LSB consultation on proposed rules under sections 30 and 51 of the Legal Services Act 2007

The CLC's response

June 2009

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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.

   <u>The purpose of the CLC</u>

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 on proposed rules to be made under sections 30 and 51 of the Legal Services Act 2009.

Consultation Questions

<u>Internal Governance Arrangements - Section 30</u>

5. Although as highlighted in paragraphs 1.6 and 3.4 of the consultation paper, the proposed rules under section 30 of the Legal Services Act are not likely to have a significant impact on the CLC. The CLC supports the broad principles underpinning the proposed section 30 rules and where appropriate we comment on the relevant consultation questions.

6. The CLC remains committed to ensuring that any ancillary activities that it undertakes will not interfere or be perceived to interfere with the effective discharge of its regulatory responsibilities.

Question 1 – How might an independent regulatory arm best be "ring-fenced" from a representative-controlled approved regulator in the way we describe (i.e requiring a delegation of the power to regulate processes and procedures; and the power to determine strategic direction)?

7. It seems to us that acceptable 'ring-fenced" arrangements for an independent regulatory arm will be as close as possible to the position of statutory regulators which have no representative functions. This must include the ability and freedom to determine strategic direction and to direct the processes and all other necessary enablers to support the effective delivery of the agreed strategic direction.

Question 2 – What do you think of our proposals relating to regulatory board appointees, set out under paragraph 3.15?

8. We consider the proposals for regulatory board appointees as reasonable particularly as they are aligned to good practice which statutory regulators which have no representative functions such as the CLC will be happy to embrace.

9. We particularly support the principle of an in built majority of non-lawyers on regulatory boards in order to enhance public confidence and ownership in the regulatory framework. Whilst the LSB recognises existing statute constrains the implementation of this principle across all approved regulators. We sincerely hope that the LSB will provide support for the amendment of existing statute to enable approved regulators such as the CLC to have regulatory boards with an in built majority of non-lawyers.

Question 3 – Is it necessary to go further than our proposals under 3.15, for example by making it an explicit requirement for the chairs of independent regulatory board/equivalents to be non-lawyers?

10. We agree that the Chair of the regulatory board should not be limited on the basis of professional qualifications. We favour the principle of appointment of the Chair based on merit and not limited to either a non-lawyer or a lawyer. We are satisfied that the principle of an in built majority of non lawyers on a regulatory board is sufficient to maintain public confidence in the regulatory framework.

Question 4 – Do you agree with our proposals in respect of the management of resources, including those covering 'shared services' models that approved regulators might adopt? What issues might stand outside such arrangements as suggested in paragraph 3.22?

11. We have no comment.

Questions 5 – Is our proposed balance between formal rules and less formal (non-enforceable) guidance right? In what ways would further or different guidance be helpful?

12. We have no comment.

Question 6 – What are your views on our suggested permitted oversight role for representative-controlled approved regulators over their regulatory arms? Are practical modifications required to make it work?

13. We have no comment.

Question 7 – In principle, what do you think about the concept of dual self-certification?

14. We think the self certification concept is particularly helpful to reinforce the partnership approach between the LSB and the approved regulators. In addition, the self certification concept will focus the mind of the approved regulator to proactively ensure continued compliance with the internal governance rules rather than passively waiting for the LSB to check compliance with the rules.

15. It seems to us that the concept of dual self certification is a constructive approach to achieve appropriate engagement with all relevant parties in order to facilitate compliance with the rules. Given that it has at all times had purely a regulatory function, dual self certification does not apply to the CLC. However, the CLC agrees it should certify continued compliance with the LSB's internal governance rules.

Question 8 – If a dual self-certification model were adopted, how should it work in practice? Or would alternative arrangements be more appropriate, either in the short or longer term.

16. We support the proposal to approve the arrangements proposed by approved regulators as part of the general review of arrangements as proposed in the LSB Business Plan. However, we hope that our arrangements for appointment of regulatory board members in accordance with the Legal Services Act will be approved much earlier than the proposed timetable in the plan.

17. We think the dual self-certification process which is an annual process should be underpinned by ongoing sub processes throughout the year to ensure that issues of non compliance are addressed as quickly as possible.

