



Bar Association for Commerce, Finance and Industry

Submission to the Bar Standards Board Pupillage Review Group (“PRG”)

This paper follows a meeting of the PRG with representatives of BACFI on 6th May and expands and supplements the issues discussed at that meeting.

Key messages:

- **The number of pupillages should be increased so that all competent barristers have the opportunity to achieve full practising status**
- **There is scope for more pupillages in the private sector**
- **Barriers to becoming a PTO need to be removed**
- **More flexibility in the format of and content of pupillage is required**
- **Clear standards (for pupils and supervisors) need to be set**
- **Firms need to be persuaded of the advantages of training barristers - a BSB education programme to firms on becoming a PTO is needed**
- **None of our proposals compromise quality of training**

Introduction

The Bar Association for Commerce, Finance and Industry was founded in 1965 to promote the interests and professional status of barristers employed in commerce, finance and industry. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed barristers practising outside chambers in commercial organisations.

BACFI is keen to play its part as a representative organisation in helping shape the development of the Bar of England and Wales, by bringing forward the views of its members and pressing for appropriate change. BACFI actively supports the objective of an independent and high quality bar, accessible to all.

The background

BACFI is concerned that following the introduction of the new Code of Conduct in 2000, many barristers have not been able to obtain a practising certificate because of the lack of pupillage opportunities. Although those called before 2000 may rely on the “206 regime”, this is regarded as most unsatisfactory both in regulatory and practical terms and is unlikely to continue following the current review of the practising rules of the Code of Conduct.

If more training opportunities are not created the number of non-practising barristers (“npbs”) will continue to increase. Many npbs do carry out legal services. They are not permitted to offer such services as barristers but we know from our research that the fact that they have been called to the bar leads many employers to rely on their legal skills. We feel this is a regulatory risk. Creating more training places for competent BVC graduates would help to minimise this risk.

One of the concluding recommendations of the Richards’ report in December 2006 was that:

“We agree and recommend that the process of training for the Bar should as a matter of urgency be reviewed so as to consider whether more training and qualification opportunities can be created for BVC graduates. The practical issue is who will have the responsibility for doing so. This is likely to involve substantial resources in time and money. We recommend that the Bar Council (including the Bar Standards Board) and the Inns, which all have real interests in this issue, should assume that responsibility.”

The Bar Council representatives on this group agreed that:

“The Bar Council takes the clear view that that there is scope for looking at alternatives to pupillage and ensuring flexibility about the requirements required to exercise rights of audience. In particular, strenuous efforts need to be made to persuade employers and the government service to provide more employed pupillages than are presently on offer. How this can be achieved is beyond the scope of this working group, but is to be actively addressed by the EBC of the Bar Council.”

We understand that the present review of Pupillage stems from these recommendations and from the Neuberger¹ recommendations. These include:

Recommendation 32 *The Bar Council and the Bar Standards Board should work towards ensuring that more employed and other pupillages are made available.*

Recommendation 38 *Active measures should be taken to encourage and enable employers to become PTOs and to offer employed pupillages.*

The efforts being made to encourage students from disadvantaged backgrounds to consider a career at the Bar (Social Mobility Foundation/ Diversity initiatives) will be seriously undermined unless the number of pupillages is increased.

The current lack of pupillage opportunities in relation to the numbers seeking pupillage (discounting those who do not have the ability to complete their training) should be a matter of grave concern to the Bar, as should be the migration of large numbers high quality barristers and students to the solicitors' profession. BACFI would like to assist in facilitating more pupillages in the private sector employed bar.

The numbers

The PRG informed us that currently there are 553 pupillages of which only 30 are at the employed bar. We understand that there is only one pupillage in the private sector of commerce, finance and industry.

There are only 4 registered PTOs in this sector. Two of these offered "commercial pupillages" under the old scheme but have not taken pupils for several years and are unlikely to do so in the future. There were more commercial pupillages in the past when individual senior employed barristers became registered Pupil Masters and merely took on pupils as and when their firms allowed them to. There was no requirement for the organisation to register as a PTO. We estimate that at any one time there may have been up to a dozen pupillages of this type in the sector.

