

RESPONSES OF THE ACL TO THE INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION INTERIM REPORT OF PROFESSOR STEPHEN MAYSON

Our Background

The Association of Costs Lawyers (ACL) is a membership organisation representing students, Lawyers and retired practitioners in the field of legal costs.

ACL was founded in 1977 as the Association of Law Costs Draftsmen (ALCD) with the aim of promoting the status and interests of its members. In 2007, Fellows of the ALCD were granted rights to conduct costs litigation and rights of audience under the Legal Services Act.

In 2011 the ALCD was renamed as the Association of Costs Lawyers and became the statutory regulator of qualified costs practitioners. In line with the Legal Services Act, ACL delegated regulatory work to the Costs Lawyers Standards Board (CLSB).

There are currently 573 members of the ACL who represent both paying and receiving parties in all forms of costs litigation. Many members also act for Litigants in Person and the Association is committed to delivering better access to justice in all costs related matters.

All of our members have experience in costs issues and the vast majority deal with costs on a day-to-day basis, as well as using the Courts in person and on paper regularly.

Our members work alongside other legal professionals, some of which also hold a professional title and many who do not. The latter usually operate as unregulated Costs Draftsmen who act, when conducting often complex costs litigation, as an exempt person under the supervision of a solicitor with a professional title.

Costs law has experienced a somewhat exponential increase in complexity and importance to consumers of legal services over the past decade, whether this be through the introduction of costs budgeting, the expansion of various different fixed costs regimes and the expansion of solicitor/client assessments due to the irrecoverability of additional liabilities between the parties. This expansion both of the scope and the complexity of the work costs practitioners conduct raises significant problems for the current regulatory framework. Our members experience a regulatory framework where unregulated actors are conducting costs litigation under the supervision of someone with a professional title who does not have the expertise, knowledge or experience of the activities which they are supervising.

Costs Lawyers, as regulated by the CLSB, have undertaken three years of study to become qualified and have mandatory requirements for continuing professional development. It is often the experience of our members that the regulatory obligations and responsibilities that they adhere to are not reciprocated by unregulated costs practitioners.

Historically our members have pursued a hard-fought campaign to enter the regulated field of the legal profession. We believe that our regulated status provides security and confidence to the consumer that unregulated actors cannot. ACL thus approaches any consultation which

would potentially alter the regulatory foundations upon which our members operate with both caution and objectivity.

ACL has responded to each consultation proposition which will impact on the regulatory status and work of our members. We have sought to give some insight and background as to how each proposition will impact on our members and the consumers of our services.

This response is not intended to represent the personal views of the individual members of the ACL Council but it is intended to reflect the anticipated views of the membership, who, with their wide ranging experience in all matters relating to costs law and wider legal activities, will be able to add substantial content to this consultation.

The Propositions

1. Do you agree with Proposition 1 that promoting and protecting the public interest (as outlined in paragraph 4.2) should be the primary objective for the regulation of legal services?

ACL agrees that promoting and protecting the public interest should be the primary objective for the regulation of legal services.

2. Do you agree with proposition 2 (paragraph 4.3.5) that consumer expectations and regulatory reality should be aligned by at least allowing access to the Legal Ombudsman for all consumers of legal services offered to the public?

ACL agrees provisionally that all consumers of legal services should have access to the Legal Ombudsman, regardless of the status of the professional they instruct.

3. Do you agree with proposition 3 (paragraphs 4.3.5) that all legal services should be capable of falling within the regulatory framework, irrespective of who provides them?

Given ACL's agreement to Proposition 2 it thus follows that ACL agrees that in principle all legal services should be capable of falling within the regulatory framework.

4. Do you agree with proposition 4 (paragraph 4.4) that there should be an alternative or additional form of entry into regulation for those who do not hold a professional title?

