



**CBA Response to the CILEX Consultation
“Higher Rights of Audience “**

1. This is the response of the Criminal Bar Association of England and Wales (the “CBA”) to the CILEX consultation on Higher Rights of Audience.

2. The CBA represents approximately 4,000 member barristers who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. The CBA is the largest specialist Bar Association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy of members of the CBA guarantee the delivery of justice in our courts.

3. The CBA promotes the Criminal Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality, and diversity across the profession; and the continuing training and development of Criminal barristers to ensure the gold standard of advocacy in our criminal courts.

4. A strong and independent criminal Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights, often acting on behalf of the most vulnerable members of society. The criminal Bar makes a vital contribution to the efficient operation of the criminal courts and criminal justice system and provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend.

5. Question 1: Do you agree that CRL should seek Higher Rights of Audience for suitably qualified CILEX Practitioners?

Answer: No we do not agree.

Comments: The proposal creates a two-tier system of advocates in the higher courts with CILEX practitioners only required to carry out 36 hours of training. The route to becoming a Criminal barrister involves a lengthy process of study, training and supervision. All Criminal barristers are graduates who then undertake a year of specialist Bar legal training and advocacy followed by pupillage. This ensures the highest intellectual ability, resilience and skills in written and oral advocacy with the ability to consistently make swift judgments under pressure of time that are correct at multiple stages of proceedings.

The training process over so many years is equivalent to medical training for doctors who equally begin with general training moving to increasingly more specialized work. At each stage, there are external assessors who have little vested interest in whether the individual succeeds or fails. In particular during pupillage, criminal barristers have one-to-one training and supervision from a supervisor ensuring that the high standards of advocacy at the Criminal Bar are maintained. The quality of the graduate course, the status of the postgraduate course provider and the reputation of the Criminal Bar remain high. The CILEX proposals do not compare to this level and quality of study, training and supervision which not only maintains high standards but preserves the integrity of the Criminal courts and efficiently manages the Criminal courts' workload.

Following pupillage, new practitioners continue to receive formal and informal training: they must comply with requirements to show proof of approved continuing professional development (including attending lectures and training conferences run by the CBA), and they receive mentoring and guidance from more established colleagues in Chambers. They will not have acquired the advocacy skills needed for advocacy in Crown Court or the Court of Appeal after 36 hours of training.

The value of the independent Bar has long been recognised, at the highest level. While fears have been expressed that the UK operates a two-tier system of justice. Michael Gove MP, as Secretary of State for Justice in 2015, said¹:

...when I came to office I made sure that the changes [Chris Grayling] had put in place to guarantee access to legal advice across the country were implemented. I also made sure that the criminal bar were protected from further cuts so that the high quality advocacy they provide could be supported.

The current Secretary of State, Alex Chalk MP, said at his swearing-in ceremony:

I always knew my colleagues at the Bar were brilliant lawyers and advocates, literally some of the finest this country has produced.

Michael Gove on the same occasion spoke of the divide that affected our system of justice:

While those with money can secure the finest legal provision in the world, the reality in our courts for many of our citizens is that the justice system is failing them. Badly. A dangerous inequality at the heart of our system.

There are 2 nations in our justice system at present. On the one hand, the wealthy, international class who can, for example, choose to settle cases in London with the gold standard of British justice. And then everyone else, who has to put up with a creaking, outdated system to see justice done in their own lives. The people who are let down most badly by our justice system are those who must take part in it through no fault or desire of their own: victims and witnesses of crime, and children who have been neglected.

The CILEX proposals risk introducing a third and lower tier in criminal advocacy, by admitting individuals whose training and experience falls far below that which the Criminal Bar (or the Solicitor's profession) provides. It cannot be in the public interest for insufficiently qualified advocates to exercise higher rights. The profession of criminal court advocacy should not be deskilled in the manner proposed.

¹ Speech to the Legatum Institute, 23 June 2015

The CILEX consultation papers gives two reasons for seeking higher rights: to ‘enhance diversity’ and to provide ‘career opportunities’ for legal executives². It is troubling that these two reasons are given equal weight and no mention is made of the vocational aspect of being “called” to defend the cause of justice in our courts. The CBA recognises the importance of diversity and has long championed it, but only as a contributing factor to maintaining public confidence in the rule of law, not at all costs. As for career enhancement, the career interests of individual lawyers can never be a reason for deskilling the profession. Indeed, the Criminal barristers do not pursue their profession for personal gain, far from it. A legal executive who wishes to advance their career by practising advocacy is free to train to be a solicitor or a barrister with the proper training and support that the professions provide.

6. Question 2: Do you agree with CRL’s proposals to ensure that applicants to exercise rights of audience in all courts should complete the training and assessment outlined in the consultation?

Answer: No we do not agree.

