



FUTURE BAR TRAINING

Response to the BSB consultation on the Future of
Training for the Bar: Shaping the education and
training requirements for prospective barristers
(October 2017)

A response from the Bar Association for Commerce Finance and Industry

INTRODUCTION

Founded in 1965, the Bar Association for Commerce, Finance and Industry (“BACFI”) represents the interests of employed barristers working in commerce, finance and industry. BACFI’s members include barristers employed in commercial organisations and law firms, employed by the government legal services, and those working through their own consultancy practices.

BACFI is keen to play its part as a representative organisation in helping shape the development of the Bar of England and Wales, by bringing forward the views of its members. BACFI actively supports the objective of an independent and high-quality bar, accessible to all.

GENERAL REMARKS

We note the four key principles set out by the Bar Standards Board in the foreword to the consultation. BACFI has always advocated greater flexibility in the final stage of training for the bar and we are therefore pleased to see that the BSB is considering introducing greater flexibility. However, BACFI’s aim in advocating greater flexibility is to enable commercial organisations to play a greater role in training barristers. BACFI supports the principle of flexibility insofar as it achieves these aims.

Nevertheless, BACFI believes that greater flexibility should not be introduced to the detriment of the BSB’s fourth-listed principle, ‘sustaining high standards’. English law holds a pre-eminent position in the global commercial legal services market and is held in very high esteem internationally. London is the jurisdiction of choice for major international litigation and English law makes a substantial contribution to Rule of Law and governance templates adopted in emerging nations. The English and Welsh Bar is world-renowned for its high standards of advocacy and expertise and the maintenance of these high standards should be paramount. It is vitally important that we retain the elements of education and training that have supported this pre-eminence.

The contribution the English and Welsh Bar makes to the economy should not be underestimated and BACFI urges the BSB to consider the broader contribution the Bar makes to the economy. This should not be measured purely as productivity or contribution to GDP but to the maintenance of a trusted and well-respected legal system that encourages foreign direct investment. Such a system cannot be maintained unless those recruited and accepted into the profession continue to meet the Bar’s high standards. Young trainee barristers will be tomorrow’s QCs, General Counsel and judiciary. While this contribution is less tangible and measurable, BACFI submits that it is more important to the public interest than other factors which might appear more immediately and directly impactful.

BACFI is concerned that the BSB’s principles do not adequately consider the far-reaching effect any changes made to training might have on the English legal system, the UK economy and international competitiveness. In its submission to the *Legal Education and Training Review*, BACFI (2012) set out its long-term vision for education and training, which set out the following principles:

- Setting a gold standard of technical excellence and ethical conduct
- Fair and open access to the profession, drawing from the widest talent pool
- Serving the needs of “consumers” (from retail to “Business to Business”) and upholding the rule of law
- Increasing the global footprint of English law as a governing law of choice internationally and maintaining global recognition of the excellence of English-law-qualified lawyers

- Multiple entry and exit points to achieve maximum flexibility.

BACFI is also concerned that the BSB is considering changes that, while appearing to introduce greater flexibility, will not actually address the challenges faced by commercial organisations or enable greater provision of employed pupillage.

Some of the challenges for commercial organisations, as highlighted in previous consultation responses, include:

- The advertising requirements for pupillage, which impact upon the appeal of offering pupillages within commercial organisations.
- The ease with which pupil barristers are able to move between traditional chambers, law firms and commercial organisations, which impact upon the ability of such organisations to work together effectively to educate pupils (as with the Government Legal Service and the Navy).
- The constant need to rely on waivers under the current structure when dealing with “alternative arrangements” for pupillage provision or for pupil supervisors, which also impacts upon the appeal of offering pupillages within commercial organisations.
- In a law firm or large in-house legal department, prospective solicitors and barristers might be required to undertake a common training programme (albeit with specialist components, such as an advocacy component for trainee barristers). Training requirements for the Bar need to be flexible enough to accommodate this.

THE ROLE OF THE INNS OF COURT IN BARRISTER TRAINING

Question 1: Should the BSB have regulatory oversight of students? Please explain why or why not.

