

**DEFERRAL OF CALL:
ALBA'S RESPONSE**

INTRODUCTION

1. This is the response of the Constitutional and Administrative Bar Association (known as “ALBA”) to the Consultation Paper issued by the Bar Standards Board on Deferral of Call to the Bar.

2. ALBA is one of the four leading specialist bar associations represented on the Bar Council. It represents a wide range of practitioners in the fields of public and administrative law and human rights, as well as (as associate members) solicitors and others with an interest in these fields. The Association has 880 members. This response has been approved by the ALBA’s Executive Committee, which has 20 members representing all levels of seniority and fields of practice.

3. ALBA considers that deferral of call has manifest disadvantages in the public interest: it is likely to make the profession less diverse and more socially exclusive, diminishing the quality of the services offered to the public, and it is likely to erode the profession’s links with the legal profession overseas and with academic lawyers in this country. Deferral of call will not provide any significant additional protection for the public to set against these disadvantages, being based on outdated and incorrect assumptions about what qualifies an individual to practice as a barrister.

4. The Bar Standards Board’s Consultation Paper emphasises that the Board wishes to conduct an evidence-based consideration of deferral of call. Given what are likely to be the adverse consequences of deferral of call, the absence of any factual evidence in that Paper establishing any requirement for its introduction strongly indicates that it is not justified by a clear case that the change proposed is proportionate and on balance desirable in the public interest.

QUESTION 1: IS IT IN THE PUBLIC INTEREST TO DEFER CALL TO THE BAR UNTIL AFTER COMPLETION OF PUPILLAGE?

5. In ALBA’s view deferral of call is contrary to the public interest. It is not a change which will provide, or which is required to provide, any additional significant protection to the public. But it is likely to restrict access to the bar on grounds other than merit, tending to negate efforts to make the Bar more diverse and less socially exclusive, and it will erode the Bar’s links with commonwealth and academic lawyers, in each case contrary to the public interest.

(a) protection of the public

6. ALBA considers that, in determining whether or not deferral of call is in the public interest, the principal consideration to be addressed is protection of the public. An individual who is not qualified to practice as a barrister should not be permitted to do so¹.

7. Proposals for deferral of call are based on the premise that members of the public may be confused, or misled into relying on someone as a barrister who is not qualified to practice as such, if an individual may become a barrister when he or she is not qualified to practice as such.

8. Proposals for deferral of call thus assume that what qualifies a person to practice as a barrister is possession of the *title* of barrister. But that assumption is not correct, and it would remain incorrect, even if deferral of call were to be adopted.

9. Historically it may have been the case that an individual was treated as qualified to practice as a barrister by a sufficient academic and vocational qualification coupled with a period of *initial* vocational training. But all individuals must also now comply with requirements relating to continuing professional development, which include requirements both for further training and further education, and, if they accept instructions from certain lay clients, such additional training requirements as may be imposed² (as well as having to hold in almost all cases a practising certificate and to satisfy certain other requirements such as insurance cover³). Possession of the title of barrister alone does not qualify a person to practice as a barrister.

10. Even if deferral of call was adopted, possession of the title of barrister alone would still not qualify a person to practice as a barrister even in terms of education and training. Quite apart from the position of pupils in their practising period (referred to below), there is no proposal to deprive an individual of the title of barrister if that person ceases to be qualified to practice

¹ Under the current Code of Conduct a person practices as a barrister if he supplies “legal services” and in connection with the supply of such services holds himself out (or allows himself to be held out) as a barrister or exercises any right he has as a barrister: see Code of Conduct [201]. Legal Services are widely defined to include (subject to certain specified exceptions) legal advice representation and drafting or settling any statement of case, witness statement, affidavit or other legal document: see Code of Conduct [1001]. It is not limited to the exercise of rights of audience.

² See the Code of Conduct [202(b)] and [204(c)(ii)] of the Code of Conduct.

³ See generally the Code of Practice at [202], [204] and [206.1].

as such if, for example, that individual has not satisfied any relevant education and training requirements that have to be satisfied after completion of pupillage. What controls an individual's right to practice as a barrister (and protects the public) is not possession of the title of barrister: it is the combination of requirements that must be satisfied if any individual is to be qualified to practice as a barrister of which the title is only one.

11. The problem in terms of protection of the public (if there is any) only arises if a person practices as a barrister when he or she should not be doing so. This might arise currently in a number of situations (disregarding matters unrelated to education and training). It may arise if an individual practices as a barrister:

- (1) when that individual has not been called;
- (2) when that individual has not completed the non-practising part of pupillage;
- (3) when that individual has completed the non-practising part of pupillage but
 - (i) whilst engaged on the practising part of a pupillage has not the permission of his or her pupil supervisor or Head of Chambers; or
 - (ii) is not engaged on the practising part of a pupillage or has not completed the relevant training requirements in relation to that part of pupillage;or
- (4) notwithstanding completing the relevant training requirements in relation to both parts of pupillage, that individual has not satisfied the requirements of continuing professional development or any other training requirements.

