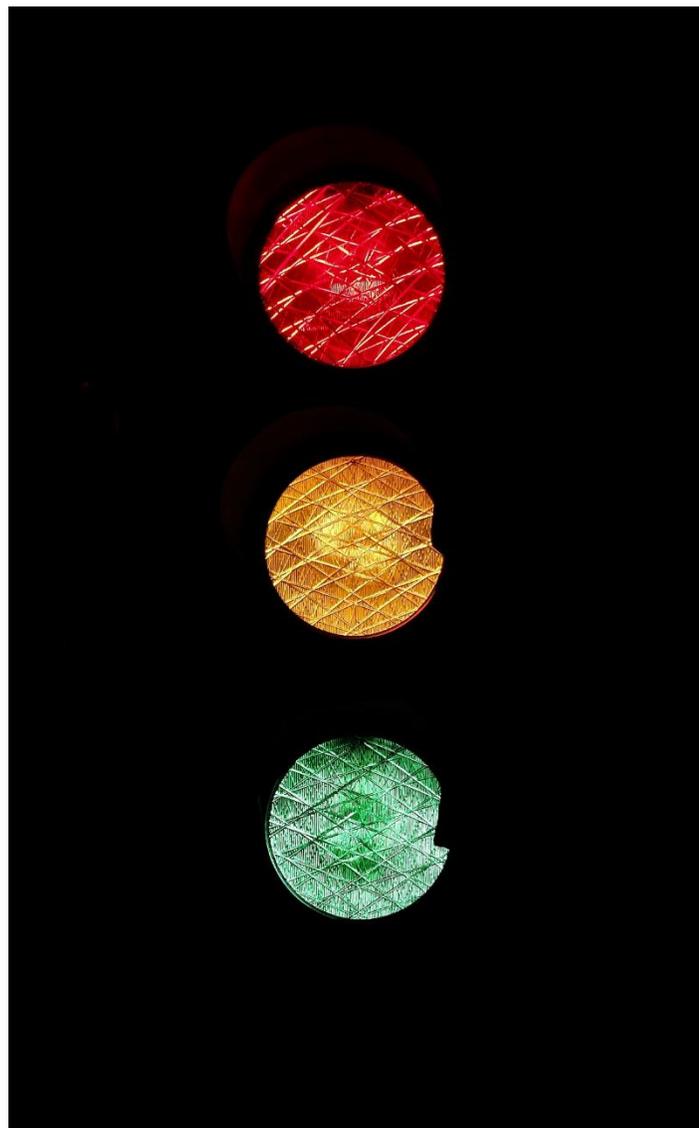

Consultation

Disciplinary Rules and Procedures: Scheduled review



29 July 2022

Costs Lawyer Standards Board

CLSB
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This consultation

The Costs Lawyer Standards Board (CLSB) regulates Costs Lawyers under the framework established by the Legal Services Act 2007. To ensure that Costs Lawyers meet appropriate professional standards, the CLSB imposes requirements in relation to competency and conduct. Those requirements are set out in various rules – such as the Code of Conduct and the Continuing Professional Development (CPD) Rules – which are collated in the [Costs Lawyer Handbook](#). The CLSB's Disciplinary Rules and Procedures (DR&P) establish the processes to be followed where the CLSB receives information indicating that a Costs Lawyer might have breached our rules. You can find the current version of the DR&P [on our website](#).

The DR&P were updated in May 2020 following a detailed review of their effectiveness. The changes that were made at that time are summarised in a [consultation paper](#) and associated [consultation outcome report](#). The new DR&P were designed to clarify and streamline the CLSB's disciplinary processes, ensuring that they remain fit for purpose and incorporate best practice from across the legal sector. They were supplemented by a number of new policy documents, which are also available on the [CLSB's website](#).

We made a commitment to review the effectiveness of the new DR&P after an initial period of two years. That review has now been carried out. The review suggested that three further improvements could be made to our disciplinary processes, namely by:

- implementing a streamlined triage process for inbound complaints;
- updating our [policy statement on enforcement and sanctions](#), to take account of the recently adopted [joint statement by the legal regulators](#) on tackling counter-inclusive misconduct through disciplinary action; and
- making minor changes to the DR&P, to better align our processes with those of the Legal Ombudsman.

This consultation relates to the third aspect, involving changes to the DR&P. This paper explains the proposed changes and raises questions that you might like to consider as part of your response, although we welcome comments on any aspect of the proposal. Consultation responses should be sent to enquiries@clsb.info by **5pm on 23 September**.

