

Note: the timings quoted are indicative only and the meeting may extend beyond the anticipated finish.



REGULATING BARRISTERS

Meeting of the Bar Standards Board

Thursday 24 September 2020, 2.00 pm

via MS Teams / etc venues, Chancery Lane

Agenda - Part 1 – Public

				Page
1.	Welcome / announcements (2.00 pm)		Chair	
2.	Apologies		Chair	
3.	Members' interests and hospitality		Chair	
4.	Approval of Part 1 (public) minutes			
	• 16 July 2020	Annex A	Chair	3-6
5.	a) Matters arising (no action list included as all previous items completed)		Chair	
	b) Forward agenda	Annex B	Chair	7
6.	Director Generals' Strategic Update (2.05 pm)	BSB 036 (20)	Mark Neale	9-19
7.	Chair's Report on Visits and External Meetings (*)	BSB 037 (20)	Chair	21
8.	Any other business (2.10 pm)			
9.	Date of next meeting			
	• Thursday 26 November 2020 (preceded by a joint Board to Board meeting with the OLC)			
10.	Private Session			
	John Picken Governance Officer 17 September 2020			

**Note – Starred items will not normally be discussed unless a Member gives prior notice that this should occur. If you wish to raise any points on these items, please contact [John Picken](#) before the meeting.*

BSB 240920

BAR STANDARDS BOARD

REGULATING BARRISTERS

Part 1 - Public
Minutes of the Bar Standards Board meeting
Thursday 16 July 2020 (4.00 pm)
via MS Teams

- Present:** Baroness Tessa Blackstone (Chair)
Naomi Ellenbogen QC (Vice Chair, BSB)
Alison Alden OBE
Lara Fielden
Steve Haines
Elizabeth Prochaska
Irena Sabic
Nicola Sawford
Adam Solomon QC
Kathryn Stone OBE
- By invitation:** Derek Sweeting QC (Vice Chair, Bar Council)
Grant Warnsby (Treasurer, Bar Council)
Malcolm Cree CBE (Chief Executive, Bar Council)
James Wakefield (Director, COIC)
- BSB & RG Executive in attendance:** Richard Cullen (Director of Finance)
Rebecca Forbes (Head of Governance & Corporate Services)
Oliver Hanmer (Director of Regulatory Operations)
Andrew Lamberti (Communications Manager)
Ewen Macleod (Director of Strategy and Policy)
Mark Neale CB (Director General)
John Picken (Governance Officer)
Victoria Stec (Head of Authorisation)
Wilf White (Director of Communications and Public Engagement)
- Press:** Jemma Slingo, Law Society Gazette
Neil Rose, Legal Futures
Catherine Baksi, The Times

Item 1 – Welcome / Announcements

1. The Chair welcomed those present to the meeting.

2. **Item 2 – Apologies**

- Andrew Mitchell QC
- Leslie Thomas QC
- Stephen Thornton CBE
- Sara Jagger (Director of Legal and Enforcement)

Item 3 – Members’ interests and hospitality

3. None.

Item 4 – Approval of Part 1 (public) minutes (Annex A)

4. The Board approved the Part 1 (public) minutes of the meeting held on Thursday 21 May 2020.

Item 5a – Matters arising

5. None.

Item 5b – Forward Agenda (Annex B)

6. Members noted the forward agenda list.

Item 6 – Health Emergency: update on risks and longer-term implications

BSB 028 (20)

7. Mark Neale referred to the centralised examinations taking place in August, under remotely proctored conditions in association with Pearson VUE. He stated that BSB fully acknowledged its responsibility to ensure that, as far as reasonable, the examinations were accessible to students. He also paid tribute to the substantial extra work undertaken by the Examinations Team in this respect.
8. Oliver Hanmer summarised the scale of the task. The salient points were:
- 2619 students are taking assessments in August (this equates to 6487 “bookings” since each student sits several examinations). Of these, 364 have made requests for “reasonable adjustments” (a total of 871 bookings);
 - some requests can be accommodated in a way which still means examinations can be taken at home. For others, the best fit solution is either to offer a place at a Pearson VUE assessment centre or via course providers;
 - to date 216 bookings for reasonable adjustments have been made for home-based students and 209 attending test centres, leaving 446 to be completed;
 - bookings remain open until 29 July 2020 and can be re-opened if necessary. Every reasonable effort will be made to find solutions for students who have not yet been accommodated, either through test centres or via online proctoring. At present there are only 9 of these (6 in the UK and 3 overseas).
9. Members acknowledged the work done to make the examinations operate in as fair and accessible way as possible, given the circumstances. In response to questions raised, Oliver Hanmer stated that:
- we are in contact with the nine candidates identified above and are actively seeking solutions. However, we also need preserve the integrity of the examinations meaning we need to strike a balance between what is reasonably feasible and what is not;
 - course providers are supporting their students and sending us relevant information. There will be an opportunity to further review our operational relationships with them after the examinations are completed.
10. Amanda Pinto QC noted this update and, with the Chair’s agreement, will now reference the ongoing work in a statement to the Bar on 17 July 2020.
11. Mark Neale also referred to pupillage and commented that:
- we have discussed this issue with the Bar Council and the Inns of Court;
 - the full effect on recruitment cannot, as yet, be accurately estimated but it is likely that some pupillages will be withdrawn next year;
 - there is no immediate risk for existing pupils, but some may have their pupillage period extended causing a knock-on effect for future recruitment.
12. In the context of the health emergency, and for Members’ information, Amanda Pinto QC summarised headline figures from the most recent survey of the Bar (the findings of which are yet to be formally published) ie
- 29% of publicly funded practitioners and 38% of criminal barristers are unsure that they will renew their practising certificates;
 - barrister incomes are expected to drop very significantly this year. Fee income has been reduced by an average of just under 60% across the board.

