



## **Legal Services Board – Decision Notice issued under Part 1 of Schedule 10 to the Legal Services Act 2007**

The Council for Licensed Conveyancers (“CLC”) has made an application under the Legal Services Act 2007 (“the Act”) for the Legal Services Board (“LSB”) to recommend that an order be made by the Lord Chancellor designating the CLC as a Licensing Authority for its existing reserved legal activities (probate, reserved instrument activities and the administration of oaths).

**The LSB has decided to make a recommendation to the Lord Chancellor that an order be made designating the CLC as a Licensing Authority for probate, reserved instrument activities and the administration of oaths.**

**In making its recommendation to the Lord Chancellor, the LSB will also recommend that the proposed licensing rules are at the same time treated as having been approved by the LSB. This includes the entire CLC Handbook and Frameworks (with the exception of any proposed amendments made in relation to the CLC’s separate application to regulate litigation and rights of audience).**

This Notice sets out the basis for the LSB decision.

### **Authority for the decision**

1. **Annex 1** sets out the authority under which the LSB has made this decision.

### **Background**

2. The CLC is already an approved regulator for probate, reserved instrument activities and the administration of oaths. The CLC currently regulates bodies with some form of non lawyer ownership which will fall within the definition of a licensable body at Section 72 of the Act. These bodies are currently deemed to be authorised (under the Schedule 5, Part 2, Paragraph 11 transitional provisions) to continue to practice reserved legal activities. However, once the transitional provisions end these bodies will need to apply to become a Licensed Body in order to continue practising as they are. This has motivated the CLC to apply to become a Licensing Authority in order to regulate Licensed Bodies.
3. In preparation for making this application the CLC has also reviewed the entirety of its regulatory framework. As a result the CLC has made significant revisions to the Code of Conduct to ensure an outcome focused and risk based approach to regulation is created. The new regulatory arrangements are subject to LSB approval as a change for the existing regulated community (under Schedule 4, Part 3 of the Act) as well as forming the licensing

rules with which CLC regulated licensed bodies must comply. The decision with regards to the Schedule 4, Part 3 application is the subject of a separate Decision Notice<sup>1</sup>.

### **Analysis of the application**

4. The LSB performed an analysis of the application in line with the requirements specified in Schedule 10 to the Act and in line with rules made by the LSB under that Schedule. The analysis was presented to a meeting of the Board of the LSB on 28 April 2011 in the form included at **Annex 2**.
5. The Board's consideration of this analysis, and in particular the advice of the Lord Chief Justice, prompted us to seek more detailed information about the CLC's current performance. We sought more detail on a number of issues including the size and turnover of the practices concerned, the nature of disciplinary action taken and calls on their compensation fund. This additional information did not lead us to consider that the risks posed by agreeing the application were different in degree or kind to those posed by other Approved Regulators and we are satisfied that the CLC's arrangements will be appropriate (by the time of any designation of CLC as a Licensing Authority) for them to act as both an Approved Regulator and a Licensing Authority.

### **Decisions**

6. Schedule 10, Paragraphs 11(2) and 11(3) set out the matters on which the Board must be satisfied when granting an application for designation as a Licensing Authority.
7. The Board has considered the applications and satisfied itself that the issues raised have been satisfactorily addressed. It is satisfied that the criteria for granting a Licensing Authority designation application have been met.
8. Therefore the Board decided to
  - Grant the application under Paragraph 12(1) of Part 1 of Schedule 10
  - Recommend to the Lord Chancellor that the CLC be designated as a Licensing Authority for probate, reserved instrument activities and the administration of oaths under Paragraph 14(2) of Part 1 of Schedule 10
  - Include in the recommendation to the Lord Chancellor, the recommendation that the licensing rules be approved for use by the Licensing Authority when the Lord Chancellor exercises his authority under Paragraph 16(1) of part 1 of Schedule 10.
9. This document constitutes the Decision Notice which is being provided to applicant under Paragraph 12(3) and is being published under Paragraph 12(12) (5).

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<sup>1</sup> The Decision Notice for this application can be found here  
[http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/applications.htm](http://www.legalservicesboard.org.uk/what_we_do/regulation/applications.htm)

## **Chronology**

- The LSB confirmed receipt of an application from the CLC on 4 February 2011
- The Decision Period started on 4 February 2011 and ended on 28 April 2011<sup>2</sup>
- The application was published on the LSB website on 9 February 2011
- The advice from the mandatory consultees and CLC response were published on the LSB website on 15 April 2011
- This Decision Notice is being published on our website on 10 May 2011

## **Actions**

- The CLC to assess the consistency of all its licensing determinations after 6 months operating as a Licensing Authority, and then every 12 months thereafter. Review process to include decisions on the approach to separate businesses as well as any conditions placed on individual licences.

