CHANCERY BAR

LETR Discussion Paper 02/2012

Response of the Chancery Bar Association

Introduction

1. The Chancery Bar Association ("ChBA") 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 recognized 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. We note the comment in paragraph 24 that composite responses by representative bodies need to be treated with care and might be skewed towards representative and interest groups. In the case of the ChBA response we believe that such a concern is misplaced. We are firmly of the view that this response, approved by a representative committee of 17 elected members and 7 regional and London co-optees, is likely to be the most reliable evidence that the Review Team will have of the attitude of the vast bulk of our membership.

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 we will address those below. There are some general or overarching points which we would like to make first.

6. In our view the significant features of the present system of legal education training ("LET") which allow the Chancery Bar to maintain its standing are as follows.

    a. The system produces applicants for pupillage or tenancy or employment with the following qualities:
        i. a strong natural intellectual and advocarial ability;
        ii. a strong base of knowledge and understanding of the law through the QLD or alternatively a sufficient base of legal knowledge through the GDL and the advantage of bringing other skills and knowledge acquired in obtaining a non-law degree (e.g. research skills from a history degree or language skills from an English degree);
        iii. a strong base in written and oral advocacy and other specialist vocational training (ethics, the role of the advocate, pleadings, procedure and evidence, ADR) through the BPTC.
    b. This is supplemented by on the job training during pupillage which bridges the gap between the classroom and practice. This is where a considerable amount of work is done on softer skills (e.g. negotiation, client relations) and ethics.
    c. Once in practice there is high quality continuing professional development by the specialist Bar Associations and the Inns of Court

(including 36 hours of advocacy related CPR in the first three years of practice). The ChBA's own programme is outlined below.

d. The nature of self-employed practice at the Chancery Bar is such that a barrister is constantly learning in practice; whether it is advocacy, or law, or how to deal with a difficult client or deliver unwelcome advice.

e. Finally the self-employed Bar is a highly competitive environment. Practice is a constant examination by other highly skilled lawyers (solicitors, opponents, Judges) and laymen (well-informed clients). This is reinforced by the need to prove excellence in specified competancies for appointment as Queen's Counsel and for judicial appointment.

7. The ChBA has always provided support for ongoing professional development. It has a New Practitioner Programme of 3 or 4 free seminars every year. This is in addition to its regular programme of 12 to 14 free seminars each year as well as a 2 day annual conference. These events involve High Court Judges and leading barristers and academics. The speaker notes for all seminars over recent years are a valuable resource and are available online. Some of these seminars are filmed and are available on DVD for those unable to attend and seminars are periodically organized outside London in conjunction with local Bar Associations.

8. While the comments made about the changes to the legal profession that the future may bring are noted, it is our view that the traditional model of the self-employed Bar will continue to survive for a considerable time. It is worth making the point that chambers are small organisations. They are groups of sole practitioners who share expenses. There are a few sets of 60 to 70 members, but the overwhelming majority are much smaller than that and some have fewer than 10 members. The result is that sets of chambers do not need or have large infrastructures. There is no HR department. The recruitment and supervision of pupils falls on practising barristers. The

administration of this is already a heavy burden. Supervision of pupillage has traditionally been regarded as a duty to the profession, and in many cases pupil supervisors will receive no direct benefit from undertaking the task. Excessive regulation places a further heavy burden on practising barristers. Increased regulation and compliance issues may reduce the number of pupillages or require staff to be taken on which will increase overheads and consequently legal fees (at the ultimate expense of the consumer).

9. We now address the specific questions raised in the Discussion Paper.

Question 1: in the light of limited evidence received so far we would welcome further input as regards the preferred scope of Foundation subjects, and/or views on alternative formulations of principles or outcomes for the QLD/GDL (We would be grateful if respondents who feel that have already addressed this issue in response to Discussion Paper 01/2012 simply refer us to their previous answer).

10. We believe that the QLD/GDL should contain a minimum knowledge base of law and a minimum base of cognitive and other skills training. Furthermore we believe that it is in the public interest that all holders of a QLD/GDL should have a common education in core areas of the law and we do not think allowing a specialised (e.g. civil law only) QLD/GDL is appropriate. We believe the current Joint Statement captures the minimums required. All self-employed barristers need to have studied the existing Foundation Subjects. We would be as concerned to see applicants for a chancery pupillage or tenancy who had not studied criminal law, or constitutional law, or human rights as we would be if they had not studied tort, contract, restitution, equity and trusts, or property law.

11. The ChBA regards the GDL as a very valuable alternative route into practice. It provides access to a pool of talented individuals who (history has shown)

have the appropriate qualities for successful practice at the Bar. Any longer than one year and the GDL may become unattractive and may impede access to the Bar.

Question 2: Do you see merit in developing an approach to initial education akin to ICAEW? What would you see as the risks and benefits of such a system?

