



**Proposed Amendment to the
Application by the CLC to the Legal Services Board
to be designated as a Licensing Authority
Standard of Proof
April 2011**

Submission Deadline: 27 April 2011

Executive Summary

1. Taking account of the matters set out in this Consultation Paper, the CLC has provisionally concluded that the appropriate standard of proof to be applied for all enforcement proceedings should be the 'balance of probabilities', rather than a sliding scale from the 'balance of probabilities' to 'beyond reasonable doubt', depending on the seriousness of the allegation, as is currently the case in proceedings before the CLC's Discipline and Appeals Committee. This will ensure that the standard of proof is consistent with that applied by the First Tier Tribunal of the General Regulatory Council.
2. To ensure consistency of enforcement powers between those regulated by the CLC as a Licensing Authority and those regulated by it as an Approved Regulator, the CLC has also provisionally concluded that rule 18 Discipline and Appeals Committee (Procedure) Rules 2001 (SI 2001/2797) should be amended so that the balance of probabilities is the standard of proof applicable to all disciplinary matters referred to the Discipline and Appeals Committee for determination.
3. The Legal Services Board has approved the CLC's Approved Regulator (Disciplinary Procedure) Rules 2011 which are due to come into force on 30 April 2011. Rule 12 applies the same sliding scale on the standard of proof as is currently applied by the CLC's Discipline and Appeals Committee (see paragraph 1 above). The CLC has provisionally concluded that the balance of probabilities test should also be applied by the Licensing and Casework Manager and by the Adjudication Panel.
4. The CLC's current intention is that the amendments required to the Discipline and Appeals Committee (Procedure) Rules 2001 and the Approved Regulator (Disciplinary Procedure) Rules 2011 come into force on 6 October 2011, from which date it is hoped the CLC will be designated a Licensing Authority.

Responding to this Consultation

5. You are invited to respond to one or other, or both, of the questions:
 - a. Do you agree that the appropriate standard of proof for enforcement proceedings taken by the CLC as a Licensing Authority should be the balance of probabilities?
 - b. Do you agree that the same standard of proof (the balance of probabilities) should also be applied when the CLC is taking enforcement action as an Approved Regulator?
6. If you do not agree with either of these proposals could you please state as fully as possible the reasons why you do not agree.
7. The CLC also welcomes comments on the proposals as a whole.
8. When you respond could you please give your name and address and state whether you are a licensed conveyancer. If you are not a licensed conveyancer, could you please state, if relevant, your status or professional qualification. The CLC reserves the right to publish any response and to refer to it specifically in any further document it publishes following this Consultation. If you wish your response to be treated as confidential could you please let us know when you respond.
9. The CLC has allowed short period for responses to this consultation because the issue raised (the standard of proof) is very narrow and in the CLC's view the rationale for the change is clear cut.
10. All responses should be send by email to consultations@clc-uk.org or by post to:

The Council for Licensed Conveyancers
16 Glebe Road
Chelmsford
Essex CM1 1QG

Or by to DX 121925 CHELMSFORD 6

Submission Deadline: 27 April 2011

The CLC's Proposal

11. The CLC published one consultation paper in August 2010 on the draft Code of Conduct and a further four consultation papers in September 2010 setting out its intended arrangements for applying a principles based and outcomes focused approach to regulation, to regulate litigation and advocacy services and to be designated a Licensing Authority.

12. At paragraph 2.8 of the Regulatory and Enforcement Policies Consultation of September 2010 stated:

enforcement decisions taken by the CLC will be informed by all available, relevant and reliable evidence, and will be based upon criteria published on our website. Decisions will be taken on the evidence applying the 'balance of probabilities' standard, except where a criminal act (including fraud or dishonesty) is alleged in which case the standard applied will be 'beyond reasonable doubt'. Account will be taken of the impact on consumers, the impact on the respondent and the reliability of the available evidence. The respondent will be afforded the opportunity to reply.

13. The intention in adopting this formulation was to follow rule 18 of the CLC's Discipline and Appeals Committee (Procedure) rules 2001 (SI 2001/2797) which provides:

- 18.—(1) Subject to paragraph (2), in any proceedings before the Committee—
- (a) a fact is to be regarded as proved if the Committee consider that it has been proved on the balance of probabilities, and
 - (b) the Committee may consider any evidence which would be admissible in civil proceedings in England or Wales.
- (2) In proceedings where a criminal act or any fraud or dishonesty is alleged—
- (a) the allegation is only to be regarded as proved if the Committee consider that it has been proved beyond reasonable doubt, and
 - (b) the Committee may only consider evidence which—
 - (i) would be admissible in criminal proceedings in England or Wales, or
 - (ii) they are satisfied, after consulting with the Legal Assessor, it is desirable in the interests of justice to consider.
- (3) This rule does not apply to an allegation to which rule 19 applies.

14. None of the responses to the CLC's consultation either generally or specifically commented on the proposed standard of proof.

15. At paragraph 2.23 of its application to the Legal Services Board to be designated a Licensing Authority, the CLC stated:

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). We will review our compliance

monitoring approach and the responses generated to ensure they are consistently applied.

16. In their advice as mandatory consultees to the Legal Service Board the Legal Services Consumer Panel and the Lord Chief Justice have commented in terms that the balance of probabilities was the appropriate standard of proof for the protection of consumers.
17. The CLC's initial view was that the applicable standard of proof was by no means as clear cut as had been suggested by the mandatory consultees. However, the CLC considers it critical that the standard of proof it applies is the same as that applied by the First Tier Tribunal of the General Regulatory Chamber which will determine appeals against enforcement and other determinations made by the CLC as a Licensing Authority. Failure to do so would lead to confusion within the CLC regulated community and is likely to diminish the reputation of both the profession and the CLC because there may be a perception that enforcement action is not being taken against the regulated community because too low a standard of proof is being applied. As identified by the Consumer Panel this would be detrimental to the interests of consumers. As set out in the Executive Summary the CLC also proposes that the balance of probabilities should be the test which is also applied by the Discipline and Appeals Committee, the Adjudication Panel and the Licensing and Casework Manager as from 6 October 2011.
18. The CLC believes that there will be no detriment to the profession in applying the balance of probabilities test. The current position is that the 'beyond reasonable doubt' test is applied only where a criminal act or any fraud or dishonesty is alleged. In most cases the balance of probabilities test is already applied. As prosecutor it remains for the CLC to prove its case. There is a structured process enabling the respondent to appeal which is compliant with the Human Rights Act 1998.