



Bar Training Consultation Paper – BACFI Response

The Bar Association for Commerce, Finance and Industry was founded in 1965 to promote the interests and professional status of barristers employed in commerce, finance and industry. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed and unregistered barristers practising principally in the commercial private sector.

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.

Comments on Pupillage section (pages 46-78).

These comments assume that pupillage in some form will continue as opposed to a much more flexible structure of training as advocated in BACFI's Response to the LETR.

Para 209: it is not true that pupillages in major companies have increased. There are to our knowledge fewer than five companies authorised as Pupillage Training Organisations, although we are unaware how many of these companies are offering pupillages currently. The increase has been in law firm pupillages.

Para 222: the Paper uses the term "independent practice". This term should have been discontinued in favour of "self-employed practice"

Recruitment and selection (paras. 239-254)

QP1: Have we correctly identified the issues relating to recruitment and selection and access to pupillages?

The consultation sets out the issues the BSB has identified relating to the recruitment and selection of pupils and access to pupillages in traditional barristers' chambers (i.e. those from which self-employed barristers practice). No mention is made of the recruitment and selection of pupils or access to pupillage in non-chambers organisations.

See our comments in answer to QP9 below. The advertising requirements for pupillages are inflexible and prohibitive to the offering of pupillages in non-chambers organisations.

The advertising requirements mean companies are unable to promote from within and this acts as a barrier to increasing access to pupillages in companies.

Whilst it is clearly important to create a framework which improves access to pupillages in chambers BACFI asks the BSB to consider the contribution that commercial organisations might make to the provision of training for barristers. The pupillage framework should be designed with commercial organisations in mind.

QP2: Are there other issues which the regulator should take into account when thinking about recruitment and selection and access to pupillage?

See QP1 above. BACFI asks the BSB to ensure the pupillage framework is designed with commercial organisations in mind and facilitates the recruitment and selection of pupils by and access to pupillage within commercial organisations.

- The advertising requirements are prohibitive to the offering of pupillages within commercial organisations (see answer to QP9).
- The requirement to appoint an authorised training officer who may supervise a maximum of three pupils is reasonable within the context of a traditional chambers but does not take account of the structure and resources of a commercial organisation. For example, a commercial organisation might employ only one barrister within its legal department but is likely to have other practising lawyers, a HR department and a Learning and Development department.
- Regardless of the practice a young barrister intends to undertake, spending some or all of a pupillage with a commercial organisation is likely to be of benefit. To attract the very best individuals to the Bar – and ultimately the best quality of service to the public – the framework for qualification, recruitment and training needs to be flexible enough to allow individuals to move between traditional chambers, law firms and commercial organisations. The current structure of pupillage (as set out in paras. 255 and 256) does not support this.
- Paras. 255 to 262 (pages 57-58) on Structure of Pupillage neatly sum up some of what is wrong with the present system as far as commercial organisations are concerned. Those paragraphs list all the circumstances in which waivers are required. These represent immediate barriers for a streamlined commercial organisation.

QP3: Have we correctly identified the issues relating to the structure of pupillage and the quality of experience for the pupil?

For commercial organisations there are many other issues:

- Lack of flexibility in the structure means the offering of pupillage is not attractive and, in many instances, not practicable for commercial organisations. The usual structure (as set out in paras. 255 and 256 of the consultation) is unlikely to fit with the business requirements of a commercial organisation.

- Pupils should be able to move between traditional chambers, law firms and commercial organisations . A more flexible approach which encourages commercial organisations and traditional chambers to work together to educate pupils, much as with the Government Legal Service and the Navy, would increase the number of training opportunities available and make it easier for the best candidates (whatever their background) to enter practice at the Bar.
- The current structure places too much reliance on waivers. A better approach might be to list outcomes and require the training provider to deliver those outcomes (as the SRA has done).
- The formality of requiring a pupil supervisor instead of an approved training programme does not fit with the organisational structure of most commercial organisations. A company with HR and Learning and Development departments could create a well-structured training programme with supervision provided in accordance with departmental organisation.
- BACFI (2012) set out its “vision for the future of the legal services market” which proposed “fair and open access to the profession, drawing from the widest talent pool” and “multiple entry and exit points to achieve maximum flexibility”.

QP4: Are there other issues which the regulator should take into account when thinking about the structure of pupillage and the quality of experience for the pupil?

See the points made above in relation to QP3.

