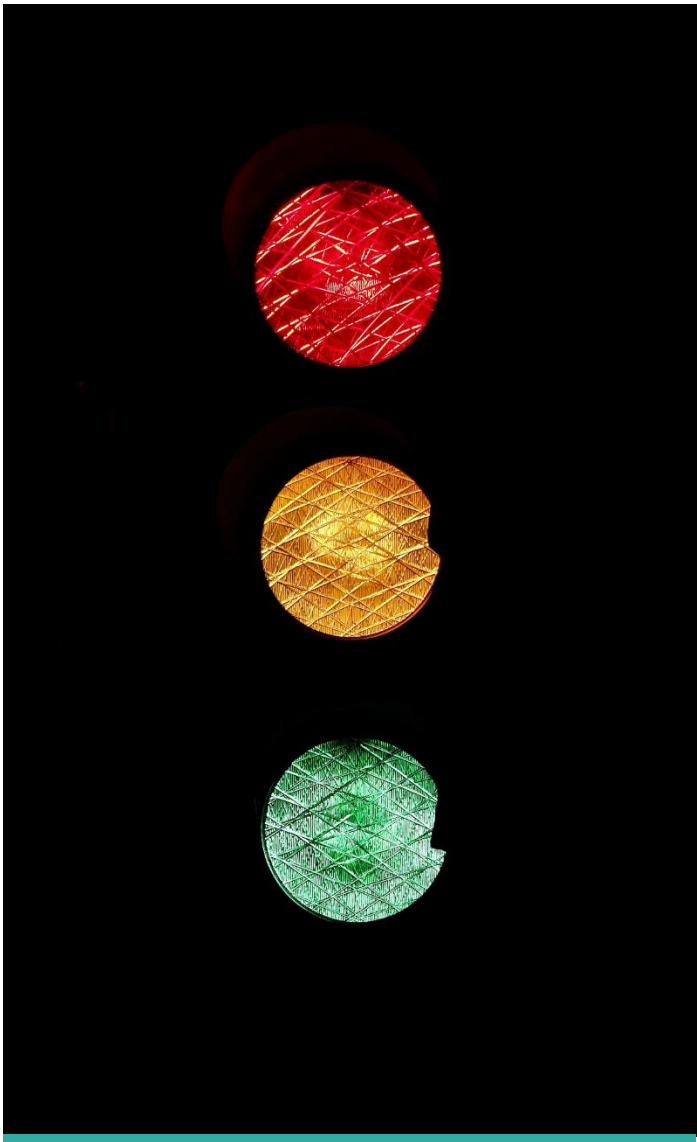
Consultation outcome

Disciplinary Rules and Procedures



20 January 2020

Costs Lawyer Standards Board

Overview

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. These 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 the CLSB's rules. On 26 September 2019 we launched a public consultation in relation to proposed changes to our DR&P. The consultation document can be found on our website here.

The consultation closed on 15 November 2019, following which we considered the responses in detail. Seven responses were received: three from individual practitioners, two from members of our disciplinary Panel (together referred to as individual respondents), one from the Legal Services Consumer Panel (LSCP) and one from the Association of Costs Lawyers (ACL). The proposed changes to the DR&P were well received and consultees provided helpful feedback on points of detail. This document sets out how the CLSB will take respondents' feedback on board in implementing the revised DR&P.

Responses to consultation questions

The consultation document posed seven questions to consultees, seeking targeted feedback on core aspects of the proposals. Most respondents addressed each question.

Consultation question 1: Interim suspension orders

Consultees were generally positive about the proposals for introducing a power to impose interim suspension orders (ISOs) that would enable the temporary suspension of a Costs Lawyer's practicing certificate. The individual respondents affirmed that the

changes struck the right balance between proportionality, procedural fairness and workability. The LSCP welcomed the proposal, noting that it would meet the Legal Services Board's (LSB's) recommendations with regards to ISOs and better protect the public and consumer interest. It would also bring the CLSB's arrangements in line with the other regulators of legal services.

ACL said it was not opposed to the principle of ISOs, noting that is in the interests of its members that consumers are provided with the regulatory protection they expect when instructing a Costs Lawyer. Thus, should a situation arise where the wider consumer interest would be aided by the immediate suspension of a Costs Lawyer's authorisation, such an order should be at the CLSB's disposal. It added that as the Costs Lawyer branch of the legal profession is relatively small compared to other legal professions, it is inevitable that situations which merit an ISO in practice will be rare.

