

ANNEX 20 ASSOCIATE PROSECUTOR RIGHTS CONSULTATION RESPONSES AND ANALYSIS

ANALYSIS OF RESPONSES TO CONSULTATION ON PROPOSAL TO SEEK RIGHTS OF AUDIENCE AND RIGHTS TO CONDUCT LITIGATION FOR ASSOCIATE PROSECUTOR MEMBERS OF ILEX

Introduction

ILEX Professional Standards Ltd (IPS) issued a consultation on its proposal to seek Rights of Audience and Rights to Conduct Litigation for those members registered with ILEX in the Associate Prosecutor grade. Associate Prosecutor members of ILEX are employees of the Crown Prosecution Service (CPS) employed as Associate Prosecutors.

The consultation was issued on 17 February 2010 and the consultation period closed on 6 April 2010. However, where consultees asked for an extension it was granted to them.

The consultation paper was posted on the ILEX Professional Standards Ltd web site and a notice was placed in the Legal Executive Journal, which is sent to all members of ILEX, advising them of the consultation.

The consultation form was also posted directly to interested stakeholders. These included approved regulators and their associated regulatory bodies, consumer interest groups, voluntary membership groups and the Office of the Legal Services Ombudsman.

Responses

Responses were received from two regulatory bodies, 5 representative bodies and 2 independent bodies. Each of the responses has been analysed individually below.

The application had previously been submitted to the Ministry of Justice (MOJ). The MOJ staff analysed the application. Their feedback was picked up by other respondents and has therefore not been addressed separately.

A list of the consultees and respondents appear at the end of this document.

Analysis of Consultation Responses

1. Solicitors Regulation Authority (SRA)

The SRA responded to each question in turn. This analysis focuses on responses where it made a substantive comment. On the whole the SRA did not have any comments of

the nature of the rights being sought but were concerned that any new rights be introduced in a way that supported the delivery of high quality legal services to consumers. The SRA took the view that the CPS selection process for Associate Prosecutors was sensible and agreed that it should require candidates to demonstrate knowledge of competence in both the theory and the practical application of Associate Prosecutor (AP) duties.

The SRA agreed it was appropriate for the trial preparation course to be delivered and completed by face to face provision and that the assessment criteria were broad enough to assess competence in core aspects of trial preparation work. On the whole it took the view that ILEX was right to structure the Level 1 qualification in a way that focussed upon ensuring each individual had the requisite knowledge of the standard and quality of service they must provide and was equipped with the capability to achieve that standard through their advocacy work.

The SRA took the view that the mentoring scheme provided a useful resource for Level 2 APs. It commented that it will be important to have full buy in and commitment from the mentors being shadowed. IPS agrees that the CPS will need to ensure that mentors agree to providing appropriate mentoring to Level 2 APs. The CPS has trialled the Level 2 qualification course, which already requires the buy in of mentors. There have been no reported incidents of lack of co-operation by mentors.

The SRA had no other comments on the qualification course or assessment criteria. It noted the commitment of External Advisors appointed by IPS to inspect and moderate course provision and course material. The SRA took the approach that this was a sensible proposition.

The SRA agreed with the proposal that APs undertake 16 hours CPD and commented that this was consistent with the practice for legal professionals working in other jurisdictions. It commented that IPS could include a requirement that APs may be additionally required to attend other specific courses. IPS is aware of the issue and a disciplinary panel does have the power to direct that an AP undertake specific training. This mirrors the approach in respect of other members of ILEX. The CPS agreed that IPS should recommence courses to address conduct issues.

The SRA agreed with the proposals whereby the CPS would refer conduct matters to IPS as appropriate.

2. Bar Standards Board (BSB)

The BSB was supportive of IPS in seeking to put in place requirements for the qualification and competence of APs. It stated that care should be taken to ensure that IPS assures itself that the standards are met at all levels and that the qualification and roles are appropriately calibrated with existing qualifications and roles. IPS recognises

the importance of undertaking monitoring and inspection to ensure that standards are being met. In developing its qualification scheme IPS considered what skills an AP would require to undertake their functions.

The BSB was broadly supportive of the proposal that IPS would investigate the conduct of Associate Prosecutors and that the CPS would refer conduct matters to IPS.

The BSB commented that the standards set by IPS for APs would eventually need to be consistent with Advocacy standards being developed as part of the Quality Assurance of Advocates scheme. IPS is participating in the development work on that scheme and is aware that eventual standards will need to be consistent.

3. Legal Services Ombudsman (LSO)

The LSO had no specific comments to make other than to say that the consultation was a comprehensive document.

4. HMCPSI

HMCPSI made a general response which was informed by their recent experience of inspecting the CPS. In particular it had carried out a comprehensive review of the quality of CPS Advocacy and case presentation between 2008 and 2009. On the whole it found that its review confirmed many of the findings of the earlier area effectiveness and overall performance assessment reports.

HMCPSI raised its concern about disclosure decisions. It noted that the CPS' handling of unused material remained an aspect of concern which continued to raise issues of performance. It recommended that it should be specifically addressed by training, mentoring and quality assurance of decisions. The CPS and IPS are aware of the concern and the trial preparation course which will be completed by an AP1 covers the ability to identify unused material, state the test for disclosure and deal with ongoing disclosure issues. IPS takes the view that disclosure is appropriately covered within the course. Furthermore it is one of the criteria upon which candidates will be tested during the assessment of the trial preparation course.

IPS recognises the comment made by HMCPSI that a right of audience is being sought to enable AP2 to prosecute all proceedings involving adult and youth offenders except trials in either way offences. The position at present is that the rights of APs to prosecute trials is restricted through statute to summary-only non-imprisonable offences (section 7A of the Prosecution of Offences Act 1985). IPS has developed suitable course outcomes and assessment criteria to ensure that APs will be competent to undertake advocacy falling within their remit.

HMCPST commented that during their review of advocacy and case presentation the inspectors found the quality of presentation by APs to be generally good in the context of the work they undertake. It found that nearly 70% were assessed as fully competent or above which compared favourably against assessments of Crown Prosecutors and CPS Agents. It also added that APs were held in high regard within the CPS and by external stakeholders. It added that the results emphasised the importance of ensuring that only candidates with the right qualities were selected. HMCPST issued a word of caution that care must be taken to ensure that the scheme does not result in APs being deployed in cases beyond their competence. IPS recognises the importance of ensuring APs only work within their competence. It is a requirement of the ILEX Code of Conduct that a member declines to act in a case which is beyond their competence.

HMCPST commented that there was praise for the original foundation course undertaken by APs. It commented that it was highly regarded by candidates, trainers and externals. However, HMCPST found that APs were less complementary about the training for extended powers granted in July 2008. The CPS has now incorporated the July 2008 extended powers training into the AP foundation course placing greater emphasis on practical exercises. IPS recognised the importance of ensuring that training was suitable to ensure that candidates are competent to undertake advocacy. It has significantly developed the course outcomes to ensure that they will provide suitable competency for APs.

HMCPST commented that the quality assurance arrangements needed to be strengthened for newly designated APs. The CPS recognises the issue and has implemented quality assurance arrangements for all advocates presenting cases on its behalf through the Advocacy Quality Management Scheme and through CPS Core Quality Standards monitoring.

HMCPST also commented on the importance of ensuring that APs have easy access to CPS lawyers when they are in court and that they should not be pressurised into acting outside the scope of their responsibilities. IPS recognises the issues and will stress to APs that they must only act within their competence and within the scope of the rights afforded to them.

5. Bar Council

The Bar Council provided responses to each of the questions. They have been analysed below.

- **Q1** – The Bar Council commented that the rights would be exercised by people with no legal qualification or minimum academic, professional or vocational qualification or training. ILEX responds that the training proposed for APs in the ILEX Application will be sufficient to demonstrate competence. An AP should not

be required to have a minimum academic requirement if they are able to demonstrate competence to undertake the work through other means.

- The Bar Council commented that defendants were entitled to have their cases prosecuted by properly qualified prosecutors. ILEX recognises the issue and has ensured that its proposed qualification scheme will provide sufficient training and develop sufficient knowledge to enable APs to undertake the work that falls within their remit.
- The Bar Council also commented upon the status of APs and the salary to be paid to them. ILEX submits that status and salary should not be an issue provided that the rights are exercised by suitably trained and competent people.
- **Q2** – The Bar Council commented that there was no indication about how long an AP needed to prosecute at Level 1 before moving to Level 2 and how they would be monitored on the job. ILEX submits that the length of time served at AP1 grade is not a suitable criteria to determine whether a person should be moved on to the AP2 grade. Admission as an AP2 should be based upon competence and experience which will be assessed through the selection criteria and training and assessment scheme. The monitoring of AP1 performance will be carried out by the CPS through its usual appraisal and monitoring processes which include reviews through HMCPsI Area and thematic inspections, the introduction of the CPS Advocacy Quality Monitoring Scheme and CPS Core Quality Standards monitoring.
- **Q3** – The Bar Council commented that it was unclear about the comment that APs will be suitably qualified because there was no formal academic training or legal qualification that was required of them. ILEX responds that suitably qualified means qualified in accordance with the criteria for selection and assessment of APs in accordance with the proposal set out in its application. Most of the proposed training courses conclude with an assessment which provides an assurance that an AP is suitably qualified to exercise the rights that will be granted to them.
- The Bar Council commented that the legal knowledge of candidates will not be separately assessed and therefore it was difficult to compare entry onto the AP1 course with other associated study and training. ILEX responds that other training courses, for example, law degrees, do not assess knowledge of law prior to commencement of the qualification process. Similarly APs' legal knowledge, although not formally assessed, will be developed after the selection process rather than being a prerequisite to selection. However, it should be noted that some knowledge will be shown by applicants as part of the case study presentation they are required to undertake during the selection process.

- **Q4** – The Bar Council commented that the selection criteria did not address the decisions APs would make as to charge, evidence and discontinuance. ILEX responds that the training courses themselves will develop candidates ability to understand evidence and legal issues rather than this being a pre requisite to selection.
- The Bar Council compared the proposals for APs against ILEX's proposed application for litigation and advocacy rights for ILEX members. Under the ILEX members qualification scheme an applicant is required to have studied relevant ILEX subjects. However, it should be noted that as an applicant has shown knowledge as a pre-requisite on the ILEX litigation scheme they are not required to study those elements as part of the qualification scheme. Under the proposal for APs, as APs are not required to show legal knowledge as a pre requisite, they will study relevant aspects during the qualification scheme.
- **Q5** – The Bar Council commented that candidates will be unable to meet some of the entry criteria such as making decisions independently, having a demonstrable knowledge of criminal law and its application and skills in identifying evidential issues and omissions in drafting and communicating. It should be noted that these are skills that an AP would have developed while undertaking a caseworker role at the CPS. Where an applicant is unable to demonstrate these skills they will not be selected for AP training.
- **Q6** – The Bar Council commented that APs will be observing cases prior to commencement of the qualification course and they were concerned that they observed the correct approach. ILEX responds that the observation process is intended to provide a context for the AP training. APs will learn the correct procedure during their qualification courses and will be able to identify through that approach if a person were not following the correct procedure.
- **Q7** – The Bar Council commented that the consultation provided the course objectives for the foundation course but did not provide the course material. Under the proposals ILEX would receive course materials from the CPS as part of the accreditation process. It will rigorously assess the course materials to ensure that they will be sufficient to meet the course outcomes. This is the same approach as ILEX follows in respect of existing rights of audience qualification. The thoroughness of the accreditation process has ensured that candidates receive appropriate course material and suitable training. Feedback from candidates on those courses has been very positive in that respect.
- The Bar Council also commented that the foundation course covered important topics upon which candidates were not tested. ILEX submits that the foundation course does include an informal test which is used by the CPS to identify areas of

development. Furthermore, knowledge that candidates will gain from the foundation course will be formally tested in the context of the practical skills.

- **Q8** – The Bar Council commented that the contents of the trial preparation course were reasonable.
- **Q9** – The Bar Council commented that the trial preparation assessment framework did not provide an outline of the standards to be expected or comparison against the LPC or BVC. ILEX responds it has defined standards in the assessment material, however, the statements have now been developed further. ILEX adds that the assessment criteria are developed to ensure that a candidate is competent to undertake the specific activities that they will be authorised to undertake alone. The LPC and BVC are aimed at providing wider training to enable a solicitor or barrister to undertake a range of work. Therefore given the limited rights awarded to APs it is not possible to develop similar comparators.
- The Bar Council commented that it was unclear whether or not candidate assessments would be undertaken by an independent assessor. The advocacy assessments will be undertaken by an independent assessment organisation and the other assessments will be undertaken by the CPS. In both instances ILEX will monitor standards of assessments through its inspection visits and by moderation meetings taking place with external advisors.
- **Q10** – The Bar Council found that the contents of the advocacy skills course were reasonable.
- **Q11** – The Bar Council commented that while the course objectives and assessment framework for advocacy skills courses were laudable there was no information as to who would conduct the assessment, whether there will be ongoing monitoring of candidates following course completion or how the standards compared with trainee solicitors and pupil barristers. In response to these queries the assessment will be carried out by an independent assessment organisation or by the CPS and ILEX will monitor standards of assessment through its inspection visits and moderation meetings. The CPS will monitor candidates following completion of the courses through its usual appraisal and supervision processes. The CPS has introduced an Advocacy Quality Management Strategy that assesses the quality of advocates in court and a Core Quality Standard monitoring scheme whereby CPS Unit Heads dip sample case files each month to consider whether the prosecutor has complied with CPS Core Quality Standards. The Unit Head will consider thirty-four standards relating to the preparation and presentation of the case. Furthermore CPS Areas are subject to inspections by HMCPSI. These arrangements far exceed the monitoring of

other advocates. As mentioned earlier the CPS training cannot be compared with LPC and BVC courses due to the different levels of qualification.