**Legal Services Board**  
**9 May 2011**

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[http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/licensing\\_authority\\_application.htm](http://www.legalservicesboard.org.uk/what_we_do/regulation/licensing_authority_application.htm)

**Annex 1: Authority for the decision**

1. Paragraph 1(2) of Part 1 of Schedule 10 of the Act enables any body to make an application requesting that the LSB recommends that an order be made by the Lord Chancellor to designate that body as a Licensing Authority in respect of identified reserved legal activities. Paragraph 1(3) of Schedule 10 provides that a body may only make such an application if it is an existing approved regulator in relation to the activity or it has made an application under Part 2 of Schedule 4 (designation of approved regulators) for the Board to recommend that an order be made by the Lord Chancellor designating the body as an approved regulator in relation to the activity.<sup>3</sup>
2. Part 1 of Schedule 10 also documents the processes, participants and criteria that will be applied to any such application that is made. These provisions include duties being imposed upon the LSB to make rules at Paragraph 1(4) for the form and manner of the application, 1(5) for the amount of the prescribed (application) fee, 2(2) for procedures and criteria for considering whether to accept an application for consideration, and 9(3) about considering oral and written representations made to the LSB as part of the process of consideration
3. Paragraph 11(1) of Part 1 of Schedule 10 to the Act, also requires the LSB to make rules about how it will determine if it should recommend to the Lord Chancellor that an application for designation by a body to become a Licensing Authority in relation to identified reserved legal activities should be made. These Rules for Licensing Authority Designation Applications came into effect on 1 January 2010<sup>4</sup>.
4. The LSB may only grant an application in relation to a particular reserved legal activity if it is satisfied in relation to the requirements under Paragraphs 11(2)<sup>5</sup> and 11(3)<sup>6</sup> of Part 1 of

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<sup>3</sup> The term “approved regulator” is defined in section 20 of the Act and a list of the Approved Regulators and the reserved legal activities for which they are approved is contained in Schedule 4 Part 1 of the Act. The term “reserved legal activities” is defined at Section 12 of the act and a list of the reserved legal activities and a definition of what is comprised within each of them is contained in Schedule 2 of the Act. Both Schedules will be amended from time to time in accordance with activities conducted in accordance with provisions of the Act.

<sup>4</sup> The Rules for Licensing Authority Designation Applications can be found on the LSB website [http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/Designating\\_LA\\_rules.pdf](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/Designating_LA_rules.pdf)

<sup>5</sup> Paragraphs 11(2)(a) to (d) provide that the LSB may only grant an application if satisfied that the applicant’s proposed licensing rules in relation to the activity comply with the requirements of section 83; that if an order to be made under paragraph 15 designating the body in relation to the activity there would be a body with power to hear and determine appeals; that if an order were to be made under paragraph 15 designating the body in relation to that activity, the applicant would have appropriate internal governance arrangements in place at the time the order takes effect; that if an order were made under paragraph 15 designating the body in relation to that activity, the applicant would be competent, and have sufficient resources to perform the role of licensing authority in relation to the activity at the time the order takes effect.

<sup>6</sup> Paragraphs 11(3)(a) and (b) of Schedule 4 provides that the LSB must in particular be satisfied that the exercise of the applicant’s regulatory functions would not be prejudiced by any of its representative functions and that decisions relating to the exercise of regulatory functions would, so far as reasonably practicable, be taken independently from decisions relating to the exercise of representative functions.

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Schedule 10. The Rules for Licensing Authority Designation Applications provide the mechanism through which the LSB carries out its assessment against these requirements and the LSB has therefore satisfied itself of compliance with the requirements of Paragraphs 11(2) and 11(3) by an assessment of the application and proposed regulatory arrangements against the Rules for Licensing Authority Designation Applications.

5. Paragraph 16(1) provides that where an order is made by the Lord Chancellor under Paragraph 15 of Part 1 of Schedule 10, the applicant's proposed licensing rules are at the same time treated as having been approved by the Board.

## **Annex 2: Application by the Council for Licensed Conveyancers to become a Licensing Authority**

### **1. Recommendation**

- 1.1 This section of the paper invites the Board to make a decision on the CLC application to be designated as a Licensing Authority. More detailed recommendations in relation to this application are set out at paragraphs 1-3 of the recommendations section of the cover paper.

### **2. Summary**

- 2.1 We have completed a detailed review of the application. This has included consideration of all advice from the mandatory consultees and CLC's response to that advice (all advice is published on our website). We have also met with CLC to discuss their progress in making the necessary organisational changes to become a Licensing Authority, including development of its staff, systems and processes. All of the information has been assessed against the Legal Services Board's (LSB) rules on applications for designation of licensing authorities and guidance on the contents of licensing rules.
- 2.2 We have been through the detail of the licensing rules to ensure that they meet the requirements of the Act. The requirements under paragraph 11(2) of schedule 10 of the Act, on which the Board must be satisfied in order to make a recommendation to the Lord Chancellor, are set out at paragraph 8.3 along with our conclusions. This includes the requirements for licensing rules under section 83. More information on the contents of licensing rules can be provided on request.
- 2.3 In his advice to us, the Lord Chief Justice has registered his opposition to the CLC being granted the status it seeks in this application. The Lord Chief Justice's concerns are centred on the question of multiple regulators for ABS, the competence of the CLC compared with the bigger regulators, and the implications of the CLC's application to extend its reserved legal activities (which he firmly opposes). More detail is contained in section 10 of this report. We agree with the Lord Chief Justice that these are important issues to be considered in our assessment of this application and in order to make a recommendation we need to be satisfied of the CLC's ability to regulate ABS.
- 2.4 We will carefully consider any concerns raised by the Lord Chief Justice in relation to the wider rights being sought as part of the assessment of the application to extend its reserved legal activities. The Lord Chief Justice is of course right to highlight the significance of the CLC gaining additional reserved legal activities as not only does that application involve a different statutory process, it also raises more fundamental questions that require significant analysis and challenge. At present, the Board can expect to take its decision on the application to extend reserved activities in July 2011. The Board must put that application to one side whilst it considers this application on its own merits.
- 2.5 For reasons explored in more detail throughout this paper, the executive has concluded that the CLC has developed the required licensing rules to regulate ABS and has done so in accordance with both LSB guidance and the requirements of the Act. Whilst we recognise that there is some development work to do in terms of how the proposed arrangements will

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operate in practice, we are satisfied that the CLC has the capacity and capability to be a competent Licensing Authority for its existing reserved activities.

