20 May 2019

Neil Buckley (sent by email)
Legal Services Board
One Kemble Street
London
WC2B 4AN

Dear Neil,

We write further to the warning notice issued pursuant to paragraph 21(1)(b) of Schedule 4 to the Legal Services Act 2007 dated 24 April 2019.

To date, the CLSB has provided 76 pages of information in relation to this application under

- the application,
- the CLCA handbook; and
- the response to the LSB request for further information.

Regulatory objectives seriously at risk

As the LSB is aware, on 1 November 2017 the CLSB communicated it had made the difficult decision to suspend entry onto the prescriptive three-year course following information received in relation to the continued financial viability of that course run by ACL Training.

The CLSB invested over two years of work with a respected legal education specialist to identify an alternative means of entry (the proposed CLCA) that:

- is proportionate (based on the professions low risk profile); and
- is sustainable; and
- meets all the published requirements of the LSB.

As the title Costs Lawyer is not protected and cannot be protected, regulation is voluntary. The CLSB has always sought to apply a proportionate and cost-effective approach to regulation to ensure it remains attractive to those who choose to be regulated.

Based on annual April levy numbers, since 2012 the number of regulated Costs Lawyers has varied between 565 and 684. Costs Lawyers compete against an estimated 4,000 unqualified and potentially unregulated (if not working for an SRA regulated firm) Law Costs Draftsmen.

The future of the Costs Lawyer profession is seriously at risk. With no viable means of entry the Costs Lawyer profession will start to shrink year on year from 2019 (the year when those who signed up for the three-year qualification in 2016 conclude the course). The void will be filled by unqualified and potentially unregulated Law Costs Draftsmen. Such an outcome would not be compatible with the regulatory objectives set out at S.11(a), (d), (f) and (h) of the Legal Services Act 2007.

Addressing the issues raised in the warning notice:

"the CLSB has not presented evidence to support its contentions about barriers"
With respect, there is one barrier that renders all others irrelevant. ACL Training advised the CLSB back in October 2017 that due to falling numbers of trainees it was no longer financially viable for them to provide the current prescriptive three-year qualification. The CLCA is aimed at removing that primary barrier, as well as addressing sub-prime barriers by offering a flexible, cost-effective means of entry with choice.

"not been able to evidence sufficient level of demand"
Until such time there is an approved product to offer, specific demand for it cannot be quantified. Does the LSB's objection mean that the absence of fully proven demand would undermine any proposal? The alternative appears to be no means of entry. We believe the CLCA offers best balance, all things considered. Demand will be cultivated by the approved provider with the support of the CLSB.

"***CLSB has not demonstrated that there would be sufficient level of demand. This is relevant to the potential cost of the CLCA to candidates and the commercial viability"***
Four well respected legal training companies and a University have expressed an interest in providing the CLCA. If these businesses consider the CLCA "*commercially viable*" and the CLSB assists in supporting effective marketing, demand for it should develop. As we have advised, the provider will have other means of financially supporting the CLCA e.g. providing specialist CPD to Costs Lawyers.

"*Robustness and rigour of the proposed assessment framework"*
On 9 December 2013, the LSB approved a revised syllabus which did not even contain a threshold standard and provided significantly less detail on competence and legal knowledge than in the CLCA. Under the CLCA, a threshold standard is now stated. In respect of knowledge and competence, the education framework of other legal professions was

considered when the CLCA was drafted. A respected legal education consultant who had worked with other regulators e.g. SRA, advised the CLSB.

The LSB states *"this material does not provide sufficient clarity on the standards of competence that would be required*" but has not identified what aspects require further clarity at this stage i.e. before a provider is appointed and the assessment and materials drafted. We would welcome the opportunity to discuss this issue to gain greater understanding of what the LSB expects.

The LSB also states *"most other regulators have supplemented high level competence statements with significant additional detail*." The specific regulators the LSB is referring to have not been identified. The CLSB employed a respected legal education specialist who had worked with the SRA for example, and the education models of Solicitors, Barristers and Legal Executives were all studied and considered when drafting the CLCA. Again, further clarification would be appreciated.

"***proposed approach to grating rights of audience ….. appear to set the bar considerably lower than other approved regulators in relation to awarding rights of audience"***
On 9 December 2013, the LSB approved a revised education syllabus which did not specifically include a practical test of oral advocacy skills.

In considering whether there was evidence to support the introduction of such testing the CLSB considered, inter alia:

(i) Surprisingly short testing of oral advocacy skills for trainee Barristers and Solicitors, the value of which is therefore questionable.

(ii) A survey of current Costs Lawyers identified:
(a) Approximately one in five Costs Lawyers do not undertake oral advocacy.
(b) Those who did undertake oral advocacy advised it formed only approximately 10% of their work.

