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Section 34 Further Consultation
Legal Services Regulation Authority,
P.O. Box 12906
Dublin 2

30/08/2019

Regarding: *Further Consultation on section 34 Report*

Dear Sir/Madam,

This document constitutes my response to your further consultation on the training and education of legal professionals in Ireland, and should be read in conjunction with my response¹ to your initial consultation on this issue. I am now responding as a practising barrister, having completed my pupillage year.

In the first instance, I want to make clear that I support the 14 proposals for change suggested in the interim report prepared by Hook Tangaza on behalf of the LSRA² (the “*Report*”). Should it be implemented, the proposed new competency framework looks like it would constitute a positive development. I was, however, disappointed to note that there was no specific proposal made on funding during the pupillage year, and I have expanded on my views on that topic below.

Having completed my year’s pupillage since my last submission, I have two additional areas on which I wish to comment. My comments are based on my experiences during the pupillage year, as well as observations of the experiences of my peers. However, for the avoidance of doubt I wish to make clear that I was fortunate to have an exemplary Master, and thus any criticisms I make of the pupillage year are directed to my observations of the system rather than my personal experience as a pupil. The two areas this submission addresses are: (i) clarity about pupillage learning outcomes; and (ii) funding of the pupillage year.

(i) Pupillage learning outcomes:

I note that the *Report* suggests (at [5.6.9] to [5.6.13]) that the desired outcomes from the pupillage year are relatively well defined and there was limited feedback on this aspect of the consultation at the last opportunity. I feel that a number of points are worth emphasising to the LSRA on this topic. In particular, I feel that the pupillage experience would benefit from more clearly-defined and concrete aims, with specific proactive monitoring to ensure that they are achieved.

¹ Available here:

<http://lsra.ie/en/LSRA/S34%20Submission%20Christopher%20Mills.pdf/Files/S34%20Submission%20Christopher%20Mills.pdf>.

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<http://lsra.ie/en/LSRA/20180928%20Review%20of%20Legal%20Practitioner%20Education%20and%20Training%20-Final%20version.pdf/Files/20180928%20Review%20of%20Legal%20Practitioner%20Education%20and%20Training%20-Final%20version.pdf>.

At present, an individual's experience of pupillage depends almost entirely on the interaction they have with their Master and the extent to which that Master is willing to invest in providing the training necessary. Apart from the fact that some Masters take their pedagogical role more seriously than others, the ability of any one individual Master to provide holistic training is debatable. Barristers obviously practice in different areas of law, and their practices (and therefore the work they do) reflects the nature of that area. An individual barrister's practice will also be variable from year to year, depending on the cases in which they are involved and the stage at which those cases happen to be. As a result, some pupils may end up doing exclusively advocacy work for their Master, while others carry out only drafting or research, and others have an experience somewhere between those two extremes. Practice management and development in that environment tends to occur in an *ad hoc* manner. In those circumstances, the experiences of individual pupils are highly variable. That doesn't appear to be a good approach to competency-based professional training.

In contrast, the Bar Standards Board in the UK makes very clear at Chapter 9 of its Pupillage Handbook³ the four areas which pupils are supposed to develop during the year (representing a mix of advocacy, paperwork, and practice development), and the exact role of the pupil Master in the assessment of that process, including through the provision of feedback on development goals. While I accept that something similar may not work in precisely the same manner in the context of a self-employed independent Bar in Ireland, I do feel that there should be greater clarity at the outset of the pupillage year about what exactly a pupil is expected to have accomplished during the year, and there should be more rigorous central monitoring to ensure that this happens.

In that respect, at present the interaction of a pupil with the Bar Council is minimal. They provide an initial "induction day" which involves a series of talks about different areas of practice, and which is not focused on practical matters. The New Practitioners Programme constituted a series of CPD seminars which were helpful, but again did not focus on skills development. The other interaction with the Bar Council during pupillage year occurs on an *ad hoc* basis, and in particular where issues arise in a pupil-Master relationship. While I have no direct experience of this, I understand that the Bar Council works to reconcile the differences if it can, and to find a different Master for the pupil if necessary. While that is welcome as a mechanism to deal with substandard training or pupillage experience, there are issues with it as a system: (i) it relies on self-reporting by the pupil, in circumstances where there may be career-based disincentives for doing so; (ii) it is a relatively informal and reactive mechanism; and (iii) it is potentially disruptive to have to change Master during the training year. A better mechanism would involve structured, periodic, and proactive monitoring of training and outcomes.

In the context of the *Report's* suggested move to a competency-based framework, I think that the LSRA should clearly define the desired outcome (in terms of skills developed) from the pupillage year, and should monitor (or ensure that the Bar Council monitors) that this is being achieved. Acknowledging the variable nature of any individual barrister's practice, there should be a greater emphasis on centralised learning during the year, including skills-based development to ensure that all pupils have exposure to all aspects of practice, including advocacy, paperwork, and practice management.

