# Pupillage

*Paul Hoffman SC, Cape Bar, discusses internship, affirmative action and the future of pupillage at the Bar*

PAUL HOFFMAN SC, Cape Bar

It is by now well known that the President of the Constitutional Court, Justice Arthur Chaskalson, has proposed that a system of internship for new law graduates be introduced in South Africa. The Department of Justice, which has already put in place a new four-year under-graduate LLB course, has expressed interest in this proposal, but has not as yet taken any decisions on the matter. It seems likely that in the not too distant future internship will be introduced.

The advent of the new South Africa would appear to have left the organised Bar relatively untouched up to now, so much so, that advocates favouring democratic change, calling themselves "Advocates for Transformation" ("AFT"), have united for the purpose of actively promoting and upholding the values and principles of South Africa's new Constitution. The other aims of AFT are the establishment of a Bar which:

- more accurately reflects the demographics of the community it serves;
- is better able to respond to the needs, concerns and interests of those sections of society that have been previously marginalised and disempowered;
- is able to take its place as an important and vital part of the legal fraternity, rather than remain the remote and largely unaffordable collection of lawyers that it currently is; and
- is able to maintain its independence in the future.

These are all laudable goals. Indeed, it is difficult to imagine that there are any advocates in practice at the Bar who do not subscribe to the vision of AFT. The fundamental question is how best to achieve these aims.

It is obvious that any system of internship which may be introduced (and it seems likely that some system of internship will be introduced), will impact favourably upon the present crisis in the lower criminal courts, the cost of providing legal aid and the manner in which aspirant attorneys and advocates are prepared for the practice of their chosen professions. This note focuses on the last of these topics. It would seem that the most appropriate manner in which to transform the Bar is by starting from the bottom with the system of pupillage and modernising it so as to bring about the transformation contemplated in the first of the goals of AFT set out above.

## Difficult system

The current system of pupillage has existed with very minor variations since 1980 when the National Bar Examination ("NBE") was introduced for the first time as a means of improving the quality of the Junior Bar. Prior to the introduction of the NBE, the only hurdle was that those wishing to join the Bar had to apply to Court to be admitted as advocates. Today, aspirant advocates, if they wish to practise at the organised Bar (rather than as independent advocates - a somewhat more endangered species), are required to undergo an unpaid period of pupillage lasting five months, commencing either at the beginning or the middle of the year. Each pupil is assigned to a pupil master who is invariably a junior of some experience at the Bar to which the pupil is called. At least in theory, the pupil shadows the master for those five months, except when he or she is preparing for or sitting the NBE. Those who pass the written part of the NBE with flying colours, are spared the ordeal of the oral examination which follows the NBE and is reserved for lesser mortals. During pupillage free lectures on the topics covered by the NBE are organised by each Bar and pupils are also required to attend advocacy skills training courses in which practical basic courtcraft instruction is given and pupils are required to perform in mock courtroom situations. At the end of the five months those pupils who pass the NBE are allowed to take chambers and become full members of the Bar. No further or continuing training is required.

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It is difficult to imagine a system which would make it more difficult for the formerly disadvantaged to attain membership of the Bar.

When the NBE was introduced, applicants for pupillage tended to be somewhat more senior than those of today. The Bar was perceived to be a specialist profession in which those with little or no experience of life and law would have difficulty in making their mark. These days, numerous applications for pupillage are received from persons who are either straight from law school or who, in any event, have no previous practical legal experience. This is one of the more unfortunate side effects of the reluctance of the attorneys' profession to accept as candidate attorneys many worthy applicants who do not fall into the "summa cum laude" category. The Bar, like the Ritz Hotel, is open to all LLB graduates who can afford it. Therein lies the rub. A 5-month unpaid stretch entails much in the way of personal sacrifice, especially for those who were formerly disadvantaged and have to rely on loans or charity to finance their pupillage. The capping of the 5-month pupillage with

a failure in the NBE is both wasteful and harsh and can be potentially destructive of the careers of those pupils who fail.

## Internship

Whether or not a system of internship is introduced, the time has come to transform the system of pupillage into one which better serves society whilst actively promoting the values of our new constitutional order.

Insofar as the policy of affirmative action concerns the system of pupillage, it should be seen as a policy of affirming opportunities, not outcomes. As long ago as 1994 President Mandela said in relation to this subject:

> "Affirmative action will not be at the expense of others. Nor will it lead to the lowering of standards. Emphasis must be in training and upgrading of skills. This will be essential for the growth of our economy and will benefit all South Africans."

