



THE CRIMINAL BAR ASSOCIATION

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ILEX PROFESSIONAL STANDARDS LTD'S CONSULTATION PAPER ON THE PROPOSAL FOR ILEX MEMBERS TO EXERCISE LITIGATION AND ADVOCACY RIGHTS IN CRIMINAL PROCEEDINGS

RESPONSE OF THE CRIMINAL BAR ASSOCIATION

1. The Criminal Bar Association ("CBA") represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It 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 guarantee the delivery of justice in our courts; ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.
2. Notwithstanding that, for reasons we do not understand, the CBA was not initially included in the consultee list, we welcome the opportunity to respond to the ILEX

Professional Standards (“IPS”) consultation paper “Proposal for ILEX members to exercise litigation and advocacy rights in criminal litigation” (the “consultation paper”).

General Response

3. ILEX/IPS is making an application under the Legal Services Act 2007 (“the Act”) to become an approved regulator to grant additional rights to its members to undertake reserved legal activities. The application seeks to grant rights to conduct litigation in criminal proceedings to qualified members. It also includes an application to grant rights of audience in criminal proceedings to members who qualify as litigators. The proposal therefore represents a significant increase in those who will be permitted to exercise litigation and advocacy rights in criminal proceedings. One of the cornerstone principles of the Act is open and fair competition. Fair competition is achieved through ensuring that all ‘competitors’ have the same or equivalent, qualification and training. If one group is permitted to participate through meeting a different, and lesser, set of criteria, competition can only be distorted and standards cannot be maintained.
4. Whilst it is said the proposals will ‘*promote competition in the provision of services...*’, there is no attempt to explain how ILEX members will meet criteria comparable to those met by trainee solicitors and pupil barristers. It is of great concern that the paper is silent in this respect.
5. The conduct of litigation and the exercise of a right of audience (advocacy) are “*reserved legal activities*” under Schedule 2 of the Legal Services Act 2007. We suggest that there has to be a positive case advanced to demonstrate how the proposed change will be in the public interest. This is what happened when the rules on imposing restrictions on the ability of barristers to conduct litigation activities were considered. Support from the BSB and others for the removal of restrictions on barristers conducting litigation was premised on a perceived benefit to consumers of legal services. The need to instruct a solicitor simply to issue proceedings might add an unnecessary expense. The OFT articulated the point in a letter to the Legal Services Board “*the current outright ban on barristers conducting litigation work limits the choice for consumers on who they can*

instruct in these matters. Where there would be time and cost efficiencies from one person, such as a barrister conducting both advocacy and litigation, the ban would prevent consumers from being able to benefit from lower fees.” No such case is made out in the consultation paper.

6. Our specific responses will focus principally on advocacy rights as advocacy in the criminal courts is the main area in which we have experience and expertise. However our general observations concern litigation as well as advocacy. Through observation and participation in the criminal process we have a clear insight into the conduct of litigation and the consequences of that flow when it is performed well or badly.
7. In our view these rights should not be extended without good and sufficient cause. The paper does not identify such a cause. Indeed it says nothing as to the need, consumer or otherwise, for the extension it seeks. Notwithstanding the very extensive content of the consultation paper, there is no reference as to how such an expansion of members’ rights will benefit consumers and clients. Conventional wisdom, as expressed by the Lord Chancellor in the last government was that there is currently an oversupply of advocates and litigators and that if anything the country was “overlawyered.” In these circumstances there would need to be a clear public interest case demonstrated for the introduction of a further tier of litigators and advocates.
8. Accordingly, our response to this consultation is twofold. First, before opening up the the field to new advocates, there should be certainty that such advocates will meet criteria that are the same as or comparable to those to be met by the Bar. Otherwise competition will be distorted rather than fair and open. Secondly, in the absence of objective evidence that the current providers of criminal litigation and advocacy services is insufficient or otherwise inadequate to meet demand, this extension is unnecessary.

