



THE CRIMINAL BAR ASSOCIATION

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ILEX PROFESSIONAL STANDARDS LTD CONSULTATION:
PROPOSAL TO REVISE RIGHTS OF AUDIENCE CERTIFICATION
RULES TO ENABLE ADVOCACY RIGHTS COMMITTEE TO
DELEGATE DECISION MAKING POWERS

INTRODUCTION

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. We welcome the opportunity to respond to this consultation paper.

2. ILEX/ IPS is revising the constitution of the Advocacy Rights and Qualifying Employment Committees¹ ('ARC') to comply with the Internal Governance Rules of the Legal Services Board² and is establishing an Admissions and Licensing Committee ('the Committee') to replace and undertake this role. In doing so, ILEX seeks to revise the terms of reference of the Committee to enable it to delegate decision making to IPS officers in matters affecting the rights of audience qualification, namely:
 - a) Approval of applications for 'certificates of eligibility' made by Graduate members and Fellows seeking to enrol onto the rights of audience qualification scheme;
 - b) Approval of applications to renew first advocacy certificates;
 - c) Approval of applications made by course providers to deliver the advocacy rights courses.

EXECUTIVE SUMMARY

3. The CBA is of the view that the consultation paper does not attempt to explain the need to revise the terms of reference of the Committee, indeed it is silent on whether there is a need. The rights of audience qualification is an important one and decisions affecting such rights should not be made lightly or delegated without good and sufficient cause. It is of concern that no such cause is identified. For the same reason, it is obvious that approval to provide advocacy rights courses should only be granted after a thorough inspection and adjudication by an appropriately qualified person.
4. The view of the CBA is that these proposals, and the apparent current practice of the ARC, run counter to the letter and spirit of the Rights of Audience

¹ Rights of Audience Certification Rules

<http://www.ilex.org.uk/PDF/IPS%20ROA%20certification%20rules.pdf>

² Legal Services Act 2007, section 30 (1) Internal Governance Rules 2009

http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/internal_governance_rules_2009.pdf

Certification Rules ('ROA Certification Rules'). These rules envisage a two stage decision making process by both external assessors and by a committee made up of people with experience of advocacy and experience of dealing with issues affecting the consumer. The current process is designed to ensure a thorough and meticulous assessment of *all* aspects of the application. Such assessment by a well chosen and appropriately qualified committee should ensure that the decision of the external assessor is subject to rigorous consideration. Any weak aspects of the application can be identified and dealt with accordingly.

5. The ARC is required by the ROA Certification Rules to make a decision on each individual application – be it for a certificate of eligibility, a first renewal or the right to deliver an advocacy rights course. It should exercise its own discretion regardless of the decision of an external assessor in relation to one specific element of the application and it should consider the application as a whole.
6. These proposals seek to delegate that responsibility to one IPS officer in each case. In the view of the CBA, to say that the ARC “usually” endorse the view of the external assessor is an insufficient justification. The CBA is concerned that these proposals might formalise a currently informal rubber stamping exercise. This is not what the ROA Certification Rules intended to create, nor should it be the practice of the ARC.
7. The proposal that IPS officers should be able to grant certificates of eligibility (or renewal of first advocacy certificates/ approval of applications to provide advocacy rights courses) where external advisors have advised that the applicant has met part of the required criteria, must not be permitted to have the effect of reducing criteria required to a single criterion assessed by the external advisor. That would undoubtedly water down the assessment process as set out in the ROA Certification Rules and would clearly not be in the

public interest. Such a result would run contrary to the stated intention of the Legal Services Board to put the consumer at the heart of the legal system.

8. These proposals will lead to a scheme that is either less exacting or one which will appear to be so. The proposals run the risk that standards and quality will not be maintained. Accordingly, it is difficult to see how the proposals can be in the public interest.
9. The consultation paper contains insufficient detail in many respects to allow proper scrutiny of the proposals. Indeed, it begs more questions than asked. Take, for example, the qualifications and training to be provided to IPS officers. While the consultation paper asserts that IPS officers have built up considerable expertise in assessing course providers and determining whether applicants meet appropriate standards, there is no suggestion that further training is to be provided to assist them in performing their new and enhanced role. There are no proposals for such training to be provided to new recruits. There is no guarantee that all IPS officers have built up the same levels of expertise in both assessing applicants for rights of audience and course providers.
10. While certain IPS officers may have acquired knowledge of the application process, there appears to be no requirement for an officer to have experience of advocacy services or consumer issues. The ROA Certification Rules created a body (the ARC) that was designed to have particular expertise in these areas. These areas of expertise are not reproduced in IPS officers. It is not even proposed that the ARC should have oversight of the decisions made by IPS officers.
11. Bearing all of the above in mind, the CBA is of the view that:
 - (1) these proposals are not in the public interest;

- (2) the consultation paper has not demonstrated that the regulatory objectives will be preserved, rather the proposals run the risk of prejudicing the regulatory objectives;
- (3) the need to make the suggested changes has not been made out.

