

THE CHANCERY BAR ASSOCIATION

RESPONSE TO THE BAR STANDARDS BOARD'S CONSULTATION PAPER ON THE PROPOSED NEW EQUALITY & DIVERSITY CONDUCT & PRACTISING RULES

Introduction

1. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,000 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. Membership of the association is restricted to those barristers whose practice consists primarily of Chancery work.
2. 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.
3. 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.
4. This response is the official response of the Association. It has been produced by Mark West, Catherine Addy and Georgia Bedworth, all of whom are members of the Committee and attended the BSB Consultation Event at BMA House in Tavistock Square on 15th February 2011.

5. The response adopts the list of questions set out in the original BSB Consultation Paper and replies to each question individually.

Question A

(a) Do you agree that the new regulatory equality provisions should be integrated within the Code of Conduct?

Yes.

Question B

(b) Do you agree that the proposed new Conduct Rules should apply to all practising barristers including employed barristers and those who are managers or employees of recognised bodies?

Yes.

Question C

(c) Do you agree that the obligations should apply not just to a barrister's own chambers or other place of business but also to any ProcureCo through which s/he obtains business?

Yes.

Question D

(d) Do you think it is appropriate that the proposed rules place a personal obligation on all self-employed barristers to take all reasonable steps to ensure that the rules are complied with as opposed to putting the onus only on Heads of Chambers or those with the responsibility for the administration of chambers?

No. The obligation should be placed on the Heads of Chambers and those with responsibility for the management or the administration of chambers. The proposed amendment might seem attractive at first blush, but in our view it is both impractical and impracticable to impose an obligation on all self-employed barristers. The objections to the proposed amendment are based both on practicality and on principle. As to the former, how would such an obligation

be monitored? What would the sanctions be for breach of the obligation? How would those sanctions be enforced? In reality it is very difficult to see that very junior members of chambers could do anything to ensure compliance with some of the rules (such as the make-up of pupillage or tenancy selection panels). Nor is it easy to understand how the obligation will apply in the case of a barrister for whom taking reasonable steps involves doing nothing and thus whether the proposed amendment in that respect will actually achieve anything. As to the latter, it is entirely unclear how the obligation will impact on a barrister as his or her career progresses, save that it appears that what is envisaged is an obligation the nature and content of which changes over time, and that the nature and content of the obligation will vary depending on one's position in chambers where that position is not one relating to the management of chambers to which one has been elected as a matter of choice, but which is governed solely by one's position on the board outside the door; such a Protean concept has no place in a code of professional conduct. By contrast, placing the responsibility with the Heads of Chambers and the Management Committee has the merit of clarity and indeed the proposed approach may be perceived as diluting the responsibilities of the Heads of Chambers and those responsible for the management of chambers.

Question E

(e) Do you agree with the proposed requirement that from 1 January 2013 that the member/s of chambers with lead responsibility for the recruitment of tenants, pupils, clerks and mini-pupils and at least one member of every selection panel except in unforeseen and exceptional circumstances, who may be the same person, must have received recent and appropriate training in fair recruitment and selection processes?

i. Do you believe the 1 January 2013 deadline to be realistic and achievable?

ii. Do you think the Bar Standards Board should regulate the training undertaken for this purpose?

i. Yes, but it should be understood that the provision that only one member of a selection panel has received training is a short-term expedient pending training for the rest of the panel by 1st January 2014. In principle, all barristers involved in selecting tenants, pupils and assessed mini-pupils should be required to be trained in appropriate non-discriminatory

procedures, as the Neuberger Committee recommended. There needs, however, to be clarification as to what is (i) recent and (ii) appropriate training in this respect.

ii. Whilst we see no objection to the Bar Standards Board being the body which should regulate the training undertaken for this purpose, we do not think that it should itself be the training provider. We do not think that the training should be exclusively external and that the Board should permit internal training within chambers in appropriate circumstances e.g. by cascading by those members of chambers who have already been trained themselves. Consideration should also be given to the possibilities of interactive e-training and to the award of CPD points (perhaps 1.5-2 hours) to such training.

Question F

(f) In light of the Neuberger recommendation that all barristers involved in selection be trained, would you agree with a requirement that by 1 January 2014 every member of all selection panels involved in the recruitment of tenants, pupils, clerks and mini-pupils must be trained in fair recruitment processes?

Yes.

Question G

(g) Do you agree with the proposed requirement that chambers recruitment and selection processes use objective and fair criteria?

Yes.

Question H

(h) Do you agree with the proposed requirement that chambers must collect and analyse the actual numbers and percentages of barristers and pupils in chambers from different groups on an annual basis and that these groups must include as a minimum race and gender?

Yes. In collecting such data, it must be recognised that populations of chambers are relatively static. It is however difficult to justify restricting the collection of data to race and gender, particularly given the scope of the proposed guidance by the LSB. Data ought to be

collected in relation to each of the protected characteristics. However, there should be no obligation on individual barristers to answer particular questions. We do not consider that chambers ought to be obliged to collect and analyse data on social mobility as proposed by the LSB. Whilst this is laudable in theory, in practice the data is likely to be difficult to collect or analyse. Any categories of social class which can be provided are likely to be a blunt instrument and the results of analysis of the data are unlikely to be useful.

i. Do you agree that this should be done annually?