Background

A report setting out the full findings of the two-year review of the DR&P was presented to the CLSB board in July 2022, and is available in the board papers published [on our website](#). The review aimed to promote the [regulatory objectives](#) of:

- protecting and promoting the interests of consumers;
- encouraging an independent, strong, diverse and effective legal profession; and
- promoting and maintaining adherence to the professional principles.

The scope of the review was limited by the number and nature of complaints that we have considered under the new DR&P to date. The table below shows the number of complaints handled by the CLSB in relation to Costs Lawyers' conduct in the two years between May 2020 and May 2022. (Note that complaints which did not meet a threshold test for jurisdiction – in particular, complaints that were not about regulated Costs Lawyers – and complaints that were not pursued by the complainant are not included.)

Type of complaint	Number
Referred to Legal Ombudsman under the MOU	3
Referred to Solicitors Regulation Authority (SRA) under the MOU	1
Otherwise did not fall within the CLSB's jurisdiction	2
Resolved through pre-investigation correspondence	1
Referred for formal investigation	0
Referred to Conduct Committee	0
Interim suspension order (ISO) considered	0
Disclosures by Costs Lawyers	5

As can be seen from this data, there was insufficient evidence to carry out a wholesale review of the effectiveness of all aspects of the DR&P. However, we did have sufficient evidence to consider how incoming complaints are initially handled, up to the stage of escalation to a formal investigation. In doing so, we identified a need for better alignment of our processes with those of the Legal Ombudsman, to facilitate referrals

under the Memorandum of Understanding (MOU) between the organisations at an early stage.

Where a complaint relates to the service provided by a Costs Lawyer, or has both service and conduct elements, it is referred in the first instance to the Legal Ombudsman.¹ The Legal Ombudsman then provides the CLSB with quarterly updates on all open cases relating to Costs Lawyers. This referral process works reasonably well. However, we have identified several areas where we could be more aligned with the Legal Ombudsman’s procedures to ensure the smooth running of complaints that have both service and conduct aspects (known as hybrid complaints). We propose to make limited changes to the DR&P to address this.

Explanation of proposed changes

Interplay between time limits and first tier complaint procedures

The DR&P provide that complaints must be made to the CLSB within one year of the alleged misconduct, or one year from the date on which the complainant first became aware that misconduct may have occurred.² Outside of these limits, we can only consider a complaint if there is a reasonable explanation for the delay (without unfair prejudice to the Costs Lawyer involved) or if it is otherwise in the public interest. Conversely, the Legal Ombudsman’s rules allow complainants to bring a complaint within six years of an alleged service failing, or within three years of finding out about an issue.

This misalignment does not cause difficulties in itself. We effectively “stop the clock” on our time limits while we wait for the Legal Ombudsman to investigate a hybrid complaint, because the complaint is deemed to have been made to us at the time it was made to the Legal Ombudsman.³ Where a complaint is made to the Legal Ombudsman

¹ Under DR&P 2, reproduced at Annex 1.

² See DR&P 1.3 at Annex 1.

³ DR&P 2.3 provides that “the CLSB will treat the date of notification to the CLSB as being the date the complaint was made to either the CLSB or Legal Ombudsman”.

that would be out of time under the DR&P – i.e. where the complaint is more than one year old but less than six years old – and the Legal Ombudsman makes a finding of misconduct, this can be accepted by the CLSB under the public interest exception referred to above.

The Legal Ombudsman has also recently consulted on changes to its rules which would reduce its own time limit to one year for new cases. Its main rationale is that older cases are more challenging to investigate due to difficulties in gathering evidence, particularly where a firm has since closed. At the time of publishing this consultation paper, we understand that such changes have been approved by the sector’s oversight regulator (the Legal Services Board) but are yet to be implemented.

For these reasons, we do not believe it is necessary or appropriate to align our time limits with the Legal Ombudsman’s current requirements. However, an issue that does require attention is the interplay between these time limits and the requirement for a complainant to participate in a practitioner’s internal (“first tier”) complaint handling process. The Legal Ombudsman’s rules (derived from section 126 of the Legal Services Act) require a complainant to exhaust the first tier process before escalating the complaint to the Legal Ombudsman, allowing the practitioner eight weeks to resolve the issue. Until the first tier has been exhausted, a complaint cannot be formally made to the Legal Ombudsman, and consequently the CLSB cannot formally pause its own time limit by reference to the Legal Ombudsman’s investigation during that period.

