



**LSB Discussion Paper  
Alternative Business Structures:  
approaches to licensing**  
The CLC's response  
February 2010

## **The CLC's response to the LSB's Consultation Paper Alternative Business Structures: approaches to licensing**

### **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 of the 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 under which regulatory activities appearing to it to represent the best regulatory practice.

### The purpose of the CLC

3. To set entry standards and regulate the profession of Licensed Conveyancers effectively in order to:
  - secure adequate consumer protection and redress;
  - promote effective competition in the legal services market; and
  - provide choice for consumers.
  
4. The CLC welcomes the opportunity to respond to the LSB's discussion paper on the approaches to licensing Alternative Business Structures.

### Alternative Business Structures and the CLC

5. The CLC has had no restriction on the ownership of its regulated entities since its Recognised Bodies Rules 2000 came into force. Those Rules required the Chairman and not less than half of the directors to be licensed conveyancers. Since 31 March 2009 all practices regulated by the CLC have been designated 'recognised bodies'. At least one of the Managers of a recognised body must be a licensed conveyancer. Approximately a quarter of the practices we regulate already have managers/owners who are not licensed conveyancers or approved persons. The CLC has in fact – if not in name – been regulating Alternative Business Structures providing conveyancing services for the last decade.
  
6. We remain committed to applying to become a Licensing Authority so that it can continue to regulate those practices which will become Alternative Business Structures.

## Consultation Questions

### Question 1 – What is your view of basing the regulation of ABS on outcomes?

7. We agree that there should be a principles approach to regulation of ABS based on outcomes, rather than on the current narrow base of prescriptive rules. We accept that this will be challenging for the regulated community which will have to understand the professional principles and how they should be applied to the delivery of legal services.
8. It will encourage regulators to adopt a proportionate approach, targeting those who consistently or significantly fail to deliver such outcomes for consumers, rather than taking steps against all the providers who have not complied with the minutiae of a prescriptive set of rules. This is in keeping with the risk-based approach which the CLC is currently adopting.
9. Our regulatory framework will identify standards we expect those we regulate to achieve/maintain derived from the professional principles, supplemented by guidance. This provides the regulated community with flexibility in complying with the professional principles resulting in more consistent and positive outcomes for consumers.
10. The CLC has already taken steps towards an entity based approach to regulation, whilst acknowledging that it is appropriate in particular circumstances to take disciplinary action against individuals whose conduct harms (or risks harm) to consumers or adversely affects (or risks having an adverse affect) on the profession.
11. Resulting from our experience to date of entity based regulation, particularly of 'partial ABS' recognised bodies, we agree it is extremely helpful for entity level considerations to include business planning and wider finance issues such as cash flow forecasts to understand inherent risks in the proposed business model. We consider that such an approach is consistent with the outcome of maintaining similar consumer confidence in ABS firms as other non ABS firms regulated by the CLC.

### Question 2 – Do you think our approach set out for the tests for external ownership is appropriate?

11. We agree that the tests for external ownership should be consistent across the LAs and broadly agree the approach taken in the Consultation Paper, subject to some comments:
  - We suggest that consideration should be given to a further amendment to SI 1975/1023 which specifies those professions which are exempted from the Rehabilitation of Offenders Act 1974 to ensure that all Authorised Persons and those participating in ABS either are or are not exempted.
  - The CLC has replaced the requirement for a covenant with a rule entitling the CLC to take proceedings against Managers to recover any grant made out of the Compensation Fund who have contributed "intentionally, recklessly or negligently" to the loss suffered by the Claimant. We prefer this approach because

- it does not require the CLC to ensure that covenants in the correct form have been made;
  - it is directed only against those who are culpable; and
  - it provides an incentive for Managers to ensure run off cover is taken out when a practice is closed.
12. We accept that it may not be appropriate for LAs to consider management competence as part of the granting of licences to ABS. However, it seems to us to be inconsistent with the concept of entity based regulation for the LAs not to require an ABS to address inadequacies in its management capability if the LAs has evidence from its ongoing supervisory activity that such inadequacies are the major contributor to negative outcomes for consumers.

**Question 3 – Do you have views on how indemnity and compensation may work for ABS?**

13. CLC regulated Practices are required to take out Professional Indemnity Insurance through the Master Policy and to make contributions to the CLC's Compensation Fund (which acts as a fund of last resort). Grants may be made out of the Compensation Fund in respect of loss suffered as a result of negligence on the part of licensed conveyancers, as well as dishonesty.

We remain concerned at a number of issues across the legal services market:

- The level of professional indemnity insurance varies depending on a practitioner's regulator, rather than on the particular service provided;
  - The fact that only the CLC and the SRA administer Compensation Funds appears to be determined by an accident of history, rather than any policy considerations. We accept that establishing a Compensation Fund for any other legal regulator may be challenging, if not impossible.
  - The cost of obtaining run off cover appears to be a significant barrier preventing practices transferring from one legal regulator to another.
14. We accept that the protection afforded to clients by the CLC might be characterised as gold-plated, and that appropriate consumer education might in some instances justify relaxing that protection. We are concerned that to date insufficient evidence has been gathered nor have appropriate policy solutions been proposed to justify altering the status quo within the market. We are of the view that there is a significant risk that an opportunity for a root and branch review will be missed, given the imperative for the first ABS licences to be issued by mid 2011.

