



The Bar Council

Bar Council response to CILEX Rights of Audience

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to CILEX's consultation on Rights of Audience.¹
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality, and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal, family and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Question 1: Do you agree that CRL should seek Higher Rights of Audience for suitably qualified CILEX Practitioners?

4. No
5. The current training for CILEX practitioners to obtain rights of audience in the lower courts is as follows
 - At para 13 - "*...CILEX Practitioners with litigation and advocacy already hold rights of audience in the lower courts. The rights of audience are awarded by CRL once the*

¹ <https://cilexregulation.org.uk/wp-content/uploads/2023/07/Higher-Rights-of-Audience-Consultation-24-July-2023.pdf>

applicant has successfully completed a CRL approved advocacy skills course and assessment (the right to conduct litigation is assessed separately). They can then apply for authorisation."

- At para 14 - *"The current advocacy skills course is outlined below:*
 - *It consists of 36 hours tuition, delivered over 6 one day sessions (including one day of home study to complete the law of evidence requirements).*
 - *It develops candidates' advocacy skills and tuition is provided in to encourage the maximum amount of individual participation.*
 - *Candidates are provided with feedback throughout the course, after which the candidate is formally assessed through simulated court proceedings.*
 - *The skills developed during the course build on pre-existing skills that the candidates have developed in the workplace, and cover: Professional Conduct, Interviewing, Negotiation, Case Analysis and Theory, Skeleton Argument o Advocacy (preparation and at the hearing), and Evidence.*
6. The additional training proposed for CILEX practitioners to obtain Higher Rights of Audience is set out as follows:
- At para 15 - *"CRL has worked with our current external assessors for the advocacy skills courses to determine additional requirements to enable CILEX Litigators and Advocates to obtain Higher Rights of Audience."*
 - At para 17 - *"because most family proceedings work is dealt with in the lower courts, and the existing advocacy rights course will provide appropriate rights of audience, CRL is not proposing to provide a separate Higher Rights qualification for family work. However, family lawyers seeking Higher Rights would be able to take the civil route if they wished to seek Higher Rights of Audience. This also applies to immigration lawyers."*
 - At Para 19 - *"As part of developing these additional skills, CRL proposes that the additional training should include formative assessments to cover:*
 - a. *A Trial Strategy Plan (TSP).*
 - b. *Additional written training to extend the knowledge gained on the current Advocacy Skills course in relation to evidence*
 - c. *Crown Court processes, conduct, ethics, and etiquette*
 - d. *Speeches, applications and submissions, appeals, skeleton arguments*
 - e. *Sentencing and mitigation*
 - At para 20 - *"CRL estimates that this will require an additional 12 hours of training over two days with pre-reading required.*
 - At para 21 - *"CRL would propose that prospective candidates will become eligible to take the additional training once they have completed their first renewal of their Advocacy rights. This is to ensure that they have the appropriate experience to undertake advocacy in all courts".*
7. In other words, a CILEX Practitioner need only complete 36 hours tuition, delivered over 6 one day sessions (including one day of home study to complete the law of evidence requirements plus an additional 12 hours of training over two days to be eligible to apply for Higher Rights of Audience in the criminal and civil courts.

8. There is no provision for specific training for practitioners who seek Higher Rights to appear in family or immigration cases. It is wrongly assumed that those two highly specialist areas of the law, with rules, regulations and practice directions of their own, can somehow be subsumed within the training offered in Civil law.
9. The established route to the Bar involves independent checks of intellectual ability, stamina, skills in written and oral advocacy, and the ability to consistently make swift and correct judgments. Those checks are made at multiple stages in a training route that lasts for years and includes at least an undergraduate degree, the Bar vocational course, and then a year of pupillage. For many, there will be added into that list conversion course qualification, and periods of alternative employment which enable them further to develop such skills. At each stage, there is the involvement of external assessors who have little vested interest in whether the person succeeds or fails. This ensures that the standards of the respective institution – the quality of the degree course, the status of the postgraduate course provider and the reputation of the status remain high.
10. The result of the training is that those who attain the qualifications, have proved themselves to possess the high quality of skills needed properly to act as a barrister. The courts and their clients can be confident in their intellectual abilities, judgement and integrity because they have proved them at many stages. That serves to ensure that the high standards necessary to ensure the effective administration of justice are maintained.
11. The CILEX proposals bring very little of this and overlook such complex matters. There is a concern that these standards will be relaxed for CILEX practitioners whilst they continue to be strengthened for barristers in the public interest. To address this issue, there should be an appropriate and rigorous standard of training and expertise that should be demonstrated by these practitioners before qualifying. Those standards should be equal to the standards expected of solicitor-advocates and barristers to ensure that no client is misrepresented.

