

## **Amendment to the Parental Leave Rule**

For approval by the Legal Services Board.

08 August 2017.

This application for a change to a regulatory arrangement is made in accordance with the requirements set out in the Legal Services Board's Rules for Rule Change applications.

Any queries about this application should be addressed to:

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## 1. Details of proposed alteration

1.1. The purpose of this paper is to request that the Legal Services Board (LSB) approve the following amendment to the parental leave rule at Rule C110.3.k of the BSB Handbook:

### Rule C110.3:

- .k chambers has a *parental leave* policy which, ~~in the case of chambers,~~ must cover as a minimum:
- .i **the right of a member of chambers to take parental leave;**
  - .ii the right of a member of chambers to return to chambers after a specified period, **or number of separate periods**, of parental leave, **provided the total leave taken does not exceed a specified maximum duration** (which must be at least one year);
  - .iii **a provision that enables parental leave to be taken flexibly and allows the member of chambers to maintain their practice while on parental leave, including the ability to carry out fee earning work while on parental leave without giving up other parental leave rights;**
  - .iv the extent to which a member of chambers is or is not required to contribute to chambers' rent and expenses during parental leave;
  - .v the method of calculation of any waiver, reduction or reimbursement of chambers' rent and expenses during parental leave;
  - .vi where any element of rent is paid on a flat rate basis, the chambers' policy must as a minimum provide that chambers will offer members taking a period of parental leave a minimum of 6 months free of chambers' rent;
  - .vii the procedure for dealing with grievances under the policy;
  - .viii chambers' commitment to regularly review the effectiveness of the policy;

1.2. It is also proposed that the definition of "parental leave" be amended to read:

Parental leave means leave **from practice** taken by ~~the main~~ a carer of a child preceding or following birth or adoption. This could be a mother, father, or adoptive parent of either sex, **and includes the married, civil, or de facto partner of a biological or adoptive parent.**

1.3. The amendment to Rule C110.3.k will be supplemented by the following guidance:

- a. Rule rC110.3.k applies to all members of chambers, irrespective of whether their partner or spouse takes parental leave.
- b. A flexible policy might include for example: keeping in touch (KIT) days; returns to practice in between periods of parental leave; or allowing a carer to practise part time.
- c. Any periods of leave/return should be arranged between chambers and members taking parental leave in a way that is mutually convenient.

1.4. Additional guidance and examples of best practice will also be included in an updated version of the BSB Handbook Equality Rules<sup>1</sup>.

1.5. The effect of these changes will be that parental leave will be available to members of chambers as follows:

- Parental leave should be available to every member of chambers who becomes a parent/carer of a child preceding or following birth or adoption;
- A parental leave entitlement should continue to constitute a period of at least 1 year away from practice, including a rent free period (though a barrister would not be obliged to take the full entitlement);
- The rule should apply to all mothers, fathers, and adoptive parents, as well as the married, civil, and de facto partners of biological or adoptive parents;
- Chambers' parental leave policies should allow parental leave to be taken flexibly, to enable members to maintain their practice and support their income while on leave;
- The BSB should not prescribe what form this flexibility takes, however suggestions will be included in the guidance in both the BSB Handbook and the additional guidance document on the Equality Rules.

1.6. Before reaching the proposals listed above, the BSB consulted on a number of potential options for the parental leave rule change. The details of this consultation can be found in section 8 below, and the consultation paper itself can be found at Annex A.

## 2. Details of existing arrangements

2.1. At present the BSB Handbook rule rC110.3.k ensures that parental leave is offered to the main carer of a new-born child at the self-employed Bar. Although a number of chambers offer shared parental leave (SPL) our rules currently do not require this.

2.2. The current rule reads:

### **Rule C110.3:**

- .k chambers has a parental leave policy which, in the case of a chambers, must cover as a minimum:
  - i. the right of a member of chambers to return to chambers after a specified period (which must be at least one year) of parental or adoption leave;
  - ii. the extent to which a member of chambers is or is not required to contribute to chambers' rent and expenses during parental leave;
  - iii. the method of calculation of any waiver, reduction or reimbursement of chambers' rent and expenses during parental leave;

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<sup>1</sup> [https://www.barstandardsboard.org.uk/media/1562168/bsb\\_equality\\_rules\\_handbook\\_corrected.pdf](https://www.barstandardsboard.org.uk/media/1562168/bsb_equality_rules_handbook_corrected.pdf)

- iv. where any element of rent is paid on a flat rate basis, the chambers policy must as a minimum provide that chambers will offer members taking a period of parental leave, or leave following adoption, a minimum of 6 months free of chambers' rent;
- v. the procedure for dealing with grievances under the policy;
- vi. chambers' commitment to regularly review the effectiveness of the policy;

**2.3.** The current policy requires one carer to define as the "main carer" in order to access the parental leave rights required by the Handbook. The main carer has a guaranteed right to a parental leave provision under the current rule, but the second carer does not. Chambers may adopt more flexible policies but are not required to.