ACL said it was pleased to note that the CLSB could not identify a past case where an ISO should have been made, had the power existed. Against this backdrop, ACL emphasised the importance of the Lay Panel Member in determining whether an ISO should be imposed and the importance of the appeals process. ACL confirmed it had no objections to the process outlined in the consultation but would urge regular reviews of procedures in the event that they are put into action.

We agree that regular review is warranted to ensure any new procedures are operating effectively. In addition to routine review of the new regulatory arrangements as a whole (discussed further below), we will carry out a focused review of the process for imposing ISOs once the ISO power has been used for the first time.

Finally, one individual commented that the Lay Panel Member imposing the ISO should be able to sit on any subsequent Conduct Committee provided that this is made clear to all involved and the evidence they were given is available to the Conduct Committee. We agree that this should be permissible and accept that this is not explicitly set out in the proposed rules; we will therefore add a provision to this effect in a new rule 6.2.3. We will, however, retain the provision stating that the Lay Panel Member may not sit on the Conduct Appeal Committee that hears any appeal from their decision in relation to

an ISO. We take on board ACL's comments about the importance of an independent appeals process in this regard.

Consultation question 2: Clarification of roles

All respondents believed that the introduction of a Case Manager would be a sensible change. One Panel member believed the introduction of a Case Manager was critical to improving the experience of those involved in the process. The LSCP agreed it would be helpful to introduce the Case Manager role, enabling all the parties involved to have a single point of contact, including the Costs Lawyer, complainant, witnesses and Panel Members. ACL also welcomed any revisions, including the introduction of case managers, designed to improve communication between a Costs Lawyer and the disciplinary process in line with the LSB's requirements.

Given the tenor and detail of the responses to this question, we do not believe that any changes to our proposals are required.

Consultation question 3: Transparency

The consultation document sought feedback on whether respondents felt there were any specific circumstances in which Conduct Committee hearings should be held in private.

One individual respondent noted that a hearing in private could potentially be required if it dealt with a complaint arising from conduct in the context of confidential proceedings (or arbitration). In such circumstances, the respondent thought it might be necessary to refer to confidential documents or matters, necessitating a private hearing. Civil Procedure Rule 39.2 provides guidance as to when hearings before the court may be heard in private, and it was suggested that it may be worth importing some of those principles into the DR&P such that the Conduct Committee could consider whether a hearing should be in private on a case by case basis (upon their own motion or as applied for). A second individual respondent agreed that there may be occasions when a hearing or a part of it has to remain private at the discretion of the panel and this "safety net" should be explicitly built into the rules.

The LSCP said that it did not envisage any circumstances in which a private hearing should be held other than perhaps the case being commercially sensitive. ACL said it is committed to encouraging greater transparency within the regulatory and disciplinary processes that affect its members. In line with the practice of other regulators, ACL accepts that Conduct Committee hearings should be held in public in most circumstances. ACL suggested, however, that the revised rules permit the Conduct Committee to hold hearings in private in exceptional circumstances, on the application of either party. It was felt that this would bring procedures into line with other arms of the legal profession, for instance the Solicitors Disciplinary Tribunal.

Given that respondents could envisage circumstances in which it might be necessary and appropriate to hold hearings in private, we agree that it would be prudent to make provision for this as an exception to the usual position. We also agree that this should be at the discretion of the Conduct Committee upon its own motion or application of either party. We therefore propose to introduce such a discretion into the new DR&P to reflect the feedback received (as new rule 6.4.3). In setting out parameters for the exercise of that discretion, we will take into account Civil Procedure Rule 39.2 as suggested.

Another individual respondent said that, while they were content with the proposed changes, depending on the nature of the complaint there might need to be oversight of any decision to hold a hearing in private, with clear reasons being given as to why that decision was taken. We wish to ensure the process is as transparent as possible. Thus we accept that the reasons for any departure from an open process should be publicly available and will add a provision to this effect in the new DR&P (as new rule 6.4.4). However, we are conscious that in some cases the provision of reasons could defeat the purpose of holding the proceedings in private; the reasons themselves might require confidentiality. In such cases, we will require the Conduct Committee to produce a non-confidential version of its reasons for publication, which explains the Conduct Committee's decision as transparently as is possible in the circumstances of the case.

