



**Application to regulate
Advocacy and Litigation Services
CLC representations
July 2011**

The CLC's application to regulate Advocacy and Litigation Services – the CLC's response to the issues raised by the mandatory consultees

Summary

The CLC is grateful for the positive and supportive responses received from the Office of Fair Trading and the Legal Services Consumer Panel. We do not accept the objections raised by the Lord Chief Justice. We believe that the CLC has the competence and capability to regulate litigation and advocacy services, demonstrated by its good record of effectively regulating entities delivering other reserved activities.

We are, however, content for our application to be granted on condition that licences to provide advocacy and litigation services are issued initially only to those CLC regulated entities which have Authorised Persons permitted to provide litigation and advocacy services (such as solicitors and barristers) as managers. We are satisfied that this alternative arrangement is consistent with the incremental approach in our application which provides an appropriate balance: ensuring appropriate public protection whilst permitting supplier diversity and innovation in legal services delivery.

Once approval has been given, we expect to work with Nottingham Law School and NARIC expanding on the proposals set out in Annex H of our Application for the development of a robust education and training scheme from autumn 2014 or earlier (depending on the condition imposed by the LSB) for aspiring licensed conveyancer advocates and litigators. We shall keep the LSB informed of progress, consult and seek approvals, as required.

Introduction

1. In February 2011 we applied to the Legal Services Board (LSB) to become an Approved Regulator authorised to regulate Advocacy and Litigation Services.
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.¹

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

¹ Para 11 sch 4 Legal Services Act 2007

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 activities².
 - 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".³
 - The Legal Services Act 2007 was enacted in October 2007.
 - Following advice from the Legal Services Consultative Panel, the CLC was authorised to regulate probate services from August 2008⁴ and issued its first probate licences in December 2008.
 - The LSB has approved the CLC's Licensing Authority application and, subject to approval by the Lord Chancellor and the making of the designation order, the CLC anticipates issuing ABS licences from 6 October 2011. As part of that application the LSB concluded "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"⁵.
4. The CLC has extended its regulatory powers incrementally over a number of years. The CLC considers its application to extend the scope of services it regulates a logical development of that approach.

CLC's Competence and Capability to regulate Advocacy and Litigation Services

5. The CLC's Competence and Capability to regulate Advocacy and Litigation Services is evidenced as follows:
- The CLC has regulated conveyancing services since the late 1980s and probate services since 2008

² 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)

³ Para 56 page 123 of the Clementi Report

⁴ SI 2008/1865

⁵ Para 2.7 annex 2 LSB Decision Notice at

http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/clc_decision_notice.pdf

- The CLC has regulated entities since its inception
- The CLC has established Professional Indemnity and Compensation Fund arrangements
- The LSB has approved the CLC's Code of Conduct and supporting regulatory arrangements introducing a principles based and outcomes focused approach to regulation
- The LSB has approved the CLC's Licensing Authority application and made a recommendation to the Lord Chancellor that it should be designated a Licensing Authority
- The grant of incremental permissions and the anticipated slow start to granting licences to provide advocacy and litigation services means that we will have the time and opportunity to build on our experience
- We will also bring in such experience by recruitment.

Advice from the Office of Fair Trading and the Legal Services Consumer Panel

6. In its response of 5 April 2011 the Office of Fair Trading concluded "we advise that we find no evidence or theory to suggest that the CLC becoming an approved regulator to award rights to conduct litigation and rights of audience to members of the CLC would (or would be likely to) prevent, restrict or distort competition within the market". It believes that allowing the CLC's Application "could act as an alternative supply to solicitors in the conduct of litigation and solicitors and barristers for advocacy services in court proceedings. This could, potentially, place competitive pressure on the pricing of these services and broaden access to justice".
7. In its response of 21 March 2011 the Legal Services Consumer Panel commented that it considered the CLC's proposed incremental approach to be sensible. It suggested that:
 - what appeared to be missing in the CLC's proposals is an external and independent check on the technical competence of litigation and advocacy work.

CLC Response: the CLC's Application makes it clear that it expects to rely on external advisers supplemented by the recruitment of at least one new full-time employee to oversee the provision of the necessary experience in assessing evidence of practical training, monitoring litigation and advocacy licence-holders and assessing the quality of supervisions (7(a) page 29).
 - customer feedback should form part of assessing competence in order to achieve consumer outcomes such as explaining matters clearly and good client care.

