RESPONSE TO THE BAR STANDARDS BOARD CONSULTATION ON SHARED PARENTAL LEAVE (NOVEMBER 2016)

INNER TEMPLE BAR LIAISON COMMITTEE

1. The Inner Temple Bar Liaison Committee represents over 3000 practitioner members of the Honourable Society of the Inner Temple. Committee members range from recently qualified barristers to QCs and come from both the independent and the employed bar.

2. This document responds to each of the questions raised in the consultation paper. There are some issues that arise in response to more than one question. Where this occurs, we have endeavoured to highlight this so as to reduce duplication.

Question 1: Do you agree with the proposed change to the wording of the parental leave rule above?

3. We agree with the thrust of the proposed changes to the rules in the BSB Handbook but believe – if the decision is to proceed with the 'complicated rule' (see consultation paper, paragraph 26) – that further refinement of Handbook rule r C110k(iii) would be desirable, as set out below.

4. The consultation paper (pages 7-8) sets out three scenarios in which Shared Parental Leave ("**SPL**") would be accessible. While scenarios 1 and 2 deal with self-employed barristers (in the same chambers or different chambers respectively), scenario 3 involves another carer who is 'employed'. The nature of the 'employed' carer's parental leave entitlement differs to that of the self-employed barrister, consisting (generally speaking) of a continued right to receive the whole or a portion of their salary for a specified period rather than a right to return to chambers after a specified period together with rent and/or expenses relief.

5. For this reason, sub-paragraph k(iii) does not immediately appear apt to cover scenario 3 ('The first carer is a self-employed barrister / The second carer is employed'). The words "*a joint carer is entitled to a proportion of the leave/rights available under their chambers' policy, equivalent to the proportion sacrificed by the other carer"* imply that one is looking at the carers taking a proportion of

equivalent rights, namely that *"… a joint carer is entitled to a proportion of the leave/rights available under their chambers' policy, equivalent to the proportion (of those rights) sacrificed by the other carer"*. Such rights are only equivalent in the case of scenarios 1 and 2.

6. While it emerges from paragraph 2 of scenario 3 (page 8) – *"The percentage of entitlements sacrificed by the employed carer could be taken by the self-employed barrister as a proportion of the chambers' policies"* – that the intention in this scenario is that each carer takes a proportion of their respective sets of rights regardless of their nature, we believe that this needs to be made clear in the rule itself.

7. To avoid confusion as to the scope of sub-paragraph k(iii), a potential amendment to the provision – so that it clearly encompasses all three scenarios – might read as follows:

> *"… a joint carer is entitled to a proportion of the leave/rights available under their chambers' policy, equivalent to the proportion of whatever leave/rights have been sacrificed by the other carer (whether such rights be under (i) the same chambers' policy; (ii) a different chambers' policy; or (iii) the policy of a different third party employer)."*

8. The accompanying guidance can then illustrate how SPL would be accessible in each of the three scenarios, as foreshadowed in paragraph 17 of the consultation paper.

9. The above comments, however, assume that the BSB proceeds with the 'complicated rule'. In fact, our preference is for the 'simplified' rule set out in paragraph 27 of the consultation paper – see paragraphs **Error! Reference source not found.** and 26 below.

Question 2: Would the suggestions at paragraphs 16-17 be appropriate guidance for chambers' SPL policies?

10. We agree with the suggestions for appropriate guidance outlined at paragraphs 16-17, subject to the following points.

SPLIT and KIT days

11. The consultation paper notes that 'Keeping in Touch' (KIT) days and 'Shared Parental Leave in Touch' (SPLIT) days would not be a compulsory element of the rule, so would need to be agreed by carers and their chambers: paragraph 16(b). The consultation paper also notes that SPL can be taken as one continuous block of leave, or split into a maximum of three separate blocks of leave: paragraph 16(a). Accordingly, sets of chambers would need to decide whether to place an upper limit on the number of SPLIT and/or KIT days that could be taken during any one block of leave. For instance, if a self-employed barrister was entitled to 6 months of parental leave and opted to split it into three blocks of 2 months, would it be permissible to take all the SPLIT and KIT days (amounting to 6 weeks in total) within one 2 month period, or would they need to be allocated pro rata?

12. In addition, the concepts of SPLIT and KIT days were formulated in the context of paid employment and may require some modification when applied to self-employed barristers. While individual days of paid work may be an appropriate measure for SPLIT time for those in paid employment, in the context of the work of the self-employed barrister, an hourly figure may be more realistic. The appropriateness of the 'Keeping in Touch' nomenclature may also be questioned in sets of chambers where the majority of members travel frequently and spend the remainder of their time working at home and/or at the Inn libraries. In such chambers, physical presence in chambers is not the norm in any event so 'keeping in touch' seems less relevant.

Proof of joint carer status

13. Paragraph 16(c) states that *"a barrister taking SPL would show that they are a 'joint' carer by not submitting any bills during their time on leave"*. The concern is, of course, that a barrister could assert joint carer status and obtain the associated benefits but carry on a full time practice from home or elsewhere.

14. However, the language of paragraph 16(c) is somewhat puzzling, since *"not submitting any bills"* is a negative stipulation, and this is said to *"minimise*

bureaucracy", but joint carer status is also a matter for the barrister to *"show"*. Is the intention for the non-submission of bills to be policed? We note in this regard that while the consultation paper states *"[w]e also do not propose to set up any regime to require chambers to check what leave is being taken by a barrister's partner"* (paragraph 13), the document is silent as regards checks a chambers might perform on its own members.

15. If the intention is for the non-submission of bills to be policed, who by? In sets of chambers with their own accountants, these individuals would be a logical choice. Alternatively, it might be done by the clerks. The guidance accompanying the proposed rule change would benefit from further elaboration in this regard.

