



The Council
of the Inns
of Court

RESPONSE TO THE BAR STANDARDS BOARD'S

ENGAGEMENT PROGRAMME PAPER ON

PUPILLAGE GATEWAY TIMETABLE AND WRITTEN AGREEMENTS FOR PUPILLAGE

July 2019

INDEX

- A: Introduction
- B: Background to the BSB's first proposal relating to the Pupillage Gateway timetable
- C: Background to the BSB's second proposal relating to written agreements for pupillage
- D: The questions raised by the BSB in the Paper
- E: Summary of the Inns' response to the Paper
- F: The Inns' general approach to the BSB's proposals
- G: The Inns' detailed response to the BSB's proposals relating to the Pupillage Gateway timetable
- H: The Inns' detailed response to the BSB's proposals relating to written agreements for pupils

A: Introduction

1. The Bar Standard Board (**BSB**) launched a targeted engagement programme seeking views on two proposals in May 2019. The first relates to the Pupillage Gateway timetable and the second to the provision of written agreements for pupillage.
2. The BSB circulated a summary document explaining the proposals (**the Paper**). The Council of the Inns of Court (**COIC**) submits this Response to the Paper on behalf of the four Inns of Court (**the Inns**), after due consultation with them (**the Response**). The Response represents and records the agreed views of the Inns to the questions raised in the Paper.

B: Background to the first proposal relating to the Pupillage Gateway timetable

3. At present, all pupillages must be advertised on the Pupillage Gateway (**the Gateway**). Authorised Education and Training Organisations (**AETOs**) must apply for a waiver for any exception.¹ However, AETOs are not required to adhere to the Gateway advertising and recruitment timetable. The BSB proposes to introduce a requirement, as a condition of AETOs authorisation, that all pupillage recruitment must be in line with the Gateway timetable. This does not require all pupillage providers to use the Gateway for processing pupillage applications but simply aims to put in place a common timetable in terms of dates.
4. The proposed new standard timeline is as follows (with specific dates within these parameters set annually):
 - (1) Late November – publication of advertisements on the Gateway;
 - (2) Early January – applications open;

¹ As is acknowledged in the Bar Qualification Manual the term AETO applies to two different types of entity: (1) Higher Education Institutions such as the current Bar Professional Training Course Providers and (2) pupillage training providers, such as Chambers.

- (3) Early February – applications close;
- (4) February to May – shortlisting and interviews; and
- (5) Early May – offers made.

- 5. The BSB are proposing to add a final stage to the Gateway timetable whereby once offers are released, all applicants have a 14-day deadline to communicate acceptance of an offer (if any).

C: Background relating to the BSB’s second proposal relating to written agreements for pupillage

- 6. Currently, there is no requirement for written agreements to be in place between AETOs and pupils except the obligation implicit in the need to keep records of pupillage agreements under paragraph 4 of the Bar Qualification Manual Part 2 C2. The BSB are proposing to introduce a mandatory requirement for written agreements to be drafted and signed upon commencement of pupillage. This would be established as a condition of AETO authorisation. The broad proposed terms are set out in Annex A to the Paper. They are split into three sections: the AETOs’ duties; the pupil’s duties; and details of the pupillage. The BSB say it will be for the AETOs to draft specific wording that meets these outcomes. The BSB state that most of these terms reflect the requirements in the BSB Handbook, Authorisation Framework and Bar Qualification Manual. However, there are also some additional terms which the BSB proposes adding and some of the BSB Handbook requirements currently only apply to Chambers and not AETOs at the employed Bar. The BSB proposes to apply them consistently. The BSB proposes that agreements must reflect any relevant legislation, such as the obligations of the AETOs and the pupil under the GDPR and the Data Protection Act 2018. AETOs would be permitted to add any further terms they wish, provided those terms are not “*unfair and/or unduly onerous*”.