**Question 4 – Do you agree with our position on reserved and non-reserved legal activities?**

15. We agree that ABS should be treated in a consistent way to non-ABS and that all legal activities undertaken by an ABS should be regulated. It is likely that ABS regulated by the CLC will be subject to additional regulation compared to current non-ABS regulated by the CLC unless changes to the legislative framework are implemented to enable the CLC to regulate all legal activities undertaken by all its regulated firms.
16. Furthermore in order to support the achievement of this outcome, the CLC in its consultation paper on its intended application to regulate licensed conveyancers in the exercise of rights of audience and the conduct of litigation (at [www.clc-uk.org](http://www.clc-uk.org)) published at the beginning of February 2010, announced its intention to apply for amendment of the Administration of Justice Act 1985 “so that it regulates licensed conveyancers in the provision of any legal service they provide” (paragraph 41).
17. We expect LAs to focus on raising consumer awareness as education undoubtedly has a part to play in clarifying for consumers the distinctions between activities which are regulated and those which are not. We agree with the Law Society that there is scope for widening what is considered to be reserved legal work so as to provide greater consumer protection.
18. To ensure that licensed conveyancers continue to deliver consistently high standards we have further proposed in our consultation paper that we should be empowered to issue separate licences enabling licensed conveyancers and CLC regulated Practices for different reserved legal activities (Reserved Instrument Activities, Probate Activities, the Exercise of a Right of Audience, the Conduct of Litigation), rather than issuing blanket authorisation to provide all these reserved legal activities. We anticipate that such a requirement will not apply to the Administration of Oaths, since we have not identified the same scope for consumer detriment in the provision of this service.

**Question 5 – Are the enforcement powers for LAs suitable?**

19. We agree that the maximum penalty a LA can award should be unlimited, subject to the requirement to act proportionately. In our view the proposed enforcement powers for LAs will be sufficient. We are developing an Enforcement Policy to provide clarity in the way the CLC’s enforcement powers will be applied.

**Question 6 – What do you think of our approach to access to justice?**

20. We agree that there should be a wide definition of access to justice, and observe that there appears to be no common accepted definition. We further agree that LAs should monitor access to justice and to that extent it is appropriate for LAs to ask ABS on application how they propose to improve access to justice. We consider that it is impractical to try to meaningfully assess the impact of access to justice on a application by application basis, since that can only be measured by reference to the supply of all legal services by entities regulated by different ARs and LAs over a period of time.

**Question 7 – What is your view of our preference for a single appeals body?**

21. The CLC is in favour of a single appeals body. This will ensure consistency in decision making across the Licensing Authorities. We consider the GRC is an appropriate body to hear appeals.

**Question 8 - Do you agree with our approach to special bodies?**

22. The CLC believes it is in the interests of consumers for special bodies to meet the same standards as other providers of legal services. Complaints about special bodies should be dealt with in the same way as it will be for other legal service providers. We agree in principle that the contribution of special bodies to the costs of regulation should reflect the fact that they are not for profit organisations. We also agree the proposal that special bodies should be allowed 12 months after the start of mainstram ABS to gain a full licence.

**Question 9 – Do you think that our approach to HoLP and HoFA is suitable?**

23. We agree the LSB's approach, specifically, the proposal to focus on compliance systems. In principle, we agree that HoLP and HoFAs should undergo a fit and proper test, though we believe that it should be for individual LAs to determine any training requirements. In some smaller organisations it will be inevitable that the HoLP and HoFA are the same individual.

**Question 10 – Do you think that our approach to complaints handling is suitable?**

24. Yes. In addition we do not foresee a problem with allowing an ABS to adapt their complaint handling systems if they already have one for their non-legal services consumers because the ABS is still expected to deliver the same outcome as other market providers on this issue.

**Question 11 – What are your views on our proposed course of action to conduct research and, depending on the results, either compel transparency of data or encourage it?**

25. We acknowledge that the opportunities afforded by ABS may well have positive diversity implications in opening up new career progression paths. Research will be required to track changes. We can see that there is a case for ABS to publish diversity data, but are not convinced that such differential arrangements should be imposed on ABS alone.
26. We are not in a position to predict what effect ABS may have on small firms, nor whether any adverse impact will, either wholly or partially, be offset by the opportunities for career progression offered by ABS.

**Question 12 – Do you agree with our approach to international issues?**

27. The Practices currently regulated by the CLC are only entitled to provide conveyancing and probate services in England and Wales. We are not therefore in a position to comment.

**Question 13 – Should LDPs, Recognised Bodies and other similar firms have transitional arrangements into the wider ABS framework in the way we propose?**

28. We agree the LSB's proposal for transitional arrangements. We believe that a 12 month transitional period is likely to be sufficient.

**Question 14 – Should ABS licences be issued for indefinite periods?**

29. Yes. With regard to annual charging process, our preference is for it to be broadly cost reflective which is similar to our currently proposals for non ABS CLC regulated practices. The CLC has recently issued a consultation paper on Licence and Practice Fees. One of the proposals is that Practice Fees should be linked to turnover, so whilst the basis on which the fee payable may be fixed, the actual sum payable by each ABS will be determined on turnover which may be varied from year to year.

The CLC anticipates applying a number of different risk-based measures to determine compliance, including declarations made by the senior management of the ABS through annual returns coupled with confirmation from the HoLP and HoFA.

**Question 15 – Do you agree with our approach to managing regulatory overlaps?**

30. Yes.

**Summary**

31. We support the progress made by the LSB to date and as we have indicated are committed to becoming a licensing authority, though important issues still need to be resolved, such as indemnity and compensation arrangements.