



**Licensing Authority Application**  
**CLC representations**  
April 2011

## **the CLC's response to the issues raised by the mandatory consultees**

### **Introduction**

1. In February 2011 we applied to the Legal Services Board (LSB) to become a Licensing Authority authorised to license Alternative Business Structures (ABS).
2. In making its determination the LSB is required to consult with the Legal Services Consumer Panel (LSCP), the Office of Fair Trading (OFT) and the Lord Chief Justice (LCJ) (together the mandatory consultees). We welcome the comments of the mandatory consultees and the opportunity to respond to them. This document constitutes our written representations about the advice given by the mandatory consultees.<sup>1</sup>

### **Background**

3. In responding to the points made by the mandatory consultees the CLC asks that the following points are borne in mind:
  - The CLC was established by the Administration of Justice Act 1985 (AJA) to regulate licensed conveyancers in the provision of conveyancing services (the AJA was a development of the House Buyer's Bill promoted by Austin Mitchell MP and supported by the Consumers Association). The CLC issued its first licences in 1988.
  - The Courts and Legal Services Act 1990 enabled the CLC to apply to license licensed conveyancers in the provision of advocacy, litigation and probate activities<sup>2</sup>.
  - Applying the more permissive provisions of the AJA, the CLC made the Recognised Bodies Rules 2000 which allowed certificates of recognition to be issued to limited companies wholly owned by non-licensed conveyancers and managed by non-licensed conveyancers, provided the Chairman and a majority of the directors were licensed conveyancers (in effect these bodies were ABS).
  - Sir David Clementi published his final report 'Review of the Regulatory Framework for Legal Services in England and Wales' in December 2004 making wide ranging recommendations for reform. He commented that the CLC "does permit outside investors to own practices [ie ABS] within its regulatory area".<sup>3</sup>
  - The Legal Services Act 2007 was enacted in October 2007.

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<sup>1</sup> Para 9 sch 10 Legal Services Act 2007

<sup>2</sup> s.53 Courts and Legal Services Act 1990 (which came into force in December 2004 (SI 2004/2950) immediately before publication of the Clementi Review)

<sup>3</sup> Para 56 page 123 of the Clementi Report

- The CLC was authorised to regulate probate services from August 2008<sup>4</sup> and issued its first probate licences in December 2008.
- The Licensing Rules 2009 and Regulation of Practices (Recognised Bodies) Rules 2009 came into force in March 2009. These rules:
  - permitted licensed conveyancers to become managers in SRA regulated entities;
  - extended the CLC’s power to regulate non-licensed conveyancer managers; and
  - changed the requirements so that only one licensed conveyancer is required to be a Manager in a CLC regulated entity, entities to select the most appropriate candidates (who may or may not be licensed conveyancers) as Managers.

4. As is apparent, the CLC has extended its regulatory powers incrementally over a number of years. The application to become a licensing authority and to extend the scope of services it regulates is a development of that approach.

**Non-reserved legal activities**

5. Our application stated that we are likely to expect Licensed Bodies offering non-reserved legal activities closely related to the reserved legal activities they undertake (such as will writing where they provide probate activities) to provide those activities through the regulated entity<sup>5</sup>. We believe this to be in the interests of consumer protection since consumers ‘assume that someone is making sure standards are being maintained’<sup>6</sup>.
6. This prompted comments from all three mandatory consultees. Both the LSCP and the LCJ supported our proposal to regulate non-reserved legal activities to the same standard as those which are reserved. The LSCP considered this to be aligned towards consumer expectation that all legal services are regulated, but noted that our intention to consider alternative approaches could lead to inconsistency and cause confusion for consumers. This concern was echoed by the LCJ.
7. The OFT has taken a different approach. It suggested that our application to become a licensing authority included provisions that ‘exclude the carrying out of unreserved legal activities unless they are performed within the licensed entity’ which may result in ‘the imposition of regulation that is not necessary to protect consumers, and creates a barrier to entry that limits competition’. The OFT also expressed concern that the application may give ‘the CLC undue discretion over what unreserved activities the licensed body can undertake’. It went on to suggest the insertion of a ‘sunset clause’ allowing for the relevant provisions to be reviewed at a later date ‘for any evidence of a detrimental effect on competition’.

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<sup>4</sup> SI 2008/1865

<sup>5</sup> Para 3.10 p.19 CLC LA Application

<sup>6</sup> Para 1.2 Legal Services Consumer Panel paper “Quality in Legal Services” published November 2010  
[http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/ConsumerPanel\\_QualityinLegalServicesReport\\_Final.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_QualityinLegalServicesReport_Final.pdf)