12. Deferral of call does not address the first of these situations (in which the public is currently only protected in practice by the criminal law if an offence is committed and by the fact that such misconduct may disqualify a person from being called). Nor does deferral address the fourth situation. Those advocating deferral assume that in that situation disciplinary sanctions, such as losing the status of being a barrister, are sufficient to protect the public from individuals practising as a barrister when they should not be doing so. But for some reason they equally assume that such sanctions are inadequate in situations (2) and (3) and that the public can be sufficiently protected in those situations from such individuals only if a person is not entitled to call himself or herself a barrister.

13. It is not obvious, however, why that should be so. In each case the most severe disciplinary sanction is loss of the status of a barrister. It is not obvious why the loss of the possibility of acquiring that status (if deferral of call is introduced) is a disciplinary sanction having a greater

deterrent effect than losing a status that has been acquired.

14. The consultation paper does not identify any evidence that the current framework is inadequate to deter individuals from practising as barristers when they should not be doing so in situations (2) or (3); that there is any significant number of cases in which individuals are practising as a barrister when they should not be doing so in those situations; or that there are a disproportionately large number of cases in which the relevant requirements are disregarded in those situations compared with the fourth. Moreover those supporting deferral appear to assume, inconsistently, that such disciplinary sanctions remain sufficient in all three situations in the case of requirements unrelated to training and education.

15. If there is any problem which disciplinary sanctions do not adequately cater for and which requires more serious deterrent sanctions, however, the answer lies not in deferral but in the creation of a criminal offence of practising as a barrister without holding a practising certificate. This would address all four situations mentioned above (other than a case of an individual in the practising period of pupillage who has not got permission from his or her pupil-supervisor or head of chambers).

16. In considering the case for deferral above, it has been assumed that, under deferral of call, individuals would not be able to call themselves a barrister and thus practice as a barrister in their 'practising' period of pupillage. That indeed is the only logical position that can be adopted if deferral of call is thought justifiable for until the completion of pupillage such an individual has not completed what is regarded as the necessary initial training. ALBA is aware, however, that the Bar Council has proposed that such individuals should be given "temporary" call to the Bar. This is inconsistent with the objective behind deferral of call (as the consultation paper notes⁴) that only a person fully qualified to practice as a barrister does so (as the proposed temporary status implicitly recognises). Moreover (unlike others) such an individual is currently not qualified to practice in any event without the permission of that individual's pupil supervisor or head of chambers⁵, so that possession of the title 'barrister' would not of itself show that the individual is qualified to practice as a barrister (just as it does not now do so subsequently and would not do so if deferral of call was adopted).

⁴ See [41].

⁵ See the Code of Practice at [802].

17. It is suggested in the Consultation Paper that an argument in favour of deferral is that the public is entitled to expect a barrister to have completed the training necessary to practice as a barrister and that to confer the title of barrister on those who have not completed (and in many cases will never complete) the training required to practice as a barrister is unjustified in principle and liable to mislead the public⁶. As noted above, this argument assumes (falsely) that the only education and training that an individual needs to complete in order to be qualified to practice as a barrister is a sufficient academic and vocational qualification coupled with a period of *initial* vocational training.

18. In fact the title “barrister” is a professional qualification. The answer to the question, what precise vocational qualifications should be required to obtain it, is not one that can be answered by reference to some abstract standard divorced from the consequences that different alternatives may have.

19. Thus, in terms of protection of the public, the principal concern should be that only those individuals who are qualified to do so practice as a barrister. Thus it is not contrary to the public interest for example for an academic who has not completed a pupillage to be known to be a barrister if he is not practising as a barrister nor is it obvious that the public will be misled materially or be put any risk in such a case. ALBA considers for the reasons given above that there is no reason to assume that deferral of call would itself add any significant safeguard to help ensure that only those individuals who are qualified to do so practice as a barrister.

20. ALBA recognises, however, that no member of the public should be misled about the experience that any person practising as a barrister has. The crucial question in this respect is whether the public will be misled by an individual practising as a barrister in the practising part of his pupillage (as such individuals are now entitled to do and would continue to be entitled to do if the Bar Council’s proposals for temporary call were to be adopted). ALBA is not aware that there is any evidence that this arrangement is liable to mislead the public materially or that it has created a significant problem that could itself justify deferral of call. ALBA assumes that the Bar Council is not aware of any such evidence as the Bar Council would otherwise not have recommended a system of ‘temporary’ call. If there is any problem in this respect, however, it can be solved (without incurring the disadvantages of deferral referred to below) by imposing a requirement that, when accepting any instructions or

⁶ See the Consultation Paper at [28].

undertaking any other work as a barrister, an individual must disclose that the fact that he has yet to complete the practising part of his pupillage⁷.

