



Legal Services Board – Decision Notice issued under Part 2 of Schedule 4 to the Legal Services Act 2007

ILEX Professional Standards (“IPS”) has made an application on behalf of the Institute of Legal Executives (“ILEX”¹) under the Legal Services Act 2007 (“the Act”) for the Legal Services Board (“LSB”) to recommend that an order be made by the Lord Chancellor designating ILEX as an approved regulator in relation to the reserved legal activity of conduct of litigation. They have also sought approval from the LSB for the related new regulatory arrangements and changes to their regulatory arrangements for rights of audience.

The LSB has decided to make a recommendation to the Lord Chancellor that an order be made designating ILEX as approved regulator for the reserved legal activity of the conduct of litigation. Under the regulatory arrangements ILEX will be restricted to granting the right to conduct litigation to Associate Prosecutors of the Crown Prosecution Service.

The LSB has also decided to approve in part the proposed regulatory arrangements. The part approval limits the regulatory arrangements to the range of activities currently undertaken by Associate Prosecutors rather than, as proposed by ILEX, the full range of activities allowed under the Prosecution of Offences Act 1985 (as amended by the Criminal Justice and Immigration Act 2008) but not yet in force.

This Notice sets out the basis for the LSB decisions.

Authority for the decision

1. Annex I sets out the authority under which the LSB has made this decision.

Background

2. Section 7A(1) of the Prosecution of Offences Act 1985 (POA) allows for certain non-lawyer employees of the CPS, known as Associate Prosecutors (APs), to be granted the rights and powers of Crown Prosecutors by the Director of Public Prosecutions (DPP). The range of activities that APs can undertake are limited by instructions issued by the DPP under sections 7A(3) and (4) of POA. APs are court advocates dealing with the range of hearings in the instructions and they also conduct a small amount of out of court legal work.
3. Until 1 May 2011, the designation of these rights is granted by the DPP. The Criminal Justice and Immigration Act 2008 (**the 2008 Act**) allowed for a wider range of rights to be granted to APs. At the time concern was expressed and objections were raised on the

¹ ILEX is used throughout this report to mean both the approved regulator and its regulatory body, ILEX Professional Standards Limited

grounds that APs were not legally qualified and were not subject to any professional Code of Conduct. To address this, agreement was reached that the DPP will continue to designate APs but they will also need to be authorised by an approved regulator under the Act. (s7A(8) POA, as inserted by the 2008 Act).

4. From 1 May 2011, ILEX will be responsible for granting the rights of audience and rights of litigation necessary for APs to continue to represent the CPS. Without ILEX authorisation of the individuals, the CPS will not be able to deploy APs.

Issues arising from the assessment of the applications

5. The applications have been reviewed and assessed against the applicable rules and guidance.
6. The following issues have been considered and resolved.

Regulatory resources (capacity, monitoring and enforcement)

8. In making a recommendation for designation, the LSB has a duty to ensure that the applicant is “competent and [has] sufficient resources to perform the role of regulator in relation to the reserved legal activity at that time” (Schedule 4, Part 2, 13(2)(b)).
9. The training and qualification arrangements will be subject to inspections by both officers of IPS and external advisers. Reports on these inspections will be presented to the Admissions and Licensing Committee which has overall responsibility for the scheme.
10. Beyond the consideration of complaints, there was no indication in the application that ILEX will be undertaking any proactive monitoring of the work of APs. Nor was there anything to explain what (if any) monitoring will be undertaken directly by ILEX in relation to APs. This was discussed with ILEX (and CPS) at a meeting on 15 December 2010.
11. ILEX confirmed that each AP must complete their own renewal application through which they collect individual data. APs are required to answer questions on whether they have been excluded or expelled by a professional body or had proceedings taken against them under s43 Solicitors Act 1974; whether the member has had a bankruptcy order or county court judgement made against them or has entered into an individual voluntary arrangement; whether a complaint has been made against them either to their employer or the Legal Ombudsman. They must also complete the annual online continuing professional development records in compliance with the CPD regulations.
12. ILEX confirmed that their regulatory activity will be based on the monitoring and supervision that CPS undertakes. CPS has in place procedures for performance appraisals of staff, disciplinary procedures and complaints handling. It has also developed its own advocacy assurance framework. Although not supervising the CPS itself, ILEX will rely on CPS processes and reporting to identify any regulatory issues that need to be addressed.
13. There is external assessment of the performance of the CPS. HMCPSI was established as an independent body under the Crown Prosecution Service Inspectorate Act 2000. Reporting to the Attorney General it provides assurance on the effectiveness and efficiency of the CPS.

