

RESPONSE OF ILEX PROFESSIONAL STANDARDS LTD TO THE ADVICE FROM MANDATORY CONSULTEES

Re Applications to Award Rights to Conduct Litigation and Rights of Audience and Rights of Probate to Members of ILEX

1. IPS received a copy of the advice obtained by the Legal Services Board (LSB) from the mandatory consultees to its two above applications on 1 February 2011. IPS has indicated to the LSB that it wishes to make a response to the advice given by the mandatory consultees.
2. This document sets out the response of IPS to the advice given by each consultee.

Office of Fair Trading (OFT)

3. The OFT advice was that the applications would not prevent, restrict or distort competition within the market. The OFT added that allowing ILEX members authorisation to conduct litigation and to have rights of audience and authorisation to deliver independent probate services, within the parameters outlined in the application, may strengthen competition for the provision of services. The OFT noted that the application could place competitive pressure on the pricing of the services and broaden access to justice in respect of litigation and advocacy rights and increase competition and broaden access to consumers in respect of probate practice rights.
4. IPS agrees with the views expressed by the OFT in respect of its application.

Legal Services Consumer Panel (LSCP)

5. The LSCP commented that it does not have any substantive policy comments on the likely impact on consumers where a designation is made by the Lord Chancellor as set out in the application. IPS submits that the designation would improve access to justice and increase competition for the benefit of consumers. This has been recognised by the OFT in its response.
6. The LSCP commented that it was concerned by the lack of detail on how ILEX intends to monitor compliance with its rules or ensure the ongoing competence of practitioners. It added that the proposed level of resource appeared to be small and it was concerned about ILEX's lack of experience in regulating entities. These are issues that IPS has been discussing with the LSB since its applications were made. IPS has now revised its rules to regulate entities as required to meet compliance with the Legal Services Act. IPS has also developed its internal arrangements to include a risk based approach to regulation. IPS submits that the

additional information, which is being provided to the LSB, will provide the detail on how it intends to monitor compliance with its rules and ensure ongoing competence of practitioners.

7. The entity based regulations will ensure compliance with the ILEX rules by all owners, managers and employees of authorised entities. Compliance will be monitored through the application process for authorisation, which will be assessed against IPS' risk based model of regulation. All practices will be required to make an annual return to IPS. The information required to be submitted is that which was contained in the independent practice criteria set out in the application. It requires that applicants provide details of the entity, business plan and financial returns including an accountant's report. IPS will assess the information on the annual return against the risk based assessment model, which has been designed to assess the risk posed by entities in respect of compliance with IPS' rules.
8. The competence of individual practitioners will be assured through the annual renewal process of certificates. All practitioners with litigation rights will be required to renew their certificates after one year of issue, at which point they provide case portfolios to demonstrate how they have applied the knowledge and skills developed during the qualification courses. IPS already uses this model in respect of Legal Executive Advocates, qualifying under the Rights of Audience scheme. The model has worked well and was approved by the Lord Chancellor's Consultative Panel when the application for rights of audience was being considered.
9. IPS recognises its resources are small. It has made proposals to increase staff incrementally as the work of assessing applications develops. The application for the rights includes cost models which demonstrate that the schemes can be self funding. If additional resources were to be required, to those already envisaged in the submissions, IPS believes that the scheme income would be sufficient to recruit additional resource at an appropriate level. ILEX also has reserves which can be used to buy additional resources, were it to become necessary to put in place resources before income is generated.

Advice of The Right Honourable The Lord Judge

10. Each of the matters raised by Lord Judge in his letter of 26 January 2011 is discussed below.
11. Lord Judge commented that the LSCP had not concluded that granting the application will have a positive impact on the consumer interest. He stated that it was a matter of concern that the Panel failed to identify a clear and significant consumer interest in favour of granting the applications and that he shared the concerns expressed by the LSCP. IPS has commented on the concerns expressed by the LSCP above. IPS

submits that the LSCP has not concluded that the granting of the applications will not have a positive impact on the consumer interest. The advice of the LSCP states it does not have any substantive comments on the likely impact on consumers. The OFT believes there will be a benefit to consumers if the applications are approved.

12. Lord Judge commented that it was not certain that regulatory competition will operate in the public and consumer interest. Lord Judge commented that it was important to examine in more detail whether IPS' assumption that the applications are in the public and consumer interest and therefore benefit the proper administration of justice is correct. Lord Judge commented that it was difficult to see how in practice regulatory competition can improve standards of regulation. He was concerned that the proliferation of regulation could lead to a reduction in standards and thereby cause detriment to consumer and public interest. We do not comment on whether regulatory competition will or will not improve standards of regulation. The issue was considered in the course of parliamentary debate on the Legal Services Bill. This application is now made under the terms of the Act which Parliament approved. The premise of the legislation is that competition in the provision of legal services will improve standards. Parliament must have taken the view that the current regulatory arrangements were not capable of securing the improvements in service and standards which were needed. IPS and ILEX believe that enabling ILEX to authorise litigation and probate practitioners will open the way to improvements in service provision. This is clearly the case in relation to probate, where the scheme ILEX proposes is designed to strengthen regulation and raise standards in an area of practice where there are significant concerns regarding the provision of unregulated services. It remains to be seen whether the legislators' belief is correct that the Legal Services Act will improve the provision of Legal Services or whether it will simply make the regulation of them more complex.
13. Lord Judge commented that it was imperative that the regulatory standards imposed on ILEX members in independent practice are equivalent to those put in place by the SRA and BSB. He added that he was not satisfied that the applications contained sufficient assurance of ILEX's ability to guarantee the proper and effective regulation of its members to the same standard as that carried out by the SRA or BSB. IPS believes that the detailed arrangements proposed in the application provide sufficient assurance regarding the proper and effective regulation of ILEX litigators and probate practitioners. The qualification requirements are set at a high standard. They are designed specifically to ensure that practitioners are competent in the type of work they undertake. They build on substantial practical experience which must be demonstrated before applicants can undertake the skills, practice and accountancy training. Barristers, of course, do not normally work as probate practitioners and may not practise as litigators without

