Representation, Education and Support for Employed Barristers

Why are there so few Employed Bar Pupillages currently available? A revised 2013 Briefing Note from BACFI

1. There are only 3 ATOs currently in the CFI sector (General Healthcare, Corporation of London and Citigroup). All the other ATOs available to the employed Bar are either solicitors' firms, the GLS, CPS or regulatory authorities - all of which find it easier to obtain authorisation as generally they will employ a fair number of barristers and offer more opportunity for court experience. Even the GLS is currently reviewing its pupillage policies in the light of the Government cut backs.

Why bother ?

2. We know from our 2009 survey of General Counsel from a wide range of companies that there has in the past been a demand for ATO status. We do not know whether it remains now that commercial legal departments find it relatively easy to recruit from Chambers and firms fatally affected by legal aid cuts. Sadly, this merely means that the CFI sector simply does not pull its weight when it comes to training young barristers of the future. It is easier to pick up those already (expensively) trained by others. As the Bar shrinks, so the number of young and old barristers employed in the CFI sector will reduce and the opportunities for future employment for barristers generally will be less. We do not believe that those who consider that the Bar should "shrink to fit the work available to chambers" have considered this consequence.

3. We do know, however, that many firms have recently been deterred by the complexity and demands of the ATO application process and decided to offer only solicitors' training to their legal staff. The Wood conclusion that there are no follow-on employment opportunities for employed barristers after pupillage is not borne out by our research. We know that many companies wish to train their own staff to a professional standard or may wish to recruit additional staff to meet new business demands. We also know that many General Counsel wish to have a mix of barristers and solicitors in their legal departments.

Advertising requirements

4. The BSB's ATO advertising requirements continue to be a concern. Although the BSB states clearly that waivers are available, our experience is that companies have found it difficult to obtain waivers. We understand the current position of the BSB to be that if a company wants to appoint an internal candidate, then that person must have been recruited from an advertisement which indicated that the appointment was "with a view to a possible pupillage". Commercial recruitment is a very different process to that of recruiting pupils to Chambers. Firms recruit at the lowest possible level to fill a need that might change or grow over time. Once an employees has proved him or herself competent and capable of more, firms may wish to offer further training opportunities as part of career development processes. Where there are several part-qualified young barristers in a firm or department, an internal competition for pupillage may be held.

5. We would like the BSB to adopt a simple alternative to the advertising rule, to the effect that all recruitment to the ATO applicant company must be by open competition. The BSB should be willing to accept that modern firms operate very strict HR policies with diversity and equal opportunity at the top of the agenda. If a company wishes to recruit pupils by internal competition then this should be acceptable to the BSB, provided that the competitors have themselves been openly recruited to the company in the first place. It should be noted that the SRA does not require external advertising of trainee places; but requires that the organisation complies with the law and rule 6 of the Solicitors' Code of Conduct which is designed to prevent discrimination and promote equality and diversity.

Continuity of training

6. The BSB should do more to encourage part-time pupillages. Although currently we understand that part-time pupillages can be authorised, this is once again by way of a waiver and is moreover not generally well known. We understand informally that the Pupillage Review Group has recommended that there should be general authorisation for part-time pupillages to be could be completed over a two or three year period. The main objective for firms offering training is flexibility. An employee's training must be fitted in around the job and indeed, for Personnel and HR departments, the one activity is expected to enhance the other.

Variety of work

7. We would like to see the BSB encourage shared pupillage schemes such as that operated by the Royal Navy and in slightly different ways by the GLSA and CPOS hitherto. Some companies in our survey were unwilling to apply for ATO status because they felt their legal work was limited in scope. If the BSB were to positively encourage arrangements whereby the pupil could spend 6 months in the company and 6 months in, say Chambers, or in combinations involving solicitors firms, we consider that ATO applications from the CFI sector would increase. This could also provide an opportunity for Chambers to second pupils into companies under an exchange scheme. Again this concept needs to be "mainstreamed", without the current lengthy authorisation process involving waivers.

BSB accessibility

8. Our overall view is that the BSB needs to recognise the need for some flexibility in the organisation of professional Bar training within companies. Most companies will not be prepared to spend months going through the ATO application process, especially where it employs very few suitably qualified staff members. It should be possible for Personnel or HR staff to seek a meeting with t the BSB Education and Training department to discuss the ATO process. In practice, the initiative for further training will come from the employed part- qualified barrister and he or she will have prepared a scheme for the company to consider. The candidate should be able to approach the BSB informally for help meeting the regulatory requirements and satisfying the demands of his or her employers in a timely fashion. We have in mind here the very long delays experienced by the Service Prosecuting Authority in 2011/2.