Question 3: What are your views on how the suggested rule change will affect these three scenarios?

16. For the reasons given above, we would suggest that there is an air of unreality about scenarios 2 and 3 given the current draft of the rule change.

17. Dealing first with scenario 2 – that of two self-employed barristers in different chambers. It is envisaged that if barrister A gives up a percentage of his/her entitlement then barrister B would be able to take up that sacrificed percentage under his (Chambers B's) parental leave policy (as envisaged by proposed rule rC110(k)(iii)). Because of potential differentials in parental policies this could mean that there would be a disproportionate impact on those sets with a more generous policy which is, we would suggest, undesirable.

18. As to scenario 3, we again think this unrealistic – especially at paragraph 2. For the reasons given above we would advocate the rewording set out above.

Question 4: Are there any additional scenarios we should consider?

19. No – subject to the response below to scenario 4 (second carer not in paid work and not in receipt of state benefits).

Question 5: Are there any additional benefits or challenges to the new proposed rule?

20. In our view the following 'potential benefits' listed in the table may be overly optimistic:

    20.1 *"improve the gender diversity at the senior end of the self-employed Bar by supporting the retention and progression of female self-employed barristers"* (bullet point 4)

    20.2 *"increase income for chambers that would otherwise have failed to retain female members"* (bullet point 5)

    20.3 *"mitigate possible unconscious bias against selecting women of child-bearing age as pupils or tenants"* (bullet point 10).

21. We ask: how can SPL hope to improve gender diversity at the senior end of the self-employed Bar when it only covers the first year of a child's life? Also, the consultation paper does not acknowledge the extent of the cultural shift necessary for an SPL regime to succeed. If a male barrister is not minded to share the task of childcare with his female partner it seems unlikely that offering him rent and/or expenses relief during his leave and a right to return to chambers at the end of it will make a difference. We would, however, stress that these are not reasons for declining to adopt a rule change to effect SPL, only that the likely impact of such a rule change may not be as significant as hoped.

22. Further we would add an additional bullet point to the 'potential challenges' column, namely that the rule change as currently drafted – or indeed in the revised form set out above – would mean that sets of chambers would incur additional accounting costs in implementing SPL, particularly so if the requirement regarding bills is implemented. See our comments in paragraphs 14 and 15 above.

Question 6: Which of the options in paragraph 23 (a, b or c) should be the minimum standard required by the BSB or chambers in their SPL policies and why?

23. For ease of reference we have reproduced the three options contained in paragraph 23 (a-c) below:

> *"a. Align the Handbook rule with SPL legislation. This would mean that the self-employed barrister in scenario 4 would only be entitled to parental leave if they were the main carer;*
>
> *b. Entitle the self-employed barrister to 50% of their chambers' parental leave policy. This would mirror the position the barrister would be in if their partner was employed and they shared their SPL entitlement equally; or*
>
> *c. Entitle the self-employed barrister to 100% of their chambers' parental leave policy. This would mean that all self-employed barristers would have access to a full parental leave policy, no matter what their partner's employment status was. Unlike in options (a) and (b), self-employed barristers, whose partner is not in paid work, could choose to be the main carer in their child's first year."*

24. In our view access to parental leave should not be dependent upon the employment status of the barrister's partner. We take the view that overall SPL is a positive measure which should be equally available to members of the Bar, regardless of their partner's employment status or whether they are the main carer. We therefore favour option 23(c). We come to that conclusion because it seems to us that the principal benefits of SPL apply more or less equally to the barrister, the profession and to the child in Option (c) as they do in Options (a) or (b). Furthermore, if entitlement to SPL were to depend on the current employment status of the partner, that seems a somewhat arbitrary limitation, in that employment status is something which can and does change over time, and over the course of a career.

Question 7: Would you support the alternative approach set out in paragraph 27?

25. For ease of reference paragraph 27 is reproduced below:

> *"… to give <u>all</u> self-employed barristers who become the carer of a child full access to the chambers' parental leave policy, regardless of whether their*

partner is a barrister at the same chambers, a different chambers, is employed, or is not in paid work" (emphasis in original).

26. We are mindful that this alternative approach may result in a greater financial burden on chambers, but also consider that that additional burden may be at risk of being overstated. In practice, we consider that notwithstanding the availability of SPL, the vast majority of barristers whose partner is not in paid work or self-employed will be unlikely, for economic reasons if nothing else, to avail themselves of their full entitlement to SPL.

27. We therefore support the alternative approach because we consider that it best furthers the laudable objectives of SPL. If in time it is apparent that uptake of this is so prohibitively costly for chambers the rule can be revisited, but as a starting point and for the reasons set out at paragraph 24 above, this is our favoured approach.

Question 8: Would the increased burden on chambers be justified in the light of any benefits?

28. Yes, we believe that the increased burden on chambers is justified.

29. Subject to the note of caution sounded in paragraph 21 above, we believe that the benefits of the alternative approach include supporting a cultural shift and a change in public attitudes towards traditional gender roles. The alternative approach would make it easier for men and women to share the child carer and breadwinner roles interchangeably without any complicated rule changes.

Question 9: What do you estimate the financial cost of giving full parental leave entitlements to both carers would be for your chambers?

30. The Inner Temple Bar Liaison Committee is not a chambers. We do however recognise that there is the potential for more members of a chambers to take up SPL on the alternative approach, which would in turn mean that more members of chambers would be entitled to rent and/or expenses relief during chambers' lifetime.

31. However, in light of the reasons set out in paragraph 26, we believe that the financial cost to a chambers will not outweigh the benefits of implementation of this alternative approach.