The regulator should take account of the needs of commercial organisations and the contribution companies can make to the training of future barristers. Prospective self-employed commercial barristers would benefit from the perspective and insight to be gained by experience working within a commercial law firm or the legal department of a commercial organisation. Companies of different kinds can offer prospective barristers training and experience across a range of areas, such as financial transactions, commercial negotiations, contracts drafting, customer complaints, dispute resolution, regulatory challenges, construction projects, manufacturing processes, product design, scientific research, intellectual property and international trade. They can also offer exposure to alternative forms of advocacy (see the answer to QP 6 for further detail). Traditional chambers are unlikely to be able to offer this level of experience and insight, which can only add to the breadth and depth of a barrister’s training.

Equally, traditional chambers can offer prospective employed barristers experience that a law firm or commercial organisation might find it difficult, if not impossible, to replicate.

Commercial organisations already offer structured training and CPD in a range of areas, making use of in-house HR and Learning and Development functions. The framework of

training for the Bar should be flexible enough to accommodate the needs and resources of commercial organisations.

Standards

QP5: Have we correctly identified the issues relating to meeting the required standards in pupillage?

For companies, one of the difficulties is providing sufficient exposure to courtroom advocacy experience. The Government Legal Service, CPS and the Navy for example, have approved arrangements for secondments to chambers. However, it is more difficult for a company with maybe one pupil to set up such an arrangement. This is one of the main barriers to organisations being able to offer pupillages and we feel that more could be done to encourage chambers to take pupils on secondments maybe by way of exchange to give their pupils exposure to commercial work. We consider that the nature of self-employed practice may otherwise discourage this type of cooperation. It should be noted, however, that some companies have their own in-house litigation and advocacy teams including persons with higher rights of audience: such companies should be able to offer pupillages which give experience of advocacy.

The standard checklists are not entirely relevant to employed practice. General Healthcare developed a customised checklist for an employed pupillage which we suggest could be promoted.

The BSB should consider other ways in which the standards could be met within a commercial setting. Dutton (2004) set out the advocacy criteria barristers should meet. The regulator should consider how such criteria (or some of them) could be met by a pupil training within a commercial organisation (for example, through participation in board meetings, commercial negotiations, mediations, arbitrations, regulatory investigations or employment tribunals) and ensure the standards are flexible enough to accommodate these.

QP6: Are there other issues which the regulator should take into account when thinking about meeting the required standards in pupillage?

See above. The regulator should consider how the standards could be satisfied by exposure to board meetings, commercial negotiations, mediation and other non-standard advocacy.

Regulator's role

QP7: Have we correctly identified the issues relating to the regulator's role in pupillage?

We endorse a risk-based approach to supervision and less bureaucracy in the PTO approval process. Many companies have dedicated HR and Learning and Development departments. Companies regulated in other industries (e.g. financial services companies or banks regulated by the FCA or PRA) will have training and competence obligations under their industry regulations. Many companies subscribe to the Investors in People accreditation or ISO accreditation, or enter the Times 100 Best Companies To Work For competition annually. Companies are more likely to have their own checks and systems

for training standards and the delivery of development programmes. This should be taken into account when assessing a company's ability to provide effective training to pupil barristers. Some companies have incorporated solicitors training as part of their graduate programme, under which trainee solicitors can undertake two years training with the in-house legal department whilst studying part time for the solicitors LPC see for example <http://www.btgraduates.com/our-programmes/uk-graduate-programmes/roles/legal>

QP8: Are there other issues which the regulator should take into account when thinking about the regulator's role in pupillage?

See above.

QP9: Are there any other issues not raised in the categories above which we have failed to identify in relation to current arrangements for pupillage

We have mentioned the over-reliance on waivers. One issue which has caused problems in companies seeking to appoint pupils is the advertising rules. Many organisations wish to grant pupillage training to existing employees be they paralegals, other professionals (such as patent or trade mark agents), or PAs/legal secretaries. Very often such employees will not have been recruited "with a view to pupillage" which appears to be the BSB's current requirement, especially if they have been with the company for a number of years. We take the view that if such employees were recruited originally through open competition then this should satisfy the advertising requirements.

Future Approaches

QP10: Do you agree with this fundamental position regarding work-based training as a pre-requisite for authorisation?

We agree with the principle that the public would expect a barrister to have undertaken a period of work-based training. However, we believe this should be subject to more flexibility as to how the training is delivered and the standards reached. As suggested above, we believe that a period of work-based training spent within a commercial organisation or law firm is likely to be beneficial to prospective self-employed barristers just as a period in a traditional chambers would be beneficial to prospective employed barristers.

