



BSB consultation May 2019: Engagement Programme – Pupillage Gateway Timetable and Written Agreements for Pupillage

Who we are

The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of some 1.300 members handling the full breadth of Chancery work at all level 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 was traditionally dealt with the Chancery Division of the High Court of Justice, but from 2 October 2017 has been dealt with by the Business and Property Courts, which sit in London and in regional centres outside London. The B&PCs attract high profile, complex and, increasingly, international disputes.

Our members offer specialist expertise in advocacy, mediation and advisory work including across the whole spectrum of company, financial and business law. As advocates members are instructed in all courts in England and Wales, as well as abroad.

Response to Part II – Gateway Timetable Proposal

1. The BSB seeks views as follows:

- Whether the ChBA believes that the BSB should make it a mandatory condition of AETO authorisation that all pupillage providers are required to recruit in line with all stages of the Pupillage Gateway timetable.
- Whether there is any other way to ensure candidates are aware vacancies exist and can make informed decisions.

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- The ChBA's thoughts on a proposal to add a 14-day deadline for applicants to respond to offers.
 - Whether it is feasible to require compliance with the Gateway timetable from November 2019.

2. The ChBA firmly supports the principle of accessibility and agrees with the BSB that it is essential that pupillage opportunities are advertised and recruited to fairly. The current system is fragmented and difficult to navigate. For the reasons set out below, the ChBA agrees that there should be a mandatory timetable for pupillage subject to a waiver for good reason (not exceptional circumstances) but that the position should be reviewed after a period of say 2 years to assess its effectiveness in achieving its objectives.

- Earlier or later advertisement or application deadlines than on the Gateway may disadvantage certain applicants who are less likely to be aware that these opportunities exist.
- Providers opting out of the Gateway timetable prevents candidates from making informed decisions. It can cause stress and allows chambers to exploit the uncertainty faced by candidates which is unfair and should be avoided if possible.
- AETOs which recruit using the Gateway timetable may face a competitive disadvantage if there is no mandatory timetable.
- Any disadvantage to AETOs caused by an inability to recruit at short notice after a period of growth can be mitigated by applying for a waiver from the requirement to recruit in line with the timetable. A waiver for good reason could also allow sets to deal with unforeseen events. For example, if a pupil were to pull out of a pupillage in the summer before the October they were due to start, a set may wish to run a recruitment process that summer and should be permitted to do so.
- A mandatory timetable is the best (albeit not perfect) way to ensure candidates are aware vacancies exist and can make informed decisions.

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- In most circumstances, the Gateway timetable will not cause disadvantages to AETOs or applicants by forcing interviews to be held in a limited timeframe. In reality, sets which do not follow the Gateway timetable have a much tighter timetable than that provided by the Gateway. Any real disadvantages which are caused can be mitigated by applications for a waiver.
 - The BSB should be cautious before taking upon itself to remove the ability for chambers to give themselves a competitive advantage where they choose to do so. However, the BSB already does this in a number of ways in relation to pupillage (e.g. through minimum pupillage award, advertising requirements, maximum number of pupils to a supervisor) where there are good reasons to do so. There are good reasons (as set out above) to have a mandatory timetable. Further, it is important that chambers comply with the timetable - a breach of the timetable should lead to the imposition of sanctions which we understand is currently not possible.
 - As the ability to obtain a waiver is an important protection against unfair disadvantage to ATEO the threshold should not be fixed too high – good reason rather than exceptional circumstances.

3. The ChBA is, however, conscious that a mandatory timetable may have unwanted consequences. It is an unfortunate reality that applicants with the best academic credentials and who perform best at interview will tend to be the ones that receive multiple offers. Experience shows that a very small number of applicants receive multiple offers. The general body of Bar students are pleased to receive a single offer – and they take it if they get it. There is a risk that if the Gateway timetable is imposed on all pupillage recruitment, then there will be a group of perhaps twenty or thirty applicants each year who receive large numbers of offers. Inevitably (because each applicant can ultimately take up only one pupillage), those very high-performing applicants reject all but one of their offers, which then have to be offered to reserve candidates. If the Gateway timetable is imposed across the board, then a more-or-less chaotic scramble for reserves will take place



once the deadline for the acceptance of offers has passed. That process will be administratively burdensome for pupillage providers and stressful and upsetting for applicants. There is a risk that the proposed reform would be good for the very high-performing students, because they would be able to apply everywhere, receive their multiple offers, and then choose their preferred organisation – but could have dangerous consequences for exactly those students it is designed to support.

4. On the other hand, this already happens to an extent in respect of Gateway sets and it is hoped that applicants will make intelligent choices in the range of chambers they make their applications to, much as they do for Universities, so that they maximise their chances of receiving a first choice offer, rather than being a reserve.
5. For this reason, and because it is an interference with the competitive freedom of sets of chambers, while we support the proposal, the ChBA suggests that the position should be reviewed after a period of say 2 years to consider whether it is effective in achieving its objectives.
6. Turning to the proposed mandatory 14-day period to communicate acceptance of offers we agree that adding a final stage to the timetable comprising a deadline for accepting first choice offers is sensible for the reasons given in the consultation. However, the system is only feasible if candidates are given a shorter period in which to make their decision. An offer period of two weeks can leave Chambers in difficulties. If the first-choice candidate spends two weeks making a decision, a set can, in that time, easily lose all of their reserve candidates. An offer period of 7 days would seem to strike a fair balance between giving the candidate an insufficient time to weigh up their options and permitting them to ‘hold’ a number of offers for a large period of time.