### **3. Rationale for the alteration**

**3.1.** The BSB Handbook equality rules on parental leave, introduced in 2012, apply only to the main carer of a child following birth or adoption. This could be the mother, father or adoptive parent of either sex. The BSB introduced these rules to allow self-employed barristers in chambers access to similar parental leave provisions as are afforded to employed barristers through legislation (albeit there are necessarily differences to take account of the nature of self-employed practice).

**3.2.** In April 2015 a new legal requirement for employers to offer shared parental leave to eligible parents came into force. The purpose of the legislation is to provide both parents with flexibility in considering how to best care for their child in its first year. The SPL provisions do not apply to self-employed barristers, save for where a self-employed barrister is the mother or main adopter, who chooses to reduce their Maternity or Adoption Allowance and pass their entitlement to an employed partner.

**3.3.** The Bar Council, through the Protocol for Ensuring Regulatory Independence, requested that the BSB consider amending the parental leave rules and provide guidance with respect to SPL. It cited the need for the BSB Handbook to reflect the new regulations, and to enable parents at the self-employed Bar to take a flexible approach to caring for their children while maintaining their practice.

**3.4.** In February 2016 the BSB organised a Task Completion Group<sup>2</sup> (TCG) to discuss the appropriate regulatory changes that should result from the introduction of the SPL Regulations. A Bar Council representative attended the start of the meeting to give a presentation outlining their proposal, before leaving to allow the BSB to consider the available options. The TCG then advised the Board, which approved the work that has led to this rule change.

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<sup>2</sup> The members of the Task Completion Group were: Jessica Prandle (BSB Senior Policy Officer, E&D); Amit Popat (BSB Policy Manager, Equality and Access to Justice); Stephanie Borthwick (BSB Senior Policy Officer, Professional Standards); Rolande Anderson (Lay BSB Board member); Lucy Bone; (Barrister, Littleton Chambers); and Jacky Chase (Chambers Administrator, 25 Bedford Row).

- 3.5.** The BSB is committed to promoting the principle of parental leave, and particularly supporting the progression and the retention of parents at the Bar, which aligns to our statutory regulatory objectives and our own equality strategy.
- 3.6.** Accordingly the BSB researched possible options for introducing shared parental leave to the self-employed Bar by adjusting the parental leave rule in the Handbook.
- 3.7.** The profession was consulted on the options (see part 8). The consultation prompted a number of adjustments, which were then presented to a task completion group (compiled of independent practitioners) and an independent expert advisor of the BSB.
- 3.8.** The rule change now proposed is in line with the regulatory objective of encouraging an independent, strong, diverse and effective legal profession. Unlike the existing arrangements, the proposed rule will provide flexibility to barrister-parents, while also obliging chambers to enable barristers to maintain their practice while on parental leave. It is hoped that these changes will lead to improved retention of parents at the Bar, and therefore help improve gender diversity at the senior end of the profession.

#### **4. Nature and effect of proposed change**

- 4.1.** This proposal is to amend the current parental leave rule (rC110.3.k) to make parental leave open to all self-employed barristers, thereby facilitating shared caring responsibilities.
- 4.2.** The proposed rule change includes an amendment to the definition of “parental leave”. Reference to “the main carer” has been replaced by reference to “a carer”. This would make parental leave available to any member of chambers who becomes the parent/carer of a child, and enable child caring responsibilities to be shared.
- 4.3.** The definition of parental leave has also been extended to include the “married, civil, or de facto partner of a biological or adoptive parent”. This is to ensure that a carer who is not the legal parent of a child will still have access to parental leave.
- 4.4.** The following four scenarios demonstrate the proposed change in the scope of the rule<sup>3</sup>:

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<sup>3</sup> The scenarios compare the current rule with the proposed new rule. No comparison is made to the SPL Regulations, as the BSB has determined that it is not appropriate to appropriate to try and replicate them precisely (see paragraphs 4.8 to 4.13).