Comments: The proposed training and assessment falls far short of the same standards that are established in the Criminal Bar. There is no multi-centre independent quality assurance proposed as the entire process will be dealt with within one body, CILEX. There is no indication of who it is within CILEX, with the extensive practical skills and experience needed, who will teach and monitor skills that include ethical decision-making, cross-examination of vulnerable and young witnesses, drafting of documents for the Court of Appeal or the application of the disclosure regime. There is no comparison with the membership of or training provided by the Inns of Court. There is no indication as to how long the training process will last, nor is there any indication of its rigour. Unless the training prescribed for CILEX members compares directly with the years of training supervision and experience of Criminal barristers, a two or three-tier system of representation will develop. The public will have no confidence in the proposals unless a detailed and rigorous training programme is set out which is at least the equivalent of that which barristers or solicitors with higher rights undergo.

² Consultation Paper, §3

7. Question 5: Do you foresee any issues with the revised Practitioner Authorisation Rules?

Answer: Yes, we foresee serious issues with the revised Practitioner Authorisation Rules.

Comments: As mentioned above, the revised Practitioner Authorisation Rules do not address the disparity in education, training, supervision and experience of other criminal advocates.

The CILEX document asserts, "*[a]s the legal sector evolves there's a growing demand for a new kind of lawyer – a specialist lawyer*" and "*specialist lawyers are the future of law*".

It is mistaken to suppose that a new class of specialists is required.

The Criminal bar are specialist lawyers: they specialize in criminal law, in particular advocacy, as the majority of their work relates to appearing in court. Anyone acquainted with the reality of legal practice in the UK will already know that it is highly specialized. The Bar alone comprises criminal, family, chancery, environment, copyright, commercial, immigration, landlord and tenant specialists (and others), as does our sister profession of Solicitors. Like doctors, who also study train and are supervised for a number of years and who specialize in particular areas of medicine, Criminal barristers are specialists who achieve that specialism by devoting their time to criminal law.

8. Question 7: Do you have any other comments?

Answer: Yes

Comments:

The critical question is whether the introduction of this cohort of advocates will serve the public interest and assist the courts and judges in fulfilling their 'overriding objective' of 'acquitting the innocent and convicting the guilty and dealing with a case efficiently and expeditiously'.

The CBA believes that these proposals mean that those with far less training will find themselves thrown into our specialist, fast moving Criminal courts. Risks of error in

criminal cases can have the most devastating consequences resulting in the loss of liberty for individuals and additional distress for witnesses and victims. These proposals undermine the current standards of the Criminal advocate but also risk causing further delay in our Criminal courts where historic backlogs are being addressed as efficiently and quickly as possible.

Criminal barristers work the hours needed in the administration of justice, and are dedicated to doing what is necessary to ensure justice is done. Independence from the need to meet the profit targets of a business fosters the independence that characterizes the Criminal Bar's ethos. They give unwelcome but accurate advice to whoever they represent based on deep knowledge of law and procedure derived from their training and career-long learning and experience.

Our independence is demonstrated by the fact that many barristers practice as both prosecutors and defenders. The duty to accept whatever brief arrives in the cab as it pulls up at the cab rank, whether it is to prosecute or defend helps maintain this independence and impartiality. This risks being compromised where advocates only conduct cases on behalf of their employer and have not been educated and trained to adhere to the demanding ethical standards of the Bar.

We remind those considering these proposals that independence of Criminal advocates and their good conduct is crucial to the functioning of an effective criminal justice system. The integrity of our criminal courts, and their legitimacy in the eyes of the public depends on elements that include: the independence of our Judiciary, safeguarding of human rights and the rule of law, provision of transparent and objective recourse and the maintenance of the highest ethical standards of legal professionals held to account by their professional bodies with the necessary serious disciplinary sanctions.

The value to the integrity of our criminal justice system of independent advocates at the Criminal Bar, prosecuting and defending in our courts should be protected and not undermined. We point out that the UK State is required to take measures to strengthen integrity in our courts. Article 11 of the UN Convention against Corruption defines integrity as "the ability to resist corruption, fully respecting the core values of independence, impartiality, personal integrity, propriety, equality, competence and diligence." (UNODC The Doha Declaration: Promoting a Culture of Lawfulness 9-10

April 2018). These values are identified in the Commission on Human Rights resolution 2003/43 on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers; and in resolution 2003/39 on the integrity of the judicial system.

Advocates with limited CILEX training are unlikely to be as effective and efficient in their role as those with much more training and supervision which will cause further delays in our already over-burdened system. With the backlog in criminal cases to address, lowering standards is not the answer. In fact to lower standards of advocates to address this need is both patronizing and short-sighted.

For all these reasons, the CBA does not support the scheme proposed by CILEX. That is not to say that CILEX members with the same qualifications, training, supervision and experience as Criminal barristers should be excluded as advocates, indeed they would be welcomed to the Criminal Bar. Half of entrants to the Criminal Bar are now women and BAME entrants are increasing in numbers, indeed some groups are over-represented compared to the general population. Funding is available to assist and support those with different backgrounds to come to the Criminal Bar. All who are motivated by a dedication to criminal justice and who are prepared to study, train and work hard to achieve the high standards required are welcome.

16th September 2023