BACFI does not believe the BSB should have greater regulatory oversight of students than it has currently. The existing rules already provide a broad framework and additional regulation of students risks putting trainee barristers under greater pressure unnecessarily at a time when they need to focus on learning. The BSB can achieve its objective of safeguarding the public by regulating training providers, without putting trainee barristers at a disadvantage or making training for the Bar appear less attractive (for example, because of a perceived lack of proportionality in regulatory requirements).

Equality and diversity information can be obtained and monitored without greater regulatory oversight and the level of regulatory oversight the BSB would be likely to be able to apply to students would be unlikely to make them any better able to judge suitability of character, or fitness or propriety for the Bar.

BACFI would be concerned that greater regulatory oversight would be more costly for the profession.

Question 2: Do you think the BSB should continue to require membership of an Inn as a mandatory part of Bar training? Please explain why or why not.

BACFI believes membership of an Inn should continue to be a mandatory part of Bar training. The Inns represent a vital part of life at the Bar (whether employed or self-employed), they embody the history and

best traditions of the Bar, they facilitate unprecedented levels of engagement between the different branches of the profession and provide unparalleled access to members of the judiciary and other leading national and international role models. BACFI is concerned that the BSB's consultation appears to reveal a worrying lack of understanding of the role the Inns play in life at the Bar.

The Inns are central to the tradition and shared values of the Bar. They instil in barristers a respect for the profession and the courts that transcends legal and regulatory provisions. They are part of the cultural fabric of the Bar and help give barristers a sense of identity, responsibility and duty. Whatever their practice (and whether employed or self-employed) barristers observe the same standards of ethics and professionalism because they belong to the community of barristers. The Inns are uniquely positioned to be able to maintain these shared values and tradition.

Paragraph 1.1 in the BSB's *Professional Statement for Barristers* describes the requirement for barristers to 'uphold the reputation of the Bar and observe their duty to the court in the administration of justice.' Section 2 of the *Professional Statement for Barristers* sets out, in detail, the professional standards a barrister is expected to observe. Barristers observe these standards, not because they are set out in a statement, but because it is part of the culture of the Bar, instilled by the Inns of Court, that they should.

The Inns provide membership of a society of barristers, within which young trainees can meet with senior barristers and judges, who give up their time to pass on their knowledge and experience to the next generation. In this way, the Bar and its culture are perpetuated.

There is an obvious risk that if membership of an Inn was not mandatory, many students might choose not to join an Inn. In so doing, they would deprive themselves of the valuable opportunities the Inns provide for learning, mentoring and socialising with barristers of all levels of seniority. Students that did not join an Inn might not feel part of the community of barristers; might not have the same institutional sense of duty and responsibility; and might be less inclined to observe the required professional and ethical standards because they would not be part of the same shared culture that exists today. Furthermore if membership were discretionary, this would inevitably lead to a two-tier system, with those who benefited from membership of an Inn being held in much higher regard, having better access to training and networking contacts.

As an association of employed barristers, BACFI believes in the 'One Bar' concept. Membership of an Inn maintains the community to which all barristers (employed and self-employed) belong. The Inns provide a cradle-to-grave support network from which all barristers can benefit and through which barristers can help each other and wider society. All the Inns hold events for and support the employed Bar. The Inns also include employed barristers within their representative and management bodies. A student joining an Inn and attending Inn events can meet barristers who have had vastly different career experiences but who all belong to One Bar and share in the same culture of the Bar. Such support, mentoring and learning opportunities, and access to networking contacts risks being diminished significantly if the current system were altered.

Question 3: If you answered 'yes' to question 2, do you think the BSB should continue to require "student membership" of an Inn or set the requirement at the point of (or just before) being called to the Bar? Please explain why or why not.

BACFI believes that the BSB should continue to require student membership of an Inn. The reasons given in answer to Question 2 explain the importance of membership of an Inn, not only to pre-qualification training,

but also for newly-qualified barristers and those seeking additional support as their practice develops or changes.

Question 4: Do you think the BSB should continue to delegate responsibility for educational and fit and proper person checks to the Inns of Court? Please explain why or why not.