D: The questions raised by the BSB in the Paper

7. In addition, to inviting any general comments or views, the BSB raises the following specific questions in relation to the two proposals.
8. In relation to the first proposal, relating to pupillage recruitment, the main question asked is, should the BSB make it a mandatory condition of AETO authorisation that all pupillage providers recruit in line with all stages of the Pupillage Gateway timetable, or is there any other way to ensure candidates are aware vacancies exist and can make informed decisions? As part of this the following questions are also raised.
 - a. Should another step be added to the Gateway timetable, namely a 14-day deadline for applicants to respond to offers?
 - b. Is it feasible to require compliance with the (new) Gateway timetable from November 2019?
9. In relation to the second proposal relating to written agreements for pupillage, the main question asked is, should the BSB make it a mandatory condition of AETO authorisation that all pupillage providers are required to use written agreements for pupillage? The BSB also asks the following question.
 - a. Are the proposed outcomes set out in Annex A appropriate and clear?

E: The Inns' general approach to the BSB's proposals

10. The Inns recognise that this consultation is one where there may be differing views as between those who are barristers in Chambers and other pupillage providers (and who bear any regulatory burden) and those who are pupils. It is important that the BSB obtains the views of both groups, independently of the Inns' response, to assist its thinking towards these proposals.
11. The Inns' approach to these proposals is, generally, informed by the following considerations. It is important that access to pupillage should be available to

applicants on a fair and equal basis. The pupillage application process should not be unduly burdensome on either applicants or those who provide pupillage including Chambers. There is at present an acute shortage of pupillage places compared to the number of applicants. Any proposal that could result in reduction in available pupillages should be avoided. The Inns' future and present students, the profession and the public, all have a legitimate interest in ensuring that there are sufficient pupillage places to provide access to the profession for well-qualified advocates. The BSB and the Inns have been working towards making the profession more accessible and reflective of society and share a common desire to avoid doing anything that would setback the progress made or create adverse impacts for any of the equality groups. The Inns trust that a full equality impact assessment has been or will be carried out, and will be shared with all interested parties so that it can be considered before a final decision is taken as to whether these proposals are implemented.

F: Summary of the Inns' Response to the Specific Proposals

12. In summary, as explained in more detail below, the Inns' views as to the first proposal are:
 - a. As to the first proposal In general, the Inns can see the benefits of requiring all pupillage recruitment to adhere to the common Gateway timetable;
 - b. The proposal to allow AETOs to apply for a waiver from the requirements to adhere to the set timetable at all and also in regard to the interview period in "*exceptional circumstances*" should be made more flexible;
 - c. Operating a waiver scheme so as to allow interviewing outside the Gateway timeframe may be difficult given the short period in which application and decision could be made;
 - d. The proposed test of "*exceptional circumstances*" sets the bar too high and potentially sends a discouraging message to AETOs considering offering further pupillages outside the Gateway timetable or seeking an extension of the interview period. An alternative approach would be to grant a waiver "*for good reason*";

- e. The BSB are proposing to introduce a 14-day deadline for all applicants to accept an offer on the basis that all AETOs are required to use the Gateway timetable. The Inns agree that in these circumstances this further step should be added to the Gateway timetable to increase consistency and fairness for pupils and AETOs. However, care needs to be taken as to how this change is put into practice; and
- f. It is not feasible to require compliance with the (new) Gateway timetable from November 2019.

13. In summary, as explained in more detail below, the Inns' views as to the second proposal are:

- a. The Inns are aware that some Chambers have written agreements in place with their pupils as a matter of individual organisational preference, but is unaware whether this is common practice across the Bar. The Inns recognise that having a written contract reflects best employment/industry practice;
- b. Any express regulatory requirement as to the content of pupillage agreements must go no further than specifying the minimum that is required in order for a pupil and AETOs to have certainty over the fundamental aspects of the agreement between them;
- c. The detailed requirements and the format of Annex A are flawed;
- d. The Inns favour, at most, a simplified version of Annex A setting out a less detailed list of the minimum terms that must appear in a pupillage contract in an analogous way to that required by the Employment Rights Act 1996 of employers in a Statement of Particulars of Employment;
- e. In relation to the contents of any written agreement, in addition to the simplification, the Inns would note that a clear demarcation is required between proposed minimum contractual terms to be set out in a contract and the requirement to provide pupils with details of policies that apply to their training;
- f. Further if any such provision is introduced, in whatever form, in order to assist compliance, the Inns would urge the Bar Council to provide support in its implementation. The Inns suggest that the Bar Council should make

available to all AETOs a model form/template complying with the BSB's minimum requirements;