- **Q12** – The Bar Council commented that the youth course was reasonable but it did not refer to an understanding of statutory sentencing provision and issues arising where the youth appears with an adult offender. ILEX has revisited the course outcome and notes that the issues relating to a youth appearing with an adult co-defendant are covered in the course objectives for the youth court. Issues relating to sentencing and youths are covered during the foundation course. However, we have now also added them into the Youth Course.
- **Q13** – The Bar Council commented that no information was provided about the youth court assessment, in particular whether candidates would have prior notice of the exercise. Candidates will be given sufficient time to prepare the case correctly. It is likely that they will either receive the exercise for the skills assessment the night before the assessment is due to take place or on the day of the assessment. ILEX submits that this is a reasonable approach and would reflect practice whereby an AP would be given the cases before they were due to appear in court, and therefore be allowed sufficient time to prepare for cases.
- **Q14** – Overall the Bar Council commented that there was no provision within the AP1 assessment structure or content for consideration of case law and that it lacked academic rigor, independent source and legal reasoning based on case law. ILEX submits that the courses cover case law to the extent necessary for APs. Core legal training will be provided during the foundation course which then forms the basis of the subsequent skills courses and assessments. However, case law training has been specifically added to course outcomes to provide clarity in response to this point.
- The Bar Council also commented that no information was provided as to the qualification training period, contact time between mentor and trainee or structure to that contact. The total time taken to qualify as an AP1 will be in the region of 12 weeks of which 8 weeks will involve observations and contact with the mentor, with the remaining time taken by courses. The total time taken to qualify as an AP2 will be in the region of 10 weeks of which 8 weeks will involve observations and contact with the mentor. The observation grids now clarify the purpose of observations.
- **Q15** – The Bar Council raised its concern that an AP may observe another AP undertaking bail hearings. It commented that there was nothing in place to ensure that the trainee observed a suitably qualified, experienced and competent person. ILEX responds that the person being observed will have been assessed by the CPS as being qualified and competent to exercise the rights that the

trainee AP is observing. Therefore they may be the most suitable person to be observed.

- **Q16** – The Bar Council commented that the criteria for the bail course was reasonable and fair.
- **Q17** – The Bar Council commented that no information was provided as to who would carry out the assessment for the bail courses or whether candidates will have prior notice of the practical exercises. The CPS will assess the bail course. The assessments will be subject to moderation and inspection by ILEX. The candidates will have sufficient time to prepare for the assessments. They are likely to receive the assessment on the day of the assessment to reflect what would happen in practice in bail cases.
- **Q18** – The Bar Council commented that the jump between AP1 and AP2 was not reflected in the selection process. They stated that there was no minimum qualification or experience required of candidates. In particular they commented that the practical exercises did not give any indication as to a candidate's ability to understand the law or make decisions based on evidence and admissibility. ILEX submits that appropriate training of the law will be provided during the AP2 foundation course. The course outcomes have been amended to clarify that they include law, procedure and case law.
- **Q19** – The Bar Council commented that the AP2 mentor must be qualified, experienced and be a competent prosecutor. ILEX responds that a person prosecuting on behalf of the CPS will be competent and suitably experienced.
- **Q20** – The Bar Council commented that the Level 2 foundation course outcomes were laudable. However, it added that there was no assessment regime to ensure that a candidate had the core knowledge and skill relating to fundamental legal issues and principles. ILEX responds that core knowledge will be assessed in the content of the advocacy skills assessments. In particular during the opening speech candidates will be required to identify relevant legal, factual and evidential issues.
- **Q21** – The Bar Council found that the course outcomes for the advocacy skills course were fair and reasonable.
- **Q22** – In respect of the advocacy course assessment criteria the Bar Council commented that there was no information as to what was satisfactory or good compared with other assessment of academic and vocational training. ILEX responds that the assessment of good and satisfactory has been set out in the introduction to the AP2 assessment criteria. A candidate who is assessed as good will be one who significantly exceeds the standard. A candidate assessed

as satisfactory will be someone who meets the standard. The assessments statements have, however, been clarified.

- **Q23** – The Bar Council commented that the flaw with the qualification lay with the issue that APs could qualify without meeting basic academic levels. ILEX responds that although an AP is not required to have pre-existing academic qualification they will be academically trained to the level and extent required to exercise the rights of APs.
- **Q24** – The Bar Council commented that no information was provided about the external organisations who will carry out the assessment of candidates. ILEX has not provided details of external assessors by name because they will be accredited by the CPS against criteria to undertake the assessment. ILEX will receive details of the assessors as part of the application by the CPS for accreditation to run the qualification courses. At that stage ILEX will be able to determine the suitability of the assessor.
- **Q25** – The Bar Council commented that it was unclear who would assess applications for accreditation. They added that IPS was not independent given that ILEX was promoting the scheme for its members. ILEX responds that IPS, in conjunction with its Admissions and Licensing Committee and external advisors will carry out the assessment of course provision and materials produced by the CPS. IPS is the independent regulatory body for ILEX members. Furthermore the external advisors will be independent of ILEX and IPS.
- **Q26** – The Bar Council commented that the CPD requirement was appropriate but was concerned that only 8 hours CPD needed to be undertaken in criminal practice. ILEX responds that this approach is reasonable and mirrors the approach taken in respect of all ILEX members.
- **Q27** – The Bar Council took the view that it was right that APs are bound by the same standard of conduct as other prosecutors.
- **Q28** – The Bar Council commented that it was unclear whether IPS would share with the CPS any information about complaints made to it. ILEX has a Memorandum of Understanding in place with the CPS which covers the requirement that complaints information received at IPS will be shared with the CPS.
- **Q29** – The Bar Council agreed that the CPS should be obliged to refer conduct matters to ILEX.

6. Young Barristers Committee (YBC)

The YBC endorsed the response of the Bar Council. It added that prosecutors who have no formal legal qualification or training would be able to present cases. The YBC expressed its concern that they cannot guarantee the same service to the public as a legally qualified barrister or solicitor. It raised its concern that the extension of AP1 powers was another step towards de-lawyering the magistrates and youth courts. ILEX responds that the proposals in its application represent a suitable and proportionate route to qualification as an AP addressing the skills and knowledge necessary to undertake that work.

The YBC argued that the public interest needed to be considered when extending the review powers to APs. Parliament has already identified that APs can exercise review powers. Although the review powers contained in the ILEX Application are wider than APs currently exercise ILEX will ensure that APs are suitably competent to exercise those powers. The YBC commented that the AP powers were being extended to enable costs to be cut. ILEX submits that the extension is suitable and proportionate and will ensure that a suitably qualified person exercises the right.

The YBC commented that consideration had not been given to cases which are unsuitable for APs to deal with. ILEX submits that the Code of Conduct requires APs to only undertake cases that they are competent to undertake. Where an AP encounters a case which they feel is beyond their competence they will be required to stop dealing with it.

The remainder of the comments made by the YBC had been addressed in the response to the Bar Council.

7. Criminal Bar Association (CBA)

The CBA stated it did not support ILEX's proposals. It commented that the majority of the work in the magistrates and youth courts would be carried out by those without formal legal qualifications. ILEX has addressed this point in respect to the Bar Council response. It submits that suitable competence will be assured through the knowledge and skills training provided to APs.

The CBA stated that there was insufficient information regarding the training and supervision of APs. ILEX responds that the course outcomes have been set out in the Application and consultation and have been commented upon by other respondents.

The CBA added that it was concerned there will be an increased risk of miscarriages of justice and a loss of confidence in the effective and fair prosecution of cases. Without further information ILEX is unable to provide any response to this comment.

- **Q1** – The CBA makes responses previously made by the YBC and the Bar Council. ILEX responds that APs will be suitably qualified and trained to exercise the rights appropriate to their remit. Where a case is complex and an AP finds that they do not have the competence to undertake it they will be required through the ILEX Code of Conduct to decline from dealing with it.
- **Q2** – An AP1 will not be entitled to move to an AP2 grade on the basis of a number of years served at AP1 grade but upon an assessment of competence to move onto that grade where a vacancy has arisen.
- **Q3** – The selection process for APs will not involve an assessment of their knowledge of the law because that knowledge will be developed in the context of the courses that AP1s and AP2s will undertake.
- **Q4** – The CBA takes the view that the person specification criteria are fair and reasonable for AP selection processes. However, they added that it did not include the quality required to act as a lawyer and advocate making sound judgments based on a sound understanding of law and procedure. Again ILEX submits that appropriate knowledge of law and procedure will be developed through the subsequent training courses.
- **Q5** – The CBA commented that it was unclear how knowledge and experience can be shown at the AP1 selection process when a person did not have a legal qualification. The CBA submitted that the criteria were not realistic. The CPS has been assessing existing APs against the criteria, who have been able to evidence their achievement against the criteria. Therefore the criteria are realistic and have been shown to be achievable.
- **Q6** – The CBA expressed its concern that there was no requirement for the AP mentor to be a fully qualified lawyer. ILEX submits that the mentor should be the most suitable person to undertake that role. A requirement to be a fully qualified lawyer may be unsuitable, particularly in the context of the rights that an AP is required to observe.
- **Q7** – The CBA commented that the foundation course content was not provided. ILEX will assess the content of courses as part of its accreditation process. A copy of the index to the manual appears in the application.
- The CBA also commented that the knowledge gained on the foundation course will not be tested. The knowledge will however be tested in the context of the practical skills assessment which takes place during the AP1 assessments. There will also be an informal test on the foundation course which will be used to identify areas of development.

- **Q9** – The CBA found that the course objectives for the trial preparation course were reasonable. It made the same comments about the assessment framework that had been made by the Bar Council and addressed earlier.
- **Q11** – The CBA commented that the aims and objectives of the advocacy skills course were reasonable. It also made the same comments about the assessment which had been made by other respondents.
- **Q13** – The CBA found that the aims and objectives of the youth court were reasonable. It made the same comment made by other respondents as well.
- **Q14** – These comments have been made earlier.
- **Q17** – The comments about the bail course assessments had been made by earlier respondents and had been addressed previously.
- **Q18** – The CBA stated that there was no criteria as to how an AP1 became experienced to move onto the AP2 stage. ILEX submits that applicants for AP2 will be assessed against the selection criteria which set out the requirements that a person should be able to meet to move on to that stage as a vacancy arises. The CBA also commented that the presentation stage for AP2 required only a remand application and opposing a bail application. It commented that this will not provide an indication of the applicant's ability to prosecute cases properly. ILEX submits that the presentation stage is intended to be used to select candidates. The formal assessment of their ability to exercise the AP2 rights will be carried out during the course of the subsequent training and assessment, most importantly the advocacy skills course. If a candidate is assessed as not competent during the advocacy skills course assessment they will not qualify as an AP2.
- **Q19** – This comment had been made by previous respondents.
- **Q20** – This comment had been made by previous respondents.
- **Q22** – This comment had been made by previous respondents.
- **Q23** – The CBA was concerned that a person without a formal legal qualification will be able to deal with the same issues of law, evidence and procedure as those conducted in the Crown Court. ILEX submits again that an AP will be assessed as competent to undertake those activities before they are authorised to do so.
- **Q25** – This comment had been made by previous respondents.
- **Q26** – This comment had been made by previous respondents.

- **Q29** – This comment had been made by previous respondents.

8. FDA

The FDA is the union for senior managers and professionals in public service.

The FDA was opposed to the proposals.

- **Q1**- The FDA submitted that the proposals undermine the concept of quality justice by removing qualified solicitors and barristers from representing the Crown. ILEX submits that the aim is not to remove solicitors and barristers unnecessarily but to ensure that the most appropriate person exercises the rights.

The FDA submitted that the proposals undermine the value of the role of qualified employers within the CPS. However, it has not provided any further information in relation to this submission.

The FDA made the same comments about the skills not being commensurate with the academic and vocational skills of barristers, solicitors or ILEX Fellows. ILEX submits that the skills of APs will be suitably developed to enable them to exercise the rights that they are being granted.

The FDA added that the rights exceeded rights granted to Crown Prosecutors and came close to rights granted to senior Crown Prosecutors and Crown Advocates. APs have the statutory powers of Crown Prosecutors in a defined range of proceedings. AP powers do not therefore exceed the powers of a Crown Prosecutor. Internal CPS policy guidance limits the powers of a Crown Prosecutor depending on experience.

The FDA made the same comment about the de-lawyering of courts as made by other respondents.

