the LSB publish about informal resolution of an issue? Will publication help to spread learning in the regulated community or do you consider that it may hamper informal resolution of an issue? Are there alternatives that you consider would be more appropriate? Please explain your answer.

The CLC believes that confidentiality is an important incentive encouraging informal resolution. Learning can be spread by the appropriate use of updates (such as newsletters) without direct reference to the specific Approved Bodies.

Question 5 - What are your views on how performance targets could be used?

Performance targets should be designed to improve behaviour and must therefore be realistic taking account of the resources available, or reasonably available to, the Approved Regulator. The CLC agrees that performance targets could be used effectively with other regulatory tools.

Question 6 - What are your views on how directions should be used?

As with performance targets, directions should be used to improve behaviour with other regulatory tools, such as performance targets.

Question 7 - What are your views on using directions to require an Approved Regulator to spend money on a specific issue?

The CLC considers that directions should not expressly require money to be spent on a specific issue, although that may be a natural consequence of the direction. The application of funds for an identified purpose is no guarantee that they would be used effectively. The CLC acknowledges that ultimately a direction to spend money on a specific issue is better than a fine, but it is not an ideal solution. In addition, such directions may constrain development of innovative solutions which may deliver similar or better outcomes.

Question 8 - What are your views on how censure should be used?

The CLC agrees the approach suggested at paragraph 3.30.

Question 9 - What do you think the LSB's aims should be in imposing financial penalties?

The LSB should have in mind the likely effect that the imposition of a penalty may have on the regulated community given that the Approved Regulator may either have to look to the regulated community to reimburse a penalty, or alternatively have to cut back on one or more parts of its operation. The CLC questions whether it is appropriate for the aspirational aim to incentivise Approved Regulators to improve

their compliance through increased choice for authorised persons should influence the maximum amount penalty particularly as the choice for authorised persons is very limited at the moment.

Question 10 - What are your views on what the maximum amount of a financial penalty should be?

The CLC agrees that the maximum amount of a financial penalty should be determined by a formula but the criteria to be applied in determining the penalty payable in a particular circumstance should be the same as that applied by the Court. In particular, the LSB should be aware of the likely effect any penalty awarded may have on the continuing viability of the approved regulator. If the maximum penalty of £10 million were to be imposed, it is likely that a number of the smaller Approved Regulators (including the CLC) would have to cease their operations. If the Approved Regulator put the LSB on notice of such a possibility, it is suggested that the LSB should reconsider to determine whether any of the other statutory remedies available should be applied either to enable the Approved Regulator to continue or for an orderly transition of functions to another Approved Regulator.

The CLC is concerned that the rationale for the maximum amount of the penalty is in part benchmarked on the practice in other sectors such as utilities. The 'income' of Approved Regulators in our view is not an 'equivalent measure' as the concept of 'turnover' because turnover usually includes an element of the 'profit' plus the cost of delivery of services. The income of Approved Regulators does not include an element of profit so the impact of the maximum penalty is not comparable with the examples indicated in the paragraph 3.38. The proposed maximum penalty is approximately about 25% of the annual practising fees paid by licensed conveyancers which appear disproportionate. Whilst it is accepted that the penalty should be an effective deterrent, it is important that the penalty also achieves the aim of changing behaviour of the Approved Regulator. If the Approved Regulator is forced to close its operations due to the amount of the penalty, it would appear that the penalty has failed to achieve its desired aim.

It follows that the CLC considers the maximum limit of £10 million wholly disproportionate and submits that this should not be a default maximum limit. As an observation it appears that using the other methods of calculation (assuming they are adopted unamended), of the Approved Regulators only the Law Society could currently have a penalty in excess of £10 million imposed against it.

Question 11 - Is the formula proposed the right one or is there another more appropriate measure?

The CLC has no other formula to suggest.

Question 12 - Can you identify any circumstances when the proposed formula may be inappropriate to use?

No.

Question 13 - What are your views on whether the maximum should be linked to the total value of the services being regulated?

