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| AR | Costs Lawyer Standards Board |
| Date and time | Wednesday 13 February 2013 – 11.00 to 12.45 |
| Location | LSB Office |
| LSB attendees | Dawn Reid, James Meyrick, Sonya Gedson |
| AR Attendees | Lynn Plumbley |
| Purpose of meeting | To discuss the CLSB's response to a Warning Notice (RE: Trainee Costs Lawyers rule change application) |

AGENDA

1. Introduction
2. Delegated powers
3. Establishing the problem
4. Proportionality
5. ACTL issues/Education Audit 2012
6. Entity Regulation
7. Consultation feedback
8. Next Steps
9. Action points

DISCUSSION

Introduction

The meeting followed the order of the pre-meeting notes circulated to LSB and CLSB attendees (see Annex 1). LSB confirmed that ACL/ACLT have not engaged in any correspondence with the LSB regarding the application or the Warning Notice but confirmed it had been mentioned briefly at a meeting between ACL & LSB towards the end of 2012.

Delegated powers

The wider definition of competency includes 'legal competency'. The CLSB must have 'legal competence' to regulate Trainees; it must have the powers to do this, delegated or otherwise.

CLSB explained that the MoU is a higher document which sets out the definitive agreement reached between ACL and CLSB at the point of delegation; it is silent on which body regulates Trainees. The Operating Protocol is a lesser document. CLSB confirmed that it does not believe it currently has the powers to regulate Trainees as this was left with ACL whilst CLSB established and proved its processes and procedures as a regulator of Costs Lawyers in the first instance; it was their intention to deal with that issue after the application had been approved by the LSB as it did not make sense to go through the process of gaining the current powers for the application to then be turned down by the LSB.

There is a lack of a clarity around the delegated of powers between CLSB, ACL and ACLT and the CLSB's proposal seeks to remedy this, providing a clear and defined process for Trainees, their employees and the consumer. The ACLT Handbook and Protocol which is currently in draft form indicates that ACLT has undertaken the regulation of Trainees in the past as it refers to training arrangements and disciplinary procedures; CLSB understands that historically ACL delegated this function to ACLT as it was the sole training provider.

To approve an application the LSB needs to be satisfied that the applicant has the necessary powers to introduce the proposed regulations. CLSB gains its powers through the delegation from the ACL which is the “approved regulator” under the Legal Services Act 2007 (LSA 2007). It is therefore for the CLSB to work with ACL to resolve the delegation issue. It may be that the MoU does not need to be changed, but the Operating Protocol will require appropriate amendments

CLSB suggested that ACL may themselves lack the powers to regulate Trainees as ACL is a trade union and a membership body of Costs Lawyers. CLSB questioned whether a Trainee could be given no option other than to be a member of ACL if it is a voluntary membership body for Costs Lawyers. LSB advised that this requires further investigation by the ACL and CLSB.

Establishing the problem

Trainees are not authorised to conduct reserved legal activities but they can undertake costs law work under court discretion. As far as CLSB is aware, all Trainees rely on court discretion (314 Trainees, compared to 565 regulated Costs Lawyers). CLSB does not hold information on where Trainees work, for example solicitors firms, costs lawyer firms or sole practitioners.

CLSB explained that there is a procedure (operating in some courts) which requires those appearing in court to complete a slip which asks a person’s name, who they work on behalf of etc. CLSB are currently lobbying to change the slip to ensure a more rigorous check on who makes representations in court.

LSB advised that Trainees could fall under the exempt person’s clause in Schedule 3 to the Legal Services Act 2007 where they exercise a right of audience when assisting in the conduct of litigation under instructions from and the supervision of another authorised person (LSA2007, Schd 3, 1(7)).

In terms of the role of the supervisor, they do not have any responsibilities under the CLSB Code and the professional conduct regulations within the Code covers Costs Lawyers and not Trainees. CPD arrangements apply to both Costs Lawyers and Trainees. CLSB also highlighted that the existing Code for Costs Lawyers and the proposed Code for Trainees are only slightly different wording but very similar requirements.

Trainees practice costs law but there are no regulations which cover them from practising point of view. It was noted that where they are working in firm authorised by another legal services approved regulator that regulator’s regulatory arrangements will apply. There are no mechanisms to deal with complaints on the professional conduct of Trainees. CLSB do not currently hold any data on Trainees apart from their name, address and email address and therefore cannot at this stage say how many trainees are working outside legal services approved firms.

LSB suggested that CLSB might collect additional data from Trainees to help to determine the scale of the potential problem and therefore whether the proposed arrangements are appropriate and proportionate (e.g. how many Trainees operate on their own, how many are operating within firms). Such additional data may assist CLSB in determining if the proposed regulatory requirements for Trainees are appropriate for all working situations for Trainees.

On an unrelated issue CLSB made the point that Law Costs Draftsmen (approximately 2000-4,000) may conduct reserved legal activities (relying on court discretion) but are unregulated and

that this poses a risk to the profession and consumer which also requires addressing. At present the costs law profession is being undermined by those who practice outside of regulation. A Trainee could simply remain so thus evading regulation for example.

