



Legal Services Board – decision notice issued under Part 3 of Schedule 4 to the Legal Services Act 2007

The Costs Lawyer Standards Board (CLSB) application for approval of the proposed regulation of Trainee Costs Lawyers

The Legal Services Board (LSB) has refused an application from the Costs Lawyer Standards Board (CLSB) for approval of an alteration to its regulatory arrangements regarding Trainee Costs Lawyers.

This decision notice sets out the basis for the LSB refusing to grant the application and the decision taken.

Introduction

1. The LSB is required by Part 3 of Schedule 4 to the Legal Services Act 2007 (the Act) to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements. The Association of Law Costs Draftsmen, known from 1 January 2011 as the Association of Costs Lawyers (ACL), is an approved regulator. The ACL has established CLSB to whom it has delegated its regulatory functions.
2. Paragraph 25 of Schedule 4 to the Act explains that the LSB may only refuse an application setting out a proposed change to the regulatory arrangements if it is satisfied that by granting the application one or more of the criteria specified in sub paragraph 25(3) (and listed in the footnote below¹) would be met. For example, the LSB's granting of the application to alter the regulatory arrangements must not be prejudicial to the regulatory objectives overall. Accordingly, if the LSB is not satisfied that one or more of the criteria for refusal would be met, then it must approve the application in whole, or the parts of it that can be approved.
3. As provided for by paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the LSB has made rules² about how the application to alter the regulatory arrangements must be made including the contents of that application. The rules highlight the applicant's obligations under section 28 of the Act to have regard to the Better Regulation Principles. The rules also require that the applicant provides information about the nature and effect

¹ 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.

² Rules for Rule Change Applications – Version 2 (November 2010)

of each proposed change and of appropriate consultation undertaken. Sub paragraph 25(3)(f) of Schedule 4 to the Act requires that each proposed alteration has been made or is likely to be made in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration. This therefore includes the LSB's rules.

4. The chronology for the LSB's handling of this application can be found towards the end of this decision notice.

Background

5. CLSB application sets out that the training for Costs Lawyers consists of a three year modular course and three years' qualifying experience in costs law and practice as an employee of an authorised person e.g. Costs Lawyer or solicitor. The experience element is usually completed alongside the modular course. In the training period, Trainee Costs Lawyers are not authorised to undertake reserved legal activities, but they may be able to carry on some reserved legal activities if they constitute an "exempt person" under Schedule 3 to the Act – for example, they may in certain circumstances have the permission of the court. As they are not authorised persons, Trainee Costs Lawyers are not subject to CLSB regulatory framework.

Proposal

6. CLSB proposed that Trainee Costs Lawyers should be regulated as if they were authorised persons. The proposed regulations included the introduction of a separate code of conduct, training and CPD rules and disciplinary rules and procedures for Trainee Costs Lawyers. CLSB also proposed a fee of £100 for Trainee Costs Lawyers towards the cost of the proposed extra regulation.
7. This would add another 286 people to those currently being regulated, an increase of approximately 50%.
8. CLSB's basis for the application to introduce regulation for Trainee Costs Lawyers was:
 - It is right for Trainees who practise as they study to sign up to regulation and thus abide by the same level of professional expectation as their fully qualified colleagues
 - CLSB does not believe there is currently an adequate, sufficiently robust or transparent regulatory process in place for Trainees under the ACL or its educational subsidiary, ACL Training
 - Regulation would provide greater consumer awareness, confidence and protection.

Initial assessment of the application

9. The criteria for refusing an application are set out in paragraph 25(3) of Schedule 4 to the Act. These include a requirement that granting the application would be contrary to any provision made by or by virtue of the Act (paragraph 25(3)(b)). When considering

any application for alterations to regulatory arrangements, the LSB must, as it must when exercising any of its statutory functions, have regard to the regulatory objectives and the Better Regulation Principles (section 3 of the Act). All approved regulators have a similar duty (section 28 of the Act). The LSB encourages legal services regulators to remove unnecessary regulation. Any proposed increase in regulation should only be introduced where, amongst other things, there is clear evidence that it is needed and its costs and any wider effects are proportionate to the harm avoided.

