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LEGAL SERVICES CONSUMER PANEL

2 March 2011

Dear Emily

Application by the Council for Licensed Conveyancers to become a Licensing Authority

Thank you for your letter of 7 February inviting the Panel to provide advice on the above application. Under the Legal Services Act, the Panel is a mandatory consultee on applications from bodies to become licensing authorities. In deciding what advice to give, the Panel must, in particular, have regard to the likely impact on consumers of the Lord Chancellor making an order for designation as set out in the application.

Making an assessment of likely consumer impact does not lend itself to a precise formula. The Panel applies well established consumer principles – such as access, choice and redress – as reference points by which to analyse the issues. In addition, we identify the risks to consumers and the type and degree of possible harm, and then make a judgement as to whether the proposed arrangements are likely to promote access and offer sufficient protection. Finally, the regulatory objectives in the Legal Services Act underpin our assessment.

The CLC's application marks the end point of a consultation process in which the Panel has been actively engaged. We congratulate the CLC on the emphasis it has given throughout this process to delivering good consumer outcomes. The positive way in which the CLC has responded to our feedback has also been refreshing. Most noteworthy, at our suggestion the application includes a Client Charter, but there are other examples.

The Legal Services Board can only approve or reject licensing authority applications; it cannot impose conditions. The Panel supports the CLC's application, but we make some comments below in order to highlight concerns and issues which we would like the CLC to address in the future.

Reserved/non-reserved activities

The application states that non-reserved legal activities will be regulated to the same standard as those which are reserved. The non-reserved legal activities which a successful applicant can provide will be specified as permissions on the licence. The CLC is likely to expect applicants offering non-reserved legal activities closely related to the reserved legal activities they propose to undertake (such as will writing where they provide probate activities) to provide those activities through the regulated entity. Where the applicant proposes otherwise, the CLC we will expect them to explain why they consider such an approach to be in the best interests of consumers and how they intend to address any risks identified.

The Panel supports regulating non-reserved legal activities to the same standard as those which are reserved, as this aligns towards consumer expectations that all legal services are regulated. Consumers cannot be expected to untangle the finer niceties of regulatory boundaries. It would be a recipe for confusion if an entity was, for example, insured for defective probate work but not for writing a defective will.

The Panel also supports the expectation that licensed bodies should offer reserved and non-reserved work through the same entity, as it aims to prevent entities from dodging regulation by establishing a separate business. This policy has apparent parallels with the separate business rule operated by the Solicitors Regulation Authority, which the Panel also supports. However, the CLC's intention to consider alternative approaches could lead to inconsistency and cause confusion for consumers. We recall an example given by the Legal Ombudsman of someone who went to his solicitor to get a will written. He was shown next door and introduced to someone who he was told would take care of the matter. It was only some time later when he realised that in that short walk from one building to the next, he was moving from a regulated to an unregulated environment.

The CLC's proposals also raise a series of practical questions. How is a 'legal activity' defined? When is one legal activity 'closely related' to another? How does the CLC intend to monitor compliance? What criteria will the CLC apply in considering alternative approaches? The Panel hopes the CLC will develop further its policy approach on these questions and ensure the regulatory framework is transparent and easy to understand for consumers.

Standard of proof in disciplinary hearings

The application states that all formal enforcement decisions will be determined applying a sliding scale standard of proof ranging from the 'balance of probabilities' where the allegation (if proved) is less serious and is likely to lead to little (if no) loss to the consumer and minimal adverse impact on the rest of the profession, to 'beyond reasonable doubt' where the allegation is serious, particularly where dishonesty is alleged (the exception being intervention). Following informal enquiries made by the Panel, the CLC has issued a supplemental paper to the application

stating it does not intend to review the current formulation of the standard of proof set out at rule 12 of its disciplinary procedure rules.

The Panel was disappointed by the supplemental paper, which is very legalistic focusing on case law rather than considering the merits of the competing approaches and deciding which route would most likely improve consumer outcomes. We are also surprised that the CLC is not minded to review its policy given that ILEX currently uses the civil standard, the SRA uses the civil standard for its own disciplinary hearings (i.e. cases not referred to the SDT) and the Bar Standards Board has announced a review which will look at whether it should change to the civil standard. The lack of consistency with other approved regulators is concerning in the context of regulatory competition, as there is a risk that licensable bodies will be attracted to the regime which makes it harder for the licensing authority to take disciplinary action. The SRA Board rejected the argument that lawyers required a higher standard of proof in their disciplinary proceedings. Moreover, as the SRA has highlighted, the trend in other sectors is towards the civil standard, for example, in the medical, teaching and accountancy professions.

The Panel considers the civil standard of proof should apply in all disciplinary hearings. The underlying purpose of disciplinary proceedings is public protection, which could be frustrated if a licensing authority is unable to take action, or is unsuccessful in so doing, because the evidentiary burden is disproportionate. Another aspect of proportionality is that cases prosecuted using the criminal standard of proof are likely to take longer and be costlier. A failure to enforce rules could leave consumers at continued risk of detriment and undermine public confidence in the regulatory system. Whilst the impact on the practitioner concerned must also be considered, CLC action would not affect the person's liberty. Furthermore, elsewhere the civil standard of proof is regularly used in serious cases that have a major impact on individuals and businesses. These points were made by the SRA when it gave detailed consideration to this issue at its December 2009 Board meeting.

Access to justice

The application states that licensable bodies will be required to provide the CLC with an Access to Justice Statement explaining how the entity will respond to the needs of consumers and improve the public's access to justice opportunities. An application may be declined on the basis of access to justice, though this is likely to be only in the most exceptional circumstances.

The Panel welcomes the requirement on licensable bodies to set out how their application would improve access to justice. It is important to remember that the Act makes this a positive duty – to improve. We also welcome the requirement for licensed bodies to make an annual declaration of how access to justice has been improved and the CLC's intention to draw attention to good practice. However, it is also important that the CLC monitors the impact on access to justice of its ABS regime as a whole, not just at an individual entity level. Over the next period, we

would like to see the CLC give more thought to how it will analyse this overall impact and communicate its findings externally.

Consumer engagement

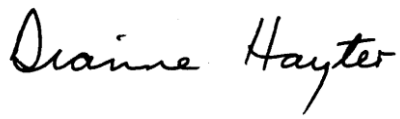
The application includes a commitment in the Corporate Strategy to develop a 'comprehensive programme of research to increase our understanding about the attitudes of consumers (including the changing dynamics around the ways in which the public interest is conceived) and the regulated community in order to underpin and enhance our evidence based approach to policy making'. Whilst this is a very welcome statement, the Business Plan 2011 does not refer to specific consumer engagement activities that would enable the CLC to deliver on this commitment.

Following informal enquiries made by the Panel, the CLC has informed us that allocation of resources for its proposed consumer engagement work is intentionally not explicit in order that it has flexibility. It is developing an Access and Engagement Strategy and does not know the extent of resources needed; however flexibility is provided under the professional fees, communications and staff costs and in particular, later this year it will be realigning resources to support the delivery of the priorities in the Business Plan. In addition, the Panel is aware that the CLC is participating in the joint regulators' initiative to create a public network.

The Panel is encouraged by these developments and looks forward to seeing more detailed plans as they emerge.

Please contact Steve Brooker, Consumer Panel Manager, for enquiries in relation to this submission.

Yours sincerely,



Dr Dianne Hayter
Chair