- 2.6 The CLC already has experience of regulating ABS type structures with fewer protections than are proposed within this application and by the Act. The proposed regulatory framework would build upon this experience, with the addition of protections such as fitness to own checks and the requirement to have a Head of Legal Practice (HoLP) and Head of Finance and Administration (HoFA).
- 2.7 We are therefore satisfied that should the Board make this recommendation to the Lord Chancellor, the CLC would be competent and have sufficient resources to perform the role of Licensing Authority in relation to its current reserved legal activities at the time the order takes effect.

### **3. Authority for the decision**

- 3.1 Under Schedule 10, Part 1 of the Act, bodies may apply to the LSB to become a Licensing Authority. Any such application must specify the reserved legal activities to which the application relates. The CLC is already an approved regulator for probate, reserved instrument activities and the administration of oaths. The scope of this application is limited to these areas at the current time.
- 3.2 Once satisfied that the application meets the requirements of our rules for applications to be designated as a Licensing Authority (the LA designation rules), other rules (notably those on regulatory independence) and that the body has in place appropriate licensing rules to regulate the proposed activities, the LSB can approve the application and recommend to the Lord Chancellor that the applicant be designated as a Licensing Authority for all or some of the reserved legal activities applied for. We have also considered the application against our guidance on the contents of licensing rules which form much of our policy approach for ABS.

### **4. The Applicant**

- 4.1 The CLC was established by the Administration of Justice Act 1985 to regulate licensed conveyancers in the provision of legal services (currently conveyancing and probate) and is an approved regulator under the Act.
- 4.2 The CLC currently regulates approximately 10-15% of the residential conveyancing market. Its regulated community is made of up 1103 licensed conveyancers, 301 managers and 215 practices<sup>7</sup>. As a quarter of these practices are currently owned or managed by non-authorised persons, the CLC already has some experience of regulating ABS type structures and managing risks associated with external ownership.

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<sup>7</sup> CLC Licensing Authority application, page 4. Figures correct as at February 2011 (when the application was submitted)

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- 4.3 In preparation for making this application the CLC has also reviewed the entirety of its regulatory framework. The CLC has made significant revisions to the Code of Conduct to ensure an outcome focused and risk based approach to regulation. It has only retained detailed rules where it thinks it is necessary. The new regulatory arrangements are subject to LSB approval as a change for the existing regulated community (under Schedule 4, Part 3 of the Act) as well as forming the licensing rules with which CLC regulated licensed bodies must comply.

## **5. The Application**

- 5.1 This application is to seek
- a recommendation from the LSB to the Lord Chancellor that CLC be designated as a Licensing Authority for probate, reserved instrument activities and the administration of oaths
  - agreement that in making the recommendation to the Lord Chancellor about the licensing application, to include a recommendation that the licensing rules be approved for use by the Licensing Authority when the Lord Chancellor exercises his authority under paragraph 16(1) of Schedule 10, Part 1

## **6. Structure of the application**

- 6.1 The main part of the application consists of background information and an explanation of how the proposed regulatory arrangements comply with the Regulatory Objectives, Better Regulation Principles, Statutory Code of Practice for Regulators (Hampton principles), and the Code of Practice on Guidance on Regulation. The CLC has also completed competition analysis and an assessment of its compliance with the Framework Services Directive.
- 6.2 A summary of the Licensed Body Framework and relevant sections of the handbook is provided (which together form the licensing rules). This includes an assessment of how the proposed arrangements relate to the requirements of the Act and LSB guidance on the content of licensing rules.
- 6.3 The CLC has also provided explanatory material on its approach to regulation including risk, resourcing, staffing and adaptability. This is supported by the Corporate Strategy, Business Plan and Resources Statement.
- 6.4 Consideration of the impact of the proposals on equality and diversity and a proposed Client Charter (setting out the outcomes a consumer might expect) are also included.

## **7. Completeness assessment of the application**

- 7.1 The LA Designation rules set out the information and evidence needed for LSB to consider an application. This includes both administrative information and the licensing rules requirements (set out in the Act and in our guidance on the contents of licensing rules). The full application was published on the LSB website on 9 February 2011.



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- 7.2 The application contained all of the information needed under these rules with the exception of a statement on the reserved legal activities which the application applies to. This was provided to us by the CLC on 11 April 2011.
- 7.3 It should be noted that the CLC has developed its licensing rules on the assumption that the following orders proceed as planned: section 69 (modifying the functions of the CLC), section 80 (appeals), section 95 (maximum financial penalty) and an order making an amendment to the rehabilitation of offenders exemption (to enable Licensing authorities to conduct enhanced CRB checks).