- **Q2** – The FDA opposed some of the rights on the basis that they were presently reserved to senior Crown Prosecutors and Crown Advocates. They opposed on the basis that the new rights would be exercised by people with no minimum recognised qualification, experience or practice. ILEX submits that APs will exercise rights for which they will have been suitably trained and for which they will have been assessed as being suitably competent.
- **Q3** – The FDA raised its concern that IPS would not be scrutinising the recruiting of APs, which will be based upon completion of a form and a limited interview. IPS responds that the AP selection process is comprehensive and fully compliant with Civil Service guidelines. CPS recruitment processes are also subject to audit and

review. In addition to this IPS will have an oversight role whereby the CPS will need to satisfy IPS that the criteria for the selection of candidates is adhered to. It should be noted that the selection will also involve a role play exercise rather than just an interview as suggested by the FDA.

- **Q4** – The FDA was concerned that the CPS would be able to change the selection criteria without notifying IPS. The CPS will need to work within the ambit of the criteria included in this application. It is aware that any revisions would require consideration by IPS, who would need to seek LSB approval, if necessary.
- **Q5** – The FDA was concerned that the selection process was likely to favour someone who could perform on the day over someone who may possess relevant skills. ILEX submits that it should be noted that in addition to the selection process candidates will proceed onto the courses which will require assessment as well providing a number of opportunities to ensure the competence of candidates.
- **Q6** – The FDA was concerned that insufficient detail had been provided about the content, length, depth of study or assessment for the pre-course work. The FDA commented that similar amounts of time were required by solicitors and barristers as part of their CPD requirements. ILEX submits that this pre-course work is required to be undertaken by candidates before commencing the qualification process. They too will be required to undertake CPD subsequent to designation as an AP.
- **Q7** – The FDA took the view that a 5 day Foundation course was insufficient to equip someone to undertake criminal litigation work, where they had no prior academic or vocational training. ILEX responds that it should be noted that the Foundation course is one of many courses to be undertaken by APs as part of the qualification process. The course focuses on what is necessary to qualify and exercise the rights of an AP.
- **Q8** – The FDA submitted that as APs have no formal legal qualifications or training an internal CPS assessment may be inadequate. ILEX submits that again the internal assessment is focused upon what is necessary to exercise the rights of an AP whereas a solicitor or barrister would have been trained in a range of activity including contentious and non-contentious work, a large amount of which would be unnecessary to exercise the role of an AP.
- Course criteria and assessments – the FDA responded to questions on the course criteria and assessments that there was insufficient information provided. ILEX is concerned about the comments as the consultation paper included the course outcomes and assessments criteria. Other respondents have commented on those documents.

- **Q12** – The FDA was opposed to allowing APs to undertake uncontested youth bail applications. They compared the position to Crown Prosecutors and senior Crown Prosecutors who are required to undertake a 2 day youth specialist course and 9 hours CPD before being authorised to present uncontested youth bail applications. However, the CPS is unaware of the 2 day course or CPD requirements for Crown Prosecutors mentioned by the FDA. The CPS has a number of obligations in relation to the considerations that apply in the prosecution of youth offenders. The deployment of APs in youth courts will fully comply with those obligations and it will ensure that APs are fully trained to act competently.
- **Q18** – The same comments have been made in relation to AP2 selection as AP1 at Q5
- **Q19** – The FDA took the view that the mentoring arrangements for AP2 were less than the existing provisions for APs. ILEX disagrees with this view. The mentoring arrangements are sufficient and will be supported by training and assessment.
- **Q24** – The FDA was concerned that there was insufficient external scrutiny and undertakings from the CPS about the consistency of its training. ILEX submits that the CPS will be required to make an application to IPS for approval of its qualification course and assessment material. IPS will scrutinise the materials to ensure it meets required outcomes and there will be inspection and monitoring visits undertaken by IPS and its external advisers to ensure that standards of delivery are being met. It is submitted that this represents a suitable and proportionate mechanism to ensure that standards are being met.
- **Q26** – The FDA responded that there was nothing upon which APs would build their CPD knowledge and an alternative might be completion of portfolios for submission to an accredited mentor or completion of refresher courses. ILEX submits that the CPD courses will build upon the existing knowledge that APs will have developed. APs will identify appropriate activities with their managers. They may involve participation in formal courses, self-study, writing presentations and job shadowing.
- **Q27** – The FDA were concerned that the disciplinary sanctions of IPS were insufficient because there was no provision to strike off an AP. All members of ILEX, including APs, are subject to the Investigation, Disciplinary and Appeal Rules of IPS. Under these rules the Disciplinary Tribunal can make an Order to exclude a person from membership of ILEX. An exclusion order made against an AP would have the affect of preventing them from exercising the powers of an AP.

9. Justices Clerks Society (JCS)

The JCS submitted a letter to IPS. Although its letter was headed Advocacy and Litigation Rights for APs it commented upon ILEX's other consultations seeking litigation rights for ILEX members.

10. The Law Society

The Law Society submitted a letter in response to the consultation.

The Law Society was pleased to see that APs will be subject to external regulation. It was content with the regulatory system, including the Code of Code for APs.

The Law Society commented that the post qualification supervision arrangements include that the supervising Crown Prosecutor be available to be contacted at all times in the course of the Court session. CPS guidance to Chief Crown Prosecutors on deployment and supervision of APs states that a suitably experienced Crown Prosecutor must always be available to provide guidance and assistance while the AP is at court in case the need arises. The Crown Prosecutor should either be present at court or readily contactable by telephone.

The Law Society also raised its concerns that a person could qualify as an AP2 without any academic or legal qualification. This comment has been made by previous respondents as well. ILEX submits that the APs will be suitably trained and qualified to exercise the rights that all within their remit.

ANNEX 1

LIST OF RESPONDENTS

Solicitors Regulation Authority

Bar Standards Board

Legal Services Ombudsman

HMCPST

Bar Council

Young Barristers Committee

Criminal Bar Association

FDA

Justices Clerks Society

Law Society

LIST OF ORGANISATIONS TO WHOM CONSULTATIONS WERE SENT BUT DID NOT RESPOND

Council for Licensed Conveyancers

Association of Law Costs Draftsman

Intellectual Property Regulation Board

Chartered Institute of Patent Agents

Institute of Trade Mark Attorneys

Which?

Magistrates Association

NACAB

ILEX Professional Standards consultation: “Proposal to seek rights of audience and rights to conduct litigation for associate prosecutor members of ILEX”

Response from the Solicitors Regulation Authority

Introduction

1. The Solicitors Regulation Authority (SRA) is the independent regulatory arm of the Law Society for England and Wales. We regulate individual solicitors, certain other lawyers and non lawyers with whom they practise, solicitors’ firms and their staff.
2. We welcome the opportunity to take part in this consultation, and have set out some comments below.

SRA comments

Q1. ILEX seeks rights to conduct litigation and rights of audience for Associate Prosecutor Members. Do you have any comments on the rights sought? If so, please set them out.

3. We do not have any comments on the nature of the rights being sought for ILEX’s Associate Prosecutor members; we are however concerned that any new rights afforded to Approved Regulators are introduced in such a way that supports the delivery of high quality legal services to consumers, and in a way that continues to promote strong and effective consumer protection.

Q2. ILEX proposes that the rights will be awarded through two Certificates: Level 1 and Level 2. Do you have comments on the proposed split between the two Certificates? If so, please set them out.

4. We do not have any comments on the proposed split.

Q3. Do you have any comments on the CPS selection process? If so, please set them out.

5. The selection process, as described at pages 7 and 8 of the consultation paper, seems sensible.

Q4. Do you have any comments on the proposed competencies for the Associate Prosecutor selection process? If so, please set them out.

6. We do not have any comments on the competencies set out in Appendix 1.

Q5. Do you have any comments on the selection process for Associate Prosecutors at Level 1? If so, please set them out.

7. We agree that the Level 1 selection process should require applicants to demonstrate knowledge of competence in both the theory and the practical application of Associate Prosecutor duties.

Q6. Do you have any comments on the pre-course work required to be completed by Associate Prosecutors? If so, please set them out.

8. We do not have any specific comments on this.

Q7. Do you have any comments on the contents of the Foundation course? If so, please set them out.

9. We do not have any specific comments on the Foundation course contents or objectives.

Q8. Do you have comments on the contents of the Trial Preparation course? If so, please set them out.

10. We agree it is appropriate for the Trial Preparation course to be delivered and completed face-to-face, as this will help to demonstrate to participants the reality of legal services provision and in turn the level of competence and knowledge required on their part.

Q9. Do you have comments on the assessment criteria for the Trial Preparation course? If so, please set them out.

11. The assessment criteria seem broad enough to assess competence in the core aspects of trial preparation work.

Q10. Do you have comments on the course criteria for the Advocacy Skills course? If so, please set them out.

12. We do not have any specific comments on the Advocacy Skills course criteria.

Q11. Do you have comments on the assessment criteria for the Advocacy Skills course? If so, please set them out.

13. We do not have any specific comments on the Advocacy Skills course assessment criteria.

Q12. Do you have comments on the course criteria for the Youth course? If so, please set them out.

14. We do not have any specific comments on the course criteria.

Q13. Do you have comments on the assessment criteria for the Youth court? If so, please set them out.

15. We do not have any specific comments on the assessment criteria.

Q14. Do you have any comments on the structure or content of the Level 1 qualification? If so, please set them out.

16. We agree that ILEX / IPS are right to structure the Level 1 qualification in such a way that it focuses on ensuring each qualified individual has the requisite knowledge of the

standard and quality of service they must provide, and is equipped with the capability to achieve that standard through their advocacy work.

Q15. Do you have any comments on the observation grid for bail hearings? If so, please set them out.

17. We have no comments on the bail hearings observation grid.

Q16. Do you have any comments on the criteria for the Bail courses? If so, please set them out.

18. We have no comments on the proposed bail courses criteria.

Q17. Do you have any comments on the assessment criteria for the Bail courses? If so, please set them out.

19. We have no comments on the proposed bail courses criteria.

Q18. Do you have any comments on the selection process for Level 2 Associate Prosecutors? If so, please set them out.

20. We agree that the format of the Level 2 selection process could in essence mirror the Level 1 selection process.

Q19. Do you have any comments on the observation and mentoring arrangements for Level 2 Associate Prosecutors? If so, please set them out.

21. The mentoring scheme described in the consultation paper should be a useful resource for Level 2 applicants, although it will be important to have full buy-in and commitment from the mentors themselves to be shadowed.

Q20. Do you have any comments on the course outcomes for the Level 2 Foundation course? If so, please set them out.

22. We agree that it is right for the course outcomes described in Appendix 6 of the consultation paper to focus on requiring Associate Prosecutors to become entirely comfortable and knowledgeable about the professional standards expected of them.

Q21. Do you have any comments on the course outcomes for the Advocacy Skills course? If so, please set them out.

23. The course outcomes focus on the different stages involved in trials, and as such should require participants to demonstrate clearly their competence and capability in managing and concluding a trial on behalf of their client.

Q22. Do you have any comments on the assessment criteria for the Advocacy Skills course? If so, please set them out.

24. We have no specific comments on the assessment criteria.

Q23. Do you have any comments on the content or structure of the Level 2 qualification? If so, please set them out.

25. We have no comments on this.

Q24. Do you have any comments on the process by which IPS will accredit the CPS to deliver courses? If so, please set them out.

26. We have no specific comments on the proposed accreditation role for IPS.

Q25. Do you have any comments on the oversight and monitoring role to be undertaken by IPS to ensure standards of course delivery and assessment are maintained? If so, please set them out.

27. We note the commitment in the consultation paper for external advisors to be appointed by IPS to inspect and moderate course providers and their materials, and we agree that this is a sensible proposition.

Q26. Do you have any comments on the number of hours CPD Associate Prosecutors are required to undertake? If so, please set them out.

28. We agree that the proposed 16 CPD hours for Associate Prosecutors is consistent with practice for legal professionals working in other jurisdictions. The final version of this requirement could include a reference to the fact that IPS may additionally require individual Prosecutors to attend other specific courses as required (for example, following a moderation or complaint that had flagged up a particular training need.)

Q27. Do you have any comments on the standards of conduct that IPS expects Associate Prosecutors to observe? If so, please set them out.

29. We have no comments on the approach described on pages 17 and 18 of the consultation paper.

Q28. Do you have any comments on the arrangements by which IPS will investigate the conduct of Associate Prosecutors? If so, please set them out.

30. The approach set out in the consultation paper seems appropriate.

Q29. Do you agree that CPS should be expected to refer any conduct matters to IPS as appropriate? If not, please state why.

31. Yes. This two-way information exchange is essential to support IPS in delivering effective consumer-focused regulation, and in ensuring standards of practice remain sufficiently high within the court service and within the wider legal services framework.

BAR STANDARDS BOARD

ILEX Professional Standards – Proposal to seek rights of audience and rights to conduct litigation for associate prosecutor members of ILEX Bar Standards Board response to consultation

The Bar Standards Board (BSB) welcomes the opportunity to respond to the consultation issued by ILEX Professional Standards (IPS) regarding its proposal to seek rights of audience and rights to conduct litigation for associate prosecutor members of ILEX.

The BSB has several general comments to make.

Education and Training

The BSB is supportive of IPS seeking to put in place requirements regarding qualifications and competencies for this extension in practice for ILEX members. Care should be taken to ensure that the IPS assures itself that standards are met at all levels while undertaking this work and that all qualifications and roles should be appropriately calibrated with existing qualifications and roles.

