



JUDICIARY OF
ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD JUDGE

Chris Kenny Esq
Chief Executive
Legal Services Board
7th Floor, Victoria House
Southampton Row
London
WC1B 4AD

26 July 2013

Dear *Chris Kenny,*

Application by ILEX Professional Standards for approval to amend its regulatory arrangements for the Chartered Institute of Legal Executives to grant (i) rights to conduct litigation to Chartered Legal Executives; and (ii) rights of audience to Chartered Legal Executives who obtain rights to conduct litigation. Application by IPS for the Chartered Institute of Legal Executives to become an approved regulator for probate activities and reserved instrument activities under the Legal Services Act 2007.

Thank you for your two letters of 11 June 2013 in which you invite my comments on the current applications made to the Legal Services Board by the Chartered Institute of Legal Executives ('CILEx').

I have sought the views of other members of the judiciary before arriving at my advice.

Application to amend regulatory arrangements to grant (i) rights to conduct litigation to Chartered Legal Executives and (ii) rights of audience to Chartered Legal Executives who obtain rights to conduct litigation.

The Institute of Legal Executives (as it then was) made (and subsequently withdrew) a related application to the Legal Services Board in 2011. The new application represents a substantial revision of the 2011 application. The litigation and advocacy rights which are the subject of the application now include criminal litigation and criminal advocacy. The route by which the rights will be awarded and the

Royal Courts of Justice Strand London WC2A 2LL
Telephone 020 7947 6776 **Fax** 020 7947 7512 **Email** thelordchiefjustice@judiciary.gsi.gov.uk
Text Phone 18001 020 7947 7512 (Helpline for the deaf and hard of hearing)
Website www.judiciary.gov.uk

interrelationship of the rights, as reflected in the Rights to Conduct Litigation and Rights of Audience Certification Rules and their annexes, has been significantly reformulated. The CILEx Code of Conduct had been redrafted and reframed. Notwithstanding these revisions, points of principle raised in my response to the 2011 application remain relevant.

Regulatory competition, parity of standards, and the disciplinary oversight of the court

The Legal Services Board is aware of my concern that regulatory competition will have a detrimental affect on standards. Where two regulators regulate the same reserved legal activity, this will inevitably lead to variation in regulatory standards. In particular in relation to the reserved legal activities which most strongly affect the courts, and so bear directly on the functioning of the justice system and on the rule of law, it must be ensured that those authorised adhere to the *highest possible standards* of integrity and expertise¹. A variation in standards is inappropriate in principle.

The importance of consistent high standards historically found expression in the disciplinary control exercised by the court over the professions. Regulation of the Bar is still carried out under delegated authority from the judiciary; prior to 2007 the Master of the Rolls was the statutory regulator for solicitors. While in practice the judges' regulatory role was delegated to the professions, the symbolism of judicial control is significant in its own right, and the residual disciplinary powers exercisable by judges is important. Both reflect the public interest in the effective administration of justice and are a means by which the rule of law can be enforced and upheld.

A further point should be made. Unless carefully guarded against, a variation in standards will lead those who are regulated to choose the regulator who is less robust, and thereby represent the drive to the bottom. There is no public or 'consumer' benefit in this outcome. The increase in access to justice which may be brought about by the regulation of more professionals must be considered against this risk.

The Ministry of Justice has recently announced a review of legal services regulation. My concerns are known to them.

Against this background I make the following general observations on CILEx's application.

- 1) While the IPS/CILEx Code of Conduct and the competencies required of CILEx Fellows who are awarded the new rights are set out in detail in the scheme rules and the Code, there is no analysis of how these standards compare to those to which solicitors regulated by the SRA and barristers regulated by the BSB are held. It is imperative that this analysis be conducted and made available. There can be no room for the development or application of differential ethical standards, as such would be contrary to the consumer

¹ It is not the case that every authorised person must have the same absolute level of expertise. What is required is expertise which is proportionate to the case in hand. This requires Regulators to be equally robust in two things: (i) ensuring the highest level of competence for cases undertaken; (ii) ensuring that authorised persons only act in cases in which they are competent.

interest and the wider public interest in the proper administration of justice. Equally, it is imperative that consideration is given to whether and how IPS can ensure that its knowledge, skill and experience requirements result in the highest possible professional standards in the cases in which CILEx fellows take part. IPS must be as robust in ensuring that CILEx fellows exhibit the highest levels of competency in the cases in which they are involved as are the SRA and BSB in ensuring competency among those admitted to the roll or called to the bar. If the standards are different, my principled objectives are engaged.