## 8. Assessment against LSB Rules and Guidance

- 8.1 The application has been reviewed and assessed against the applicable rules and guidance. The issues identified are discussed in section 10 of the report.
- 8.2 In assessing the application against the LSB's Rules and Guidance the following have been considered:
- The application and supporting documents
  - The advice from the mandatory consultees and CLC's response
  - Further information provided by CLC in response to our issues logs on the main application and the supporting regulatory arrangements (which form the licensing rules)
  - Information on the CLC's organisational development, regulatory approach (including its management information system) provided during a visit to the CLC on Monday 4 April 2011. These issues are discussed further at section 10 of this report
- 8.3 Schedule 10, 11(2) sets out the matters on which the Board must be satisfied when granting an application for designation of a Licensing Authority. The following table summarises our conclusion against each of those matters:

Matter to be satisfied	Conclusion
Compliance with section 83 requirements	
Contain appropriate qualification regulations for Licensable Bodies	<p>The <b>CLC Licensed Body Framework</b> requires all applicant bodies to provide information on the entity's employment procedures and arrangements. This includes information on staff structure (in part to determine the ratio of Authorised Persons to those who are not) and the experience, qualifications and professional history of both the HoLP and HoFA.</p> <p>The Specific Requirements in the <b>Licensed Body Code</b> specify that a HoLP and HoFA must have appropriate (in terms of the body's profile)</p>

	<p>experience and qualifications. The HoLP must be an Authorised Person in relation to one or more of the reserved legal activities (this is a requirement under paragraph 11(2)(b) of schedule 11 of the Act). There are no specific qualification requirements for the HoFA but the suitability criteria require the HoFA to demonstrate that they have accountancy experience, competence and/or whether or not they have a recognised accountancy qualification.</p> <p>The CLC’s determination will be informed by the structure and profile of the entity and will be used to inform the risk profile of the licensed body. This is consistent with the statutory requirements and LSB guidance which provides that “<i>qualifications and experience of those who work in an ABS are matters for the ABS to decide, based on the requirements of its business and the expectations of its staff</i>”.<sup>8</sup></p>
<p>Provision for how the Licensing Authority, when considering the regulatory objectives in connection with an application for a licence, will take account of the objective of improving access to justice</p>	<p>The CLC’s Licensed Body Framework states that licence assessment and determinations are based upon the applicant’s compatibility with the regulatory objectives. A judgement will be made on an assessment of the applicant’s capability and capacity to deliver the outcomes required by the regulatory arrangements.</p> <p>Applicants are required to provide details of the arrangements they have in place for complying with the Code of Conduct and the Licensed Body Code, as well as outlining any incompatibility with the Codes. Where issues have been identified, applicants must detail how these have been or will be resolved.</p> <p>Applicants must also provide an Access to Justice statement which sets out how they aim to improve access to justice. The CLC expects that applications will be declined on the basis of access to justice only in exceptional circumstances. This is consistent with paragraph 43 of LSB guidance on licensing rules. The CLC will continue to monitor overall impact on access to justice and will publish a summary of the declared access to justice improvements after six months and then every 12 months thereafter.</p> <p>Additionally, the CLC considers that improved</p>

<sup>8</sup> LSB ‘Alternative Business Structures: Approaches to Licensing. Guidance to licensing authorities on the content of licensing rules’, paragraphs 37-39

	<p>access to justice for the public is dependent on access to the profession that would serve them. Licensing application requirements include the provision of the entity's diversity profile, which must be broken down by management level. In accordance with the LSB wider policy on diversity, the CLC will also extend this requirement to non ABS.</p>
<p>Contain appropriate arrangements (including conduct rules, discipline rules and practice rules) under which the Licensing Authority will be able to regulate the conduct of bodies licensed by it and their managers and employees</p>	<p>In preparation for making this application the CLC has reviewed the whole of its regulatory framework. Significant revisions have been made to the Code of Conduct to ensure an outcome focused and risk based approach to regulation. It has only retained detailed rules where it thinks it is necessary.</p> <p>All bodies and individuals regulated by the CLC are required to comply with a number of universal codes (as provided in the CLC handbook).</p> <p>The Code of Conduct is the umbrella document which all other codes support but includes the following codes: accounts, anti-money laundering &amp; combating terrorist financing, complaints, conduct and Professional Indemnity Insurance. There is also a <b>Licensed Body Code</b> which contains specific provisions required of ABS (for example the requirement to have a HoLP and HoFA and any duties on any external owners).</p> <p>The CLC also has a series of frameworks which set out the way in which it will regulate. This includes the <b>Licensed Body Framework</b> which contains the majority of provisions required of licensing rules.</p>
<p>Contain appropriate indemnification arrangements</p>	<p>Professional Indemnity Insurance cover is a mandatory requirement of all those regulated by the CLC (as set out in both the Code of Conduct and Professional Indemnity Code). The CLC currently operates a Master Policy. This arrangement is currently mandatory but in future all those regulated by the CLC will be permitted to opt out of the Master Policy where they are able to obtain equivalent cover from an alternative source. The CLC will obtain advice from insurance brokers to inform verification of the cover's sufficiency. Where the CLC is not satisfied with an applicant's indemnity insurance cover and conditions, they will not license the applicant until proof has been provided that the policy has been</p>

