



THE CRIMINAL BAR ASSOCIATION

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Introduction

1. The Criminal Bar Association represents over 3,800 barristers specialising in criminal law. We welcome the opportunity to respond to the ILEX Professional Standards (“IPS”) consultation paper “Proposal to seek rights of audience and rights to conduct litigation for Associate Prosecutor members of ILEX” (the “Consultation Paper”).

The ILEX application

2. ILEX is making an application under the Legal Services Act 2007 to become an approved regulator in respect of advocacy and litigation undertaken by those of its members who are registered as Associate Prosecutors (“APs”) within the Crown Prosecution Service (“CPS”). The application seeks approval to grant rights to conduct litigation and rights of audience.

3. Currently, Level 2 Associate Prosecutors can conduct all proceedings in the Magistrates’ Court and the Youth Court save for trials in triable either way matters and offences punishable with a term of imprisonment¹.

4. The rights which are sought are split into two levels: Level 1 and Level 2. Level 1 rights of audience will permit a ‘New Associate

¹ Associate Prosecutors – Directors Instructions. See http://www.cps.gov.uk/legal/a_to_c/associate_prosecutors_directors_instructions/

Prosecutor' to appear in the Magistrates' Court (including Youth Courts) to prosecute all hearings except: trials; Newton Hearings; Special Reasons hearings; Contested Preventative Civil Orders; and Contested Binding Over Proceedings.

5. Level 2 rights of audience will permit the Associate Prosecutor to appear in the Magistrates' Courts (including Youth Courts) to prosecute all proceedings where the CPS is the prosecuting authority except trials in either-way matters.

6. Holders of Level 1 and Level 2 Rights of audience and Litigation Certificate in Criminal Proceedings will be awarded the following litigation rights:

- a. The right to exercise the powers of a Crown Prosecutor to conduct a case outside court, namely:
 - i. Review of a prosecution case by applying the Code for Crown Prosecutors; and
 - ii. Other casework functions necessary to progress prosecution cases that fall within an Associate Prosecutor's statutory remit. That is:
 - To decide appropriate bail conditions and objections to bail in Magistrates' Court and Youth Court proceedings;
 - To decide whether to discontinue a case;
 - To make disclosure decisions;
 - To decide witnesses to give live evidence, to serve under section 9 of the Criminal Justice Act 1967 and to tender to the defence;
 - To amend a charge or summons, prefer a new charge or drop a charge;

- To decide whether to apply, vary or discharge a civil preventative order.

The CBA response

7. For the reasons set out below we do not support the proposal. In our view, such rights are fundamental and must not be extended without good and sufficient cause. The Consultation Paper does not make out such a cause; indeed it is silent on the need for the step it proposes to take.

8. When the role of a designated caseworker was extended by the Criminal Justice and Immigration Act 2008, it was limited to conducting simple guilty pleas and non-imprisonable offences. The proposals extend the role far beyond that which this piece of legislation envisaged. We are concerned that the majority of the work carried out in the Magistrates' and Youth Courts will now be conducted by those without formal legal qualifications or minimum academic or other professional or vocational qualification or training.

9. There is insufficient information within the Consultation Paper in some fundamental respects, namely training and supervision of APs. In one of the most essential areas (the Foundation course) there is no assessment at all. This course covers areas of law and procedure which are of paramount importance for all those prosecuting trials, particularly those without a formal legal qualification. In some aspects of the training the Consultation Paper does not set out the standards which are to be met. Without making an assessment it will not be possible to ascertain the applicants capability and competence; without knowledge of the standards required it is not possible to make a comparison with the

standards required of a trainee solicitor or pupil. It is submitted the proposals must be capable of such comparison.

10. We are concerned that the proposals will lead to an increase in the risk of miscarriages of justice and an overall loss of confidence in the effective and fair prosecution of cases.

Our answers to the questions

Question 1: ILEX seeks rights to conduct litigation and rights of audience for Associate Prosecutor Members. Do you have any comments on the rights sought?

The rights sought are significant and include not only the rights to review cases, making charging decisions and decision to offer no evidence, but also rights to prosecute trials. A considerable degree of responsibility therefore will be placed in the hands of prosecutors with no formal legal qualification or training. In the circumstances, there can be no guarantee of the quality of service provided by legally qualified barristers or solicitors.

Under the proposals, APs will be able to conduct all summary trials in Magistrates' Courts and Youth Courts save for either way matters. Magistrates' Courts and Youth Courts can deal with some extremely serious cases. A conviction in the Magistrates' Court can result in a prison sentence of up to 6 months and the loss of one's good character, employment and reputation. Youth Courts can hear matters which, but for the age of the defendant, could be heard in the Crown Court. It is not correct to say the steps proposed are acceptable because they are confined to less important cases. It matters not that the proposals are restricted to proceedings in the Magistrates' Court rather than the Crown Court. The same laws apply, many of which are highly complex. The fundamental issue is that these cases will be conducted by people with no legal

qualification or minimum academic or other professional or vocational qualification or training.