10. The initial assessment of the application identified two issues which the Board was satisfied could meet the criteria in paragraph 25(3) for refusing an application.
11. The first was in relation to the powers of CLSB. Schedule 4, Paragraph 25(3)(b) allows refusal if granting the application would result in any of the designation requirements ceasing to be satisfied; paragraph 25(4)(b) sets out that the designation requirements include that the applicant is competent, and has sufficient resources to perform the role of approved regulator in relation to the reserved legal activities in respect of which it is designated. "Competence" includes "legal competence", i.e. that it has the necessary powers to do that which the regulatory arrangements propose.
12. From the LSB's assessment, we queried whether or not the power to regulate Trainee Costs Lawyers had been delegated by ACL to CLSB. Paragraph 2.14 of the Operational Protocol between CLSB and ACL sets out that ACL has operational responsibility to 'set and manage professional standards of Trainee Costs Lawyers'. In light of this, the LSB was not satisfied that it was sufficiently clear that CLSB had the requisite powers to regulate Trainee Costs Lawyers.
13. The second issue was whether the scale and nature of the perceived issues justified the introduction of the proposed regulatory requirements. Paragraph 25(3)(b) of Schedule 4 to the Act allows refusal where granting the application would be contrary to any provision made by or by virtue of this Act or any other enactment. Section 28(3) of the Act imposes an obligation on approved regulators to have regard to the Better Regulation Principles (where regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed). The LSB was not satisfied that the application and supplementary information provided by CLSB contained sufficient evidence to explain and justify the extent of the problem that the proposed regulatory intervention was seeking to address. We were particularly concerned as to whether in the absence of this information it could be demonstrated that the requirements for regulation to be proportionate and targeted had been met.
14. CLSB in their application stated that, in relation to proportionality, 'the proposal will provide confidence that disciplinary proceedings will be proportionate, consistent and fair'. With regards to whether the proposed regulatory action was sufficiently targeted, CLSB stated that the proposal 'will allow CLSB to monitor risks, strengths and weaknesses at Trainee level of the profession. CLSB continually monitors and reviews its processes and procedures to ensure they remain fully effective at all times.' The LSB considered that these assertions appeared to lack any confirmatory data and did not demonstrate the extent of consumer detriment that was actually arising or whether that could be addressed in any other way, which was more proportionate and/or targeted.

15. In accordance with Paragraph 21(1)(b) of Schedule 4 to the Act, on 17 December 2012, the LSB therefore issued a warning notice to ACL and CLSB advising that the LSB was considering whether to refuse the application. The notice to CLSB set out the grounds on which the LSB was considering refusal. The warning notice lasts for 12 months from the date of receipt of the warning notice by the ACL and is due to expire on 16 December 2013.
16. Following the issue of the warning notice, CLSB Chief Executive wrote to LSB Chief Executive on 23 January 2013 and there was a meeting with CLSB Chief Executive on 13 February 2013.

Potential refusal under 25(3)(b) and 25(4)(b) - Competence

17. CLSB agreed with our analysis that the specific power to regulate trainees had not been delegated from ACL to CLSB. In the letter of 23 January 2013 CLSB set out how it would seek powers once the application was approved. At the meeting on 13 February 2013 the LSB explained that it would not be possible to grant the application without CLSB already having the necessary powers in place.
18. On 22 July 2013, CLSB confirmed that the ACL Council had met on Friday 19 July 2013 and voted in favour of CLSB proposal for them to regulate Trainee Costs Lawyers as set out in the consultation paper issued on 11 September 2012.
19. On 11 September 2013, the LSB received evidence (in the form of a forwarded e-mail from the ACL Chair) confirming that the ACL Board had at its meeting on 19 July 2013 agreed that "The CLSB should henceforth set and manage the professional standards of Trainee Costs Lawyers." CLSB and the ACL are satisfied that this is sufficient to delegate the powers without formally amending the delegation agreement.
20. The LSB is now satisfied that the issue around CLSB having delegated authority to regulate trainees has been addressed. Therefore there is no reason to refuse the application on this basis.

Potential refusal under 25(3)(b) – Better Regulation Principles

21. Any application to alter regulatory arrangements needs to show evidence that there has been regard to the Better Regulation Principles. For this requirement to be met, the applicant needs to demonstrate how it has considered whether the proposed regulatory activity is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.
22. Further information was sought and the matter was discussed at the meeting on 13 February 2013. The LSB subsequently wrote to CLSB on 18 February 2013 to suggest topics that CLSB may wish to explore further to help it understand the scale of the potential problem it saw with Trainees. It was left to CLSB as to what specific information it might seek and the method for collecting it. On 5 March 2013, CLSB

submitted additional information to support its application to regulate Costs Lawyer Trainees.

23. The information received from CLSB is summarised below:

- A consultation which was directed to various interested parties including the Cost Lawyers profession, legal services regulators and legal services representative bodies. It ran for six weeks and received eight responses.
- Information provided by CLSB confirmed that of the 286 trainees on the ACL's Trainee Register in March 2013, 24% (68) work for a solicitor's firm and are therefore covered by other regulations. CLSB was not able to confirm where the remaining 76% of Trainee Costs Lawyers work and what activities they are undertaking.
- Complaints data against Trainee Costs Lawyers for the previous six years detailed three cases related to Trainees. In each case, the issue was concerned with how the Trainees had used other authors' work in assignments.