CLC Response: We agree and will ensure that processes are developed for obtaining consumer feedback.
 - It is hoped that the CLC's arrangements will eventually become fully integrated into QAA since a multiplicity of schemes risks confusion, inconsistent levels of protection and unnecessary cost.

CLC Response: We agree that in principle the CLC's arrangements should become fully integrated into QAA. That is, however, dependent on the CLC being satisfied that the LSB endorses the QAA as a scheme which offers proportionate and cost effective delivery of relevant outcomes.

8. The Consumer Panel welcomes the CLC's approach to regulating non-reserved legal services which reduces the risk to consumers within the limitations of the regulatory framework. It commented that it believed that a combination of measures – the narrow and incremental permissions process, enhanced rules in the code of conduct and clear information to consumers – should support quality control and promote informed consumer choice.

Advice from the Lord Chief Justice

9. In his response of 27 May 2011 the LCJ refers to his letter of 17 December 2010 and states "My views have not been subject to any material change in the period between December 2010 and now. In my view the conduct of litigation and rights of audience and rights of advocacy are activities which lie outside the proper sphere of activity of a licensed conveyancer. For the reasons set out in the attached letter I oppose the CLC's application in its entirety".

10. The LCJ raises two preliminary points:

- the conduct of litigation and rights of advocacy is outside the proper sphere of activity of a licensed conveyancer...The CLC was established to regulate conveyancing services; litigation and advocacy services are completely unrelated activities.

CLC's Response: as explained at paragraph 3, section 53 Courts and Legal Services Act 1990 makes specific provision for the CLC to regulate advocacy and litigation services. In introducing the amendment to the House of Commons the Solicitor General said that it was necessary to amend the AJA "to enable the Council to pursue applications for authorisation or approval". He explained that the purpose of the amendment was to place the CLC "on the same footing as other bodies able to seek authorisation in due course".⁶

We are confident that that the CLC has the necessary competencies and capabilities to be able effectively and efficiently to regulate litigation and advocacy services (see paragraph 5).

- "I am unable to identify a strong public interest in [an extension of the CLC's regulatory scope]...In my view access to justice is adequately provided through ILEX's scheme, there is little justification for a parallel scheme administered by the CLC"

⁶ <http://hansard.millbanksystems.com/commons/1990/jul/25/the-council-for-licensed-conveyancers>

CLC's Response: the statutory objective is "protecting and promoting the public interest". In its paper "The Regulatory Objectives"⁷ the LSB identified 3 elements to the public interest objective:

- "the public interest is best served through a properly regulated legal services market compatible with the regulatory objectives contributing to properly maintaining confidence in the legal system"(paragraph 6) – the CLC's application is supported by its new Code of Conduct and regulatory arrangements evidencing a principles based, outcomes focused approach to regulation.
- "a commitment to transparency" (paragraph 7) – the CLC is fully committed to transparency as evidenced in particular to the steps it has taken to consult with the profession and other stakeholders before implementing its new regulatory arrangements and making its Licensing Authority and extension of scope applications.
- "the principle of separation of regulation and representation within the approved regulators is key to this objective" (paragraph 8) – unlike the Law Society, the Bar Council and ILEX, the CLC was established by statute with an exclusive regulatory function. There has been no representative role to separate from its regulatory function.

More recently, the following definition has been offered:

The public interest concerns objectives and actions for the collective benefit and good of current and future citizens in achieving and maintaining those fundamentals of society that are regarded by them as essential to their common security and well-being, and to their legitimate participation in society.⁸

We believe that our objectives in making this application are entirely consistent with this definition. We shall provide a system of regulation which delivers the same level of safeguards as are currently delivered by the other legal regulators. We are aiming to do so innovatively, the combined effect of which will be, not only to broaden the range of legal providers, but also to increase the collective benefit and good to current and future citizens.

ILEX's scheme covers only the awarding of rights of audience and rights to conduct litigation to Associate Prosecutor members, its other applications to extend the scope of activities it regulates having been withdrawn by letter dated 14 July 2011⁹.

11. The LCJ then endorses the concerns set out in the response of the Law Society to the CLC's Consultation Paper. Our response to those issues is set out in the Annex.

