

By email only (under s203 of the Legal Services Act 2007)



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Lynn Plumbley,
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24 April 2019

Dear Lynn,

Warning notice issued pursuant to paragraph 21(1)(b) of Schedule 4 to the Legal Services Act 2007

This warning notice, issued under paragraph 21(1)(b) of Schedule 4 to the Legal Services Act 2007 and given to the Association of Costs Lawyers (ACL), informs the Costs Lawyer Standards Board (CLSB) that the Legal Services Board (LSB) is considering whether to refuse the CLSB's application, submitted on 26 January 2019, seeking approval of alterations to its regulatory arrangements to introduce a new Costs Lawyer Competency Assessment (CLCA). The words used in this notice have the meanings given to them in the Legal Services Act 2007 (the Act).

The LSB has decided to consider further the CLSB's proposals to introduce a new route of entry into the profession. The replacement of the current training rules will mean the currently suspended training course run by ACL Training will cease to exist once the current cohort of students has completed it. The proposed CLCA would be the new route of entry into the profession. The CLSB noted in its application that "The CLSB believes that a means of entry system which focuses on the outcomes to be achieved rather than structures and processes will have a positive impact on the quality of the costs law services provided, and will increase the number of qualified and regulated costs law practitioners."

Having considered the application and responses provided by the CLSB to a number of issues that the LSB has raised, the proposed changes continue to raise significant questions for the LSB and as a result we are considering refusing the application under paragraph 25(3) of Schedule 4 to the Act. Of particular bearing with respect to the changes proposed is whether:

- Granting the application would be prejudicial to the regulatory objectives, including, protecting and promoting the public interest, protecting and promoting the interests

of consumers, promoting competition in the provision of services, encouraging an independent, strong, diverse and effective legal profession & promoting and maintaining adherence to the professional principles (paragraph 25(3)(a) of Schedule 4 to the Act).

- Granting the application would be contrary to the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration (paragraph 25(3)(f) of Schedule 4 to the Act, and in particular rule 11(j) of the LSB's Rules for applications to alter regulatory arrangements ("the Rules")).

Our concerns include, but are not limited to:

- The lack of information and evidence to support the stated rationale for the CLCA. In particular, the CLSB has not presented evidence to support its contentions about the barriers that exist with the current framework or been able to demonstrate how the proposed approach would reduce these barriers. Related to this, the CLSB has not been able to demonstrate that there would be a sufficient level of demand for the proposed CLCA. This is relevant to the potential cost of the CLCA to candidates and the commercial viability of the CLCA, given that potential providers of the CLCA will be required to develop and continue to deliver a sufficiently robust assessment of competence.
- Concerns about the robustness and rigour of the proposed assessment framework. In particular, the application presents a Competence and Threshold Standard, accompanied by a number of statements of competence and legal knowledge in different areas which list areas of expected knowledge and competence without defining the level or outcome expected. This material does not provide sufficient clarity on the standards or competencies that would be required, or how they could be demonstrated, which would enable a candidate to be authorised to provide reserved legal activities. The CLSB has drawn comparisons to the approach of other approved regulators, however, most other regulators have supplemented high level competence statements with significant additional detail on what is expected in to demonstrate competence at the point of authorisation.
- The proposed approach to granting rights of audience appears inadequate and appears to contradict the wider outcomes-focussed approach provided by the CLCA. In particular, the proposal to allow for rights of audience to be gained through attendance at a one day training course, with no assessment, is at odds with the CLSB's rationale for the CLCA, to shift away from an inputs based model and towards an outcomes-focussed assessment based model. The proposal would appear to set the bar considerably lower than other approved regulators in relation to awarding rights of audience. The CLSB has not presented sufficient evidence to justify this approach.
- The application does not present sufficient evidence on the potential equality impact or wider cost implications of the proposal. The proposal will undoubtedly have

equality and diversity impacts, including those related to the cost of the proposed new framework. The CLSB has made statements about likely cost savings and positive equality impacts but has not presented any evidence to support this or any modelling of costs. The cost of assessment is likely to be influenced by the numbers that will be taking assessments. This is therefore linked to the issue identified concerning uncertainty of demand for the course and ultimately its commercial viability. On the basis of the evidence presented to date, we do not believe there is sufficient assurance that the proposals will reduce the overall costs of qualification, or that there are no potential equality risks that need to be considered and mitigated.

- We are concerned that inadequate assurance has been provided on the plan for implementation, delivery and to ensure the ongoing viability of the CLCA. In particular, we note that the CLSB has not independently identified any risks associated with implementation, delivery or ongoing viability and therefore has not provided any plans for managing or mitigating these risks.
- Relevant to all of the above is that the CLSB is seeking one-stage approval for the new framework. This means that it is envisaged that the LSB's approval would provide approval for the new framework to come into force, before an assessment provider has been appointed and the assessment framework developed and finalised. Therefore the LSB is being asked to approve a framework when significant relevant detail remains outstanding.
- Finally, we are concerned about the manner and process of consultation that the CLSB has undertaken to develop these proposals. In particular, we note that the CLSB has only consulted on one model (the CLCA) and that its consultations asked closed questions that did not encourage feedback or suggestions on alternative approaches. Moreover, the CLSB has not published consultation responses and has not published its own reports on what has been raised and considered through consultation, nor has it made these available to the LSB. These issues are of particular concern given that the application presents a significant policy change.

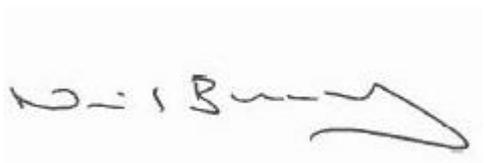
Warning notice process

The Board will make a decision based on evidence presented in the application and additional information including that received from the CLSB during the initial decision process. If the CLSB wishes to respond to the points the LSB has highlighted, you may do so by 22 May 2019. Any responses should be supported by additional evidence which has not already been provided by the CLSB.

Paragraph 22(1) of Schedule 4 to the Act and paragraph 20 of the Rules provides that where a warning notice has been issued, the Board may seek advice about whether the application should be granted. At this stage, we do not envisage that it will be necessary to seek such advice.

The effect of the warning notice is to extend the decision period in which the LSB can consider the application. Paragraph 26(3) of Schedule 4 to the Act provides that the LSB has a period of 12 months from the date of your receiving this warning notice to continue considering the proposed rule change. The decision period will therefore expire on 24 April 2020. While the decision period has been extended by 12 months, the LSB would expect to conclude its deliberation before then, subject to proper and full consideration of all the issues.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Neil Buckley', with a stylized flourish at the end.

Neil Buckley
Chief Executive

cc Iain Stark, Chair, Association of Costs Lawyers
 Steve Winfield, Chair, Costs Lawyer Standards Board