**Scenario 1**

The first carer is a self-employed barrister. The second carer is a self-employed barrister. Both work out of 'Chambers A'.

**Under the current rule**

- The "main carer" of the child has the right to return to chambers after a specified period of leave (which may as a minimum be up to one year), taken as a single block of leave.
- The main carer also has the right to a waiver, reduction, or reimbursement of chambers rent and expenses during this period of leave (and where rent is paid on a flat rate basis this must be at least 6 months free of chambers rent).
- The second carer would not have any guaranteed leave or rent free entitlement.

**Under the proposed rule change**

- The two carers would each have an entitlement to the full leave and rent free arrangements offered by 'Chambers A'.

**Scenario 2**

The first carer is a self-employed barrister in 'Chambers A'. The second carer is a self-employed barrister in 'Chambers B'.

**Under the current rule**

- The "main carer" would be entitled to parental leave as in Scenario 1.
- The second carer would not have any guaranteed entitlement, as in Scenario 1.

**Under the proposed rule change**

- Both the barrister at 'Chambers A' and the barrister at 'Chambers B' would have the right to a full parental leave entitlement.

**Scenario 3**

The first carer is a self-employed barrister. The second carer is employed.

**Under the current rule**

- If the self-employed barrister was the "main carer", they would have access to parental leave.
- The barrister could choose to reduce their allowance and transfer part of their entitlement to their employed partner.

**Under the proposed rule change**

- The self-employed barrister would be entitled to parental leave, regardless of whether their partner took leave.

<ul style="list-style-type: none"> <li>• However if the barrister was the secondary carer they would not have any guaranteed entitlement to parental leave.</li> </ul>	
<p><b>Scenario 4</b></p> <p>The first carer is a self-employed barrister. The second carer is not in paid work.</p>	
<p><b>Under the current rule</b></p> <ul style="list-style-type: none"> <li>• If the self-employed barrister is the mother giving birth, or the carer named as the main adopter, then they have access to parental leave.</li> <li>• If not, they have no guaranteed entitlement to parental leave.</li> </ul>	<p><b>Under the proposed rule change</b></p> <ul style="list-style-type: none"> <li>• The self-employed barrister would be entitled to parental leave, regardless of the employment status of their partner.</li> </ul>

#### The effect on chambers' rental receipts

- 4.5.** The proposal has the effect of potentially increasing the total amount of parental leave that any one chambers must offer (the precise impact would depend on the extent to which parents not currently entitled to take leave would seek to do so). This poses the risk of a short-term detrimental effect on chambers' rental receipts, as more barristers may take advantage of the rental break associated with parental leave.
- 4.6.** During development of this policy some chambers provided estimates of this financial risk. One respondent estimated that if every barrister who had a child over the past five years had taken a full parental leave allowance, there would be a less than 5% reduction in chambers rental income (compared with if none had taken additional parental leave).
- 4.7.** This risk could be somewhat mitigated by the incorporation of flexible working arrangements while on parental leave (which may include partial rent contributions). It is also possible that both parents may not wish to take their full leave entitlement.

#### The proposed new rule does not match the SPL Regulations that apply to employees

- 4.8.** The proposal would make parental leave more widely available to the self-employed Bar than the SPL Regulations do for the employed Bar. This could be interpreted as the BSB imposing additional financial burdens on chambers, especially as the proposal would not require self-employed barristers to share leave entitlements.
- 4.9.** This was considered at length by the TCG and the APEX advisor. It was agreed that matching the system of leave sharing available to the employed Bar would require a significantly more complicated rule, with little justification.

- 4.10.** Further, it would not be possible to exactly match the rights available to employed barristers, without creating a pseudo-employment relationship (e.g. requiring chambers to contribute to a self-employed barrister's income while they are on parental leave). Therefore any attempt to precisely replicate the SPL Regulations would undermine the self-employed status of members of chambers.
- 4.11.** It would be inherently inappropriate to create a rule that does not respect the self-employed status of members of chambers. Given that one of the aims of the policy is to improve the retention of parents at the self-employed Bar, it would also be inappropriate to create a policy that included all of the restrictions and disadvantages of the SPL Regulations but without the accompanying benefits.
- 4.12.** Therefore in developing this policy we took the view that it should be suited to the unique nature of the self-employed Bar, and not restricted to matching the SPL Regulations as closely as possible. The rule should respect the fact that members of chambers are self-employed, and not attempt to mimic the employee-employer relationship inherent in the SPL Regulations.
- 4.13.** The change is proposed specifically with the self-employed Bar in mind, and in recognition of the different benefits and disbenefits of self-employment.