⁷ Accessible at

http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf

⁸ Legal Services Regulation and 'the Public Interest' Legal Services Institute accessible at

http://www.legalservicesinstitute.org.uk/LSI/Legal_Services_Regulation_and_the_Public_Interest/

⁹ Accessible at

http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/passmore_14_july_2011.pdf

Incremental Approach

12. The CLC's proposed incremental approach to the regulation of litigation and advocacy provides the appropriate balance by protecting the interests of the public, maintaining high professional standards and encouraging supplier diversity in legal services.
13. The CLC is mindful of the concerns of other stakeholders, although as indicated earlier in this response, it is satisfied that its arrangements adequately mitigate those concerns.
14. However, in the interests of enhancing stakeholder confidence in its arrangements, the CLC is prepared to extend the scope of its incremental approach to the regulation of litigation and advocacy.
15. The CLC is willing to consider an approval from the LSB which permits the regulation of CLC regulated entities providing litigation and advocacy services. Only Authorised Persons entitled to provide litigation and advocacy services would be permitted to be managers in these entities (licensed conveyancers would only be permitted to be managers for the purpose of delivering conveyancing and probate services).
16. With this approach public confidence is maintained through the double wrap of regulatory protection by combining the CLC's track record of regulating entities with the experience of other Approved Regulators, in particular of the SRA and BSB, in regulating Authorised Persons in the provision of such services.
17. Subject to a satisfactory review of the CLC's performance as a regulator of entities providing litigation and advocacy services and the necessary approvals, the CLC intends to regulate licensed conveyancers who meet its educational and training requirements in the provision of litigation and advocacy services.

Annex

Response to the issues raised by Law Society

1. The CLC does not have the competence or the experience to regulate litigation and advocacy work

CLC Response: As set out in its Application (8(j) page 33), the CLC lacks a track record in regulating the new reserved legal activities. We do not believe that this can be a valid objection on its own, given that Parliament intended as long ago as 1990 that the CLC could apply to regulate litigation and advocacy without prior experience.

The CLC believes that the grant of incremental permissions and the anticipated slow start to granting new licences means that we will have the time and opportunity to acquire the necessary experience. We will also bring in such experience by recruitment.

We have a track record of successfully creating a new regulatory regime and expanding our regulatory remit without any prior experience in the area in question (ie conveyancing and probate licences respectively).

2. The scope of the academic and vocational stages of education is not sufficiently broad to form a basis for litigators and advocates

CLC Response: As set out at Annex H to its Application, the CLC proposes over a number of years to develop a comprehensive academic and training framework for licensed conveyancers in the delivery of advocacy and litigation services. This will include extending the range of legal areas studied and developing skills, qualities and attributes relevant for licensed conveyancers providing litigation and advocacy services to ensure that similar outcomes are achieved for the public relative to other Authorised Persons such as solicitors and barristers.

3. The public is not well served by a regulator whose lack of expertise results in a lowering of standards

CLC Response: There is no evidence that the CLC's lack of expertise in regulating legal services prior to the regulation of conveyancing resulted in a lowering of standards. The CLC already has a longstanding and robust framework for regulating the provision of legal services to consumers with comprehensive client protection measures. It operates in a practice area where client money-handling and client service delivery are critical issues. It is therefore not correct to imply that lack of experience in regulating a particular area of legal practice means that the CLC lacks expertise in maintaining appropriate standards in the public interest. The CLC is building on its experience in regulating other areas of legal practice to inform how it regulates litigation and advocacy services.

On the contrary the CLC recognises that its experience in maintaining a singular focus on protecting the interests of consumers as a statutory regulator without any professional self interest presents a risk that its lack of experience may lead to setting disproportionate higher standards (or a perception that standards have been

set too high) in determining its approach to the regulation of advocacy and litigation services. To mitigate that risk:

- changes will be introduced over a period of time
- we will benchmark and align our approach with other relevant regulators where appropriate
- we will build on the existing framework:
 - by the development of incremental permissions
 - through the education and practical training stages
 - through our arrangements for post-licensing mentoring and monitoring
- further permissions will only be granted upon proof of satisfactory experience and competence
- our register will show the competencies of a licensed conveyancer and recognised body
- we will publish the benefits of our approach to granting these new licences.

Additional queries

- (a) how will monitoring processes be altered to take into account the delivery of advocacy and litigation services**

CLC Response: We shall monitor the utilisation of the new practising entitlements of litigation and advocacy holders on an annual basis for the first five years after acquiring a full licence (thereafter it may be a triennial requirement). The monitoring will take the form of a series of questions in an annual return (to include quantification of the new litigation matters opened in the previous 12 months). This information will form part of our risk assessment of CLC practices and licensed conveyancers. We shall publish guidelines as to how the risk assessment will operate.