14. As an approved regulator, ILEX is required to act in accordance with the Better Regulation Principles (proportionality, accountability, consistency, transparency and being targeted). It could be argued that requiring additional monitoring by ILEX of the Associate Prosecutors would impose further cost for potentially little additional benefit.
15. While placing some reliance on well established CPS procedures may be a proportionate response, it does not absolve ILEX from the responsibility of proper regulation. They will need to ensure and be able to demonstrate that the procedures relied on are fit for regulatory purposes and that they receive sufficient information on which to form their own view on the standards of compliance with the ILEX Code of Conduct and relevant rules. They will also need to ensure that where they are not satisfied that the appropriate standards have been achieved they take remedial action. To the extent that any HMCPSi report identifies issues relating to the professional standards and conduct of APs, ILEX will need to demonstrate that appropriate action is being taken to address the issues.
16. We have also considered the following as relevant to our assessment on the adequacy of the regulatory arrangements
 - The proposed arrangements apply to a narrow group of members who all have to be employed by the CPS to exercise the rights that they are granted
 - All APs work under the supervision of a Crown Prosecutor who will be a barrister or solicitor. They have very limited scope and all decisions are made by the Crown Prosecutor who is an authorised person.
 - The change will bring no significant difference to the way that APs are selected, trained and supervised. There is no evidence to suggest that the process that has been used to date has resulted in inappropriate people being appointed as APs, therefore granting this application will not increase the risk of this happening. The authorisation and regulation of APs by ILEX will bring a degree of external scrutiny to these processes.
17. Our conclusion is that at this time ILEX has sufficient capability and capacity to regulate this specific class of membership. In our view it is not unreasonable for ILEX to place reliance on CPS procedures where they (ILEX) are able to satisfy themselves that those procedures are fit for regulatory purposes and they receive regular and sufficient information to enable them to form their own view on standards and to take action if necessary.
18. In order to ensure that there is transparency and accountability of the effectiveness of these arrangements, our intention is to impose a requirement on ILEX under s55 of the Act to report to LSB by 30 June 2012 on how they have satisfied themselves that AP members of ILEX have met the requirements of the regulatory arrangements. The scope of that report will be notified to ILEX at a later date but is expected to include commentary on the information that they have received, their assessment of the issues and risks that have been identified and how these have been addressed.

Complaint handling arrangements

19. The MOU sets out the respective responsibilities of the CPS and ILEX in handling complaints, including the reporting arrangements between the two organisations. No

complaints have been made or referred to ILEX during the voluntary arrangement and CPS commented that they rarely receive complaints about individual prosecutors.

20. The advice from the Legal Services Consumer Panel (LSCP) noted that there is no independent complaints mechanism to consider complaints against APs, with particular reference to victims and witnesses who maybe among the most vulnerable people to come into contact with APs. Following discussions with both ILEX and the Legal Ombudsman (which concluded that since the “client” that the AP is representing is the CPS and is therefore outside the scope of the Ombudsman), LSCP suggested that ILEX explore with the Ombudsman the possibility of using the voluntary arrangements (Sections 163 to 166 of the Act).
21. We agree with ILEX’s analysis that means that voluntary arrangements cannot be used by virtue of s164(5) (which states that if at the time the events complained of took place the individual complained about was an authorised person, voluntary arrangements cannot be used). We also agree with the view that there is no client relationship between an AP and a victim or witness.
22. ILEX has noted that CPS has its own procedure for dealing with complaints made by victims and witnesses. The Parliamentary and Health Ombudsman (PHO) is able consider complaints referred to her by Members of Parliament from witness and victims. The CPS Annual Reports and Resource Accounts for 2008-09 and 2009-10 both record that the CPS was not the subject of any complaints to the PHO in those years.
24. On balance we are satisfied that the complaints arrangements are appropriate. There is a mechanism for aggrieved victims and witnesses to have a complaint properly considered and, if required, a mechanism for an independent assessment to take place by the PHO; this addresses the concern raised by the LSCP.