Proportionality

CLSB indicated that the conduct risk for Trainees is greater than the risks for Costs Lawyers as Trainees are inexperienced and lack the appropriate qualifications. Trainees do not undertake oaths, but they do draft bills, points of dispute, see clients and attend court as an advocate.

The costs associated with Trainees are currently falling to Costs Lawyers as Trainees do not pay a fee for regulation. The fee payable for Trainees would be charged as a qualification requirement and not a practising fee.

As an overarching point, CLSB believe that it should be allowed to regulate their profession the way it sees fit and believe that LSB operates under the political remit of the government which encourages less regulation.

LSB noted that there is a government agenda to reduce (and not increase) regulation, but the LSB's starting point is the LSA 2007. LSB highlighted that the CLSB has an obligation under the LSA 2007 to have due regard to the Better Regulatory Principles (BRP). The LSB (which also has a duty to have regard to the BRPs) has to consider the extent to which an applicant has had regard to the BRPs when assessing a rules change application.¹

ACTL issues/Education Audit 2012

CLSB, ACL and ACLT have been working to redesign the Costs Lawyer qualification regime with the help of expert advice from a dually qualified Costs Lawyer and barrister. The new regime will be a three year modular course with an exam at the end of each year. As a direct result of this work, ACLT has suspended intake for the 2013 year and new Trainees will not be able to commence study until the new regime has been implemented. Those enrolled within the existing modules will be required to complete them.

LSB advised that education and training requirements are regulatory arrangements (Section 21 (1)(f) of the LSA 2007) and therefore any changes will require LSB approval before coming into force. CLSB advised that the regulations will come into force in January 2014, in place for registrations in June 2014 and intake in September 2014.

Entity Regulation

CLSB advised that some Costs Lawyers operate with a business model involving non-authorised person ownership which is beneficial for the operating Costs Lawyer in terms lower tax (e.g. a husband who is a Costs Lawyer offers 49% of shares in his business to his wife, who is not a lawyer). The initial reaction of some sole practitioners or small firms to CLSB's approach to entity regulation has been negative; CLSB is concerned that people will opt out of regulation by the CLSB as it is voluntary.

¹ The CLSB added the following post meeting note: *CLSB reiterated that it was a contradiction to state its proposals were against BRP's as required entity regulation would bring about the regulation of Trainees who practice. Trainee Solicitors are regulated by the SRA, CLSB questioned why Trainee Costs Lawyers should be treated differently.*

CLSB could make changes to its regulatory arrangements (subject to having the necessary powers) to allow it to approved regulate Costs Lawyer (non-ABS) firms only, and avoid ABS altogether which allows for business models with non-lawyer ownership. The CLSB would therefore make a rule change application to the LSB and propose an entity regime to regulate entities. If the CLSB wish to regulate ABS (which would include husband and wife example above) it would need to make a separate application to the LSB (for designation as a licensing authority for ABS).

LSB noted that the transitional provisions are expected to be removed by 2015.

Consultation

LSB commented that the consultation process for the application did not appear to be in line with best regulatory practice in that, the timing of 6 weeks was seemed short in light of the proposal of a significant change to the regulatory framework of CLSB and the Trainees were not initially consulted directly and once contacted had only 10 days to reply. CLSB felt the period was adequate based on previous consultation input experience and general consultation fatigue. Further, CLSB had been totally open on the consultation, listing all consultation responses on a report and submitting them to the LSB.

CLSB reiterated that it did not receive the Trainees Register from ACL until part way through the consultation period and described their experience of consultations with responses peaking in the first and last weeks with little feedback received in between. LSB noted that its own experience was that there is a rush towards the end of the consultation period. CLSB confirmed it did not receive any late responses to the consultation.

CLSB indicated that it has received positive feedback on their initiative to provide both Costs Lawyer and Trainee Registers to Costs Law Judges so they may check the names of who make representations in court, whether under court discretion or otherwise.

Next steps

LSB advised on the possible next steps:

1. The Warning Notice stays in place and the CLSB address the delegation issue and provide additional information in support of the application. The LSB would make a decision in due course and publishes a chronology of how the application was considered and any concerns or issues LSB had with the application in its final decision notice; or
2. CLSB withdraws the application; no decision is made or published by the LSB.

CLSB advised that it did not wish to withdraw the application and wished to continue with the Warning Notice period until LSB makes a decision.

Action points

- CLSB to meet with ACL to discuss the delegation of powers.
- CLSB to conduct a short survey with Trainees using the Trainee Register
 - LSB to advise on the type of information which would help to make a decision on the application.
- LSB to send CLSB links on past education/qualification regulations rule change applications submitted to the LSB.

ANNEX 1 Warning Notice – a discussion of the CLSB’s response

Chronology

The refusal criteria listed in Schedule 4, Paragraph 25 of the Legal Services Act 2007 (LSA 2007) sets out the circumstances in which the LSB can refuse a rule change application. We have given further consideration to some specific issues which relate to the refusal criteria and wrote to CLSB on 17 December 2012 to issue a Warning Notice indicating that the LSB were considering refusing the CLSB’s application to regulate Trainees.