We shall also engage Legal Practice Inspectors with specific knowledge and experience of advocacy and litigation to inspect and quality assure the conduct of individual matters. This extension of our current approach to transactional risk management is unique as a regulator in legal services.

- (b) the CLC has not demonstrated that it has a full grasp of the complex issues involved with regulating varied areas of legal work, nor that it is capable of regulating in this area**

CLC Response: We believe that our application more than adequately answers these concerns.

- (c) where different areas are regulated the CLC will need to ensure that a public register is available outlining which area individual Licensed Conveyancers are allowed to practice in to ensure that the consumer is fully informed**

CLC Response: The CLC will publish a register with this information (see 5(d) page 26 of the CLC's Application).

- (d) **the CLC's Code of Conduct would need to be amended to reflect their duty to the Court**

CLC Response: Principle 4 of the CLC's Code of Conduct requires Licensed Conveyancers to comply with their duty to the Court (see Annex F of the CLC's Application to the LSB).

- (e) **the CLC does not undertake CRB checks to verify information provided by those applying for a licence**

CLC Response: the CLC has been in discussions with both the LSB and the Ministry of Justice (particularly in relation to its Licensing Authority application) for the Exceptions Order to the Rehabilitation of Offenders Act to be extended to include Licensed Conveyancers (contrast solicitors, barristers and legal executives who are included).

The CLC has regulated Licensed Conveyancers and CLC regulated practices since 1988 without being able to carry out CRB checks. It agrees that having the exception is desirable and helpful. To mitigate the absence of CRB checks the CLC has developed thresholds combined with a triangulation approach (cross-checking of data) which the CLC is confident will provide sufficiently robust protection for consumers.

Furthermore, the types of offences which raise the most concern (such as dishonesty related) only become spent some considerable time after the offence, and so are likely to be discloseable in any event.

- (f) **the CLC is premature in developing qualification arrangements for Licensed Conveyancers wishing to exercise rights of audience given the joint regulators current Quality Assurance for Advocates consultation**

CLC Response: the Quality Assurance Scheme is designed for criminal advocates. As it has made clear in its application, the CLC is not seeking to regulate Licensed Conveyancers as criminal advocates. It is willing to participate in a Scheme appropriately endorsed by the LSB directed to civil advocates.

- (g) **limited details are given about the period of practical training**

CLC Response: We anticipate replacing the time served element of the practical training requirements with a set of outcomes. See further 4(d) page 22 of the CLC's Application.

- (h) **no detail is given about the supervision requirements:**

- **who will supervise individuals undertaking training and**
- **how will the CLC be satisfied that the outcomes are met**

CLC Response: We will ensure that a qualified person has sufficient experience to provide supervision of an appropriate quality. We shall achieve this by requiring qualified persons to apply for the status of supervisor before they are entitled to supervise (and we will keep a register of qualified persons). We will

publish guidelines underpinned by an issue of principle: the qualified person must have:

- experience of practice as an authorised person, and
- experience in a relevant area of practice (see further 4(d)(iii) page 23 of the CLC's Application).

We have not determined finally how we will be satisfied that the outcomes are met. We anticipate this will be achieved by the trainee submitting to the CLC a completed log (in a form approved by the CLC) evidencing their experience and how this satisfies the prescribed outcomes certified by the supervisor. The log will be quality assured by the CLC. We expect to rely on external advisers supplemented by the recruitment of at least one new full-time employee to oversee the provision of experience and judgment (see further 7(a) page 29 of the CLC's Application).

- (i) there is a potentially confusing system for the provision of the core academic and vocational stages of training – how can the CLC assure quality and how can CLC ensure that course providers will allow this piecemeal approach**

CLC Response: we are confident that proposals we have made constitute a single coherent programme. The development of an outcomes approach to learning and training underpinned by guidelines will enable individuals to qualify as licensed conveyancers in a variety of ways without risk of harm to the consumer. We believe this is a natural iteration of the work being carried out by the CLC, as well as other legal regulators.

- (j) the CLC should consult again when it intends to implement higher rights accreditation scheme**

CLC Response: Agreed.

- (k) the short timescale for implementation is challenging**

CLC Response: The CLC agrees that the timetable is challenging, but is confident that it is achievable. The CLC has already demonstrated with its application to become a licensing authority that it is fleet of foot and able to meet similar challenging timescales.