



Legal Services Board – decision notice issued under Part 3 of Schedule 4 to the Legal Services Act 2007

ILEX Professional Standards Limited rule change application for approval of alterations to regulatory arrangements: for the Chartered Institute of Legal Executives to grant rights to conduct litigation to Chartered Legal Executives; and the rights of audience to Chartered Legal Executives who obtain rights to conduct litigation.

The Legal Services Board (LSB) has granted, in part, an application from ILEX Professional Standards Limited (IPS) who sought to make changes to its regulatory arrangements for the Chartered Institute of Legal Executives (**CILEX**) to grant rights to conduct litigation to Chartered Legal Executives; and the rights of audience to Chartered Legal Executives who obtain rights to conduct litigation.

This decision notice sets out the basis for the LSB granting the application, in part, and the decision taken, including a brief description of the changes.

Introduction

1. The LSB is required by Part 3 of Schedule 4 to the Legal Services Act 2007 (the Act) to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements. The Chartered Institute of Legal Executives (CILEx) is an approved regulator and IPS is the regulatory arm to which CILEx has delegated its regulatory functions.
2. Paragraph 25 of Schedule 4 to the Act explains that the LSB may only refuse an application setting out a proposed change to the regulatory arrangements if it is satisfied that by granting the application one or more of the criteria specified in sub paragraph 25(3) (and listed in the footnote below¹) will be met. For example, the LSB's granting of the application to alter the regulatory arrangements must not be prejudicial to the regulatory objectives overall. Accordingly, if the LSB is not satisfied that one or more of the criteria for refusal are met, then it must approve the application in whole, or the parts of it that can be approved.

¹ 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.

3. As provided for by paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the LSB has made rules² about how the application to alter the regulatory arrangements must be made including the contents of that application. The rules highlight the applicant's obligations under section 28 of the Act to have regard to the Better Regulation Principles. The rules also require that the applicant provides information about the nature and effect of each proposed change and of appropriate consultation undertaken. Sub paragraph 25(3)(f) of Schedule 4 to the Act requires that each proposed alteration has been made or is likely to be made in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration. This therefore includes the LSB's rules.
4. The chronology for the LSB's handling of this application can be found towards the end of this decision notice.

Background

5. CILEx became an approved regulator for the reserved legal activity of the conduct of litigation in May 2011. At that time, the regulatory arrangements approved by the LSB restricted the scope so that the right to conduct litigation could only be granted to Associate Prosecutors of the Crown Prosecution Service. The litigation rights scheme which is the subject of this application and decision notice has been set out in new scheme rules and not as amendments to the Associate Prosecutor Scheme Rules. There are no changes to the Associate Prosecutor Scheme Rules which will sit alongside the rules approved in this notice.
6. The application seeks approval for the implantation of the Rights to Conduct Litigation and Rights of Audience Certification Rules which set out the qualification requirements for an individual seeking authorisation to conduct these reserved legal activities.
7. The application also seeks approval for the following set of arrangements which allow IPS to authorise entities. These regulatory arrangements are identical to those in the application seeking a recommendation from the LSB to the Lord Chancellor for designation as an approved regulator for probate activities and reserved instrument activities that was submitted at the same time:
 - Admission and Licensing Committee Rules;
 - Authorisation Rules;
 - Strategic Risk Committee Rules;
 - CILEx Code of Conduct;
 - Accounts Rules;
 - First Tier Complaints Handling Requirements;
 - Investigation, Disciplinary and Appeal Rules;
 - Professional Indemnity Insurance Rules;
 - IPS Minimum Wording; and
 - Compensation Fund Rules.

² Rules for Rule Change Applications – Version 2 (November 2010)

Proposed changes

8. The principal changes in relation to this application are:
 - extending the range of members to which CILEx can award rights to conduct litigation to now include Chartered Legal Executives;
 - extending the award of the right to conduct litigation from criminal proceedings to now include civil and family proceedings.
 - that a person able to carry on the conduct of litigation will become a Chartered Legal Executive Litigator.
9. The changes will also mean that Chartered Legal Executives, Litigators and Advocates will be able to conduct litigation and exercise rights of audience in legal practices, also known as entities, regulated by IPS or another approved regulator. IPS has developed regulatory arrangements for the authorisation and supervision of the entities it seeks to regulate. The effect is that CILEx will be able to authorise practitioners carrying on reserved legal activities to set up an independent practice and allow IPS to authorise and regulate entities.

The assessment process – issuing a warning notice

10. The Act requires that, if the LSB is considering whether to refuse an application, it issues a warning notice to the applicant. Paragraph 22 of Schedule 4 to the Act, allows the LSB to seek formal advice from such persons it considers appropriate to give the Board advice regarding whether the application should be granted. In the case of this application, if granted it would result in a significant widening of the regulatory scope of CILEx. Accordingly, the LSB decided to seek the advice of the Lord Chief Justice to help in its assessment of the application.
11. The Board also wanted to be satisfied that CILEx had sufficient competency, capacity and resources to undertake regulation in relation to the additional litigation rights sought.
12. The warning notice was issued on 18 April 2013 after which the LSB asked the Lord Chief Justice for advice, which was received on 22 July 2013. Written representations were made by IPS, in response, on 13 August 2013.