Complaints and Discipline

The BSB is broadly supportive of the proposal that IPS will investigate the conduct of Associate Prosecutors. It strongly supports the expectation that the CPS should refer any conduct matters to the IPS and that any exclusion from membership of ILEX should result in the Associate Prosecutor losing their rights to conduct litigation or exercise rights of audience.

QAA scheme

The BSB has an interest in use of CPS Advocacy Standards and linkage to the joint work being undertaken by regulators on the QAA scheme. There is a considerable amount of work being undertaken at present on advocacy standards by the Joint Advocacy Group. Any standards set by IPS for associate prosecutor members must, in the BSB's view, be consistent with the final advocacy standards being developed across all regulators.

Bar Standards Board
1 April 2010



**PROPOSAL TO SEEK RIGHTS OF AUDIENCE AND
RIGHTS TO CONDUCT LITIGATION FOR
ASSOCIATE PROSECUTOR MEMBERS OF ILEX**

CONSULTATION RESPONSE FORM

ABOUT YOU

Please provide the following information about you. Where you are responding on behalf of an organisation please provide a contact name and telephone number.

Your name: Stephen Wooler

Name of organisation: HMcpsi

Address: 26-28 Old Queen Street, London

Post code: SW1H 9HP

Telephone no: 020 7210

Email: Stephen.Wooler@hmcpsi.gsi.gov.uk

If you are responding on behalf of an organisation outline the type of organisation for which you provide a response (eg representative body, regulatory body etc)

Inspectorate

Do you consent to IPS publishing your response
.....**Yes / No**

Thank you for forwarding details of the consultation in respect of your proposal to become a regulator for rights of audience and litigation rights for CPS associate prosecutors.

As you will appreciate, our role as the Inspectorate of the CPS is to report upon its performance in a number of respects. These include presentation of cases in courts and deployment of advocates including associate prosecutors. HMcpSI has not been directly involved in development of the policy to introduce associate prosecutors within the CPS or in developing their rights of audience or to conduct litigation. As such our response is in more general terms and is informed by our recent experience of inspecting the CPS. The proposals very much reflect the existing situation with regard to training and we are mindful that the CPS itself will retain primary responsibility for the selection and training of future APs.

We have commented in full area inspection reports, overall performance assessments and in the recent London Borough assessments about the quality of advocacy including case presentation by APs and their deployment in court including support arrangements. Towards the end of 2008 and the beginning of 2009, HMcpSI carried out a comprehensive review of the quality of CPS advocacy and case presentation. The report was published in July 2009.

The methodology included observation in courts in each of eight CPS areas selected according to various criteria which included size of caseload and relative numbers of the different advocates. The review confirmed many of the findings of earlier area effectiveness and overall performance assessment reports.

Because our comments are in general terms, we set them out here rather than in response to individual questions, although part of our response is in direct reference to question 1, as indicated.

Extension of litigation rights - Q 1

The principal considerations must be the skill and ability of individual APs to undertake the level of advocacy and litigation in question. This is dependent to a large extent on the efficacy and robustness of the selection, application and training process- something which applies equally to solicitors and barristers. In respect of the specific litigation rights, these are generally part of the normal preparation and review functions inherent in casework and will develop in individuals as they gain greater advocacy experience.

A particular area of risk is in respect of disclosure decisions. These are usually taken by lawyers but the law requires that they be kept under review including by the trial advocate. Although there have been recent improvements overall in the CPS handling of unused material, it remains an aspect of casework which continues to raise issues of performance. It needs to be specifically addressed by training, mentoring and quality assurance of decisions generally and it will be important that associate prosecutors have the necessary

understanding and skills to recognise when a change of circumstances in the course of a trial requires additional disclosure.

The consultation document, at paragraph 20, indicates that advocacy rights under a level 2 certificate include prosecuting “all proceedings against all adult and youth offenders, including bail applications and applications in relation to bail, where the CPS is the prosecuting authority **except trials in either-way offences**”. This appears to conflict with a statement made by Mike Kennedy, CPS Chief Operating Officer, in a letter sent in response to an article in the Law Society’s Gazette that “APs do not have the statutory power to prosecute trials in **imprisonable offences** and the CPS has no plans to seek such powers from Parliament”. Restricting advocacy rights to the former category of cases does not exclude completely the latter. We think there is a need for clarity.

Quality of case presentation

During the thematic review of advocacy and case presentation, inspectors found the quality of presentation by APs to be generally good in the context of the work then undertaken. Our review pre-dates the most recent extension of AP rights. Nearly 70% of those observed were assessed as fully competent and above. This compared favourably with assessments of Crown Prosecutors and CPS agents (usually junior barristers) in the same exercise. APs are held in high regard within CPS itself and external stakeholders are very positive in their assessments regarding them as generally competent to excellent.

These results are encouraging but emphasise the importance of the selection criteria and application process in ensuring that only those candidates with the right qualities are proposed. There may be sound business reasons for deploying APs within the extended rights they can now enjoy but care must be taken that it does not result in individuals being pressured into putting themselves forward to handle cases beyond their experience. That was a significant issue in relation to the development of crown advocacy.

Deployment of APs

There remain some wide variations in areas from 11% deployment of APs in court to 35.7%. There are also variations in AP court loads from 20 cases to between 40-50 (usually London courts). Nevertheless, the CPS has worked well so far with the local courts to facilitate deployment of APs so that their usage is maximised. This will be a crucial factor in the success of the usage of the extended rights although the Summary Trials Pathfinder Project report has been positive on this aspect. We are not however in a position to comment on the validity of its findings.

Training

There is praise for the original foundation course for DCWs which was identified as a strength. It was highly regarded by candidates for designation, trainers and externals.

During the thematic review, APs were less complimentary about the training for extended powers granted July 2008. The course was considered to be too theory based with not enough emphasis on practical aspects. At the same time, national training was being piloted in pathfinder areas for APs wishing to undertake trials. The Pathfinder project report was more positive about the training and we understand that there have been some changes to take account of concerns of APs. These include a greater focus on practical exercises and witness examination techniques.

Post qualification competence

There is no national system for quality assuring advocacy at any level. This has been the subject of comment in area inspection reports as well as the advocacy report. There are mentoring arrangements for newly designated APs. In our view these do need to be strengthened. Most areas have only informal arrangements whereby lawyer managers observe advocates, including APs, for appraisal purposes and actively seek feedback from magistrates and DJs.

The arrangements for supervising APs set out in paragraph 90 of the consultation document do not go into detail but effective monitoring requires a consistent and regular approach which also ensures that proper and immediate feedback is provided.

The process of supervision also requires appropriate arrangements to support APs in court. It is important to ensure that they have easy access to a CPS lawyer to assist with unforeseen and difficult legal questions without unnecessary disruption to the court. Arrangements should also ensure that they are not pressured into acting outside the scope of their responsibilities. Although APs have generally expressed satisfaction with local arrangements in this respect, there are some instances when it has been difficult to seek assistance promptly.

Conclusion

We have not gone into detail about the proposals as already indicated. The arrangements for selection, training, assessment, course accreditation and conduct of APs are comprehensive and have been developed, tested and revised where necessary as part of the Pathfinder project. This will no doubt be a continuing process and one to which HM CPSI will contribute, as appropriate.



**PROPOSAL TO SEEK RIGHTS OF AUDIENCE AND
RIGHTS TO CONDUCT LITIGATION FOR
ASSOCIATE PROSECUTOR MEMBERS OF ILEX**

**CONSULTATION RESPONSE FORM
ABOUT YOU**

Please provide the following information about you. Where you are responding on behalf of an organisation please provide a contact name and telephone number.

Your name:

Name of organisation: *The Bar Council*

Address: *The General Council of the Bar,
289-293 High Holborn, London.*

Post code: *WC1V 7HZ*

Telephone no. *020 7242 0082*

Email JBye@BarCouncil.org.uk (Jan Bye
Head of Professional Affairs, Bar Council)

If you are responding on behalf of an organisation outline the type of organisation for which you provide a response (eg representative body, regulatory body etc)

Representative body

Do you consent to IPS publishing your response
.....**Yes / No**

CONSULTATION QUESTIONS

Q1. ILEX seeks rights to conduct litigation and rights of audience for Associate Prosecutor Members. Do you have any comments on the rights sought? If so, please set them out.

Yes / No

Provide comments below

The rights sought are significant. Not only do they include rights to review cases including charging decisions and discontinuance, but also include rights relating to the actual court based prosecution of cases. A level 2 Associate Prosecutor will be permitted to appear before the Magistrates' Court to prosecute all proceedings against all adult and youth offenders including bail applications where the CPS is the prosecuting authority except trials in either-way offences. The fundamental issue is that these rights will be exercised by people with no legal qualification and indeed with no minimum academic or other professional or vocational qualification or training.

The fact that the proposals will affect proceedings in the Magistrates' Court rather than in the Crown Court is irrelevant. The same laws as to admissibility as to evidence apply in the Magistrates' Court as they do in the Crown Court. The fact that sentence is necessarily restricted in the Magistrates' Court should not overshadow the fundamental principle that both the public and a defendant are entitled to have cases prosecuted by properly qualified prosecutors.

The importance of the rights to be exercised by an Associate Prosecutor are not reflected in:

- a. the status of the position (the position is akin to Community Support Officers who are civilian patrol staff introduced as a cheaper alternative to real police officers)*
- b. the salary to be paid (compared to qualified lawyers)*

The effect will be to undermine public confidence in the prosecution of cases.

- Q2.** ILEX proposes that the rights will be awarded through two Certificates: Level 1 and Level 2. Do you have comments on the proposed split between the two Certificates? If so, please set them out.

Yes / No

Provide comments below

There is a considerable jump between the rights enjoyed by a level 1 Associate Prosecutor and those to be undertaken by a level 2 prosecutor. No indications are given as to:

- a. Approximately how long an Associate Prosecutor would be expected to prosecute at level 1 before they were considered to have had sufficient experience in order to move on to level 2.*
- b. How, once certified at level 1, the Associate Prosecutor will be monitored 'on the job' so that the move to level 2 would, initially at least, involve more than mere self-promotion.*

- Q3.** Do you have any comments on the CPS selection process? If so, please set them out.

Yes / No

Provide comments below

It is stated that the CPS will select staff to train as Associate Prosecutors "in accordance with the rules set out in the application". The IPS application seeks to establish that "an associate prosecutor will be suitably qualified in accordance with the proposed regulations regarding education, training and experience to exercise the rights to conduct litigation and rights of audience". It has already been established that there is no minimum academic requirement or formal legal qualification or training. It is therefore unclear what is meant by an associate prosecutor being "suitably qualified" in this context.

Selection will be by way of candidates already within the CPS being selected to train as associate prosecutors depending on business needs. It is said that the applicants will undergo a "rigorous selection process" involving completion of an application form; case study presentation and interview. At no stage is the candidate separately assessed as to their legal knowledge on fundamental issues of criminal offences, procedure, evidence and sentence. On the information provided it is impossible to compare entry onto the level 1 course with that associated with other legal study and training. As such it is impossible to draw a meaningful comparison with the selection process.

- Q4.** Do you have any comments on the proposed competencies for the Associate Prosecutor selection process? If so, please set them out.

Yes / No

Provide comments below

The 'person specification' criteria refers to fair and reasonable criteria in assessing a person's suitability generally. However the criteria falls short in assessing the specific qualities of a lawyer and advocate. An associate prosecutor is going to be required to make decisions as to charge, evidence, discontinuance etc. Of fundamental importance is the ability to understand evidence and legal issues associated with an offence and to exercise independent judgement based on sound understanding of case law and established legal principles. The assessment procedure does not properly reflect the importance of these core matters.

We note that the qualification scheme for litigators wishing to practise in civil and family work is considerably more robust than it is for those wishing to operate as Associate Prosecutors. It is not apparent why there should be a defined academic (to the standard of A level and Honours Degree) and a practical requirement

(at least 5 years experience) for members wishing to undertake civil and family work but no similar requirements for those intending to prosecute criminal matters.

Q5. Do you have any comments on the selection process for Associate Prosecutors at Level 1? If so, please set them out.

Yes / No

Provide comments below

The position of associate prosecutor is founded on the basis that a person with no legal qualification or training or any previous court advocacy can apply for the position and that appropriate training will be provided during the qualification stage. However the criteria as set out at appendix 1 suggests that the candidate will have had an opportunity to "make decisions independently" and has a "demonstrable working knowledge of criminal law and its application" as well as "well developed skills in identifying evidential issues and omissions and in drafting and communicating". It is submitted that the candidate to whom the role of associate prosecutor may appeal (for example case workers and other administrative support staff) will not ordinarily meet the criteria as set out. Either this means that very few people will meet the selection criteria or the criteria has been drafted in such a way so as to give an unrealistic indication as to the calibre of candidate the selection process is designed to promote.

- Q6.** Do you have any comments on the pre-course work required to be completed by Associate Prosecutors? If so, please set them out.

Yes / ~~No~~

Provide comments below

It is stated that each trainee will be appointed a mentor whom the trainee will observe at court. It is noted with concern that this may well be an Associate Prosecutor rather than a fully qualified lawyer.