(iii) Since 31 October 2011, there have been no concerns raised with LeO or the CLSB about the oral advocacy skills of Costs Lawyers (service complaints or professional conduct complaints). This is likely as trainee Costs Lawyers "earn and learn" and therefore hone their skills, including oral advocacy, before qualifying.

(iv) Under the CLCA, evaluation of oral advocacy skills rests with the employer. Under the proposed new statement of competence an employer is required to sign to a trainee having proven themselves competent over a period of "not less than 24 months in legal practice" to "represent a client through effective communication and other skills." The CLSB is of the view an employer evaluation over a minimum period of 2 years is of greater value than the view of one person in a 20-minute Court mock up test.

No risk of a failure to meet the regulatory objectives were identified. The CLSB therefore concluded the evidence was simply not there to introduce a new mandatory practical oral advocacy test under the CLCA.

"***evidence on the potential equality impact or wider cost implications of the proposal"***
As advised, the CLSB has not identified any negative impact on equality and the LSB has not provided evidence/information on where it disagrees with that position. By making access flexible and more affordable, it opens up greater opportunity of qualifying to those who may have previously found the cost and commitment off-putting. It also makes the qualification attractive to the Law Costs Draftsman who is of an age enrolling on the prescriptive three-year qualification simply was not an attractive option.

"modelling costs"
A "chicken and egg" scenario. As advised, some of those interested in providing the CLCA have indicated potential costs on a business confidential basis at this stage. Only once the CLCA has been approved can potential providers firm up their business proposals. Suffice it to say, it is anticipated the cost of qualifying will be more than 50% cheaper than the prescriptive three-year qualification.

"Inadequate assurance has been provided on the plan for implementation, delivery and to ensure the on-going viability of the CLCA"
As advised, once the CLCA has been approved it will then be for interested providers to set out delivery proposals. The CLSB will be looking for costed proposals and key business skills such as marketing. The CLSB will apply a rigorous assessment of delivery capabilities as part of that process. Risks will continue to be monitored under CLSB risk strategy.

"the CLSB is seeking a one stage approval process ….. LSB approval …. Before an assessment provider has been appointed and the assessment framework developed and finalised."
The LSB did not involve itself at this level when it re-affirmed the prevailing means of entry on 31 October 2011 (when the CLSB became an approved regulator). Nor did it request costed proposals by ACL Training or details of how they proposed to deliver on the syllabus when the LSB approved revisions on 9 December 2013.

Once the CLCA has been approved, it will be for potential providers to present their proposals to the CLSB. It would be for the CLSB to appoint whom it considers appropriate based on a rigorous assessment of key skills and other factors such as sound costings, proven business acumen, proven marketing skills, proven record of success in providing legal training and a financially sound organisation.

"***The CLSB has only consulted on one model (the CCA) and its consultations asked closed questions that did not encourage feedback or suggestions on alternative approaches"***
There is no requirement under the LSA that a regulator presents multiple choice options on a proposal under consultation.

As advised, two other means of entry were explored by the CLSB and ACL/ACL Training:
(i) Joining the apprenticeship scheme: Following a working party with employers the CLSB concluded this was not a long-term viable option for reasons previously set out. The CLSB approached ACL/ACL Training to establish if they considered it viable for take up. The ACL/ACL Training did not take the option up.

(ii) A two-year version of the prescriptive three-year qualification: Based on ACL/ACL Training costing we were advised 65 trainees were required to make it financially viable and only 38 had expressed an interest. The proposal was therefore put forward by ACL/ACL Training as a one-off intake concluding at the end of the "run-off" period of the three-year qualification. It was not put forward as a long-term solution. Even if it had been, a shorter two-year version of the current prescriptive qualification would not have been approved by the LSB as it did not conform with guidance currently in issued by the LSB.

"the CLSB has not published consultation responses"
In accordance with historical accepted practice with the LSB since 31 October 2011, the CLSB has provided a resume of responses from individual Costs Lawyers. The CLSB also provided the LSB with copies of responses received from bodies such as the ACL and SRA.

"***feedback or suggestions on alternative approaches"***
This has been covered above. Two alternative approaches were considered, they were worked through and not considered viable options. The application sets out how the proposal has changed following each consultation.

In conclusion
The LSB notice states "*our concerns include, but are not limited to*." This raises a concern that the CLSB has not been advised of all potential issues with its proposal. We would welcome reassurance that we have received a definitive list of issues.

If the LSB is of the view that the CLSB has misunderstood the nature of its concerns, or should it wish to discuss them further, the CLSB would be happy to meet to discuss those issues. We are of the view that many of the gaps between the CLSB position of comfort with the proposal and that of the LSB could be narrowed by way of a meeting (face to face or conference call).

Yours sincerely,

Lynn Plumbley
Chief Executive