Specific response to consultation questions

9. **Q1. Provide your comments on the criminal litigation and advocacy rights sought.**

10. The rights sought are significant. They will essentially permit ILEX members to set up independent practices to provide services to clients in criminal proceedings. This will mean that they will be able prosecute and defend in criminal proceedings. Although the associated rights of audience are primarily limited to the Magistrates' and Youth Courts, they will include bail applications and appeals in the Crown Court as well as the right to appear before a Coroner's Court and to exercise rights of audience "*similar to those exercised by solicitors and barristers*". Accordingly in our view the rights sought require qualification and skills commensurate with the academic and vocational skills of practising barristers and solicitors. Anything less would be to sell the courts and the public short in the provision of sensitive legal services where the relationship between the advocate and the tribunal is vital and delicate.
11. As indicated above, the paper has not established any gap in the current provision of services market so as to make a case based on need for an extension of the rights sought. Other than promoting the interests of ILEX members there is no obvious benefit identified for clients or other users of the criminal justice system. The CBA is very concerned at the spectre of criminal cases, which can carry an immediate custodial sentence, being tried before lay benches with no other legal professional present.
12. Under the proposals ILEX members will be able to appear "*in all adult Magistrates' Courts in relation to all matters within that Court's criminal jurisdiction*" and "*in all Youth Courts in relation to all matters within that Court's criminal jurisdiction*" including conducting trials in those courts. Magistrates' Courts and Youth Courts deal with some extremely serious matters which can lead to the loss of liberty, good character, employment and reputation. Youth Courts frequently deal with matters which, but for the age of the defendant, could be heard in the Crown Court. They regularly throw up difficult points of law requiring consideration by the higher courts. It is not in our view correct to state the rights proposed are acceptable because they are limited to the Magistrates' Courts. Nor do we believe it is acceptable at para 6 of the paper to duck a difficult but essential question going to competence on the basis that it is not practicable to address the question.

13. The consultation does not consider how cases might be identified as being appropriate for the ILEX member's qualification and/or level of experience. Will it permit its members to act in all cases regardless of their complexity? Will the ILEX member be permitted to conduct matters in which witnesses and/or defendants are young and/or vulnerable? Will the ILEX member be permitted to conduct a bail application regardless of the seriousness of the offence involved? Upon what basis will such decisions be made?

Q2. Do you have any comments on whether the application will meet the regulatory objectives or professional principles? If so, set them out.

14. It is stated that ILEX litigators will *"help to improve access to justice by introducing an alternative type of practitioner to consumers"* However, nowhere in the paper is any problem with access to justice identified or how it will be improved or how the alternative route to practice will or may make a more cost effective model of providing legal services at the essential level of quality.
15. The paper further states the proposals will *"promote competition in the provision of services through the alternative route to practice they will provide which may make more cost effective models of providing legal services possible"*. However, the paper is silent on how the alternative route to practice will or may make a more cost effective model of providing legal services.
16. The CBA does not oppose or fear a competitive market. However, our concern is to ensure the competition is fair to all and that standards are maintained. The proposals do not set out the standards to be met by the ILEX member and therefore it is not possible to ascertain capability and competence of the member and it is not therefore possible to make a comparison with the standards required of a trainee solicitor or pupil barrister.

Q3. We have set out minimum entry requirements which members must meet to apply for the criminal litigation and advocacy qualification courses. Do you have any comments on the knowledge and experience guidelines which appear at Appendix 1? If so, set them out.

17. The assessment process does not specify how the information advanced by the applicant will be verified. Given that much of the assessment process will be based on what a candidate advances about his experience in the form of a self-assembled portfolio, it is our view that there must be a vigorous and independent verification process of the information put forward.
18. There is no provision for any independent assessment (by the committee or officer) of the applicant's ability. For example, the assessment process does not include any assessment based on an observation of a candidate at court. We note with concern there is no mandatory requirement to have observed proceedings in court and no requirement to have undertaken any form of advocacy training which is comparable to that required by trainee solicitors and pupil barristers.
19. It is noted that so far as a candidate meeting the relevant criteria is concerned the paper repeatedly refers to the committee or officer "expecting" an applicant to have reached the standard of level 6 Professional Higher Diploma in Criminal Litigation or equivalent qualification. We regret we are only aware from the ILEX website of the Higher Diploma in Law and Practice. Criminal Law and Criminal Litigation are offered as units within this course. Is there a Criminal Litigation diploma in place? If so it should be clearly advertised so that its contents and organisation can be scrutinized. If not then the suggestion is misleading. IPL must be able to satisfy the regulators that they have in place a course of the appropriate standard. It should then be a mandatory minimum requirement.
20. At paragraph 11 it is further noted that "the committee or officer may accept alternative evidence of the applicant's knowledge of criminal law and of criminal litigation other than the successful completion of the relevant head of the level 6 Professional Higher Diploma." No examples of what may be deemed acceptable alternative evidence is

