CHANCERY BAR

RESPONSE OF THE CHANCERY BAR ASSOCIATION

TO

BURTON PUPILLAGE WORKING GROUP FIRST INTERIM REPORT

1. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 barristers. Its members handle 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.

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. We begin by expressing concern at the adequacy of consultation on the proposals in the Burton Pupillage Working Group's first interim report ("the Report"). The Chancery Bar Association was first asked to consider the Report by email dated 21 June 2012 and on enquiry was informed that a response by 16 July 2012 would be acceptable. It appears from documents presented to the Bar Council's GMC meetings on 2 and 7 July that a permanent committee

of COIC has already been set up with a view to implementation of the proposals in the Report and probably had been set up even before the Association was asked to comment. Consultation which serves only as window-dressing for decisions already made is simply a waste of time and is not really consultation at all.

5. The Association would be highly supportive of any project which involves the Inns working together to promote social mobility and help create a more diverse Bar. We believe that the Inns, with their long history of legal education and substantial scholarship funds, could be real drivers for positive change, particularly if they combine forces rather than seeing themselves in competition. But, for the reasons given below, we do not consider that simply increasing the number of pupillages is the best or most cost-effective way of achieving this goal and cannot, in general, support the proposals in the Report.

6. The Report starts from the position that there is a "pupillage shortfall". This is not defined in the Report itself, but it appears from the supporting papers that the "shortfall" is said to exist because (a) there are now fewer pupillages offered than in the past and/or (b) there are many more applicants for pupillage than there are pupillages available. We believe that it would only be right to speak of a pupillage "shortfall" if there were fewer pupils of a standard suitable for tenancy being trained than there were tenancies or employment opportunities for those completing pupillage. We are not aware of any such problems in the field of Chancery practice, though we recognise that other specific sectors of the Bar may be suffering from a shortfall of pupils in this sense. Anecdotally we hear of problems associated with insufficient first six pupillages at the Criminal and other publicly funded areas of the Bar (which Chambers are obliged to fund directly in cash) compared with second six pupillages (which can be funded by a guarantee of earnings), but do not know how far this is backed up by hard evidence. Otherwise, as the Wood report on pupillage found, there is a close correlation between the

number of pupillages in one year and the number of tenancies/employed positions in the following year. This correlation continues to be seen in the Bar Entry Matrix statistics produced by the Bar Council in the Bar Barometer (although some care must be taken over these statistics, as we understand they include tenancies/employment positions taken up by those already in practice as well as new starters). As the Wood Report noted, the correlation suggests that Chambers and employers are now more carefully planning for their strategic recruitment needs, training up broadly the right numbers of pupils for which there are tenancies/employment opportunities available. The reduction in the number of pupillages does not reflect a shortfall but simply a reduction in the historic disproportionate *oversupply* of qualified pupils.

7. The Report, having identified a pupillage "shortfall", then presses for urgent action to increase the number of pupillages available. We are concerned, however, that insufficient thought has been given to the ultimate goal which is thereby to be achieved. We identify three different possible goals in the Report, namely:

(1) the creation of a more diverse Bar;

(2) to assist BPTC students who cannot obtain pupillage complete their training for the purpose of enabling them to seek employment with other professions;

(3) to assist smaller Chambers in publicly-funded areas of work who are not sufficiently viable to recruit their own pupils.

We comment on each of these below.

8. ***Creation of a more diverse Bar.*** The Chancery Bar Association wholeheartedly supports the principle that barristers should come from a

wide range of backgrounds. An increase in the number of pupillages, without any corresponding increase in the numbers of tenancies or employment positions, however, does nothing to change the make-up of the Bar. Furthermore, the proposals in the Report for funding additional pupillages do not seek to target that funding on those from non-privileged backgrounds but rather to make additional pupillages available across the board. It is unlikely, therefore, that the increase in pupillages *per se* will substantially increase the proportion of pupils from non-traditional backgrounds. It may, in fact, decrease that proportion, since minimum funding (and *a fortiori* less than minimum funding or no funding at all) does not cover all living costs and therefore only those who are better resourced are likely to be in a position to take up a pupillage on that basis.

9. In addition, we note with concern the rumours that at least one of the Inns is considering diverting funds which would otherwise be available by way of scholarships to BPTC students in order to meet the funding requirements of the intended additional pupillages. We consider that this diversion of resources would be more likely to have a deleterious effect upon the diversity of the Bar as even fewer students from non-traditional backgrounds would be able to afford to undertake the first stage of training. We do, however, urge COIC to consider other ways in which the Inns could use their resources to promote diversity at the Bar. Much good work is already being done in this field, through programmes like Inner Temple's Pegasus Access Scheme, but there is so much more that could be done. The money which it is proposed the Inns should spend on expanding pupillage places could in our view be much more usefully targeted with a view to achieving this goal.

