



## **IPS RESPONSE TO LORD CHIEF JUSTICE ADVICE TO LSB ON PRACTICE RIGHTS APPLICATIONS**

### **LITIGATION AND ADVOCACY APPLICATION**

The rights to conduct litigation application is a rule change application, as is the associated award of rights of audience.

IPS has developed an outcomes focused approach to regulation with the aim of meeting the regulatory objectives, including the protection of consumers and the public. The application takes a risk based approach to entity regulation as expected by the Legal Services Board and the Legal Services Act 2007 (the Act). The Lord Chief Justice recognises the substantial revision IPS has made to its application compared to the application it made in 2010/11 for litigation rights.

In developing this application IPS took into account comments made by the statutory consultees on its previous application. IPS and CILEx also met with key stakeholders, including members of the judiciary, in developing its regulatory arrangements and took into account their feedback.

IPS and CILEx recognise that the issues raised by the Lord Chief Justice are important and deal with them below. The Lord Chief Justice has acknowledged, elsewhere, the substantial development undertaken by IPS. In his keynote speech at the CILEx Presidential Luncheon on 6 June 2013 he commented "... enabling talented men, but particularly talented women, to come forward into the legal profession regardless of background is one of the great achievements. Perhaps even more, it is not based on diminished standards, it works on this simple basis: if you are good enough, if you're bright enough, if you have the right standards of integrity and professionalism; your skin colour, your gender, your social background, whatever it may be that you think is holding you back, it will not hold you back if you come to CILEx. I think that is a crucial achievement."

Each of the points of principle raised by the Lord Chief Justice is dealt with below.

### **Regulatory Competition**

IPS does not agree that any case has been made out to support the claim that regulatory competition could have a detrimental effect on standards. A single regulator does not guarantee high standards. The premise of the Act is that competition drives up standards and that there can be more than one regulator, provided they can operate to standards required by the Act. As the OFT has observed in its advice to the LSB, IPS-regulated litigators will introduce new

practitioners and increase competition in the provision of services. This point is addressed at Part 3 (page 42) of the application. There is already a significant degree of regulatory competition in the legal services sector; and existing regulators such as the Bar Standards Board and the Council for Licensed Conveyancers aim to extend the range of their regulatory designation.

The application sets out how we will establish and maintain standards to at least the same level as that of other litigators. The competence based approach to authorisation by activity as set out at Part 4 of the application will deliver practitioners who have a high level of expertise. Principle 5 of the Code of Conduct, which is explained at Part 6 of the application, stipulates that practitioners may act only in cases in which they are competent.

### **Parity of standards**

IPS believes it is setting proportionate standards appropriate for the rights it seeks to award.

CILEx members are specialist lawyers. The litigation application builds upon this principle by delivering lawyers who will be assessed as being competent to practise in the distinct area of litigation in which they seek to practise, be it criminal, civil or family proceedings. IPS authorised litigators will be competent in the specific area of the law in which they will practise, and authorised only in that area, as opposed to generalist lawyers. Consumers can be assured that their matter is handled by a highly knowledgeable litigator who has been formally assessed as properly skilled and experienced from the point of first authorisation.

The knowledge components of the required competencies are set at Level 6, which is honours degree standard. This is the same standard as a law degree and as the professional training provided to solicitors and barristers, but focussed directly on the relevant area of practice. It builds on the substantial experience of litigation which CILEx Fellows will have before IPS permits them to enter the litigation and advocacy rights qualification process. This is not a requirement imposed on solicitors or barristers.

In many aspects the IPS approach to authorisation by competence requires more of IPS litigators than is required of solicitors and barristers. IPS litigators would be the only litigators who must demonstrate direct experience in their area of practice through an activity portfolio before authorisation; undertake continuing professional development in their specific area of practice; and undertake professionalism training each year. The requirements and processes for qualification are set out clearly in Part 4 of the application and in the Certification Rules.

The application sets out at Part 3 how this activity based regulation delivers consumer expectations and meets the regulatory objectives. It is clear other consultees, such as the Consumer Panel, as well as IPS' insurance broker and insurance providers, regard the specialist qualification and regulation model as a particular strength of the proposed arrangements.

Advocates authorised by IPS have been assessed as highly competent by independent research carried out as part of the development of the Quality Assurance Scheme for criminal advocates and by Her Majesty's Crown Prosecution Inspectorate (HMCPPI). The report of HMCPPI on advocacy conducted by Associate Prosecutors found *the levels of performance are a testament to the selection and training arrangements put in place by the CPS, endorsed by CILEx when it became the regulator for Associate Prosecutors* demonstrating that linking qualification and accreditation closely to the activities authorised practitioners are allowed to undertake is a significant guarantor of competence. The rights of audience scheme for litigators proposed in the application is the same as that for existing Legal Executive Advocates and has been designed to continue to deliver highly capable practitioners.

