

Application by the Bar Standards Board to adopt the new Bar Training Regulations

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OFT1017

1 GENERAL SUMMARY

- 1.1 The advice below concerns the application by the Bar Standards Board to replace the 'Consolidated Regulations of the Inns of Court and the General Council of the Bar' (the Consolidated Regulations) with the 'Bar Training Regulations'.
- 1.2 Under section 29 and Schedule 4 to the Courts and Legal Services Act 1990 (the CLSA) (as amended), if a body authorised to grant rights of audience or rights to conduct litigation makes an alteration to its qualification rules or rules of conduct, the alteration shall not have effect unless approved by the Secretary of State. The Secretary of State may seek the advice of the Office of Fair Trading who shall consider whether the proposed alterations would have, or be likely to have, any significant effect on competition.
- 1.3 I am authorised by the Office of Fair Trading, under paragraph 12 of Schedule 1 to the Enterprise Act 2002, to carry out competition scrutiny of the proposed alterations as required by the provisions of the CLSA (as amended) set out above.
- 1.4 The Consolidated Regulations of the Inns of Court form the qualification regulations for practice at the Bar of England and Wales.
- 1.5 Under the Legal Services Act 2007 the (Act), the General Council of the Bar (the Bar Council) is an 'approved regulator' and its 'regulatory arrangements' are treated as having been approved for the purposes of the Act. As defined in the Act, such 'regulatory arrangements' include regulations relating to education and training and other 'qualification regulations'.
- 1.6 The Act contains provisions which will require approved regulators to ensure that their regulatory functions are exercised independently from their representative functions (that is any functions they have in connection with the representation or promotion of the interests of persons whom they regulate). In

anticipation of this requirement, the Bar Council (as from 1 January 2006) established the Bar Standards Board (the Board) and has devolved to the Board all of its regulatory functions and powers.

1.7 The Board proposes that the draft Bar Training Regulations will replace the Consolidated Regulations. According to the Explanatory Note: 'It is not the purpose of the new Bar Training Regulations to alter the basic structure of training for the Bar or the requirements which a person must satisfy in order to become qualified to practice as a barrister. Rather, the preparation of the Bar Training Regulations has had two main aims. These are:

- a) to re-write the rules so as to simplify them wherever possible and express them in clearer and more modern language, and
- b) to put in place a new framework under which (i) responsibility for regulating in training for the Bar is vested in the Board and (ii) in those areas where the Inns of Court carry out functions under the Bar Training Regulations they do so in combination with each other and subject to oversight by the Board.'

1.8 For the reasons discussed in the following paragraphs, I consider that in so far as the training requirements and the regulations for barristers have changed, this application would not and would not be likely to have any significant effect on competition.

1.9 However, I suggest that the Guidance to be issued by the Board clarifies the types of employment that may be acceptable as external training and the procedures to be followed in order to obtain approval from the Board.

2 THE BAR TRAINING REGULATIONS AND ITS LIKELY COMPETITIVE EFFECT

Background

- 2.1 Originally, the education and training of students wishing to become barristers was the sole responsibility of the four Inns of Court. In 1863 the four Inns for the first time made Consolidated Regulations to provide for the admission and education of students and the calling of students to the Bar. More recently, part of the responsibility for regulating training of the Bar has been undertaken by the Bar Council.
- 2.2 The Act makes provision for a new legal framework for the regulation of persons who carry on certain legal activities. Under the Act, the Bar Council is an 'approved regulator' and its 'regulatory arrangements' are treated as having been approved for the purposes of the Act. As defined in the Act, such 'regulatory arrangements' include regulations relating to education and training and other 'qualification regulations'.
- 2.3 The Act contains provisions which will require approved regulators to ensure that their regulatory functions are exercised independently from their representative functions (that is any functions they have in connection with the representation or promotion of the interests of persons whom they regulate). In anticipation of this requirement, the Bar Council (as from 1 January 2006) established the Board and has devolved to the Board all the regulatory functions and powers. The Board has a lay Chair and 7 of its 15 members are lay members. All the members of the Board have been appointed on merit through an impartial selection process, and the barrister members are not and may not be members of the representative Bar Council. In discharging the Bar Council's regulatory functions, the Board is required to act solely in the public interest and to pursue the regulatory objectives set out in the Act.