QP11: Do you agree that pupillage should be more flexible in its content, with the BSB taking a more generally permissive approach to the sorts of activities that might constitute appropriate content, as long as the requirements of the Professional Statement could be demonstrated as being met?

We agree.

QP12: What are the risks, if any, associated with this?

We recognise that a more flexible and generally permissive approach might lead to a risk that training is inadequate or that the standard of services delivered to the public might

not reach the required standard. However, this risk can be mitigated easily by a risk-based and outcomes-focused approach to authorisation and supervision.

PTO and Supervisor

QP14: Do you agree with the principle of the rebalancing of responsibility for pupillage as between the “entity” (chambers or otherwise) and the individual pupil supervisor? Why/Why not?

We agree with the principle of the rebalancing of responsibility for pupillage as between the entity and the individual pupil supervisor. We believe that most companies would be able to adapt their existing training programmes and policies to accommodate the structured approach described in the bullet points in Para. 307. In a company the responsibility would naturally fall principally on the company. We have no problem with this rebalancing.

QP15: Do you think there should be more systematic initial validation of PTOs and supervisors?

We agree in principle that there should be more systematic initial validation of PTOs. However, the approach should be flexible enough not to deter companies from applying to become PTOs.

QP16: Do you think there should be periodic re-validation of PTOs and supervisors?

We agree with the principle that there should be periodic re-validation of PTOs and supervisors. However, this re-validation should be flexible and accommodating, and should not deter companies from applying to become PTOs.

QP17: Do you think there are benefits in a published list of approved PTOs and supervisors?

Yes. The argument against has been that organisations will be swamped with applications but it is necessary in the interests of transparency. Such transparency would have benefits for the Bar, trainees, prospective students, PTOs and the regulator.

Future Approaches

1. Continuous improvement

QP18: Do you agree with this analysis of the advantages and disadvantages of this approach? Are there any specific points you disagree with?

We largely agree with the analysis of the advantages and disadvantages of this approach but suggest that whilst the current approach has proven effective for a significant number of chambers it has not proven effective in providing opportunities for pupillage in non-chambers organisations.

We agree that a system that changes organically is less likely to impact on the businesses of chambers and that this is important. However, we believe that introducing greater flexibility would increase the opportunities for pupillage in non-chambers organisations without having an impact on chambers. Flexibility would mean chambers could continue with their current approach and companies could offer training better suited to their structure.

QP19: Are there any other advantages or disadvantages to this approach?

This approach will be seen as more of the same and will not give the changes that many organisations are seeking.

QP20: Are there any equality impacts of this approach that you are aware of?

It will not be seen to encourage part-time pupillages or pupillages over a longer period, sandwich courses and the like. This is likely to affect single parents, others with dependants and those who do not have the financial means to fund full-time study who may need to train part-time. The approach might not encourage the provision of pupillage by commercial organisations with the result that there will be fewer opportunities outside London or for people from less privileged backgrounds.

Approach 2.

QP21: Do you agree with this analysis of the advantages and disadvantages of this approach? Are there any specific points you disagree with?

We largely agree with the analysis of the advantages this approach would offer. In particular, we believe that a more flexible approach to the structure of pupillage and the removal of waiver requirements would make it easier for commercial organisations to offer pupillage.

We largely disagree with the analysis of the disadvantages. We believe that such an approach would not be difficult for chambers to adopt and would encourage more non-chambers organisations to offer pupillage. Accordingly, we believe the approach would lead to more opportunities for pupillage. It is suggested in Para. 333 that there would be a risk of chambers using trainees as “cheap labour”. Such a risk could easily be mitigated through regulation. For example, PTOs could be asked to explain why a pupil had not “graduated” after the period of time set out in the training programme submitted to the BSB.

Maintaining an option for chambers (or other PTOs) to adopt the current standard model for pupillage should mean costs do not increase for those PTOs that wish to continue with that model. And the flexibility permitted by the second approach would mean PTOs that wish to can design a more bespoke model.

Whilst there might be differences in the content and scope of training programmes, this should not be seen as a disadvantage. Certain core values and standards would be common and the different content is likely to allow chambers and other PTOs to tailor training programmes to their needs. Pupils joining specialist chambers today (be they criminal, family, construction, intellectual property or any other specialism) will already

receive training of different styles and focus and this is necessary to allow the Bar to continue to specialise and to offer a standard of expert service to the public.

QP22: Are there any other advantages or disadvantages to this approach?