#### Potential benefits of the proposed changes

- 4.14.** The BSB agreed with the advisory view of the TCG that the above risks will be outweighed by long term benefits to chambers and the profession generally. The policy will help barristers maintain their practice while on parental leave, reducing the difficulty of 'returning to practice' that some barristers currently face on their return. This will therefore mean that barristers are better able to continue in self-employed practice after having children, and so will continue to contribute to chambers' rental receipts, and retention at the Bar, in the longer term.
- 4.15.** The policy avoids limiting the leave available to one self-employed barrister by reference to the leave taken by their partner. This removes an element of bureaucracy in the process, eliminating the need for the chambers of a barrister taking parental leave to communicate with the chambers or employer of that barrister's partner. It also avoids creating an artificial employer-employee relationship between chambers and barristers.
- 4.16.** It is hoped that introducing this rule change will contribute to a culture change at the Bar. Rather than self-employed barristers seemingly facing a choice between their careers and having a family, barristers can flexibly share caring responsibilities with their partner to facilitate having both.
- 4.17.** In turn it is hoped that this will help to improve the retention of women at the Bar, a problem highlighted in the Women at the Bar Report 2016.



## **5. Risk/statement in respect of the LSA regulatory objectives**

### Protecting and promoting the public interest

- 5.1.** It is in the public interest for the Bar to be as representative of society as possible and attract and retain as diverse a workforce as possible. Consumers of legal services should feel confident that practitioners are able to represent them and their best interests.
- 5.2.** It is hoped that the proposed rule change will particularly improve the retention of parents at the Bar. Given the tendency for parenting responsibilities to fall predominantly on women, this policy change should go some way to helping improve the retention of women at the Bar and therefore improve the gender diversity of the profession, particularly at the senior end. This was a problem specifically identified by previous research, most notably that women barristers were most likely to leave after approximately 12 years call – generally the point at which they are starting a family<sup>4</sup>.

### Supporting the constitutional principle of the rule of law

- 5.3.** It is not expected that this policy will have any adverse impact on this regulatory objective.

### Improving access to justice

- 5.4.** When developing any new rules concerned with the provision of legal services, the BSB has at the centre of its focus the need to ensure those services are as accessible as possible – improving access to justice.
- 5.5.** The proposed amendments should ensure that chambers are able to retain a greater proportion of their workforce and thereby increase diversity. It is hoped that the new rules should improve in particular female retention rates in areas where women are currently under-represented. Ultimately this could lead to greater choice and indirectly improved access to justice for the consumer.

### Protecting and promoting the interests of consumers

- 5.6.** The change would support this objective for the reasons discussed in “Protecting and promoting the public interest” above.

### Promoting competition in the provision of services

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<sup>4</sup> [https://www.barstandardsboard.org.uk/media/1773934/women\\_at\\_the\\_bar\\_-\\_full\\_report\\_-\\_final\\_12\\_07\\_16.pdf](https://www.barstandardsboard.org.uk/media/1773934/women_at_the_bar_-_full_report_-_final_12_07_16.pdf)

**5.7.** This is closely linked to the comments under “Improving access to justice” above. The Women at the Bar research highlighted that many women move into employed practice when they start a family, as that may give them a more stable framework in which to balance their private and working lives<sup>5</sup>.

**5.8.** Consequently improving the working flexibility available to those at the self-employed Bar may reduce the number of parents transferring to the employed Bar, and thus increase competition amongst self-employed practitioners.

#### Encouraging an independent, strong, diverse and effective legal profession

**5.9.** The proposed rule change is primarily targeted at promoting this regulatory objective. Previous research has indicated that difficulties returning after parental leave have contributed to the low retention of women after 12 years of call. It is hoped that by implementing this change to the parental leave rules more barristers will be able to become parents while maintaining their practice, thereby improving the retention of women at the Bar and promoting work-life balance generally.