21. In ALBA's view, therefore, deferral of call is not a change which will provide, or which is required to provide, any additional significant protection to the public.

(b) the disadvantages of deferral in the public interest

22. ALBA considers that deferral of call is likely to restrict access to the bar contrary to the public interest.

23. In this connection there are two interrelated factors that have to be considered in assessing the impact of the introduction of deferral of call: (i) the increased financial risk that deferral will create for those considering becoming barristers; and (ii) the effective transfer of decisions on who may become a barrister to those who decide who shall be offered a pupillage.

24. Those deciding whether or not to read for the bar have to do so having already incurred increasing amounts of debt in order to complete a university degree. Existing debt before the BVC may be over £20,000⁸. Currently, in order to become a barrister, they may have also to incur further debt in meeting fees and living costs in order to complete a conversion course (if their degree is not in law) and the BVC, as well as meeting the costs of admission to an Inn and Call. The costs involved are far from insignificant. The cost of BVC fees alone, for example, may be between £8,000 to £11,000. But at the end of that process such individuals may obtain a professional title that is respected and of value even if they do not practice as barristers. Moreover whether they obtain that title is a matter that depends on their own achievement assessed objectively.

25. Given deferral of call, by contrast, the title of barrister will only be obtained on completion of pupillage. Accordingly those who may obtain it will be selected effectively by those offering pupillages. Such offers are made in the interests of those offering them, and decisions to make such offers are taken by reference to criteria and having followed procedures which those

⁷ A requirement to make disclosure about specific matters relating to a barrister's status and qualifications is not unprecedented: see eg Code of Practice [206.1(b)].

⁸ A recent Bar Council survey showed that, of 625 BVC students responding, 30.6% had debts of more than £20,000. The introduction of "top up fees" for University courses is likely to make this position worse.

making them may themselves devise provided that they do not act unlawfully. It cannot be suggested that those who obtain pupillages are necessarily those who are the best suited for practice at the bar measured in a common objective manner. A more able student applying to chambers where there is intense competition for a pupillage may be unsuccessful, when a less able pupil applying to chambers where the competition is less intense may be successful. Those who do not obtain pupillage will no doubt be able to claim that they have completed the BVC. But such a claim is not likely itself to be regarded as being of the same value as being a barrister (if only because of the well recognised status which the degree granted by the Inns of Court confers).

26. There is already a substantial risk that individuals with modest means are deterred from coming to the Bar. The effect of deferral of call will be to increase the financial risks involved in becoming a barrister which is likely to deter more individuals from coming to the Bar. Those unable to obtain pupillage will not be compensated for the costs of studying for the BVC by securing anything of recognised value. The financial risks involved will be increased significantly. ALBA recognises that there is a problem created by large difference between the number of those entitled to be called and the current number of pupillages available, given (among other matters) the decline in the number of pupillages available following the introduction of the requirement to fund them. Whilst the increased financial risks involved will undoubtedly reduce this mismatch, those deterred will not necessarily be the least able. No “diversity impact assessment” has been provided considering the impact of deferral of call, something that in ALBA’s view is required if their impact is to be justified. In ALBA’s view those deterred are more likely to be those less confident about their financial position and those who are less confident that they will prove acceptable to those choosing who should be offered a pupillage. Such results will tend to negate efforts to make the Bar less socially exclusive and more diverse. In ALBA’s view, although this is certainly not in the interests of the Bar itself, increasing practical deterrents on entry to the legal profession not based on objective merit will also harm the public interest in securing a legal profession that offers the highest quality services to the public.

27. Deferral of call would also sever links that the Bar now has contrary to the public interest.

28. The assumption behind deferral of call is that the only form of legal practice for which the title of barrister should be exclusively reserved is practice at the Bar in England and Wales. But there are other forms of practice as a lawyer in which those who are now called to the Bar may

wish to engage. Deterring such individuals from becoming barristers would not be in the public interest.

29. Deferral of call is likely to weaken the Bar's links, for example, with commonwealth and academic lawyers contrary to the public interest. Not all those from overseas who are now called to the Bar wish to practice as barristers in England and Wales. Many wish to practice as lawyers elsewhere and call to the Bar in this country assists them in fulfilling their ambitions. Deferral of call will tend to make it less likely that overseas students will wish to come to this country to study at all or for as long as they now do. Quite apart from the income and their presence which is of benefit to this country, further erosion of connections with the legal professions abroad (particularly in countries which are or were former members of the commonwealth) which deferral is likely to cause is not in the interests of the profession in this country (for whom it is likely to reduce opportunities for international practice) and it will also tend to undermine a common legal culture in the common law world which has benefited the development of law in this country. Similarly the Bar benefits from its links with academic lawyers who also help in the educational activities of the Inns. Deterring them from coming to the Bar if they have no intention of practising as barristers in England and Wales would likewise not be in the public interest.