Specific issues

13. The key points raised from the assessment and warning notice process are set out below.

Parity of standards

14. The Lord Chief Justice raised as an issue the extent to which the standards IPS requires of its regulated community compared to those of the Solicitors Regulation Authority and the Bar Standards Board. In response, IPS confirmed that it believes it is setting proportionate standards appropriate for the rights it seeks to award. For example, the

knowledge components of the required competencies are set at honours degree standard which is the same standard as a law degree and as the professional training provided to solicitors and barristers. The standards will also build upon the experience gained in litigation (when acting under the supervision of an authorised person) which CILEX Fellows will have before IPS permits them to enter the litigation and advocacy rights qualification process. In addition, before being authorised, IPS litigators will need to demonstrate direct experience in their area of practice. They must also undertake continuing professional development in their specific area (or areas) of practice as well as professionalism training each year. The LSB's assessment is that there is no evidence which raises concern about a lack of parity in standards between IPS and other approved regulators which authorise and regulate litigators.

The courts

15. Two issues were raised by the Lord Chief Justice in respect of IPS litigators and the courts. The first was that as CILEX Fellows were not officers of the court, they would not be subject to the same disciplinary regime that the court applies to solicitors. The second matter was in respect of CILEX litigators' duty under the IPS Code of Conduct not to mislead the court. The draft Code of Conduct within the application referred to 'knowingly' misleading the court; the Lord Chief Justice's view was that it should also include 'recklessly' misleading the court.
16. With regard to the first issue, IPS sought legal advice, which stated that the disciplinary remit over lawyers is now, in practice, exercised by all regulators and that there is therefore no regulatory gap in discipline that is not addressed by current legislation and by the professional obligations imposed on the IPS regulated community.
17. With regard to the second issue of misleading the court, in light of the concerns raised by the Lord Chief Justice, IPS agreed to revise its Code of Conduct to state that a regulated person "must not knowingly or recklessly allow the court to be misled".

Self compiled portfolio

18. A further concern raised by the Lord Chief Justice was allowing knowledge to be assessed by a self-compiled portfolio. IPS has provided reassurance that objectivity of the assessment will be assured by thorough independent assessment of portfolios. Furthermore, IPS will seek independent references to obtain triangulating information about the applicant's knowledge, skills and experience. The LSB is content with this multi-faceted method of verifying and checking portfolios.

Absence of an equivalent to the 'Cab Rank Rule'

19. The Lord Chief Justice noted the absence of a clearly expressed 'Cab Rank Rule', and did not consider that the general obligation to treat everyone fairly and without prejudice in CILEX's Code of Conduct obligated the provision irrespective of the nature of the case or desirability of the client. The LSB considers that the principle, as articulated in the CILEX Code, is sufficient to ensure that the regulated community know that they must treat clients fairly. It does not consider a specific necessity for a Cab Rank Rule in CILEX's Code of Conduct.

Regulatory capability and capacity

20. The LSB is satisfied from its assessment that IPS has the necessary capability and capacity to enable it to properly commence entity regulation and regulation of Fellows for the conduct of litigation. As set out in the LSB's Decision Notice³ of 9 December 2013 in relation to the CILEx designation application, IPS has managed a phased recruitment which has enabled it to bring in people with relevant experience, thus mitigating the risks associated with carrying out a new and expanded scope of reserved legal activities. This includes its ability to undertake supervision and compliance through its risk based approach.

LSB Decision

21. The LSB has considered IPS' application against the criteria in paragraph 25(3) of Schedule 4 to the Act and is satisfied that there is no reason to refuse the application in respect of the following specific regulatory arrangements:

- The Conduct of Litigation and Rights of Audience Certification Rules
- Authorisation Rules with the exception of rule 2(4) which is only approved in part
- Admissions and Licensing Committee Rules
- The Strategic Risk Committee Rules
- CILEx revised Code of Conduct
- Accounts Rules
- First Tier Complaints Handling Requirements
- Investigation, Disciplinary and Appeal Rules
- Professional Indemnity Insurance Rules
- The IPS Minimum Wording

22. Accordingly, the LSB grants the application in so far as it applies to those arrangements.

What the LSB is not approving

23. It should be noted that the LSB is not in a position at this stage to assess and reach a decision in relation to the following rules:

- Rule 2(4) of the Authorisation Rules in so far as it relates to the Compensation Fund Rules; and
- the Compensation Fund Rules.

24. This is on the basis that an order is required under section 69 of the Act to modify the powers of CILEx in order to allow it to make rules relating to the starting up and maintaining of a compensation fund. If the necessary order is made, the LSB will then be able to consider the remaining components of this application. In the LSB's view, if

³ The Decision Notice was published on the LSB website and can be found via the following link:
http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/IPSDecisionNotice.pdf

the applicant makes the alterations anticipated with respect to the Compensation Rules, we would envisage these being considered for exemption from approval.

25. Annex 1 to this decision notice contains a link to the rules the LSB has approved in this notice.

Chronology

- The LSB confirmed receipt of an application from IPS on 25 March 2013.
- On 5 June 2013, the LSB extended the initial decision period to 11 August 2013.
- The LSB issued a Warning Notice on 18 April 2013; this extended the decision period to 17 April 2014.
- Advice was requested from the Lord Chief Justice on 11 June 2013.
- The Lord Chief Justice sent his advice to the LSB on 26 July 2013.
- The advice received was sent to IPS on 31 July 2013. IPS provided its written representation on 13 August 2013.
- This decision is effective from and is being issued to IPS on 19 December 2013.
- This decision notice will be published on our website on 20 December 2013.

Chris Kenny, Chief Executive
Acting under delegated authority granted by the Board of the Legal Services Board
19 December 2013

Annex 1

The regulatory arrangements approved have been published as a separate document on the LSB website alongside this notice at

http://www.legalservicesboard.org.uk/what_we_do/regulation/applications.htm#2013