Scope of BACFI's research of pupillage

Bearing in mind that the BSB's work is "evidence based", we have carried out some limited research. We have sought the views of firms where we have a member within the organisation. We have also contacted other organisations where there is currently no BACFI member but the organisation is listed by the SRA as offering solicitor training contracts. In addition, we have sought evidence from organisations outside our sector where their experience or the issues encountered are relevant to employed pupillages generally. The size of the legal departments contacted range from one or two lawyer teams to large legal departments which operate like law firms. Such departments have hundreds of lawyers worldwide, paralegals, librarians, know-how officers, state of the art management systems and significant legal expense budgets to instruct external counsel running to many USD 100s million per annum.

Thus the organisations contacted represent a good range across the many sectors of commerce, finance or industry and some outside that sector. The organisations which we have **not** approached are the CPS, the GLS and firms of solicitors. We understand the Bar Council's Employed Bar Committee (which cover all sectors of the employed

¹ Entry to the Bar Working Party Final Report, November 2007

bar) may be doing this. Our core area of knowledge remains commerce, finance and industry.

We have also done two mini surveys, one of recent BVC graduates and one of recent pupils (details already provided to the PRG). In addition we have obtained details of the SRA requirements for in-house training contracts.

We believe that the evidence which we have gathered presents a representative picture of the issues involved. A list of the organisations we have contacted for the purposes of this review is attached at Annex 1.

Is there scope for more pupillages in the private sector employed bar?

The short answer is YES!

Some General Counsel we have interviewed said that in principle they would like to train their own barristers; others have commented that they welcome the different skills barristers bring to the team, in particular presentation and forensic skills. In addition, those Legal departments which prefer to recruit ready-trained lawyers often prefer those who have had some exposure to the commercial realities of in-house practice and would therefore welcome a barrister who has done an in-house pupillage.

Many companies which invest in training as a personal development and employee retention tool may be interested in training pupils. However in order to mitigate risk and justify the expense they would usually offer training to existing employees. It is easier to make a business case to train an employee who is a known quantity with a track record of performance and commitment to the organisation. Frequently these are para legals, many of whom are already barristers, who have shown promise.

Exactly how many pupillages could be created is more difficult to estimate. A target could be to match the number of solicitor training contracts in the sector on a pro rata basis. We have established from the SRA that between 2% and 3% of all training contracts take place in the sector. A company which is already training solicitors may well be persuaded to train barristers.

We found that if there is a senior barrister in the legal department there is a willingness to consider taking pupils. In one company we found a barrister who had registered as a pupil supervisor and just needed some encouragement to think about recommending that his organisation become a PTO. So it does appear that we are calling upon the *esprit de corps* of the profession and that pupillages might be created given some encouragement and removal of barriers (of which more below).

Demand from prospective pupils

There are many barrister para-legals working in large legal departments who would jump at the chance of training in-house. We have also encountered barristers currently working in other fields who would like to train in-house. Creating more pupillages would also raise the profile of the bar in the private sector which in turn may result in more referrals to the self-employed bar.

Why are there not more employed pupillages in the private sector? What changes need to take place to remedy the situation?

Preference for ready trained lawyers

Many organisations prefer to engage ready trained lawyers (irrespective of whether they are barristers or solicitors). This seems to be a matter of company policy rather than being typical of any one type or size of legal department.

The advantage for firms is that ready trained lawyers can immediately add value to the work of a legal department. They can normally more or less “hit the ground running”. They are also usually hired with a particular business need in mind. Legal training is not core to businesses (unlike in a law firm where it is the *raison d’être* and principal commodity of the firm). A lawyer is an overhead in business terms so there needs to be a formulated business case to hire a lawyer.

These organisations view training from scratch as a significant investment of time and resource which represents a greater risk to a business than recruiting a trained lawyer. In times of recession, training is often the first casualty in a legal budget. Such organisations are therefore not likely targets for pupillage training.

However, as mentioned above, there are many companies which do invest in training lawyers, or might be prepared to consider doing so if some of the current issues surrounding employed pupillages were resolved. These are as follows.