Consultation question 4: Publication of disciplinary outcomes

All respondents were supportive of the proposals in relation to publishing disciplinary outcomes. ACL was satisfied that the changes proposed in respect of the publication of outcomes properly accommodated the introduction of ISOs. It also encouraged the CLSB to keep the position under review given the limited amount of historic data available.

The LSCP noted that it was important for the information is published in plain English in order for it to be easily understood by members of the public who are not familiar with the case. The documents should also be published in an accessible format for ease of access by third parties. The LSCP added that it would recommend that the CLSB and all the other regulators publish the outcomes of their regulatory process in a similar format.

We agree with the LSCP that consistency of language and format across the regulators would deliver real benefits for consumers of legal services. We are collaborating with the other regulators through the Regulators Forum with the aim of agreeing a common approach. Given our size, we can be nimble in adjusting our systems and processes to accommodate existing approaches of the larger regulators and are open to change in this regard. Until a common approach is agreed, we will continue to seek ways of improving our own approach to how we communicate information via the Register of Costs Lawyers and on our website generally in relation to disciplinary outcomes. In this regard, we note that we are working toward launching a new website in the first half of 2020, which will include a refreshed format for the Register.

Consultation question 5: Appointment of Panel members

All respondents agreed that the DR&P should allow for the appointment of additional Panel members on an ad hoc basis, subject to the safeguards proposed in the new rules. The LSCP said it was sensible that the CLSB plans to appoint additional Panel members to constitute Conduct Committees and Conduct Appeal Committees given the low numbers currently available, as this would allow for a more flexible, responsive and timely process for all parties involved in a hearing. It was also supportive of the proposed Conduct Committee and Conduct Appeal Committee compositions.

The ACL said that while it welcomed reforms that would enable disciplinary processes to be undertaken more swiftly and without delay, its ideal solution would be to expand the pool of Panel members to ensure that hearings could be conducted in a more timely manner without the need for ad hoc membership. However, its view was that ad hoc appointments would be permissible providing that the safeguards – independence and a strict adherence to the CLSB's Panel Member Code of Conduct – are maintained.

On this basis, we propose to allow for the ad hoc appointment of Panel members, but will create guidance clearly setting out the criteria for such appointments, building on the safeguards that are incorporated in the rules themselves. One individual respondent noted that there should be an indication of any limitations placed on ad hoc Panel members (for example, whether they are able to deal with ISOs or adjournment requests and whether they are appointed for one case only). We agree that it would be helpful to clarify this for potential appointees and existing Panel members, and will do so in the guidance.

Consultation question 6: Financial penalties

The consultation document asked whether the proposed financial penalties in the new DR&P were sufficient to deter conduct that falls below the standards expected of a Costs Lawyer. All respondents said they were.

One individual respondent said the penalty and costs regime should be reviewed annually. Another felt there should be provision for the fixed costs to be increased annually by reference to a base rate or a set percentage as the true costs of an investigation and hearing will not remain as they are at the point of implementation. We take this observation on board, but equally want to ensure certainty for the regulated community. We explored ways of potentially index-linking the fixed costs within the rules themselves, but ultimately felt that this approach risked making the provisions overly complex and inaccessible. We therefore intend to review the level of fixed costs and penalties during our first wider review of the new DR&P (see further below).

The LSCP added that it welcomed the revision but could not comment on the individual amounts recommended given its lack of expertise. It recommended considering the guidance on the SRA's approach to financial penalties, where the regulator considers both the nature and impact scores of the conduct to calculate the financial penalty. We agree, and will take the SRA's approach into account when we update our sanctions guidance for Conduct Committee members prior to implementation of the new DR&P.

ACL said it is committed to ensuring that the costs of regulation are kept to a minimum for its members whilst ensuring that regulation remains effective for the consumer. ACL was thus satisfied with the proposed increases to both fixed costs and penalties. This was strictly on the basis that it reduced the financial burden on compliant Costs Lawyers via a subsidy from their practicing certificate fee. We agree; this was – and remains – our intention in revising the fixed costs figures.

Consultation question 7: Overarching considerations

This question noted the need to align the DR&P with certain overarching principles (namely the right to a fair trial and the LSB's requirements for well-functioning enforcement processes), and asked consultees whether there were any other overarching considerations that should be taken into account. No respondents felt there were other considerations that had not been accounted for, but ACL again urged that the revised DR&P be reviewed on an annual basis to ensure that they continue to comply with the LSB's requirements.