ACL became the approved regulator of Costs Lawyers as authorised persons under the Legal Services Act in 2011. This was the culmination of a long and hard fought campaign to bring what was previously an unregulated sector of unqualified and unregulated costs draftsmen into a regulatory orbit.

ACL believes that this expansion of regulation into the legal costs profession increased standards and protection for consumers, through stringent qualification requirements and ongoing continuing professional development requirements.

ACL is thus cautious about the introduction of individuals who have not satisfied the *current* requirements in respect of qualifications into the regulatory framework.

However, ACL imagines that these concerns could be mitigated somewhat by further detail as to what specific activities would be subject to BTE and DTE regulation. For instance, ACL believes that the conduct of detailed assessment proceedings (as a piece of litigation) should always require, for the protection of consumers, BTE regulation. Be that via a professional title or some other means.

5. Do you agree with proposition 5 (paragraph 4.5.1) that a future regulatory framework should allow the differential application of before-, during- and after-the-event regulation to reflect the importance or risk of any particular activity or circumstance?

ACL is broadly supportive of differential application of before-, during- and after-the event regulation of particular activities. The work of our members encompasses all aspects of legal work and the costs associated of specific legal activities. Just as certain legal activities are of a higher risk to consumers than others, the same applies for the work our members carry out. The possibility for our members reducing the associated costs of regulation if they work only in low risk areas is an area we are keen to explore. However, ACL must reserve the right to respond further at a later date when it comes to determining *which* activities should be deemed to require before- or during-the-event regulation.

6. Do you agree with proposition 6 (paragraph 4.5.5) that professional title should no longer be the only route to personal authorisation, even in respect of those important or highest-risk activities for which BTE authorisation would continue to be required?

We would refer back to our response to Proposition 4. In principle ACL does not oppose the regulation of those who do not hold a professional title. However, this would be on the basis that a level playing field is maintained and that the BTE authorisation of those currently unregulated is comparable to the qualifications and learning outcomes held by our current membership.

7. Do you agree with proposition 7 (paragraph 4.5.5) that the appropriate regulator should determine which qualification or assurance of (continuing) competence, experience and integrity would need to be demonstrated by any particular legal services on a BTE basis and the additional requirements that would be applied on a DTE or ATE basis to the relevant providers?

ACL agrees that it should be the appropriate regulator which determines the qualifications and experience to be demonstrated prior to conducting any legal activities which would require BTE authorisation. ACL agrees that requirements that presently placed on holders of a professional title should be extended to all of those who wish to undertake those activities which would require BTE authorisation. This would, ACL feels, go some way to narrowing the 'regulatory gap', which our members are grappling with.

8. Do you have a view on (paragraph 4.6) a revised definition of 'legal activity' or 'legal services'?

ACL feels that the profession has, on the whole worked well under the definition given under section 12(3) Legal Services Act 2007. As a membership organisation however we are happy to engage in any definitive proposals to alter the definition of legal activities/services to cover areas such as mediation.

9. Do you have a view on (paragraph 4.7) what should be the minimum conditions attached to after-the-event regulation?

Should the principle that all legal activities and services should be regulated be established, ACL feels that certainly there should be a requirement of transparency on behalf of all providers. ACL would encourage the introduction of a code of conduct and requirements for the disclosure of terms of engagement and at least some level of indemnity insurance.

Whilst ACL accepts that there may be a public policy argument for only creating minimal ATE conditions, it feels that only allowing recourse to the Legal Ombudsman would not provide sufficiently effective protection to consumers.

10. Do you agree with proposition 8 (paragraph 4.8.3) that the application of regulatory requirements could be supported by the existence of a public register of who is regulated and for what, such that:
- ATE regulation and *voluntary* registration should extend to all providers of low-risk legal services; and
 - BTE and DTE regulation and *mandatory* registration should apply to providers of higher-risk legal services?

ACL agrees that a public register of those who are regulated and for what activities is a fundamentally positive step in assisting the public navigate any future framework. Currently all of ACL's members as authorised persons under the current framework are included on a public register. We thus have no objections to a mandatory register across all activities.