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	<p>amended to reflect the risks identified.</p> <p>In addition, the ABS Multi-Disciplinary Practice Memorandum of Understanding has been established to enable licensing authorities to exchange information about suspected or fraudulent activity or dishonesty.</p>
Contain appropriate compensation arrangements	<p>The CLC operates a compensation fund to which all members of the regulated community must contribute. Contributions are based upon turnover and are dependent on the financial requirements of the fund each year. ABS firms will be brought within this.</p> <p>In order to allow compensation grants to be paid to consumers of ABS, the remit of the fund needs to be widened. The CLC has confirmed to us that subject to some minor amendments (which will be made before a recommendation to the Lord Chancellor is put forward), the regulatory arrangements provided enable the operation of a single compensation fund for both ABS and non ABS.</p>
Provision required by sections 52 and 54 regarding the resolution of regulatory conflict	<p>The CLC is a signatory to the ABS Multi-Disciplinary practices Memorandum of Understanding (MoU). The MoU seeks to clarify so far as it is practicable the roles of the regulators and professional bodies in the oversight of Licensed Bodies. It provides a framework for cooperation, coordination and exchange of information. LSB staff have been involved in the development of this document.</p> <p>The MoU has been agreed in principle by the Approved Regulators. The SRA has taken the lead in resolving the remaining issues with the FSA with regards to its statutory remit. We are expecting there to be more signatories over the next couple of months and are confident that the framework will provide an adequate basis for regulatory conflicts to be resolved by the time the CLC are designated.</p>
Provision required by sections 112 and 145 in relation to complaints handling (including compliance with our signposting requirement)	<p>The Code of Conduct provides clear outcomes in relation to complaints handling (see Overriding Principle 6). The Complaints Code and Guidance provide more detailed provisions on complaints.</p>
Any other provisions required to be contained in the licensing rules	<p>There are no further provisions.</p>

<p>That if an order were to be made designating the CLC as a Licensing Authority, there would be a body with the power to hear and determine appeals</p>	<p>The CLC has elected for the First Tier Tribunal (FTT) of the General Regulatory Chamber (GRC) of the Tribunals Service to hear appeals from determinations made by the CLC as a Licensing Authority. This is consistent with the LSB's longer term policy of having a single appellate body for all Licensing Authority decisions. It is also consistent with paragraphs 129-130 of our guidance on licensing rules which states that licensing rules must specify one body to which appeals can be made for those issues for which the rules (and/or the Act) provide a right of appeal. The ability of the FTT to hear appeals, and therefore the designation of the CLC, is dependent on the section 80 order.</p>
<p>That if an order were to be made designating the CLC as a Licensing Authority, the CLC would be competent and have sufficient resources to perform the role of Licensing Authority in relation to the activity at the time the order takes effect</p>	<p>The CLC application includes a report on resources prepared by an external audit service (Scrutton Bland). The report concludes that the CLC:</p> <ul style="list-style-type: none"> <li>• Has sufficient financial resources to conduct its existing and future operations</li> <li>• Has adequate and effective control processes in respect of human resources, including recruitment, training and retention</li> <li>• Has adequate and effective control processes in respect of qualifications of licensed conveyancers and the requirements for their Continuing Professional Development;</li> <li>• Has adequate and effective processes in respect of the control of litigation matters which are reported to the Council</li> <li>• Has in place the structure, resources, systems, policies and flexibility to meet the demands of market changes from October 2011 onwards</li> <li>• Is well placed to achieve its strategic objectives</li> </ul> <p>Further information on the competency of the CLC in relation to the regulation of ABS is provided at section 10 of this report.</p>
<p>The exercise of regulatory functions is not prejudiced by representative functions</p>	<p>The CLC was created to have an exclusively regulatory function. The CLC's Certificate of Regulatory Independence was signed off by the LSB in May 2010 and we will not be requiring the</p>
<p>Decisions relating to the exercise of the</p>	

regulatory functions are taken (as far as possible) independently from decisions relating to the exercise	CLC to submit a new certificate for 2011. Given the status of the CLC, we have done no further review of this issue as part of this application.
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## 9. The Mandatory Consultees

- 9.1 When considering an application to become a Licensing Authority, the LSB is required to seek the advice of the Lord Chief Justice, The Office of Fair Trading and the Legal Services Consumer Panel (collectively referred to as the “Mandatory Consultees”). In addition, the LSB can seek advice from a selected consultee though no such advice has been sought in relation to this application.
- 9.2 Advice was received from each of the mandatory consultees and the CLC submitted a response within the required timescale.
- 9.3 It should be noted that the Legal Services Consumer Panel congratulated the CLC on the emphasis it has given throughout the process to delivering good consumer outcomes. The advice also commented on the “positive way in which the CLC has responded” to any feedback provided.
- 9.4 Specific issues raised by the mandatory consultees are covered in the relevant section of this report.