8. The CLC believes that the observations from the mandatory consultees should be considered in the context of the broader legal landscape. The Legal Services Institute has published two papers: one reviewing the history and rationale of reserved legal activities, and: the other suggesting the case for reserving specific legal activities<sup>7</sup>. In parallel the Legal Services Board has asked the Legal Services Consumer Panel to provide advice 'about the consumer interest in relation to the provision of will writing services'<sup>8</sup>. What is clear (and is not altogether unsurprising) is that no overarching policy considerations of the nature of the regulatory objectives (set out at s.1 Legal Services Act 2007) were formulated at the time legal activities began to be reserved in the nineteenth century.
9. Clearly, the CLC needs to have these factors in mind in determining how it should approach the regulation of reserved and non-reserved legal activities. In this context the CLC considers it is consistent with the regulatory objectives for it to take the factors identified at paragraph 5.31.2 (page 105 of its application) into account in determining whether to approve the arrangements proposed for the provision of reserved and non-reserved legal activities. Since the regulation of non-reserved legal activities is to a large extent a new departure for it, the CLC has decided to manage the delivery of non-reserved legal activities by the use of permissions endorsed on a licence. It believes this is a transparent and proportionate way to manage any associated risks.
10. As we state in our application 'we will operate a programme of systematic review to ensure that our regulatory arrangements remain up-to-date and relevant'<sup>9</sup>. Given that commitment, we do not consider that a 'sunset clause' is necessary.
11. The LSCP also asked some specific questions.

*How is a 'legal activity' defined?*

Please see s.12(3) of the Legal Services Act 2007.

*When is one legal activity 'closely related' to another?*

The approach the CLC proposes to take is whether, given the reserved legal activities which the applicant is proposing to provide, it is reasonable to expect the applicant to provide other (non-reserved) legal activities with those reserved legal activities.

*How will we monitor compliance?*

We will issue licences endorsed with authorisations, permissions and conditions. The permissions will specify the non-reserved legal activities the applicant is entitled to provide. Additional conditions may be imposed if we are satisfied that such conditions are required to mitigate any identified risk.

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<sup>7</sup> accessible at [http://www.legalservicesinstitute.org.uk/LSI/LSI\\_Papers/Institute\\_Papers/Institute\\_papers/](http://www.legalservicesinstitute.org.uk/LSI/LSI_Papers/Institute_Papers/Institute_papers/)

<sup>8</sup> Letter LSB to LSCP 9 September 2010 at [http://www.legalservicesconsumerpanel.org.uk/ourwork/will\\_writing/documents/20100909\\_LSBcommissioningletter.pdf](http://www.legalservicesconsumerpanel.org.uk/ourwork/will_writing/documents/20100909_LSBcommissioningletter.pdf)

<sup>9</sup> Para 2.55 p.15 CLC LA Application

We will approach the regulation of these activities as we do the reserved legal activities which we currently regulate. We will assess delivery of the Code of Conduct Outcomes through our monitoring programme.

*What criteria will we apply in considering alternative approaches?*

These are set out at paragraph 5.31.2, page 105 of our application. See also paragraph 8.11 of the Licensed Body (ABS) Licensing Framework (page 324-325 of our application).

### **Standard of proof**

12. The CLC's Regulatory and Enforcement Policies provide that the civil standard of proof (the 'balance of probabilities') is to be applied in regulatory determinations, other than if a criminal act is alleged (including fraud or dishonesty), in which case the test applied is 'beyond reasonable doubt'<sup>10</sup>. The LSCP expressed disappointment that the CLC had not decided to apply the civil standard. The LCJ agreed that it would seem appropriate for the CLC 'to move to a position commensurate with that of other regulators'.
13. The CLC's initial view was that the applicable standard of proof was by no means as clear cut as had been suggested by the mandatory consultees. However, the CLC considers it critical that the standard of proof it applies is the same as that applied by the First Tier Tribunal of the General Regulatory Chamber which will determine appeals against enforcement and other determinations made by the CLC as a Licensing Authority. Failure to do so would lead to confusion within the CLC regulated community and is likely to diminish the reputation of both the profession and the CLC because there may be a perception that appropriate enforcement action is not being taken against the regulated community if too low a standard of proof is applied.
14. The CLC has published a short consultation paper in which it proposes that the civil standard of proof (the balance of probabilities) should be applied in all of its regulatory proceedings and determinations.

### **Access to Justice**

15. In accordance with the Legal Service Board's guidance<sup>11</sup> our application committed us to requiring applicants to provide us with a statement outlining how licensing them would improve access to justice. We will also require our regulated community to provide us with an access to statement as part of the information which it is required to provide us on an annual basis and publish access to justice examples of good practice. The LSCP has welcomed both of these initiatives. As suggested by the LSCP, we shall consider further how we will analyse the overall impact of access to justice and communicate our findings externally

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<sup>10</sup> Para 2.23 p.10 CLC LA Application; para 2.2 p.255 & para 4.2 p. 259 (Regulatory Policy); para 2.6 p.265

<sup>11</sup> Para 41p.7 LSB Guidance

16. The LCJ considered that our proposal to refuse an application on the basis of access to justice only in exceptional circumstances failed to provide the necessary assurances for the protection of the public interest and the administration of justice.
17. The introduction of a regulatory objective targeted specifically at access to justice is new to the legal regulators, as it is to their communities. We anticipate that it will take a number of years before the impact of these reforms on access to justice can be effectively measured. The approach taken by the CLC in its application is consistent with the LSB's Guidance. We refer, in particular, to the LSB statement 'Since it is likely to be difficult for applicants [for an ABS licence] to predict the impact that they will have on access to justice in isolation, other than in exceptional circumstances, we would not expect a licence application to be refused on the basis of the response to this question'.<sup>12</sup> Over time, the LSB expects evidence to build up (by ARs, LAs and the LSB) that shows how access to justice changes.<sup>13</sup>

### **Consumer Engagement**

18. Our Corporate Strategy commits us to developing a comprehensive programme of research to increase our understanding about the attitudes of both consumers and the regulated community so that we can underpin and enhance our evidence-based policy approach<sup>14</sup>. We shall share our detailed plans with the LSCP as they emerge.