11. Do you agree with proposition 9 (paragraph 4.9.2) that:
- The current list of reserved activities should be reviewed to identify clearly the public interest basis of the continuing need for prior authorization by reference to public good or consumer protection;
 - Other activities should also be reviewed against these same criteria to see whether prior authorization should in the future be extended to them (and do you have any suggestions for what those activities might reasonably be)?

ACL has no objection in principle to the current list of reserved activities being reviewed and the consideration of other activities being included in the pool requiring prior authorisation. ACL is happy to engage with this process and to provide case studies and data as to what activities our members undertake and the basis for BTE/DTE regulation. We will be embarking on further soundings from our members in this respect.

12. Do you agree with proposition 10 (paragraph 4.10.2):
- That the future primary focus of regulation should be the 'provider' of legal services, whether an individual, entity, title-holder or technology; and

- b. If so, how might a definition of provider be constructed, and what would it need to include and exclude?

Currently Costs Lawyers are regulated through their individual practicing certificate. There is no current provision within our practicing rules for entities to carry this regulation. It is against this backdrop that ACL responds.

ACL does not oppose in principle a move towards the regulation of 'providers' of legal services as opposed to regulation of professional titles or ABSs. ACL agrees that competence and integrity are qualities that can only be demonstrated by human beings, not legal constructs. Clearly however the definition of a 'provider' will require further consideration. ACL is happy to engage in this process as and when required.

13. Do you agree with proposition 11 (paragraph 4.10.3) that:
- for the purposes of a future single register of providers of legal services, the registration should be in the name of the entity, partnership, or individual subject to regulatory requirements or with which a client has terms of engagement; and
 - BTE authorization should only be granted to individuals?

As outlined above, Costs Lawyers are regulated as individuals through their practicing certificate. It is from this experience which ACL responds. ACL agrees that for the purposes of lower risk activities the provider of legal services should be included on the single register.

In respect of the higher risk activities however, ACL is of the opinion that prior authorisation should only be provided to individuals. We would echo the thoughts of the interim report, that the integrity and competences which these activities require can only be demonstrated by an individual.

14. Do you have a view on whether there should be a continuing need for separate registration of alternative business structures or prior approval of 'non-lawyer managers' for ABSs (paragraph 4.10.5)

As our members are currently regulated directly through their practicing certificate, ACL as a membership organisation does not hold a view in respect of registration of ABSs, save from the sentiment outlined above regarding the authorisation of individuals to undertake activities of the highest risk to the public.

Consequential Questions

1. Do you agree that it should be a matter for a regulator to decide whether, and on what basis, an individual could be granted, and maintain, authorisation or accreditation for legal services over a period of time. In particular, do you agree that those who have a professional title, and those who do not, should be subject to the same regulatory requirements, both initially and over time in respect of the same legal services; and that there should be no automatic or perpetual 'passporting' for any providers, whether title-holders or not?

In principle ACL agrees that it would be for the regulator to determine authorisation and accreditation for individuals over a period of time. The costs lawyer profession

as a regulated wing is comparatively young when compared to other professional titles. Our code of conduct and practicing rules restrict our members to practicing in areas that relate solely to costs. With our CPD requirements and our specialised knowledge of costs as an area of law, ACL feels that the risk of 'perpetual passporting' by our members is less of a concern to a regulatory framework than other branches of the legal profession. We are of course happy to engage further on this area should it be required.

2. Do you have a view on whether (paragraph 5.2.3):
 - a. A practitioner should be required to demonstrate continuing competence and experience of a sufficient level to reflect the risks associated with the service in question or with the types of client served;
 - b. There should be any automatic or perpetual 'passporting' for title-holders and other regulated providers; and
 - c. Those who hold a professional title should be, in regulatory terms, any more privileged or disadvantaged than those who do not?