## 10. Issues arising from the assessment of the application

### *Advice from the Lord Chief Justice*

- 10.1 In his advice to us, the Lord Chief Justice has registered his firm opposition to the CLC being granted the status it seeks in this application and sets out several concerns. The first is around CLC’s experience of regulating ABS type entities. The Lord Chief Justice recognises that the CLC has some experience of regulating entities which are owned or managed by non-authorised persons but notes that the numbers are small and the types of activities being undertaken by those entities are far narrower in scope than what is ultimately being considered by the CLC. The Lord Chief Justice considers this application to be a stepping stone towards the CLC extending the types of reserved activities that it may regulate and is therefore unable to support it due to his strong opposition to the CLC being able to regulate civil litigation and advocacy.
- 10.2 The Lord Chief Justice’s advice is that there should be a limit to the number of regulators who are permitted to operate in this area and that the more established regulators ought to regulate ABS in the first instance as they have the widest knowledge and experience of legal services regulation.
- 10.3 Finally, the Lord Chief Justice is concerned that the protections offered by the CLC in respect of the protection of the public interest and the constitutional point of law lack substance. He gives the example of the Framework Memorandum of Understanding (Framework MoU), developed by the approved regulators and other key parties to ensure

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consistency of approach between regulators, which he considers to emphasise the risk of inconsistency. The Lord Chief Justice has significant concerns about the risks around differing regulatory standards which are likely to occur with different regulators operating in the same field.

- 10.4 The CLC has responded to all of the advice provided to us, including the advice from the Lord Chief Justice. Whilst the CLC does not agree with the view expressed by the Lord Chief Justice in relation to its application to regulate litigation and advocacy services, it believes that the CLC's Licensing Authority application should be determined in accordance with the requirements of the relevant sections of the Legal Services Act and separately from any other application. The CLC is confident in its ability to meet the challenges posed by the regulation of ABS and the implementation of a principle based and outcomes focused approach to regulation. On the matter of the Framework MoU, the CLC considers that it would not be consistent with the regulatory objectives if a Licensing Authority did not have in place agreements with other regulators in order to ensure that any breach of regulatory requirements can be dealt with appropriately. The Board should note that the LSB has been involved in the development of the Framework MoU.

*LSB analysis of the Lord Chief Justice's advice and CLC's representations*

- 10.5 We agree with the Lord Chief Justice that these are important issues to be considered in our assessment of the application.
- 10.6 The CLC has submitted a separate application to the LSB seeking a recommendation to the Lord Chancellor that it be designated for the reserved legal activities of the conduct of litigation and rights of audience. That application is being assessed under a separate process and part of that is to seek the advice of the Lord Chief Justice. Any decision to recommend designation as a Licensing Authority at this time is specifically limited to the current reserved legal activities for which the CLC is an approved regulator. It may inform consideration of the application to for additional reserved legal activities but does not in any way pre-suppose the outcome of the other application.
- 10.7 We have sought information from the CLC on their experience of regulating ABS type bodies. At the current time 44 of the 215 practices which the CLC currently regulate will be licensable bodies (as defined by section 72 of the Act) when Part 5 of the Act is commenced. Together these 44 practices account for 65% of the turnover of the profession. The CLC considers that over 30 of these will need to be licensed as ABS before the end of the transitional period (6 October 2012). We note that those in this category, although fewer in number, account for 54% turnover of the profession.
- 10.8 The CLC is therefore already regulating bodies that fall within the definition of ABS and our view is that they should be allowed to continue to do this. Bringing these within a Licensing Authority regime will mean that these entities will be subject to more detailed due diligence checking on application as the requirements for licensing rules contain more detail about what tests are to be satisfied before a licence can be granted. Consumer protection will also be enhanced by the ongoing requirements for ABS such as the requirement to have a HoLP and HoFA. CLC's risk based approach to supervision will enable them to identify those

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entities which present risks and decide on appropriate regulatory response. This will promote and protect the interests of both consumers and the wider public and promote adherence to the professional principles.

- 10.9 Although the CLC application is the first from a potential Licensing Authority, we do not think that they should be the only Licensing Authority for ABS. The Act already allows more than one regulator to regulate any of the reserved legal activities provided the proper standards are maintained. The CLC does not currently have the ability to regulate the range of reserved activities and any future extensions are limited via primary legislation to conveyancing, probate, rights of audience and litigation (section 53 of the Courts and Legal Services Act 1990). If the CLC is successful in extending its reserved legal activities, it will only be able to authorise persons that are firstly licensed conveyancers. The application to extend reserved legal activities, submitted at the same time as this application to be designated as a Licensing Authority will be decided later this year after careful consideration of all the evidence, analysis and advice (including the advice from the Lord Chief Justice). That said we do not consider this application is about regulatory competition. It is about the competence of the CLC as a Licensing Authority for the areas they currently regulate and ensuring the right protections are in place to address the risks associated with the removal of restrictions on ownership. The Act imposes a responsibility to consider applications against the criteria on which we need to be satisfied when making a recommendation. The criteria are focused around the competence, capability and resources of the applicant rather than the number of licensing authorities that should be permitted.
- 10.10 In terms of regulatory standards, the LSB has thus far taken a case by case approach which has helped to inform its strategic view. At this time we are satisfied that the CLC's arrangements are appropriate for regulation as both an Approved Regulator and a Licensing Authority. Consistency of standards is not an issue that is exclusive to Licensing authorities; it applies across all the activities of all the Approved Regulators for which LSB has oversight responsibility. Through our current work on regulatory standards we will (subject to the outcome of the consultation process) agree with each of the Approved Regulators an individual action plan through which they will improve standards in their approach to regulation. The fact that there are already multiple regulators covering all of the reserved activities (other than notarial activities) inevitably means that there will be a degree of inconsistency of *approach* to some aspects of regulation. However, the Executive's view is that the MoU and the work on regulatory standards should help to ensure greater consistency of outcomes.