- g. The Inns do not agree that all of the proposed outcomes are appropriate as terms of a written agreement giving rise to contractual effect. It is instead suggested that many of the proposed outcomes would be more appropriately described as non-contractual policies that the AETO have a regulatory requirement to provide to any pupil; and
- h. The proposed outcomes set out in Annex A are in the Inns' view inappropriate and unclear.

G: The Inns' detailed response to the BSB's proposals relating to the Pupillage Gateway timetable

- 14. In general, the Inns can see the benefits of requiring all pupillage recruitment to adhere to the common Gateway timetable. Such a requirement would have a number of benefits for pupils and overall for AETOs. In particular, a harmonised Gateway timetable would simplify and clarify the pupillage recruitment process for all parties involved; ensuring candidates are aware of all existing vacancies and have the ability to make truly informed decisions on pupillage offers.
- 15. The Inns note with concern two specific issues relating to this proposal to mandate the Gateway timetable flagged up by the BSB. First the BSB acknowledge that a set timetable may make the recruitment process less flexible which may disadvantage some AETOs who presently recruit on a very different timetable. The BSB notes that AETOs' own business cycles may differ from the Gateway timetable, and secondly AETOs may have a growth period, but then have to wait a year to recruit. The BSB's view is that if these AETOs could have recruited sooner, then potential pupillages may be lost.² Secondly the BSB recognises that a set timetable may disadvantage both AETOs and applicants if all interviews must be held in the same limited time frame.³ The BSB notes that this could reduce candidate and AETO choice where

² Proposal paragraph 10

³ Proposal paragraph 11

interview dates conflict. It may also be difficult for applicants who have other responsibilities (e.g. as carers or if they are in work). The BSB proposes to address all these possible negative impacts by allowing AETOs to apply for a waiver from the requirements to adhere to the set timetable at all and also in regard to the interview period in “*exceptional circumstances*”.

16. The Inns’ view is that the waiver process should be more flexible as set out below to avoid the loss of potential pupillage places, adverse impact on disadvantaged applicants or a reduction in candidate and AETO choice.
17. There is a risk that any disadvantage flowing from a requirement for all interviews to be held in one common limited time frame may create a competitive disadvantage for the AETOs recruiting on the Gateway, contrary to the intention to create a fair process. These AETOs will not have access to the applications until the submission window closes in early February. In contrast AETOs recruiting off the Gateway will receive applications from early January and can immediately begin some assessment and planning. Consideration should be given to mitigating this disadvantage.
18. Operating a waiver scheme so as to allow interviewing outside the Gateway timeframe may be difficult. It would require a prompt application by AETOs, and an equally prompt decision from the BSB. The proposed test of “*exceptional circumstances*” sets the bar too high and potentially sends a discouraging message to AETOs considering offering further pupillages outside the Gateway timetable or seeking an extension of the interview period. An alternative approach would be to grant a waiver “*for good reason*”. Examples of where this test would be met would be where an additional pupillage becomes available as the pupil recruited is unable to take up the pupillage offered or needs to defer, or where additional funding is secured for offering further pupillages.
19. It is assumed that the BSB are proposing to introduce a 14-day deadline for all applicants to accept an offer on the basis that all AETOs are required to use the Gateway timetable. The Inns agree that in these circumstances this further step

should be added to the Gateway timetable to increase consistency and fairness for pupils and AETOs. However, care needs to be taken as to how this change is put into practice. The Inns are aware that there are candidates who receive multiple offers and stories persist of improper time-limited offers. There are also occasions where a candidate is on the reserve list for his/her main pupillage provider but also has other offer(s). In these circumstances the candidate will want to wait to see whether the main provider can offer pupillage before responding to the other offers. An aim to prevent pressure on pupils to accept pupilages without time for proper consideration is a valid one. But where pupils take the full 14 days to decide, this may disadvantage other potential pupils. Less flexibility is required at this stage, but the present proposal should be capable of extension in appropriate circumstances.