The PTO accreditation process

We found that amongst commercial firms there is little awareness of the process involved to become a PTO. Those which have applied or have considered doing so report that the process is bureaucratic, full of hurdles, lengthy and not worth the hassle as compared the SRA process. The SRA requires an undertaking from the organisation to comply with the training rules rather than requiring a lengthy submission of the firm’s policies. Given that there are likely to be more solicitors in the organisation and that the SRA process is more straightforward, many companies will adopt only the solicitor training route. The Bar thus loses the opportunity of approving a PTO which over time would yield many pupillages. We have reports of cases where organisations which were prepared to offer barrister training found the BSB process so difficult that they were not prepared to follow through and switched to register in the SRA process.

The PTO application process focuses on form rather than substance. It needs to be simplified. The current process is often dependent on the granting of waivers and the exercise of discretion which causes delays. Organisations which have already invested time in making a business case for training are not prepared to rely on discretionary waivers and to submit lengthy documentation proving their internal policies. The experience of the FSA in this respect is instructive.

The FSA’s application was initially rejected and eventually granted only after a two year battle with the Bar Council and the BSB. This has been extremely damaging to the BSB’s reputation especially as the FSA is a large employer of barristers. The employed sector is quite small so the difficulties experienced by the FSA are widely known.

There have been some steps forward (e.g. second qualified lawyer requirement modified) but this is not enough. The BSB will need to work hard to reverse the

perceptions that the profession is unfriendly to private sector PTOs. Although several solicitors firms have recently been added to the list of employer PTOs there have been no new private sector PTOs for some time.

Quite simply if there is a wish to create more employed pupillages, the BSB needs to be more welcoming and proactive towards commercial PTO applicants. There are isolated success stories (Inexus is one). However, the recent experience of a member related in an email attached as Annex 2 is not one of them and gives an indication of the task ahead to improve matters.

The need for a Pupil supervisor with higher rights of audience (“HRA”)

Many employed barristers called pre 2000 will have reached senior positions without requiring HRA, HRA not being required in most legal departments. It is surely more important to ensure that those supervising training are individually highly qualified and regularly trained. If our proposals for modifying the way in which the advocacy criteria can be satisfied are accepted, there should be no need for supervisors to have HRA. It is the quality of the training which should be the key. Employers already operate governance, management and reporting structures and processes within their organisations and training regimes for pupils would fall naturally into these. As occurs in chambers, the pupil may be supervised by several lawyers as he or she moves through the training programme. A simple “year’s standing” test together with a requirement to attend training (by the Inns or BSB) could be adopted for those supervising pupils.

We therefore recommend that the requirement for a pupil supervisor to have HRA be removed, subject to the proposals on meeting the advocacy criteria as set out below.

Running two legal trainee schemes

One of the issues for employers is the need to operate two separate training schemes for solicitors and barristers. The Bar requires a one year training period and the SRA a two year training contract. Also the content of training differs between the two schemes. Many firms we spoke to do not want to have to meet two sets of rules and criteria. We feel that greater flexibility in content and structure of pupillage training could lead to this problem being minimised always provided that the “Collyear”² outcomes (attached as Annex 3) are achieved for trainee barristers. However, we are not advocating lengthening the pupillage duration to two years.

Some large companies have a legal trainee scheme for which they will recruit externally. British Telecom has recently established one such scheme. They have decided to offer training only for solicitors and it is a pity that pupillage training was not considered. This points to the need for an information initiative from the BSB.

Advocacy requirement

The strict interpretation of the advocacy training elements of Collyear may be a deterrent to many companies and now need to be approached in the light of a more flexible approach. Some companies may be happy to make arrangements with chambers for a period of secondment. However, fully sponsored pupillages, may not be attractive to employers who want to get some immediate benefit from the work the trainee can perform. Other companies may be able to offer advocacy experience in tribunals or other fora as described below. We feel it should be left to the employer to decide how best to

² ‘Blueprint for the future’, Final Report of the Committee chaired by Sir John Collyear FEng, May 2000

meet the advocacy requirement depending on the work of the department. The BSB /Bar Council could also facilitate exchanges between pupils in companies and those in chambers which would be beneficial to all concerned.

We make detailed proposals on this point below in the section on Content of pupillage below.

Advertising

The requirement to advertise externally for pupils is a significant barrier to many employers. As explained in detail above, many legal departments would wish to select from existing staff – paralegals or even non- lawyers. Those which would advertise externally would do so as part of a general legal trainee scheme (for barristers and solicitors) and not on OLPAS/Pupillage Portal. The SRA does not require external advertising but requires that the organisation complies with the law and rule 6 of the Solicitors’ Code of Conduct which is designed to prevent discrimination and promote equality and diversity.

