

RESPONSE OF IPS TO LSB REQUEST FOR FURTHER INFORMATION IN RESPECT OF LITIGATION AND PROBATE RIGHTS APPLICATIONS

FRAMEWORK FOR IDENTIFYING RISK

This Addendum to the IPS Application for litigation/advocacy and probate rights gives further information about the approach IPS will take to ensuring practices authorised by IPS will meet the requirements set out in the ILEX practitioners Practice and Accounts rules.

The Application already sets out a number of ways in which compliance and quality will be assured: through a rigorous approval process, physical monitoring and annual review. Part III of the rules sets out how IPS will deal with practices which fail to meet any of the standards.

The processes set out in the application are based on control of practices through individual authorised persons, rather than entities. The level of scrutiny and control is designed to offer the same protection to clients and the public as has been provided by other types of legal practice and the mechanisms available are in some respects the same. The types of practice which will be permitted under the application are ones which constitute sole or joint practices of ILEX practitioners. Although ILEX practitioners will be permitted under the rules to practice with other types of lawyer such as solicitors or licensed conveyancers, those practices would need to be regulated by the SRA or the CLC, rather than IPS. The rules provide for different areas of compliance with the rules to meet each case.

It is expected the number of ILEX litigators/probate practitioners who wish to practice independently will build up slowly. The litigation qualification scheme is likely to take an applicant a year to complete, from the point at which it is approved. Because of the slightly different qualification structures qualification to practice in probate might be achieved in 6 months so there will be a lead-in time for IPS to ready itself for regulating independent practice.

The application sets out business development criteria, for IPS, assuming 10, 20 or 40 new practices per year. This scale of development will not present any difficulties in managing the arrangements for applicants, ongoing monitoring and annual review.

IPS is preparing an application to become a licensing authority. ILEX can only become a licensing authority if it is an Approved Regulator in respect of a range of reserved activities, which currently it is not. If IPS' application for litigation, probate and other rights were to be successful, a licensing application will enable a wider range of practice models to develop through regulation of entities. In the meantime the arrangements set out in the application for rights are robust to meet the legislative objectives and to

assure safe standards of practice by ILEX litigators/probate practitioners to the same level as other types of practitioner providing these services.

It is recognised that Legal Disciplinary Practices will be able to continue after the development of licensing arrangements and therefore the numbers of such practices may reach a point where monitoring may need to be more risk-based. Risk based monitoring is in any event a desirable approach for good regulation. In effect the practice rules in the application are designed to address areas of risk. Going forward, we recognise those measures will need to be able to be applied through objective measurements, particularly in relation to annual renewal of certificates, rather than depending on an individual inspection regime. The aim will be to ensure that firms can be identified where clients' interests and the regulatory principles are at risk so that resources can be focused on them. Specific mechanisms for risk assessment included in the application are explained below, by reference to the queries raised by the LSB in its e-mail to IPS dated 12 August 2010. IPS will use these to produce a risk register for use on initial application, during monitoring visits and on annual review.

Supervised, independent and sole practitioners

IPS recognises that there are differing risks posed by practitioners working in supervised employment compared to those working independently; and sole practitioners rather than multiple partner/owner practices (in this note 'practitioners' refers to litigation and probate practitioners). The Practice Management and Accounts Rules at annex 11 to the application impose (at rules 10 and 11) different compliance obligations in respect of each of the different practice models, in recognition of the different risks they pose.

Those members who practise in an environment where they are supervised by a principal will need to comply with the practice management and accounts rules and other regulatory arrangements imposed by their principal's regulator. There are discretionary powers to deal with regulatory conflicts in the IPS rules. Where the principal is regulated by IPS then the supervised practitioner will need to comply with the IPS Practice Management and Accounts Rules and other regulatory arrangements. In such instances compliance by the supervised practitioner will be determined through the information provided by the principal to IPS. Those information requirements in respect of the principal are referred to below.

IPS recognises that an independent practitioner regulated by IPS will potentially pose a higher risk than an employed practitioner. Independent practitioners regulated by IPS will be responsible for ensuring that all the members and employees of their practice comply with the IPS requirements. They will be responsible for ensuring compliance with client care, practice management, professional duty, accounting, compensation fund and indemnity insurance requirements. Where they fail to meet the requirements

IPS proposes, the powers needed to take appropriate remedial action exist under the rules to ensure that non compliance is addressed.

Failure to address non compliance will pose a risk to IPS' reputation, credibility, compensation fund and its regulatory status. Therefore it will be in IPS' interest to identify and deal with risks at an early stage. Where a practitioner is supervised by a principal, the regulator of the principal or the entity will be responsible for taking action to remedy non-compliance. However, IPS will retain its regulatory control over the member as an individual practitioner.

IPS recognises that it appears, historically, that solicitor sole practitioners have posed a greater risk of default compared with larger practices. The exposure to risk of small firms is likely to be greater. However, while numbers of IPS sole practitioners remain small, the arrangements for authorisation, inspection and annual review set out in the application are proportionate to address those risks. In the event of larger numbers of sole practitioners being authorised, risk assessment methods will need to be deployed to identify those practices which pose the greatest risk. This issue is discussed further below.