The introduction of a suitable system of internship should be both encouraged and welcomed by the Bar. The Bar should recommend a period of internship of at least a year, if not two, and that internship should be compulsory for all new graduates who wish to pursue a career in legal practice. Consideration should also be given to not permitting students to graduate until such time as they have completed their internship. The Bar should make it a rule that it will not accept as pupils persons who have not completed internship, or at least have an equivalent amount of practical experience. The Bar's image as a reservoir of the best talent in the specialised area of court work should be honed: the excellent standard of the service provided by the Bar to the litigating public should be promoted.

The Bar should not, however, involve itself in the implementation of the system of internship in any direct way. The training of interns should be left to the universities and to the Department of Justice. The Bar does not have the resources to embark upon so daunting a task, especially as it relies on the services of volunteers to man its pupillage and advocacy training systems. They cannot, in all fairness, be expected to shoulder the burden of training all new graduates in the country without remuneration.

Internship should properly be seen as the transitional period between university life and the world of professional practice. All interns should be treated and trained alike. No distinction should be drawn between interns who aspire to a career at the Bar and those who wish to become attorneys, prosecutors, legal advisors or indeed pursue any other career.

Interns should be encouraged to experience their internship as a period during which they will be exposed to the opportunity of seeing at first-hand how the administration of justice functions in South Africa. Internship will be their chance to improve the lot of their fellow citizens who become involved in the justice system in whatever way, whilst sharpening their skills through the training received by them before and during internship. Unless interns are encouraged to expend their youthful energy, idealism and talents in a positive way, the system of internship is doomed to fail. The State should be encouraged to provide interns with sufficient training of high quality to enable them to make a useful contribution during their internship. Any attempt to combine pupillage and internship should be avoided. Internship ought properly to be regarded as a precursor to advocates' training, not as an integral part of it. It is simply unrealistic to expect raw young graduates with a mere 4 years of full-time academic life behind them to be ripe and ready for the specialised training which ought to be the hallmark of pupillage. Putting pupillage before internship is akin to putting the cart before the horse or expecting young lawyers to fly before they can walk; this is especially applicable to the formerly disadvantaged groups. Interns should be subjected to the generalised type of practical training that Justice Training is equipped to provide. It should be borne in mind that pupils are given the more specialised training that is at the core of the excellence which the Bar seeks to provide. Combining pupillage with internship may well be the first step on the slippery slope towards fusion and the disappearance of the Bar.

## Entrance examination

It is proposed that, concurrently with the introduction of internship, or possibly before then, the system of pupillage should be revised to meet the needs of pupils, the Bar and society as they have evolved and changed since 1980 when the NBE was introduced into a South Africa which is very different to the country we know today. Bearing in mind that internship is likely to feature in legal training, any new pupillage system should be designed to provide opportunities to interns and to dovetail with the system of internship.

The first innovation suggested is that the NBE as we know it should be scrapped and that an entrance examination called the National Bar Entrance Examination ("NBEE") should be introduced. Experience has taught that far too many persons who were not really ready for, or suited to pupillage have in effect wasted their time and that of their masters, lecturers, trainers and examiners by attempting the old NBE which they could only do by undergoing pupillage. This is manifestly unfair to all concerned.

The NBEE will be the only formal examination that pupils will be required to sit. It will cover the same subject matter as is at present covered by the NBE with the exception of the legal writing "open book" examination, which will be omitted from the NBEE. The NBEE will be held once a year in January. Those wishing to sit the NBEE will have the option of attending a series of lectures during November and December of the previous year, or they may work through the material of the syllabus of the NBEE during their year of years of internship, without the benefit of lectures if they so choose. Candidates will not be required to give up their jobs or embark upon a long and expensive pupillage in order to sit for the NBEE. Indeed, only those who pass the NBEE will be permitted to commence pupillage. Pupils under the new system will be assured of the opportunity of a career at the Bar when they commence pupillage, rather than have the hope that at the end of pupillage such an opportunity will open to them, which is at present the case.

## Adjusting the system

The period of pupillage should be extended to nine months, running from February to October of each year. In the first of these months the pupils will be given intensive advocacy skills training in motion court work, the leading and cross-examination >

of witnesses and case preparation in general. At the end of this training (lasting a month or two) pupils will be permitted to accept briefs which their masters are satisfied they are capable of handling. The Bar will liaise with the Legal Aid Board with a view to ensuring a flow of suitable legal aid work for its pupil members, such as undefended divorces, pleas in mitigation and Magistrate Court civil trial work. A tariff should be agreed with the Legal Aid Board which will ease the legal aid burden of the taxpayer, while keeping pupils in a style which will improve upon the "survival wages" proposed for interns.