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7. Finally, if the BSB decides to adopt the proposed change, then we do not think it will be feasible to require compliance from November 2019. Many chambers who are not in the Gateway who have recruited during the course of 2019 would likely take a year's break from recruiting a pupil, rather than run a process less than a year after the last one. November 2020 is the earliest an orderly or efficient change can fairly be made.

Response to Part III – Written Pupillage Agreements

8. The BSB seeks views as follows:
- Should the BSB make it a mandatory condition of AETO authorisation that all pupillage providers are required to use written agreements for pupillage?
 - Whether the proposed outcomes set out in Annex A to the Consultation are appropriate and clear.
 - Whether the consultee has any other views relating to the proposal.
9. It should be noted that the vast majority of members of the ChBA are self-employed barristers and, accordingly, the BSB should look to other responses to the Consultation from the employed bar or specialist bar associations with more employed barrister members in relation to issues concerning the employed bar.
10. In summary, whilst the ChBA broadly agrees with the rationale behind the proposal as explained at paras 17-19 in Part III of the Consultation, we do not believe that the introduction of the proposed mandatory condition on AETO authorisation is the right way of achieving the desired outcomes. Further, we believe there is a risk that the introduction of such a condition may lead to a reduction in the number of AETOs willing to offer pupillage.
11. Our views are set out further below.
12. We agree in particular with the following points identified as the aims of the proposal in Part III of the Consultation:
- AETOs, supervisors and pupils should be assisted in understanding their obligations.

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- The pupil experience across the Bar should be made more consistent, in the sense that there ought to be a minimum standard of pupillage provision provided to avoid pupils undertaking obviously sub-standard training or pupillages where insufficient risk management is undertaken to protect pupils from, for example, harassment. (However, we note that it will not be possible, and we do not consider it a desirable aim, to ‘standardise’ pupillages across the Bar in a more general sense because of the inherent great variety between AETOs and practice areas.)
 - All reasonable steps should be taken to minimise the risk of inappropriate behaviour towards pupils.

13. We have also reviewed the proposed outcomes in Annex A to the Consultation and:

- we agree that the proposed outcomes in Annex A are appropriate and clear insofar as they reflect existing requirements in the BSB Handbook, Authorisation Framework and Bar Qualification Manual, save that the requirement listed in para 2 should – we think – be included in the terms of a pupillage offer, rather than anything which is produced to the pupil at the start of pupillage;
- we agree that the additional proposed outcomes in Annex A (in italic font) suggested by the BSB are appropriate and clear, save that those requirements suggested in paras 18 and 19 should – we think – be included in the terms of a pupillage offer, rather than anything which is produced to the pupil at the start of pupillage.

14. However, we do not think that the proposal is the right method of achieving those outcomes and runs the risk of creating other problems.

15. The majority of the proposed outcomes in Annex A reflect existing requirements (be they regulatory requirements or statutory requirements, such as compliance with the Data Protection Act 2018). In relation to those outcomes, there is no need to require AETOs to have a written agreement with their pupils. Non-compliance by a pupillage provider carries with it sanction which is both sufficient punishment and a sufficient deterrent against any further poor conduct.



16. The particular disadvantages of seeking to put those outcomes into a written agreement with a pupil which we have identified include:

- increased administrative work for pupillage providers in drafting specific wording;
- needless duplication with the work which pupillage providers already have to do by reason of their legal and regulatory obligations;
- potential delay and/or additional work in pupillage providers seeking BSB approval of the contractual wording;
- potential confusion and/or increased administrative burden in the event of an issue arising and a resolution being needed; for example, if a pupil suffers bullying during pupillage and has a written contract with the AETO under which the AETO has agreed to ensure that pupillage is conducted in a manner which is fair and equitable and has also provided the mandatory anti-harassment policy and complaints and grievances policy, the pupil might invoke the anti-harassment and/or complaints procedure(s) and might also threaten or bring a contractual claim under the written contract – that is most unlikely to lead to an efficient resolution of the issue and attempts should always be made to streamline and simplify such procedures, rather than complicate them, in order to increase their effectiveness and make them more likely to be invoked by pupils who find themselves in a problem situation;
- concerns about contractual claims under the contracts may make AETOs less keen to provide pupillage - the BSB can already take regulatory action if regulatory requirements are breached and it is not sensible to add anything further – that is sufficient deterrent;
- it may be difficult to write flexibility sensibly into written contracts but AETOs need to have some flexibility should unforeseen circumstances arise during pupillage - some flexibility is provided within the current statutory and regulatory framework and that should remain.



17. In accordance with principles of outcomes-focussed and targeted and proportionate regulation, we would suggest that resources would be more usefully deployed in ensuring that AETOs understand and have processes in place to comply with their existing obligations under legislation and the BSB Handbook, Authorisation Framework and Bar Qualification Manual when they apply for AETO authorisation.

18. We would also suggest that AETOs are encouraged to do the following as a matter of good practice:

- Send written pupillage offers (requiring a written response from the future pupil) setting out all the terms and conditions which a pupil will be required to fulfil prior to starting pupillage;
- Produce a 'pupillage pack' for pupils to be given to them (and to their pupil supervisors) at the outset of pupillage containing:
 - a short document summarising the AETO's obligations during pupillage under the BSB Handbook, Authorisation Framework and Bar Qualification Manual and what is expected of pupils in outline terms;
 - copies of the written policies required under the BSB Handbook, Authorisation Framework and Bar Qualification Manual; and
 - contact details for specific barristers/staff members at the AETO with responsibility for aspects of the pupillage process (eg Head of Pupillage Committee, administrator/secretary to the Pupillage Committee, pupil mentor(s), Head of the Equality & Diversity Committee).

Chancery Bar Association