Realised Risks

IPS has developed a number of arrangements through which it will be able to determine whether risk has been realised. These arrangements encompass a mix of self declaration and scrutiny at the point of authorisation, by inspection and annually thereafter. They include:

- The provision of annual information to IPS such as a business plan for the practice which is updated annually. Annex 10 to the application sets out the information required to be provided by an independent practitioner to show how the practice will operate and run and be managed and financed. The business plan produced as part of this process will enable practitioners to identify whether further work would be needed to ensure the financial viability of their practice and enable IPS to identify potential risks for discussion with the practitioner.
- File management and client care information will be required on an annual basis. This will provide a mechanism by which practitioners can review their compliance with the practice management rules in respect of client care information and file management procedures.
- Practitioners will be required to provide annual information on accounting structures within the practice, including details of the client and office account, compliance with the requirements on reconciliation of accounting records and the business accounting information. This information will enable an assessment to be undertaken to ensure client money is adequately protected and will provide another opportunity to assess the business viability of a practice.

- The annual accounting reports will be sent to IPS by the accountants of the practice. Again this provides an opportunity to ensure compliance with the IPS accounts rules. The accountant will provide an independent assessment upon which IPS will be able to rely. The accountant will also be required to identify any issues of non-compliance with the accounts rules.
- The return to indemnity insurers will require practitioners to undertake an assessment of their risk management strategy.

The information will be provided to IPS at the point at which a practitioner is deemed fit to practice independently. It will provide IPS with an initial opportunity to assess the information to ensure that a practitioner will be compliant with IPS' regulatory arrangements. The annual return will provide the opportunity for IPS to re-assess compliance with the rules. Instances of non-compliance will be used to identify risk and thereafter how they will be addressed. In particular the client care information will identify risks to the progress of client cases and a failure to comply with the requirement to protect consumer interest. The accounting information will identify potential risks to consumer interest.

The mechanisms provided for in the rules will allow IPS to risk assess applications by prospective independent practitioners and to monitor the risk in subsequent years. IPS will use the risk indicators to take appropriate action.

Responding to realised risk

IPS will develop a strategy for dealing with risk based on the requirements set out in the rules. In many instances it will be able to work with practitioners to improve compliance and thereby reduce risk. It has the power in appropriate cases to ask practitioners to show how they will remedy any issues identified. IPS will determine whether the plan is acceptable and in appropriate instances agree additional actions to be included in the plan. It will thereafter regularly review compliance and achievement against the plan through seeking appropriate documentary evidence from practitioners. Where IPS identifies that an area of risk cannot be rectified through a development plan, that a development plan is insufficient or that a practitioner has failed to comply with a development plan, it will be able to take disciplinary action to protect the interest of consumers and the public. This reflects processes which have been used by IPS to manage risks arising in immigration practices. In such instances it would be able to suspend a practitioner's certificate or membership of ILEX, take investigative action, inspect and monitor practices and ultimately take disciplinary tribunal proceedings. Suspension of a practice certificate or exclusion from membership of ILEX will prevent an ILEX practitioner from lawfully providing legal services and, where the member is a sole practitioner, prevent the firm from providing services.

Identifying risks

The information IPS will use to identify risks posed by practitioners includes the accounts information (reconciliation, confirmation that client money is separated from office money, compliance with the accounts rules); the annual return (client care information, regular updates to clients and compliance with file management procedures, regular costs updates to clients and complaints records); accountants report (compliance with accounts rules).

IPS will require members to disclose whether any complaints have been made against them or, where relevant, their firm. Complaints returns may disclose evidence of incompetence, service failures, the presence of poor systems and procedures in a practice, inadequate supervision and pressures which impact adversely upon service delivery. The returns will be used to identify whether development plans can be put in place to improve systems and procedures and mechanisms for dealing with workloads. They will also identify how competence can be developed through CPD courses or retraining.

Business accounting information will be used to identify risk to the financial viability of a practice which may ultimately risk client money and client cases.

Changes in risk

Practitioners will be required to provide information annually. This will provide IPS with an annual opportunity to re-assess risk posed by practitioners. Risk registers should enable changes in risk to be identified quickly. Practitioners will have annual renewal dates for certificates. The renewals are staggered over two periods each year. The renewal periods will provide IPS with an ability to build up a picture over time. The annual return may identify different trends in risk over time. That will provide IPS with an opportunity to take appropriate action. In addition complaints data and complaints made to IPS about the conduct of practitioners will be used to identify changes and trends in risk and thereafter take appropriate action.