24. CLSB argues that the level of complaints recorded do not reflect the status quo and that this is directly attributable to ACL Training not being set up to deal with professional conduct issues (and ACL's inadequate structures to deal with disciplinary matters) and lack of consumer awareness of how to make a complaint about a Trainee.

25. Having considered all of the information provided in the initial application and subsequently, the LSB notes the following:

- The process for producing the proposal was far from ideal - the consultation period was short and Trainees did not receive direct notice of the consultation until 16 days after it commenced due to problems obtaining their contact details from ACL. While a majority of those who responded (five of eight) supported the proposal, the response rate was low.
- There is an uncertain evidence base about the nature of the practice of those who would be covered by the proposal. From the data on Trainee Costs Lawyers that CLSB was able to gather, it was not possible to determine how often trainees represent clients in court as "exempt persons" under Schedule 3 to the Act (e.g. with the permission of the court) and whether those doing so were acting in a way likely to cause detriment or impact on consumers or the public interest.
- Complaints data showed only three cases in over six years relating to Trainees. There were no cases concerning the conduct of a Trainee Costs Lawyer when acting with the court's permission to represent clients. While noting CLSB's point about the inadequacy of data collection, the LSB did not see any evidence to justify a conclusion that the actual level of harm and misconduct/incompetence was necessarily higher than that reported through complaints.

26. Having considered all of the information the LSB has concluded the following:

- Paragraph 1(2) of Schedule 3 to the Act provides that where a non-authorized person is exercising a right of audience having been granted permission by that court in

relation to those proceedings, they are an exempt person for the purposes of the Act. Given this explicit statutory recognition of non-regulated practice at this level, if trainees have a right of audience granted by the court in relation to those specific proceedings and are exempt from needing to be an authorised person in that situation, there needs to be compelling evidence of a problem that can only be cured by the introduction of regulatory requirements.

- The proposal seems to assume that, since trainees can represent clients in court, they need to be regulated. However, as no information has been provided about who is actually doing this, CLSB seeks to impose new regulatory requirements on all trainees, irrespective of their activities. Moreover, doing so would have the effect of bringing a whole new category of people within the scope of regulation. This is neither a targeted nor a proportionate approach.
- Moreover, trainees are appearing only with the express approval of the judge concerned, not as authorised persons in their own right. CLSB have not presented any arguments about why trainees appearing in this context pose a degree of risk which is different in both kind and degree to other unauthorised persons acting in different cases to whom judges grant a right of audience.
- The available complaints data has not identified any issues relating to trainees when appearing in court, or indeed, in other forms of client facing activity; nor has any other information been presented to suggest that trainees are acting inappropriately or below expected standards. In the absence of specific information it is not possible to say that the proposed regulatory arrangements are a proportionate response to an issue.

27. This analysis therefore leads the LSB to the conclusion that the proposal is seriously flawed in relation to its apparent lack of:

- proportionality – given the paucity of evidence of problems arising in practice;
- targeting – given the fact that no problems have been reported for Trainee Costs Lawyers representing clients in court, an across the board requirement on all trainees as a class cannot be justified.

Decision

28. We have concluded that the application contains insufficient information to support the imposition of regulatory requirements on Trainee Costs Lawyers. Therefore, the application has been refused under Paragraph 25(3)(b) of Schedule 4 on the basis that the LSB is satisfied granting the application would be contrary to a provision of the Act, namely in discharging its regulatory functions with the proposed regulatory arrangements, the approved regulator would not be having regard to the Better Regulation Principles, contrary to Section 28(3) of the Act. If the LSB were to approve it it would not be acting in accordance with its duties under Schedule 3 of the Act.

Chronology

- The LSB confirmed receipt of an application from CLSB on 26 October 2012.
- The LSB issued an extension notice on 21 November 2012.

- The LSB issued a warning notice to the ACL on 17 December 2012 that expires on 16 December 2013.
- The LSB received a letter from CLSB in response to the warning notice on 24 January 2013.
- A meeting was held on 13 February 2013 between CLSB and the LSB to discuss the warning notice.
- Further information was received from CLSB on 5 March 2013 to support the application.
- The LSB received confirmation from ACL on 11 September 2013 that it was content that CLSB has the necessary powers to regulate Cost Lawyers Trainees.
- The LSB refused the application from CLSB on 9 December 2013.
- This decision notice will be published on the LSB website on 10 December 2013.

**Board of the Legal Services Board
9 December 2013**