Question 2: Do you agree with CRL’s proposals to ensure that applicants to exercise rights of audience in all courts should complete the training and assessment outlined in the consultation?

12. No. (We assume the question means “... should complete *only* the training...”)
13. The training process to become a barrister and solicitor (then solicitor-advocate once qualified as a solicitor is detailed and clear. The content of the training and assessment proposed for CILEX practitioners to obtain Higher Rights of Audience remain unclear and are not specified within the proposals. That is a significant failure.

14. For many years, the Bar has significantly developed compulsory advocacy training, particularly for those at the early years of practice. The New Practitioners Programme, and the implementation of compulsory advocacy training in the first six months of pupillage, underpins the profession's commitment to protecting the public interest. This advocacy training is ongoing even after the completion of the Bar's vocational component to ensure that newly qualified barristers can provide high quality advocacy to their clients.

CILEX CPD Requirements

15. CPD Guidance Document Updated May 2022 set out the CPD CILEX practitioners are expected to engage in.
16. CILEX Practitioners and Advocates required to complete 9 CPD outcomes each year, at least 5 of which must be planned.
17. For CILEX Litigators and Advocates at least 2 of the 5 planned outcomes must be related to advocacy focused activities to develop skills as an advocate and knowledge of procedure.
18. Outcomes can be met through variety of CPD activities including: attendance at courses, shadowing other advocates, webinars focused on drafting arguments.
19. Other requirements for other types of CILEX members e.g. Paralegal members required to complete 8 hours CPD and 1 professional outcome.

"A planned outcome would be a learning outcome which you plan in advance; you need to know what you want to update your knowledge/competence on. Once you have set a learning outcome, you would undertake an activity which would be you completing the outcome."

"An unplanned outcome is simply how it sounds; we would describe this as unexpected learning. This would be an activity which you undertake and have not planned beforehand. An example of this would be reading the CILEX Journal, you are unable to plan what topics will arise therefore if you did benefit from the article it would be an unplanned outcome."

20. The Bar Council cannot see any specific provision for continuing professional development set out within CRL's proposed training and assessment. The general provision for continuing professional development set out for CILEX practitioners is inadequate to assist those who have Higher Rights of Audience to undertake focused advocacy training to ensure continued improvement of their advocacy, the currency in their thinking and remain practitioners who are across the detail of developments in the law.
21. As presently drafted, the CILEX proposals do not enforce the same standards that are established in the current Bar route. There is no multi-centre quality assurance built in, with the entire process dealt with within CILEX. There is no indication of who it is within CILEX, who possesses the skills and experience needed to teach, for example, cross-examination, drafting documents for the Court of Appeal, or the

application of the disclosure regime. There is no indication of how the process would link into membership of or training offered by the Inns of Court. There is no indication as to how long the training process will last, nor is there any indication of its rigour.

22. The proposals for training and assessment lack detail and the information provided is not only inadequate to assist the reader to assess the quality of the training it also lacks specificity. By way of example, how will the training and assessment compare with the solicitor-advocate training, and the Bar training? These questions remain unanswered in the current proposal.

Question 3. Are there any additional elements of the training and assessment that you believe should be included within the standards for CILEX higher court advocates in civil proceedings?

23. Yes

24. As we note below in our response to Question 4, trial advocacy is a high-level skill requiring academic, intellectual, and vocational training that barristers receive and develop over an extended period of time. The vocational aspect of the Bar course is rigorous in its testing which aims to ensure that barristers can manage the pressured situations that they are regularly required to face. In civil proceedings, those can involve not only the inevitable emotional stresses of dealing with clients and others in a context where their homes, children and/or livelihoods are threatened, but also highly technical matters where it is necessary to understand the evidence of experts across a wide range of fields and challenge that evidence with incisive cross-examination. Barristers are expected to engage effectively with people across the whole spectrum of society, to manage these stresses and challenges and to respond appropriately in a formal and structured setting. This requires a set of skills that is developed through the vocational component of the course and strengthened during pupillage. Given the significant amount of time and energy dedicated to this area in training for the Bar, The Bar Council does not feel that the current training and assessment model is able to deliver these standards.

