CHANCERY BAR

LSB consultation on proposals for draft guidance to be issued under section 162 of the LSA 2007: Increasing flexibility in legal education and training

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. 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. A large number of Chancery claims are also heard in the County Courts.

3. Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, inheritance, trusts and business law. As advocates, they litigate in all courts in England and Wales, as well as in common law jurisdictions abroad.

4. The consultation 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.

5. In our view the significant features of the present system of legal education and 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, with higher requirements being placed on barristers in their first three years of practice, including successful completion of a further advocacy and ethics course.
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 often highly educated and commercially switched-on clients). This is reinforced by the need to prove excellence in specified competencies for appointment as Queen's Counsel and for judicial appointment.

6. While the changes to the legal profession that the future may bring are recognised, it is our view that the traditional model of the self-employed Bar will continue to survive for a considerable time. It is therefore 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. Supervision of pupillage has traditionally been regarded as a duty to the profession. While we believe that there can be no substitute for pupillage insofar as it prepares new barristers for the realities of legal practice (in a way that academic study and "classroom" vocational training cannot replicate), it must be acknowledged that the administration of pupillage is a heavy responsibility for already busy self-employed professionals. Excessive regulation and increased compliance requirements place a further burden on practising barristers, the unintended effect of which may be to reduce the number of pupillages offered or to require staff to be taken on which will increase overheads and consequently legal fees (at the ultimate expense of the consumer).

Response to the questions

7. We now address the specific questions raised in the consultation.

Proposed outcomes

Question 1: Do you agree that these outcomes are the right ones?

Outcome 1

8. As a general observation, Outcome 1 appears to envisage a system which aims to produce basic competence at the point of entry whereas it is in both the consumer and the public interest that: (a) the pool of applicants to the Bar includes not just the competent, but the most able with the qualities and skills identified in paragraph 5(a) above; and (b) that the Bar and the consumer has a simple means of comparing and identifying them.

9. More specifically, we would be concerned if one of the "time served models" or "inputs" which regulators are being invited to move away from is the QLD or GDL. Academic ability is an important indicator of a person's aptitude for chancery work and has proved to be a good indicator of a person's likely success at the Bar. It is important for both those choosing applicants into the profession, and for consumers, that those who are most able can be identified.

10. At present:

a. At the end of the QLD or GDL, students are assessed by reference to their academic legal knowledge and this forms a basis for assessing whether they can take on the challenges of vocational training.

b. At the end of the BPTC year, students are assessed by reference to whether they have sufficient skills in legal research, client conferences, opinion writing, pleading and oral and written advocacy and sufficient knowledge and understanding of procedure, evidence and ethics to undertake pupillage.

c. At the mid-point and at the end of pupillage, pupils are assessed by reference to whether they have satisfactorily completed the standard checklist and the specialist checklist relevant to their areas of practice. These checklists set out a list of the core elements of a barristers' work. By completion of pupillage, a pupil must know, understand and, particularly, be able to do these core elements. It can be seen that in the final stage of training, the Bar's education and training requirements focus on what the individual must know, understand and be able to do at the point of authorisation.

This method of staged focus on what an individual must do, works. It could be said that there is a separate 'point of authorisation' by which individuals will be assessed at each stage. If an individual cannot successfully complete a particular stage, it is unlikely that they will do so in the future. It is impractical to expect providers of education and training to continue to teach the first stage learning during the second stage and the first and second stages during the third stage. To do so would result in insufficient attention being paid to the knowledge and skills taught on the second and third stages. To that extent, appropriate barriers to entry could serve a useful purpose. They prevent individuals continuing to waste time and expend large sums on expensive training when it is clear that they will not be found competent at the end of all of the training stages and, indeed, may not be able to find a place on the third stage of training (pupillage).

<u>Outcome 2</u>

11. We assume that Outcome 2 is only referring to the BPTC and not the QLD and the GDL. We observe that significant flexibility may generate disparity between the training received from different providers. This will make it more difficult for chambers and employers to be assured that they are recruiting pupillage candidates who come with the necessary skills to undertake pupillage. More importantly, it will make it more difficult for solicitors and

consumers instructing counsel to ensure that the barrister they instruct will have a similar base level of training to the barrister representing the other party to the dispute.

Outcome 3

12. Outcome 3 appears to envisage that the threshold for entry into the profession is basic competence. We assume that it is not being suggested that those entering the Bar should only be educated and trained to competence. Obviously it is in both the consumer and public interest that students are educated and trained to be excellent, even though the assessment requirement may only be competence. What amounts to competence will vary from sector to sector.

Outcome 4

13. Outcome 4 does not apply to the self-employed Bar. Self-employed barristers are not employed by an entity. See paragraph 6 above.

Outcome 5

14. So far as the Bar is concerned, there IS an "oversupply" in the sense of too many students coming through the system. We remain concerned 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 incurred the cost and time of the BPTC, when compared to the number of pupillages and tenancies which are available. In 2009/10 there were 1432 successful BPTC students and just 460 first six pupillages available. In 2010/11 there were 1375 successful students[1] and 446 1st six pupillages [2]. Of those who failed to obtain pupillage, 171 (2009/10) and 191 (2010/11) entered employed practice. This is a key problem with the existing system, which is a source of considerable unhappiness for the majority of students who fail to get pupillage. In our view, this is a substantial barrier to the cause of social mobility and diversity at the Bar – it favours those who can afford to hazard the high risk of not obtaining pupillage.