During the course of pupillage the emphasis of the training of pupils will be entirely practical. This will make a refreshing change from the present system in which a disproportionate amount of time, energy and effort is expended during pupillage, preparing for the NBE at the expense of the all important practical side of pupillage. Advanced advocacy skills training workshops will be held over weekends and during the High Court vacations, so as to train pupils in the art of cross-examining experts, the preparation and presentation of argument in opposed motions, appeals and the like. Attendance at these workshops will be compulsory. Failure to attend or to perform adequately could lead to the extension of the period of pupillage, but not to failure of pupillage. The workshops will obviously be designed to dovetail with the type of work which pupils are permitted to do during pupillage. It is envisaged that the briefing of pupils will be actively encouraged by Bar Councils and pupil masters, perhaps by the publication of a directory of new pupils for circulation among attorneys. In this way the transition from pupillage to practice will in fact be much gentler than is now the case. The emergence of pupils from pupillage will be marked by the issue of a "due performance certificate" from the Pupillage Committee of each Bar which will consult with the advocacy trainers and pupil masters involved before issuing the certificate usually around the end of October, but possibly somewhat later in cases in which a pupil is not quite ready to "fly solo". The legal writing paper of the current NBE will be replaced either by a review of the written work actually done by pupils or an informal test which may take the form of a series of assignments, covering those aspects of legal writing which pupils may encounter in their professional work. Pupils who are regarded as not being up to the required standard at legal writing will be required to repeat the test or do further assignments prior to emerging from pupillage.

By adjusting the system of pupillage in this way, it is felt that it will co-exist comfortably with any system of internship which may be introduced in the future. Candidates for the NBEE who do not pass will not be involved in the type of crisis that befalls those who fail the NBE as it currently exists. Many such candidates will be emerging from internship and may well be able to remain with the Department of Justice for a further year, rendering useful service and gaining valuable experience as public defenders or prosecutors, while preparing for a second attempt at the NBEE. By changing the focus of pupillage to practical skills training and working on paid briefs approved by the master of each pupil, it is to be hoped that the skills level of the Junior Bar will be considerably enhanced. In the initial stages of the new system it may well be prudent to involve existing members of the Junior Bar in the advocacy skills training programme either on a compulsory or a voluntary basis. The proposed changes to the system all affirm the opportunities of the previously disadvantaged, marginalised and disempowered potential pupils. The economic barriers to entering upon pupillage are to a large extent dismantled and the opportunity of all those who are able to pass the NBEE to embark upon a career at the Bar is affirmed.

A Bar which smooths the way for the admission of new members in the way suggested will not have to be restructured artificially, it will restructure itself by growing appropriately. These proposals are calculated to foster and promote the true ethos of the Bar by cultivating the excellence, the independence and the essential "referral profession" nature of the Bar. Indeed, for the Bar to survive and prosper, these characteristics of its ethos need to be nurtured. By converting pupillage from the current unpaid period of cramming for the NBE into a longer period of practical training (preceded by the NBEE), during which pupils are more gradually introduced to the practice of law at the Bar and may accept suitable briefs and legal aid work at a tariff which is less burdensome to the discus, it is submitted that the proposals properly address the requirements of affirmative action. Pupils emerging into the profession through the system envisaged by the counter proposals will be better equipped to financially survive the process and upon its completion, to render the excellent specialist service for which the Bar is and ought to be known.

### *MERCANTILE PROFESSIONAL BANKING SPONSORS GCB PUPIL BURSARY FUND*

The General Council of the Bar resolved that a bursary scheme for the entire country be created for deserving pupils who wish to practise as advocates and accordingly a National Bursary Fund was established. Previously this was funded by members of the Bar to the tune of R20 000 per annum.

With the advent of the new South Africa and the drive to redress the imbalance of the past it has become increasingly financially burdensome for the GCB to keep up with the additional requirements placed upon it by the influx of new members, many of whom are from formally disadvantaged backgrounds.

The GCB is, however, pleased to announce that Mercantile Professional Banking, a division of Mercantile Bank Limited, has agreed to provide the Bursary Fund with the sum of R40 000 per annum. In addition, Mercantile Bank has agreed that in respect of all transactions concluded with any member of the Bar, a portion of the administration fee normally charged by Mercantile Bank will be donated to the Bursary Fund.

The GCB is extremely grateful to Mercantile Bank for this generous donation which will greatly benefit those pupil members who would not otherwise be able to follow the profession of advocacy.

Mercantile Professional Banking may be contacted at 011-7840052 (Celeste Von Guilleaume or Lisa Crooks).