It is noted that trainees are required to observe different hearings prior to the commencement of the course. If part of the reasoning behind this is to show the trainee the correct approach in court then details need to be provided as to how the provider will ensure that what the trainee sees meets the appropriate standard or is otherwise directed as to why a particular approach is not appropriate.

- Q7.** Do you have any comments on the contents of the Foundation course? If so, please set them out.

Yes / ~~No~~

Provide comments below

The Consultation Paper simply provides details of the Foundation Course objectives. It does not, for example set out the material to be used in order to test a candidate's ability to meet the objectives or indeed provide any other assessment details. Indeed from the information at Appendix 4 it would seem that there is to be no assessment in respect of those matters covered in the Foundation Course. The Foundation Course covers very important topics such as, professional conduct & ethics; evidence; law relating to offences and procedure. It is therefore of some concern that a candidate's ability is not, it would seem, to be tested on these core topics

with the same rigour as would be expected of a law student, trainee solicitor or barrister undertaking comparable academic or vocational assessment.

- Q8.** Do you have comments on the contents of the Trial Preparation course? If so, please set them out.

Yes / ~~No~~

Provide comments below

The contents of the Trial Preparation course are reasonable.

- Q9.** Do you have any comments on the assessment criteria for the Trial Preparation course? If so, please set them out.

Yes / ~~No~~

Provide comments below

Although the Consultation Paper provides a template assessment grid and to this extent provides the assessment framework, it does not in fact give any meaningful insight into the standards to be expected. For example, is a candidate who achieves a 'competent' on a comparable footing with a trainee solicitor or barrister achieving a similar result in the LPC or BVC?

Without more meaningful comparable information by which to assess the criteria there is no way of measuring a candidate's competency against that, for example, of a candidate undertaking a law degree or diploma, a candidate on the CPE course or otherwise engaged in vocational training through either the LPC or BVC.

It is all very well setting out the course objectives, but the issue is the level of competency a candidate would be expected to reach in order to pass the course and how this level compares with that of the level of assessment under other academic and vocational training.

The consultation paper does not suggest that either the 'training' or more importantly, the assessment would be conducted by an independent assessor such as a judge,

senior practitioner or advocacy trainer.

Q10. Do you have any comments on the course criteria for the Advocacy Skills course? If so, please set them out.

Yes / ~~No~~

Provide comments below

The contents of the Advocacy Skills course are reasonable.

Q11. Do you have any comments on the assessment criteria for the Advocacy Skills course? If so, please set them out.

Yes / ~~No~~

Provide comments below

Whilst the course objectives are laudable and the assessment framework appropriate, there is no information as to:

- a. Who will conduct the assessment day process (will this be an internal representative of the CPS or an external independent examiner)*
- b. Will there be any ongoing monitoring of the candidate following completion of the course in the same way that counsel is or can be monitored for the purpose of moving up the grading scale. If so by whom (CPS, judiciary, peers?)*
- c. How the expected standard compares with that expected of trainee solicitors or pupil barristers as set down by the LPC and BVC providers and, in the case of pupil barristers, the compulsory advocacy course run by the Inns of Court.*

Q12. Do you have any comments on the course criteria for the Youth course? If so, please set them out.

Yes / No

Provide comments below

The contents of the Youth course are reasonable. However they do not specifically refer to

- a. An understanding of the actual statutory sentencing provisions.*
- b. Issues arising when a youth appears with an adult offender*

Q13. Do you have any comments on the assessment criteria for the Youth Court? If so, please set them out.

Yes / No

Provide comments below

The concern is as to the assessment criteria. The assessment is to be based on a practical assessment exercise. No detail is given as to whether the candidate will have prior notice of the exercise, if so then the exercise can have only limited insight into a candidate's core knowledge of the law and procedure. There does not appear to be any other assessment to test a candidate's core knowledge as to law and procedure.

Q14. Do you have any comments on the structure or content of the Level 1 qualification? If so, please set them out.

Yes / ~~No~~

Provide comments below

The fundamental concern is that the structure and content is not based on core legal learning. For example, there is no provision within the assessment structure or content for consideration of case law either in respect of specific offences, sentence or procedure. This it is submitted, is a fundamental weakness of the qualification. In short it lacks academic rigor, independent thought and legal reasoning based on case law.

No information is provided as to the qualification/training period; the contact time between mentor and trainee or the structure to that contact etc.

Q15. Do you have any comments on the observation grid for bail hearings? If so, please set them out.

Yes / ~~No~~

Provide comments below

Whilst it is always of some use to observe someone else in action it is of concern that the person to be observed may themselves be an Associate Prosecutor. There appears to be a lack of structures in place to ensure that anyone a trainee observes is suitably qualified, experienced and competent.

Q16. Do you have any comments on the criteria for the Bail courses?
If so, please set them out.

Yes / ~~No~~

Provide comments below

The criteria is reasonable and fair.

Q17. Do you have any comments on the assessment criteria for the Bail courses? If so, please set them out.

Yes / ~~No~~

Provide comments below

No information is provided as to who will carry out the assessment of competence or whether the candidate will have prior notice of the practical exercises. This is important because it raises the issue of how the candidate's core knowledge is assessed.

Q18. Do you have any comments on the selection process for Level 2 Associate Prosecutors? If so, please set them out.

Yes / No

Provide comments below

The jump in rights and responsibilities between a level 1 and level 2 associate prosecutor is not reflected in the selection process. There is no minimum qualification or experience required and the practical exercises (a remand application and opposition to a bail application) are limited. Whilst they may give some indication as to a candidate's ability to identify the relevant factors and as to their presentational skills they do not give any indication as to a candidate's ability to understand the law or make decisions based on evidence and admissibility which are fundamental to prosecuting cases properly.

Q19. Do you have any comments on the observation and mentoring arrangements for Level 2 Associate Prosecutors? If so, please set them out.

Yes / ~~No~~

Provide comments below

It is said that an Associate Prosecutor will be assigned to a mentor who will 'usually' be an experienced Crown Prosecutor. It is submitted that anyone acting in a mentoring capacity to a trainee must be a qualified, experienced and competent prosecutor.

Q20. Do you have any comments on the course outcomes for the Level 2 Foundation course? If so, please set them out.

Yes / ~~No~~

Provide comments below

The course outcomes for the level 2 Foundation course is laudable. However there does not appear to be a specific assessment regime to ensure that a candidate has the core knowledge and skills relating to fundamental legal issues and principles. The absence of such assessment at the foundation stage is concerning, particularly when a candidate will commence the level 2 qualification by self-study, e-learning modules.

Q21. Do you have any comments on the course outcomes for the Advocacy Skills course? If so, please set them out.

Yes / ~~No~~

Provide comments below

The course outcome and content is fair and reasonable

Q22. Do you have any comments on the assessment criteria for the Advocacy Skills course? If so, please set them out.

Yes / ~~No~~

Provide comments below

It is all very well saying that in order for a candidate to be declared 'ready' to prosecute a trial a candidate must be assessed as 'good' or 'satisfactory' in each of the 4 core areas. However there is no information as to what 'satisfactory' or 'good' means as compared with other forms of assessment in comparable academic and vocational training. It is essential that the standard expected is comparable with standards expected of junior solicitors and barristers.

Q23. Do you have any comments on the content or structure of the Level 2 qualification? If so, please set them out.

Yes / ~~No~~

Provide comments below

A level 2 Associate Prosecutor will be permitted to conduct trials in the Magistrates' Court. The fact that it is a trial in the Magistrates' Court rather than in the Crown court is irrelevant. The same issues as to evidence, procedure and law generally arise in the Magistrates' Court as in the Crown Court and require prosecutors who are equally qualified and equipped to deal with such issues. The fundamental flaw with this qualification is that candidates will qualify as Associate Prosecutors without meeting any basic academic level, without ever having studied law either at an academic or vocational level.

Q24. Do you have comments on the process by which IPS will accredit the CPS to deliver courses? If so, please set them out.

Yes / ~~No~~

Provide comments below

It is said that the CPS appoints external organisations to conduct assessment of candidates. No details of who these external organisations are have been provided.

Q25. Do you have any comments on the oversight and monitoring role to be undertaken by IPS to ensure standards of course delivery and assessment are maintained? If so, please set them out.

Yes / ~~No~~

Provide comments below

The IPS will accredit the CPS if the relevant criteria for the accreditation of course providers for advocacy and other ILEX course is met. The criteria is said to include location; suitability of premises, teaching resources and support, teaching and assessment experience, course content and candidate contact and support mechanism.

It is not clear who will conduct the assessment for the purposes of accreditation. The IPS are not independent given that ILEX are promoting the scheme for their members and the CPS cannot properly assess its own performance.

Q26. Do you have any comments on the number of hours CPD Associate Prosecutors are required to undertake? If so, please set them out.

Yes / ~~No~~

Provide comments below

The CPD requirement of 16 hours is appropriate. However the requirement that only 8 hours must be in criminal practice is not appropriate. Practitioners at the Bar for example must undertake 12 hours in an area in which they practise.

Q27. Do you have any comments on the standards of conduct that IPS expects Associate Prosecutors to observe? If so, please set them out.

Yes / ~~No~~

Provide comments below

It is right that associate prosecutors are bound by the same standards of conduct as any other prosecutor.

Q28. Do you have any comments on the arrangements by which IPS will investigate the conduct of Associate Prosecutors? If so, please set them out.

Yes / ~~No~~

Provide comments below

Although it is made clear that the outcome of any complaint made to the CPS about an associate prosecutor is reported to the IPS, it is not made clear whether the same applies if the complaint is made only to the IPS. In particular whether, the IPS would be obliged to disclose that information to the CPS where the individual was not excluded from membership of the ILEX.

Q29. Do you agree that the CPS should be expected to refer any conduct matters to IPS as appropriate? If not, please state why.

Yes / ~~No~~

Provide comments below

The CPS should be obliged to refer any conduct matters, irrespective of how it decides to deal with them to the body representing associate prosecutors.

How to respond

Please send the response form to IPS through one of the following methods:

- Email to bbsra@ilexstandards.org.uk
- By post to ILEX Professional Standards Ltd, Kempston Manor, Kempston, Bedford MK42 7AB
- By DX to ILEX Professional Standards Ltd, DX 124780 Kempston 2

Submission deadline

The deadline for the submission of responses is **3 April 2010**



YOUNG BARRISTERS' COMMITTEE

**PROPOSAL TO SEEK RIGHTS OF AUDIENCE AND
RIGHTS TO CONDUCT LITIGATION FOR
ASSOCIATE PROSECUTOR MEMBERS OF ILEX**

ILEX PROFESSIONAL STANDARDS LTD CONSULTATION PAPER

RESPONSE OF THE YOUNG BARRISTERS' COMMITTEE

Introduction

1. The Young Barristers' Committee ("the YBC") is one of the Bar Council's main representative committees and it represents barristers who are under 10 years' call. Led by a Chairman and a Vice-Chairman, it comprises elected members of the Bar Council (employed and self-employed barristers) under 7 years' call, as well as barristers who are co-opted to ensure representation from different areas of practice and from all Circuits. Its membership is therefore diverse and representative.
2. This is the response of the YBC to the consultation paper issued by ILEX Professional Standards ("IPS") entitled *Proposal to seek Rights of Audience and Rights to Conduct Litigation for Associate Prosecutor members of ILEX* ("the IPS paper").

About the IPS consultation

3. ILEX is making an application under the Legal Services Act 2007 to become an approved regulator in respect of advocacy and litigation undertaken by

those of its members who are registered as 'Associate Prosecutors' within the Crown Prosecution Service. The application seeks approval to grant rights to conduct litigation and rights of audience.

4. Currently, Level 2 Associate Prosecutors can conduct all proceedings in the Magistrates' Court and the Youth Court save for trials in triable either-way matters and offences punishable with a term of imprisonment¹.
5. The rights which are sought are split into two levels: Level 1 and Level 2. Level 1 rights of audience will permit a 'New Associate Prosecutor' to appear in the Magistrates' Court (including Youth Courts) to prosecute all hearings except: trials; Newton Hearings; Special Reasons hearings; Contested Preventative Civil Orders; and Contested Binding Over Proceedings.
6. Level 2 rights of audience will permit the Associate Prosecutor to appear in the Magistrates' Courts (including Youth Courts) to prosecute all proceedings where the CPS is the prosecuting authority except trials in either-way matters.
7. Holders of Level 1 and Level 2 Rights of Audience and Litigation Certificate in Criminal Proceedings will be awarded the following litigation rights:
 - a. The right to exercise the powers of a Crown Prosecutor to conduct a case outside court, namely:
 - i. Review of a prosecution case by applying the Code for Crown Prosecutors; and
 - ii. Other casework functions necessary to progress prosecution cases that fall within an Associate Prosecutor's statutory remit.That is:

¹ Associate Prosecutors – Directors Instructions. See http://www.cps.gov.uk/legal/a_to_c/associate_prosecutors_directors_instructions/

- To decide appropriate bail conditions and objections to bail in Magistrates' Court and Youth Court proceedings;
- To decide whether to discontinue a case;
- To make disclosure decisions;
- To decide witnesses to give live evidence, to serve under section 9 of the Criminal Justice Act 1967 and to tender to the defence;
- To amend a charge or summons, prefer a new charge or drop a charge;
- To decide whether to apply, vary or discharge a civil preventative order.