### **Professional Indemnity Insurance**

19. The OFT welcomed our proposal to allow entities to opt out of our Master Policy, but considered that it should be explicitly and clearly stated that this means insurance cover can be obtained on the open market. The Licensed Body Framework, a copy of which will be provided to all interested applicants, is clear that 'Licensable bodies can obtain cover through this or may arrange other cover. Should you choose to opt out of the CLC Master Policy you are required to obtain this cover from an authorised insurer.'<sup>15</sup>

### **Memorandum of Understanding (MoU)**

20. The LCJ expressed concern that our proposed arrangements lack substance, giving as an example the proposed Alternative Business Structure (ABS) Multi-Disciplinary Practices MoU which he says whilst intended 'to ensure consistency of approach between regulators only emphasises the risk of inconsistency'. We do not accept this. We have had MoUs in place with other regulators (including the SRA) for a number of years. In our experience they work well because they ensure there is a timely exchange of information on regulatory issues. S.54 Legal Services Act 2007 brings an element of consistency to these arrangements by requiring :

'the regulatory arrangements of an approved regulator [to] make such provision as is reasonably practicable and, in all the circumstances, appropriate—

(a) to prevent external regulatory conflicts,

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<sup>12</sup> Para 43 LSB Guidance

<sup>13</sup> Para 44 LSB Guidance

<sup>14</sup> Page 388 CLC LA Application

<sup>15</sup> Para 3.3 p.312 CLC LA Application

- (b) to provide for the resolution of any external regulatory conflicts which arise, and
- (c) to prevent unnecessary duplication of regulatory provisions made by an external regulatory body .

21. The SRA has also included a copy of the draft MoU in its licensing authority application<sup>16</sup>. The MoU in its current form has been developed following a series of workshops attended by all parties to the draft MoU, namely:

- Bar Standards Board
- Council for Licensed Conveyancers
- Financial Services Authority
- Institute of Chartered Accountants in England and Wales
- ILEX Professional Standards
- Intellectual Property Regulation Board
- Law Society of Scotland
- National Federation of Property Professionals
- Royal Institute of Chartered Surveyors
- Solicitors Regulation Authority,

as well as the LSB.

22. ABS will be authorised to provide a range of services (including legal services) and though a Licensing Authority will regulate the legal services provided by ABS, it would not, in the CLC's view, 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 is addressed by the most appropriate regulator.

23. The MoU also seeks to ensure there is a timely exchange of information about breach of regulatory arrangements, including fraudulent activity and dishonesty. This is consistent with the interests of the consumer and public, as well as the administration of justice.

#### **Limiting the number of Licensing Authorities**

24. The LCJ proposes that the number of Approved Regulators permitted to become Licensing Authorities should be limited, and that 'more established regulators...ought to regulate ABS in the first instance'.

25. As is apparent from paragraph 3 above, the CLC has regulated licensed conveyancers since 1988. The AJA provides a robust statutory framework which has enabled it to be an entity regulator, and, as set out above, it has regulated ABS within its regulatory area since 2000. Our regulatory approach and the arrangements we propose in our Licensing Authority application are focused on the regulatory objectives and the principles of good regulation (as required by s.28 Legal Services Act 2007).

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<sup>16</sup> Annex Q

26. The LCJ responded to the CLC's consultation papers in December 2010 saying that he opposed both of the CLC's proposed applications: the application to regulate litigation and advocacy services, and; the application to be designated a Licensing Authority. He viewed it as inappropriate that the CLC be licensed to regulate ABS carrying out these additional reserved legal activities (litigation and advocacy services). We queried this response. The LCJ's office replied stating that the LCJ's objections did not apply to the CLC's application to become a licensing body in respect of bodies providing conveyancing services. His concerns were raised in respect of litigation and advocacy services. We were advised that the LCJ reiterated the view that all regulatory regimes must operate in the public interest in the administration of justice, and not merely in the interests of the consumer.
27. Whilst we do not agree with the view expressed by the LCJ in relation to our application to regulate litigation and advocacy services (to which we will respond separately in the context of that application), we believe that the CLC's Licensing Authority application should be determined in accordance with the requirements of Part 5 of the Legal Services Act 2007 and separately from any other application it has made. We remain confident that the CLC has the competence and the capability as an innovative regulator to meet the challenges posed by the regulation of ABS and the implementation of a principles based and outcomes focused approach to regulation.