- 2.4 The Inns of Court have agreed that their remaining powers to regulate training and qualification for the Bar should also be transferred to the Board. This will be achieved when the Bar Training Regulations come into effect because the Bar Training Regulations will vest responsibility for regulating training (including future responsibility for amending the Bar Training Regulations) in the Board.
- 2.5 According to the Explanatory Note: 'It is not the purpose of the new Bar Training Regulations to alter the basic structure of training for the Bar or the requirements which a person must satisfy in order to become qualified to practice as a barrister. Rather, the preparation of the [Bar] Training Regulations has had two main aims. These are:
- a) to re-write the rules so as to simplify them wherever possible and express them in clearer and more modern language, and
 - b) to put in place a new framework under which (i) responsibility for regulating in training for the Bar is vested in the Board and (ii) in those areas where the Inns carry out functions under the [Bar Training] Regulations they do so in combination with each other and subject to oversight by the Board.'

Likely competitive effects of proposed changes

Part II. Admission to Inns of Court

- 2.6 Before a person may be called to the Bar by an Inn of Court, he or she must first be admitted as a member of the Inn. Part II of the Bar Training Regulations sets out the criteria and procedure governing the admission of students to the Inns. There are two basic requirements which a person must satisfy in order to be eligible for admission under the Bar Training Regulations. These are that the applicant a) has the necessary educational qualifications and b) is a fit and proper person to become a practising barrister.

- 2.7 The Bar Training Regulations do not make any substantive change to the educational qualifications necessary for admission to an Inn. At present, to be eligible for admission an applicant must either be undertaking or have already completed (or been exempted from) the Academic Stage of training for the Bar. One difference from the Consolidated Regulations is that the Bar Training Regulations do not specify the requirements to be met by 'mature students' (defined as students without a qualifying law degree or degree in another discipline of a satisfactory standard and meeting certain other criteria), as was the case under the Consolidated Regulations. The intention is that such 'mature students' instead should now apply for an exemption from the Academic stage under Part VII of the revised Bar Training Regulations.
- 2.8 This amendment appears unlikely to have a significant effect on competition, provided the application procedure for exemption from the Academic stage is not unnecessarily restrictive. Indeed the Explanatory Note states that the number of 'mature students' is in decline as the proportion of the population attending university increases. Any body which exercises discretion in granting exemptions from qualification requirements must exercise this discretion in a transparent manner by using appropriate criteria. This may be achieved by naming the criteria for deciding whether an exemption will be granted; by ensuring that these are proportionate, non-discriminatory and based on objective standards; and by providing reasons where an exemption has not been granted.
- 2.9 Similar considerations apply to the exercise of discretion in relation to determining the types of conduct that 'otherwise makes that person unfit to become a practising barrister'.¹

¹ Regulation 6b.

Part V. Professional stage

- 2.10 Consolidated Regulation 46 contains a list of activities that may (with prior approval of the Qualifications Committee) be treated as part of the practising six months of pupillage outside the independent bar (known as external training). Consolidated Regulation 46 is to be replaced by a more general provision in Bar Training Regulation 42 which gives less indication as to what sort of employment the Board may approve. The Explanatory Note to the Bar Training Regulations states that it will be for the Board to issue guidance setting out its general approach to the approval of such external training.
- 2.11 Taking into consideration the discretionary nature of what qualifies as external training and the current absence of clear published criteria, we consider that barristers seeking external training should know in advance of entering employment whether that position would be likely to satisfy the Board. Our concern is that this revision creates a degree of uncertainty for barristers who wish to practice at the employed Bar and to complete the professional stage within the time limits set out in the Bar Training Regulations.² It is therefore important that the Guidance to be issued by the Board clarifies the types of employment that may be acceptable as external training and the procedures to be followed in order to obtain approval from the Board.

² Regulations 29 and 32.

Part VII. Exemptions from training

2.12 This specifies that certain categories of applicants are automatically entitled to an exemption³. In other cases the Board has discretion to grant an exemption from the Academic Stage. The comments made in paragraph 2.8 above, as to how a body should exercise its discretion, also apply here.

3. CONCLUSION

3.1 We do not anticipate that the proposed amendments outlined in the Explanatory Note, would have, or be likely to have any significant effect on competition in the market for the supply of advocacy services. It is, however, important that the Guidance to be issued by the Board clarifies the types of employment that may be acceptable as external training and the procedures to be followed in order to obtain approval from the Board.

³ Regulation 67.