

Constitutional and Administrative Law Bar Association (ALBA)

Submission to the Bar Standards Board's Pupillage Review Working Group

15 September 2009

1. ALBA is grateful for this opportunity to submit our views to the Pupillage Review Working Group chaired by Derek Wood QC. We are particularly grateful to Derek Wood for taking the time to attend one of our committee meetings to brief us on the issues which the Working Group has before it, as well as on some of the evidence which it has gathered to inform its deliberations and recommendations.
2. As we stated at that meeting, in responding to consultations our preference is to provide our comments in the form of a written submission prepared after we have had an opportunity to consider the relevant issues. That is what we are doing by way of this present document. We note, however, that the Working Group has not yet published a consultation paper. ALBA would welcome the publication of such a consultation paper once the Working Group's deliberations are more advanced, so that interested parties (including ALBA) have an opportunity to comment on the Working Group's proposed recommendations before those recommendations are finalised.

Issue 1: What is the function of pupillage? What is the impact of our answer to that question on how pupillage should be regulated?

The function of pupillage

3. In our view, the function of pupillage (at least from the regulatory and public interest perspectives) is to provide an individual with the practical training that will enable him or her competently to provide legal services as a barrister in a particular area of legal practice. Provided that the Bar Vocational Course is taught and assessed to a sufficiently high standard, such an individual will already have demonstrated the attainment of certain core competencies, such as the ability to draft basic pleadings

and to make straightforward oral applications, albeit in the necessarily artificial setting of a delivered training course. But the fact that the individual has displayed such competencies is not sufficient to permit him/her to hold themselves out to accept instructions from clients. They first need to obtain a measure of experience of the issues and judgement calls involved in professional practice in a particular field of specialist legal work; and that is what pupillage with an experienced barrister provides.

Should pupils be formally assessed by the BSB?

4. Any suggestion that pupils should be able to ‘graduate’ from the non-practising period of pupillage only if they demonstrate that they have met certain centrally assessed standards seems to us to misunderstand the nature of the pupillage process. A non-practising period of pupillage is not designed to replicate the BVC by teaching basic skills, but to provide the pupil with a measure of practical experience in a particular specialist field of legal practice, that will enable him or her to progress to the next stage: developing skills ‘on the job’ through a process, continuing over at least the next decade, of taking on cases of increasing complexity, learning from leaders and other colleagues, and relentless self-evaluation.
5. Centrally set assessments or assessment criteria (whether at the 6 months or 12 months stage) would, in any event, be impossible to implement, given the huge variety of forms of legal practice that barristers now undertake. The membership of ALBA includes, for example, barristers doing advisory work in government departments, barristers working alongside solicitors in law firms, and barristers working in litigation and non-litigation roles in campaigning organisations such as Liberty. These forms of practice seem to us to be of equal validity to independent practice from a set of chambers.
6. While we agree that the hallmark of the Bar is advocacy, we believe that advocacy can take many forms. Barristers are professional advocates whose talents for advocating arguments on behalf of others can be of value in many different settings. Centrally set assessments would tend to elevate some forms of advocacy above

others, and could be unfair to pupils of employed barristers (in that regard, we note that employed barristers are now able to provide 12-month pupillages without requiring their pupils to undertake 6 of those 12 months of pupillage by way of a secondment to a set of chambers). They would also fail to recognise that the nature of legal practice in some sets of chambers (including several of the sets represented within ALBA) is that pupils undertake little if any advocacy during their pupillages, but receive exceptionally rigorous training in other areas.

7. In making these observations, we do not mean to suggest that the maintenance of high standards in pupillage is not important. On the contrary, it is vital for the future of the Bar. But what is required is not more assessment of pupils, but a greater recognition across the Bar of the responsibility that we – individual professionals, pupil supervisors, sets of chambers, specialist bar associations, the Bar Council and the Inns of Court – all share for the future of the Bar, and for providing new practitioners (i.e. not only pupils, but also barristers in their early years of practice) with high quality training and mentoring.

The Bar's contribution to pupil training

8. In recent years ALBA has identified a number of ways in which we have been able to provide training to new practitioners. Most notable among these has been our highly successful beginners'-level course on judicial review practice and procedure, delivered by experienced barristers and open to new practitioners from all chambers. In view of the recent 'regionalisation' of the Administrative Court, we are seeking to make arrangements for the course to be made available to barristers in the regional centres. For the last two years, a number of barristers from the regions have participated by video conferencing. We have also sought, to the extent that our funds allow, to subsidise attendance and accommodation charges for new practitioners (including pupils) attending our annual conference (held over a July weekend in Cambridge), and we would encourage chambers to offer financial support to their own pupils to attend that conference. In addition, our programme of evening lectures by judges and experienced barristers, covering both Administrative Court procedure

and substantive public law, is open to all lawyers (including pupils) free of charge, and pupils are strongly encouraged to attend.