Quality assurance

25. Quality assurance is a key tool for regulators to demonstrate ongoing competence of authorised persons. In its advice, the LSCP suggested that ILEX should make a commitment to use the Quality Assurance for Advocates (QAA) Scheme currently being developed by the Joint Advocacy Group for the whole of its regulated community. ILEX response is that the CPS has developed an internal quality assurance scheme for all CPS advocates (including APs) which is a suitable alternative to the proposed QAA scheme.
26. At this stage the QAA scheme is still in development and so it is not unreasonable to place reliance on the CPS scheme. Once the QAA scheme is agreed, ILEX must require CPS to migrate to that scheme for APs.

Relationship between ILEX and CPS

28. ILEX needs to be able to demonstrate that they are delivering independent regulation of APs. If the primary source of information for ILEX derives from the CPS systems, controls and procedures, the arrangements must allow for ILEX to request such information as it needs to deliver its regulatory function and require CPS to provide that information. This should be clear in the Memorandum of Understanding (MOU).

29. The MOU must set out the regular information that will be provided and allow ad hoc requests to be made. It must also make provision for ILEX to carry out its own inspections/reviews where necessary.

Range of activities to be covered by the regulatory arrangements

30. The advice from the Lord Chief Justice noted that the draft Certification Rules in the application have been written to allow for any future extension of cases that APs are allowed to prosecute.
31. ILEX's application covers the full range of statutory activities that APs are able to undertake. Section 55(5) of the Criminal Justice and Immigration Act 2008 (the 2008 Act) amends S7A of POA and allows APs to conduct criminal proceedings in magistrates courts of trials other than trials of either way offences or "offences which are punishable with imprisonment in the case of persons aged 21 or over".
32. A further provision permits the Attorney General to amend this, by statutory instrument, to remove the words "or offences punishable with imprisonment in the case of persons aged 21 or over". At the time that the 2008 Act was being considered, assurances were given that this would not be introduced before May 2011. CPS has confirmed that there is currently no plan to introduce this change.
33. Our view is that the Certification Rules should mirror the current scope currently permitted under the POA and that, should the Attorney General decide to amend the scope, this should lead to an application by ILEX to the LSB to change their regulatory arrangements.
34. ILEX has amended the Certification Rules that were submitted for approval. Rule 4 (Level 2 Rights of Audience and Litigation Certificate in Criminal Proceedings) now reflects the current statutory position.

Decisions

35. Schedule 4, paras 13(2) and 13(3) set out the matters on which the Board must be satisfied when granting an application for designation.
36. Schedule 4, para 25 explains that the LSB must grant an application to change to the Regulatory Arrangements unless one or more of the criteria specified sub-paragraph 25(3) met.
37. The Board has considered the applications and satisfied itself that the issues raised have been satisfactorily addressed. It is satisfied that the criteria for granting a designation application have been met and that there are no grounds on which it should refuse to approve the regulatory arrangements.
38. Therefore the Board decided to
- Recommend to the Lord Chancellor that, taking into account the scope of the regulatory arrangements which limits the granting of these rights to APs, the Institute of Legal Executives Limited be designated as an approved regulator for the reserved legal activity of the conduct of litigation; and
 - To approve in part the proposed regulatory arrangements.

Chronology

- The LSB confirmed receipt of an application from 29 July 2010
- The decision period started 27 July 2010 and ended on 1 February 2011²
- The application was published on the LSB website on 10 August 2010
- The advice from the mandatory consultees and ILEX response were published on the LSB website on 17 December 2010
- This Decision Notice is being published on our website on 1 February 2011.