<u>Practising Fees – Section 51</u>

Question 9 – Do you agree that the mandatory permitted purposes currently listed in statute should be widened to include explicit provision for regulatory objective (g), i.e. "increasing public understanding of the citizen's legal rights and duties"?

18. We agree with the proposed widening of the mandatory permitted purposes to include explicit provision for regulatory objective (g).

19. We consider that regulatory objective (g) is an important aspect of our regulatory framework for the future.

Question 10 – Should any other (general or specific) purpose be permitted under our section 51 rules?

20. We cannot at this stage think of additional purposes that should be permitted under section 51 rules. If it is agreed that contributions to the CLC's compensation fund are practice fees for the purpose of s.51 LSA, it follows that s.51(4) should be broadened specifically to permit payments to be made in the same circumstances as grants and associated costs are currently made out of the CLC's compensation fund.

Question 11- What do you think about our proposal to seek evidence that links to the regulatory objectives in the Act?

21. Although not explicit in the document, we assume that the LSB intends the practice fee to incorporate licence fees for individuals and entities including any mandatory contribution to a Compensation Fund.

22. We consider in principle the proposal to seek evidence that links proposed practice fees with the regulatory objectives in the Act as reasonable. The challenge in practice is the extent of the evidence required from approved regulators to satisfy the LSB. Qualitatively linking proposed activities funded by the practice fee to the regulatory objectives should not be too difficult. However, it would be quite challenging for some approved regulators if the LSB requires in the short to medium term quantitative evidence to measure the linkage between the practice fee and regulatory objectives in the Act.

Question 12 – What criteria should the Board use to assess applications submitted to it?

23. We consider that the principles that the LSB will use in the apportionment of the levy to approved regulators should also be utilised in the assessment of the practice fee proposed by approved regulators.

24. One of the criteria could be the adequacy of the impact assessment of the options considered by each approved regulator.

Question 13 – If they are adopted, what should Memorandum of Understanding between the Board and approved regulators contain? For approved regulators in particular, are there any particular implications for your organisations?

25. The Memorandum of Understanding should contain the following;

- Timetable for submission of application for approval of practice fee
- Timetable for approval of practice fee
- Details of required supporting information
- Process to review the decision to refuse the approval of the practice fee
- Circumstances when consultation will be required

Question 14 – Should there be a requirement on approved regulators to consult prior to the submission of their application each year – and if so, who should be consulted, and on what? Should there be a distinction drawn between approved regulators with elected representative council or boards; and those which have no such elected body?

26. We consider that it is sufficient that there is a recommendation that approved regulators should consult prior to the submission of their application in certain circumstances rather than a requirement to consult on an annual basis. We also consider that, subject to appropriate safeguards, there should be a de minimis provision which permits movements in the practice fee, say in line with the RPI or CPI index, without the need to comply with the full approval procedure.

27. In the circumstances when it is appropriate to consult prior to the submission of our application, we consider that the regulated community should be the primary consultee and they should be consulted on the following factors:

- Proposed changes to the fees structure

- Rationale for the proposed practice fee
- Appropriateness of the proposed fee
- Proposed allocation of fees across the regulated community

28. A modified procedure may be required if compensation fund contributions are to be treated as practice fee.

Question 15 – What degree of detail would be most appropriate to require when seeking to maximise transparency but be proportionate in terms of bureaucracy? Have we got the balance right?

29. We have no comments.

Question 16 – Are there any issues in respect of practising certificate fees that you think we should consider as part of this consultation exercise?

30. All the points we wish to make have been incorporated into our previous responses.

Question 17 – Please comment on our draft proposed rules, both in terms of the broad framework and the detailed substance.

31. We have no specific comments.

Summary

32. Given that it has at no time had a representative function, the issue of separation does not apply directly to the CLC, although it accepts it is appropriate for the CLC to certify continuing compliance with the LSB's internal governance rules.

33. The Practice Fee Rules will have a more immediate impact on the CLC. There is a concern that the process for obtaining approval for setting of fees may be unnecessarily time consuming and costly. A de minimis provision may resolve at least some of these issues. Assuming they are to be treated as practice fees, it may be appropriate for a different (and more streamlined) process to be applied in respect of compensation fund contributions.

34. Generally, the CLC welcomes the approach taken by the LSB and looks forward to engaging with the LSB and other parties in the implementation of sections 30 and 51 of the Legal Services Act 2007.