



Consultation response

Council for Licensed Conveyancers: Outcomes-focused Regulation – Draft CLC Code of Conduct

Overview

- 1.1 **The Legal Services Consumer Panel strongly supports the Council for Licensed Conveyancers' (CLC) emphasis on delivering good consumer outcomes and welcomes the overriding principles. However, the Code could be strengthened by making the outcomes more ambitious.**
 - 1.2 **The outcomes underpinning the principles need to focus on what occurs, rather than on consumer confidence or trust; as these can be misplaced.**
 - 1.3 **The proposed discretion within 'specific requirements' is supported as it allows innovation. However, some specific requirements should be rules, rather than optional, given their central importance to consumer protection.**
 - 1.4 **The CLC should aim for less, rather than more, guidance so as to place the onus on firms to determine for themselves how to deliver the required outcomes.**
 - 1.5 **The term 'vulnerable' needs to be defined broadly and go wider than disability.**
 - 1.6 **The CLC needs to consider how it will communicate to consumers what they can expect from providers without having to read the full Code or understand the regulatory framework. This might take the form of a consumer charter.**
- The proposals**
- 1.7 The Council for Licensed Conveyancers (CLC) is consulting on a new code of conduct. The new Code of Conduct has been revised to reflect an outcome-focused approach to regulation.
 - 1.8 The Code is centred around 6 *Overriding Principles*:
 - Act with independence and integrity
 - Maintain proper standards of work
 - Act in the best interests of Clients
 - Comply with your duty to the court
 - Deal with regulators and ombudsmen in an open and co-operative way
 - Promote equality of access and service
 - 1.9 Each *Overriding Principle* is underpinned by:
 - Client-based *Outcomes* that firms must deliver;
 - *Principles* that govern delivery of the outcomes; and
 - *Specific Requirements* with which firms must comply unless they are able to satisfy the CLC that they are acting in a way consistent with the overriding principle and outcomes.

1.10 The CLC has also released consultations on:

- Revised Rules and Guidance;
- Regulatory and Enforcement approach;
- Licensed Body (ABS) Framework; and
- Litigation and Advocacy Regulation Application.

The Panel's response

1.11 The Panel's response focuses initially on overarching issues related to the Code of Conduct, then discusses consumer communication and finally makes some specific points about particular issues.

1.12 The Panel has reviewed the CLC's further consultation documents. Given their detailed nature, the Panel's comments are limited to high level issues that are most relevant to consumer protection and consumer information. The Panel is a mandatory consultee on applications to become approved regulators; we may respond to the Litigation and Advocacy Regulation Application at that time.

1.13 The Panel was grateful of the opportunity to meet with CLC staff to discuss the draft Code during this consultation exercise.

Overarching issues

Overriding Principles and Outcomes

1.14 The Panel welcomes the overriding principles and supports the Code's upfront emphasis on delivering positive outcomes for consumers of legal services. This reinforces the primary purpose of regulation and reminds professionals that their key

focus should be positive consumer experiences.

1.15 The Panel understands that the primary purpose of a code of conduct is to set out the minimum requirements to protect consumers, with competition, rather than rules, acting as the primary driver to improve standards. Nevertheless, the Code should be strengthened by making the overarching principles and outcomes more ambitious, so that they demand a high standard of work. For example a focus in the Code is on providing a 'proper' standard of service, whereas the Panel wants consumers to access high quality service and for licensed conveyancers to strive to improve. This would match the CLC's regulatory aims of delivering 'high standards of service' and 'high standards of conduct', as stated in the Regulatory & Enforcement Approach consultation paper.

Purpose of outcomes

1.16 The outcomes underpinning each principle need to focus on the outcome *for* the consumer, rather than consumer *perceptions of* the outcome. Many of the outcomes refer to clients being 'confident' or 'trust[ing]' that something has occurred; this is not the same as requiring the outcome itself.

1.17 To address this issue, the outcomes in the Code should be rephrased. For example, under *Overriding Principle 1*, the outcome should state 'Clients *receive* independent representation and advice' rather than 'Clients *are confident that they receive* independent legal representation and advice', and under *Overriding Principle 6*, the outcome should state 'Client complaint handling procedures *provide* effective safeguards for them', rather than 'Clients *are*

confident that complaints handling procedures provide effective safeguards for them'.

Discretion for specific requirements

- 1.18 The Panel supports the proposed discretion for 'specific requirements'; this approach should maintain consumer protection whilst encouraging innovation from firms.
- 1.19 However, not all of the specific requirements should be open to discretion given their central importance to consumer protection. For example, the requirements that firms have a separate account for client money (under *Overriding Principle 1*), that firms advise clients that unregulated services are not covered by professional indemnity insurance (under *Overriding Principle 3*), and that firms advise clients of their rights to have their complaint escalated to the Legal Ombudsman (under *Overriding Principle 6*) all need to be mandatory.

Revised Rules and Guidance

- 1.20 The Code of Conduct consultation notes that shifting to a principles-based regime creates uncertainty for firms. To address this, the CLC intends to provide guidance and support as set out in the Revised Rules and Guidance.
- 1.21 Parts of the Revised Rules and Guidance contain significant detail on suggested approaches. The Panel encourages the CLC to reduce the level of guidance where possible, as some uncertainty is a benefit of principles-based regulation since the profession must think for itself how to deliver the required outcomes, instead of simply following 'suggested approaches'. The CLC needs to balance helping firms to achieve outcomes with being *too* helpful.