12. There is too little information on how this radical solution would work in practice for us usefully to comment.

Question 3: we would welcome views on whether or not the scope of the LPC core should be reduced, or, indeed, extended. What aspects of the core should be reduced/substituted/extended, and why?

13. We have no comment to make on this.

Question 4: should greater emphasis be placed on the role and responsibilities of the employed barrister in the BPTC or any successor course? If so, what changes would you wish to see?

14. No. The BPTC is intended to train the basic vocational skills a barrister needs – such as oral and written advocacy, the rules of procedure and evidence, and ethics. It is these skills which an employer would expect a trained barrister, rather than, say, a trained solicitor to have. That is and should be the purpose and function of the BPTC.

15. Further "the role and responsibilities of the employed barrister" will vary according to his or her employment and we question what training can

usefully be given as part of the BPTC. In our view such training is primarily a function of pupillage, particularly if it is with the employer (assuming it is a Pupillage Training Organisation).

Question 5: do proposals to extend rights to conduct litigation and the extension of Public Access to new practitioners require any changes to the BPTC, further education or new practitioner programmes, particularly as regards (a) criminal procedure (b) civil procedure (c) client care, and (d) initial interviewing (conferencing) skills?

16. We think that extended rights proposed are likely to be taken up by a small minority. New practitioners who wish to exercise those rights should receive at least the same special training as is requires for current holders of those rights. In the case of new practitioners that training may need to address the lack of a period of mentoring. In our view this should be part of the BPTC but should be specialist training provided later to those who wish to exercise the rights.

Question 6: we would welcome any additional view as to the viability and desirability of the kind of integration outlined here. What might the risks be, particularly in terms of the LSA regulatory objectives? What are the benefits?

17. We have already suggested (paragraph 7 of our response to the LETR Discussion Paper "Equality, Diversity and Social Mobility Issues Affecting Education and Training in the Legal Services Sector") how some of the issues arising from the "pinch-point" which arises in training for the Bar might be addressed by fully integrating the BPTC and pupillage.. This is not the same as the partial integration which is being suggested here, which would not have the advantages which we identified – in particular that pupils would not incur the cost and time of the BPTC without the guarantee of pupillage. We would

not endorse any reform of the BPTC which does not address this key problem with the existing system, which is a source of considerable unhappiness for the majority of students who fail to get pupillage and, in our view, a substantial barrier to the cause of social mobility and diversity at the Bar.

18. In our response to the earlier Discussion Paper, we set out the advantages of a fully-integrated BPTC/pupillage. We see these as (1) a reduction in the number of "surplus" BPTC graduates (2) greater efficiency (and therefore a reduction in overall costs to students) by the abolition of the long summer holiday which currently forms the transition between the BPTC and pupillage and (3) the experience of real-life application of points being learned in the classroom, as discussed in your paper. We recognise however that there are disadvantages to any integration. The ability to provide satisfactory training in pupillage is in part dependent on the pupil being present and able to concentrate on the work he or she is being shown. A difficulty with an integrated course is that the practical on the job training being provided in pupillage may be disrupted and become unsatisfactory. Furthermore, for a large part of the self-employed bar the supervision of pupillage remains an unremunerated duty to the profession. Any sort of integration may impose further administrative or financial burdens upon the Bar and raises issues as to how it is to be funded. That may place further downward pressure on the number of pupillages available.

19. It does seem to us that the proposal for partial integration retains the disadvantages but without the advantages which we identified.

Question 7: We would welcome additional evidence as regards the quality of education and training and any significant perceived knowledge or skills gaps in relation to qualification for these other regulated professions.

20. We have no comment to make on this.

Question 8: As a matter of principle, and as a means of assuring a baseline standard for the regulated sector, should the qualification point for unsupervised practice of reserved activities be set, for at least some part of the terminal ('day one competence') qualification at not less than graduate-equivalence (QCF/HEQF level 6), or does this set the bar too high? (Note: 'qualification' for these purposes could include assessment of supervised practice). What are the risks/benefits of setting the standard lower? If a lower standard is appropriate, do you have a view what that should be (eg, level 3, 4, etc)?

21. We are inclined to agree that there should be a high baseline standard.

Question 9: Do you consider that current standards for paralegal qualifications are fragmented and complex? If so, would you favour the development of a clearer framework and more coordinated standards of paralegal education?

22. We have no comment to make on this.

Question 10: If voluntary co-ordination (eg, around NOS) is not achieved, would you favour bringing individual paralegal training fully within legal services regulation, or would you consider entity regulation of paralegals employed in regulated entities to be sufficient?

23. We have no comment to make on this.

Question 11: Regarding ethics and values in the law curriculum, (assuming the Joint Announcement is retained) would stakeholders wish to see

(a) the status quo retained;

(b) a statement in the Joint Announcement of the need to develop knowledge and understanding of the relationship between morality and law and the values underpinning the legal system

(c) a statement in the Joint Announcement of the need to develop knowledge and understanding of the relationship between morality and law, the values underpinning the legal system, and the role of lawyers in relation to those values

(d) the addition of legal ethics as a specific Foundation of Legal Knowledge.