12. We seek to answer individual questions below.

QUESTION 1: Do you agree that the Committee should be able to delegate decision making to IPS officers? Please set out any comments you have.

- 13. As of January 2011, the Committee (formerly the ARC) will be responsible for granting rights of audience to ILEX fellows. This is the right of a lawyer to appear and conduct proceedings in court on behalf of their client. This is a responsibility not lightly to be undertaken and applicants for such rights should be required to demonstrate a commensurate level of expertise and experience.
- 14. The IPS, as the regulatory body, is responsible for assessing whether members have met the standards expected of them to enrol on the advocacy qualification scheme. The assessment is conducted when an applicant applies for a certificate of eligibility.
- 15. An application for a certificate of eligibility must be supported by:
 - a) Evidence of the applicant's knowledge of the law, rules of evidence and legal practice relevant to the Advocacy Skills Course he wishes to undertake;
 - b) A record of the applicant's advocacy and litigation experience;
 - c) A portfolio of cases in which the applicant has been involved over the preceding two years;
 - d) Details of two referees who can attest to the applicant's knowledge of the relevant practice area;

- e) A statement from the applicant's employer confirming the details of litigation and advocacy experience provided.
16. The portfolio referred to at paragraph 15 (c) above, is sent to an external advisor who will assess whether the portfolio meets the criteria set out in the 'knowledge and experience guidelines' and the 'portfolio guidelines'. Once the external advisor confirms that the criteria have been met, the application is referred to the ARC for consideration.
 17. It is the responsibility of the ARC to decide whether the application is approved. The ROA Certification Rules require the committee to consider all of the material provided by the applicant – that includes all of the material listed in paragraph 15 above. It may also call the applicant for interview if it considers it appropriate to do so. In making any such assessment, the ARC must have regard to the 'knowledge and experience guidelines and the portfolio guidelines'.
 18. It is worth noting that the ARC is required to consider any advice provided by external advisors but is not bound by that advice (paragraph 36, ROA Certification Rules). The ARC is expected and designed to exercise its own collective judgment over the applications for certificates of eligibility. The ARC is designed to act as a body for the robust assessment of applications to undertake the advocacy qualification scheme. This is not simply a layer of bureaucracy. The ARC is required to consider all of the material before it, the external advisor only assesses (and most likely, only sees) the portfolio material. The ARC therefore exists to carry out a particular function – namely to assess the applications of those who seek to have rights of audience. It is clearly in the public interest, as well as in the interest of the reputation of ILEX fellows and members, that such applications are properly and thoroughly assessed.

19. Membership of the ARC is designed to ensure that such decisions are made by appropriately qualified persons. Membership is as follows:
- a) Six ILEX fellows, at least five of whom are members of the Council;
 - b) Four independent members:
 - i. two of whom shall have knowledge and experience of advocacy services; and
 - ii. two of whom shall have knowledge and experience of ‘consumer issues’.
20. The consultation paper is entirely silent on the reason for the proposal to delegate decisions in respect of eligibility certificates to IPS officers. For this reason, we are concerned that the need for such delegation is not made out. There does not appear to be any attempt at justification of the move away from an assessment and consideration by the ARC who have knowledge and experience which will enable them to make such assessments.
21. The consultation appears to state as its justification for allowing the decision to be taken by an IPS officer that “*The Advocacy Rights Committee usually endorses the advice of the external advisor*”³ and therefore where the external advisor has indicated the applicant has met the portfolio criteria, an IPS officer can grant the application. It is only the portfolio aspect of the supporting documentation/information which is assessed by an external advisor. This appears to permit the circumvention of the proper process of assessment of the other aspects of the application by the ARC.
22. The proposals include the granting of significant rights, namely in respect of advocacy and it is our submission that a certificate for advocacy rights should only be granted after rigorous consideration of *all* aspects of the application by an appropriately qualified body of people. Delegation such as that outlined in the consultation paper may lead to ‘rubber-stamping’ certificates for rights

³ Para 10 of the consultation paper

of audience simply because an external advisor has advised that the portfolio criteria have been met. As we have previously pointed out, in order to ensure standards and quality is maintained, a proper process should be in place and put into practice.