**5.10.** BSB research<sup>6</sup> has shown that 69.7% of women who had children stated that starting a family has had an adverse effect on their career. Women barristers are also far more likely than men to cite family reasons for leaving the self-employed Bar. Both the difficulty of balancing home and work life, and more desire to spend time with family, were reasons specifically cited.

**5.11.** The suggested modification to the parental leave policy could help address some of these issues and thereby encourage retention of women, and a more diverse profession.

### **6. Statement in respect of the Better Regulation Principles**

**6.1.** The BSB considers that the proposed amendment fulfils its obligation to have regard to the Better Regulation Principles. The following section summarises how the proposed amendment meets these principles.

· *Transparent:* a consultation (Annex A) was issued and a log of responses to the consultation is also available at Annex B.

· *Accountable:* the proposed amendment has been consulted on extensively and debated by the Bar Standards Board in public session. The BSB will keep the impact of the amendment under review. The ongoing effect of this rule change will be monitored using the BSB’s new evaluation framework. The framework aims to provide a standardised and effective way to monitor the impact of rule changes and policies. In the case of this policy change, the indicators monitored will include: take

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

up of parental leave; gender diversity of the profession; and general feedback on the efficacy of the equality rules.

- *Proportionate*: The proposed changes to the parental leave rule are not overly prescriptive, nor are they disproportionately wide-ranging. The rule is restricted to carers in the role of a parent. The potential increase in the number of barristers accessing the rule is proportionate to the benefits the rule change may lead to, namely increased flexibility for parents during early years of childcare, and increased retention of parents at the Bar. In consideration of chambers finances, the possible short-term loss in rental income while a parent is on leave is small relative to the possible long-term gains in rental income from having a parent able to maintain and return to their practice after having a child. The rule change is outcome focused with regards to flexibility. The proposed guidance includes suggested options for how chambers parental leave policies might incorporate flexibility. However the precise form of flexibility is not prescribed, and it is for chambers to determine the best approach for their members. This ensures that the rule is in line with the intended outcome (encouraging flexibility to facilitate retention of parents at the Bar), without being too prescriptive.

- *Consistent*: as the new rule applies to all members of chambers, regardless of the employment status or leave taken by their partner, any possibility of indirect discrimination is mitigated, and the rule applies consistently to all members of the self-employed Bar who are members of chambers.

- *Targeted*: the proposed amendments have been developed specifically to target problems identified by previous BSB research (retention of parents), and to tackle an identified cause of that problem (difficulty rebuilding practice after periods of parental leave).

## **7. Statement in relation to desired outcomes**

**7.1.** The desired outcomes are that there will be a culture change at the self-employed Bar, away from the assumption that a single parent/carer should take time away from work to care for a child during its first year, and towards more flexible shared caring. In turn it is hoped that this will lead to improved retention of parents at the self-employed Bar, and improved gender diversity at the Bar, especially at the senior end of the profession.

## **8. Consultation process undertaken**

**8.1.** In November 2016 the BSB released a consultation paper (“the consultation”) on a proposed change to the current parental leave rules in the BSB Handbook. The consultation discussed a number of different options that sought to replicate the statutory scheme and one that sought to simplify the rules by offering the same parental leave entitlement to every parent/carer. The latter was supported by the largest group of respondents to the consultation and the TCG / APEX member for the reasons discussed in this paper.

**8.2.** The BSB received a total of 19 responses to the consultation, from individuals, chambers, and representative bodies. These responses have been collated and analysed to inform the recommendation in this paper. The consultation paper is attached at Annex A and a list of respondents and high-level summary is attached at Annex B. The full responses are available on request.

**8.3.** The consultation posed a number of potential options for the change to the parental leave rule. The version of the rule that has become the proposed rule change appeared at the end of the consultation, as an alternative to the more complicated rule change required to mirror the SPL Regulations.

#### General response from the profession regarding the introduction of SPL

**8.4.** The majority of responses supported the introduction of a shared parental leave (SPL) rule in the Handbook, subject to a range of constructive criticisms. A very small number of responses were opposed to the introduction of SPL rules.

