

RESPONSE TO BSB CPD CONSULTATION

The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

Q1 Do you agree there should be no compulsory CPD topics for established barristers, but barristers must carry out a balance of activities? Please explain your views.

No. We consider some wellness CPD should be mandatory every few years. We will expand on this answer below. However first we wish to put our views on this question in the context of our response as a whole.

We feel that there is a significant risk that removing the hours requirement for CPD will simply cause barristers to do less CPD. Our perception is that the minimum hours requirement has caused many barristers to do more CPD than they otherwise would, and this has been very beneficial, particularly given the advantages of broad CPD set out in the fourth bullet point under answer 2 below. High quality CPD can be extremely helpful to barristers broadening their knowledge and keeping them up to date which has an important benefit in protecting the public.

If there is a concern that some specific elements of the CPD that is currently being undertaken is not useful or that certain barristers may be choosing to do online CPD at the last minute that is not particularly relevant to them simply in order to satisfy the hours requirement (e.g. para.20), then we would suggest that this is tackled directly, for example by looking carefully at the range of online CPD on offer. We should say in this regard that we do share the concerns in para.20 as far as online CPD is concerned. However we are concerned that barristers should be encouraged to explore, rather than discouraged from exploring, the areas around their practice areas so that they are aware of the “unknown unknowns” and can give more rounded advice which is more beneficial to their clients. For example for many practitioners it will be of assistance to have a working knowledge of the impact of taxation on their area, even if they would not dream of advising on the tax.

Further, we are also concerned that the broader areas of CPD set out in section 2 of Appendix A are too wide, and that this too will reduce the amount of useful CPD undertaken. For example, legal reading and research is something that most barristers do in the course of every case, so allowing that to count as CPD would not only be likely to reduce significantly the amount of extra CPD that is undertaken but, worse, would not actually constitute proper education and training in the sense contemplated by the policy underlying CPD. Similarly, we suggest that allowing development of interpersonal skills into CPD must be carefully watched (see also answer 3 below). Barristers having interpersonal skills is obviously in the interest

of people who have to use the legal system. However, we would deprecate allowing activities like marketing and development of marketing skills to count as CPD, because these are concerned with using interpersonal skills to *obtain business*, which is not necessarily in the interest of users of the legal system. Although barristers may benefit from learning what marketing is, and is not, acceptable, that can be handled through a professional ethics seminar as part of ordinary CPD training, and the SBAs can be encouraged to feature such events regularly if there is a perception that training in that area is needed. That is to be contrasted with education and training in skills required in dealing with clients and the judiciary, which are a key part of a barrister's professional work, even if that training lacks an intellectual core.

We consider that more could be done by the BSB in regulating providers of CPD to ensure that the CPD output is high quality. There is a perception that some online providers do not necessarily provide as high quality CPD as provided before the internet became a medium for CPD.

Finally, given the increasingly useful work done on wellbeing at the Bar and recognition of its importance, we would suggest that consideration is given to introducing a compulsory CPD session on wellbeing once every few years, in order to build on the existing work by getting barristers to discuss openly wellbeing issues which will have a beneficial effect on consumers. We do not consider that any other CPD should be mandatory. We did consider whether equality and diversity CPD should be mandatory and in the end we thought that this would be an unnecessary burden on those who practise in employment law. Equality and diversity CPD should be strongly encouraged.

Q2 What do you think will be the challenges that barristers will have to face in the new CPD scheme? What more could the BSB do to help barristers to meet those demands?