9. The Inns already do important work in providing advocacy training for pupils which is of the highest quality and is provided through the goodwill of the many practising barristers who give generously of their time and/or money to make that training possible. With greater resources, the Inns could do even more. The South Eastern Circuit's advocacy course for new practitioners of 2-5 years' call is a model for the quality training that the Bar can provide for new practitioners when it successfully taps in to the enthusiasm, goodwill and camaraderie that so strongly characterises our profession. What we need is more of the same; but there is also a danger that trying to achieve this through regulation could have the perverse effect of deterring the goodwill and voluntarism that can invariably be found to underpin the higher quality training offerings available within the Bar.

The responsibility of PTOs to provide well-planned training programmes for their pupils

10. Primary responsibility for the training of pupils should, of course, lie with the relevant set of chambers or other pupillage training organisation ("PTO") which has offered the individual pupil a pupillage and thereby assumed duties to that individual, to the wider profession and to the public interest. There is a danger that pupilages that have not been adequately planned by the relevant PTO can short-change the pupil by providing him/her with too narrow a range of experience even within the confines of the PTO's own areas of practice. Pupillage should not simply be an undirected period of time spent 'following someone else around'. PTOs should therefore be required to *plan* the training they will offer their pupils, and to monitor their pupils' development with a view to identifying any gaps which need to be filled.
11. In our view, the fixing of PTOs with these obligations would be best achieved by making each PTO responsible to the BSB for the pupilages that it offers. That responsibility should be enforceable under the Code of Conduct against the Head of Chambers (or, in the case of a PTO that is not a set of chambers, the most senior barrister) or another barrister (such as the chairman of the PTO's pupillage

committee) to whom responsibility for Pupillage has been formally assigned. This would reflect the modern reality in many ALBA members' PTOs, where the training and development of pupils is managed by a pupillage committee which reassigns pupils to new pupil supervisors with greater frequency than once every 6 months. The management of pupillages as a pre-planned coherent training experience has been made easier by the fact that many pupils now spend all 12 months of pupillage with the same PTO, rather than moving PTO at the 6-month point.

12. In addition, PTOs should be required to place written and oral advocacy, and professional ethics, at the heart of their training plans, albeit that training in these areas will inevitably have to take different forms depending on the PTO's area of practice, and whether and to what extent its barristers carry out oral advocacy in court. PTOs should also be encouraged to consider what opportunities may be available for broadening the training they provide; for example, by providing their pupils with appropriate opportunities (whether before or after the taking of the tenancy decision) to spend a short period of time on secondment to another PTO (whether the Crown Prosecution Service, a law firm, the Government Legal Service or a local authority), undertaking cases through the Free Representation Unit, or marshalling for a judge. Making PTOs and pupillage committee chairpersons, rather than individual pupil supervisors, the focus of regulation of pupillage training would be likely to make it administratively simpler for such beneficial short secondments to be arranged consistently with regulatory requirements for pupillage.

The importance of recorded feedback

13. Most important of all is that PTOs be required to include in their training plans strong mechanisms for ensuring that pupils receive regular written and oral feedback on their work. While there is plainly a cost to this in terms of barristers' time, high quality continuous feedback is, and must be recognised as, an essential element of training. Indeed, in the absence of such feedback, it is difficult to say that meaningful training (rather than merely experience) is being provided. Pupils need to know where they are doing well, where they need to improve, and *how* to improve. Pupils need to be

shown in concrete ways how to do better. So-called training that does not include these things is manifestly deficient.

14. A record of feedback will also help to ensure that tenancy decisions are taken fairly and in accordance with the Bar's guidelines on equality and diversity. The record will also help identify any areas in relation to which the pupil may require particular help to improve, and will also provide an indication of whether the PTO's training programme is effective in enabling pupils to grow in confidence and develop their skills.

Pupillage as training for tenancy

15. For many PTOs, pupillage has another purpose, which is to enable the PTO to assess the pupil's suitability for an offer of tenancy. In our view, there are many benefits where a PTO sees its pupils as its likely future tenants. In particular, the PTO in question will have a strong incentive to invest in providing the pupil with high quality training, and to see the pupillage year as the early stage in a much longer process of helping the pupil to develop into a successful experienced practitioner. For that reason, we see little merit in the suggestions that are sometimes made within the Bar that, given the large number of BVC graduates who fail to find pupillages, steps should be taken to increase the number of pupillages, even while the number of tenancies looks likely to fall.

Issue 2: Is the current length and structure of pupillage appropriate?