BACFI does not understand why the BSB has asked this question in this way. BACFI is not aware that the BSB has any responsibility to carry out educational and fit and proper person checks, which it could delegate. BACFI understands that this responsibility sits with the Inns currently. BACFI believes the Inns of Court should, if they wish, remain responsible for verifying the education, fitness and propriety of their members. This is consistent with the approach in other professions. For example, in regulated financial services, professionals are required to obtain a Certificate of Competence from their chosen professional body (e.g. the Chartered Institute of Securities and Investments; or the Chartered Insurance Institute). The Financial Conduct Authority does not perform this function itself.

Question 5: Do you think the BSB should require DBS checks as part of the fit and proper person checks? If you do, who do you think should perform this function and why?

BACFI does not have a view on whether or not DBS checks should be required as part of the fit and proper person checks. The BSB might be interested to know that BACFI's experience is that many commercial organisations carry out DBS checks as part of their regular pre-employment checks before engaging a new employee, this is particularly the case where there is a regulatory or statutory requirement to do so. It is not clear however why this would be required for student barristers.

Question 6: Do you agree with our proposals to improve the current checks as described? Please explain why or why not.

BACFI does not have a view on the BSB's proposals.

Question 7: Do you think that the Inns or the BSB should oversee student conduct? Please explain why.

BACFI does not believe it would be appropriate for the BSB to oversee student conduct. In answer to Question 1, we have said that the BSB should not have any greater regulatory oversight of students than currently. It would be inconsistent with our answer to Question 1 to say that the BSB should be responsible for overseeing student conduct. BACFI does not believe oversight of student conduct would be consistent with the role of a regulatory body.

Our answer to Question 1 sets out the reasons for our belief that the BSB should have no greater regulatory oversight of students than currently.

Question 8: Do you think that the BSB should continue to prescribe qualifying sessions as part of the mandatory training requirements? Please explain why or why not, including (if appropriate) which elements of the qualifying sessions are particularly useful to be undertaken prior to practice.

BACFI believes very strongly that qualifying sessions should remain part of the mandatory training requirements. In answer to Question 2, we explained our belief that the high professional and ethical standards observed by barristers exist because those standards are part of the tradition and culture of the Bar and that the Inns are central to the developing and maintaining of that culture. BACFI believes that a strong culture of compliance is far more powerful than any regulation or regulatory body. Barristers (whether employed or self-employed) observe high professional and ethical standards because they understand those standards to be part of what it is to be a barrister, not because they must subscribe to a set of regulatory principles. BACFI believes the qualifying sessions are important in instilling the shared culture of the Bar in student barristers; in developing in future barristers the sense of duty and responsibility that comes with being a barrister; and in helping future barristers become part of the community of barristers. Membership of an Inn is not enough to bring students within the community of barristers. The qualifying sessions compel students to get involved in the life of their Inn.

Question 8 asks which elements of the qualifying sessions are particularly useful to be undertaken prior to practice. BACFI is concerned that this demonstrates a lack of understanding of the contribution the Inns play in life at the Bar and the importance of the Inns and qualifying sessions to the culture of the Bar. BACFI agrees with the point made in Paragraph 150 of the consultation paper. However, it is important to understand that the removal of Qualifying Sessions, and the removal of mandatory dining in Hall at the Inns, will mean that students will not only be deprived of the opportunities to develop professional networks but of membership of a professional community with a strong culture of professional excellence that stretches back many generations.

Question 9: If you answered 'yes' in question 8, should there be any changes to the existing arrangements? If so, do you prefer Option B or Option C to reform our oversight of qualifying sessions? Please explain why.

BACFI does not believe any changes to the existing arrangements are necessary, save for the comments noted above about the benefits of some form of mandatory dining in Hall. BACFI does not agree with Option B because, as explained in answer to Question 8, BACFI believes qualifying sessions are vital to the maintenance of the strong professional and ethical culture of the Bar. BACFI does not agree with Option C either. Option C again demonstrates a lack of understanding of the importance of the Inns and qualifying sessions to the maintenance of the shared culture of the Bar. This is not something that can be measured easily or assessed in a student so as to facilitate the creation of a development plan.

Question 10: If you answered 'yes' in question 8, do you think that other training providers could provide qualifying sessions? Please explain why or why not, including what elements need to be delivered by or in association with the Inns themselves to ensure their benefits are to be retained.