23. Similar considerations apply in respect of the renewal of first advocacy certificates.
24. Again, the consultation paper does not identify any need for the process for the renewal of advocacy certificates to change. There is no reference at all to the purpose behind the proposal; it is not suggested that the ARC is no longer efficient, appropriate or otherwise unnecessary.
25. In respect of such renewals, the applicant is required to submit:
 - a. Confirmation that he is employed;
 - b. A record of the applicant's advocacy and litigation experience during the period since his advocacy certificate was granted;
 - c. A portfolio of cases in which the applicant has been involved during the period since his advocacy certificate was granted (in accordance with the portfolio guidelines);
 - d. A statement from his employer confirming the details provided above;
26. Paragraph 82 of the ROA Certification Rules states that the portfolio will be sent to an external adviser. This suggests that this is the only part of the application which the external advisor sees. Where the advisor concludes that the portfolio is satisfactory, the application is referred to the ARC.
27. Again, the CBA are concerned to read that 'in practice the Advocacy Rights Committee endorses the advice of the external advisor'. The external adviser can only say whether one part of the application, namely the portfolio, has met the criteria in the ROA Certification Rules. The external advisor cannot make

a recommendation as to whether the applicant's certificate should be renewed. This is intended to be the subject of a separate decision made by the ARC in the light of all the information provided by the applicant. Were it to be otherwise, this would reduce the criteria required to renew an advocacy certificate to one criterion only – that of the portfolio, and that would contradict the ROA Certification Rules.

28. For all these reasons, the CBA cannot agree that the Committee should be able to delegate decision making to IPS officers.

Question 2: [re: applications for certificates of eligibility] Do you agree the officers should apply the same criteria as is currently applied by the Advocacy Rights Committee? If you have any comments please set the out.

29. The same criteria should be applied by whosoever makes the decision. However, the issue is not the criteria to be applied but whether it is necessary and in the public interest to have the decision making process delegated to a single officer who is not required to have any specific qualification without reference to the need for such delegation and whether such delegation will ensure an adequate and thorough assessment.

Question 3: [re: applications for renewal of first advocacy certificate] Do you agree that officers should apply the same criteria as currently applied by the Advocacy Rights Committee? If you have any comments please set them out below.

30. The CBA repeats the comments made in respect of question 2 above.

Question 4: Do you agree that the IPS officers should be able to approve applications made by course providers seeking accreditation to deliver and assess advocacy courses? If you have any comments please set them out.

31. The consultation does not identify any reason why the current process is inadequate, inefficient or otherwise no longer appropriate. There is no discussion of the need to revise the terms of reference to delegate decisions in respect of course providers. It is of concern that the consultation merely states as an attempt to justify its proposal that *“In practice the Committee endorses the advice of the external assessor”*. The Consultation contains no reference to any statistics to support this assertion.

32. We repeat the submissions made in response to the previous questions. All aspects of any application for the provision of courses, in particular for advocacy, must be subject to rigorous and meticulous examination, by an appropriately qualified committee in accordance with the ROA Certification Rules and should not be ‘rubber stamped’.

Question 5: Do you have any comments on the suitability of IPS officers to make delegated decisions? If so, set them out.

33. We refer to the points made in paragraphs 9 and 10 above. The consultation paper does not identify reasons why an IPS officer might be more appropriate than an appropriately selected ARC. The consultation paper does not identify the extent of the experience and expertise IPS officers will have before they can make delegated decisions; nor does it identify a minimum level of experience or knowledge that will be required; nor does it suggest any arrangements for oversight of delegated decision-making.

34. Bearing in mind the paucity of such information in the consultation paper, the CBA is driven to the conclusion that the case for removing the decision making from the ARC and placing it in the hands of a single person, with unknown qualifications, is not made out.

Question 6: Do you have any comments on whether the application will meet the regulatory objectives or professional principles? If so, set them out.

35. The consultation paper states that the regulatory objectives and professional principles will be met because:
- a) Public and consumer interests will continue to be protected as the IPS officers will apply the same criteria when approving applications as are presently applied by the committee. Where the IPS officers have any doubt whether an application meets the criteria it will be referred to the Committee for consideration;
 - b) The objective of supporting the rule of law will continue to be met as only suitably qualified ILEX members will be able to exercise rights of audience;
 - c) Approval of applicants and course providers will continue to improve the provision of access to justice for consumers to the same extent as the current arrangements;
 - d) The delegation will have no impact on the promotion of competition in the provision of services. Only suitably competent advocates and course providers will be approved;
 - e) There is no impact on the objective of encouraging a strong, independent, diverse and effective legal profession;
 - f) The delegation will have no impact on the objective of promoting and maintaining adherence to the professional principles.
36. The consultation paper has not set out how it will ensure any of the objectives *will* be met. There is no impact assessment. The paper effectively states that they will be met because they will be met. For instance, when setting out the ‘detail’ of the proposal, there is no reference to how it is said that an IPS officer will be able to apply the criteria and make an assessment in a way which is comparable with the ARC; the consultation paper does not set out how delegating decisions will ensure only “suitably qualified ILEX members will be able to exercise rights of audience”.

37. If the rules that govern the making of such important decisions are applied without proper scrutiny, there is an obvious risk that applications that should not be granted will be. It follows that, if that be the case, standards will not be maintained, public and consumer interests will not be protected and provision of access to justice will be diminished rather than improved.

Criminal Bar Association

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