Note regarding guidance issued affecting rights of audience in the Crown Court

The Right to Exercise Rights of Audience

1. Rights of audience in the Crown Court are dealt with at Archbold 2-23 2018.
2. This section of Archbold lays out that rights of audience before the Crown Court are governed by Pt 3 of the Legal Services Act 2007: see ss.12 and 13. Section 13(2) stipulates that a person is entitled to carry on a reserved legal activity if the person is an “authorised person” or “exempt person” in relation to that activity. An authorised person is a person who is authorised to carry on the relevant activity by a relevant approved regulator in relation to the relevant activity: s.18(1)(a). An exempt person is a person who is exempt by virtue of Sch.3 (exempt persons) or Sch.5, para. 13 or 18 (additional categories of exempt persons during transitional period). An “approved regulator” is a body which is designated as such by Sch.4, Pt 1, or under Sch.4, Pt 2, and whose regulatory arrangements are approved for the purposes of the Act, and, if an order under s.62(1)(a) has effect, the Legal Services Board (s.20(2)); and an approved regulator is a “relevant approved regulator” in relation to a reserved legal activity if the regulator is designated by Pt 1, or under Pt 2, of Sch.4 in relation to that activity, or where the regulator is the board, it is designated in relation to that activity by an order under s.62(1)(a). An approved regulator may authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant approved regulator: s.20(6). The 2007 act replaced the Courts and Legal Services Act 1990.
3. Put briefly, a barrister has rights of audience in the Crown Court where the Bar Standards Board is satisfied he or she has the relevant qualifications, has satisfied the continuing professional development (“CPD”) requirements and possesses the necessary insurance. A practicing certificate will be issued and valid in these circumstances and these circumstances only.
4. It is also of note that there are additional regulatory and supervisory implications for barristers of up to three years’ qualification. In order to have rights of audience, such barristers must have a supervisor in their office or chambers who must be registered as such and must be readily available to provide guidance to them. A practicing certificate will not be issued without this supervisory role.
5. In order for solicitors to obtain rights of audience for the Crown Court (save for exempted matters including appeals and bail applications), they must first obtain a higher rights qualification and are required to demonstrate that they are competent to undertake advocacy by successfully completing assessments prescribed by the authority, or by gaining an equivalent qualification in a comparable jurisdiction. Only in such circumstances will they obtain rights of audience in the Crown Court and higher courts. Only such solicitors on the roll will an approved regulator by the meaning of the 2007 act. Such solicitors must be appropriately insured and have complied with their CPD requirements.
6. CiLex legal executives can obtain extended rights of audience with the relevant qualifications. However, they are unable to apply for higher rights to practice in the Crown Court and higher courts save for in appeals and bail applications. This distinguishes them from qualified solicitors who are able to obtain higher rights.
7. Section 14(1) confirms that carrying on a reserved legal activity without being entitled to do so is an either-way offence, punishable on conviction on indictment, with imprisonment for a term not exceeding two years or a fine (or both).

*Exceptional Discretion to grant rights of audience*

1. The inherent jurisdiction for a court to grant rights of audience is preserved under Legal Services Act 2007, schedule 3, paragraph 1(2).
2. The requirements and exemptions contained within the Legal Services Act 2007 are detailed. We submit that from the content of the statute it is clear that the discretion is a residual one that should operate on a narrow basis.
3. Consideration has been given to when such a residual discretion should be used both by way of case law and court-issued guidance. In February 2016, in a consultation document issued by the Lord Chief Justice[[1]](#footnote-1) in relation to Mckenzie friends, the issue of granting rights of audience is dealt with. In this document, the LCJ confirms it should be used on a case by case basis.
4. There are a number of cases which confirm the power should be exercised on a case by case basis (eg *D v S (Rights of Audience)* [1997] 1 FLR 724, based on the mirror provisions of the 1990 Act; *Paragon Finance plc v Noueiri* [2001] 1 WLR 2357 at 2368ff). These cases make clear that the residual discretion is not a way of granting rights of audience generally. The 2007 act is designed with a view to maintaining the proper and efficient administration of justice by ensuring those that appear in the courts are properly qualified and regulated to do so. The discretionary power is therefore a limited one.
5. Munslow Messias v Mullarkey [2003] EWHC 2600 (Ch) also deals with the fact that it would not be appropriate to grant rights of audience on a blanket basis for the entire proceedings and that instead the granting of rights of audience will have to be dealt with throughout the proceedings.
6. *D v S* is a case relating to an unqualified person. However, Lord Woolf MR highlighted the stringent requirements as to training and conduct on those obtaining rights of audience and described it as being “monstrously inappropriate” and out of spirit with the 1990 act to grant rights of audience to unqualified persons. He said the power should be used in exceptional circumstances when considering *D v S*. This applies equally to the 2007 act which in fact lays out more stringent requirements for individuals obtaining rights of audience. The statutory regime has made clear that there will be stringent requirements governing rights of audience. The comprehensive nature of the statute is supportive of the discretion being a residual and narrow one. Whilst the bulk of the case law relates to Mckenzie friends and unqualified advocates, a number of the principles relating to the residual discretion and its exceptional use apply.

Compulsory Insurance

1. As all will be aware, all advocates must have professional indemnity insurance in order to practise lawfully. A minimum level of cover is set by the BSB in order for barristers to lawfully deal with in-court advocacy.
2. BSB guidance makes clear that any failure to have valid insurance invalidates the authorisation that a barrister has to practise and will amount to a breach of the BSB handbook. Failure to provide the BSB with evidence of insurance will invalidate the authorisation and the individual or entity will therefore not be authorised to practise.  Barristers would also be in breach of your professional obligations pursuant to the BSB Handbook (S83.4).
3. The SRA also confirms that solicitors’ firms are subject to compulsory insurance. A solicitor without higher rights is not authorised to conduct advocacy unless one of the exceptions detailed above applies.
4. A solicitor without higher rights and a paralegal would not, save for in exceptional circumstances, be permitted to conduct advocacy. In those circumstances, the professional indemnity insurance held by solicitors is unlikely to extend to cover the conducting of advocacy by those without the appropriate qualifications.
5. Each firm will likely want to consult their indemnity insurers on an urgent basis regarding the impact of the court’s guidance that solicitors will address the court at PTPHs. It seems very unlikely that such insurers will be willing to indemnify in these circumstances and firms will likely want to be sure of their position before being granted rights of audience by the courts.
6. These considerations are of course separate but in addition to any ethical and competency based assessment that those applying for rights of audience would consider. The SRA has provided separate guidance on that topic.
1. https://www.judiciary.gov.uk/wp-content/uploads/2016/02/mf-consultation-paper-feb2016-1.pdf [↑](#footnote-ref-1)