

## **The Architecture of Change Part 2 – the new SRA handbook feedback**

### **Response by the Council of Mortgage Lenders**

#### **to the Solicitors Regulation Authority Consultation**

#### **Introduction**

1. The Council of Mortgage Lenders (CML) is the representative trade body for the mortgage industry in the UK. Our 111 members account for around 94% of the assets of the mortgage market, and their activities encompass all forms of housing tenure – home-ownership, low-cost home-ownership, buy to let and private and social rental.
2. As mentioned in previous consultation responses, we are not experts in the regulatory framework as it currently stands or set out in the Legal Services Act. However, our members have a major interest in this topic as their businesses are heavily dependant on one area of legal services – conveyancing.
3. Our interest in this consultation relates mainly to the SRA proposals on conflict of interest rules. As such, our response focuses primarily on these proposals and the associated questions posed by SRA. This response should be read in light of our response to the SRA's consultation on outcomes-focused regulation, submitted on 5 March 2010.
4. We have a number of associates who are law firms. We strongly support the work that those organisations carry out.

#### **Proposals on conflict of interest rules**

5. The CML has some observations about the proposed conflict of interest rules in Chapter 3. Firstly, as outlined in the CML's 5 March 2010 response, lenders are concerned about the removal of the detailed provisions relating to conveyancing. We believe that removing these provisions for conflict of interest presents a greater risk of client detriment, as the more unscrupulous members of the solicitor profession seek to exploit loopholes where lack of clarity exists. This is more likely to occur with an outcomes-focused approach.
6. Secondly, as currently drafted, CML believes the proposed new conflict of interest rules could accelerate a shift toward separate representation of borrowers and lenders, as conveyancers seek to minimise the potential risk of breaching the code of conduct. In particular, the proposed Chapter 3, outcomes 4 and 5 state that a solicitor can only act where there is a between-client conflict which does not involve conveyance of land as the transaction. This can be interpreted as meaning that there is an *automatic* presumption that representing both lenders and borrowers is a conflict of interest, despite this being accepted practice over the past several decades. The existing rules have been developed over this time period and have worked well, with no widespread issues of breach of the conflict rules reported by lenders.
7. The CML is already developing standard lender instructions for use where separate representation occurs, on the basis that, in some transactions, this may be preferable to reduce risks around solicitor fraud and negligence. This, unfortunately, reflects the lender's lack of confidence in the profession, of which the SRA is aware. However, we recognise the extra cost and delay that separate legal representation will add to the conveyancing process, and are developing the standard instructions on the basis that it would be an individual lender's decision to use separate representation. This reflects in part, the mixed views of our membership on the benefits of separate representation, particularly as joint representation has, in the main, worked well for lenders and borrowers for many years. Conflict rules which appear to require separate representation will

inevitably mean heavier costs for consumers to bear in the event that separate representation becomes widespread.

8. If the SRA's intention is not to prevent continued joint representation, then we suggest some guidance related to outcomes 4 and 5 to Chapter 3 of the Handbook, along the lines of 'For the purpose of this chapter, a conflict of interest shall not be deemed to arise by virtue solely of you acting for both borrower and lender in the same mortgage transaction'.

### **Proposals on information and reporting requirements**

9. The CML welcomes and supports the SRA's aim to improve the information and reporting requirements. As highlighted above, lenders have a particular concern over the levels of fraud and dishonesty in the profession at present. Better and more effective risk-assessment of firms should reduce this. We believe more regular review and reporting obligations of already-authorised firms would assist in deterring fraudsters from moving around within the profession, as lenders' fraud specialists currently see occurring.

### **Proposals on protecting the public**

10. We intend to make detailed comment on aspects of the Solicitors Indemnity Insurance Rules and Compensation Fund rules in our response to the SRA's consultation on client financial protection arrangements.

### **Summary**

11. The CML has some concerns about the new Chapter 3 conflict of interest rules as drafted: firstly, concern at the potential for client detriment where lack of clarity exists; and secondly, that the new rules appear to no longer allow joint legal representation of lender and borrower. While the CML is actively looking at developing some standard instructions for separate representation, these are being developed on the basis that separate representation would co-exist with joint representation, recognising the potential for extra cost and delay that separate representation would bring to the consumer.

12. We broadly welcome the SRA's aim to improve information and reporting requirements for solicitors and stress that, as well as measures preventing fraudsters from entering the profession in the first instance, tighter controls to identify and remove those already existing in the profession are required.

13. We will make more detailed comment on the protection of public proposals in our response to the SRA consultation on client financial protection arrangements.

### **Specific questions**

14. We have only answered the consultation questions posed which relate to the specific areas we have commented on.

#### **Do you have any comments on the revised code?**

15. Yes – on conflicts of interest rules, see paras 5-7 above.

#### **Do you have any comments on Chapter 3 conflicts of interest?**

16. Yes – see paras 5-7 above.

#### **Do you have any comments on the revised Authorisation Rules?**

17. No - see the general comment at paragraph 9.

#### **Do you have any comments on the proposed approach to reporting and notification?**

18. See paragraph 9. We note that the SRA is intending to consult separately on reporting requirements, and may make further comment on this consultation.

### **Comments**

19. If you have any comments or queries on this response, please contact Jennifer Bourne – [Jennifer.bourne@cml.org.uk](mailto:Jennifer.bourne@cml.org.uk) or 020 7438 8929.