Concerns of the YBC

8. The YBC wholly endorses the response of the Bar Council to the IPS paper. It does not therefore seek to repeat the points already made therein, nor to respond to the individual questions posed in the consultation paper, but it sets out below some general comments on the IPS proposals.

9. The YBC's concerns emanate from the fact that the result of the consultation will be to invest a considerable degree of responsibility and power in prosecutors who have no formal legal qualification or training. They therefore cannot guarantee the same degree of service to the public as a legally qualified barrister or solicitor.

10. The YBC cannot accept that these measures can therefore be in the public interest. This consultation is part of an 'incremental policy' adopted by both ILEX and the CPS. Initially designated caseworkers were principally office based. Their role was extended by the Criminal Justice and Immigration Act 2008 to permit them to conduct simple guilty pleas and trials for non-

imprisonable offences. They have since become known as 'Associate Prosecutors' and under these proposals will be able to conduct all summary trials save for either-way matters – this will include cases where the defendant is at risk of an imprisonable offence. The YBC is therefore extremely concerned that this is another step towards the 'de-lawyering' of the Magistrates' and Youth Courts.

Significant Rights

11. The rights invested in Crown Prosecutors, both in terms of reviewing cases and advocacy, are important ones. Extending such rights, which have hitherto been entrusted to Crown Advocates, to persons with no legal qualification is not a step which should be taken lightly. The YBC argues that before these rights are extended to such persons, persuasive arguments will need to be made as to why such a step would be in the public interest. In the view of the YBC no such arguments have been put forward.

12. The YBC also agrees with the views of the Bar Council in that not only are the rights themselves significant, but they are also a significant amplification of the rights conferred to Associate Prosecutors. The YBC considers that no evidence has been pointed to which demonstrates that such a step is necessary. Were the Director of Public Prosecutions to extend these rights to Associate Prosecutors, the conclusion which must be drawn is that he has done so in order to cut costs. While the YBC recognises that all public services are under financial pressure, the increased risk to the public of miscarriages of justice would far outweigh the benefit of these measures.

Significant Cases

13. The YBC also wholly agrees with the Bar Council in that the fact that such decisions are currently to be limited to the Magistrates' and Youth Court is

irrelevant. Cases heard in the Magistrates' Court can result in prison sentences of up to six months, a conviction in a Magistrates' Court can result in the loss of one's good character and employment. This can have devastating and long-lasting consequences for the defendant and his/her family. Cases heard in the Youth Court can include extremely serious allegations that would otherwise be heard in the Crown Court but for the age of the defendant. The notion that it is acceptable for such cases to be prosecuted and/or reviewed by a non-lawyer because they are less important is wholly erroneous.

Training and Supervision

14. So far as appropriate training is concerned, the YBC is of the view that it is of critical importance that those who prosecute cases in *any* court have an appropriate legal qualification and/or training which is comparable to that of barristers and solicitors. Not only does this provide a measure of guarantee for the public but it also ensures that competition is on a level playing field.

15. The YBC is of the view that the training proposed by the consultation paper is insufficiently detailed to allow a comparison to be made between that training and either a legal qualification or the Bar Professional Training Course or the Legal Practice Course. For example, at page 7 of the IPS paper, it describes the CPS 'Person Specification for an Associate Prosecutor' to select suitable candidates. Applicants are marked using a scale of 1 to 5, with 1 being 'requirements not met' and 5 being 'requirements consistently met'. We are told that applicants are expected to achieve at least a score of 3 against each competency. Not only does the IPS paper not set out the definition of the remaining numbers on the scale (2,3 and 4) but it appears that someone will be deemed a suitable candidate if they obtain a score of something considerably less than 'requirements consistently met' against each

competency. The YBC is concerned about the stringency of the selection process.

16. Furthermore, at no stage is reference made to the requirement to have even a basic level of legal knowledge. If the individual is to be required to make decisions regarding charge, that will require an assessment of the law and rules of evidence. The YBC endorses all the points made in this regard by the Bar Council.
17. The YBC is concerned that no proposals are put forward for identifying categories of cases in which conduct of the case or trial by an Associate Prosecutor would not be appropriate. While not wishing to undermine anything said above about the unsuitability of Associate Prosecutors to undertake contested hearings, in particular where the liberty of the defendant is at risk, in the view of the YBC at the very least consideration should be given as to whether or not Associate Prosecutors should prosecute trials which involve a) child or vulnerable witnesses; b) cases where abuse of process is alleged; c) cases involving a vulnerable defendant or a defendant with mental health difficulties; d) cases involving challenging issues of law or fact.
18. The YBC is also concerned at an apparent lack of proposed supervision. In these days where legal aid is increasingly limited and more and more defendants represent themselves – particularly in the Magistrates' Court where charges might be perceived as less serious - there is a real possibility that an Associate Prosecutor may prosecute a case defended by a litigant in person. Therefore, no lawyers would be involved in the preparation of a case, in pre-trial negotiations or oral and written representations and the only lawyer who ever deals with the case is a court clerk – whose functions are to advise the lay Magistrates or the District Judge and not to advise either party. Even this might disappear if pilots to replace legally qualified clerks with

Young Barristers' Committee

March 2010



THE CRIMINAL BAR ASSOCIATION
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Introduction

1. The Criminal Bar Association represents over 3,800 barristers specialising in criminal law. We welcome the opportunity to respond to the ILEX Professional Standards (“IPS”) consultation paper “Proposal to seek rights of audience and rights to conduct litigation for Associate Prosecutor members of ILEX” (the “Consultation Paper”).

The ILEX application

2. ILEX is making an application under the Legal Services Act 2007 to become an approved regulator in respect of advocacy and litigation undertaken by those of its members who are registered as Associate Prosecutors (“APs”) within the Crown Prosecution Service (“CPS”). The application seeks approval to grant rights to conduct litigation and rights of audience.

3. Currently, Level 2 Associate Prosecutors can conduct all proceedings in the Magistrates’ Court and the Youth Court save for trials in triable either way matters and offences punishable with a term of imprisonment¹.

4. The rights which are sought are split into two levels: Level 1 and Level 2. Level 1 rights of audience will permit a ‘New Associate

¹ Associate Prosecutors – Directors Instructions. See http://www.cps.gov.uk/legal/a_to_c/associate_prosecutors_directors_instructions/

Prosecutor' to appear in the Magistrates' Court (including Youth Courts) to prosecute all hearings except: trials; Newton Hearings; Special Reasons hearings; Contested Preventative Civil Orders; and Contested Binding Over Proceedings.

5. Level 2 rights of audience will permit the Associate Prosecutor to appear in the Magistrates' Courts (including Youth Courts) to prosecute all proceedings where the CPS is the prosecuting authority except trials in either-way matters.

6. Holders of Level 1 and Level 2 Rights of audience and Litigation Certificate in Criminal Proceedings will be awarded the following litigation rights:

a. The right to exercise the powers of a Crown Prosecutor to conduct a case outside court, namely:

- i. Review of a prosecution case by applying the Code for Crown Prosecutors; and
- ii. Other casework functions necessary to progress prosecution cases that fall within an Associate Prosecutor's statutory remit. That is:
 - To decide appropriate bail conditions and objections to bail in Magistrates' Court and Youth Court proceedings;
 - To decide whether to discontinue a case;
 - To make disclosure decisions;
 - To decide witnesses to give live evidence, to serve under section 9 of the Criminal Justice Act 1967 and to tender to the defence;
 - To amend a charge or summons, prefer a new charge or drop a charge;

- To decide whether to apply, vary or discharge a civil preventative order.

The CBA response

7. For the reasons set out below we do not support the proposal. In our view, such rights are fundamental and must not be extended without good and sufficient cause. The Consultation Paper does not make out such a cause; indeed it is silent on the need for the step it proposes to take.

8. When the role of a designated caseworker was extended by the Criminal Justice and Immigration Act 2008, it was limited to conducting simple guilty pleas and non-imprisonable offences. The proposals extend the role far beyond that which this piece of legislation envisaged. We are concerned that the majority of the work carried out in the Magistrates' and Youth Courts will now be conducted by those without formal legal qualifications or minimum academic or other professional or vocational qualification or training.

9. There is insufficient information within the Consultation Paper in some fundamental respects, namely training and supervision of APs. In one of the most essential areas (the Foundation course) there is no assessment at all. This course covers areas of law and procedure which are of paramount importance for all those prosecuting trials, particularly those without a formal legal qualification. In some aspects of the training the Consultation Paper does not set out the standards which are to be met. Without making an assessment it will not be possible to ascertain the applicants capability and competence; without knowledge of the standards required it is not possible to make a comparison with the

standards required of a trainee solicitor or pupil. It is submitted the proposals must be capable of such comparison.

10. We are concerned that the proposals will lead to an increase in the risk of miscarriages of justice and an overall loss of confidence in the effective and fair prosecution of cases.

Our answers to the questions Question 1: ILEX seeks rights to conduct litigation and rights of audience for Associate Prosecutor Members. Do you have any comments on the rights sought?

The rights sought are significant and include not only the rights to review cases, making charging decisions and decision to offer no evidence, but also rights to prosecute trials. A considerable degree of responsibility therefore will be placed in the hands of prosecutors with no formal legal qualification or training. In the circumstances, there can be no guarantee of the quality of service provided by legally qualified barristers or solicitors.

Under the proposals, APs will be able to conduct all summary trials in Magistrates' Courts and Youth Courts save for either way matters. Magistrates' Courts and Youth Courts can deal with some extremely serious cases. A conviction in the Magistrates' Court can result in a prison sentence of up to 6 months and the loss of ones good character, employment and reputation. Youth Courts can hear matters which, but for the age of the defendant, could be heard in the Crown Court. It is not correct to say the steps proposed are acceptable because they are confined to less important cases. It matters not that the proposals are restricted to proceedings in the Magistrates' Court rather than the Crown Court. The same laws apply, many of which are highly complex. The fundamental issue is that these cases will be conducted by people with no legal

qualification or minimum academic or other professional or vocational qualification or training.

The proposals do not consider how cases might be identified as being appropriate for prosecution by an AP. For instance, is it envisaged that APs will prosecute *all* trials of summary matters regardless of their complexity? Will APs be permitted to conduct trials in which the witnesses and/or defendants are young and/or vulnerable? Will APs be permitted to conduct cases in which issues of law (abuse of process, for instance) arise? Will the AP be permitted to conduct bail applications in any case regardless of the seriousness of it? Upon what basis will such decisions be made?

Question 2: ILEX proposes that the rights will be awarded through two certificates: Level 1 and Level 2. Do you have comments on the proposed split between the two certificates?

The Consultation Paper does not set out what is required of a Level 1 AP in order to achieve Level 2, save to say *“Experienced Level 1 APs will be eligible to apply to complete a higher qualification programme leading to the award of Level 2 Rights of Audience and Litigation Certificate in Criminal Proceedings”*. It is not clear what is meant by *‘experienced’*. How long is it envisaged the AP should prosecute at Level 1 before becoming sufficiently experienced to apply for Level 2? Is there a minimum requirement? How is the Level 1 AP monitored conducting cases in order to establish suitability to make the application for Level 2?

Question 3: Do you have any comments on the CPS selection process?

The Consultation Paper states the IPS seeks to ensure that APs will be *“suitably qualified”*. Given there no minimum academic

requirement or formal legal qualification it is unclear what is meant by this. The paper does not expand on this further. It does say that the selection process will be *"rigorous"* and will involve an application form, case study presentation and interview. It does not include an assessment of legal knowledge, evidence and procedure. It is not therefore possible to assess how the process compares with other legal study and training.

We note that the CPS will select staff to train as APs according to *'business needs'*. It is not clear what such business needs might be. In fact, nowhere in the Consultation Paper is there an explanation as to the need to take this step. We submit there should be persuasive arguments made that this step is required and is in the public interest. We have seen none.

Question 4: Do you have any comments on the proposed competencies for the Associate Prosecutor selection process?

The *'person specification'* criteria appear to be fair and reasonable but do not include the qualities required to act as a lawyer and advocate, making sound legal judgements based on a sound understanding of law and procedure.

Question 5: Do you have any comments on the selection process for Associate Prosecutors at Level 1?

We note the requirement that a Level 1 AP must have *"experience of casework within the criminal justice system/lay presentation"*, *"a demonstrable working knowledge of criminal law and its application, magistrates' court practice and procedure and the criminal justice system"* and *"well developed skills in identifying evidential issues and omissions and in drafting and communication"*. Given there is no requirement of a formal legal qualification or minimum academic

or other professional or vocational qualification or training, it is difficult to envisage how the experience and knowledge identified above might be gained and therefore causes concern about how the criteria might be met. It is submitted that the criteria are not realistic.

Question 6: Do you have any comments on the pre-course work required to be completed by Associate Prosecutors?

The Consultation Paper indicates that a trainee AP will be allocated a mentor but does not set out the criteria required to qualify as a mentor save to say it will be *“an experienced Associate Prosecutor or a Crown Prosecutor”*. It is of concern that there is no requirement for the mentor to be a fully qualified lawyer.

Trainees will be required to observe various court hearings but the Consultation Paper does not specify whether the person being observed will be a qualified lawyer or another AP nor how to ensure that the appropriate standards are met by that person.