We think barristers will face the following challenges under the new CPD scheme. We view these challenges as significant, at least unless the content of the permissible learning requirements is loosened:

- They will need to make time for planning of their CPD for the year and evaluation of their CPD as the year progresses and at the end of it, together with the written documents that have to be prepared in this regard- e.g. para.68 "*We will expect barristers to spend time planning their CPD for the coming year*", para.80 "*it is also good practice for a barrister to reflect through the CPD cycle*" (an expression which we find hard to understand);
- It will not necessarily be straightforward to identify in advance every year "learning objectives" with the specificity suggested in para.5 of Appendix A. In a fast moving area it will be often be most important for a barrister to keep on top of the new developments that occur during the course of the year, which may well not be known at the start of the year. Therefore, unless the barrister is permitted simply to state as his learning objective for the year "keeping up to date with new developments in area X" (which might be thought to devalue the purpose of the requirement of stating a learning objective), he may be in difficulty in identifying properly his learning objectives at the start of the year. Further in this regard, we think that it is important that barristers are not discouraged by the planning objective requirements from focusing on keeping up to date in their area of law, which is often the most challenging and important thing to do.
- It may also not be straightforward for some senior practitioners, such as leading or established silks in specialist areas, to credibly identify learning objectives for a year, given their expertise in the area in question and the likelihood that there may well not be a particularly large amount of CPD available for their specialist area. There is also an element of invention here, since many barristers are unaware that they have any need for a particular "learning objective" unless and until they are instructed in a case which requires them to be expert on a particular legal subject. It will be a rare

case where any barrister would ever credibly be able to say that he or she knew in advance the specific areas where they needed further education, as opposed to reactively selecting events or seminars as they are offered which best suit their needs at the time. The notion of “identifying learning objectives” on a per barrister basis in advance is quite meaningless in the CPD context. In short, courses and seminars have “learning objectives” – people do not.

- This brings us to a wider point, which is that we think that it is useful for barristers to do broad CPD whether or not it might seem to them at the time to bear directly on their practice area. Our experience is that often the most useful lectures and sessions we attend are those that are slightly tangential to our practice area, where we pick up points of relevance that we might not have expected, and that barristers attend the sessions in question because (a) they are put on by their Specialist Bar Association, (b) the barrister happens to be available at the time and (c) they need to get the relevant amount of CPD, rather than necessarily because they perceive the session to be directly relevant to them. It is difficult to plan for these in advance at the start of the year, and we are concerned that such planning requirements may cause the use of this valuable learning tool to diminish. Therefore, it will be a challenge for barristers to be able to justify in advance this broader CPD as a learning objective at the start of the year.
- Barristers’ diaries are often fast-moving and therefore barristers frequently have to decide at the last minute whether they will attend a particular session or not. This poses a further difficulty in planning CPD at the start of the year, because the barrister will not know with certainty his availability for particular sessions.

As to what the BSB could do to help barristers meet these demands:

- The permissible learning objectives need to be significantly broader given the above points (and further guidance needs to be given as to permissible learning objectives per answer 3 below), subject to the points made above.

Q3 Do you think the Guidance in Appendix A provides adequate support to barristers by outlining what the new approach to CPD requires? Please explain your views.

No. The most important gap in support is sufficient definition of what compliance with the new approach entails. The guidance is too vague and insufficient worked examples are given for such a significant change in approach to CPD. In particular:

How many learning objectives should be identified at the beginning of each year?

We suggest a minimum of 10 examples of what the BSB consider acceptable learning objectives should be given;

The (non-exclusive) list of types of CPD at paragraph 24 leaves many questions unanswered. Is authorship of articles for a chambers website an acceptable type of CPD? What is “reading” if not “research”? Is research that is solely required by a particular set of instructions also acceptable CPD? Or conversations with colleagues? What is acceptable CPD in the knowledge area of interpersonal skills, social awareness, or marketing? What is the objective basis for standard-setting in that area?

As regards assessment, what evidence will the BSB require to check the matters identified at paragraph 30, 31 and 35? How will the BSB consider experience and seniority, and what relevance will this have? As regards paragraph 33, how will the BSB assess whether planned learning objectives have been met or failed?

We note that section 3 is referred to in paragraph 12 but not again. Are paragraphs 29 to 40 intended to form Section 3?

There appears to be an error at paragraph 2 bullet 4. Should “competence” read “Compliance” to match paras 21-23?

Q4 Do you agree that requiring a barrister to plan their CPD learning objectives for a year will help to make the CPD activities more relevant to the barrister’s needs? Please explain your view.