Specific risks

The risks that are of particular concern can be summarised as the following:

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- A risk to client money. Our particular concern would be an inability to identify what is client money and inability to separate client money from office money.
 - Conflicts of interest, particularly in relation to referral fees and tying in of services.
 - Dishonesty on the part of practitioners. Dishonesty can include misleading IPS or clients, taking client money, money laundering and other aspects of financial dishonesty.
 - Incompetence such as acting in areas where a practitioner has no skills, knowledge or experience.

- Mismanagement of a practice which leads to a poor service to clients or a failure to progress client matters.

IPS recognises the particular risks associated with its probate practitioner scheme. It has proposed that people who are already providing will writing or probate services at the time the rules come into effect (as they may do, as these services are not generally reserved activities) may seek regulation by ILEX and qualification as a probate practitioner. Such applicants may be accepted as probate practitioners subject to a development plan which identifies how they will develop their knowledge and experience and/or their practices and procedures to meet IPS requirements in full. It is recognised that these practitioners may pose a risk to IPS where their practices and procedures fail to meet IPS requirements. To address such risk IPS has proposed that such practitioners will be authorised subject to conditions. Suitable conditions would be imposed upon a practitioner's certificate to limit them from practising in areas where development needs have been identified.

Concerns about particular risks

The risks are of particular concern because they relate to areas in which the regulatory objectives, professional practice rules and the interests of clients and consumers are most clearly at risk in these particular areas of practice. In addition to the impact on clients, failure to address them would damage the reputation and credibility of IPS and would impact adversely upon the integrity of other practitioners authorised by IPS who were competent. The risk could lead to claims against the compensation fund and increases to professional indemnity insurance premiums.

Criteria for intervention

As indicated earlier, the processes proposed by IPS aim to ensure practitioners are only authorised where the competence and practice criteria are met and the risks posed to clients, the public, the statutory objectives and the professional principles are at an acceptable level. Where increased risks are identified subsequently the intention will be to engage the practitioner in alleviating the risk. Intervention proceedings would be taken where IPS identifies that there has been a substantive breach of the practice rules and/or a practitioner's dishonesty, competence or mismanagement pose a serious risk to client interests, including client money and the progress of client cases and where either remedial action is not an appropriate response or the practitioner is unable or unwilling to take action to address any concerns or failings identified.

Impact of disciplinary actions

IPS already has in place a number of activities which are aimed at having a deterrent effect on members and educating members. These include:

- Publication of disciplinary decisions. IPS currently publishes disciplinary decisions which include learning points for members arising from disciplinary cases. Its experience has been that such publication has been well received by ILEX members and acts as a useful reminder to them. Regular articles are published in the ILEX Journal, which is sent to all practitioners and will be available on the web site. The articles will address high risk areas and identify what the minimum compliance requirements are for practitioners. The annual reporting of the investigation and disciplinary work enables lessons learned to be fed back into the qualification criteria for membership and this would continue for the practice rights schemes. Disciplinary records appear on the ILEX membership database.
- Casework will inform interactions with other practitioners. This is clearly easier with limited numbers of practitioners and it is recognised the monitoring and review of annual returns will need to develop to enable IPS to identify practitioners who pose comparable, known risks.
- IPS will publish its decision making criteria which will show practitioners what action IPS will take in particular circumstances where a risk is identified which has not or cannot be addressed.
- IPS will make recommendations to members about appropriate training they could take to improve their skills and knowledge in high risk areas of work.

Coping with high levels of practitioner applications

As indicated above, if demand were to increase for practitioner certificates beyond IPS' existing resources it will need to focus more on a desk-based monitoring process. Effectively that desk-based monitoring process is already required by the certification rules. As outlined earlier, practitioners are required to provide annual information to IPS which will be used to identify and monitor risk.

Triggers for action upon scrutiny of data.

The information provided above outlines the triggers that IPS will use to identify where it needs to take action upon its scrutiny of information provided by practitioners. These include failure to comply with the accounting requirements, failure to separate client and office money, failure to provide adequate client care and costs information to clients, failure to cope with work load, a business forecast which discloses a risk that a practice is not financially viable and repetitive complaints especially in the same area.

Managing risks in relation to larger organisations.

It is recognised that a situation could arise where a small number of ILEX practitioners employed a large number of staff. IPS recognises that its procedures must be robust enough to cope with such scenarios. Practitioners must provide details of their business structures, under the rules. The rules

also require them to ensure that work is properly managed and supervised. At present responsibility for compliance with practice arrangements rests with the ILEX practitioners. In such instances IPS will be looking to ensure that a practice has suitable management and supervision arrangements in place to ensure that the staff comply with IPS' requirement. IPS' regulatory remit will result in actions being taken in instances of non-compliance against the ILEX practitioners.

Managing the interplay with ABS

IPS notes the LSB concern about the danger of entities remaining within the current regime to evade possibly more onerous controls under the licensing process. It should be recognised that such risk only arises in respect of practices comprising ILEX members alone. IPS' application to become a licensing authority will include entity regulation rules. It is recognised that parallel work will need to be carried out to ensure that sole practitioner or LDPs meet proportionate, but comparable practice standards.

*IPS/ risk rights
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