(ii) Funding of pupillage year:

One topic that was highlighted in the *Report* (at [5.6.16] to [5.6.19]) as being a potential issue (and a barrier to entry in the profession) is the lack of any payment during the pupillage year. The Bar Council has recently voted to ensure that Masters pay a minimum stipend equivalent to the first year Law Library fees to their pupil, which reduces the immediate upfront cost, but doesn't remove the financial barrier of having to work unpaid for a year. I note that there was some support for retaining an unpaid pupillage year, with one pupil Master writing:

"There are limits to what can be done to address the difficulties faced by newly qualified barristers in making a living. The Bar is – and should be – a competitive environment. It is

³ https://www.barstandardsboard.org.uk/media/1841538/bsb_pupillage_handbook_2017_1.8.17.pdf.

already the case that fees for membership of the Law Library operate on a sliding scale, so that the most junior members pay the lowest fees and are, in effect, subsidised by more senior members of the profession. There are many roles open to young barristers which can both supplement their income and complement their practice, such as law reporting, lecturing and the provision of research or discovery services to law firms. It is also open to barristers to undertake any other part-time work which does not conflict with their role at the Bar”.

The following points are worth considering on this issue:

- A competitive environment is appropriate at the stage of the career where barristers are fully qualified and thus directly competing against each other for work. The very existence of the mandatory pupillage year acknowledges that pupils are not yet competent to carry out all of the tasks of an experienced barrister, and they are not competing against (nor are they in a position to compete against) more senior practitioners in those circumstances. The “competitiveness” that is encouraged at that stage has nothing to do with the ability of the individual to deliver legal services, and everything to do with the ability of the individual to work unpaid for a year – requiring a level of independent wealth that unnecessarily excludes many from entry into the profession at all.
- Mandatory and unpaid training is an unjustifiable barrier to entry into the profession. In almost every profession some level of vocational or practical training is a requirement to qualify fully. I am unaware of any other profession in which the trainee is expected to complete mandatory professional training on an unpaid basis. While a trainee may not be fully competent to act as a qualified professional at that stage, their work does provide value to the firm or institution receiving it. Clearly the level of remuneration can and should account for the fact that the trainee is not yet fully qualified. The structure of the self-employed independent Bar means that careful consideration would need to be given to a mechanism to achieve this, but difficulty in implementation should not detract from the importance of the principle that trainees (and pupils) add some value and should receive some compensation as a result.
- The existence of alternative avenues by which to earn an income (whether related to the law or not) should not operate as an excuse not to compensate a pupil. In circumstances where a pupil barrister is supposed to be learning and developing skills that will allow them to compete in the legal marketplace once fully qualified, being forced due to economic necessity during a training year to carry out other paid employment actually detracts from the aim of the year. The primary focus during a training year, such as pupillage, should be on honing the necessary skills to be an independent practitioner, and not on working additional (and often non-law-related) jobs.

Despite recent positive moves from in the Law Library, to effect real change on this issue it is likely that some external impetus will be necessary to achieve an appropriate and agreed level of remuneration for pupil barristers. The most recent list of potential Masters for 2018/2019⁴ shows that, of 257 potential Masters, only 29 paid the 1st year subscription, 22 paid the first year entry fee, 15 paid the second year subscription, and 51 offered alternative financial support. There is overlap between those figures, but even assuming no overlap, that means that only 117 out of 257 (fewer than 50%) of potential Masters offered any financial support to pupils in 2018/2019.

In contrast, in the UK there is a minimum pupillage award⁵ (set by the Bar Standards Board) that is intended to ensure that pupils receive at least the minimum wage (increasing to a living wage over time) during their pupillage year. This minimises the financial barrier to entry, which makes the career potentially viable for a wider pool of individuals. That has a positive impact both on competition within

⁴ <https://www.lawlibrary.ie/Membership/Master-List-as-of-250618.aspx>.

⁵ <https://www.barstandardsboard.org.uk/media-centre/press-releases-and-news/minimum-pupillage-award-from-1-september-2019-announced/>.

the profession and on the quality of candidates entering the profession, since it is fair to assume that at the moment some very able candidates are dissuaded by barriers to entry (something reflected in the survey results at [5.2.3] to [5.2.8] of the *Report*).

I believe that formalising the pupillage system (including via some level of mandatory compensation) will also ensure that there will be better incentives within the system to allow a competency-based framework to be implemented successfully. A pupil who is being paid is likely to treat the role more seriously. A Master who has paid something towards their pupil's costs during the year is likely to ensure that the pupil carries out valuable work for them.

I recognise that there would be a cost to be borne if a system of mandatory payment was introduced for the pupillage year, and there is a risk that this would act as a disincentive for Masters if they had to bear it in its entirety. There are also potential issues regarding the creation of an employment relationship which may be an undesirable outcome. In those circumstances, serious consideration should be given to paying pupils a stipend from a central fund established for that purpose, and paid into by existing practitioners (either generally, or just those who wish to take on a pupil). Such a fund could potentially be managed by the LSRA and thus funded by its levy. Moving to a system in which pupils are paid something would be a relatively radical change, and buy-in from stakeholders (not least, more senior barristers) would be necessary – the LSRA could consider creating a working group to engage with the necessary stakeholders with a view to pursuing this initiative, and dealing with practical implementation concerns.

In summary, I suggest that in creating a new framework for the training and education of legal professionals, the LSRA should consider:

- (i) Formalising the intended learning outcomes from the pupillage year, and ensuring that there is proactive monitoring that those outcomes are achieved – to the extent that those outcomes are not being achieved via one-to-one pupillage training, greater emphasis should be placed on centralised skills development; and
- (ii) Establishing a working group comprised of the relevant stakeholders to consider and implement a minimum payment for pupils and to clarify any operational or practical issues.

I trust this is in order, but please don't hesitate to get in touch if you have any queries or if you need any further information.

Yours Sincerely,

Chris Mills BL