No. Approved Regulators do not provide services direct to the public, unlike utilities. There is a question whether in principle the entities regulated should be directly liable for the shortcomings of their Approved Regulator given that the LSA provides for

clear separation in the role and functions of the representative and regulatory arms of the Approved Regulators.

Question 14 - What are your views on the amounts suggested in the formula? What other amounts do you think might be appropriate, bearing in mind the need for a financial penalty to act as a credible deterrent? Please explain your answer.

The maximum amounts proposed suggest that a penalty can be fixed at a level which has the effect of closing down the functions of the Approved Regulator.

We suggest that the maximum penalty should not exceed £125 per authorised person and £2500 per entity.

Question 15 - What are your views on the process that the LSB proposes to use to arrive at an appropriate amount for a financial penalty?

The CLC agrees there should not be a precise methodology to calculate the penalty payable. It agrees that aggravating and mitigating factors should be taken into account.

Question 16 - What are your views on the examples of the factors that the LSB may take into account when deciding what level of penalty is appropriate? What other factors do you consider that the LSB should take into account? Please explain your answer.

The CLC refers to its response to Question 15.

Question 17 - What are your views on the LSB's aims for using intervention directions? Are there other circumstances when you consider that the exercise of this power might be appropriate?

The CLC agrees the LSB's aims.

Question 18 - What are your views on the LSB's aims for cancelling the designation of an Approved Regulator? Are there other circumstances when you consider that the exercise of this power might be appropriate?

The CLC agrees the LSB's aims.

Section 4

Question 19 - Do you think the draft statutory instrument is appropriate? If not, please say why. If you think that it should be changed, it would be helpful if you could suggest drafting changes and explain the reasons for them.

The CLC has nothing to add.

Section 5

Question 20 - What are your views on each of the initial impact assessments? If you have any evidence to support your view, in particular on the possible costs involved, please provide that information.

The CLC agrees that the impact of the enforcement policy is likely ultimately to be cost neutral although in the short to medium term it is likely there will be a period of adjustment to enable the Approved Regulators to comply with the Regulatory Objectives.

Annex 3

Question 21 – Do you agree with the approach taken to oral representations?

Yes.

Question 22 – Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the process.

The CLC has nothing to add.

Annex 5

Question 23 – Do you agree with the Board’s approach for making nominations for the purposes of Section 41(2)(a)?

Yes.

Question 24 – If you do not agree with the Board’s approach, what alternative approach would you suggest?

Not applicable.

Question 25 – Do you agree with the Board’s approach for making nominations for the purposes of Section 42(3)?

Yes.

Question 26 – If you do not agree with the Board’s approach, what alternative approach would you suggest?

Not applicable.

Annex 6

Question 27 – Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the Board’s approach to its requirements for the content of Applications?

Yes.

Question 28 – If you do not agree with the Board’s approach to its requirements for the content of Applications, what alternative approaches would you suggest and why?

Not applicable.

Question 29 – Do you agree with the approach taken to oral representations?

Yes.

Question 30 – Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the process.

Not applicable.

Annex 7

Question 31 – Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the Board’s approach to its requirements for the content of Applications?

Yes.

Question 32 – If you do not agree with the Board’s approach to its requirements for the content of Applications, what alternative approaches would you suggest and why?

Not applicable.

Question 33 – What do you think the appropriate level of, and method of calculation of the Prescribed Fee should be?

The CLC considers that the Prescribed Fee should be determined in the same manner as it is proposed that the Prescribed Fee for applications to become an Approved Regulator or for an existing Approved Regulator to regulated additional Reserved Activities – on the basis of marginal cost to the LSB. This can be estimated at the out set if pre-payment is required.

Annex 8

Question 34 – Do you agree with the Board’s approach for making nominations for the purposes of Section 48(3)?

Yes.

Question 35 – If you do not agree with the Board’s approach, what alternative approach would you suggest?

Not applicable.

Summary

5. The CLC broadly agrees the approach taken in determining how the LSB should exercise its compliance and enforcement powers, subject to the overriding requirement that such powers should be exercised fairly and proportionately and should not have the effect of penalising the regulated community where the failure clearly is that of the Approved Body.