See QP21 above. Approach 2 might offer a degree of flexibility that should encourage commercial organisations to offer pupillage. This in turn would mean prospective barristers have more and better opportunities to gain valuable work-place experience and to build specialised practices enabling greater access from the diverse communities the Bar serves.

QP23: Are there any equality impacts of this approach that you are aware of?

More flexibility will give opportunities to those candidates who wish or need to undertake a pupillage part-time or over a longer period.

Approach 3

This approach gives a degree of flexibility commercial organisations would welcome. It does not seem to have been fleshed out to any degree. It seems that PTO approval would be needed but not clear what a prospective PTO would have to show.

Para 337: suggests that advocacy not regulated by the BSB may “count” towards full authorisation but there is no detail of how this would link to the requirement for courtroom advocacy. It seems to suggest that experience outside a pupillage programme may be part of the training towards full qualification. This is a step forward to the flexibility BACFI has been advocating but needs a lot further detail.

QP24: Do you agree with this analysis of the advantages and disadvantages of this approach? Are there any specific points you disagree with?

The analysis seems heavily weighted with the disadvantages. We agree that the profession as a whole, being very conservative, may not favour this approach. However there is a need to open up more pathways to qualification without sacrificing quality. We are sure that a way can be found to deal with all the disadvantages listed and we would recommend that the BSB spend time to develop a regime based on the principles outlined. It may be that such a scheme could operate as an alternative to conventional pupillage provided that candidates on qualification were treated equally.

QP25: Are there any other advantages or disadvantages to this approach?

We believe that such an approach would find favour with companies who could then integrate pupils into their existing training schemes for legal trainees. They would need reassurance that their scheme would result in a practising certificate for their barrister

trainees. There is a considerable potential for barristers to be trained within companies and any degree of flexibility in the training route would be welcomed.

QP26: Are there any equality impacts of this approach that you are aware of?

As above, the possibility of combining paid work with training would open up training to those who might otherwise not be able to afford to train as a barrister. It might particularly help those who want or need to work or train part-time.

QP27: From the three approaches outlined above, do you have a preference and if so, why?

We believe the third approach offers maximum flexibility but before fully endorsing it we would like to see it worked up as a detailed proposition. We can also see the potential benefits of a flexible framework combining elements from the second and third suggested approaches.

QP28: Have you identified any other approach we might reasonably adopt in respect of professional, work-based training for barristers and which would satisfy our aims and regulatory and statutory obligations as set out earlier in the consultation? If so, please briefly outline.

In our response to the Legal Education and Training Review, we suggested a holistic approach to training that could be adopted by the legal profession as a whole (BACFI, 2012). The approach we suggested does not fit with the sequential 3-stage approach outlined in the consultation.

We proposed three stages of training – pre-professional, professional and continuing – that we believe would provide for a strong and robust, world-class legal profession. In our pre-professional stage, prospective lawyers would attain the necessary academic competence in law whether as graduates (in law or other disciplines), postgraduates, or suitably qualified and experienced non-graduates (such as legal executives). Our proposed professional stage would be a two- to four-year period of blended learning combining elements of academic, technical and practical training. Training at this stage could be common to all lawyers (whether intending solicitors or barristers) and be flexible enough to allow transfer between streams whilst also providing opportunities for specialisation.

The advantages of this approach would be that it would:

- provide greater flexibility and allow trainees to move between law firms, chambers and commercial organisations more easily and gain exposure to a wider variety of practice areas and approaches;
- provide more entry points to the legal profession and exit points to practice at different levels;
- allow trainees to earn as they learn;

- make the professions more accessible to people from less privileged backgrounds;
- be more accessible to people who wished to train or work part-time or over a longer period;
- allow prospective lawyers to gain more experience before having to decide between the different legal professions;
- allow lawyers to move between the different parts of the legal profession more easily; and
- produce lawyers with a wider breadth of experience that would ultimately be of benefit to the public.

The main disadvantages of this approach might be that it could:

- take time to implement, representing a significant change from the current system requiring wholesale changes to the training of lawyers, which is unlikely to be achievable in the short to medium term;
- make it more difficult for the smallest organisations to attract trainees because of competition from larger organisations that are able to offer higher pay and better benefits.

Our immediate priority is the development of a pupillage system that is flexible enough to enable commercial organisations to train prospective employed, and even self-employed, barristers. This is likely to require a reconsideration of the types of advocacy that count towards completion of pupillage and / or traditional chambers being encouraged to work with commercial organisations in the training of pupils.

Bibliography

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