



Legal Services Board – Decision Notice issued under Part 2 of Schedule 4 and Part 1 of Schedule 10 to the Legal Services Act 2007

1. The Council for Licensed Conveyancers (CLC) made an application to the Legal Services Board (LSB) under the Legal Services Act 2007 (LSA2007) for the LSB to make a recommendation to the Lord Chancellor that an order be made designating the CLC as an approved regulator in relation to the reserved legal activities of the conduct of litigation and the exercise of a right of audience. It also made an application to be designated as a licensing authority for the same activities. CLC also sought approval of the related regulatory arrangements.
2. **The LSB has not granted these applications on the grounds that the CLC lacks the legal power to make rules and regulations that would allow it to authorise entities for these activities and failed to demonstrate an appropriate understanding of the specific risks of the new activities. Therefore the LSB was unable to conclude that it was satisfied that the test in paragraph 13(2) of Schedule 4 (in relation to the AR application) had been met. Since the application relating to the CLC as approved regulator is not being granted, then the CLC's application for designation as a licensing authority must also be refused as the LSB is not satisfied that the test in paragraph 11(2)(d) of Schedule 10 is met.**
3. As the applications are not being granted the proposed regulatory arrangements and the proposed licensing rules for these activities are not approved.
4. This Decision Notice sets out the basis for the LSB decisions.

Authority for the decision

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

Background

6. Part 2 of Schedule 4 to the LSA2007 contains provisions allowing bodies (applicants) to apply to the Legal Services Board for a recommendation to the Lord Chancellor that the applicant be designated as an approved regulator for one or more reserved legal activities listed in s12 of LSA2007. Applicants may be new entrants (i.e. bodies who are not currently approved for any of the reserved legal activities) or an existing approved regulator.

7. The CLC is an existing approved regulator for the reserved legal activities of reserved instrument activities, probate activities and the administration of oaths. It made an application to the LSB in February 2011 seeking a recommendation to the Lord Chancellor for the additional reserved legal activities of conduct of litigation and exercise of rights of audience.
8. The application was also for the CLC to be designated as a licensing authority for the same reserved legal activities. At the same time that this application was submitted, CLC had made an application to the LSB for a recommendation for designation as a licensing authority for the activities for which it was already an approved regulator. That licensing authority application was granted on 9 May 2011 and the CLC were designated as a licensing authority on 12 September 2011.

Issues arising from the assessment of the application

Power to make the necessary arrangements

9. In its applications, the CLC noted that the Administration of Justice Act 1985 (AJA1985), as amended by the Courts and Legal Services Act 1990 (CLSA1990), may not permit the CLC to authorise and supervise recognised bodies for conduct of litigation and/or the exercise of the rights of audience. The application stated (page 8) “If we receive designation, it is possible that s32(1)(ba) [of the AJA1985] will need to be changed to reflect this, using the mechanism under s69 of the 2007 Act”.
10. As a body created by statute, the CLC only has the powers given to it in statute (as amended). In making any recommendation to the Lord Chancellor, the LSB needs to be satisfied that the applicant is lawfully able to do that which has been applied for. Given the uncertainty created in the application, LSB undertook a detailed analysis of the legal position.
11. The CLC’s own regulatory arrangements require that licensed conveyancers only provide the activities for which they are authorised as an employee or manager of a CLC authorised body or a body authorised by another legal services approved regulator. There is a distinction between licensed conveyancers and the bodies through which they deliver legal services.¹
12. S32(1)(ba) of AJA1985 states that the Council may make rules “prescribing the Council’s arrangements for authorising recognised bodies, for the purposes of the Legal Services Act 2007, to carry on reserved instrument activities or the administration of oaths, within the meaning of the Act”. It will be noted that this section makes no reference to the activities applied for.
13. This led us to conclude that the CLC is currently unable to make rules and regulations that would allow them to regulate (by which we mean authorise, supervise and take enforcement action) recognised bodies for the reserved legal activities of the conduct of litigation and exercise of rights of audience.
14. CLC sought an external opinion on whether our analysis was correct. That opinion noted that s53 of CLSA1990 gives the CLC the powers to become an approved regulator for these activities and s53(2) provides that if so designated it “can authorise a person to

¹ CLC Licensed Conveyancer Licensing Framework, paragraph 10

carry on a relevant activity only if the person is a licensed conveyancer.” The CLC argued that a reference to a licensed conveyancer in s53 covers not only individuals (for whom the CLC can make rules and regulations for these activities under the AJA1985) but also entities on the basis that “person” could include bodies corporate.