20. In the Inns' view it is not feasible to require compliance with the (new) Gateway timetable from November 2019. There is advantage to giving notice of future reforms. However, it may be difficult or impractical for non-Gateway providers with a very different timetable at present to implement such a proposal in a tight timescale. The Inns' concern is that if the system were implemented this quickly there could be complaints and/or implementation issues which might overshadow the positive benefits of the proposal. The Inns favour a slower but more effective transition to any new timetable, say from November 2020.

H: The Inns' detailed response to the BSB's proposals relating to written agreements for pupils

21. The Inns are aware that some Chambers have written agreements in place with their pupils as a matter of individual organisational preference, but is unaware whether this is common practice across the Bar. The Inns note that since 1 April 2019 AETOs have already (arguably) been implicitly required to have a written agreement in order to comply with the obligation to keep records of its pupillage agreements

under paragraph 4 of the Bar Qualification Manual Part 2 C2.⁴ The Inns recognise that having a written contract reflects best employment/industry practice. Having clear written terms and policies helps Chambers deal with matters arising in pupillage more effectively and fairly. For example, setting out where to find Chambers' policies on equal opportunities and grievances helps pupils understand how to raise concerns and helps promote equal opportunities and diversity. Setting out rules around conduct and disciplinary processes clarifies expectations and processes during pupillage, and the potential consequences of falling below those standards.

22. The Inns' view is that:

- a. it is important for the BSB to be clear as to the extent to which such a written agreement is required, its mandatory contents and its format;
- b. any express regulatory requirement as to the content of pupillage agreements must go no further than specifying the minimum that is required in order for a pupil and AETOs to have certainty over the fundamental aspects of the agreement between them; and
- c. the detailed requirements and the format of Annex A are flawed. The proposal seeks to have the mandatory agreement repeat some important parts of policies or provisions which are already set out in the Bar Qualification Manual, BSB Handbook or Authorisation Framework, while omitting to cover other significant provisions. Where an obligation is already clearly set out in an applicable document there is no need for it to be repeated in detail in a pupillage agreement.

⁴ Paragraph 4 expressly states that: *"As a condition of authorisation AETOs must maintain the following data and records for at least 5 years ... Pupillage agreements"*. However we further note paragraphs 2.23 and 2.25 of the Bar Qualification Manual Part 2 C2 which provides that: *"Offers of pupillage may be made by AETOs through the Bar Council's Pupillage Gateway if the AETO uses the Gateway to administer their recruitment process, or directly if not. ... The BSB is currently consulting stakeholders on whether the BSB should mandate the use of written pupillage agreements."*

23. There is a risk that requiring a document to be provided that contains too much detail becomes counterproductive. If its production is seen to be an administrative burden it could even result in a reduction in the available pupillages among those Chambers without access to well-funded administrative support.
24. The Inns also see significant risk in inviting all AETOs to draft their own pupillage training contract. Some Chambers without access to employment law expertise may draft terms which result in a contract for services or of apprenticeship, rather than the education and training contract envisaged in paragraph 2.23 of the Bar Qualification Manual Part 2 C2 by reference to Edmonds v. Lawson 2000 [QB] 501 (CA). It might also unintentionally affect the tax status of the pupil.
25. The Inns favour, at most, a simplified version of Annex A setting out a less detailed list of the minimum terms that must appear in a pupillage contract in an analogous way to that required by the Employment Rights Act 1996 of employers in a Statement of Particulars of Employment.
26. In relation to the contents of any written agreement, in addition to the simplification, the Inns would note that a clear demarcation is required between proposed minimum contractual terms to be set out in a contract and the requirement to provide pupils with details of policies that apply to their training. The Inns would agree that it is beneficial for a pupil to be notified in writing of the applicable policies to their pupillage, that such policies should be in writing, and that pupils should be told where they can find those policies.
27. Further if any such provision is introduced, in whatever form, in order to assist compliance, the Inns would urge the Bar Council to provide support in its implementation. The Inns suggest that the Bar Council should make available to all AETOs a model form/template complying with the BSB's minimum requirements. Regular review should be undertaken of this document and revisions provided if necessary, to ensure compliance with legislation and to take on board any feedback received from AETOs from year to year. Pupillage providers would be free to add to