Question 7: Do you have any comments on the contents of the Foundation Course?

The Consultation Paper contains only the course outcomes and objectives and not the course content and therefore it is not possible to comment. It is worth noting that the course envisages covering important areas (such as evidence and the law in relation to criminal offences which will be prosecuted) which do not appear to be subject of an assessment. It is of considerable concern that the ability to satisfy the objectives in such fundamental areas will not be tested.

Question 8: Do you have comments on the contents of the Trial Preparation course?

Question 9: Do you have any comments on the assessment criteria for the Trial Preparation course?

The aims and objectives of the course appear reasonable.

The assessment grid provides an assessment framework but goes no further and does not provide details of what is to be expected in order to achieve '*competent*' or '*good*'. It is not therefore possible to compare the assessment criteria with that required of a trainee solicitor or pupil.

It is of concern that there is no detail about who will be responsible for the assessment.

Question 10: Do you comments on the course criteria for the Advocacy Skills course? Question 11: Do you have any comments on the assessment criteria for the Advocacy Skills course?

The aims and objectives of the course appear reasonable.

The assessment criteria seem reasonable and appropriate. Again, it is worth noting that there is no detail about who shall carry out the assessment and how the standards compare to that required of a trainee solicitor or pupil.

Question 12: Do you have any comments on the course criteria for the Youth course? Question 13: Do you have any comments on the assessment criteria for the Youth Court?

The aims and objectives of the course appear reasonable, although there is no reference to youth sentencing provisions nor the situation where a youth appears with an adult.

In relation to the assessment criteria, the Consultation Paper does not contain important details such as whether the assessment is to be a practical exercise. The criteria include *“relevant legal and policy principles”* but do not contain knowledge of the law and procedure.

Question 14: Do you have any comments on the structure or content of the Level 1 qualification?

In addition to the above comments, we observe that there is no time frame for the qualification/training period; there is no detail as to the contact between trainee and mentor, nor the structure to that contact.

Question 15: Do you have any comments on the observation grid for bail hearings? Question 16: Do you have any comments on the criteria for the Bail courses? Question 17: Do you have any comments on the assessment criteria for the Bail courses?

There is no detail about who the trainee will observe and whether that person shall be a fully qualified lawyer or another AP and what steps will be taken to ensure that person is suitably qualified and experienced.

The criteria for the Bail courses seem reasonable and fair.

Again, there is no detail in relation to who will carry out the assessment.

Question 18: Do you have any comments on the selection process for Level 2 Associate Prosecutors?

The Consultation Paper states *“experienced Level 1 Associate Prosecutors will be able to progress to become Level 2 Associate Prosecutors, as opportunities arise”*. It does not set out what criteria is to be met in order to become *“experienced”*. There is no minimum qualification or experience, and the presentation stage involves only a remand application and opposing a bail application. This, it is said, is designed to *“test the advocacy skills, judgement and analytical skills of applicants”*. It is of concern that the presentation stage is limited and in our submission will not be able to provide an indication of the applicant’s ability to prosecute cases properly.

Question 19: Do you have any comments on the observation and mentoring arrangements for Level 2 Associate Prosecutors?

The Consultation Paper states the mentor will *“usually be an experienced Crown Prosecutor”*. There is no detail as to how it will be ensured that the mentor is suitably qualified and experienced, which in our experience they must be.

Question 20: Do you have any comments on the course outcomes for the Level 2 Foundation course?

The aims and objectives seem reasonable and fair. It is of concern, however, that there is no assessment in relation to this aspect of the training. The Foundation Course is designed to deal with some fundamental aspects of evidence and procedure. It is not possible to properly prosecute a case without proper knowledge and understanding of these complex areas. Assessment in this respect is of paramount importance, especially given the other aspect of the training is E-learning.

Question 21: Do you have any comments on the course outcomes for the Advocacy Skills course? Question 22: Do you have any comments on the assessment criteria for the Advocacy Skills course?

Preparing and presenting a mock trial to an independent assessor is a good means of assessing advocacy skills and is to be encouraged. The concern in respect of the assessment is the lack of information as to the "*standard required*". The Consultation does not specify what this means and therefore it is not possible to compare this to the standard required of a trainee solicitor or pupil. The standards must be comparable.

Question 23: Do you have any comments on the content or structure of the Level 2 qualification?

In addition to comments above, we are concerned that a Level 2 AP will be able to conduct trials which deal with the same issues of law, evidence and procedure as those conducted in the Crown Court without a formal legal qualification, and in some respects without an assessment of basic legal knowledge. To say the proposals are acceptable because they are confined to less important cases is wrong and misleading.

Question 24: Do you have any comments on the process by which IPS will accredit the CPS to deliver courses?

No.

Question 25: Do you have any comments on the oversight and monitoring role to be undertaken by IPS to ensure standards of course delivery and assessment are maintained?

The only comment we make is that IPS is not independent given that ILEX is proposing the scheme for its members.

Question 26: Do you have any comments on the number of hours CPD Associate Prosecutors are required to undertake?

Members of the Bar must undertake 42 hours CPD in their first three years practice as New Practitioners and 12 hours annually as an Established Practitioner thereafter. All hours must be undertaken in the area in which they practice. We see no reason for APs to have to complete only half their CPD hours in criminal practice, procedure, knowledge or advocacy skills training.

Question 27: Do you have any comments on the standards of conduct that IPS expects Associate Prosecutors to observe?

It is right that APs are bound by the same standards of conduct as other prosecutors.

Question 28: Do you have any comments on the arrangements by which IPS will investigate the conduct of Associate Prosecutors? Question 29: Do you agree that the CPS should be expected to refer any conduct matters to IPS as appropriate?

It is not clear whether IPS is under an obligation to report to the CPS a complaint made only to IPS. It is only right that the CPS is obliged to refer conduct matters to IPS.

Paul Mendelle Q.C.
Christopher Kinch
Q.C. Lesley Bates 2nd
April 2010

Response to the proposal to seek rights of audience and rights to conduct litigation for Associate Prosecutor members of ILEX

On behalf of the FDA Crown Prosecution Service Section

prepared by the Professional Issues Sub-Committee

April

Introduction

The FDA is fundamentally opposed to any further extension of rights for Associate Prosecutors. As a matter of general principle the proposals significantly undermine the concept of quality justice by the removal of qualified solicitors and barristers representing the Crown. The proposals undermine the value of the role of qualified lawyers both within the Crown Prosecution Service and employed by the defence by reducing the required quality of defence representation.

The nature and complexity of the rights proposed requires skills commensurate with the academic and vocational skills of practising barristers and solicitors. The proposed extended rights are not commensurate with the role of Associate Prosecutor for which there is no minimum academic qualification required. In addition, the proposed rights are not in parity with the requirements placed on those already holding ILEX qualifications or ILEX Fellows.

The proposals are diametrically opposed to the objectives required of a regulator pursuant to the **Legal Services Act 2007**, particularly the objectives of, *Supporting the Rule of Law*; and *Protecting and promoting the interests of consumers and the public interest*.

Issue is also taken with the suggestion that victims and witnesses within the criminal justice system are consumers as they do not choose to become part of the criminal Justice System. Consequently they should be considered as a distinct vulnerable class deserving the highest quality of care.

The rights proposed to be granted Associate Prosecutors under this proposal exceed the rights granted to Crown Prosecutors and come close to the full range of functions undertaken by Senior Crown Prosecutors and Crown Advocates. The proposals will have a detrimental effect on the confidence of the public in the criminal justice system as frequently in cases dealt with by Associate Prosecutors the only practising solicitor or barrister will be the defence advocate.

This disparity will disadvantage victims and undermine one of the basic tenets of the adversarial justice system: the “parity of arms” between the defence and prosecution in contested criminal matters. A victim or witness in a criminal trial conducted by an Associate Prosecutor will not even be made aware that the prosecutor is not a practising solicitor or barrister and even were they to know, unlike the defendant, they could not seek alternative representation.

Answers to Specific Consultation questions

Q1. ILEX seeks rights to conduct litigation and rights of audience for Associate Prosecutor Members. Do you have any comments on the rights sought? If so, please set them out.

As mentioned in the introductory comments above the FDA would stress the concerns about the extension of rights proposed:

1. The proposals significantly undermine the concept of quality justice by the removal of qualified solicitors and barristers representing the Crown;
2. The proposals undermine the value of the role of qualified lawyers both within the Crown Prosecution Service and employed by the defence;
3. The rights proposed require skills commensurate with the academic and vocational skills of practising barristers and solicitors;
4. The extended rights are not commensurate with those for which there is no minimum academic qualification;
5. The proposed rights are not in parity with the requirements placed on those already holding ILEX qualifications or ILEX Fellows;
6. The rights proposed exceed the rights granted to Crown Prosecutors and come close to the full range of functions undertaken by Senior Crown Prosecutors and Crown Advocates;
7. The proposals will have a detrimental effect on the confidence of the public in the criminal justice system as frequently in cases dealt with by Associate Prosecutors the only fully qualified lawyer will be the defence advocate.

Q2. ILEX proposes that the rights will be awarded through two Certificates: Level 1 and Level 2. Do you have comments on the proposed split between the two Certificates? If so, please set them out.

The FDA opposes the extension of rights at level two and opposes the extended scope of the level one rights as envisaged by the proposals:

1. New rights are sought to be included at level one such as the power to discontinue proceedings without the authority of an Senior Crown Prosecutor;
2. New rights to conduct reviews on summary only cases with rights comparable to those of Senior Crown Prosecutors;
3. The power to deal with bail applications for all those appearing before the Magistrates and Youth Court;

4. Rights to appear in the Crown Court in respect of bail applications;
5. The power to deal with issues relating to disclosure under the provisions of the **Criminal Procedure and Investigation Act 1996**;
6. The power to add, amend or alter charges without the authority of an Senior Crown Prosecutor; and
7. The lack of a caveat as to the nature, complexity or sensitivity of the cases involved and their suitability for an Associate Prosecutor.

The rights above are presently reserved to Senior Crown Prosecutors and Crown Advocates and the extension of such powers to those who have no minimum standard of recognised qualification, experience or practise is not appropriate.

Q3. Do you have any comments on the CPS selection process? If so, please set them out.

Concerns are expressed by the FDA that the IPS will not be scrutinising the recruitment of the Associate Prosecutors who they will then regulate. Since there is, in effect, no minimum standard for applicants the selection for the post of Associate Prosecutor will be an exercise based solely on the completion of a form and the performance in a limited interview.

Q4. Do you have any comments on the proposed competencies for the Associate Prosecutor selection process? If so, please set them out.

The competency framework is a subjective set of criteria applied by the Crown Prosecution Service and subject to change without notice to the IPS. The competencies are sufficiently wide and lacking in detail and appear to have little bearing on the actual conduct of criminal advocacy or litigation. It is noted that there is no equivalency between external applicants for the post of Associate Prosecutors who must hold a recognised professional or academic legal qualification and those already working for the Crown Prosecution Service.

Q5. Do you have any comments on the selection process for Associate Prosecutors at Level 1? If so, please set them out.

The selection process appears to have little of the rigour required for posts in which the conduct of criminal litigation is expected. The process, without considerable external scrutiny, is likely to favour those who can perform on the day over those who may possess the skills required to undertake the role.

Q6. Do you have any comments on the pre-course work required to be completed by Associate Prosecutors? If so, please set them out.

Insufficient detail provided as to content, length, depth of study or assessment as to competency. The estimate of 20 hours for reading the manual (no details as to content) does not give any indication how that estimate is arrived at. It should be noted that qualified solicitors and barristers are required to undertake similar amounts of time to

simply maintain their practising rights through the Continuing Professional Development process. This is on top of the time they have already spent in academic and vocational study.

Q7. Do you have any comments on the contents of the Foundation course? If so, please set them out.

A 5 day course to equip someone to undertake criminal litigation, where no prior academic or vocational is required is insufficient. It should be noted that all practising solicitors and barristers joining the Crown Prosecution Service are required to undertake a comparable induction course. The suggestion that some additional days training is sufficient to raise the knowledge and skills of unqualified staff is a matter of serious concern. Without further details of the course topic the required pre-reading and depth and scope of the course it is difficult to assess its value.

Q8. Do you have comments on the contents of the Trial Preparation course? If so, please set them out.

Whilst there is insufficient detail to assess the value of the contents of the trial preparation course the FDA would make the following comments. Prosecutors who are practising solicitors and barristers complete various advocacy training courses in addition to their academic and vocational legal training. The lawyers have already completed university or ILEX exams and the exams of the Legal Practice Course therefore an internal CPS assessment is adequate for them. The position for Associate Prosecutors is wholly different as many will not have had the legal training to competently fulfil their professional obligations to the required standard.

Q9. Do you have any comments on the assessment criteria for the Trial Preparation course? If so, please set them out.

There is insufficient detail to assess the value of the assessment criteria and how they are to be defined and applied.

Q10. Do you have any comments on the course criteria for the Advocacy Skills course? If so, please set them out.

There is insufficient detail to assess the value of the assessment criteria and how they are to be defined and applied.

Q11. Do you have any comments on the assessment criteria for the Advocacy Skills course? If so, please set them out.

There is insufficient detail to assess the value of the assessment criteria and how they are to be defined and applied.