The economic reality means that if there is to be an appreciable increase in pupillages in the employed sector the requirement to advertise externally must be removed. Open and fair selection criteria will invariably be applied, as the law requires, at the time of entry to the organisation. Frankly, to suggest as the BSB did in the case of the FSA, that large commercial organisations are any less open and fair in their entry selection than Chambers is insulting. Many major firms have the Investors in People kitemark and this could be accepted as evidence of full compliance. Alternatively a simple undertaking on the application form that the candidates for pupillage have been selected by open competition should be sufficient.

Reliance on waivers is, as explained above, unacceptable to commercial firms.

Standards and the Regulations

It is difficult to identify precisely what are the expected training standards. The Training Regulations (replacing the Consolidated Regulations) and the PTO Guidance do not set standards and there is voluminous guidance on the BSB website which is difficult to follow. There is no consolidated text and it is not possible to say what is mandatory. We feel that the rigid structure of a standard Pupillage Policy and programme is unlikely to fit with a commercial organisation’s training structure. It should therefore be left to the organisation to undertake to carry out the training to certain minimum standards of competencies focussed on skills and outcomes achieved. This is in line with the SRA’s new approach to work-based learning.

The rules on sponsored pupillages, secondments and other forms of external training need to be clearly set out and not subject to waiver.

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We have out lined above the issues with the present system and proposed some changes. Below we summarise what a modern pupillage in this sector may look like.

What should a modern pupillage look like?

Format

BACFI has long advocated a more flexible format for pupillage. The rigidity of the current format is not only a barrier to entry but also a deterrent to those from less advantaged backgrounds who may need to earn during pupillage to support themselves. Most BVC graduates embark on pupillage with significant debts and may need a more flexible arrangement. Neuberger recommended that the availability of part-time pupillages should be more widely advertised and that there should be an understanding approach to approval; we support this. We would go further and provide for an absolute right to a part-time pupillage provided certain conditions are met. This could mirror the SRA requirements where a training contract can be spread over 4 years. Pupillage should be permitted span 3 years if necessary and the period during which pupillage needs to be completed following the BVC similarly extended.

Neuberger also recommended that “a funding pool should be established so as to provide additional funded pupillages sponsored by employers or government agencies unable to train pupils themselves but keen to ensure a supply of barristers with particular skills” (recommendation 37). We agree the Bar should be proactive in offering commercial firms opportunities to participate in the training process. For example, by funding pupillages in chambers³ or offering partial grants to pupils who are being trained elsewhere, perhaps by essay competitions or scholarship programmes in the name of the firm. The arrangement would flatter and engage senior employed Barristers and reinforce the “one Bar” message. The fact is, these people have been largely ignored by the Bar “establishment” for so long, yet they have a great deal to offer.

Advocacy

We accept that advocacy, in all its forms, including written and oral advocacy, is the distinguishing skill of a barrister.

However, we are of the strong view that advocacy is not exclusively restricted to adversarial advocacy in the traditional civil and criminal court setting. We have long recommended widening the fora where “on your feet” advocacy experience can be obtained, to include tribunals and other settings where formal advocacy skills are deployed. A non-exhaustive list of the various alternative fora is attached as Annex 4.

This broadening scope of advocacy reflects commercial reality. The self-employed bar increasingly engages in other forms of advocacy such as mediation and arbitration. Traditional court work is becoming more scarce. Our survey of those who had recently undertaken pupillage showed that some pupils had no opportunity to go into court in their second six. Increasingly, Family, Revenue and some forms of commercial work take place outside the courts, although advocacy in the widest sense is still necessary. The key skills for trainee barristers include preparation, identifying the legal issues, thinking through an argument, analysing the supporting evidence, expressing written and oral arguments in a clear and succinct manner and being able to defend one’s position in a hostile environment. All these are as necessary in employed practice as they are in

³ Similar arrangements already obtain with Royal Navy pupils who are paid their Navy salary and sent to chambers, with short periods spent with CPS and (in future) the Tri-Services Prosecuting Authority.

self-employed and court based work. It is vital for the BSB to recognise this and to move away from its inherited over reliance on traditional court advocacy.

