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Southampton Row
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27 September 2010

Dear Emily

Application to become an Approved Regulator to award rights of audience and rights to conduct litigation to Associate Prosecutor members of ILEX

Thank you for your letter of 4 August inviting the Panel to provide advice on the above application. Under the Legal Services Act, the Panel is a mandatory consultee on applications from bodies to become approved regulators. In deciding what advice to give, the Panel must, in particular, have regard to the likely impact on consumers of the Lord Chancellor making an order for designation as set out in the application.

As this is the first occasion on which the Panel has been requested to provide advice, it may be useful to set out our approach in responding. Making an assessment of likely consumer impact does not lend itself to a precise formula. The Panel applies well established consumer principles – such as access, choice and redress – as reference points by which to analyse the issues. In addition, we identify the risks to consumers and the type and degree of possible harm, and then make a judgement as to whether the proposed arrangements are likely to promote access and offer sufficient protection. Finally, the regulatory objectives in the Legal Services Act underpin our assessment.

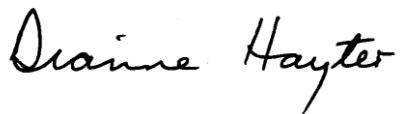
As part of the process, the Panel may request further information from the applicant or any other person. In this case, we sought clarification from the applicant by telephone on 6 August in relation to: the relationship between its regulatory arrangements and the Quality Assurance for Advocates initiative; and complaints about Associate Prosecutors. We asked the Legal Ombudsman about whether consumers could use its service to make complaints¹.

¹ See its response, attached

The Panel's comments on the ILEX application are attached. Overall, we support the application, which should ensure that a wider pool of competent advocates is available to the Crown Prosecution Service and add to the diversity of the profession which itself increases consumers' access to appropriate legal services. The Panel nevertheless has some concerns about elements of the proposals, in particular the need to ensure that complainants can access the Legal Ombudsman.

Please contact Steve Brooker, Consumer Panel Manager, for enquiries in relation to this submission.

Yours sincerely,

A handwritten signature in black ink that reads "Dianne Hayter". The signature is written in a cursive, flowing style.

Dr Dianne Hayter
Chair

Encl.

Detailed comments

Overall impact on consumers

The application should give the Crown Prosecution Service (CPS) access to a wider pool of competent advocates, enabling all advocates to be deployed appropriately across the courts network. Further, ILEX provides an opportunity for people to become lawyers through non-traditional routes, so the application should add to the diversity of the profession. This in itself is of benefit to consumers who will experience a wider range of providers.

The key risk to consumers is that the regulatory arrangements allow in, or fail to deal with, poor quality advocates. However, the Panel was reassured by the support of the Solicitors Regulation Authority for the selection process and qualification framework. The Panel is also satisfied with arrangements for monitoring ongoing competence. Importantly this includes at least one advocacy assessment each year of all advocates measured against the CPS National Standards of Advocacy. This practical assessment supplements ongoing supervision by a Crown Prosecutor and five hours of compulsory advocacy skills training as part of the annual CPD requirement.

The Panel has concerns about certain elements of the proposals relating to: the relationship between the proposed regulatory arrangements and the Quality Assurance for Advocates (QAA) initiative²; complaints about Associate Prosecutors; and the apparent absence of client care skills within the training programme.

Specific concerns

Relationship between the proposed regulatory arrangements and QAA

There are parallels between the proposals to assure the quality of ILEX Associate Prosecutors employed by the CPS and the QAA initiative. The latter will initially cover advocates (including legal executive advocates) acting for defendants in criminal matters, but is likely to be extended to other areas.

Regulatory overlap should be avoided otherwise confusion, inconsistent levels of protection and unnecessary cost could result. Successful delivery of QAA is not guaranteed, and is not due to come into operation until July 2011 (whereas the ILEX scheme will operate from May 2011). This makes it necessary for ILEX to put interim arrangements in place. However, it

² See

http://www.barstandardsboard.org.uk/assets/documents/QAA_Consultation_Paper%20final%20version%2010-08-10.pdf

would be desirable to see a public commitment to transition to QAA within the shortest possible timeframe.

The Panel welcomes the statement that ILEX Professional Standards acknowledges that eventual standards will need to be consistent.³ Ideally, the proposed regulatory arrangement should be fully integrated within QAA.