Q12. Do you have any comments on the course criteria for the Youth course? If so, please set them out.

The limited current proposals by the CPS to extend Associate Powers to do uncontested youth bail applications are currently being opposed by the FDA due to competency issues. The complexities of the Youth Court system do not easily fit with the role of the Associate Prosecutor. The present system prevents even Crown Prosecutor and Senior Crown Prosecutors from conducting youth work without first undertaking a Youth Specialist course lasting two days and providing 9 hours of CPD. There appears little parity between the rigorous training required for practising solicitors and barristers and the Associate Prosecutor youth course suggested here.

Q13. Do you have any comments on the assessment criteria for the Youth Court? If so, please set them out.

There is insufficient detail to assess the value of the assessment criteria and how they are to be defined and applied.

Q14. Do you have any comments on the structure or content of the Level 1 qualification? If so, please set them out.

There is insufficient detail to assess the value of the structure and content.

Q15. Do you have any comments on the observation grid for bail hearings? If so, please set them out.

No comment beyond the concerns already raised in the previous responses

Q16. Do you have any comments on the criteria for the Bail courses? If so, please set them out.

There is insufficient detail to assess the value of the structure and content.

Q17. Do you have any comments on the assessment criteria for the Bail courses? If so, please set them out.

There is insufficient detail to assess the value of the assessment criteria and how they are to be defined and applied.

Q18. Do you have any comments on the selection process for Level 2 Associate Prosecutors? If so, please set them out.

The selection process appears to have little of the rigour required for posts in which the conduct of criminal litigation is expected. The process, without considerable external scrutiny, is likely to favour those who can perform on the day over those who may possess the skills required to undertake the role.

Q19. Do you have any comments on the observation and mentoring arrangements for Level 2 Associate Prosecutors? If so, please set them out.

The mentoring requirements are less than the existing provisions for adequate supervision of Associate Prosecutors under the current level of powers. The FDA would have to conclude that the arrangements are inadequate and a formal structure of supervision, assessment and mentoring be put in place.

Q20. Do you have any comments on the course outcomes for the Level 2 Foundation course? If so, please set them out.

No comment beyond the concerns already raised in the previous responses.

Q21. Do you have any comments on the course outcomes for the Advocacy Skills course? If so, please set them out.

No comment beyond the concerns already raised in the previous responses.

Q22. Do you have any comments on the assessment criteria for the Advocacy Skills course? If so, please set them out.

There is insufficient detail to assess the value of the assessment criteria and how they are to be defined and applied.

Q23. Do you have any comments on the content or structure of the Level 2 qualification? If so, please set them out.

There is insufficient detail to assess the value of the structure and content.

Q24. Do you have comments on the process by which IPS will accredit the CPS to deliver courses? If so, please set them out.

Subject to the general concerns already raised, specific concerns are expressed about the wide and ill defined assessment criteria. For even a very limited extension of rights the FDA would expect considerable external scrutiny and undertakings from the Crown Prosecution Service about the consistency of the training.

Q25. Do you have any comments on the oversight and monitoring role to be undertaken by IPS to ensure standards of course delivery and assessment are maintained? If so, please set them out.

Please see the response to 24 above.

Q26. Do you have any comments on the number of hours CPD Associate Prosecutors are required to undertake? If so, please set them out.

The system of CPD hours are predicated on a level of knowledge gained through academic and vocational training. The requirements of ILEX members and Fellows similarly seek to build on the recognised professional qualifications held. There is no comparable requirement for Associate Prosecutors and as such there is in essence nothing to build the knowledge upon. The requirement to attend a course and receive the relevant hours seems wholly inadequate. Perhaps the completion of a portfolio for submission to an accredited mentor or the completion of an annual refresher course is more appropriate.

Q27. Do you have any comments on the standards of conduct that IPS expects Associate Prosecutors to observe? If so, please set them out.

The sanction for any breach is unlikely to have an effect on an Associate Prosecutors as there are no provisions for striking off or similar. There appears to be no process for the removal of designation from an Associate Prosecutors and thus it is difficult to see what action IPS would take. The most likely sanction would be performance or discipline proceedings against the Associate Prosecutors as an employee of the Crown Prosecution Service and thus IPS would have little real role in the maintenance of standards.

Q28. Do you have any comments on the arrangements by which IPS will investigate the conduct of Associate Prosecutors? If so, please set them out.

Please see 27 above, it is unlikely that conduct will come to the attention of IPS in any event.

Q29. Do you agree that the CPS should be expected to refer any conduct matters to IPS as appropriate? If not, please state why.

Please see 27 above. The Crown Prosecution Service would deal with any matter internally prior to referring the matter to IPS and as such the actual regulatory role appears limited.

Conclusion

These proposals represent an exponential increase of powers of Associate Prosecutors which were never envisaged within the **Prosecution of Offences Act 1985** or under the recent extension of the **Criminal Justice and Immigration Act 2008**. This is particularly true in the realm of bail applications and committals where the increase of powers of Associate Prosecutors has already fundamentally undermined the value of the role of practising solicitor and barrister prosecutors within the Criminal Justice System. The caveats originally placed on the use of essentially unqualified lay prosecutors have been eroded and the Magistrates Court is increasingly becoming devoid of practising solicitor and barrister prosecutors. The move towards further rights for Associate Prosecutors is contrary to the increasing complexity of the criminal law and further shifts the balance away from victims and witnesses towards defendants, by virtue of their qualified lawyer representation.

Associate Prosecutors, due their lack of knowledge, both of their limitations and legal knowledge can make errors of which they are unaware. The rights were extended in spite of opposition from the FDA, the Law Society and the Bar Council not for self interest, but to preserve the parity of arms required under an adversarial criminal justice system. If a government wish to change the overarching system of law to codify existing statute and ensure that a trial is an inquisition conducted by a legally qualified investigating judge there could be a place for such lay presenters in the lower court, however until that time the role of the Associate Prosecutors must remain limited and properly supervised.

Thus the FDA explicitly opposes the extension proposed within this consultation, regardless of the limited safeguards, regulation and training schemes proposed.

Andrew P. Morgan
FDA CPS Section Deputy National Convenor
Chairman, FDA CPS Section Professional Issues Sub-Committee
Tuesday, 06 April 2010

JUSTICES CLERKS SOCIETY

Our ref: SB/RH 92.09

24th March 2010

Mrs Baljeet Basra
ILEX Professional Standards Manager
Kempston Manor
Kempston
Bedford
MK42 7AB

BY E-MAIL

Dear Mrs Baljeet

PROPOSAL TO SEEK ADVOCACY AND LITIGATION RIGHTS FOR ILEX ASSOCIATE PROSECUTOR MEMBERS

I refer to your letter of the 17th February and am grateful for the opportunity to comment on the proposal to seek advocacy and litigation right for ILEX associate prosecutor members. I hope you will forgive me if I offer the response of the Society other than by way of the response form.

The Society is satisfied that it could safely support the proposal and would offer only a few suggestions and comments. As the Society sees it ILEX litigators would have to be qualified as a LEx with qualifications that aren't much different from a barrister, and then must do two additional stages, one as a litigator and a further one as an advocate. They would then receive a certificate of eligibility. The standards of advocacy are also the subject of a consultation, but the point is that they are common standards with the Law Society and the Bar, so there should be no difference in the standard aspired to.

The proposal on advocacy is that they can do civil and family work in the Magistrates' and County Court. LExes, with leave, do some advocacy in Family Proceedings Courts already and legal advisers and magistrates have no problem with that; they are competent and generally on top of the work – in some cases more so than barristers for obvious reasons, as they've usually had conduct of the case throughout.

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The Society would suggest that the formulation for cases in the Magistrates' Court is rather out of date. It should be:

To appear before justices or a district judge (Magistrates' Court) in the Magistrates' Courts in relation to all matters originating by complaint or application, including applications under the licensing, betting and gaming legislation;

Since this means civil proceedings in the Magistrates' Court, the Society believes it would be better to say so, rather than tie eligibility to a specific process (which could be changed, like charge and requisition). The Society sees no objection to their dealing with fines enforcement, though that might go further than they want to go. If it's agreed that it's appropriate for them to do advocacy at all, I think a better formulation would be:

To appear before magistrates, District Judges (Magistrates' Court) or Justices' Legal Advisers in the Magistrates' Courts in relation to all civil [and enforcement] matters.

Taking out the square brackets would remove fines enforcement – maintenance enforcement proceedings are civil in any event

Likewise, in the next section, (Advocacy in the Family Court), Justices' Legal Adviser ought to be added to the list of judiciary, as the most likely place for a LEx to appear is in a directions court.

Much of the consultation is taken up with how LExes will qualify, and that reads very like any other professional qualification. It follows the pattern with the other profession, of requiring individual elements to be separately certificated, so that a LEx has to be certified as both a litigator and an advocate before they could practice in a court.

I trust that these comments are of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sid Brighton', written over a horizontal line.

Sid Brighton
Chief Executive

LAW SOCIETY – EXTRACTS OF RESPONSE (includes full comments in relation to associate prosecutors)

Mrs B Basra
ILEX Professional Standards Ltd
Kempston Manor
Kempston
Bedford
MK42 7AB

21 April 2010

Dear Mrs Basra

Re: consultations on gaining probate, litigation and rights of audience for ILEX members and rights of audience for associate prosecutors

The Law Society welcomes the opportunity to comment on ILEX Professional Standard's (IPS) proposal to seek rights to carry out probate activities, conduct litigation and rights of audience for ILEX members. IPS has put forward a set of proposals on the training, qualification and regulation of members who wish to gain these new rights. I am grateful to you for agreeing to extend the deadline for response.

The Legal Services Act 2007 enables existing approved regulators to apply to the Legal Services Board to extend the range of reserved activities which they may authorise persons to carry out. The Legal Services Board will consult with prescribed bodies on an application before scrutinising it and making a recommendation to the Lord Chancellor, who will decide the fate of the application. The Legal Services Board must consider the application against various criteria laid out in the Act.

The Law Society believes that protecting the public interest should be paramount when considering any regulatory change. We consider that ILEX members should only be granted the rights to carry out the proposed activities if they are able to demonstrate that they meet the same high standards as solicitors. Solicitors' training means that they gain a broad knowledge of law and are able to apply this knowledge in a multitude of different areas. We would be concerned if other legal professionals seeking to compete with solicitors did not acquire this same broad knowledge. The professionalism and integrity of the solicitors' profession is of the utmost importance to clients and we would hope to see any competitors match these standards. We

would also expect those entering the market to be subject to a similarly robust and credible system of regulation as solicitors.

Rights of audience for associate prosecutors

The Criminal Justice and Immigration Act 2008 originally proposed that Associate Prosecutors would be unregulated and simply subject to the employee/employer relationship within the CPS. Following negotiations and lobbying by TLS, the legislation provides that Associate Prosecutors must be regulated by an external regulator, and the CPS were given until 2011 for Associate Prosecutors to become members of ILEX. The Law Society was accordingly pleased that this group of paralegals will be subject to regulation by an external (to the CPS) regulator.

The consultation paper proposes there will be two levels of Associate Prosecutor qualification. Level 1 will be such that Associate Prosecutor will perform the level of work which they perform now, which includes prosecution of all cases in the magistrates' court, including trials of non-imprisonable offences. Level 2 will enable them to prosecute every case except trials of 'either way' offences - more serious cases that can be tried in the Magistrates' Court or the Crown Court. The consultation paper also allows that Level 2 Associate Prosecutors could conduct Youth Court advocacy.

The consultation paper outlines the regulatory system, including the Code of Conduct which is based on, and is therefore essentially the same as that for solicitors, as well as the CPD requirements. The Law Society is generally content with these arrangements.

We note that the Post Qualification Competence requirements include monitoring by the supervising Crown Prosecutor, and the provision of instructions and general supervisory functions by the supervising Crown Prosecutor. In view of the way that criminal cases can produce unanticipated issues in the course of a hearing, the fast-paced nature of magistrates' courts lists, and the often very serious nature of the decisions being made - for both the alleged victim and the defendant - it is submitted that the reference to supervision should specifically refer to the need for the supervising Crown Prosecutor to be available to be contacted at all times in the course of the court session. The practice of a supervising Crown Prosecutor prosecuting in his or her own court whilst supervising the work of Associate Prosecutors elsewhere in the courthouse is unsatisfactory and causes disruption to the court list.

In addition, the Law Society has concerns about the entry qualifications. In relation to Level 2, the entry qualification does not require the candidate to have any academic or legal qualification whatsoever, and nor do they have to be an existing member of the CPS workforce. Apparently someone without any academic or legal qualification at all could qualify as a Level 2 Associate Prosecutor. The Law Society submits that in order to become a level 2 Associate Prosecutor, the minimum requirement must be that they have completed the 'ILEX part 2 criminal law and practice' paper, or the Legal Professional Course or equivalent Bar qualification, or have a law degree. We consider that this is particularly important because many of these offences are serious and legal issues are likely to arise where it will be essential that the Associate Prosecutor should be able to recognise them as such and seek appropriate advice. We believe that a basic knowledge of the law is crucial for this.

REMAINDER OF LETTER NOT COPIED HERE – RELATED TO OTHER
CONSULTATIONS ISSUED BY IPS

Yours sincerely

Mark Stobbs
Director of Policy