10. ***To assist BPTC students who cannot obtain a pupillage***. The Chancery Bar Association shares the concern which has been expressed across the Bar for many years about the massive oversupply of BVC/BPTC students in comparison with the number of pupillages, and ultimately tenancies/employment positions available. We appreciate, and many of our

members see at first hand through work with their Inn and otherwise, the great cost, both financial and personal, suffered by those who cannot obtain pupillage. We are very doubtful, however, that it is a sensible use of the Bar's and Inn's resources to train up a cohort of students for whom practice at the Bar will always be out of their reach because there are simply no tenancies/employment positions available to them on completion of pupillage. The conduct of pupillage is now heavily regulated, and rightly so, and supervision is a considerable burden on pupil supervisors. We also struggle to see why the Inns should use their funding to train up those who have no prospect of a career at the Bar and are likely to become the junior Bar's competitors in solicitors' firms and elsewhere.

11. Most of all, despite what is said about qualification as a solicitor after completing pupillage, we do not believe that it is fair or kind on the students themselves to give them pupillage without a corresponding increase in tenancies/employment positions. We strongly suspect that a minimally-funded pupil will increase his or her debt during pupillage; that student will also have had a further year of stress and delay in reaching their ultimate goal. That stress will have been exacerbated, not ameliorated, by serving time as a "second class" pupil in a Chambers which funds its preferred pupils at a higher level (something we consider highly divisive and, though permitted by the rules, not to be encouraged). We do not believe that a pupil who is unable to obtain tenancy is any more likely to view the Bar with favour than a BPTC student who has been unable to secure a pupillage.

12. ***Assisting smaller/less well-off Chambers.*** We do not doubt that there are Chambers, particularly those whose members principally undertake publicly-funded work, which struggle to meet the minimum funding requirements for a pupil. It should not be overlooked, however, that the main reason for this is that such chambers are chronically short of work that is paid at a level at which the existing barristers can survive. Moreover, at the bottom end, there is a real shortage of any work for junior tenants, as a result of solicitor

advocates swapping cases with each other for referral fees, which barristers cannot pay. This is likely to be another reason why pupillages are not being offered. There is little point in funding pupillages where there is no prospect of a pupil becoming a tenant and making a living. The Bar is then either funding its competitors, if the pupil obtains a place at a law firm or an alternative business structure, or wasting its money if not.

13. If it were the case that some Chambers doing publicly-funded work had a real prospect of recruiting a pupil as a new tenant but could not afford to pay a pupil, then there might be a case for carefully targeted funding. But we doubt whether that is likely to be the case, as there will either be too little work available or a successful Chambers will be able to afford to pay for a pupil. In any event, the ability easily and fairly to identify chambers falling within those criteria must be questionable. We see considerable difficulty in discriminating between Chambers which cannot afford to take on a pupil and those which can. The amount of money available to a Chambers for funding pupillages will depend on how much each member of Chambers earns, how much he or she pays as chambers expenses and on what, other than pupillage funding, that money is spent on. Deciding that a particular group of barristers cannot collectively "afford" to take on a pupil will involve an invidious decision on such matters as the amount of profit which a barrister "ought" to be able to make from their business before being required to pay more by way of chambers expenses.

14. As regards the way in which waivers are given from the minimum funding requirements, we agree that it would be sensible for the BSB to review the way in which the discretion is exercised in specific categories of case. We would be opposed, however, to any general waiver of the funding requirement for pupillages. As the Wood Report said, unfunded pupillages can generally only be taken by those who can afford to support themselves through 6 and often 12 months without payment and are damaging to the reputation of the Bar as an open, accessible profession. In our view, any

widening of the operation of the waiver scheme would be likely to reintroduce to the Bar a level of elitism which many have worked tirelessly to eradicate in favour of a pure meritocracy. In any event, the Legal Services Board and the Bar Standards Board are strongly opposed to unfunded pupillages, and the waiver system should (and will) not be used as a means of circumventing the minimum funding rule generally.

15. In conclusion, the real cause of the "pupillage shortfall", as the Report uses this phrase, is the fact that far too many BPTC students are being taken on by the commercial training providers than will ever find careers at the Bar. The Association believes that unless this problem is addressed directly any initiative regarding pupillage is likely to be counter-productive. We would urge the Working Group to concentrate on finding real solutions to this issue, including pressing for full implementation of all the Wood recommendations, and ensuring that full statistics about the numbers of pupillages and tenancies/employed Bar positions are made available to those who are considering signing up for the BPTC.

Catherine Addy, Maitland Chambers

Eason Rajah QC, Ten Old Square

Elspeth Talbot Rice QC, XXIV Old Buildings

Joanne Wicks QC, Wilberforce Chambers

16th July 2012