15. Following further correspondence and discussion, and recognising that this is a matter of interpretation, LSB sought its own external opinion as to whether all of the arguments presented by the CLC could collectively be relied on to support the interpretation proposed by the CLC.
16. The key issue is whether a “licensed conveyancer” can be interpreted in such a way as to cover both individuals and entities. The Opinion obtained by the LSB concluded that the AJA1985 draws a distinction between those who acquire the entitlement to provide services through a licence issued by the CLC – a licensed conveyancer – and those who may be authorised as recognised bodies.
17. S32 of the AJA1985 allows the CLC to make rules in relation to the authorisation of “conveyancing services bodies” which are defined in s32A. The management and control provisions require that to be recognised as a conveyancing services body, the body must have a licensed conveyancer as a partner, member or director (ss32A(2) to (5)). Other provisions in AJA 1985 that support the argument that licensed conveyancers and recognised bodies are distinct include rules for training and education, including examinations to be taken by such persons (s13) and that there are provisions relating to an adjudication for bankruptcy (s18(1)) but nothing relating to corporate insolvency.
18. Therefore, we concluded that we could not agree with an interpretation that “licensed conveyancer” included both individuals and entities and consequently, we could not rely on s53 of the CLSA1990 to provide the CLC with the necessary powers.
19. It is accepted that the CLC should be able to apply for designation to authorise and regulate entities for additional reserved legal activities. However, at this time the current statutory framework does not allow them to make the necessary arrangements which would allow them to authorise and supervise entities for these activities. Before granting the current application and making the recommendation to the Lord Chancellor, the LSB needs to be satisfied about the legal basis on which the CLC would conduct these activities.
20. Parliament foresaw the need for an order-making power to modify a body’s powers and s69 of the LSA2007 is the mechanism by which this can be achieved. To give effect to the expansion of the CLC’s regulatory remit, therefore, it is necessary to amend s32A of the AJA 1985 through a s69 order.

Regulatory arrangements and capability and capacity to be a regulator of the activities

21. In order to grant an application, the LSB needs to be satisfied that the applicant will have effective regulatory arrangements and will have the capability and capacity to be an effective regulator at the time that the designation is granted. The regulatory arrangements should be outcomes focused and the applicant should take a risk-based approach to the use of its resources.

22. It follows that key to this is that the applicant needs to be able to demonstrate that they have a good understanding of the risks and issues presented by the activities and that proposed regulatory and operational arrangements have been designed or adapted to mitigate those risks. They need to be able to satisfy us that they have considered the different market in which they will be operating including (but not limited to) the types of clients that might use the new services and the different types of businesses (e.g. size, business models, ownership, financing arrangements) that may seek authorisation. An understanding of the risks and issues is necessary if the applicant is to be able to be effective at targeting is authorisation, supervision and enforcement arrangements and resources in a risk based way
23. The application makes clear that the CLC will use the same regulatory arrangements (with some additions to the Code of Conduct) for these new activities as are currently used for the regulation of conveyancing and probate activities. Given that the same systems will be used, we needed to be satisfied that they are adaptable to the new activities. This was done by a review of the application and a visit to the CLC offices to see how the current arrangements work.
24. The Board concluded that this assessment gave them a degree of assurance that the CLC is a good regulator of the activities for which they are currently approved. However, the CLC had not demonstrated that it has completed a detailed risk analysis for the new activities and the absence of this meant that the Board could not say that it was satisfied that they regulatory arrangements were appropriate nor that the CLC had sufficient competence and capacity to be a regulator of these activities. Consequently the tests in paragraphs 13(2)(b) and (c) of Schedule 4 had not been met.
25. To be designated as a licensing authority for one or more reserved legal activities, an applicant must first (or at the same time) be designated as an approved regulator for that or those activities. Since the application as an approved regulator has not been granted, the CLC would not have the legal competence for designation as a licensing authority. Consequently that application cannot be granted as the test in paragraph 11(2)(d) of the Schedule 10 to LSA2007 has not been met.