Question 10 talks of 'other training providers', implying that the Inns of Court are nothing more than training providers. The Inns are not simply training providers. They are a unique institution amongst the professions that is vital to the maintenance of the best traditions and culture of the Bar and of the high professional and ethical standards that are central to that culture. The institution of the Inns of Court has been built over 600

years and no other body or training provider could replace them or provide the cultural dimension of qualifying sessions.

Question 11: Do you have any alternative suggestions for how qualifying sessions might help students meet the requirements of the Professional Statement?

We hope that through our answers to the questions in this section of the consultation we have made it clear that BACFI views the Inns of Court as vital to the culture of the Bar and to the maintenance of the high ethical and professional standards observed by the Bar. Those standards, which have long been central to the culture of the Bar, are now reflected in Paragraph 1.1 and Section 2 of the BSB's *Professional Statement for Barristers*. We urge the BSB to recognise the importance of the Inns in maintaining the culture of the Bar and that this culture is far more powerful than any written regulation or regulatory body. It will help students meet the requirements of the *Professional Statement* pertaining to professionalism and culture if they continue to join a community of barristers whose culture values professionalism and duty.

FUTURE ARRANGEMENTS FOR THE WORK-BASED COMPONENT OF TRAINING

Question 12: Do you think we should allow pupillages to vary in length? Please explain why or why not.

BACFI would like to see greater flexibility in the work-based component of training, for example by enabling greater flexibility as to who can be a pupil supervisor and where a pupillage can be undertaken, where this improves the availability of employed pupillages but not at the expense of the high standards of training for the Bar. An employed pupillage should meet the same standards, provide the same benefits, and be of the same value as a pupillage at the self-employed Bar. Any flexibility introduced to accommodate commercial organisations that wish to become pupillage providers must not present a risk that the value of pupillage (whether employed or self-employed) is diminished or pupils themselves (whether employed or self-employed) can be exploited. BACFI believes the BSB should not allow variation in the minimum duration of full-time pupillages. However, where pupillage is undertaken on a part-time basis, BACFI believes it should be possible to complete pupillage over a longer period (so that the actual time spent undertaking pupillage is equivalent to 12 months). This might assist commercial organisations that wish to offer pupillage by partnering with traditional chambers (or other organisations) to meet some of the requirements of pupillage. Large in-house legal departments and law firms might be likely to take a more modular approach to pupillage under which employed pupil barristers are required to gain more experience in different 'seats' or where the 'practising' and 'non-practising' components are undertaken simultaneously. In some commercial organisations and law firms, it might therefore be desirable to offer pupillage of longer than 12 months.

Question 13: If you answered 'yes' to Question 12, please tell us whether you think there should be minimum and/or maximum lengths associated with this change and what those minimum or maximum lengths should be. Please explain why.

BACFI believes that 12 months is an appropriate period for completion of all of the components of pupillage and that a full-time pupillage should last 12 months. Where a pupillage is undertaken on a part-time basis, the time actually spent undertaking pupillage should be equivalent to 12 months (so that if a pupil spends 50 per cent of his or her time actually undertaking pupillage, the pupillage should last two years.)

Question 14: Which option, if any, for reforming the award of the Provisional Practising Certificate do you support? Please explain why.

As discussed in answer to Question 12, law firms and commercial organisations might wish to offer modular pupillages in which the ‘practising’ and ‘non-practising’ components of pupillage are undertaken simultaneously. Flexibility might also be required to accommodate part-time pupillages. Options B and C both offer the flexibility that would accommodate law firms and commercial organisations and neither would prevent traditional chambers from following Option D in practice. Option C would appear to offer flexibility while also providing some assurance that the pupillage programme is properly planned from the outset so that pupils cannot be exploited.

Question 15: Do you think the minimum pupillage award should be raised? Please explain why or why not.

Commercial organisations offering employed pupillage are likely to pay pupils in line with their company remuneration policy and at a level that is competitive with commercial law firms and chambers. An increase in the minimum pupillage award is likely to impact smaller sets of chambers or smaller organisations that may therefore struggle to fund pupillage, and therefore impact on their willingness to offer pupillages at all. As such, BACFI defers to the Bar Council in relation to this question.