15. Neither of the two benchmarking reports referred to at paragraph 72 (individuals and small businesses) justify the conclusion that there are too few *barristers* and more specifically too

[1] The Bar Barometer 2012, page 55.
http://www.barcouncil.org.uk/media/177918/bar_barometer_nov_2012.pdf
[2] The Bar Barometer 2012 at page 55

few *chancery barristers*. The Bar, and in particular the Chancery Bar, is a highly specialised sector of the legal community. Barristers in self-employed practice are not going to be meeting the "unmet need" identified in that research in relation to e.g. an individual's conveyancing or non-contentious probate legal needs. Neither of the reports recognises that the relevant consumer of the Chancery Bar's services (and therefore the relevant consumer interest) is often large business or high net worth individuals. The Bar operates in a highly competitive environment, and chambers are incentivised to take as many tenants as they can to share expenses and increase turnover. The primary downward pressure on the numbers that can be taken is the amount of work that is available for a new tenant to do. There is (unsurprisingly) no evidence whatever that increasing the number of students coming through the system is going to make any difference to the amount of work available at the Bar.

16. We therefore disagree that proposed Outcome 5 is appropriate for the Bar. It is not in the public interest that that there should be less restrictions with a view to even more students coming through.

Question 2: Do you think the outcomes should have equal priority?

17. This should be a matter for each individual regulator.

Education and training requirements focus on what an individual must know, understand and be able to do at the point of authorisation

Question 3: Do you agree with our guidance that a risk based approach to education and training should focus more on what an individual must know, understand and be able to do at the point of authorisation?

18. See our response at paragraph 8 above.

Question 4: What are the specific obstacles that need to be removed to facilitate movement across different branches of the profession?

19. There are none, at least so far as transfer to the Bar is concerned. There is already a sensible system in place which requires those transferring to the profession to undertake training in the skills necessary to carry out the role competently. For example, solicitors have to take an

advocacy course in order to transfer. It is clearly in the consumer and public interest that transfer is not permitted unless those entering the profession are competent to carry out the role. Ensuring that consumers can be assured of receiving a service from someone competent to do the job should be a higher priority than facilitating easier movement between the professions.

Question 5: Do you agree that regulators should move away from 'time served' models?

20. No. There is a danger here in trying to fix that which is not broken.

Question 6: Do you agree that the regulation of students in particular needs to be reviewed in light of best practice in other sectors?

21. We do not believe that this applies to the Bar.

Providers of education and training have the flexibility to determine how best to deliver the outcomes required

Question 7: Do you agree that regulators should allow more flexibility in the way that education and training requirements are delivered by no longer prescribing particular routes?

22. We do not agree that this would be appropriate in relation to the Bar. In paragraph 5 above, we set out the main features of the 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.

Question 8: Do you think such a change will impact positively on equality and diversity?

23. We do not think that it would have the hoped for positive impact in relation to the Bar. In fact, it is likely to have the opposite effect. See our comments at paragraph 15 above.

Question 9: Do you agree that regulators should review their approach to quality assurance in light of developments in sector specific regulation of education providers?

24. This should be a matter for the regulators to decide.

Balancing entry and ongoing requirements

Question 10: Do you agree that entry requirements set by regulators should focus on competence?

25. We agree, subject to the points made at paragraph 13 above as to excellence in training.

Question 11: Do you agree with our proposal that there may be areas where broad based knowledge is not essential for authorisation? Can you provide any further examples of where this happens already?

26. We can see that there may be areas in other professions where this is appropriate but we do not agree with this proposal in relation to entry to the Bar. 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.

27. We note the reference (at paragraph 55) to notaries, licensed conveyancers and others who practise on more tailored legal qualifications. While we make no comment in relation to these other legal professions, we consider any comparison with the Bar to be inappropriate.

Question 12: Do you agree that reaccreditation requirements should be introduced in areas where the risks are highest?

28. No. In our view this and outcome 3(g) are counterintuitive. If the authorisation requirements of basic competence are satisfied then there is only a case for re-accreditation if there is reason to believe that those requirements will not at some point in the future be satisfied. That is the relevant "risk". This "risk" is satisfactorily met by compliance with the CPD requirements. We reiterate the points made in paragraph 5 above – the Chancery Bar is a highly competitive environment and the standards required of the Chancery Bar by judges, solicitors, clients and opponents are extremely high.

Balancing between entities and individuals

Question 13: Do you agree that in most circumstances an entity is better placed than the regulator to take responsibility for education and training?

29. We do not believe that this can apply to the self-employed Bar. See paragraph 6 above.

Question 14: Can you think of any circumstances in which this may not be possible?

30. Please see paragraph 6 and our answer to question 13 above. It will not be possible in the case of the self-employed Bar.

Restrictions on numbers

Question 15: Do you agree that it is not the role of the regulator to place restrictions on the number of people entering the profession?

31. No. Please see paragraph 15 above.

Question 16: Can you provide any examples for review where the current arrangements impose such restrictions and may be unnecessary?

32. No.

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