or amend as required (e.g. for payment terms or provider specific rules/arrangements). The advantage of this approach is that it makes it easier for smaller and/or less well funded Chambers to implement such a proposal and creates administrative simplicity. We would expect most AETOs to be far more positive about the introduction of a mandatory contract if the bulk of the administrative work was done for them in this regard. We note the reference in the Proposal to a bar on unfair or unduly onerous terms. We recommend that guidance is provided by the BSB as to what it regards as an unfair or unduly onerous term.

28. The Inns do not agree that all of the proposed outcomes are appropriate as terms of a written agreement giving rise to contractual effect. It is instead suggested that many of the proposed outcomes would be more appropriately described as non-contractual policies that the AETO have a regulatory requirement to provide to any pupil.
29. Further the proposed outcomes set out in Annex A are in the Inns' view inappropriate and unclear:
- Paragraph 4: This is not appropriate as a contractual clause. Whilst agreeing with the aim of AETOs assisting pupils with their regulatory requirements, this provision does not cater for the situation where a pupil has not complied with their part of the obligation. A more appropriate suggestion is for AETOs to have appropriate procedures to ensure that pupils are provided with appropriate assistance in all the circumstances.
 - Paragraph 8: it is suggested that all these bullet points are more appropriately included as part of a general training plan and not as contractual terms. Requiring AETOs to set out the training programme at the outset of the pupillage for the whole 12-month period may be counterproductive in that it may lead to inflexibility.
 - Paragraph 8 Bullet 2 and paragraph 28, the names of all Supervisors should not be set out at the start of the period. It is often beneficial to retain flexibility to take account of changing circumstances of supervisors (pregnancy, absence, a big case that means that the supervisor is around

more / less), and to consider the assistance that a pupil might need. This outcome has the risk of becoming unnecessarily prescriptive and cause AETOs to stick to what has been agreed because it is part of an agreement rather than considering the best interests of the pupil.

- Paragraph 8 Bullet 6: – This is unclear and should be omitted. It is not agreed that there should be an expectation that Chambers will pay for any resits, if that is what is intended by the BSB.
- Paragraph 8 Bullet 8: it is agreed that there should be a Chambers' sickness policy but not that it should be contractual. The particular issues arising from sickness may engage the Equality Act and would require individual consideration.
- Paragraph 9: (proposed new term) it is unclear what this relates to. If the suggestion is that there should be a statement that if the pupil does not pass the final assessment that they will not be signed as competent, this consequence should be made clear. If it is intended to reflect something additional, this would also need to be clarified.
- Paragraph 18: (proposed new term) it is suggested that this is deleted. It is good practice for a pupil to give such notice, but there is little that a Chambers could do in the circumstances and there can be no requirement for a pupil to undertake pupillage against their wishes.
- Appendix paragraphs 24 to 28: it is agreed that there should be policies of the kind set out in the list but not that such policies should be contractual, if that is what the BSB propose. It is sufficient that the pupil should be provided with a copy of all policies and told where such policies can be found within the AETOs.

30. We also make comment, that the Proposal page 15 footnote 10 states that pupils will normally have been called to the Bar before commencing the non-practising period. Whilst this is correct in overall numbers, there are a number of students who will be called to the Bar in the first six months of their pupillage if they start immediately after Bar School.

31. Finally, it is not clear when is it intended to introduce this reform. In the Inns' view AETOs would need a reasonable period to prepare for this and not before the 2020/2021 recruitment.