9. We note that the BSB obtained LSB approval for a change to the Bar Training Regulations to give them additional discretion in approving applications for ATO status. The BSB justified this to the LSB as follows (emphasis added):

"The proposed change would amend BTR 37 to allow the BSB the discretion to amend the criteria for an ATO. This would give the ***BSB the flexibility to amend the criteria to encourage the offering of pupillages, particularly by the Employed Bar and commercial organisations****. The BSB anticipates that the proposed change may make it easier for organisations to be approved, and hence, for the number of pupillages to be increased".*

10. Both the Richards and Neuberger Reports recommended that the Bar Council/Bar Standards Board should do more to encourage employed pupillages. We have suggested that the BSB should write to all companies offering solicitor training contracts, encouraging them to think about training barristers and inviting them to a meeting/workshop where the process could be discussed and any issues addressed. The BSB should similarly encourage Chambers to think about sharing or exchanging pupils. In other words, we would urge the BSB to take a proactive approach rather than the current rather defensive attitude.

11. At a special meeting in March 2012 attended by the BSB and representatives of both the employed and self-employed bar, the BSB agreed to consider promoting in-house pupillages on their website and by other outreach opportunities. BACFI for its part agreed to continue its efforts to persuade suitable companies to apply for authorisation. Although we are in discussion with one or two companies, unfortunately the BSB has a poor reputation (whether justified or not) in relation to the ATO process and so far there have been no applications resulting for our efforts. We have not noted any initiative by the BSB to promote in house pupillages.

12. The LETR may result in changes to the training regime in the future but in the meantime we would like to see the present guidelines modified and some encouragement from the BSB that it welcomes applications from suitable companies.

BACFI
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Representation, Education and Support for employed Barristers

WHAT SHOULD A MODERN PUPILLAGE LOOK LIKE?

Current research

The 2013 Legal Education and Training Review (LETR) reported that "there was also concern that existing regulatory structures governing supervised practice inhibited useful alternative routes to qualification, which could **reduce the bottleneck** around training for some professions and also **help to ensure that employers have the ability to train individuals in a way that suits their needs.** There is growing stakeholder interest in LSET structures in which trainees are able to work concurrently with formal study, not only to defray costs, but also to facilitate consistency between what is learned in both contexts and the development of attributes such as commercial awareness." (our emphasis).

BACFI urges the BSB to consider introducing alternative mainstream forms of pupillage which could encourage more participation in pupillage by employers and which – crucially – would not be subject the elaborate waiver procedures.

Reccs 14 and 15 of the LETR July 2013 Report suggest that the BSB's existing training Rules should urgently be reviewed; not only in the light of the unimplemented Wood recommendations but also to keep pace with external and parallel reforms in other branches of the legal profession.

This short Note sets out BACFI's vision for improving the "supervised workplace training" element of a barrister's education, which we firmly believe could both modernise and strengthen our profession.

Format

BACFI has long advocated a more flexible format for pupillage. The rigidity of the current format is not only a barrier to entry but also a deterrent to those from less advantaged backgrounds, who may need to earn during pupillage to support themselves, and to those joining the profession as a career change at a later stage of their professional life.

Most BPTC graduates embark on pupillage with significant debts and may need a more flexible arrangement. Lord Neuberger recommended that the availability of part-time pupillages should be more widely advertised and that there should be an understanding approach to approval; we support this. This could mirror the SRA requirements where a training contract can be spread

over a 4 year period, so the trainee can work part time. Pupillage should be permitted to span 3 years if necessary and the period during which pupillage needs to be completed following the BPTC similarly extended.

Lord Neuberger also recommended that "a funding pool should be established so as to provide additional funded pupillages sponsored by employers or government agencies unable to train pupils themselves but keen to ensure a supply of barristers with particular skills" (recommendation 37). We agree the Bar should be proactive in offering commercial firms opportunities to participate in the training process. For example, by funding pupillages in chambers[1] or offering partial grants to pupils who are being trained elsewhere, perhaps by essay competitions or scholarship programmes in the name of the firm. The arrangement would engage senior employed Barristers and reinforce the "One Bar" message. The fact is, barristers in commercial legal departments have been largely ignored by the Bar "establishment" for so long - yet they have a great deal to offer.

Advocacy

We accept that advocacy, in all its forms, including written and oral advocacy, is the distinguishing skill of a barrister.

However, we are of the strong view that advocacy is not exclusively restricted to adversarial advocacy in the traditional civil and criminal court setting. We have long recommended widening the fora where "on your feet" advocacy experience can be obtained, to include tribunals and other settings where formal advocacy skills are deployed. This broadening scope of advocacy reflects commercial reality. The self-employed bar increasingly engages in other forms of advocacy in tribunals, mediation and arbitration. Traditional court work is becoming scarce. Our survey of those who had recently undertaken pupillage showed that some pupils had no opportunity to go into court in their second six. Increasingly, Family, Revenue and some forms of commercial work take place outside the courts, although advocacy in the widest sense is still necessary.

The key skills for trainee barristers include preparation, identifying the legal issues, thinking through an argument, analysing the supporting evidence, expressing written and oral arguments in a clear and succinct manner, and being able to defend one's position in a hostile environment. All these are as necessary in employed practice as they are in self-employed and court based work. It is vital for the BSB to recognise this and to move away from its inherited over reliance on traditional court advocacy.