ACL would echo the views set out in our response to Consequential Question 1. If any expansion of the regulatory tent is to take place to include those who are not currently regulated, ACL is of the belief that those new entrants should both share the costs of regulation with our members and work to the same standards which are expected of our members by a regulatory framework. Our concern is not such much in respect of any privilege or advantage of our members, but with preventing any reduction in standards, competence and integrity that consumers can currently expect of a regulated costs practitioner.

3. In relation to the future regulation of professional titles, do you have any preference for, or views about, Option 1 (regulator responsibility), Option 1A (regulator responsibility with legally separate title regulators), Option 2 (professional body responsibility) or Option 3 (co-regulation)? (paragraph 5.3)

ACL has no objection in principle to the introduction of a regulator for all costs practitioners to ensure minimum standards for consumers. The issuing of the professional title of Costs Lawyer will, as far as ACL understands, remain with ACL. It thus follows that ACL will issue its own code of conduct and professional standards that we expect our members to adhere to. ACL will thus oppose moves to remove our rights as a membership organisation to regulate those who hold the title of Costs Lawyer.

4. Do you have a view on whether: the adoption and use of all professional titles should be protected (paragraph 5.3) or the current protections should continue alongside a public register and the generic use of an expression such as 'registered legal services provider'? (paragraph 4.8.3)

The title of Costs Lawyer is current protected under the Legal Services Act 2007. Whilst ACL has no objection in principle to the expansion of regulation and the introduction of a register of legal service providers, we would not agree to proposals which would impact upon the statutory protections of our members' professional title.

5. Where providers who would not ordinarily be regarded as being within the legal sector are giving advice on matters of law that fall within the definition of legal services, in principle should the same regulatory requirements apply? Further, should certain minimum ATE requirements of the legal services regulatory framework (such as access to the Legal Ombudsman) apply in any event to all providers in order to simplify the consumers route to making complaints and initial claims for redress (paragraph 5.4.3)

As a membership organisation ACL does not have a definitive view on this issue, however we would support a consistent approach across the entire sector. Thus minimum ATE requirements should be in place for all actors who are providing legal services.

6. Given the public policy objectives for legal professional privilege, and parity for clients, should privilege be extended to those providers who are registered within the legal services framework? (paragraph 5.4.4)

ACL as a membership organisation does not have a preliminary view on the expansion of legal professional privilege but will consult further with our membership.

7. Should immigration advice and services fall within the definition of legal services, with all immigration practitioners coming at least within ATE requirements for legal services (paragraph 5.5.4)

ACL as a membership organisation does not have a preliminary view on the expansion of legal professional privilege but will consult further with our membership if appropriate.

8. Should LawTech fall within a future definition of 'legal services', and a 'provider' of LawTech legal services capable of being within the regulatory framework? (paragraph 5.6)

ACL as a membership organisation does not have a preliminary view on the expansion of legal professional privilege but will consult further with our membership if appropriate.

9. Should a law centre or other similar organization be a registered entity for regulator purposes, and the body responsible for compliance with DTE or ATE requirements? If higher-risk activities are carried out for which BTE or DTE obligations exist for individuals, should the relevant individuals also be registered? If there are no such obligations, is it sufficient that individuals be otherwise covered by the entity registration? (paragraph 5.7.2)

ACL as a membership organisation does not have a preliminary view on the expansion of legal professional privilege but will consult further with our membership if appropriate.

10. Should future regulation allow the pro-bono activities of a law firm or legal department to be registered as a distinct unit (treating it for regulatory and registration purposes as a separate 'entity')? (paragraph 5.7.3)

ACL as a membership organisation does not have a preliminary view on the expansion of legal professional privilege but will consult further with our membership if appropriate.