We agree that requiring a barrister to consider, in advance of engaging in particular CPD activities, how those activities will improve their knowledge and skills areas will help to make the CPD activities more relevant to the barrister’s needs.

We disagree that requiring a barrister to plan specific measurable outcome-based objectives for a year will help make CPD activities more relevant or useful, or provide better safeguards for the public. Outcome-based objectives for a year are more appropriate to formal courses of study (as we say, “learning objectives” describe the aim of courses and seminars, not people). They appear to give little if any room for CPD activities that react to changes in the law during the course of a year, or arise as unexpected opportunities during the course of a year (e.g. authoring for a journal or conducting seminars).

We therefore suggest more focus on a relevance assessment before each CPD activity, and less focus on specific outcomes at the start of each year.

Q5 Do you agree that requiring a barrister to reflect on the CPD activities at the end of a CPD year will help to make sure that CPD is relevant and addresses a barrister’s future CPD needs? Please explain your views.

Yes, although we endorse paragraph 16 of Appendix A in suggesting that reflection may also be useful after individual CPD activities.

We are however concerned that it will be quite difficult to engage many if not most barristers to accept the necessity of both planning and reflection such that they are willing to make these activities real rather than token. Those who currently undertake token rather than meaningful CPD are particularly unlikely to engage in the process in the manner hoped by the BSB. It may be therefore that the amount of meaningful CPD is not increased and the amount of time not productively used by barristers is not decreased by the proposals made.

Q6 Do you agree the CPD regulations should take into account previous CPD records when assessing CPD in any one year? Please explain your views.

Yes. This should allow the BSB to better elicit whether a barrister is undertaking “empty” CPD which does not relate to his practice area. Large amounts of last minute CPD might well be a good indicator of this. However it should be permitted to have similar targets over a large number of years if these are sensible and broad. An example would be the target proposed above related to a key issue: keeping up to date with the law.

However please see answer to question 7 below.

Q7 Do you agree with the proposed approach to the regulation of CPD compliance? Please explain your views.

We are concerned that one major benefit of the present system (*viz*, clarity) will be lost if the new approach is brought in. Previously it has been very clear to a barrister whether he is complying with his regulatory requirements in terms of CPD. In the future this will not be the case and we are concerned that not only will the changes mean that less CPD is undertaken (to the detriment of consumers) but that more BSB resources will be taken up in monitoring compliance and further that more barristers will end up in breach of the requirements, mostly unwittingly. The monitoring will surely be quite costly because the technical issues which it is suggested may arise.

We are particularly concerned that (a) the present guidance is not clear as to what is acceptable planning and reflection (b) many barristers will not turn their mind to this activity and effectively and (c) this will be difficult for the BSB to police.

We do agree that it would be better to assist barristers with an agreed action plan if they are perceived to be in breach and that enforcement action should only occur if the particular barristers' obligations have been blatantly disregarded.

There is also a real risk that conscientious barristers who are assiduous at undertaking a large amount of CPD which is relevant to their practice area will be put in breach of the BSB's rules because they have not put in place the "box ticking" requirements of having planned and reflected on their CPD activities.

It is important that the BSB, in rolling out its new approach, does not discourage barristers from exploring the edges of their practice or complimentary areas. Compliance equally ought not to discourage this and there is a real risk that, under the proposals under consultation, it may.

Q8 Please describe any impacts (positive or negative) you foresee in relation to the proposed CPD scheme on Equality and Diversity.

We consider that a broadening the range of CPD activities is likely to benefit barristers on maternity or long term paternity leave, those with caring commitments and those with physical disabilities because obtaining CPD will be more flexible. However if online CPD was more heavily regulated this is likely to have a negative impact on this section of the Bar. If the time periods for "planning" and "reflecting" are quite narrow and pre-determined by the BSB then this may have a negative effect on those on maternity or long term paternity leave during those periods if they wish to maintain a practising certificate and the BSB should attempt to mitigate the risk of such a negative impact. The maintenance of a practising certificate should be encouraged.

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For and on behalf of the Chancery Bar Association
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