**Legal Services Board
1 February 2011**

2

http://www.legalservicesboard.org.uk/what_we_do/regulation/ilex_application_award_rights.htm

Authority for the decision

1. Paragraph 3(2) of Part 2 of Schedule 4 of the Act enables any body to apply to the LSB requesting that the LSB recommends to the Lord Chancellor that an order be made by the Lord Chancellor to designate that body as an approved regulator in respect of identified reserved legal activities³ The remainder of Paragraph 3 of Part 2 of Schedule 4 of the Act identifies other requirements that are imposed by the Act in relation to the application made by that body.
2. Part 2 of Schedule 4 documents the processes, participants and criteria that will be applied to any such application that is made. These provisions include duties being imposed upon the LSB to make rules at paragraphs 3(3) for the form and manner of the application, 3(4) for the amount of the prescribed (application) fee, 4(2) for procedures and criteria for considering whether to accept an application for consideration and 11(3) about considering oral and written representations made to the LSB as part of the process of consideration.
3. Paragraph 13(1) of Part 2 of Schedule 4 to the Act, also requires the LSB to make rules about how it will determine if it should recommend to the Lord Chancellor that an application for designation by a body to become an approved regulator in relation to identified reserved legal activities should be made. These Rules for Approved Regulator Designation Application came into effect on 1 January 2010 (“Designation Rules”).
http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/approved_regulator_designation_applications.pdf
4. The LSB may only grant an application in relation to a particular reserved legal activity if it is satisfied in relation to the requirements under paragraph 13(2)⁴ and 13(3)⁵ of Part 2 of Schedule 4. The Designation Rules provide the mechanism through which the LSB carries

³ The term “approved regulator” is defined in section 20 of the Act and a list of the Approved Regulators and the reserved legal activities for which they are approved is contained in Schedule 4 Part 1 of the Act. The term “reserved legal activities” is defined at Section 12 of the act and a list of the reserved legal activities and a definition of what is comprised within each of them is contained in Schedule 2 of the Act. Both Schedules will be amended from time to time in accordance with activities conducted in accordance with provisions of the Act.

⁴ Paragraph 13 (2) of Schedule 4 states that rules under sub-paragraph 1 must, in particular provide that the Board may grant an application in relation to a particular reserved legal activity only if it is satisfied – (a) that, if an order were to be made under paragraph 17 designating the body in relation to that activity, the applicant would have appropriate internal governance arrangements in place at the time the order takes effect, (b) that, if such an order were to be made, the applicant would be competent, and have sufficient resources, to perform the role of approved regulator in relation to the reserved legal activity at that time, (c) that the applicant’s proposed regulatory arrangements make appropriate provision, (d) that the applicant’s proposed regulatory arrangements comply with the requirement imposed by sections 52 and 54 (resolution of regulatory conflict) and (e) that those arrangements comply with the requirements imposed by sections 112 and 145 (requirements imposed in relation to the handling of complaints).

⁵ Paragraphs 13(3)(a) and (b) of Schedule 4 provides that the LSB must in particular be satisfied that the exercise of the applicant’s regulatory functions would not be prejudiced by any of its representative functions and that decisions relating to the exercise of regulatory functions would, so far as reasonably practicable, be taken independently from decisions relating to the exercise of representative functions.

out its assessment against these requirements and the LSB has therefore satisfied itself of compliance with the requirements of paragraphs 13(2) and 13(3) by an assessment of the application and proposed regulatory arrangements against the Designation Rules.

5. The LSB is also required to approve what the body proposes as its regulatory arrangements if the proposed order is made.
6. The LSB will approve regulatory arrangements in so far that they appear to achieve their intended outcome and satisfy the conditions in paragraphs 13(2)(a) to have appropriate internal governance arrangements in place and 13(2)(c) of Schedule 4 that the proposed regulatory arrangements make appropriate provision for the proposed reserved legal activity. The LSB is also required to ensure that the proposed regulatory arrangements comply with the requirement imposed by sections 52 and 54 of the Act (resolution of regulatory conflict) and that such arrangements comply with the requirements imposed in relation to the handling of complaints (sections 112 and 145).
7. Paragraph 25 of Schedule 4 explains that the LSB must approve a proposed change to the Regulatory Arrangements unless we are “...satisfied that...” the approval would fall within one or more of the criteria specified in sub paragraph 25(3) (and listed in the footnote below⁶). If the LSB is not satisfied that one or more of the criteria are met, then it must approve the application in whole, or at least the parts of it that can be approved when only part of the application meets the criteria.

⁶ The Board may refuse the application only if it is satisfied that—(a) granting the application would be prejudicial to the Regulatory Objectives, (b) granting the application would be contrary to any provision made by or by virtue of the Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator, (c) granting the application would be contrary to the public interest, (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator, (e) the alteration would enable the approved regulator to license persons under Part 5 to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.