additional qualification. Probate practitioners who qualify with the Council for Licensed Conveyancers, as is now possible, are not required to undergo a substantially more challenging qualification process than ILEX members. Practice management and accountancy standards proposed by IPS are directly comparable with the CLC requirements, as they are with the SRA requirements. The Bar Standards Board does not have any comparable standards in relation to the management of legal practice currently. In summary, IPS does not believe it is correct to assert that the regulatory standards in respect of litigation and probate must be the same as those of the SRA and the BSB because they are not themselves the same or the only standards. IPS further asserts that where comparable standards are required the arrangements proposed by IPS in these applications meet that requirement.

14. Lord Judge says that the SRA regulates through detailed investigatory, regulatory and disciplinary mechanisms. IPS has in place comparable disciplinary rules for regulating the conduct of ILEX members. The practice management rules have now been revised to ensure that they provide for the regulation of practices as well as individual members. We believe that the disciplinary and regulatory arrangements will secure the regulation and discipline of individual members and provide the necessary controls over litigation or probate practices regulated by IPS.
15. Lord Judge comments that suitable and equivalent training requirements must exist for ILEX members as exist for Solicitor Advocates and members of the Bar and that those requirements must take into account the Quality Assurance of Advocates scheme. ILEX is already authorised in relation to Advocacy rights under the Legal Services Act. These applications do not extend those rights. The QAA scheme is concerned with advocacy in criminal proceedings. These applications do not relate to criminal litigation. However, for the record, arrangements which exist for ILEX advocates who hold a criminal proceedings certificate already substantially meet the advocacy standards on which the Joint Advocacy Group has consulted.
16. Lord Judge commented that the application lacked detail to demonstrate that ILEX was in a position to carry out the necessary degree of regulatory and disciplinary oversight of members if they were able to practice independently. The application contains detailed proposals for the regulatory arrangements and standards to be imposed on ILEX members in independent practice. They are not less than those which apply to Solicitors. They have, however, been strengthened by the development of a risk based approach to regulation, in response to discussions with the Legal Services Board. Lord Judge makes reference to ILEX's recent application for Legal Executive Advocates to be permitted to become managers in legal disciplinary practices. He notes, correctly, that one aspect of that application was that Advocates would not be permitted to practise independently. However the premise of this

application is that those who qualify as litigators will undertake additional training and assessment in order to become eligible to practice independently which those who remain as employed Advocates are not required to do. Those who qualify as litigators thereby come under the supervision rules set out in this application and, in that way, are subject to detailed compliance provisions provided by the Code of Conduct and to the risk assessments which will be carried out by IPS. We agree with the Lord Chief Justices' observation that a failure to ensure that proceedings will be conducted properly would lead to avoidable damage to litigants and problems for the efficient and economic administration of justice. However, as is indicated above and we believe is clear from this application the necessary regulatory and disciplinary arrangements will be in place and will be implemented by IPS.

17. Lord Judge made reference to the arrangements under which ILEX has separated its regulatory and representative functions. His view was that they did not mirror those arrangements in place in respect of solicitors and barristers. It is true that they are not the same. However they are compliant with the requirements of the Legal Services Act. In some respects, it is arguable that the separation is clearer. Unlike the SRA and the BSB, IPS is constituted as a separate company and is not merely a board of the approved regulator. The separation of roles between ILEX and IPS is extremely robust. The majority of the IPS Board members are independent, which is not yet the case so far as the SRA and the BSB are concerned. It is for the Board of IPS to determine the work which IPS undertakes and its decision making is not fettered or unduly influenced by ILEX. The Board is entirely clear that its actions in enabling these applications to go forward will be tested in the light of the statutory objectives which include the protection and promotion of the public interest and the interests of consumers, as well as improving access to justice.
18. Lord Judge commented that the disciplinary jurisdiction exercised at present by the courts in respect of solicitors and barristers ought to be extended to include ILEX members. ILEX and IPS would not be averse to an extension of section 50 Solicitors Act 1974 to include other litigators, if that were deemed to be practicable and appropriate to secure the control of proceedings and practitioners by the judiciary. However section 50 applies in the context of a regulatory framework for solicitors, not more widely. Some of that framework has been taken over by the Legal Services Act. It would have been open to Parliament to make provision for the extension of section 50 in the Act. It is clear, within ILEX's application and is specifically provided for in its Code of Conduct, that ILEX members, who include litigators and probate practitioners, owe a primary duty to the courts. This is reinforced by the professional principles set out in subsection 1(3) of the Legal Services Act which provides that persons who exercise before any court a right of audience,

or conduct litigation in relation to the proceedings in any court, by virtue of being authorised persons should comply with their duty to the court and to act with independence in the interests of justice. IPS submits that those arrangements are sufficient within the framework of the Act to meet the concerns of the Lord Chief Justice on this issue.

Conclusion

19. ILEX and IPS regret that the Lord Chief Justice believes that these applications for rights could give rise to a potential negative impact on the proper administration of justice in England and Wales. We believe that the reasons why they do not are provided in the detail of the application in relation to the qualification arrangements, practise and accounting standards and disciplinary arrangements.

Baljeet Basra
Professional Standards Manager