16. In our view, 12 months is about the right length of time for pupillage, and we see no reason why pupils who have gained 6 months of experience within a PTO should not be permitted to practise in their second 6 months, albeit under the active guidance of a more senior barrister. An individual who has gained 6 or 12 months of experience will not, of course, be 'the finished article': barristers never stop learning, and each month of practice brings new experiences and better judgement. What is vital is that new practitioners (whether 'second 6' pupils or junior tenants in their first few years

of practice) are well supported by their colleagues, and always have a more experienced colleague they can turn to for advice or to talk through a legal or professional problem.

Issue 3: Should the £10,000 minimum funding requirement be maintained? If so, in what circumstances should it be waived?

17. We see little merit in the suggestion that the £10,000 minimum funding requirement be abolished in order to increase the number of pupillages. That amount is already very difficult, if not impossible, for a person to live on in London without getting into substantial debt. To abolish the funding requirement would only serve to make entry to the Bar even more difficult than it already is for people whose families are not in a position to provide them with financial support. The only people who would benefit from abolition are prospective pupils who have the financial means to be in a position to fund themselves.
18. It is also worth bearing in mind that the minimum funding requirement only requires chambers to spend £5,000, since the balance can be accounted for by guaranteed earnings from practice in the 'second 6'. While we recognise that money is extremely tight for the publicly funded Bar, we do not think that £5,000 is an unreasonable burden on a PTO which already has to find significantly more money than that to pay other persons, such as clerks and administrative staff. If a PTO is truly unable to afford £5,000 to fund a pupillage, then one might reasonably question whether that PTO should be offering a pupillage at all.
19. In making this point, we do not mean to downplay the very serious difficulties that the publicly funded Bar is presently experiencing. However, there must be a limit to the extent to which the Bar should be prepared to respond to those difficulties by cutting costs in ways that undermine diversity and fairness in recruitment, and would cause real hardship to young people whose career dreams may leave them open to exploitation. It may also be the case that increasing the (over)supply of pupils and new tenants at the publicly funded Bar, and thus increasing the number of barristers competing to do work for very low rates of pay, would not assist the Bar in negotiating for fairer remuneration.
20. Further, as noted above, there are advantages in PTOs recruiting only a small number of pupils, doing so in the expectation of offering those pupils tenancies (or permanent

employment) if they meet the required standard for an offer of membership of that set (or an offer of permanent employment as a lawyer within the relevant organisation). We see little evidence that tenancy vacancies are going unfilled because there are too few people who have undertaken pupillage.

21. For these reasons, we would strongly oppose any attempts to remove or weaken the minimum funding requirement. Indeed, we would favour a modest increase in the £10,000 funding level, which has remained the same for several years. A sensible course may be to implement a one-off increase now (perhaps to £12,000), and to then provide for automatic adjustments in future years based on the rate of inflation. PTOs might also be encouraged to allow pupils to draw-down early on their ‘second 6’ pupillage awards / guaranteed earnings, since we understand that this can provide the pupil with a significant tax advantage.
22. Waivers of the minimum funding requirement should only be granted in genuinely exceptional cases; for example, where a legal academic or a lawyer with an established practice wishes to undertake a period of pupillage in order to qualify to practise as a barrister in England and Wales. The fact that a PTO is undertaking publicly funded work or has limited resources does not seem to us to be a good enough reason to grant a waiver, since the grant of waivers in such circumstances would serve to undermine the policy objective behind the minimum funding requirement.

Issue 4: What (if any) role should specialist bar associations like ALBA have in setting pupillage checklists or minimum training requirements?

23. In our view, the current regulatory mechanism of pupillage checklists has not been a particularly useful one, and that is especially so in relation to PTOs practising in the field of public law. Few if any of our members practise only public law, but the checklists provided by the Bar Council appear to envisage that a pupillage will be confined to a particular area of law (e.g. criminal law or family law). The reality, however, is that many chambers practise across a number of different areas, and seek to benefit their pupils by giving them some experience of all of those areas. As a

result, pupils may end up accumulating a small number of ticks on each of a number of different checklists, and it is by no means clear how many boxes must be ticked (to indicate an experience obtained) on any particular form in order for a pupillage to be signed off as completed satisfactorily. The regulatory impact of the checklists has therefore been almost non-existent.