Yes.

ii. Do you think that data should also be gathered on disability?

Yes.

Question I

(i) Do you agree with the requirement that all chambers must collect equalities data on applications for mini-pupillage, pupillage, and starter tenancies and analyse the success of different groups at each stage of the selection process on an annual basis and that these groups must include race and gender as a minimum?

Yes, for pupillage and starter tenancies. We agree also that the data should be analysed at each stage of the selection process. Without data collection and analysis it is difficult to see how chambers will become alert to and deal with barriers to diversity. However, any changes to the Code must recognise that many chambers recruit starter tenants exclusively from their pupils and do not run open tenancy competitions. Many of the chambers within the Association recruit only one pupil with a view to one tenancy being offered at the end of that year. In those circumstances analysis of data on recruitment of a starter tenant would add nothing to the data analysis of applications for pupillage.

We do not consider that the obligations to collect and analyse data should extend to all applications for mini-pupillage. We consider that the compulsory collection and analysis of data should be limited to applications for and selection of **assessed** mini-pupillages. There

should be no obligation on chambers to analyse applications for unassessed mini-pupillages. Some chambers may offer mini-pupillages on a first come, first served basis, so there is no selection procedure and analysis of data, other than in terms of numbers of applications, would be meaningless. Chambers should be encouraged to collect data on applicants for mini-pupillage to see if there are any barriers to diversity.

In addition, it is often the case that individual members of chambers offer or provide a mini-pupillage or work experience to a personal contact, be that children of a friend or colleague or a spondee who has been allocated to them through an Inn sponsorship scheme. Mini-pupillages or work experience in chambers give an advantage to a candidate when it comes to making an application for pupillage. Whilst we recognise that 'private' mini-pupillages may perpetuate barriers to socio-economic diversity at the Bar, by giving an advantage to those whose parents have connections with the Bar, on occasion such mini-pupillages may increase diversity, such as if a mini-pupillage is provided to a spondee who has been allocated through the Inn's sponsorship scheme who might not otherwise have an opportunity to undertake a mini-pupillage. We would not wish the BSB to make changes to the Code which could discourage members of the Bar from providing work experience or mini-pupillages in such circumstances, as this would tend to increase rather than remove barriers to diversity.

i. Do you agree that this should be done annually?

Yes.

ii. Do you think that data should also be gathered on disability?

Yes.

Question J

(j) Do you agree with the proposed requirement that chambers that take pupils must regularly review the allocation of work to pupils, tenants in their first three years and members returning from parental leave?

We agree that there should be monitoring of allocation of work but cannot see any rationale for restricting this to pupils and tenants in their first three years of practice and members returning from parental leave. A review of allocation of work ought to take place across chambers.

i. Do you agree that this data should be required to be broken down by race and gender only?

It is difficult to understand what is meant by this in the context of Chancery work and how types of work should be divided into different categories. Any criteria for distinguishing different types of work would have to be easy to apply. In order to be useful, data as to allocation of work should make clear whether or not work was allocated to a particular barrister because the solicitor requested such a barrister by name.

Question K

(k) Do you agree with the proposed requirement that all chambers must have a policy on parental and adoption leave?

Yes.

It is however important to define what is meant by “parental leave” in the context of the self-employed bar. There are three principal issues for self-employed barristers (and their chambers) in this regard:

- (i) The period during which a member of chambers is relieved of the obligation to pay rent and/or chambers expenses
- (ii) The period during which chambers is required to keep a particular room or desk space available for the relevant member of chambers
- (iii) The period during which a self-employed barrister should have a right to return to chambers without being required to re-apply for tenancy.

We take the view that if the Code is to use the phrase “parental leave”, the meaning of this term must be defined. In any event, we consider that any prescribed minimum periods of “leave” should be different in each of the 3 respects identified above. In particular, the period during which a member of chambers is to be relieved of expenses may be shorter than the

period for which the chambers is required to keep open the member's room/desk space. Moreover, we consider that the period during which a self-employed member of chambers should have a right to return to chambers without being required to re-apply for tenancy should sensibly be greater than the other 2 periods. For our part, we would advocate a minimum period of a year in relation to the 'right-to-return'.

In addition, we note that the consultation paper refers to "parental leave" as a period which commences with the birth of a child. Some consideration should be given as to whether a barrister should be in a position to give notice so that the period of parental leave can commence before the actual birth.

Question L

(l) Do you agree with the proposed requirement that chambers must offer their members a minimum of 6 months parental leave, or leave following adoption?

