OFFICE OF FAIR TRADING

Application by the General Council of the Bar to amend regulation 47 of the Consolidated Regulations relating to the provisions on pupillage training

December 2005

A report by the OFT to the Department for Constitutional Affairs on the application by the General Council to amend regulation 47 of the Consolidated Regulations of the Inns of Court and the General Council of the Bar

OFT874

1 GENERAL SUMMARY

1.1 The Department for Constitutional Affairs, on 23 August 2005, requested the Office of Fair Trading ('OFT') to consider alterations to the Consolidated Regulations of the Inns of Court and the General Council of the Bar ('Consolidated Regulations'). The advice below considers the alterations proposed by the General Council of the Bar which relate to the provisions on pupillage training.

1.2 Under section 29 and Part II of Schedule 4 of 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 regulations 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 OFT which 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 OFT, under paragraph 12 of Schedule 1 of 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 Together, the Code of Conduct of the Bar Council and the Consolidated Regulations form the qualification regulations for practice at the Bar of England and Wales. The Bar Council proposes to amend regulation 47 of the Consolidated Regulations (Regulation 47) with the effect that organisations wishing to offer pupillages would need to obtain the authorisation of the Bar Council to become pupillage training organisations. It further proposes that it should be entitled to withdraw its authorisation from a pupillage training organisation where problems in an organisation's pupillage arrangements are identified. Where the failure and deficiencies of an authorised training organisation are such that the value of any pupillage training has or is likely to have been seriously compromised, the Bar Council proposes that it should be entitled to invalidate any period of pupillage.

1.5 In addition, the Bar Council proposes to change the requirements for an organisation to be entitled to offer pupillages. The most significant of these amendments is to replace the conditions relating to a pupil

supervisor's principal place of practice and the current 'second qualified lawyer' rule with substantive supervision requirements. The revised Regulation 47 therefore states that in order to obtain the authorisation of the Bar Council to become a pupillage training organisation, an organisation must provide regular supervision by a registered pupil-supervisor and regular contact with at least one other solicitor or barrister with at least three years experience of practice, in addition to the pupil-supervisor. In addition, either the pupil-supervisor or the second lawyer must be entitled to exercise a right of audience before every Court in relation to all proceedings and must be so entitled for at least three years.

1.6 In order to obtain the Bar Council's authorisation, an organisation would also need to provide details of its proposed pupillage programme, including how it will ensure that pupils satisfy each of the Collyear outcomes of pupillage, listed in paragraph 1(ii) of the Bar Council's proposed *Guidelines for Authorisation of Pupillage Training Organisations* (Guidelines).

1.7 For the reasons set out below, we consider that the overall effect of the amendments proposed by the Bar Council would be to allow more organisations to be able to offer pupillages.

1.8 We nonetheless consider that there remain unnecessary restrictions on organisations wishing to offer employed pupillages in so far as some of the requirements to become a pupillage training organisation are less relevant at the employed Bar than at the independent Bar and are therefore also more difficult to achieve by the employed Bar. Such restrictions are likely to unnecessarily limit the number of employed pupillage places and the range of training available to pupils. This can also have a detrimental effect on barristers' ability to compete with one another on the basis of the training they obtained. Further, clients of barristers' services would be faced with a reduced choice of barristers who have obtained different or more specialised training. However, we consider that these restrictions are not likely to have a significant effect on competition in the market for the supply of legal services by barristers.

2. THE AMENDMENTS TO THE CONSOLIDATED REGULATIONS AND THEIR LIKELY COMPETITIVE EFFECTS

Background

Authorisation to become a pupillage training organisation, withdrawal of authorisation and invalidation of pupillage

2.1 The Bar Council recommends that Regulation 47 should be amended with the effect that organisations wishing to offer pupillages would require the authorisation of the Bar Council to become pupillage training organisations. The revised Regulation 47 therefore states that pupillage must be undertaken with a registered pupil-supervisor and in an authorised pupillage training organisation.

2.2 At present, where an organisation meets the conditions to offer pupillage, contained in Regulation 47, it is able to do so as of right. There is currently no framework which could allow the Bar Council to verify whether an organisation offering pupillage has in place satisfactory pupillage arrangements. An authorisation scheme would allow the Bar Council to verify whether an organisation actually meets all the conditions for offering pupillages, as contained in the amended Regulation 47 and paragraph 1 of the proposed Bar Council Guidelines.