Question 16: If you answered ‘yes’ to question 15, should we use the National Living Wage or the Living Wage Foundation benchmark for the minimum award? Please explain why.

Again, BACFI defers to the Bar Council in relation to this question.

Question 17: Do you think the current exemption from funding rules for transferring lawyers should be removed? Please explain why or why not.

BACFI defers to the Bar Council in relation to this question.

Question 18: Do agree that we should introduce re-authorisation of Approved Training Organisations (ATOs)? Please explain why or why not.

BACFI agrees that the proposed light-touch re-authorisation for ATOs should be introduced. BACFI believes this would help to ensure that all ATOs were appropriately monitored so as to maintain a common standard to training across the Bar (employed and self-employed). The proposed light-touch approach does not appear to be too onerous and would be unlikely to deter commercial organisations from becoming re-authorised as

ATOs (subject to the point made in answer to Question 19). However it is important to note that the current process for authorisation to become an ATO is not as simple and as straightforward as it could or should be for commercial organisations. This impacts negatively upon the willingness of commercial organisations to consider registering as ATOs.

Question 19: If re-authorisation were to be introduced, how many years do you think the defined authorisation period should last (eg 3 or 5 years)?

BACFI feels that any period of less than five years would be unnecessarily burdensome and might deter commercial organisations from seeking authorisation or re-authorisation as ATOs.

Question 20: Do you think the BSB should allow pupil supervisors to supervise more than one pupil? Please explain why or why not.

BACFI does not agree that the BSB should allow pupil supervisors to supervise more than one pupil. BACFI has explored this issue at length. The experience of BACFI members is that one-to-one supervision during pupillage is enormously beneficial. Those members working as employed barristers in law firms observe that trainee solicitors are also required to have one, named training principal. Those members employed in in-house legal departments have also observed that training a lawyer is extremely involved and places significant demands on the trainer. Particularly in small legal teams, there would be a risk that allowing one supervisor to supervise more than one pupil would result in a poorer experience for the pupil and lead to a risk that the standard of training delivered was inadequate.

BACFI asks the BSB to consider whether or not it might be possible to permit non-barristers to be registered as pupil supervisors. For example, where a law firm wished to offer employed pupillages, it might wish to appoint a solicitor-advocate as a pupil supervisor. Clearly, this would need careful consideration and any prospective pupil supervisor would have to possess the appropriate skills and scope of practice to ensure the quality of training delivered did not suffer. However, such an alteration would limit the current use of waivers and would significantly increase the willingness of organisations to apply to become ATOs and the likelihood of additional pupillages being offered.

Question 21: Should the BSB prescribe pupil supervisor training outcomes? Please explain why or why not.

In principle, BACFI agrees that the BSB should prescribe pupil supervisor training outcomes. This would be particularly important if the categories of person able to become pupil supervisors were to be broader.

Question 22: How should the BSB seek assurance that outcomes in pupil supervisor training are being delivered?

The BSB could monitor providers of pupil supervisor training by carrying out periodic, thematic reviews to ensure training was being delivered to an appropriate standard.

Question 23: Should organisations be required to provide this assurance during the authorisation process? Please explain why or why not.

Organisations could be required to provide this assurance during the authorisation process by, for example, confirming that they have an appropriately qualified and trained pupil supervisor available. ATOs could give a further assurance at the re-authorisation stage (if re-authorisation of ATOs is introduced). However, such self-certification would be unlikely to provide as effective assurance as would the periodic monitoring of training providers.

Question 24: Should the provision of pupil supervisor training be opened up to other providers (other than the Inns)? Please explain why or why not.

In principle, provision of pupil supervisor training could be opened up to other providers. However, this would be likely to increase the risk that training was not being delivered to an adequate or consistent standard. This in turn would make the monitoring of training providers more important and, at the same time, more difficult. Restricting the training of pupil supervisors to the Inns of Court would ensure a consistency of approach and make it easier for the BSB to obtain assurance that outcomes in pupil supervisor training were being delivered.

Question 25: Should regular refresher training be mandatory for all pupil supervisors? Please explain why or why not.

BACFI believes that regular refresher training should be mandatory to ensure consistent and adequate standards of training are maintained.