24. Although it is possible for an individual chambers to design its own checklist and obtain approval for it from the BSB, we understand that only a minority of PTOs have done this (and those that have done so are probably those that already provided high quality pupillage training and thus give least cause for regulatory concern). Even when a PTO has produced its own checklist, it is still unclear how comprehensively the checklist has to be completed before the pupillage can be signed off.
25. In light of the experience with pupillage checklists, we see significant difficulties in the BSB seeking to prescribe what a pupillage in each area of practice must as a minimum contain. And while we are in principle happy to do whatever we can to assist the BSB in raising standards in relation to pupillages in PTOs practising public law, we would be very reluctant involve ourselves in setting mandatory requirements for “public law pupillages” (to the extent that such a categorisation can even be defined). In that regard, we note that there is a great measure of variety between the chambers associated with ALBA in terms of what areas of law they practise alongside administrative law. Some of those chambers’ other areas of practice include criminal or family law; other chambers practise public law alongside personal injury, mental health or professional negligence law; while yet others practise public law alongside competition, regulatory or commercial law. There are also variations between different chambers in their public law practices, with some having a strong bias towards judicial review of immigration decisions. In addition, many PTOs practising public law are employers, such as government departments, regulators and local authorities. A ‘one size fits all’ approach to setting minimum requirements for pupillages would therefore not be practicable.
26. In making these points, we emphasise that we are not simply resisting regulation. In our view, regulatory requirements have a role to play in persuading PTOs to provide their pupils with well thought out, effective programmes of training focused on the

core areas of written advocacy, oral advocacy and professional ethics. PTOs should ensure that the pupillages they provide have clearly defined objectives at the outset, and a roadmap for achieving those objectives which indicates the experiences which the pupil *must* obtain, and experiences which are desirable. But it must be for each PTO to design its own pupillage training programme by reference to the character of the organisation and its legal practice, albeit subject to the BSB being satisfied that the PTO in question has taken that responsibility seriously and covered the three core areas. In some PTOs, for example, in-house training in oral advocacy will consist largely of presenting positions in meetings or negotiations, rather than making submissions to a court, albeit that this training will be supplemented by the excellent advocacy training that ‘first 6’ pupils receive through the Inns.

27. Where ALBA sees itself making a contribution to pupillage training is by continuing to provide high quality talks, lectures and conferences that are open to pupils and other new practitioners, and by promoting and expanding the training programme we have put in place specifically for new practitioners. In our view, there are obvious benefits in PTOs co-operating through bodies such as ALBA to identify and further best practice in relation to pupillage, and to engage in a certain measure of pooling of goodwill and resources to deliver high quality training for new practitioners.

28. There is also room for others to play a greater role. As noted above, the commitment of the Inns to advocacy training is beyond question. However, there are significant differences between the Inns as to the amount of advocacy training they provide to ‘first 6’ pupils. In our view, it would be desirable for all pupils to receive at least a full week of external advocacy training.

29. We should also point out that ALBA’s own ability to make a contribution to pupillage training by the routes identified in paragraphs 8 and 27 above has to some extent been compromised or held back by adverse financial developments. Until a few years ago, ALBA used to receive annually a contribution from a joint Inns of Court fund (“ICBET”) to the cost of its summer conference. This was used, in considerable part, to ensure that the cost of the conference for pupils and new tenants was kept to well below cost. That source of funding disappeared (as the Inns took on greater training

responsibilities themselves, while still continuing to fund scholarships towards the costs of the BVC, and to contribute towards the costs of the profession's regulation). Similarly, the cost to ALBA of hiring rooms in the Inns for its seminars, talks and lectures is substantial (even though provided at less than the Inns' full commercial rates) and limits the amount that ALBA can do with its restricted funds. These are no doubt matters beyond the remit of the Pupillage Review Working Group, but they are relevant to its consideration of what the SBAs currently do, and what they could in future be asked to do, in relation to pupillage training.

30. We would like external advocacy training to include options for pupils with an interest in public law. It would, for example, be beneficial for such pupils to have opportunities not only to make typical magistrates court or county court applications, but also to receive feedback on short oral renewals of applications for permission to apply for judicial review. ALBA would be interested in working with the Inns to deliver that training. Given the growth in the number of judicial review applications in recent years, we would also like to see "first days in the Administrative Court" included as a topic covered in the Bar Council's 'Advice to Counsel' course. ALBA has provided speakers for such sessions in the past.

Issue 5: Recruitment of pupils as tenants

31. As noted above, we see advantages in PTOs regarding their pupils as their tenants / permanent employees of the future. In our view, it would be reasonable to require PTOs to provide prospective pupils with upfront clarity as to the policy which is applied by the PTO in deciding whether to offer a tenancy / permanent employment at the conclusion of pupillage, and at what point during the pupillage that decision will be taken.
32. Many PTOs state that their policy is to offer a tenancy provided that the pupil meets "the standard". Where that is the representation that is made to the pupil, it is not unreasonable for a pupil who is not offered a tenancy to seek some explanation as to where he or she has fallen short. Provided that the PTO has recorded feedback on the

pupil throughout the pupillage, it should not be difficult for the PTO to provide that explanation.

Conclusion

33. We hope the above comments are of assistance to the Working Group in its deliberations, and we repeat our willingness and desire to respond to a consultation paper from the Working Group on the proposals that it is minded to make. If there is anything else we can do to assist, please do not hesitate to let us know.

ALBA

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