In terms of priority would stakeholders consider this a higher or lower priority than other additions/substitutions (eg, the law of organisations or commercial law)? Would you consider that a need to address in education and training the underlying values of law should extend to all authorised persons under the LSA?

24. We believe that an important function of LET should be to ensure, so far as it can, that it produces ethical lawyers. We query whether it is usefully taught as an academic subject rather than as part of vocational training, pupillage or continuing professional development (the ChBA annual conference has in many years held a lively Q&A panel session chaired by a High Court Judge on ethical dilemmas which actually arise in practice). We would not wish to see legal ethics added as a Foundation Subject in place of an existing Foundation Subject. We would not wish to see it added as an additional Foundation Subject if it reduced the taught content of the other Foundation Subjects.

We would prefer to see the law of organisations as a Foundation Subject in preference to legal ethics.

Question 12: Do you agree the need for an overarching public interest test in assessing the aims and outcomes of LET? If so do you have any view as to the form it should take?

25. We believe it is implicit that the aims and outcomes of LET should be in the public interest in the sense that the aims and outcomes should achieve the greatest net public benefit taking into account the interests of all parts of the community. The public interest is not to be confused with the consumer interest, as certain bodies and groups often do. Consumer interest is a much narrower issue. We do not believe there is a need for an express test.

Question 13: we would welcome any observations you might wish to make as regards our summary/evaluation of the key issues.

26. We note 127(a). We would not accept that it applies to the Chancery Bar and we would be interested to see any evidence to the contrary.

27. We note 127 (b). This does not apply to the Chancery Bar. Please see our introductory comments.

28. We note 127(c). Ethics plays an important role in the BPTC, pupillage, CPD, QC and judicial applications. So we do not agree that its central role is not sufficiently recognised so far as the Bar is concerned.

29. We do not comment on 127(d).

30. In relation 127(e) we are concerned at the suggestion of alternative training pathways insofar as they may relate to the practice of the kind of work that is done at the Chancery (and Commercial) Bar. In the introductory section we set out the main features of present LET which allow the Chancery Bar to flourish. We do not see any real scope, or need, for an alternative entry route to the Bar beyond those already established and recognised (e.g. partial waivers of pupillage for foreign qualifying lawyers, transferring solicitors etc).

31. We note and broadly accept the points made in paragraphs 128 to 131.

Question 14: Do you agree with the assessment of the gaps (now or arising in the foreseeable future) presented in this paper in respect of the part(s) of the sector with which you are familiar? If not, please indicate briefly the basis of your disagreement. [If you feel that you have already responded adequately to this question in your response to Discussion paper 01/2012, please feel free simply to cross-refer.]

32. Where applicable this is addressed elsewhere in this Response. We have considered what is said in paragraph 101 carefully, but do not believe that the comments made there are aimed at the Chancery Bar.

Question 15: Do you consider an outcomes approach to be an appropriate basis for assessing individual competence across the regulated legal services sector? Please indicate reasons for your answer.

33. We doubt that further changes to regulation are going to make any difference to the quality of the legal services which the Bar provides.

Question 16: in terms of the underlying academic and/or practical knowledge required of service providers in your part of the sector, would you expect to see some further specification of (eg) key topics or principles to be covered, or model curricula for each stage of training? If so do you have a view as to how they should be prescribed?

34. This is already provided in the form of the QLD/GDL, BPTC and the requirements for completion of a satisfactory pupillage (which is effectively a curriculum for pupillage). The check-list for Chancery pupillage is attached.

Question 17: Would you consider it to be in the public interest to separate standards from qualifications? What particular risks and/or benefits would you anticipate emerging from a separation of standards and qualifications as here described?

35. There is insufficient detail here. Presumably "standards" has the meaning given in paragraph 116. If standards are separated from qualifications, how will this work in relation to the content of the QLD/GDL, BPTC and pupillage? Will the BSB have to assess the content of each QLD/GDL/BPTC provider to see if the course satisfies the standard? We are concerned that such a separation will simply add an extra level of regulatory complexity. So far as the Bar is concerned we do not see any real advantage in the points made in paragraph 136. We repeat our view expressed above that we do not see any real scope, or need, for an alternative entry route to the Chancery Bar beyond those already established and recognised. We are not convinced that a single system of accreditation for particular activities – applying across the board irrespective of qualifications – would work, but we will reserve more detailed comment to such time as detailed proposals are advanced.

Question 18: Decisions as to stage, progression and exemption depend upon the range and level of outcomes prescribed for becoming an authorised person. A critical question in respect of existing systems of authorisation is whether the range of training outcomes prescribed is adequate or over-extensive. We would welcome respondents' views on this in respect of any of the regulated occupations.

36. We have no comment to make on this.

Chancery Bar Association

October 2012