**8.5.** Those respondents in favour of introducing SPL proposed that a change in the rule would be a step in the right direction, helping to solve a number of problems that were identified with the current rule, such as:

- Carers of a new-born child may not wish to identify as a “main” and “secondary” carer. The effect of this is that they are not currently able to share caring responsibilities equally.
- The second carer does not have a guaranteed right to a period of parental leave at present.
- Where the second carer cannot take any leave, the main carer may feel obliged to take a longer continuous period of leave.
- Such a long and continuous absence may have a detrimental effect on the main carer’s practice on return from parental leave. This can make returning to practice difficult and may increase the likelihood that the main carer will leave self-employed practice.
- As parental leave is mostly taken by women, this contributes to the disproportionately high rate of attrition of women from the self-employed Bar<sup>7</sup>.
- The inability of new parents to share care for a child in its first year, coupled with the fact that the current parental leave provisions are predominantly taken by women, was also identified as a contributor to stereotyping of women as ‘child rearers’ and men as ‘bread winners’.

**8.6.** The two responses that were not in favour of the proposal either denied the existence of a problem, or actively supported an alternative proposal that would only enable mothers to have (and directly prevent fathers from having) access to parental leave provisions.

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<sup>7</sup> The Women at the Bar research noted the period of highest attrition coincides with the period when women are most likely to start a family.

## Should the Handbook rule mirror the SPL regulations that apply to the employed Bar?

- 8.7.** There was some disagreement among respondents about whether or not the SPL rule should closely mirror the SPL regulations that apply to employed barristers.
- 8.8.** Other than continuity of access to parental leave between the employed Bar and self-employed Bar, no specific reasoning was given as to why the Handbook SPL rule should adhere closely to the equivalent regulations that apply to employees.
- 8.9.** Matching the Handbook rule strictly to the equivalent regulations for employees is not a benefit in itself. Indeed the SPL regulations cannot be applied directly to the whole Bar because of the obvious differences between self-employment and employment.
- 8.10.** The approach we are proposing, endorsed by the majority of respondents, is to create a rule which is as fair as possible, and suits the requirements unique to the self-employed Bar.

## The Handbook definition of parental leave

- 8.11.** The consultation asked respondents to consider whether the definition should refer to “main” or “joint” carers (i.e. whether it should be possible for carers to take leave simultaneously). The decision to move away from requiring carers to define themselves in either way was informed by the responses to this question.
- 8.12.** The change to have the rule apply to any carer removes three main disadvantages:
- Parents would no longer be required to define themselves within a potentially unrealistic hierarchy of care.
  - Chambers would not need to monitor whether or not a carer is on leave at the same time as their partner.
  - It mitigates the inflexibility of the current parental leave rule that limits childcare arrangements.
- 8.13.** Some respondents raised concerns, which we have considered below. Though they are relevant considerations, we do not consider them barriers to proceeding with this rule change. Additionally, our analysis suggests that potential problems highlighted by some respondents are unlikely to arise in practice:
- One suggested that there may be a disproportionate effect on chambers with two members who share caring responsibility for a child.

- However where two carers work within the same chambers, it is unlikely that they would take an extended period of leave simultaneously, due to the loss of income.
- Even if they did take an extended period of simultaneous leave, it may well result in an earlier return to full practice for the two members of chambers.
- Finally, this is likely to be a relatively rare scenario and the members of chambers would be incentivised to consider any impact on the long-term viability of their chambers (and hence their own practice).
- Another suggested that having a “main” and “secondary” carer would enable a formal process of sharing leave (as the “main” carer would share leave with the “secondary” carer). This would bring the Handbook rule more closely in line with the SPL regulations available to employees.
  - However in the context of the self-employed Bar this is unnecessarily complicated, and assumes a relationship between chambers and barristers that is akin to an employer and employee.
  - Offering parental leave to all carers is less bureaucratic, and makes implementation practically easier for chambers.
  - Under our proposal, carers would arrange parental leave with their chambers, and would not need to concern themselves with the arrangements in other chambers (or with the employers of members’ partners).

**8.14.** Having considered the responses, the recommendation is to give all carers an entitlement to parental leave. The flexibility and longer term benefits of this option outweigh the potential problems highlighted.

#### Who the Handbook rule should apply to

**8.15.** One respondent queried who the current rule applied to, specifically if a married, civil, or de facto partner of a biological or adoptive parent could qualify for parental leave, regardless of whether that person was themselves a biological or adoptive parent of the child.

**8.16.** This prompted clarification within the definition that the rule should apply to this group.

**8.17.** It seems sensible and fair that a person who will be the parent of a child, in everything but legal title, should be able to access leave to care for that child.