Complaints

The proposed arrangement is for the CPS to consider all complaints about ILEX Associate Prosecutors internally and, if necessary, refer disciplinary action to ILEX.

This appears to confuse complaints-handling with disciplinary issues and is inconsistent with the spirit of the Legal Services Act, which gives consumers the right to complain to the Legal Ombudsman about any approved person following failure to resolve the dispute at the first-tier. In a telephone conversation on 6 August, the applicant suggested that the CPS is technically the client and so any 'complaint' would be the subject of an internal investigation. The Legal Ombudsman similarly stated: "such a complaint about a prosecutor does not, we believe, fall within the terms of the Act because it is not from a client of the lawyer concerned".⁴

This position is wholly unsatisfactory because an Associate Prosecutor may come into contact with the public, especially when dealing with victims and witnesses, which may give rise to a complaint which should be dealt with by an independent and impartial body with the power to award redress. As Associate Prosecutor members of ILEX are employees of the CPS, the CPS should be the first-tier complaints handling body. However, should consumers not be satisfied with outcome, they should be able to complain to the Legal Ombudsman. The parties should explore how independent resolution of such complaints can be achieved within the Act, perhaps using the voluntary jurisdiction provisions within the legislation.

On a separate issue, the Panel welcomes the proposed rules which incorporate lay involvement in all stages of decision making and adjudication and in particular that all decisions about complaints will be taken by bodies with a majority of lay members.

Training – client care skills

The competencies assessed at both levels 1 and 2 include Communication and Negotiation. The training appears to relate to the conduct of proceedings, but Associate Prosecutors should also demonstrate competence in softer 'client care' skills, which will be necessary when dealing with victims, witnesses and the wider community. This is especially important in a courtroom environment, which lay people can find intimidating, and whose distress may be more acutely felt due to the circumstances of the case.

³ Annex 20 of the application (consultation responses and analysis)

⁴ See its response, attached

Annex – Correspondence with Legal Ombudsman

From: Alison Robinson [mailto:Alison.Robinson@Legalombudsman.org.uk]
Sent: 13 September 2010 09:29
To: Steve Brooker
Cc: Gary Garland
Subject: RE: Complaints about Associate Prosecutor members of ILEX

Steve

Our Ombudsmen and our general counsel looked at this. Our view is that such a complaint about a prosecutor does not, we believe, fall within the terms of the Act because it is not from a client of the lawyer concerned.

Please give me a call if you would like to talk this through.

Regards
Alison

From: Steve Brooker
[mailto:steve.brooker@legalservicesconsumerpanel.org.uk]
Sent: 11 August 2010 09:32
To: Alison Robinson
Subject: Complaints about Associate Prosecutor members of ILEX

Dear Alison

I'd be grateful if you could pass this enquiry to the relevant member of staff, noting the response may form part of the Panel's published advice on the issue below.

Under the Legal Services Act, the Panel is a mandatory consultee on applications from bodies to become approved regulators. In deciding what advice to give, the Panel must, in particular, have regard to the likely impact on consumers. The Panel has received a request for advice on an application by ILEX to become an Approved Regulator to award rights of audience and rights to conduct litigation to Associate Prosecutor members of ILEX. A copy of the application can be found on the LSB's website

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

Associate Prosecutor members of ILEX are employees of the Crown Prosecution Service (CPS). The proposed regulatory arrangement is that the CPS will consider all complaints about ILEX Associate Prosecutors internally and, if necessary, refer disciplinary action to ILEX. This arrangement may be inconsistent with provisions in the Legal Services Act, which give consumers the option of complaining to the Legal Ombudsman about any approved person following attempts to resolve the dispute at the first-tier. In a telephone conversation on 6 August, the applicant

suggested that the CPS is technically the client and so any 'complaint' would be the matter of an internal investigation. However, an Associate Prosecutor may come into contact with the public, for example when dealing with victims and witnesses, which may give rise to a complaint. In our view, such complaints should be dealt with by an independent and impartial body with redress awarded as appropriate, although such complaints as those described above may count as third party complaints and, therefore, be ineligible under the Legal Ombudsman's scheme rules.

Please could you confirm whether, in your view, the Legal Ombudsman could receive complaints about Associate Prosecutor members of ILEX.

The Panel must provide advice to the LSB by 4 October, but I would welcome your response as soon as possible.

Best wishes
Steve