The proposals do not consider how cases might be identified as being appropriate for prosecution by an AP. For instance, is it envisaged that APs will prosecute *all* trials of summary matters regardless of their complexity? Will APs be permitted to conduct trials in which the witnesses and/or defendants are young and/or vulnerable? Will APs be permitted to conduct cases in which issues of law (abuse of process, for instance) arise? Will the AP be permitted to conduct bail applications in any case regardless of the seriousness of it? Upon what basis will such decisions be made?

Question 2: ILEX proposes that the rights will be awarded through two certificates: Level 1 and Level 2. Do you have comments on the proposed split between the two certificates?

The Consultation Paper does not set out what is required of a Level 1 AP in order to achieve Level 2, save to say "*Experienced Level 1 APs will be eligible to apply to complete a higher qualification programme leading to the award of Level 2 Rights of Audience and Litigation Certificate in Criminal Proceedings*". It is not clear what is meant by 'experienced'. How long is it envisaged the AP should prosecute at Level 1 before becoming sufficiently experienced to apply for Level 2? Is there a minimum requirement? How is the Level 1 AP monitored conducting cases in order to establish suitability to make the application for Level 2?

Question 3: Do you have any comments on the CPS selection process?

The Consultation Paper states the IPS seeks to ensure that APs will be "*suitably qualified*". Given there no minimum academic

requirement or formal legal qualification it is unclear what is meant by this. The paper does not expand on this further. It does say that the selection process will be "*rigorous*" and will involve an application form, case study presentation and interview. It does not include an assessment of legal knowledge, evidence and procedure. It is not therefore possible to assess how the process compares with other legal study and training.

We note that the CPS will select staff to train as APs according to '*business needs*'. It is not clear what such business needs might be. In fact, nowhere in the Consultation Paper is there an explanation as to the need to take this step. We submit there should be persuasive arguments made that this step is required and is in the public interest. We have seen none.

Question 4: Do you have any comments on the proposed competencies for the Associate Prosecutor selection process?

The '*person specification*' criteria appear to be fair and reasonable but do not include the qualities required to act as a lawyer and advocate, making sound legal judgements based on a sound understanding of law and procedure.

Question 5: Do you have any comments on the selection process for Associate Prosecutors at Level 1?

We note the requirement that a Level 1 AP must have "*experience of casework within the criminal justice system/lay presentation*", "*a demonstrable working knowledge of criminal law and its application, magistrates' court practice and procedure and the criminal justice system*" and "*well developed skills in identifying evidential issues and omissions and in drafting and communication*". Given there is no requirement of a formal legal qualification or minimum academic

or other professional or vocational qualification or training, it is difficult to envisage how the experience and knowledge identified above might be gained and therefore causes concern about how the criteria might be met. It is submitted that the criteria are not realistic.

Question 6: Do you have any comments on the pre-course work required to be completed by Associate Prosecutors?

The Consultation Paper indicates that a trainee AP will be allocated a mentor but does not set out the criteria required to qualify as a mentor save to say it will be "*an experienced Associate Prosecutor or a Crown Prosecutor*". It is of concern that there is no requirement for the mentor to be a fully qualified lawyer.

Trainees will be required to observe various court hearings but the Consultation Paper does not specify whether the person being observed will be a qualified lawyer or another AP nor how to ensure that the appropriate standards are met by that person.

Question 7: Do you have any comments on the contents of the Foundation Course?

The Consultation Paper contains only the course outcomes and objectives and not the course content and therefore it is not possible to comment. It is worth noting that the course envisages covering important areas (such as evidence and the law in relation to criminal offences which will be prosecuted) which do not appear to be subject of an assessment. It is of considerable concern that the ability to satisfy the objectives in such fundamental areas will not be tested.

Question 8: Do you have comments on the contents of the Trial Preparation course?

Question 9: Do you have any comments on the assessment criteria for the Trial Preparation course?

The aims and objectives of the course appear reasonable.

The assessment grid provides an assessment framework but goes no further and does not provide details of what is to be expected in order to achieve '*competent*' or '*good*'. It is not therefore possible to compare the assessment criteria with that required of a trainee solicitor or pupil.

It is of concern that there is no detail about who will be responsible for the assessment.

Question 10: Do you comments on the course criteria for the Advocacy Skills course?

Question 11: Do you have any comments on the assessment criteria for the Advocacy Skills course?

The aims and objectives of the course appear reasonable.