Yes, if what is meant is a minimum period during which a self-employed barrister has a right to return to chambers without forfeiting his or her tenancy. However, we do not agree that the entire such minimum period of parental leave should necessarily be rent or expenses free. We can see that a longer rent free period may cause difficulties with smaller chambers and/or with chambers who predominantly engage in publicly-funded work; moreover, in that regard too great a period might unintentionally have an adverse effect upon the recruitment of women in such chambers. In addition, we are aware that the calculation of chambers rent/expenses varies considerably between chambers and further thought needs to be given to identifying what, precisely, the relevant member of chambers is to be excused from paying during any prescribed minimum period of such leave. We address this calculation point further in answer to question M below.

i. If not, would you agree with a requirement that chambers must offer members a minimum of three months parental leave or leave following adoption?

Yes, we would agree with this proposal in each of the 3 respects identified above, subject however to the points noted below in relation to the calculation of such rental obligations.

Question M

(m) Do you agree with the proposed requirement that where rent is paid on a flat rate basis, parental leave must be rent free?

i. Would you agree with a rule requiring that the parental leave period must be rent free irrespective of whether the chambers rent is calculated as a percentage of fees earned or is a flat rate payment?

We do not consider that the whole of the minimum prescribed period of parental leave should necessarily be free of Chambers expenses and rent. For the reasons identified above, we take the view that any prescriptive minimum “rent free” period should be restricted to a period of 3 months. In our view, if a longer period were *prescribed* this could cause difficulties for smaller sets of Chambers and/or those chambers who undertake predominantly publicly-funded work. Nevertheless, chambers should be actively encouraged to *offer* greater flexibility and/or more preferential terms to its members than any such prescriptive regulations require. Accordingly, our views in relation to minimum standards are not intended to represent the norm which is anticipated will be offered by chambers. Indeed, we understand that many of our members’ chambers offer far greater flexibility and/or preferential terms than the proposed minimum requirements. However, it must be recognised that, by reason of their prescription, the standards to be set down by the Code must be acceptable and workable for all chambers irrespective of their wealth and size.

Further, the obligations set down by the Code need to be administratively workable. The term “flat rate” is ill-defined and is likely to lead to considerable confusion. Whilst we understand from attendance at the BSB Consultation Event that the intention is to exclude ‘percentage of income’ calculations, as a definition we consider that the concept of “flat rate” is unworkable given the extensive range of unique expense structures adopted by different sets of Chambers. For example, it is not clear whether the proposed provision would encompass those chambers who calculate rent and expenses on a mixed system (with part of expenses being calculated on an earnings basis and partly on a square footage basis for

rent) and/or those chambers who pay expenses on the basis of “banding”. Further, whilst some chambers pay expenses on the basis of a fixed percentage of a barrister’s earnings, what is intended to be the position where the quantum of those expenses is fixed periodically (whether monthly, quarterly or annually) on a forward basis but referable to historic income? So far as fixed costs are concerned, there ought to be a payment holiday. We can see more of a justification for there being no “payment holiday” where expenses are calculated on a historic earnings basis because there will be a reduction in payments on a forward going basis, as earnings will have fallen during the period of parental leave.

Question N

(n) Do you agree with the proposed requirement that any member or pupil must have the right to return to her /his chambers as a tenant following a period of parental or adoption leave?

We agree that members of chambers should have a right to return as a tenant after a period of parental or adoption leave. We do not consider that pupils should have a right to return to chambers as tenants following a period of parental leave unless an offer of tenancy has been made before going on parental leave and they have completed their pupillage before that date or satisfactorily complete their pupillage on their return from parental leave.

So far as pupillage is concerned, there must also be continuity of training and steps need to be taken to ensure that the rules concerning pupillage themselves incorporate clear policies on parental leave. Pupils should be entitled to return to Chambers to complete their pupillage after a period of parental leave.

i. Do you agree that this right to return should continue for a period of at least a year?

Yes. However, we would encourage the BSB to advocate, but not prescribe, greater flexibility.

The right to return also gives rise to accommodation issues. However it is not, in our view, appropriate for the BSB to make rules regarding accommodation issues in the Code of Conduct and accommodation issues will have to be addressed individually.

Question O

(o) Do you agree with the proposed requirement that chambers must have written policies permitting members of chambers (male or female) to take career breaks and work flexible hours, or part time, or partly from home?

As to career breaks, yes, although any right to return after a career break should be subject to retention of a practising certificate. Otherwise, there would appear to be no need for written policies on flexible working for the self-employed bar. In our experience, barristers regularly work flexible hours or from home. A written policy would be both unnecessary and undraftable. We also believe that a written policy would tend to delimit rather than encourage flexibility.

Question P

(p) Do you think that compliance with the any of the new regulatory requirements will place a financially onerous burden on chambers?

i. If so can you provide evidence of how the particular requirement might burden chambers financially and what revisions might be made to mitigate or remove such a burden?

We have referred to the potential financial impact on smaller sets of chambers/those which rely on publicly funded work at sections L and M above.

Question Q

(q) Do you think that the guidance is useful in understanding what is required by the new regulatory rules?

Yes.

Question R

(r) Are there any areas not covered by the regulatory requirements and/or guidance which you think need to be covered?

No.