Review of the new regulatory arrangements

A common theme across the responses was that the new arrangements should be reviewed for effectiveness after an initial bedding-in period. We agree that it would be prudent to review the new arrangements after an initial period and to learn from the experience of all those involved in the process.

Some respondents suggested an annual review, however the size and nature of our regulated community means that we carry out only a handful of disciplinary investigations in a typical year. For this reason, we feel it would be more valuable to

review how the processes are working after a two-year period, to ensure we have sufficient evidence from which to draw meaningful conclusions. As part of that review, we will look in particular at the effectiveness of the ISOs procedure, how the clarification of roles and recruitment of ad hoc Panel members has operated in practice, and whether the level of costs and penalties remains adequate.

General comments

The consultation document also welcomed comments from respondents on aspects of the proposals not specifically covered by the consultation questions canvassed above. This elicited a number of helpful observations, which will be addressed as follows:

- There is no opportunity for a Costs Lawyer who has defended disciplinary proceedings, but who is found to have breached a Principle, to make submissions in mitigation before a sanction is imposed. While in many cases the Conduct Committee will already have the evidence required to impose an appropriate sanction, we accept that in some cases it might be necessary to invite further submissions on mitigating circumstances. We will therefore introduce a provision to allow for this in rule 6.5.1. Any evidence going to mitigation that was provided to the Conduct Committee would be provided to a Conduct Appeal Committee in the event an appeal is made. We therefore do not consider it necessary to make additional rules to cover this issue at level three.
- There is no fixed costs order envisaged at level three where a Conduct Appeal Committee finds that no valid ground for appeal has been made out. We agree that imposing fixed costs in this scenario would not deter meritorious appeals and would be more in line with the approach to fixed costs orders adopted across the DR&P generally. We will therefore introduce language to address this in rule 7.3.6.
- Rules 5.4.4 and 6.6.1 would permit an appeal where new evidence has come to light since the original decision was made, however there is no explicit requirement for the new evidence to be relevant or material. We accept that this leaves scope for abuse of the rules. We will therefore include a materiality threshold in the relevant ground of appeal.

- The CLSB's Practising Rules allow conditions to be imposed on a Costs Lawyer's practising certificate, but this power is not reflected in the DR&P. We agree that this review of our DR&P presents a good opportunity to ensure practical alignment between the DR&P and our Practising Rules. We will therefore add the imposition of conditions on a practising certificate as a sanction that can be included in written undertakings (rule 5.3.7) or in an order of the Conduct Committee or Conduct Appeal Committee (rule 6.5.2).
- Rule 5.1.3 envisages that more than one extension of time could be granted for a Costs Lawyer to provide evidence in response to a complaint. One respondent considered it necessary to set out that the grant of a second or subsequent extension of time is at the absolute discretion of the CLSB to avoid prolonged delays. We agree that the needs of the Costs Lawyer should be balance against the public interest in Complaints being investigated swiftly. We will therefore add language to make this clear.
- In light of rule 1.5 (that the CLSB's jurisdiction does not extend to complaints by litigants or professionals on the other side of proceedings that are ongoing before the courts), one respondent noted that it would not be possible to make an interim suspension order in these circumstances, and that this might lead to an adverse outcome for the Costs Lawyer's client in the relevant litigation. We acknowledge this risk, but are also conscious of the risk of facilitating tactical complaints by opponents in ongoing proceedings. On balance, we therefore remain of the view that urgent conduct issues can appropriately be dealt with by the court to safeguard a litigant, with any residual conduct issues being considered by the CLSB in the usual way.
- Finally, one consultee responded to note that our consultation document was too voluminous, making it prohibitively difficult to find the time to respond. It is essential that our consultations are accessible to our regulated community and to the wider public, and we will take this feedback on board. We are conscious that this feedback must be balanced against comments from the LSCP that they would have found it helpful if more detail was provided with the consultation. We will continue to strive for the right balance in future consultations.

Next steps

We would like to thank everyone who took the time to respond to this consultation. We found the feedback very valuable in shaping a fair, transparent and efficient disciplinary regime.

We will now apply to the Legal Services Board for approval of our new DR&P, incorporating the improvements outlined in this document following consultation. Updated guidance to support the new rules will be considered by the CLSB board in April. We therefore propose to implement the changes with effect from May 2020.