The Legal Education and Training Review endorsed the qualification arrangements for the different types of practitioner and, in this respect, recognises that *the current Legal Services Education and Training system provides, for the most part, a good standard of education and training enabling the development of the core knowledge and skills needed for practice across the range of regulated professions.*

### **Disciplinary oversight of the court**

The Lord Chief Justice raises the concern that CILEx litigators and advocates would not be Officers of the Court. We recognise the historical significance of the supervisory functions of the Courts over those who appear before them. Consequently, in developing its application IPS sought advice on the legal position relating to Officers of the Court. A copy of that advice is attached at **annex 1**.

The advice identifies that the disciplinary remit over lawyers is now, in practice, exercised by regulators and that there would be no regulatory gap in practice if CILEx litigators and advocates were not Officers of the Court. CILEx advocates have of course been authorised to appear in the Courts since 2000, without being Officers of the Court.

The point has recently been taken by the High Court in deciding to refer the firm Consilium Chambers, which it found to be in contempt of the Court, directly to the SRA for action.

Chartered Legal Executives are now able to hold judicial appointments, and thus preside over courts. It would constitute a strange anomaly if the same practitioners were not, for all practical purposes, if not strictly in law, subject to the jurisdiction of the Court.

IPS has demonstrated in its regulatory standards self-assessment that it has effective and well respected disciplinary and enforcement procedures. These procedures have been further developed to encapsulate entity regulation, as set out at Part 8 of the application. They provide the route by which the judiciary may bring to the attention of IPS, as the regulator, matters concerning the conduct of those IPS regulates.

As the advice at **annex 1** concludes, it is our contention that the combination of new regulatory arrangements under the 2007 Act, CILEX's own Code of Conduct and the inherent jurisdiction of the courts to deal with contemnors is sufficient to address the concerns raised by the Lord Chief Justice.

CILEX's Chief Executive wrote to the Lord Chief Justice in 2012 setting out the advice received. A copy of that letter is at **annex 2**. The Lord Chief Justice did not respond formally but at a subsequent meeting intimated to the CILEX President and Chair of the IPS Board that, although he considered that it would be beneficial if CILEX litigators and advocates were to be Officers of the Court, the issue was no longer likely to be of central importance to the applications for practice rights.

CILEX remains genuinely enthusiastic to see the anomaly in relation to Officer of the Court status resolved. However, IPS does not accept that, pending the necessary statutory change to achieve this, there is any regulatory gap which is not addressed by the current legislation and by the professional obligations imposed on its regulated community.

### **Regulatory capability**

There are currently in the region of 20,000 CILEX members. IPS already has in place adequate resources for the regulation of all of them individually. Not all of those members will be eligible to exercise litigation rights: this will be limited to those who are Fellows and practising in the relevant field of litigation. There is no possibility whatsoever that all 7600 Fellows could seek to qualify as litigators. Approximately 50% Fellows work in the litigation field. Of these, 650 members indicate an intention to seek litigation practice rights.

IPS has planned carefully for entity regulation. Part 11 of the application sets out the implementation plan to which it is committed. The project plans supporting Part 11 have also been submitted to the LSB. These were developed following independent research about likely demand. The research enabled IPS to assess the resources it required to regulate litigators.

The resources include additional staff, development of procedures and documentation, setting up necessary committees and development of IT infrastructure. IPS has already reorganised itself into teams which mirror the four areas of regulation expected by the LSB; and completed the identified recruitment. Each team is headed by a manager and adequately supported by appropriately skilled and experienced staff. Many of the procedures have been developed, as have documents for the appointment of panellists and Trustees. Other implementation work identified in the plan, including IT development, will be completed by the point of implementation of the litigation rights scheme.

IPS is confident that it will, at the point of designation, have the infrastructure in place to meet its obligations as a regulator for new practice areas and, in the case of litigation, extension of the authorisation it has already shown itself capable of carrying out in this area.

### **Duty to the court**

IPS drafted carefully the principle defining the obligation to the court of those it regulates. The key principle in the Code of Conduct, as explained at Part 6 of the application, is that IPS' regulated community must uphold the rule of law and the impartial administration of justice. This key principle has not changed. The standard expected of the IPS-regulated community remains and will be rigorously enforced.

While the supporting statement to that principle refers to knowingly misleading the court, the overarching principle, in disciplinary proceedings, does not prevent a charge of recklessly misleading the court. IPS originally took out the reference to 'recklessly' as it believed a practitioner would be, in effect, 'knowingly reckless'. It therefore took the view that this approach supported its principles-based approach to regulation. However, should this have created a perceived regulatory gap, IPS would have no difficulty in reinstating the reference to recklessness in its Code.