given. If there is to be an escape clause here, the relevant criteria need to be clearly set out.

21. The paper is silent on the criteria by which the applicant's experience is to be judged. What is meant by "*the committee or Officer will need to take a balanced view about an applicant's experience in deciding whether his experience is sufficient to grant a Certificate of Eligibility particularly where an applicant relies in part on observed advocacy*"? How will consistent standards be maintained when the decision maker simply takes a '*balanced view of the applicant's experience*'? What is needed is no just balance but rigorous judgement against the exacting criteria demanded by the task of advocacy.

Q4. Members will be required to demonstrate their experience through portfolios of cases they have handled. Do you have any comments on the portfolio guidelines which appear at Appendix 2? If so, set them out.

22. The portfolio guidelines do not provide for any verification of the information contained within a candidate's portfolio in respect of advocacy. There is no provision for the committee or the officer to verify the contents of the cases referred to by, for example, taking up references from others involved in the case (opponents, judges etc). It is submitted that in order to fully assess the portfolio presentation, the committee or officer must be able to make enquiries of others involved in order to assess the information relied on by the candidate.

Q5. It is proposed that Fellows and Graduate Members should be able to enrol onto the qualification scheme. Do you have any comments on who should be allowed to undertake the criminal litigation and advocacy qualification? If so, set them out.

23. Whilst it is likely that a Graduate Member will have had some practical experience, it does not appear to be part of the eligibility criteria that candidates have indeed had any practical experience and more importantly the nature and extent of the experience.

24. We note there is no requirement of any applicant to have undertaken any advocacy training which is comparable to that required by trainee solicitors and pupil barristers. Please see comments above regarding the impact on the standards to be achieved and maintained and the effect on competition.

Q6. Set out any other comments you have on the proposed entry requirements.

25. The main concerns relate to the heavy emphasis on assessment based on material produced by the candidate without any independent verification of the information or any observation of the candidate's ability in court (where advocacy rights are sought).

Q7. Do you have any comments on the Criminal Litigation Skills Course criteria? If so, state what they are.

26. The relevant skills are covered. Appendices 3 and 4 seem to be silent as to the length and composition of the course.

Q8. Do you have any comments on the Criminal Advocacy Skills Course criteria? If so, state what they are.

27. The relevant skills are covered. Whether they can be delivered to the required extent in 6 sessions of study is another matter

Q9. Do you have any comments on the Criminal Litigation Skills course assessment criteria? If so, state what they are.

28. In our view the standard of competence for each assessment should be higher than 50%.

Q10. Do you have any comments on the Criminal Advocacy Skills course assessment criteria? If so, state what they are.

29. As indicated above, in our view the standard of competence for each assessment should be higher than 50%.

30. The paper is silent on how the proposed assessment compares with that required of a trainee solicitor or pupil barrister. It is assumed that any assessments will be recorded

for the purposes of comparing standards with those on the BVC and LPC and those undertaking the New Practitioners Programme through the Inns of Court.

Q11. Do you agree that a member of ILEX should complete the Litigation and Advocacy Skills Course described in this consultation. If not, state what courses of qualification a member should complete.

31. We consider the courses or qualifications ILEX members should undertake should be comparable to those undertaken by trainee solicitors and pupil barristers. It cannot be in the public interest for a new tier of advocates holding less exacting qualifications than those demanded from barristers and solicitors to be let loose in this sensitive area of work. There would be a risk of diluting quality. Furthermore the provision of a lower entry level for some new advocates would endanger rather than promote fair competition.