- 2) CILEx Fellows are not officers of the court and not subject to the same disciplinary regime that the court maintains with respect to solicitors. The Chief Executive of CILEx has written to me on this issue. She makes clear that Chartered Legal Executives would welcome becoming Officers of the Court. She regrets that a legislative opportunity is unlikely to become available to bring about this change. She points to the wasted costs regime which the court may exercise over Chartered Legal Executives, and the ability of the court to make a reference to IPS. Neither of these options are sufficiently analogous to the position that exists for the Bar and for solicitors. It is clear that the desire to become Officers of the Court is genuine. In my view, the symbolic and practical significance of the judicial oversight is such that this should be addressed.
- 3) While there are several thousand members of CILEx, the number of members who are authorised to conduct reserved legal activities is small. Currently 90 CILEx Fellows have rights of audience and 370 Associate Members are regulated to conduct litigation (application part 2 paras 25 & 26). The Legal Services Board must closely examine whether IPS has the necessary staff and resources to enable it properly to commence entity regulation and regulation of Fellows who may act unsupervised, and to do so at the same time (as opposed to, for instance, gaining experience of regulating CILEx Fellows who may conduct litigation without supervision, before also regulating entities). It is not apparent that it is in a position effectively to replicate the SRA's disciplinary, regulatory and investigatory mechanisms. As such a serious concern remains that it will not be in a proper position to police the profession to a standard sufficient to maintain public confidence and secure public interest.

And the following specific comments:

- 1) One significant difference in standards of direct concern to the court is in the expression of the primary duty to the court. CILEx's code of conduct requires those regulated by IPS not knowingly to mislead the court. The Bar Code of Conduct requires practicing barristers not knowingly or recklessly to mislead the court. The appropriate obligation is not knowingly or recklessly to mislead the court.
- 2) Further to my first general observation above, and in the absence of a requirement for supervision, the requirement in the CILEx Code of Conduct that those regulated by IPS must act *only on matters within their competence* assumes particular importance. Any guidance IPS issues on this topic will be

significant. It would have been preferable had draft guidance been included with the application. Given its significance, I, or my successor as Lord Chief Justice, would wish to review it when it becomes available. (In fact it is unclear whether IPS intend to issue guidance at all – contrast application part 6 paragraph 7 and paragraph 75.) In respect of all parts of the Code of Conduct, including the obligation only to act in matters within competence, the Legal Services Board must be satisfied that the mechanisms by which enforcement processes are triggered (essentially self-report and client complaints) are sufficient to ensure compliance.

- 3) I have some reservations about the alternative route by which applicants for rights of audience or conduct of litigation certificates may satisfy CILEx's 'knowledge criteria'. CILEx envisages that applicants will demonstrate they have satisfied the knowledge criteria through having completed a CILEx Higher Diploma or by holding a qualification of a comparable standard. But in the alternative, an applicant may rely on a portfolio to demonstrate that they have acquired the requisite knowledge through experience. It is of course the case that knowledge can be acquired through experience, but to assess knowledge through experience is to conflate these two criteria, which IPS has assessed as each being of separate importance. The concern in allowing knowledge to be assessed by a self-compiled portfolio is that an important objective element of assessment is lost.
- 4) The benefits of increased access to justice consequent on granting this application are weakened by the absence of a clearly expressed 'cab rank rule'. The obligation to treat everyone fairly and without prejudice in CILEx's Code of Conduct does not clearly obligate the provision of representation irrespective of the nature of the case or the desirability of the client.

Application for CILEx to become an approved regulator for probate activities and reserved instrument activities under the Legal Services Act 2007.

My comments made in relation to regulatory competition and parity of standards apply equally to CILEx's probate and reserved instrument activities applications. Comparative analysis is lacking, and is needed, into the standards to which practitioners authorised by other regulators are held. I emphasise again that there can be no room for the development or application of differential ethical standards, and it is imperative that consideration is given to whether and how IPS can ensure that their competency requirements are applied as robustly as other regulators apply theirs.

By way of specific comment on the probate application, I note that it is unclear whether it relates to the preparation of probate papers in non-contentious probate only, or also extends to contentious probate. The reference to "any proceedings" at page 6, para 3 of the application tends to suggest that it is intended to include contentious probate. Similarly at page 47, para 11, the application refers to members' competency to exercise "all key functions" associated with the grant of probate. However, the knowledge elements that CILEx members would be required to obtain as set out in Annex 3 of Appendix 1 to Part 4 of the application relate only to

obtaining a grant of representation, preparing a will, and administering an estate, that is, to non-contentious probate activities (see s 128 of the Senior Courts Act 1981 and the Non-Contentious Probate Rules 1987). Clarification is required as regards the extent of CILEx's application.

In addition to my concerns about proliferation of regulators as set out above, it is of course imperative that the competency requirements are relevant to the activity to be regulated. The knowledge, skills and experience required in the preparation of probate papers within contentious and non-contentious business are distinct. If and insofar as the application relates to contentious probate work (other than advocacy and conduct of litigation, which are addressed earlier in this letter), then it is necessary to bear in mind that probate actions are often highly technical and involve considerations of complex issues of law. Sometimes that law is quite historic and obscure. Such work is normally only undertaken by highly skilled lawyers who specialise in the area. If the application relates to non-contentious probate only, the preparation of papers (upon which the judicial act of the grant of representation will be based, and which can lead to opposed hearings) still requires the utmost professional skill and care. In addition, attention should be given to the repercussions in terms of cost and delay to the client if a matter which is initially non-contentious is later disputed.

Yours sincerely,

John Judge
