CHANCERY BAR

LETR Discussion Paper "Equality, Diversity and Social Mobility Issues Affecting Education and Training in the Legal Services Sector":

Response of the Chancery Bar Association

Introduction

1. This letter sets out the response of the Chancery Bar Association to the discussion paper "Equality, diversity and social mobility issues affecting education and training in the legal services sector" which has been published by Legal Education and Training Review.

2. 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.

3. 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.

4. 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.

5. The discussion paper raises a number of specific questions, and inevitably our response to the questions is specific also. Of course it is important to look at specifics, but there are also some general points which we think need to be borne in mind some (but not all) of which you have probably already identified. So we will deal with those "big picture" points before turning to your specific questions.

6. The Bar sits at the end of a very long educational supply chain. There is a limited amount that the Bar can do to rectify faults earlier in the line and it is not the role of

a regulator to impose a requirement on the Bar that it should do so. When shortlisting candidates for training we are reliant on A level and degree results since these are nationally-applicable and supposedly institution-neutral measures of academic success in a job which demands the highest intellectual ability.

7. We are very concerned about fact that the "pinch point" in a would-be barrister's training arises at such a late stage in the process, namely at the stage of applying for pupillage. Under the current system there is a massive over-supply of would-be barristers who have gone to the trouble and expense involved in the BPTC, when compared to the number of pupillages and tenancies which are available. The problem is compounded by the fact that success in the BPTC is not readily portable to other careers – so that the time and expense which has been spent by people who then fail to get a pupillage (or a tenancy) is wasted. In our view this makes the current system inefficient and a cause of great unhappiness amongst disappointed students – but rather more importantly for the purposes of the current discussion it has significant consequences for social mobility since there will be many people from non-traditional backgrounds who cannot afford to invest time and money on a venture which has such uncertain prospects of success. We think this is something which needs to be addressed, and that the way to address it is for the BPTC course and pupillage be combined, so that students spend, say, 18 months doing pupillage, straight from their law degrees/GDL, involving both shadowing work in Chambers and classroom work on a day-release basis. This would mean in practice that students would not undertake the BPTC without a guarantee of pupillage training, but would also cut down the time wasted in making the transition from the BPTC to pupillage (i.e. the long summer holiday). Students are likely to focus better on their classroom learning having experienced real life practical application of the points being learned. For many Chancery Chambers the funding of this longer pupillage would be no different from the current system – see below. Otherwise the additional funding could be made available by the Inns, whose scholarships for BPTC students, we understand,closely correlate with those who go on to get pupillage.

8. We would like to stress that the Chancery Bar generally recruits at a much earlier stage than many people appreciate. Most Chancery Chambers are not in the Pupillage Portal and make pupillage offers in the second term of a law student's final undergraduate year (or in the second term of the law conversion course) – and therefore before they commit to doing the BPTC course. A number of Chancery Chambers offer very generous pupillage awards and allow their pupils to draw down a proportion of this award during the BPTC year, so that they are effectively funding both the BPTC year and pupillage. Given the problems discussed in the above paragraph, we consider that the process of early offers of pupillage is beneficial, as it enables students to make the decision whether or not to commit to the BPTC course

when they know the outcome of their pupillage applications. The practical effect of this is that, although prospective pupils will need to pass their BPTC before their pupillage starts, the grade they achieve at the BPTC is normally irrelevant. Most mentoring and support systems (eg the Inns' sponsorship programmes, which are designed for those on their BPTC year) are often irrelevant to prospective Chancery pupils for the same reason – ie pupillages will already have been allocated before students start the BPTC.

9. We think it is important that people starting at the Bar should not do so on their own. Chambers provide an important (albeit relatively informal) training environment for junior barristers, in respect of professional ethics, substantive law and litigation tactics. We believe that people who start in practice in chambers will get a better training than those who do not, but the point goes further than that. Without wanting to sound pompous, we believe that the fair and efficient resolution of disputes is promoted by ensuring that all advocates have a firm grounding in matters of professional ethics, substantive law and litigation tactics – so that any proposal which might compromise that aim should be viewed with considerable caution. We therefore think junior barristers in their first 3 years of practice should not be permitted to practise as sole practitioners without this support environment.