30. Deferral of call would thus also sever links that the Bar now has contrary to the public interest.

(c) conclusion

31. The Consultation Paper also suggests that the fact that there are differences between the circumstances in which individuals may be called to the bar as a barrister and admitted to the roll as a solicitor may justify deferral of call⁹. Quite apart from the fact that there are differences between both parts of the profession which may justify a different approach, a case based simply on the desirability of uniformity does not establish which part of the profession should change its approach nor does it provide any sufficient reason of itself for concluding that deferral of call is in the public interest regardless of its disadvantages.

32. In ALBA's view deferral of call has manifest disadvantages in the public interest: it is likely

⁹ See [29] of the Consultation Paper.

to make the profession less diverse and more socially exclusive diminishing the quality of the services offered to the public and it is likely to erode the profession's links with the legal profession overseas and with academic lawyers in this country. Deferral of call will not provide any significant additional protection for the public to set against these disadvantages, being based on outdated and incorrect assumptions about what qualifies an individual to practice as a barrister. In ALBA's view deferral of call is contrary to the public interest.

33. Nor in ALBA's view should deferral of call be adopted unless there is a clear requirement to do so. Regulatory change for its own sake has no value: it should be justified by a clear case that change is on balance desirable in the public interest. In ALBA's view no such case has been advanced in support of deferral of call.

QUESTION 2: THE FUTURE STATUS OF PUPILS IF CALL IS DEFERRED

34. The case for deferral is that only those qualified to practice having completed their training should be entitled to be called as barristers. As noted above, allowing individuals to be called or to practice as barristers having completed only half of their pupillage is inconsistent with the case for deferral.

35. ALBA does not consider that any case has been made that those engaged in what is now the practising part of their pupillage should be unable to practice. Indeed it is part of the function of that part of pupillage that they should be able to do so. If there is a problem with regard to the public's perception of such individuals and of their experience, it can be solved by imposing a requirement that, when accepting any instructions or undertaking any other work as a barrister, an individual must disclose that the fact that he has yet to complete the practising part of his pupillage.

36. Given that call is deferred until the completion of pupillage and that individuals are to be allowed to practice in some capacity, then it cannot be as a barrister. In such a situation the name "trainee barrister" has merit. It should be available to be used only during the practising part of pupillage.

37. ALBA also considers that the name "pupillage" is probably outdated. Practical training would be more appropriate.

Q3: A NEW QUALIFICATION IF CALL IS DEFERRED

38. If call is to be deferred, it is not clear what additional qualification could or should be created.

39. The completion of the Bar Vocational Course may currently entitle an individual to a 'Postgraduate Diploma in Professional Legal Skills'. It is not obvious that of itself it would qualify an individual for any more commonly recognised postgraduate academic title.

40. The Inns are able to award the degree of the utter bar (which entitles an individual to call himself a barrister) but they have no other exemption under the Education Reform Act enabling them to award any other title. Nor does it appear that they wish to do so.

41. The purpose of inventing a new title to be awarded to someone who can now be called to the Bar, but could not be under deferral, is to seek to provide some substitute to compensate those who have incurred the costs of studying for the Bar but have been unable to obtain pupillage. ALBA does not consider that there is any title that will confer a value that will be recognised (as the title of barrister now is) that will sufficiently minimise the adverse effects that deferral is likely to have (considered above).

Q4: ARE ANY OTHER CHANGES NECESSARY GIVEN DEFERRAL

42. There are changes to the BVC that ALBA has recommended should be made in response to an earlier consultation. That response accompanies this document. In ALBA's view these should be made irrespective of whether deferral of call is introduced.

43. ALBA considers that the training requirements that are associated with pupillage (upon which the BSB is consulting in any event in connection with the replacement of the Consolidated Regulations) should not be different in substance depending on where an individual trains or practices. Those regulations will provide scope for granting exemptions if training outside England and Wales is sufficient to warrant it. ALBA recognises, however, that there may be practical difficulties in ensuring that training abroad has achieved the standard necessary to warrant an exemption and accordingly in providing general rules treating any training or practice abroad as sufficient regardless of the circumstances of particular cases. But any suggestion that an individual overseas may be called to the Bar in

effect without completing training equivalent to that which an individual must complete in this jurisdiction has no justification: it should not be easier to become a member of the Bar of England and Wales if the individual concerned is outside the jurisdiction. Moreover any such approach would be fundamentally inconsistent with the case (such as it is) for adopting deferral of call.

Q5: TIMETABLE

44. ALBA has no particular comments to make on the timetable for introducing a change which it opposes.