Q12. Do you agree that the courses should be assessed. If not, state why.

32. Those applying for extended rights must be subject to appropriate assessment.

33. Q13. Are there any gaps in the litigation qualification arrangements? If so, please outline what they are.

Q14. Should an ILEX Litigator be required to seek authorization from IPS before they are authorized to practise independently. If not, state why.

34. We are opposed in principle to a Legal Executive Litigator being authorized to provide litigation services in independent practice. We have expressed concerns as to the public interest on the grounds of dilution of quality and unfair competition. Further the paper does not identify any good reason for this extension. However, in the event that a Litigator is permitted to practice independently, we endorse the proposal that authorization from IPS should be required.

Q15. Do you agree that Litigation Certificates should be renewed? If not, state why

35. Yes. The standard of litigator needs to be continually monitored, particularly in the event that litigators are permitted to practice independently with no supervision or other peer review.

Q16. Do you agree that the first renewal should require Litigators to produce portfolios of litigation cases they have handled? If not, state why and describe any alternative arrangements you would recommend for the first renewals.

36. The relevance of a portfolio is dependent on whether the details contained within them can be independently verified. There is no reference in the paper to how such verification will be conducted.
37. Of more concern is the observation in respect of the requirement for litigators to produce portfolios of 3 cases where they have undertaken litigation and advocacy in criminal proceedings. It is stated that “*ILEX recognizes that it might not be possible for Litigators to produce 3 advocacy and litigation portfolios within their first year of qualification*”. If there is a real risk that a member will not be able to produce 3 examples, this must (a) raise the question of whether there is a need for this extension of rights in the first place and (b) whether the member has relevant experience in conducting criminal matters.

Q17. Do you agree the arrangements for subsequent renewals? If not, state why.

38. We agree that it is appropriate to have a process of formal renewal. We observe that members of the Bar must undertake 42 hours CPD in their first three years as New Practitioners and 12 hours annually as Established Practitioners thereafter. All hours must be undertaken in the area in which they practice. We see no reason for ILEX members holding the Litigators certificate and Litigators holding an Advocacy certificate to have to complete 3 and 5 hours CPD respectively. This appears to be a further example of an underestimation of the significance and distinctive features of the role of an advocate. Completion of CPD should be a part of the renewal process.

39. We repeat our concerns as to the assessment of the work undertaken being solely reliant on the information supplied by the candidate. There has to be a process of being able to verify the information.

Q18. Do you agree that Advocacy Certificates should be renewed? If not, state why.

40. See response to Q17.

Q19. Do you agree that the first renewal should require Litigators who are Advocates to produce portfolios of advocacy cases they have handled? If not, state why and describe any alternative you would recommend for first renewals.

41. It is not clear how a collection of ‘advocacy cases’ could properly indicate the individual’s ability in advocacy. Whilst the portfolio may properly provide details as to the sorts of case and the type of submissions made, it will not assist as to competency.

42. There must, in our view, be a robust process of monitoring in conjunction with the judiciary and other members of the legal profession so that a candidate provides details of judges they have been in front of or opponents they have been against for the purposes of establishing whether a member is competent. This would be akin to, for example, barristers seeking to increase their grading for the purposes of prosecuting cases whereby they are assessed on performance during a particular case.

Q20. Do you agree the arrangements for subsequent renewals? If not, outline what should be required.

43. See response to Q19.

Q21. Do you have any comments on the practice structures through which litigators may practise? If so, set them out.

44. If ILEX Litigators are to be permitted to practice as litigators in Legal Disciplinary Partnerships (LPDs), then the IPS must be in a position to regulate such activity rather than leave this to other regulatory bodies.

**Q22. Do you have any comments on the ILEX Practitioners Indemnity Insurance Scheme?
If so, state what they are.**

45. No comments

**Q23. Do you have any comments on the proposal that complaints and allegations about the
conduct of the Litigators will be investigated in accordance with the normal IPS
procedures?**

46. No comments.

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