General consumer law

- 1.22 The draft Enforcement Policy helpfully states that the CLC must ensure that the regulated community meets the needs of clients by complying with both the law and its regulatory requirements. The main Code references some aspects of general law, for example data protection. However, the Panel foresees other areas of general consumer law that are particularly relevant to the nature of the regulated activities. Examples include marketing and advertising, unfair contract terms, cancellation rights and unfair commercial practices. It would not be appropriate to reference every applicable law, but rather those covering the greatest risks.

Consumer communication

- 1.23 The Code, along with the CLC's other regulatory framework documents, are silent on how consumers will be informed about what to expect from a licensed conveyancer or how to access redress.
- 1.24 The latter is particularly important given that the CLC's Revised Rules & Guidance set out rules on consumer claims on the compensation fund but do not indicate how these requirements will be made clear to consumers. This needs to be explained in lay terms and in a more accessible document. Similarly, the CLC's Regulatory and Enforcement Policies stipulate time limits on enforcement action to which consumers should be alerted.
- 1.25 The Panel suggests the CLC consider developing a consumer-facing Charter setting out what a consumer can expect from their provider, how to get assistance and how to make a complaint. This would

overcome the problem that the Regulatory Framework documents are not targeted at consumers or designed to communicate their rights.

Specific issues

Headline pricing

- 1.26 The Panel supports the specific requirement relating to estimates of costs. However, a particular conveyancing issue is that consumers end up with a higher bill than expected due to disbursements that are added at the end of the process. Where such disbursements are not optional, they should be included in the estimate of costs at the outset so that consumers have a better idea of their total cost exposure and can budget accordingly. This is of great importance when moving home due to the many large expenses involved. Such a requirement would help to maintain a level playing field as practitioners would advertise prices on the same ground rules.
- 1.27 The Panel notes that The Law Society recently issued a practice note on this issue following reports of malpractice.

Excluding or limiting liability with consent

- 1.28 Principle (k) under *Overriding Principle 3* states that licensed conveyancers can only exclude or limit liability with the informed consent of the client. The Panel understands this is to cover circumstances where a conveyancer has a reasonable basis for limiting their liability (such as when a client requests that certain searches not be performed). However, an alternative possible interpretation (even if incorrect) is that insurance could be limited or waived as long as a client agrees. This alternative interpretation raises a number of risks to clients and the Panel suggests that this

principle be described more precisely to ensure clarity.

Co-operation with Legal Ombudsman

- 1.29 The overriding principle to co-operate with any Legal Ombudsman investigation is supported. It would be helpful to add: 'and honour its decisions' to the end of principle 'e'. The Panel is aware that non-payment of redress awards has been an issue in the solicitor's profession, so this would be a sensible additional precautionary measure.

Defining 'vulnerable' consumers

- 1.30 The concept of 'vulnerable' in *Overriding Principle 6* needs to encompass more than disability. The Panel has encouraged the Solicitors Regulation Authority (SRA) to take a broad view on vulnerability and suggests the same to the CLC. The CLC's Code needs to recognise that clients can be vulnerable in different ways, including:
- They lack knowledge about the law and buy homes only rarely – in this sense, all individuals are potentially vulnerable;
 - Even the most confident people can be vulnerable when using a solicitor at a time of distress, for example when selling a house following a bereavement or divorce; and
 - A person can be vulnerable due to their personal characteristics, for example low literacy or a disability. However, it is patronising to label all persons falling in one category, such as old people, as vulnerable. Therefore, assessment of vulnerability can only be done on a case-by-case basis.
- 1.31 The CLC may not have intended its definition to be narrow; however the outcomes listed under *Overriding Principle*

6 only relate to disability, which could mean ‘vulnerability’ is interpreted in a limited way.

- 1.32 Conveyancers are subject to general consumer law and it would be useful for this to be reflected within the framework. In particular, the Consumer Protection from Unfair Trading Regulations 2008 references three kinds of consumer: ‘average’, ‘average targeted’ and ‘average vulnerable’. The key test is whether the trader could have reasonably foreseen that the effect of the commercial practice would have been to materially distort the consumer’s economic behaviour¹.

Regulatory policy

- 1.33 The Panel is broadly satisfied with the draft regulatory and enforcement policy. We make three comments on the proposals:
- Transparency – the commitment to publish information on investigation outcomes and enforcement action is welcome. The CLC could go further by publishing complaint information as a means of encouraging compliance and helping consumers to make informed choices. The Panel would wish to see both first-tier complaint volumes and Legal Ombudsman information published, which would mirror practice in the financial services sector.
 - Risk to consumers (paragraph 27) – the CLC should consider the severity of impact on individual consumers as well as the number of people affected. This is particularly relevant in a conveyancing context where the lawyer’s actions could have serious consequences.
 - Repeat low level breaches (paragraph 27) – the CLC must also be willing to clamp down on businesses that commit

relatively minor breaches of the rules on a regular basis but fail to respond to more informal resolution approaches.

October 2010

¹ For guidance, see: http://www.ofc.gov.uk/shared_ofc/business_leaflets/cpregs/oft1008.pdf