Conversely, the DR&P do not require a complainant to exhaust a practitioner’s first tier process before escalating a conduct complaint to the CLSB. In our view, the policy intention expressed in the Legal Services Act is that practitioners will usually deal with both service and conduct complaints internally in the first instance; the Act suggests that their first tier complaints procedures must cover both service and conduct issues.⁴

⁴ See sections 112 and 127(2) of the Act, taken together.

Given that the majority of complaints handled by the CLSB during the review period were referred to either the Legal Ombudsman or the Solicitors Regulation Authority under the appropriate Memorandum of Understanding, and given our understanding of the policy intention behind the Act, **we are proposing that the DR&P be amended to introduce a requirement for a complainant to exhaust the Costs Lawyer’s first tier complaint handling process before escalating a complaint to the CLSB.** This requirement would only apply to complainants who are clients and not, for example, to fellow practitioners who are not covered by a Costs Lawyer’s internal complaints procedure.

The proposed amendment would give an eight week period for the Costs Lawyer to resolve the matter, failing which the complainant could then refer the matter to the CLSB. This aligns with the Legal Ombudsman’s timeframe.

Clearly, there will need to be exceptions to this process. In some circumstances – for example, where the Costs Lawyer’s business has closed – following a first tier complaint process may be redundant. In other circumstances, alleged misconduct may pose a sufficiently serious threat to the public interest that it requires urgent consideration by the CLSB. We therefore propose that a complainant need not have exhausted the Costs Lawyer’s internal complaints procedure if it would cause unfair prejudice to the complainant or it is otherwise in the public interest for them not to do so.

We wish to encourage successful early resolution of complaints. There is some risk that our one year time limit for bringing complaints to the CLSB could cause complainants to prematurely escalate their issue up to us from the first tier, to avoid falling foul of the time limit. Our proposed amendments to the DR&P therefore state that active participation in a first tier complaint handling process is likely to constitute a “reasonable explanation for delay” by the complainant, thus falling within an exception to the time limit established by the DR&P.

These changes can be found in proposed new DR&P 1.6, set out at Annex 1.

Clarification of the Legal Ombudsman’s jurisdiction

DR&P 2.1 states:

A Complaint about service provided by a Costs Lawyer falls within the jurisdiction of the Legal Ombudsman. A Complaint about the conduct of a Costs Lawyer (i.e. breach of a Principle) falls within the jurisdiction of the CLSB.

This is not strictly accurate, as a conduct complaint falls within the jurisdiction of *both* the CLSB and the Legal Ombudsman.⁵ This inaccuracy is carried through to DR&P 2.3, which provides that the Legal Ombudsman will first consider the service element (only) of a hybrid complaint and then the CLSB will consider the conduct element.

We are therefore proposing that **DR&P 2 be amended to ensure that the full scope of the Legal Ombudsman’s jurisdiction is accurately represented.** The proposed text appears at Annex 1.

Consultation questions

1. Do you agree with proposed new DR&P 1.6 (at Annex 1), which requires a complainant to pursue a Costs Lawyer’s internal complaints procedure before complaining to the CLSB, subject to exceptions?
2. Do you agree that the exceptions to the new requirement in DR&P 1.6 are appropriate? If not, what exception(s) should be added or removed and why?
3. Do you agree that the proposed amendments to DR&P 2.1 and 2.3 accurately reflect the roles of the Legal Ombudsman and CLSB in dealing with complaints?
4. Do you foresee any reason why the proposed changes could have a harmful impact on persons with a protected characteristic under the Equality Act 2010? If so, is there any evidence you can provide that would help us assess that impact?

⁵ Section 127(2) of the Legal Services Act provides that the Legal Ombudsman’s rules cannot exclude complaints that have been or could be dealt with under the disciplinary rules of the regulators.

Annex 1 – Proposed amendments to the Disciplinary Rules and Procedures

Proposed amendments are shown in blackline below.

RULE 1: Jurisdiction

1.1 These DR&P come into effect on the effective date above and replace any other disciplinary rules and procedures previously issued by the CLSB. These DR&P govern Complaints made on or after the effective date.