### **Code of Conduct and guidance**

IPS has no plans to publish further guidance to its Code, as stated at paragraph 7 of Part 6 of the application, unless it becomes necessary. It believes that the principles in the Code are sufficient. The reference to guidance at paragraph 75 is intended to cover the position should guidance become necessary.

### **Supervision**

IPS does not intend to rely on enforcement or complaints alone as a means of supervision. The application sets out in detail IPS' risk based approach to regulating entities at Part 5. It sets out details of the initial authorisation processes, specifying that IPS will put in place an intelligence gathering function which will identify triggers for supervisory action. This, along with annual returns and complaints data, will enable IPS to carry out proportionate supervision of those it regulates. As indicated above, work is already under way to increase the capacity to carry out this work.

These supervisory mechanisms are complemented by the new CPD scheme which requires practitioners to move towards outputs based CPD, which from October 2013 includes a mandatory professionalism element. This will ensure IPS' regulated community receive regular training in ethical behaviour – a requirement not imposed by any other regulator. This approach to CPD supports IPS' competence based approach to regulation.

### **Alternative authorisation route**

IPS already has in place a process within its regulatory arrangements for advocates authorised under the Act, whereby a Fellow with considerable experience may seek exemption from an examination in an area where they seek rights of audience. It has good experience of carrying out such assessments, which are thorough and separated from other elements of the competence based (comprising knowledge, skills and experience) approach to authorisation. IPS is careful not to conflate the exemption with the experience requirements.

Litigation and advocacy applicants will follow the same well tested mechanism presently used by IPS. This is explained at paragraphs 33 to 37 of Part 4 of the application. Applicants will provide portfolios which demonstrate that through their work they have developed knowledge of the substantive law subject. The acquisition of knowledge will be tested by requiring applicants to demonstrate the application of that knowledge to actual cases. These portfolios are additional to those required for the experience element.

Objectivity of the assessment of that knowledge will be achieved through independent assessment of those portfolios. Furthermore, IPS will seek independent references to obtain triangulating information about the applicant's knowledge, skills and experience.

This process, coupled with the authorisation as a specialist practitioner, will ensure that an IPS-regulated litigator is formally assessed as competent at the point of authorisation. This is not necessarily the position for other legal practitioners with a general qualification. The development of specialisms by solicitors and barristers during the course of their practice is very rarely subject to objective assessment of knowledge, beyond their degree studies.

### **Cab rank rule**

The cab rank 'rule' is in fact a principle, rather than a rule. The IPS Code of Conduct contains obligations for IPS' regulated community to treat everyone fairly and without prejudice. This is the appropriate obligation. IPS does not believe the cab rank principle needs to be included in its regulatory arrangements or that its absence will create any regulatory gap.

## **PROBATE ACTIVITIES AND RESERVED INSTRUMENT ACTIVITIES**

IPS' responses, made above in relation to litigation, apply also to the designation applications for probate and reserved instrument activity rights in so far as the Lord Chief Justice raises similar issues.

### **Regulatory competition and parity of standards**

IPS has developed an activity based approach to regulation for probate and reserved instrument applications. This is explained at Part 4 of the application. The proposals lead to the development of practitioners who are competent to practise at the point of authorisation rather than only at the point of qualification. The competencies have been set as those necessary to deliver skilled and capable practitioners at honours degree standard.

The Council for Licensed Conveyancers has already developed different requirements for reserved instrument activities and probate practice. This does not appear to have had an adverse effect on clients by comparison with conveyancing and probate services delivered by other lawyers. IPS' proposals will similarly deliver practitioners who are competent to provide these services to the public.

The probate application is intended to cover non-contentious probate. The definition of probate used at page 6 of the application, which was questioned by the Lord Chief Justice, is that contained in the Legal Services Act 2007. Equally the query by the Lord Chief Justice relating to key functions associated with probate is intended to cover wills and administration of estates, which are then supported by the competency framework at Annex 3 of Appendix 1 to the Scheme Rules. IPS recognises that the conduct of contentious probate requires rights to conduct litigation.

IPS agrees that the exercise of probate rights requires utmost professional skill and care. It is for this reason that it has opted for a competence based approach to authorisation by activity. The competencies have been defined so as to ensure that authorised practitioners can demonstrate all the skills necessary to deliver competent services to the public. Applicants will be required to demonstrate that they have significant experience of the work and knowledge of the subject area before being able to practise. Other lawyers, who are already at liberty to offer probate and other services at the point of qualification, are not required to be similarly experienced.

**BB/IPS Resp  
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