



JUDICIARY OF  
ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD JUDGE

Ms Emily Lyn,  
Legal Services Board,  
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Southampton Row,  
London  
WC1B 4AD

26 January 2011

*Dear Ms Lyn,*

**Application by ILEX to become an Approved Regulator to award the right to conduct litigation, rights of audience and rights of probate**

Thank you for your letter of the 9<sup>th</sup> of December 2010 in which you invite my comments on the above application by the Institute of Legal Executives (ILEX).

Under the Legal Services Act 2007 (the 2007 Act) I am a statutory consultee on applications from bodies to become approved regulators. In deciding what advice to give the Legal Services Board (LSB) I am required *'to have regard to the likely impact on the courts on England and Wales'* should the application be granted. As envisaged by Parliament during the passage of the 2007 Act, I have sought the views of other members of the senior judiciary before arriving at my advice.

I note that the Legal Services Consumer Panel (LSCP) has not concluded that granting the applications will have a positive impact on the consumer interest<sup>1</sup>. It is a matter of concern that it has failed to identify a clear and significant consumer interest in favour of granting the applications. I share the additional concerns expressed by the LSCP in respect of the applications.

I raise three further matters:

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<sup>1</sup> Letter, Dr Dianne Hayter, LSCP to Paul Greening, dated 7 December 2010 ([http://www.legalservicesconsumerpanel.org.uk/publications/consultation\\_responses/documents/2010-12-07\\_ILEX\\_Probateandlitigationapp.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2010-12-07_ILEX_Probateandlitigationapp.pdf)).

- (1) It is not certain that regulatory competition will operate in the public and consumer interest;
- (2) It is imperative that the regulatory standards imposed on ILEX Members in independent practice are equivalent to those put in place by the Solicitors Regulatory Authority (SRA) and the Bar Standards Board (BSB); and
- (3) The disciplinary jurisdiction exercised at present by the courts in respect of solicitors and barristers ought to be extended to include ILEX Members.

### **Application to award the right to conduct litigation and rights of audience**

#### **(1) Regulatory competition operating in the public and consumer interest**

These applications assume that it is in the public and consumer interest, and will as a consequence benefit the proper administration of justice in the courts of England and Wales, to increase the number of Approved Regulators responsible for granting the right to conduct litigation and rights of audience.

We need to examine in more detail whether that assumption is correct. It is difficult to see how in practice regulatory competition can improve standards of regulation, and thereby further the public and consumer interest. I am concerned that the proliferation of regulation concerning the same activities could lead to a reduction in standards and cause detriment to the consumer and public interest. Increasing complexity in regulation by authorising different regulatory bodies to regulate the same activity appears likely to lead to an ever-more complex regulatory environment; to an environment which the 2007 Act was supposed to render more transparent and simpler in the consumer and public interest. It is particularly worrying in this respect that the LSCP is itself *'sceptical that regulatory competition benefits consumers.'*<sup>2</sup> I would add that it is difficult to envisage regulatory competition benefiting the proper administration of justice; on the contrary it would appear to present a risk to the proper functioning of the courts unless it is carried out to the equivalent standard and degree by all regulators. This is a point which needs further detailed consideration.

#### **(2) Regulatory standards to be equivalent to those of the SRA and BSB**

I am not satisfied that these applications contain sufficient assurance as to ILEX's ability to guarantee the carrying out of proper and effective regulation of its members to the same standard as that carried out by either the SRA or the BSB. It is imperative that the applications provide such a guarantee, given that their approval would enable ILEX members to operate in independent practice as litigators or advocates. This is particularly the case in respect of authorisation to conduct litigation in independent practice, given that such authorisation will entail, inter alia, ILEX members holding client funds unsupervised by a solicitor. ILEX members will carry out a role, which if carried out by a solicitor, would be subject to the detailed provisions set out in the Solicitors' Code of Conduct and the regulations governing client accounts. It will also enable ILEX members to carry out activities which the SRA regulates through detailed investigatory, regulatory and disciplinary mechanisms. The same considerations apply in respect of the

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<sup>2</sup> Legal Services Consumer Panel, Consultation Response, BSB: Regulating Entities at [9] ([http://www.legalservicesconsumerpanel.org.uk/publications/consultation\\_responses/documents/2010-12-22\\_BSB\\_RegulatingEntities.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2010-12-22_BSB_RegulatingEntities.pdf)).

regulatory and disciplinary procedures put in place by the BSB for barristers. Suitable and equivalent training requirements must exist for ILEX Members as exist for solicitor advocates and members of the Bar: training provisions must take account of agreement on the scheme for the Quality Assurance of Advocates.

I am concerned that the present applications lack sufficient detail to demonstrate that ILEX is in a position to carry out the necessary degree of regulatory and disciplinary oversight of its members, were they to operate in independent practice as litigators or advocates. It is noteworthy that ILEX's recent application for its members to be able to become managers of Legal Disciplinary Partnerships (LDP) was approved by the LSB on the express proviso that ILEX LDP managers were to practice in firms regulated by the SRA and were to come under the supervision rules of the Solicitors' Code of Conduct. In this way, such managers are subject to the detailed compliance provisions provided by that Code and to compliance checks carried out by the SRA.

Furthermore, unless ILEX is able to replicate the regulatory and disciplinary scrutiny of its members as is carried out by the SRA and BSB it is difficult to see how it could ensure that its members carry out reserved activities in the consumer and public interest. Any grant of this application must ensure that proceedings will be conducted properly. Failing do so will lead to otherwise avoidable damage to litigants and problems for the efficient and economical administration of justice.

Finally, the present division between representative and regulatory functions between ILEX and ILEX Professional Services Ltd, set out in both applications, does not appear to be commensurate to the degree of organisational and physical separation of functions which exists in respect of The Law Society and the SRA and the Bar Council and the BSB. The arrangements detailed in the applications seem to provide for the possibility that too great an emphasis could be given to the interests of ILEX members in obtaining the right to practice reserved activities without proper and adequate consideration of the attendant risks to the consumer and public interest and the proper administration of justice.

### (3) Courts to have disciplinary oversight of ILEX Members

It is also a matter of concern that the court will be unable to provide the same degree of regulatory and disciplinary oversight of ILEX members in independent practice as litigators or advocates as it presently does over solicitors and barristers. In enacting the 2007 Act Parliament modernised the regulation of the legal profession but left unchanged the court's residual disciplinary jurisdiction over solicitors, as officers of the court, contained in s50 of the Solicitors Act 1974. In addition it left unchanged the judiciary's visitorial jurisdiction over members of the Bar. The present applications provide for no similar degree of residual control by the judiciary; residual control which is carried out to further the public interest and the proper administration of justice in the courts. It is imperative to reconcile the degree of regulatory and disciplinary oversight proposed by the present applications with that which exists for solicitors and barristers. It is difficult to see how, without the introduction of comparable residual regulatory and disciplinary scrutiny by the courts and judiciary, such regulation may reach the same standard as that applied to solicitors and members of the bar.

**Application to award rights of probate**

I regard the issues raised by the application to award rights of probate to be substantially similar to the issues I have addressed above. My concern at the proliferation of regulators, the need to ensure regulation at a level commensurate with that offered by the SRA and the lack of direct accountability to the court are also highlighted in respect of this application.

**Conclusion**

In all the circumstances, having reviewed the applications, I must express concern that the present applications could give rise to a potential negative impact on the proper administration of justice in England and Wales, and the court's ability to operate in both the public interest and the consumer interest. More needs to be done before I could advise that I had no concerns regarding these applications.

*Yours sincerely,*

*Jon Judge*