25. Further there are specific aspects of civil litigation that are either not included in the assessment outcomes and criteria or appear to have little emphasis given to them including (i) written advocacy skills to include the drafting of statements of case; (ii) pre action processes and requirements; (iii) cost management; (iv) appeals and (v) in the context of conduct and ethics an awareness of the importance of diversity and equality considerations.

Question 4. Are there any additional elements of the training and assessment that you believe should be included within the standards for CILEX higher court advocates in criminal proceedings?

26. Yes

27. Trial advocacy is a high-level skill requiring academic, intellectual, and vocational training. Practitioners need to have speed of thought, precision of language, and clarity of judgement. Those who are successful in qualifying as barristers through the existing route to the Bar gain those skills. They learn, for example, the need to make important decisions quickly, and get them right – whether that be in answering exam questions and justifying their answers, or in mock trials or mooting. The vocational aspect of the course is rigorous in its testing. It ensures that barristers can manage the pressurised situations that they will be facing in the course of adversarial litigation in the criminal courts. In criminal proceedings, situations are often emotionally as well as intellectually challenging, and barristers are expected to manage these stresses and act appropriately – in accordance with their duties to the court and to their clients, whether the client is the State or an individual charged with an offence. They are able to do this because it is a skill that is developed through the vocational component of the course and strengthened during pupillage. Given the significant amount of time dedicated to this area, The Bar Council does not feel that CILEX’s training and assessment model is able to deliver these standards.

Question 5: Do you foresee any issues with the revised Practitioner Authorisation Rules?

28. Yes

29. CILEX’ document is premised on the assertion, “[a]s the legal sector evolves there’s a growing demand for a new kind of lawyer – a specialist lawyer.” A specialist lawyer is not a “new” kind of lawyer, they exist in every area of law. The Bar is made up entirely of specialist lawyers: specialists because of their core emphasis on advocacy, whether written or oral; and specialist because all will have fields of law in which they operate.

30. CILEX suggests that “*specialist lawyers are the future of law*”. That may or may not be so, but if it is, then the Bar in its present form already provides such specialists. But, like doctors, they are specialists who arrive at that specialism having had a lengthy training starting at the basics and honing their specialist skills through years of training.

31. There is also no indication of what minimum standards are needed for CILEX practitioners to access Higher Rights, and how they will be fulfilled. One key issue is that there is limited reference made to the duty to the court and duty to the client, which is fundamental in all Bar training and practice.

Question 6: Do you agree that the application for Higher Rights of Audience should be restricted to those Chartered Legal Executives who hold both Litigation and Advocacy rights (CILEX Practitioners) and that those who only hold Advocacy rights (Chartered Legal Executive Advocates) would not be eligible to apply for Higher Rights of Audience?

32. No, because the Bar Council contends that none of the above should be eligible to apply for such rights.
33. The Bar requires consistent testing to ensure that barristers are competent to deliver high quality advocacy to their clients. This is primarily emphasised through the vocational component and is supported by the Inns of Court. As a new practitioner, it is expected that a total of 45 hours' worth of advocacy training must be undertaken by the end of the first three years of independent practice following the completion of the BTC and Pupillage. There is a significant amount of investment into developing these skills as a barrister, which is not currently addressed under CILEX's training proposal. Until CILEX are able to demonstrate that they can deliver a similar standard, The Bar Council does not support the application for Higher Rights of Audience to be administered to any CILEX practitioners.

Question 7: Do you have any other comments?