1.2 These DR&P apply where the following three criteria are met:

- (i) there is reason to suspect that a Costs Lawyer has been or is in breach of a Principle;
- (ii) the Costs Lawyer held a practising certificate issued by the CLSB at the time the alleged breach of a Principle occurred; and
- (iii) the Costs Lawyer holds a practising certificate issued by the CLSB at the time the Complaint is made to the CLSB.

1.3 Where the Complainant is not the CLSB, for these DR&P to apply a Complaint must be made in writing to the CLSB:

- (i) within one calendar year from the date on which the matters giving rise to the Complaint occurred; or
- (ii) within one calendar year from the date on which the Complainant first became aware that a breach of a Principle may have occurred.

1.4 In the event that a Complaint is made outside of the time limits in rule 1.3 above, then the CLSB may only consider the Complaint if:

- (i) the Complainant provides a reasonable explanation for the delay in making the Complaint and that delay does not cause unfair prejudice to the Costs Lawyer involved; or
- (ii) if it is otherwise in the public interest to consider the Complaint.

1.5 The CLSB will not consider a Complaint by a litigant in person or a solicitor on the other side of proceedings involving the Costs Lawyer, whilst those proceedings are ongoing. The court has powers to consider conduct issues in the context of ongoing proceedings.

1.6 The CLSB will not consider a Complaint by a Complainant to whom the Costs Lawyer's first tier complaints procedure applies unless:

- (i) the Complainant has raised the issue with the Costs Lawyer under the terms of the complaints procedure, and either the procedure has been exhausted or a period of eight weeks has passed;
- (ii) the Complainant demonstrates, to the CLSB's reasonable satisfaction, that it would cause unfair prejudice to the Complainant to use the Costs Lawyer's complaints procedure; or

(iii) it is otherwise in the public interest not to require the Complainant to use the Costs Lawyer's complaints procedure.

For the purposes of rule 1.4(i), active participation by a Complainant in a process under a first tier complaints procedure is likely to constitute a reasonable explanation for delay.

1.61.7 In the event the CLSB accepts jurisdiction to investigate an alleged breach of a Principle then the CLSB will confine itself to that alleged breach and to documents and witness evidence which relate to that breach. If in the course of an investigation the CLSB obtains information relating to another potential breach of a Principle, the CLSB will treat that information as a fresh Complaint.

1.71.8 The CLSB has entered into agreements with other regulatory bodies to govern situations in which more than one regulatory body might have jurisdiction to handle a Complaint. The CLSB will only exercise its jurisdiction under these DR&P in accordance with such agreements. The CLSB will notify a Complainant if a Complaint falls within this rule 1.87.

1.81.9 If a person to whom these DR&P apply has a disability, the CLSB will consider a request by that person to make reasonable adjustments to the processes set out in these DR&P. The CLSB will use best efforts to agree in advance suitable reasonable adjustments, which are consistent with the objectives of these DR&P, to address any substantial disadvantage the person might suffer. Where the CLSB determines it is not possible or not appropriate to make the reasonable adjustments requested, the CLSB will provide reasons in writing.

RULE 2: The Legal Ombudsman (service complaints)

2.1 A Complaint about the service provided by a Costs Lawyer falls within the jurisdiction of the Legal Ombudsman. A Complaint about the conduct of a Costs Lawyer (i.e. breach of a Principle) falls within the jurisdiction of both the CLSB and the Legal Ombudsman.

2.2 In the event the CLSB receives a Complaint that falls within the jurisdiction of the Legal Ombudsman and not the jurisdiction of the CLSB, the CLSB will inform the Complainant of this and provide the Complainant with contact information for the Legal Ombudsman.

2.3 In the event a Complaint relates to both the service and conduct of a Costs Lawyer the CLSB will allow the Legal Ombudsman to ~~conclude the service element of that Complaint before the CLSB considers the conduct element of that~~ investigate the Complaint in the first instance, unless the CLSB deems the conduct element so serious in nature that it requires the immediate attention of the CLSB. Once the Complaint has been determined by the Legal Ombudsman, the CLSB will (where it has the jurisdiction to do so under these DR&P) deal with any matters relating to the conduct element of the Complaint that have not been fully disposed of by the Legal Ombudsman. In doing so, the CLSB will adopt any relevant findings of fact made by the Legal Ombudsman in its determination. For the purposes of rule 1.3, the Complaint will be deemed to have been made to the CLSB ~~will treat the date of notification to the CLSB as being on~~ the date the Complaint was made to either the CLSB or Legal Ombudsman, whichever is earlier.

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