10. Chambers are small organisations, which are in reality groupings of individual members each of whom is a sole practitioner. A few chancery sets have 60-70 such members, but the overwhelming majority is considerably smaller than that and some have fewer than 10 members. The result is that sets of chambers do not currently need (and do not have) large infrastructures. So far as we are aware no set of chambers has dedicated HR staff, and the administration of recruitment and training of mini-pupils and pupils falls heavily on individual members. Excessive regulation places a heavy burden on practising barristers and risks driving up legal fees (and therefore the cost to the consumer) as Chambers come to feel that they have no option but to take on staff to deal with regulatory and compliance issues. This is why we believe that the better way to address diversity issues is by training rather than by regulation.

The questions

11. Question 2: Recruitment decisions for pupillage (ie whether to interview an applicant, or processing the result of an interview) are based on a combination of "hard facts" and contextual information. Obviously there are potential pitfalls in having regard to contextual information (among which are the weight that should be given to it, and the significance to be attached to the fact that different candidates

supply different contextual information) but the general perception of our members is that it is better and fairer to take this information into account. Quite how it is taken into account should be a matter for the recruiter (ie the set of Chambers) to decide – we do not think that a regulator should control the use to be made of contextual information since different fields of practice at the Chancery Bar require different skillsets and we do not believe regulation could be capable of being sufficiently nuanced to meet variations in different Chambers' recruitment needs. Rather the role of regulation should operate at a relatively high level of generality – ie requiring that processes must be fair.

12. Questions 4 and 5: We do not have any evidence of the type requested.

13. Question 6: We accept that getting a law degree is one way that people can satisfy the entry requirements for entry to the Bar. We also accept that the body which regulates the Bar (or the Solicitors' profession) should regulate what those entry requirements are – and that this may have an indirect effect on the law courses that academic institutions provide. But we do not think it could be right for a body whose remit is to regulate a profession to seek to regulate an academic institution which (by definition) is in the education sector rather than the legal profession. The idea floated by the question may conflict with other initiatives eg by OFFA. The question also seems to overlook two matters that we should have thought went without saying: (i) that not all people who take an undergraduate law course go on to seek legal qualification and (ii) not all people who seek legal qualification have a law degree.

14. We appreciate that one way a regulator could increase the pool of people eligible to take the BPTC course would be to lower the requirements for entry onto that course – eg to reduce the amount of legal knowledge required, or change some of the core subjects to "softer" options. But we do not think this would be a sensible idea. Litigation is not neatly divided into "contract cases", "land cases" and so on, and a great number of cases which arise in practice require not only an understanding of many of the core subjects (contract, land law and equity & trusts being the most important at the Chancery Bar) but also the ways in which these areas of law interact. The type of understanding which is required is gained only by learning the relevant legal principles before any professional training (ie the BPTC) starts – and this remains as true today as when the requirements for entry onto the BPTC course (and its predecessor courses) was first introduced.

15. Questions 7 and 29: We are aware of a number of diversity initiatives in relation to work experience at the Bar. But these initiatives have not yet been running long enough for us to form any view about the way this is affecting recruitment practices and trends.

16. Question 8: There are very few "internships" (defined by the Best Practice Code for Quality Internship as work placements exceeding 6 weeks) offered by the Bar, and none of which we are aware at the Chancery Bar. At present anyone who wants work experience in a set of Chancery Chambers must apply to that set of chambers for a "mini-pupillage". The contents of a mini-pupillage (and the number of days it lasts) will vary between sets of chambers; but as the name suggests, a mini-pupillage is a bit like a pupillage: mini-pupils are assigned a supervisor, will shadow them in Court and/or at conferences, be shown a representative example of the sort of work done in chambers and will be given an opportunity to "try their hand" at writing an opinion or drafting a statement of case which they can then discuss with their supervisor. The result is that someone coming away from a mini-pupillage will have acquired an insight – a general insight into what it would be like to be a pupil but also (and much more importantly) an insight into what it would be like to be a pupil in that particular set of chambers. Although all chancery practitioners are specialised (to a greater or lesser degree), the specialisms within the Chancery Bar cover a wide field and require a broad range of skillsets. It is common for people to have several mini-pupillages, with the result that they are able to compare several sets of chambers that (although all "chancery") may be very different in terms of the work they do and the skillsets that their work requires. Thus the current system helps students make sophisticated informed choices about where to direct their pupillage applications – something that would be lost by the introduction of a central clearing house. We should also point out that many mini-pupillages are offered as being "assessed" – ie that feedback from the mini-pupillage supervisor(s) will be taken into account if the mini-pupil subsequently applies for pupillage – and the sets of chambers that offer mini-pupillages on this "assessed" basis regard it as an important part of their recruitment process. The result is that the current system has advantages – both to mini-pupils and to Chambers – which would be lost if mini-pupillages were allocated from a pool.