Question 26: If you answered 'yes' in Question 25, how often should it be undertaken (eg every 2, 3 or 5 years)?

Refresher training should be undertaken at least every five years. This would be consistent with our answer to Question 18.

Question 27: Should delivery of mandatory courses for pupils be opened up to other training providers? Please explain why or why not, specifically considering the risks and benefits.

In principle, BACFI believes mandatory courses for pupils could be opened up to other training providers. However, this would increase the risk that the quality of training differed from provider to provider and that pupils did not all receive the same quality of training. This in turn, would lead to a need for greater monitoring by the regulator, which would increase the burden on the BSB. Restricting training to the Inns of Court, perhaps acting in concert with the Circuits, would ensure a consistency of approach whilst enabling non-London-based training, hence avoiding increasing the burden on the regulator.

BACFI believes that all pupils (whether undertaking pupillage in chambers or in a commercial organisation) should attend the same basic courses so that all pupils enter practice with the same minimum training. However, BACFI expects that commercial organisations would wish to offer additional training relevant to employed practice and, where the commercial organisation operated in a regulated industry, to the regulatory requirements in that industry.

DEVELOPMENT OF AN AUTHORISATION FRAMEWORK

Question 28: Do you find the language and terminology used in the Authorisation Framework sufficiently clear and accessible? If not, please provide examples of how and where this could be improved.

BACFI finds the language and terminology clear and accessible.

Question 29: Referring to the relevant sections of the draft Authorisation Framework, are the definitions of flexibility, accessibility, affordability and high standards sufficiently clear? If not, how could they be improved?

BACFI believes the definitions are sufficiently clear.

Question 30: Do you think we have identified the correct mandatory indicators for flexibility, accessibility, affordability and high standards? If not, what do you think should be added or removed and why?

As stated in the general remarks at the beginning of this consultation response, BACFI would like to see greater flexibility in the pupillage stage of training for the Bar. However, BACFI's aim in advocating greater flexibility is to enable commercial organisations to see the benefits of becoming ATOs, to have a simplified and straightforward process to become an ATO and therefore to play a significantly greater role in training barristers than is currently the case. This would enable a much greater range of currently under-represented individuals to become prospective barristers, and would also enable them to have significantly greater opportunities and a wider set of training options than is currently the case. BACFI supports the principle of flexibility insofar as it achieves these aims. Nevertheless, BACFI believes that greater flexibility should not be introduced to the detriment of the BSB's fourth-listed principle, 'sustaining high standards'.

BACFI agrees that accessibility and affordability are worthwhile objectives. However, as with flexibility, these principles should not be followed to the detriment of the high standards of the Bar.

BACFI urges the BSB to consider the important contribution the legal system makes to the wider economy and the extent to which a properly functioning legal system increases the competitiveness of London as a financial centre, and the UK internationally. International competitiveness and trust and confidence in the legal system should be included as a fifth principle.

PART IV: PROVISIONS FOR TRANSFERRING QUALIFIED LAWYERS

Question 31: Do you agree with our proposals for recognising transferring qualified lawyers? Please explain why or why not.

BACFI agrees with the BSB's proposals for recognising transferring qualified lawyers. BACFI believes that mobility between the Bar and the solicitor's profession should be increased and simplified. BACFI has a number of members who practice as employed barristers in law firms and who are subject to regulation by the Solicitor's Regulation Authority as managers in their firms.

PART V: PROVISIONS FOR TRANSITIONAL ARRANGEMENTS

Question 32: Do you think there is anything which we have omitted and that we should take into account when considering transitional arrangements?

BACFI believes it is important that any transitional arrangements adequately protect students and trainees already progressing through the system and that information is made available to prospective student barristers to enable them to make informed decisions about their future. At the same time, the BSB should ensure the Bar is able to attract the brightest and the best and that any transitional arrangements do not deter candidates.

FURTHER CONSULTATION AND CONTINUED ENGAGEMENT

BACFI acknowledges the comments in the consultation paper regarding advertising requirements and other areas for future consultation. BACFI is grateful to the BSB for providing an opportunity for comment on these areas and looks forward to engaging further with the BSB on these important areas.

Bar Association for Commerce Finance and Industry

January 2018