2.3 The Bar Council submits that at present even where problems in an organisation's pupillage arrangements are identified, it can do little to prevent that organisation from continuing to take pupils. It therefore proposes to amend Regulation 47 so as to entitle it to withdraw its authorisation from a pupillage training organisation. Paragraph 2 of the proposed Guidelines specifies the circumstances under which the Bar Council would be entitled to withdraw its authorisation, namely where either: an organisation no longer meets the requirements set out in paragraph 1 of the Guidelines; an organisation has failed to implement the provisions set out in its pupillage policy document or pupillage programme; an organisation has failed to comply with any conditions imposed on its authorisation; there are serious deficiencies in the quality of training received by pupils.

2.4 The Bar Council also proposes to insert in Regulation 47 a new provision that would entitle it to invalidate any period of pupillage, in whole or in part, where the failure and deficiencies of an authorised training organisation are such that the value of any pupillage training

has or is likely to have been seriously compromised. It further proposes that it should be entitled to exercise this power irrespective of whether it had refused or withdrawn its authorisation from a pupillage training organisation.

2.5 The revised Regulation 47 sets out the procedure for refusal or withdrawal of authorisation to become a pupillage training organisation or invalidation of pupillage and gives a right to review of such decisions by any affected party. Further, paragraph 4 of the proposed Guidelines sets out that a pupillage training organisation will usually be given at least 28 days to remedy any deficiencies in the provision of pupillage before withdrawal of authorisation takes effect.

2.6 In addition, the revised Regulation 47 states that where the Bar Council refuses or withdraws its authorisation or invalidates a period of pupillage, and either there is no application for a review of that decision or following such a review the decision is confirmed, an organisation would be prevented from reclaiming any payment made to a pupil, former pupil or prospective pupil as the case may be in respect of any pupillage award, pupillage funding, travelling or other payments or expenses.

Requirements to become an authorised pupillage training organisation

2.7 The Bar Council submits that it will authorise an organisation as a pupillage training organisation where it meets the conditions specified in Regulation 47 and paragraph 1 of its proposed Guidelines. These conditions are considered in turn below.

Regular supervision by a registered pupil-supervisor and regular contact with at least one other lawyer

2.8 In order to obtain the authorisation of the Bar Council, an organisation must provide regular supervision by a registered pupil-supervisor and regular contact with at least one other solicitor or barrister with at least three years experience of practice, in addition to the pupil-supervisor. Further, either the pupil-supervisor or the second lawyer must be entitled to exercise a right of audience before every Court in relation to all proceedings and must be so entitled for at least three years.

2.9 At present, the supervision requirements contained in Regulation 47 state that pupillage must be undertaken with a pupil-supervisor whose

principal place of practice must be in chambers or an office which is also the principal place of practice of at least one other barrister or solicitor who has been entitled to exercise full rights of audience for at least three years.

2.10 The Bar Council therefore proposes to amend Regulation 47 by replacing the conditions relating to a pupil-supervisor's principal place of practice and the current 'second qualified lawyer' rule with substantive supervision requirements.

2.11 The effect of the 'second qualified lawyer' requirement has been to prevent sole practitioners in self-employed practice or practices with only one higher court advocate from offering pupillage places. In addition, the Bar Council Joint Task Force on Education and Training for the Employed Bar, which in 2002 considered the reasons why so few pupillages are undertaken in employment, concluded that the 'second qualified lawyer' requirement was one of the main impediments preventing more organisations from taking pupils.

2.12 The revised Regulation 47 contains substantive supervision requirements and therefore maintains, if not improves the level of supervision provided by requiring regular supervision by a pupil-supervisor and regular contact with a second lawyer. At the same time it removes the unnecessary rigidity in the current requirements as to the principal place of practice of the pupil-supervisor and of a second qualified lawyer.

The Collyear outcomes of pupillage

2.13 In order to obtain the Bar Council's authorisation, an organisation would also need to provide details of its proposed pupillage programme, including how it will ensure that pupils satisfy each of the Collyear outcomes of pupillage, listed in paragraph 1(ii) of the proposed Guidelines.