17. Question 10: There is not much point in providing work placements unless these are done to the right standard: but doing that will be very burdensome on practitioners, with little or no "pay-back". It is far better (and a much better use of limited resources) for such placements to be available to people who are seriously thinking about practising as lawyers, rather than as part of an academic course – and this strongly suggests students should be given information about applying for placements rather than that course providers should be required to arrange placements.

18. Question 11: We are aware of C Carney's Analysis of the Background of Pupillage Portal Applicants in 2011, which shows that a significant number of people seeking pupillage have very large debts – and that the people who owe the most tend to

come from the least privileged backgrounds. Apart from that, the only "recent evidence" we have is the experience of members of this Association, in processing applications for pupillage and in acting as mentors in schemes operated by the Inns of Court. This experience confirms what we should have thought was self-evident – ie that course fees are discouraging (or preventing) some people from applying for pupillage, and those who are affected by this come disproportionately those with less privileged backgrounds.

19. Question 13: In relation to the Bar, scholarships are administered predominantly by the Inns of Court. We say "administered" because the funds used for providing those scholarships are (almost without exception) held on charitable trusts – so that the only appropriate form of regulation is that already undertaken by the Charity Commission.

20. Question 15: Unless such funding is to be provided by government (central or local) the inevitable consequence of its introduction would be that fees would have to go up – something that will disproportionately affect those whose financial need is almost (but not quite) enough to qualify for the scholarship. We are therefore concerned that the suggested scheme may actually have an adverse effect on social mobility.

21. Question 16: We have already expressed the view that the number of people admitted for the BPTC course vastly exceeds the number of pupillages that can be offered – the result being that for 5 out of 6 people taking the course, it will have been an expensive waste of time. We therefore have considerable sympathy with the suggestion that the qualification should be made more portable. But we have concerns about achieving this portability. Our first concern is that the BPTC course is already less portable than its predecessor courses were – ie historically people who did not get a pupillage could use their Bar qualification as a way of shortening the process of becoming a solicitor, but that this is no longer possible. Moreover, the oversupply of graduates from the Legal Practice Course diminishes the prospect of a career as a solicitor for a BPTC graduate. Our second, and greater, concern arises out of the content of the BPTC course which is practical rather than academic: we have real doubts whether the qualification can be made equivalent to a Masters' Degree unless there is a complete rethink about what the course is designed to achieve, with a potential loss of professional relevance. It would be right to say that many Chancery practitioners consider the BPTC course to be insufficiently demanding and capable of completion to current standards in substantially less than a full academic year.

22. Question 17: We can see that there may be some sectors of the Bar where the introduction of aptitude testing has a positive effect on diversity at the vocational

stage. What we are less sure of is whether this is an effect that will be felt at the Chancery Bar – the reason being that competition for pupillages at the Chancery Bar is extremely high, so the suggested aptitude testing is unlikely to act as an effective filter in the admissions process.

23. Question 18: In order to be eligible for call to the Bar, students must have attended a number of "qualifying sessions" by their Inn of Court. Some of these qualifying sessions relate to lecture courses or advocacy courses (including residential courses) which are relevant and important to people studying to be barristers. But in order for students to have enough qualifying sessions to be called to the Bar they must also attend at least some dinners in hall – again some of these may be linked to lectures but the majority are simply dinners (of a formal nature) that have little educational value – our concern being that these may have a negative impact on those from non-traditional backgrounds.

24. Questions 21 and 22: We do not think it would be right for regulators to prescribe outcomes in relation to the recruitment of pupils. A set of chambers can only select pupils from among the people who have applied to it for pupillage and our perception is that the spread of people who apply for Chancery pupillages is itself unrepresentative of the general population and other norms identified in the question.