#### *Organisational capability*

- 10.11 In our decision document on the Rules for Designating Approved Regulators as Licensing Authorities, we set out clear expectations that an applicant must be able to demonstrate how it has prepared properly and thoroughly for its role as a Licensing Authority and has appropriate arrangements in place to license competently. The Act requires that, in making a recommendation to the Lord Chancellor, we are satisfied that a prospective Licensing Authority will be competent and have sufficient resources to perform the role of Licensing Authority at the time that the order takes effect (Schedule 10, paragraph 11(2)(d)).



- 10.12 The process for designation of licensing authorities means that the CLC has had to submit its application before it has fully developed all of the functions it will need to regulate ABS. Arguably any Approved Regulator looking to become a Licensing Authority (or a body applying to become an Approved Regulator for the first time) would be in the same position. However the challenge is greater as the CLC is one of the first in a new regulatory regime. There is still a lot of work to do before the CLC is able to take applications from applicants so it is therefore essential that we consider not only where they have got to but what is left to do and more importantly, whether we are confident that they have the competence and ability to get there.
- 10.13 The CLC has provided a resources statement provided by Scrutton Bland, an external auditor, confirming that it has in place the structure, resources, systems, policies and flexibility to meet the demands of market changes from October 2011 onwards. As part of our assessment process we have sought more information on the way the CLC currently regulates and how it is changing its people, systems and processes to support a more outcomes focused approach. In particular we have looked at how the authorisation and licensing process will work in practice and how this fits in with the development of the CLC's risk methodology.
- 10.14 The CLC has clearly made significant progress in this area. We were given a walkthrough of the new Management Information System (MIS) which has been operational since 31 January 2011 and is under development to take ABS applications. This work is on track to be completed by 30 June 2011. The CLC has sourced additional IT support coupled with management support to ensure that this is completed on schedule. Verification of information provided by individual and firm checks at the application stage will be done by an external provider.
- 10.15 The system developments currently underway and information provided by MIS is a significant step in terms of capability. For example, the CLC is building data on individual practices to compare with data supplied by independent parties, including the Legal Ombudsman and professional indemnity insurers, in order to better understand both the market risks and entity risks within their regulated community. It enables staff to complete desk top audits and for annual submissions to be provided online. The CLC is also looking to take a more dynamic approach to risk assessment, using technology to gather wider intelligence and enabling staff to get to people and issues quicker.
- 10.16 The CLC recognises that in addition to improving its data collection and management process, its approach to supervision also needs to develop to more closely align with the principles and outcomes in the new Handbook. Alongside the system developments the CLC is also focused on ensuring they have the right people with the right skills in place. Three new Legal Practice Inspectors have been appointed in addition to the three that are currently in post. Together with the automation and increased information provided by MIS, CLC now has greater capacity to focus its supervision resources on the areas that present the most risk.
- 10.17 While we recognise that there is some development work to do, we are satisfied from our conversations with the CLC combined with the external assurance report that we have enough information to recommend that the CLC be designated as a Licensing Authority. By

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the time of designation, the CLC will have further developed its authorisation process and risk framework so that issues picked up at the licence application stage will inform the approach to supervision. The CLC will also have completed the next stage of its IT development and additional staff resources will be in place.

### *Regulation of non-reserved legal activities*

- 10.18 The CLC is proposing that all licences stipulate the non-reserved legal activities that a licensed body is allowed to undertake through a series of permissions on the licence. The CLC believes that the regulation of non-reserved legal activities to the same standard as reserved activities is in the interests of consumer protection. Depending on the particular circumstances and risks involved with an application, the CLC may also place limits on non-reserved legal activities as a condition of issuing a licence.
- 10.19 The Mandatory Consultees have expressed different views on the approach to regulation of non-reserved legal activities which is to be expected given their statutory remit. Both the Consumer Panel and the Lord Chief Justice have expressed support for the proposal to regulate non-reserved legal activities to the same standard as those which are reserved. The Consumer Panel considers that this is aligned with the consumer expectation that all legal services are regulated. The Lord Chief Justice agrees that the CLC ought to regulate non-reserved legal activity and reserved legal activity to the same standard. Such an approach will offer clarity in the regulatory environment and therefore protection of the interests of the administration of justice.
- 10.20 The OFT has expressed concern that the imposition of regulation that may not be necessary to protect consumers may create barriers to entry that limit competition. In addition, the OFT is concerned that this approach may afford the CLC undue discretion over what unreserved legal activities the licensed body can undertake.
- 10.21 In our guidance on licensing rules, we proposed that the decision on whether to regulate non-reserved legal activities should reflect the current levels of consumer protection. The CLC currently authorises individual licensed conveyancers to provide conveyancing services or probate services through the issuing of a licence. Paragraph 2(a) of schedule 17 of the Act provides an amendment to the Administration of Justice Act 1985 which broadens the scope of regulated activity for individuals to include “other services by persons who hold licences” which means that anything an individual licensed conveyancer does may be regulated.
- 10.22 The CLC can also authorise CLC recognised bodies to provide conveyancing services and “other relevant legal services” (as defined by section 32(1)(b) of the 1985 Administration of Justice Act). This is a narrower definition than that provided for individual conveyancers by the amendment mentioned above. The CLC considers that this gives them the ability to regulate non-reserved legal activities provided by Recognised Bodies.
- 10.23 As a Licensing Authority, the CLC will arguably have the ability through its licensing rules to regulate a wider set of activities than it is currently able to. The CLC has confirmed

to us that any decisions made in relation to the regulation of non-reserved legal activities will be risk based and will be made in accordance with the outcomes set out in the CLC Code of Conduct. It is not seeking to reserve particular activities to authorised persons and therefore effectively reserve currently non-reserved activities. Instead, the resources allocated to and arrangements for non-reserved legal activities will inform the risk assessment of the applicant. In determining each application, the CLC will assess the competence of the applicant, the sophistication and vulnerability of their clients and how closely aligned the non-reserved legal activities are to the reserved activities to be provided. The CLC will also consider the impact upon consumer choice and access to justice if the non-reserved activities are not permitted.