2.14 The current pupillage checklists[1] of the Bar Council provide details of the type of work that a pupil must have undertaken and the skills they must have obtained in order to meet the Collyear requirements. At present, these pupillage checklists must be satisfactorily completed in order to obtain a practising certificate.

[1] www.legaleducation.org.uk/Pupillage/checklists.php

2.15 The majority of the Collyear outcomes reflect the training and skills necessary in order to practice both at the independent and the employed Bar. Some of the required training and skills, however, appear to be less relevant to practice at the employed Bar and may therefore make it more difficult for the employed Bar to offer pupillages.

2.16 In particular, to the extent that the Collyear requirement of practical experience of advocacy currently centres only on court-room advocacy, this is a requirement which can be less easily achieved by organisations wishing to offer employed pupillages. In many legal departments advocacy is of a broader type, encompassing written advocacy, commercial negotiation, internal and external presentations and the preparation of written submissions. In order to ensure that any advocacy requirement can be met by both organisations wishing to offer pupillages at the independent and the employed Bar, it is important to define advocacy in broad terms so as to reflect the type of skills that are relevant to both the independent and the employed Bar. We note, for example, that the Dutton Report on Advocacy Training, commissioned by the Bar Council in 2002, defines the skills necessary for a modern advocate in broad terms[2].

Other requirements for authorisation

2.17 The Bar Council further submits that it will authorise an organisation as a pupillage training organisation if it has an acceptable pupillage policy document which includes details of the matters listed in paragraph 1(i) of the Guidelines. In order to obtain the Bar Council's authorisation, an organisation will therefore need to provide details of, inter alia, its pupillage funding arrangements; the roles and duties of pupils and pupil supervisors; the checklist(s) used during pupillage; the procedures for providing pupils with an objective assessment of their progress at regular intervals; the complaints and grievance procedures etc.

[2] The Dutton Report on Advocacy Training defines the skills necessary for a modern advocate to include:

- abilitiy to persuade orally;
- abilitiy to persuade by written argument;
- cogent legal and factual analysis;
- ability to develop reasoned argument;
- forensic skills with evidence.

2.18 An organisation must also undertake to provide training in accordance with guidance issued from time to time by the Bar Council in order to obtain the authorisation of the Bar Council to become a pupillage training organisation.

2.19 It will be important to the success of the authorisation scheme in general, and in particular to organisations' ability to prepare pupillage policy documents and to follow the Bar Council's guidance, to provide clear and user-friendly information and guidance to assist applicants.

2.20 Further, an organisation must ensure that a pupil has ready access to library facilities which are adequate having regard to the nature of his/her pupillage.

2.21 Finally, the Bar Council proposes to retain the current requirement that a pupil-supervisor may not be responsible for more than one pupil at a time save with the approval in writing of the Joint Regulations Committee.

Likely Competitive Effects

Authorisation to become a pupillage training organisation, withdrawal of authorisation and invalidation of pupillage

2.22 At present, any organisation which meets the requirements to offer pupillage is entitled to do so as of right. In so far as the conditions for offering pupillages are currently observed by organisations offering pupillages in the majority of cases, and assuming that the requirements for authorisation are reasonable and proportionate (see paragraph 2.27 onwards), the mere introduction of an authorisation scheme that would entitle the Bar Council to verify whether the requirements for offering pupillage are actually met is not likely to limit the number of pupillage training organisations and the number of pupillage places. For those same reasons, the provisions relating to the refusal or withdrawal of authorisation and the invalidation, in whole or in part, of pupillage are not likely to considerably limit the number of pupillage training organisations or the number of pupillage places.

2.23 Further, even if the conditions for offering pupillages are not mostly observed at present by organisations offering pupillages, and assuming that the authorisation requirements are reasonable and proportionate (see paragraph 2.27 onwards) the mere introduction of

an authorisation scheme would not constitute an unnecessary restriction on the number of pupillage training organisations and the number of pupillage places.

2.24 To the extent that the provisions relating to the refusal or withdrawal of authorisation and the invalidation of pupillage include a proper appeals procedure, they may ensure that organisations are not unduly prevented or restricted from offering pupillages and that the number of pupillage places are not unduly limited.