25. Nor do we think it would be right to criticise a set of chambers for its recruitment of pupils unless there is either something wrong with its recruitment process or there is something wrong about the way the process has been applied in particular cases. The recruitment task is (or should be) to recruit the best candidate, and inevitably involves the exercise of judgment. The proper scope for regulation should be to ensure that each set of chambers adopts a fair selection procedure, and to ensure that the people operating those procedures have sufficient training in diversity and equality issues. But it would not be right or fair to apply quotas in relation to the recruitment of pupils: as noted above most Chancery Sets will recruit up to three pupils in any given year (although many will only recruit one or two) – a number which is far too small to have any statistical validity.

26. Question 23: At present the requirements for CPD seem to be designed to cause distress and anxiety to people who are about to take, are taking, or are returning from parenthood leave (or "maternity leave"). Common sense would suggest that the CPD requirements for such people should be relaxed during the time they are away, but the current rule is that (unless a "waiver" is obtained – see below) the full number of CPD hours must be recorded. Thus people about to take parenthood leave must either get their year's allocation of points before the birth or must try to

make up for lost time when they return to work, something which can be difficult when coping with a new baby at home and the need to rebuild one's practice.

27. Although the current CPD system permits the normal requirements to be waived in the event someone takes parenthood leave, the way that it works actually compounds the problem. It is not possible to apply for a waiver until after the event, and the process of obtaining a waiver is not sufficiently transparent for any applicant to have any confidence that the application will be successful – thus putting additional stress on a parent at a time when things are difficult enough. In addition to this, there is an application fee of £125 which (since the majority of people taking parenthood leave are likely to be women) seems to be indirectly discriminatory.

28. The need to acquire CPD also causes more general difficulties for people with young families, since most lectures attracting CPD are given out of court hours – usually starting at 5.30pm or later. The ChBA is alive to this practical difficulty, which it seeks to address by making recordings of its lectures and seminars available in electronic form.

29. Question 24: We have had considerable difficulty getting CPD accreditation for seminars relating to appointment as a judge or tribunal member – and this is a matter of some concern to us since an important point of these seminars is to help address diversity issues about appointment to such posts. The problem seems to be the view that appointment to the bench (or as a tribunal member) does not constitute "career progression" – a view which does not seem to be shared by the equivalent body administering the CPD system for solicitors. The result is that there is a degree of inconsistency between the types of course that qualify for CPD depending on which part of the legal profession one practises in. Another difficulty we have with the CPD system is that the Bar Standards Board is very slow in confirming whether a particular course will carry CPD points – causing delays which cause problems for people with childcare responsibilities, who will often not be able to afford the time to go to an evening lecture unless the course attracts CPD but who will not know whether a particular course actually does attract CPD until late in the day.

30. Question 25: We agree. As noted above, we believe that the need for diversity training is particularly important in relation to all people (principally members of chambers) who are actively involved in the recruitment of pupils.

31. Question 26: Please see paragraphs 23-25 above.

32. Question 28: As noted above, all barristers in private practice are currently self-employed. Re-accreditation would impose a considerable administrative burden on

them, which is likely to be felt disproportionately by those who balance a career at the Bar with other (eg family) commitments.

33. Question 29: We are aware of the Bar Council's "Speak up for others" programme of talks to schools, and also of the Youth Parliament, both of which we believe to be a success.

34. Question 30: We agree. People who are thinking about a career as a lawyer will, at some stage, need to be aware of the various types of career that may be available – and that is best achieved by a coordinating body. We agree that such a body should be non-regulatory.

35. Question 31: The provision of such information would do no harm, and would be of some help to members of the Chancery Bar in benchmarking applications.

36. Question 33: We do not think that any other regulatory action is required. We would also urge caution before any additional regulatory requirements are imposed on the Bar: the Discussion Paper refers to the risk of "regulation overload" and we believe that this is a real risk since (as we have pointed out at the beginning of this letter) sets of chambers do not have the infrastructure to be able to cope with extensive regulatory requirements.

Joanne Wicks QC

Timothy Dutton

Georgia Bedworth

Ruth Hughes

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