Some commercial organisations would have no present difficulty in fulfilling the advocacy element of pupillage. Others (including GLS departments) have in the past sent their pupils to chambers for 3 or 6 months to obtain court experience. It would be useful for the BSB actively to facilitate mutual exchanges between chambers and employers, allowing all pupils the chance of the widest possible experiences of advocacy. Short secondments are quite common in employed practice and are easy to manage; secondees are invariably funded by their "home" employer. The BSB needs to present itself as a "can do" organisation, open to tailored training schemes which meet core criteria, rather than insisting upon particular formal programmes.

[1]Similar arrangements already obtain with Royal Navy pupils who are paid their Navy salary and sent to chambers, with short periods spent with CPS and (in future) the Services Prosecuting Authority.

Checklists and commercial skills

Any requirements should be in terms of outcomes and skills. Checklists should only be indicative; more important are the skills and experience actually obtained.

The present checklists are designed for practice at the self-employed bar and greater flexibility is required to meet a commercial organisation's needs for legal services. Critically, employed barristers in business must be able to demonstrate core commercial skills. A sample checklist from one of our member's firms has been provided to the BSB's Pupillage Review Group. Employed barristers have specialist skills and the BSB must recognise that these skills complement rather than replace those acquired in conventional pupillage. Pupillage checklists need augmenting with modern commercial skills.

Conclusion

*I*ncreasing the number of pupillages in the private sector/employed bar can only enhance the reputation of the Bar as a modern forward looking profession and the "One Bar" concept would be reinforced. Employed lawyers control large legal budgets and it is clearly in the Bar's interest to ensure that the numbers of barristers in employment remains high. To secure this, the BSB needs to ensure that its training requirements are fit for purpose in the twenty first century.

BACFI
Professional Issues sub committee
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The Three Year Rule

The Three Year Rule, which has never been applied to employed barristers working in commercial organisations, causes a considerable problem for those employed barristers who wish to leave employment and set up as self-employed consultants offering legal services of an advisory nature. If they wish to obtain self-employed practising certificates in order to "hold out", they need both to have completed pupillage and worked with a "Qualified Person"[1] for a period of three years.

The rationale for this is said to be that with a self-employed practising certificate they obtain full right of audience and can theoretically appear in all courts in all proceedings.

If the barrister concerned did not spent three years or more in chambers before becoming employed, it can be difficult to comply with the rule. Not all legal departments necessarily contain a Qualified Person, as defined. Many are led by solicitors.

Therefore to obtain a self-employed practising certificate, the barrister needs to apply for a waiver from the Bar Standards Board. The current criteria applied by the BSB for granting such waivers focus on the amount of court room advocacy that the applicant has undertaken. Here again, difficulties arise as it is rare for an employed barrister to undertake court work. The applicant's experience of advocacy - in the widest sense employed in the *Dutton definition* - will not be counted.

Even if the BSB grants a waiver, it is normally on condition that the barrister needs to work with an Alternative Qualified Person (AQP) for a period of up to three years. The AQP is supposed to advise and assist the barrister for a period, which may be as much as the full three years. The AQP and the barrister need to meet every 2 months and the AQP needs to submit a report of such meetings to the BSB on a six monthly basis. Except in the case of very young and inexperienced employed barristers, we are not sure what regulatory objective this fulfils. It can certainly be somewhat insulting to a senior employed barrister (see below).

[1] Current Code, para 203.1(b); 203.3. Handbook, Part 3, B2, s20 & s22

BACFI submits that this requirement is unnecessary for experienced employed barristers who are not carrying out reserved legal services and who, in their career development as employed barristers, will have been trained and supervised already to the highest professional level.

The rationale for the BSB in imposing the requirement is that once a barrister has a self employed practising certificate, then he/she has rights of audience in all courts and in all proceedings. Whilst we acknowledge that it would technically be possible for such barristers to appear in court, we believe that the BSB should rely on the core provisions of the Code and trust such barristers not to undertake work for which they are not trained and competent. If in fact the purpose of the rule is to ensure that the barrister obtains guidance on court room advocacy, then this will not be achieved by the current AQP regime, as the condition does not require the barrister to be appearing in court at all.

BACFI considers that this is an unreasonable requirement and has been evidenced by several cases where an AQP arrangement has been set up; but after one or two reports have been submitted the BSB has waived the remaining requirements. We know of at least one case where the AQP has reported that the barrister is a far more experienced adviser in the field of law concerned than the AQP !

Applying the principles of proportionate regulation and adopting a risk based approach we suggest that rule should be amended. We suggest that the BSB should look at the barrister's overall experience, rather than merely his/her court room advocacy experience and be prepared to grant a full waiver without conditions for a senior barrister. If the barrister intends to carry out reserved services, particularly advocacy, then they should be prepared to undertake additional training (most of the people we are aware of wish to carry out advisory services only).

BACFI
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