Chronology of the application

- Applications received 3 February 2011
- Initial decision period 3 February 2011 to 2 February 2012
- Decision period extended to 2 June 2012 on 9 January 2012
- LSB Board considered the application 28 March 2012
- Decision Notice issued to CLC 2 April 2012
- Decision Notice published 3 April 2012

Legal Services Board
2 April 2012

Authority for the decisions

Applications for designation as an approved regulator

1. Paragraph 3(2) of Part 2 of Schedule 4 to the Act enables any body to apply to the LSB requesting that the LSB recommends to the Lord Chancellor that an order be made by the Lord Chancellor to designate that body as an approved regulator in respect of identified reserved legal activities². The remainder of Paragraph 3 of Part 2 of Schedule 4 of the Act identifies other requirements that are imposed by the Act in relation to the application made by that body.
2. Part 2 of Schedule 4 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 paragraphs 3(3) for the form and manner of the application, 3(4) for the amount of the prescribed (application) fee, 4(2) for procedures and criteria for considering whether to accept an application for consideration and 11(3) about considering oral and written representations made to the LSB as part of the process of consideration.
3. Paragraph 13(1) of Part 2 of Schedule 4 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 an approved regulator in relation to identified reserved legal activities should be made. These Rules for Approved Regulator Designation Application came into effect on 1 January 2010 (“Designation Rules”)³.
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 paragraph 13(2)⁴ and 13(3)⁵ of Part 2 of Schedule 4. The Designation Rules provide the mechanism through which the LSB carries out its assessment against these requirements and the LSB has therefore satisfied itself of

² 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.

³ The Rules for Approved Regulator designation application can be found at http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/approved_regulator_designation_applications.pdf

⁴ Paragraph 13 (2) of Schedule 4 states that rules under sub-paragraph 1 must, in particular provide that the Board may grant an application in relation to a particular reserved legal activity only if it is satisfied – (a) that, if an order were to be made under paragraph 17 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, (b) that, if such an order were to be made, the applicant would be competent, and have sufficient resources, to perform the role of approved regulator in relation to the reserved legal activity at that time, (c) that the applicant’s proposed regulatory arrangements make appropriate provision, (d) that the applicant’s proposed regulatory arrangements comply with the requirement imposed by sections 52 and 54 (resolution of regulatory conflict) and (e) that those arrangements comply with the requirements imposed by sections 112 and 145 (requirements imposed in relation to the handling of complaints).

⁵ Paragraphs 13(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.

compliance with the requirements of paragraphs 13(2) and 13(3) by an assessment of the application and proposed regulatory arrangements against the Designation Rules.

5. The LSB is also required to approve what the body proposes as its regulatory arrangements if the proposed order is made.
6. The LSB will approve regulatory arrangements in so far that they appear to achieve their intended outcome and satisfy the conditions in paragraphs 13(2)(a) to have appropriate internal governance arrangements in place and 13(2)(c) of Schedule 4 that the proposed regulatory arrangements make appropriate provision for the proposed reserved legal activity. The LSB is also required to ensure that the proposed regulatory arrangements comply with the requirement imposed by sections 52 and 54 of the Act (resolution of regulatory conflict) and that such arrangements comply with the requirements imposed in relation to the handling of complaints (sections 112 and 145).
7. Paragraph 25 of Schedule 4 explains that the LSB must approve a proposed change to the Regulatory Arrangements unless we are “...satisfied that...” the approval would fall within one or more of the criteria specified in sub paragraph 25(3) (and listed in the footnote below⁶). If the LSB is not satisfied that one or more of the criteria are met, then it must approve the application in whole, or at least the parts of it that can be approved when only part of the application meets the criteria.

Applications for designation as a licensing authority

8. 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 activity².
9. 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

⁶ The Board may refuse the application only if it is satisfied that—(a) granting the application would be prejudicial to the Regulatory Objectives, (b) granting the application would be contrary to any provision made by or by virtue of the Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator, (c) granting the application would be contrary to the public interest, (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator, (e) the alteration would enable the approved regulator to license persons under Part 5 to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.

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

10. 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 2010⁷ (“LA Designation Rules”).
11. 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)⁸ and 11(3)⁹ of Part 1 of Schedule 10. The LA Designation Rules 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 LA Designation Rules.
12. 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.

⁷ 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

⁸ 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; the applicant would have appropriate internal governance arrangements in place at the time the order takes effect; and 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.

⁹ 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.