On 24 January 2013, the CLSB sent a response to the key issues set out in the Warning Notice.

LSB response to CLSB

A meeting is scheduled for 13 February 2013 to discuss the CLSB’s response to the Warning Notice. The CLSB will have an opportunity in which to adequately satisfy the LSB’s concerns before a decision is made to either grant or refuse the application. A summary of the key agenda items for this meeting are set out below.

Agenda for CLSB and LSB meeting on the Warning Notice

1. CLSB powers

It would seem that the powers to regulate the professional conduct of Trainees have not been delegated properly; CLSB and ACL could work to remedy this so that the LSB can be reasonably satisfied that CLSB have the legal competence to regulate Trainees.

If the above assumption is incorrect, please provide the evidence to explain where your powers to regulate the professional conduct of Trainees currently lie. If you do have the powers, why does the Operation Protocol indicate that this is responsibility of ACL?

CLSB’s response also indicates that they do not see the link between the CLSB having the powers to regulate Trainees and the refusal criteria in paragraph 3(b) and 4(b) of the LSA 2007 which refers to ‘competence’ and resourcing’. The issue raised by the LSB directly relates to CLSB having the ‘legal competence’ to regulate Trainees and therefore they must have the powers to do this, delegated or otherwise.

See paragraphs 1.1, 1.2, 1.5, 1.6, 1.8 and 1.18 of CLSB response letter.

2. Establishing if there is a regulatory problem

We asked for evidence to support that there is an existing problem with Trainees, CLSB set out a few cases where a Trainee was investigated for academic misconduct and a disciplinary matter. CLSB have not been able to provide further evidence that there is an existing problem with the professional conduct of Trainees e.g. further evidence on complaints data.

In order for us to understand the role of Trainee Costs Lawyers and the Costs Lawyers in charge of their supervision in more detail, can you please explain how the Supervisor vs. Trainee relationship works? E.g. under the SRA’s Qualification Regulations whilst trainee solicitors are under a duty to adhere to the 10 mandatory principles of the SRA’s Handbook, the supervisor (who is a qualified/authorised person) also has a responsibility to ensure the trainee solicitor fulfils the necessary requirements under their training contract, as set out in the SRA’s Qualification Regulations.

In addition, while under the employment and supervision of a Cost Lawyer, wouldn’t a Trainee will already be captured under the CLSB’s existing Code? It is not clear why an entirely new and separate Code for Trainees is needed?

We acknowledge the evidence provided in 1.15, 1.16 and 1.17 of the CLSB's response indicating that ACLT may not have the adequate procedures in place to deal with professional misconduct of Trainees.

- a. In order for us to understand the delegation process explained in paragraphs 1.6 and 1.7 of the CLSB's response, what criteria or competency checks have ACLT passed to gain Authorised Provider Status?
- b. Have there been any concerns about the ACLT's ability to carry out their functions in light of the inadequacies highlighted in 1.16 and 1.17 of the CLSB's response?

See paragraphs 1.15, 1.16, 1.17, 2.2, 2.5 of CLSB response letter.

3. Proportionality

We note the CLSB's response refers to the number of Trainees and Costs Lawyers as evidence that this is a proportionate approach (see paragraph 2.4 of CLSB's response letter)

To make our concerns about proportionality clear, we question whether the introduction of a complete set of new regulations for Trainees is a 'proportionate' and justifiable response in light of the fact that we see a lack of substantial evidence to indicate that there is an existing problem with Trainees (as explained in the above point).

4. Entity regulation

In response to paragraph 2.1 of the CLSB's response we do not believe that this is a contradiction, the concern set out in LSB's point 2 is in direct relation to the application that was submitted by the CLSB to regulate Trainees. The approval of entity regulation did not form part of this application and the LSB have not received an application from the CLSB to become a licensing authority, so therefore the points on entity regulation raised in the CLSB's response were not considered in our initial review of the application. We would of course encourage the CLSB to further explore entity regulation in a separate application to the LSB, which would be subject to the same scrutiny against the criteria in schedule 4 used to assess the CLSB's current application, or for the CLSB to consider whether it may wish to become a licensing authority for Alternative Business Structures.

See paragraph 2.1 of CLSB response letter.

5. Consultation feedback

We do not necessarily agree with the description of the consultation responses in the CLSB's response letter, and note that the response rate was low and they did not unanimously support the proposals. We do however, acknowledge that the lack of responses may have been influenced by the short timeframe for consultation of only 6 weeks and the CLSB did not have access to the Trainees database to contact them directly.

See paragraphs 1.9 and 1.14 of CLSB response letter.

6. Education Audit – new evidence

We thank you for the additional evidence in the form of an Education Audit provided in your response which we note was conducted after the initial application was submitted to the LSB and therefore presents new evidence. Could we please see the full version of this report? It would be helpful to see the wider context of this audit and any other relevant findings rather than just the extract as quoted in your response.

See paragraphs 1.16, 12.6 of CLSB response letter.