The assessment criteria seem reasonable and appropriate. Again, it is worth noting that there is no detail about who shall carry out the assessment and how the standards compare to that required of a trainee solicitor or pupil.

Question 12: Do you have any comments on the course criteria for the Youth course?

Question 13: Do you have any comments on the assessment criteria for the Youth Court?

The aims and objectives of the course appear reasonable, although there is no reference to youth sentencing provisions nor the situation where a youth appears with an adult.

In relation to the assessment criteria, the Consultation Paper does not contain important details such as whether the assessment is to be a practical exercise. The criteria include "*relevant legal and policy principles*" but do not contain knowledge of the law and procedure.

Question 14: Do you have any comments on the structure or content of the Level 1 qualification?

In addition to the above comments, we observe that there is no time frame for the qualification/training period; there is no detail as to the contact between trainee and mentor, nor the structure to that contact.

Question 15: Do you have any comments on the observation grid for bail hearings?

Question 16: Do you have any comments on the criteria for the Bail courses?

Question 17: Do you have any comments on the assessment criteria for the Bail courses?

There is no detail about who the trainee will observe and whether that person shall be a fully qualified lawyer or another AP and what steps will be taken to ensure that person is suitably qualified and experienced.

The criteria for the Bail courses seem reasonable and fair.

Again, there is no detail in relation to who will carry out the assessment.

Question 18: Do you have any comments on the selection process for Level 2 Associate Prosecutors?

The Consultation Paper states "*experienced Level 1 Associate Prosecutors will be able to progress to become Level 2 Associate Prosecutors, as opportunities arise*". It does not set out what criteria is to be met in order to become "*experienced*". There is no minimum qualification or experience, and the presentation stage involves only a remand application and opposing a bail application. This, it is said, is designed to "*test the advocacy skills, judgement and analytical skills of applicants*". It is of concern that the presentation stage is limited and in our submission will not be able to provide an indication of the applicant's ability to prosecute cases properly.

Question 19: Do you have any comments on the observation and mentoring arrangements for Level 2 Associate Prosecutors?

The Consultation Paper states the mentor will "*usually be an experienced Crown Prosecutor*". There is no detail as to how it will be ensured that the mentor is suitably qualified and experienced, which in our experience they must be.

Question 20: Do you have any comments on the course outcomes for the Level 2 Foundation course?

The aims and objectives seem reasonable and fair. It is of concern, however, that there is no assessment in relation to this aspect of the training. The Foundation Course is designed to deal with some fundamental aspects of evidence and procedure. It is not possible to properly prosecute a case without proper knowledge and understanding of these complex areas. Assessment in this respect is of paramount importance, especially given the other aspect of the training is E-learning.

Question 21: Do you have any comments on the course outcomes for the Advocacy Skills course?

Question 22: Do you have any comments on the assessment criteria for the Advocacy Skills course?

Preparing and presenting a mock trial to an independent assessor is a good means of assessing advocacy skills and is to be encouraged. The concern in respect of the assessment is the lack of information as to the "*standard required*". The Consultation does not specify what this means and therefore it is not possible to compare this to the standard required of a trainee solicitor or pupil. The standards must be comparable.

Question 23: Do you have any comments on the content or structure of the Level 2 qualification?

In addition to comments above, we are concerned that a Level 2 AP will be able to conduct trials which deal with the same issues of law, evidence and procedure as those conducted in the Crown Court without a formal legal qualification, and in some respects without an assessment of basic legal knowledge. To say the proposals are acceptable because they are confined to less important cases is wrong and misleading.

Question 24: Do you have any comments on the process by which IPS will accredit the CPS to deliver courses?

No.

Question 25: Do you have any comments on the oversight and monitoring role to be undertaken by IPS to ensure standards of course delivery and assessment are maintained?

The only comment we make is that IPS is not independent given that ILEX is proposing the scheme for its members.

Question 26: Do you have any comments on the number of hours CPD Associate Prosecutors are required to undertake?

Members of the Bar must undertake 42 hours CPD in their first three years practice as New Practitioners and 12 hours annually as an Established Practitioner thereafter. All hours must be undertaken in the area in which they practice. We see no reason for APs to have to complete only half their CPD hours in criminal practice, procedure, knowledge or advocacy skills training.

Question 27: Do you have any comments on the standards of conduct that IPS expects Associate Prosecutors to observe?

It is right that APs are bound by the same standards of conduct as other prosecutors.

Question 28: Do you have any comments on the arrangements by which IPS will investigate the conduct of Associate Prosecutors?

Question 29: Do you agree that the CPS should be expected to refer any conduct matters to IPS as appropriate?

It is not clear whether IPS is under an obligation to report to the CPS a complaint made only to IPS.

It is only right that the CPS is obliged to refer conduct matters to IPS.

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2nd April 2010