2.25 Similarly, to the extent that the Bar Council would usually give a pupillage training organisation at least 28 days to remedy any deficiencies in the provision of pupillage before withdrawal of authorisation takes effect, this may ensure that organisations are not unduly prevented from offering pupillages and that the number of pupillage places are not unduly limited.

2.26 In order to further ensure that the number of organisations entitled to offer pupillages and the number of available pupillage places are not unnecessarily restricted, the application procedure for becoming an authorised pupillage training organisation must not be unduly burdensome or pose significant hurdles on organisations seeking to offer pupillages. Clear and user-friendly information and guidance to assist applicants are likely to be fundamental to this.

Requirements to become an authorised pupillage training organisation

2.27 Most importantly, the requirements to become an authorised training organisation should not unnecessarily limit the number of available pupillage places by containing conditions which are unreasonable, disproportionate or insufficiently clear.

2.28 The removal of the 'second qualified lawyer' requirement and the conditions relating to a pupillage-supervisor's principal place of practice by the Bar Council goes some way in ensuring that this is not the case.

2.29 The removal of these requirements may significantly increase the number of organisations able to offer pupillages. The current 'second qualified lawyer' and 'principal place of practice' requirements apply to pupillages undertaken in both independent and employed practice. However, their effects in these two contexts are very different. In independent practice, the 'second qualified lawyer' requirement will

almost inevitably be met by chambers. By contrast, in employment, the rule acts to severely restrict the number of organisations which are able to offer pupillages. In addition, these requirements prevent sole practitioners in self-employed practice or practices with only one higher court advocate from offering pupillage places.

2.30 The OFT therefore previously advised that the restriction inherent in these requirement might be considerably relaxed and the level of supervision maintained or even improved if the rules governing pupillage supervision were expressed in terms of regular supervision by a pupil-supervisor and regular contact. We consider that this has now been achieved with the revised Regulation 47. The revised Regulation 47 may therefore have the effect of significantly increasing the number of pupillage places at the employed Bar and may open training opportunities in other Member States. In addition, it may increase the number of pupillage places offered by sole practitioners at the independent Bar.

2.31 Further, the proposed amendments to the supervision requirements may increase the range of available pupillage opportunities. This may have a positive effect on barristers' ability to compete with one another on the basis of the training they obtained. By increasing the range of training available to pupils, the proposed amendments may also provide clients with more choice of barristers who have obtained different or more specialised training.

2.32 However, the positive effects of these pro-competitive amendments are likely to be reduced in so far as the authorisation to become a pupillage training organisation depends on meeting Collyear requirements that are relevant to the independent Bar but less so to the employed Bar. Where this has the effect of making it unnecessarily difficult for organisations to offer employed pupillages, it is likely to limit the number of pupillage training organisations and the number of pupillage places.

2.33 In our view, this may be avoided by formulating the current pupillage checklist of the Bar Council in general terms so as to encompass the type of work and the type of skills that a pupil at both the independent and employed Bar would obtain. In particular, we would recommend that the Collyear requirement of practical experience of advocacy, which currently centres only on court-room advocacy and may prevent or restrict organisations from providing employed

pupillages, reflect the type of advocacy training and skills that are relevant to both the independent and the employed Bar.

2.34 Notwithstanding the potential limitations on the pro-competitive benefits of the proposed changes, the overall impact of the changes is likely to be an increase in the number of available pupillages. Any significant effect on competition that results is therefore likely to be positive.

3. CONCLUSION

3.1 In summary, the proposed amendments to Regulation 47 are likely to have the overall effect of increasing the number of organisations able to offer pupillages and will therefore have a positive effect upon competition.

3.2 We nonetheless consider that there remain unnecessary restrictions on organisations wishing to offer employed pupillages in so far as some of the requirements to become a pupillage training organisation are less relevant in the employed sector and are therefore also more difficult to achieve. An example of such a restriction is the adopted definition of advocacy training which is more narrow then necessary. Such restrictions are likely to unnecessarily limit the number of employed pupillage places and the range of training available to pupils. This can also have a detrimental effect on barristers' ability to compete with one another on the basis of the training they obtained. Clients of barristers' services would be faced with a reduced choice of barristers who have obtained different or more specialised training. However, we consider that these restrictions are not likely to have a significant effect on competition in the market for the supply of legal services by barristers.

Alan Williams
Director – Competition Enforcement Division Branch 6
OFT, December 2005