34. Yes
35. The CILEX proposals do not provide the training necessary to attain Higher Rights of Audience and properly practise at such a level.
36. The failure to provide specific and bespoke training and assessment for those practitioners who would wish to practice in the higher courts which deal with family and immigration cases is a material omission and demonstrates a fundamental lack of understanding and appreciation for the specialism of those areas.
37. In recognition of the demands of higher rights advocacy, the training for a practising barrister includes the following (subject to any exceptional waivers due to e.g. equivalent training received abroad):

Academic component

- Law degree or non-law degree plus graduate diploma in law (GDL).
- Degree covers seven foundations of legal knowledge.
- Minimum of 2:2 to be accepted onto a Bar vocational course.

Vocational component

- Bar vocational course
- Also must be part of an Inn and complete qualifying sessions before being called to the Bar.
- Qualifying sessions often educational e.g. aimed at improving advocacy/knowledge.

Pupillage

- Extremely competitive – successful candidates likely to have high academic attainment, prior advocacy experience, mini-pupillages etc.

- Must demonstrate competencies set out by BSB in Professional Statement:
 - Legal knowledge, skills and attributes
 - Practical knowledge skills and attributes i.e. good written and oral communication
 - Advocacy
 - Professional standards
 - Personal values and standards
 - Working with others
 - Management of practice
- Allocated several experienced supervisors to mentor throughout pupillage.
- Frequent attendance at courts across all levels and range of practice areas.
- Likely to include not just shadowing but drafting, research, conferences etc.
- Own caseload in second six.

New Practitioner CPD

- For barristers who have held a practising certificate for less than three years.
- Must complete 45 hours of CPD within the three-year period.
- This must comprise of:
 - At least nine hours on advocacy; and
 - At least three hours on ethics.
- Advocacy and ethics courses provided by Inns of Court
- CPD must be recorded on New Practitioner Programme Record Card

Established Practitioner CPD

- For barristers who have held a practising certificate for more than three years.
- No minimum number of hours.
- Individual responsibility to decide what training is required.
- Four stage process:
 1. Review – required to prepare a written CPD plan setting out learning objectives and proposed activities for the year.
 2. Record – keep a written record of CPD activities over past three years, including reflections on CPD activities and any variation in plans and an assessment of future learning objectives.
 3. Reflect – reflect on planned and completed CPD activities to assess whether have met objectives.
 4. Report – declare annually to BSB that CPD has been completed when renewing practising certificate.

Examples of BSB approved CPD activities: formal training courses, conferences, listening to podcasts, seminars and webinars, reading and research, authorship and editing of published works of a professional nature, presenting seminars/lectures, teaching a relevant legal course.

38. The proposals from CILEX do nothing to demonstrate that those who meet them will be able to practise advocacy at the high levels needed. They do nothing to demonstrate that those who meet them will be able to make important decisions

correctly and within a tight – often instantaneous – timeframe. They do nothing to demonstrate that those who meet them will have the intellectual ability to stand up for their client against those who have taken an established route to the Bar. They do nothing to demonstrate that an equivalent to the Barrister’s duty to the court will have been deeply embedded in those so trained. Such skills and abilities are developed through the years of training in the established route to the Bar. Their purpose is to ensure that the standards of the profession remain high, and the quality of work provided to clients, and displayed in court, is maintained. For these reasons, The Bar Council’s Education & Training Committee does not support the scheme proposed by CILEX.

What would be needed before it could be appropriate to grant higher rights to CILEX Members

39. If there were ever to be a move to extend higher rights of audience to CILEX members it would need to be supported by a much more careful analysis than has so far been proposed. That analysis would need to include a thorough and careful comparison of the content and form of the training and experience of (a) barristers, (b) solicitors with higher rates of audience, and (c) the present position of CILEX members and (d) the proposed additional training and qualification requirements for CILEX members seeking higher rights of audience. It would need to demonstrate that (c) plus (d) was equivalent to (a).
40. Nothing in the present proposal properly addresses this task.
41. If and when such an analysis had been performed, and if and when it were established that the necessary equivalence had been demonstrated, it would then be necessary to ask whether it would be better simply to require CILEX members who sought higher rights of audience to requalify either as barristers or solicitors, or to permit a system in which some proportion of CILEX members were able to acquire higher advocacy rights. The answer to that question is neither obvious nor straightforward, and depends in part on assessing the potential confusion for consumers that might arise. But the second question does not arise on the present proposals because they do not come close to demonstrating equivalence.

The Bar Council
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