#### Rental breaks

**8.18.** One response suggested that the parts of the rule relating to the right to rental breaks did not go far enough. The respondent identified this issue as one of the major features that prevents self-employed barristers from taking parental leave, and suggested that rental breaks should extend into the early period of return after parental leave.

- While this would undoubtedly be beneficial for barristers taking SPL, it could lead to a significant negative financial impact on some chambers.
- This may be disproportionately damaging to predominantly publicly funded chambers, or others already facing significant financial pressure, particularly if they operate a fixed rent policy.
- This concern is also at least partially mitigated by the introduction of a requirement for parental leave policies to be flexible.
- We propose that this suggestion should not be implemented at this stage, but should instead be subject to a separate future review.

### Guidance

**8.19.** Respondents who were supportive of the SPL rule agreed that guidance should not seek to cover every possible eventuality.

**8.20.** The suggested guidance in the consultation was widely seen as too prescriptive, particularly in terms of how flexibility should be incorporated into the rule. The guidance now suggested reflects that, while flexibility is still a required element of any chambers' parental leave policy, the specifics of that flexibility is a matter for chambers to determine.

### Task Completion Group and expert advice

**8.21.** A TCG was engaged after the consultation process, to discuss the options available, and the wording of the rule. The Task Completion Group comprised of Robin Field-Smith (Lay member of the Professional Conduct Committee), Nathalie Lieven QC (Landmark Chambers), Graham Reid (RPC Law), and Jessica Stephens (4 Pump Court).

**8.22.** The TCG was asked in particular to focus on two key questions arising from the consultation:

- Should parents be required to share parental leave (or should they both have the same entitlement currently available to the "main" carer)?
- Should the BSB prescribe what form the flexibility in chambers' parental leave policy takes?

**8.23.** The members of the TCG agreed that one leave provision per barrister provided a flexible and open policy that would enable self-employed barristers to arrange child care as they saw fit, and in a way that minimised the administrative burden for arranging leave. They also argued that, as long as the right to flexible parental leave was included in the rule, the form of flexibility should not be prescribed.

**8.24.** One of our Equality & Diversity APEX advisers was consulted separately on the same issues. She advised that we pursue a policy that was open to all self-employed barristers who become parents/carers, while prioritising simplicity and

flexibility. This has the effect of mitigating the risks of indirect discrimination that might occur otherwise<sup>8</sup>.

**8.25.** A log of responses to the consultation is available at Annex B.

## **9. Implementation timetable and operational readiness**

**9.1.** The amendment will be made as part of the next round of updates to the BSB Handbook. The new position will be communicated to the profession via the BSB's monthly Regulatory Update e-mail. [Likely to be in early November 2017 – dependent on approval.]

**9.2.** Guidance will also be produced by the BSB Equality & Access to Justice Team as to how the rule should be interpreted, which will include a model policy and clarity about the BSB's regulatory expectations. We will also liaise with the Bar Council so that it will be in a position to support the profession in complying with the new requirements. We expect the Bar Council to be in a position to produce its own supporting guidance in time for our communication with the profession about the rule change. [November 2017.]

**9.3.** After the amendment is included in the BSB Handbook there will be grace period, in which chambers will be given time to update their parental leave policies. [November 2017 – November 2018.]

**9.4.** All chambers will be required to amend their current parental leave rules in line with the proposed change. This, combined with the BSB's commitment to encouraging a culture change at the Bar, means that the BSB will be open and engaged in the process of chambers updating their rules.

**9.5.** The BSB Communications Department will promote awareness of the update to the rule, and publicise the guidance. [November 2017.]

**9.6.** Following the end of the grace period, we would aim to establish whether chambers had complied by updating their parental leave policies. In doing so our priority would be to rectify any non-compliance, with enforcement action as a last resort if necessary.

**9.7.** Approximately three years after the policy change is put into place, we will conduct an evaluative exercise to determine the successful implementation, and uptake, of the new policy. This would include work to consider whether extended rental breaks (paragraph 8.18) are a necessary or appropriate next step.

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<sup>8</sup> Any policy incorporating a complex leave-sharing mechanism might still result in the main carer taking on most of the responsibility for childcare. Our research indicates that the main carer tends to be the mother, therefore a policy with a complex leave-sharing mechanism might fail to address the discrimination identified in the status quo.



## **Annexes**

Annex A – Shared Parental Leave: consultation on a possible change to parental leave rules.

Annex B – Responses to the consultation.

Annex C – Equality Impact Screening.