Some commercial organisations would have no present difficulty in fulfilling the advocacy element of pupillage. Others (including GLS departments) have in the past sent their pupils to chambers for 3 or 6 months to obtain court experience. It would be useful for the BSB actively to facilitate mutual exchanges between chambers and employers, allowing all pupils the chance of the widest possible experiences of advocacy. Short secondments are quite common in employed practice and are easy to manage; secondees are invariably funded by their “home” employer. The BSB needs to present itself as a “can do” organisation, open to tailored training schemes which meet core criteria, rather than insisting upon particular formal programmes.

Checklists and commercial skills

Any requirements should be in terms of outcomes and skills. Checklists should only be indicative; more important are the skills and experience actually obtained. The present checklists are designed for practice at the self-employed bar and greater flexibility is required to meet the organisation’s needs for legal services. Critically, employed barristers in business must be able to demonstrate core commercial skills. A sample checklist from one of our member’s firms has been provided to the PRG. Employed barristers have specialist skills and the BSB must recognise that these skills complement rather than replace those acquired in conventional pupillage. Pupillage checklists need augmenting with modern commercial skills.

Conclusion

Increasing the number of pupillages at the private sector employed bar can only enhance the reputation of the Bar as a modern forward looking profession. The “one Bar” concept would be re-inforced. Developing relations between chambers and PTOs will result in increased referral of work to chambers by such organisations. This is a natural consequence of personal relationships and can only be to the benefit of the Bar as a whole. Employed lawyers control large legal budgets and it is clearly in the Bar’s interest to ensure that the numbers of barristers in employment remain high. In other words to embrace business jargon “a win –win situation”. To secure this, the BSB needs to ensure that its training requirements are fit for purpose in a modern world.

BACFI

June 2009

Annexes

Annex 1 List of organisations interviewed for the purposes of this submission

Annex 2 Deleted from web version

Annex 3 Collyear outcomes of pupillage

Annex 4 List of alternative fora for advocacy beyond traditional courtroom advocacy

Annex 1

List of organisations contacted

Private sector

ARUP
Aviva
AXA
BAE Systems
BBC
British Airports Authority
British American Tobacco
British Petroleum
British Telecom
Corporation of Lloyds
De La Rue
Energy Financing Limited
Eon
Exxon
General Healthcare
Glaxo Smith Kline
Hewlett Packard
Inexus
Lloyds Bank,
Man Group
National Grid
Nestlé
Rank Xerox
Shell

Other organisations

Financial Services Authority
Serious Fraud Office,
Serious Organised Crime Agency,
United Kingdom Atomic Energy Authority

The Army
The RAF
The Royal Navy

Annex 3

Collyear outcomes of pupillage

- An understanding and appreciation of the operation in practice of the rules of conduct and etiquette at the Bar
- Experience in undertaking legal research to solve real problems, of drafting and of opinion writing
- Sufficient exposure to the work undertaken by his/her pupil –supervisor to gain an understanding and some experience of working in that type of practice
- Experience of how to prepare, factually, legally and procedurally a case for hearing
- Experience through observation or otherwise of negotiation and conference skills
- Experience through observation or otherwise of trials and appeal proceedings in the higher courts
- Practical experience of advocacy

Annex 4

Alternative fora where advocacy may be experienced

Securities and Exchange Commission Enforcement Division (New York)

FSA's Regulatory Decisions Committee

Financial Ombudsman Service

HM Treasury's Financial Services and Markets Tribunal

Tax & VAT Tribunal

Trade Mark Registry and Patent Office hearings

European Patent Office hearings

Trade Marks and Designs Registration Office of the European Union (OHIM) hearings

Employment Tribunal & Employment Appeal Tribunal

The Information Tribunal (formerly Data Protection Tribunal)

Office of Fair Trading competition investigations

Competition Commission and Competition Appeal Tribunal

European Commission – Art 81 and Merger hearings

Asylum & Immigration Tribunal

Gambling Appeals Tribunal

Lands Tribunal

Social Security Tribunal

Regulatory bodies generally

Committees of the Houses of Parliament

Public Enquiries

Coroner's Office Inquests