### *Approach to separate businesses*

- 10.24 The CLC states in the application that it is likely to expect ABS offering non-reserved legal activities closely related to the reserved legal activities they undertake (such as will writing where probate services are provided) to provide those activities through the regulated entity as opposed to some being provided by a separate unregulated business. Where legal services are delivered alongside other types of services, the CLC is likely to require the legal services to be 'ring fenced' from the remainder of the business. This is the approach the CLC currently takes with Countrywide conveyancing services.
- 10.25 As with the regulation of non-reserved activities, the OFT commented that the imposition of regulation that is not necessary to protect consumers may create a barrier that limits competition.
- 10.26 The Consumer Panel supports the expectation that licensed bodies should offer reserved and non-reserved work through the same entity, as this will prevent entities from avoiding regulation through establishment of a separate business. The Consumer Panel expressed some concern that the CLC's intention to consider alternative approaches could lead to inconsistency and cause confusion for consumers and raised a series of practical questions which the CLC has since addressed in its response to the advice, for example how is a 'legal activity' defined? The Lord Chief Justice shares the view of the Consumer Panel and does not support the potential for permission of separate businesses to provide reserved and non-reserved legal services. His view is such arrangements would not create clarity in the regulatory environment.
- 10.27 The CLC is not proposing a specific prohibition of separate businesses or on legal and non-legal activities being provided by a single legal entity. The CLC also considers it to be in the consumer interest that an ABS is permitted to provide a range of activities to consumers. Decisions will be made in relation to each application and it will be for the applicant to set out the reasons why the proposed arrangements are appropriate and how they impact upon the regulatory objectives. The CLC has committed to assess the consistency of all its licensing determinations after six months operating as a Licensing Authority, and then every 12 months thereafter. The CLC has confirmed to us that this review process will include decisions on the approach to separate businesses as well as any conditions placed on individual licenses.

10.28 The CLC has determined its likely approach based upon experience of regulating legal services and places the onus on applicants to set out the reasons why an alternative approach is needed. The CLC is seeking to use the licensing process to understand the types of business it will regulate and the individual risks posed. The CLC will then target its approach accordingly.

#### *Standard of proof*

10.29 The CLC's Regulatory and Enforcement Policies provide that the civil standard of proof, based on the 'balance of probabilities' is to be applied in regulatory determinations other than if a criminal act (including fraud or dishonesty) is alleged in which case the test applied is "beyond reasonable doubt". The CLC proposed taking the same approach in its function as a Licensing Authority.

10.30 The Legal Services Consumer Panel raised the matter of the standard of proof in its advice to us and expressed disappointment that the CLC had not decided to universally adopt the civil standard. The Panel considers that the civil standard of proof should apply in all disciplinary hearings as the need to prove beyond reasonable doubt could frustrate proceedings and potentially impact negatively on public protection. The Panel also highlighted the decision of other regulators, such as ILEX and the SRA, to apply the civil standard of proof and expressed concern that the lack of consistency with other regulators may lead licensable bodies being attracted to the regime which makes it harder for the Licensing Authority to take disciplinary action. The Lord Chief Justice, having reviewed the application alongside the advice provided by the other consultees, agreed that it would seem appropriate for the CLC to move to a position commensurate with that of other regulators.

10.31 The Act provides that licensing rules must contain appropriate arrangements, including conduct rules, discipline rules and practice rules, under which the Licensing Authority will be able to regulate the conduct of bodies licensed by it and their managers and employees (section 83(5)(c)). In our guidance on the contents of licensing rules we set an expectation that an LA must have a credible and effective compliance and enforcement policy and must take account of the Better Regulation Principles when carrying out enforcement action. We have therefore considered the CLC's ability to enforce its licensing rules and whether there are any consistency issues with regards to the CLC's position on the standard of proof.

10.32 The First Tier Tribunal of the General Regulatory Chamber uses the civil standard of proof. As the First Tier Tribunal will be the appeals body for Licensing Authority decisions made by the CLC, we considered that it would be problematic for the LA to apply a different standard of proof in its internal decision making. This is particularly the case because the Tribunal will be able to conduct a substantive rehearing of a disciplinary matter and substitute its own decision for that of the Licensing Authority. It would therefore be problematic if, in making a new decision, the Tribunal did so on a different basis to that upon which the original decision was made.

10.33 Following discussion the CLC has confirmed to us that, subject to a short consultation which considers the change to the Licensing Authority application and the

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impact of amendments to the Disciplinary Procedure Rules on the current regulated community, they will adopt the civil standard of proof and amend the rules accordingly. The consultation closes on 27 April 2011.