11. Should an in-house legal department be capable, for regulatory purposes, of being registered as a distinct entity or unit, so that the department's delivery of legal services should be subject to the same regulatory obligations as any other registered provider? Should individuals within such a registered in-house unit also be registered personally if they carry on activities for which BTE authorisation would otherwise be required? (paragraph 5.8)

ACL's preliminary view is that any in-house legal department should be registered as like any other provider of legal services. Likewise, any individuals carrying out activities that require prior authorisation should be registered individually. ACL would echo previously expressed views in respect of competence and integrity being attached to individuals and not legal entities.

12. If an in-house department was not registered, should it be allowed to carry on legal services for which BTE authorisation or other regulatory conditions would otherwise be required (except where an individual is appropriately registered and authorised)? (paragraph 5.8)

In light of ACL's response above, it thus follows that our view is that registration should be mandatory prior to legal services being provided.

13. Do you have a view on whether future decisions about the legal services subject to BTE authorisation need to be decided by Parliament and set out in statute, or can greater flexibility be left to a regulator? Would the same be the case for DTE regulation? (paragraph 5.9)

ACL is conscious of the need for greater flexibility and an ability to adapt to changing circumstances should regulation be essentially based upon activity rather than title. Thus whilst there are clearly advantages in having a regulator make decisions regarding services subject to BTE authorisation, some form of Parliamentary approval should be incorporated into the process. ACL is happy to engage further on this point once definitive proposals are formulated.

14. Do you consider that (paragraph 6.3):
a. A longer-term alternative approach would sufficiently address the identified shortcomings of the current framework; and
b. The potential benefits would be worthwhile?

ACL is broadly in agreement with the interim report in respect of the shortcomings of the current framework. Shortcomings in respect of the regulatory gap are identifiable to our members. ACL's preliminary view is that the alternative

approach outlined could rectify these shortcomings. The devil will of course be in the detail. Differentiating activities by BTE, DTE and ATE regulation in principle is not objected to. ACL is happy to engage further in future exercises in determining which activities should be placed under which regulatory requirements.

15. Would you support (paragraph 6.4)
- a. The short term repeal of section 63(2) and (3) of the Legal Services Act 2007 to allow the Legal Services Board to become an approved regulator; and
 - b. The short term replacement of section 128 of the Act to allow the Legal Ombudsman to gain jurisdiction in respect of complaints made against any provider of a legal activity, including those who not offer reserved legal activities?

The short term repeal of s.63(2) and (3) of the Legal Services Act 2007 would allow the Legal Services Board to become an approved regulator to provide authorisation to those currently unregulated. From a costs practitioners' perspective this would enable currently unregulated costs draftsmen to operate on the same basis as Costs Lawyers. ACL opposes this short term change to the current regulatory framework. ACL has highlighted throughout this response our concerns regarding the operation of currently non-regulated actors within costs law. We approach a long term move to expanding the regulatory tent with objectivity and with no principled desire for a 'closed shop'. However, we cannot support any short term moves to expand regulation without appropriate assurances that qualification terms and regulatory requirements will be equal to those of our membership.

However, ACL is open to proposals to replace s.128 of the Legal Services Act 2007 to permit the Legal Ombudsman to gain jurisdiction in respect of legal activities which are not reserved. Currently our members are within the jurisdiction of the Legal Ombudsman for all legal activities by virtue of their practicing certificate. To expand jurisdiction to cover similar activities carried out by currently non-regulated practitioners would be a welcome step.

16. Do you have a preliminary view on whether there should be an expanded role for the Legal Ombudsman? (paragraph 7.2.1)

ACL does not have a preliminary view as to a potentially expanded role for the Legal Ombudsman, but will take soundings from our membership on this issue and report further.

17. Do you have a preliminary view on whether a requirement for consistency, coherence and co-ordination across regulation within the legal services sector would or should necessarily lead to a single, or at least a continuing oversight, regulator? (paragraph 7.2.2)

Given the potential for a considerable number of new regulators being set up to cover various legal activities, ACL's preliminary view is that an oversight regulator to ensure consistency and co-ordination would be required.