Part 1 - Public

13. Malcolm Cree confirmed that a fall in barrister incomes this year will result in much reduced funding for the General Council of the Bar (GCB) in 2021/22. In consequence the GCB will seek a bank loan under the government backed Coronavirus Business Interruption Loan Scheme (CBILS) to bridge this gap.
14. Members expressed serious concern about the survey findings. Were barristers to leave the profession in the numbers predicted, it would severely affect and imperil the justice system, to the detriment of access to justice and the public interest.
15. In response to questions raised, Amanda Pinto QC stated that:
- the underlying assumption in Government seems to be that matters will resolve themselves once courts return to normal business. This does not address the immediate needs of barristers already in financial hardship who cannot wait for longer term solutions to emerge;
 - the Inns and the Barristers' Benevolent Association (BBA) continue to support barristers (the latter has already given out one quarter of its available finance);
 - it may be possible to segment the survey data further eg sector of the Bar / level of call / geographical area which would enhance our understanding of risk;
 - there are risks around diversity. The Government's introduction of out of hours hearings and extended court hours underappreciates the detrimental effect on childcare arrangements. This disproportionately affects women barristers and is another fact which, cumulatively, could result in a decision to stop practising;
 - the Bar Council is heavily engaged with key players about the backlog of cases. Numbers are still increasing in part due to social distancing measures which the courts now have to observe;
 - the MoJ's modelling to reduce the backlog assumes that Covid-19 will no longer be an issue from May 2021, though the basis for this assumption is not clear;
 - the new "Blackstone Courts" are better suited to non-criminal work (due to lack of security measures). Existing combined courts will therefore be used primarily for criminal cases, but that estate has limited technological and staff capacity;
 - productivity would improve were cases listed more efficiently than at present but actually effecting this change through the MoJ is proving very difficult to achieve.
16. In response to a question about government backed bridging finance, Bar Council representatives commented as follows:
- CBILS is unpopular because most chambers do not wish to take on more debt and the scheme incorporates personal guarantees. This means if practitioners leave chambers, those remaining increase their liability. In addition many barristers use private accounts and CBILS is built around business accounts;
 - the bounce back loan is more popular though many practitioners have reported difficulties in accessing the scheme;
 - furloughing has helped chambers to reduce costs (average figures are 71% furloughed clerks and 46% furloughed staff).
17. The Chair acknowledged the very serious position faced by the profession and gave an assurance that the BSB's own business plans would take this into account. She noted the regulatory issues around the sustainability and diversity of the Bar and accordingly supported the efforts of the Bar Council to engage with Government.
18. **AGREED**
- a) to note the report and to endorse the Executive's approach to managing the risks to our regulatory objectives.
 - b) to thank the Bar Council for sharing its latest survey results and to note with concern the serious threat to the Bar, especially the publicly funded sector, and by extension the risks to access to justice and the diversity of the Bar.
 - c) to also note the increased risks around next year's financing of the GCB and thereafter.

Item 7 – Establishment of a Board Reference Group for the Code of Conduct Review

No paper

19. Ewen Macleod referred to a previously circulated request for volunteers to form a Reference Group for the Code of Conduct Review. Four Board Members have since offered to help (two barristers, two lay) so we will now proceed as planned. We can also accommodate additional Members (particularly lay) if anyone further would like to volunteer.

(Post meeting note: since the meeting, one more lay and one more barrister Members have volunteered to join the Reference Group).

20. **AGREED**

to note the report.

Item 8 – Director General’s Strategic Update (public session)

BSB 029 (20)

21. In the light of the Black Lives Matter protests, Mark Neale supplemented his report with an oral update on actions around racial equality. The salient points were:

- we will issue a statement in the Autumn setting out our expectations of chambers in promoting racial equality and combating discrimination;
- the BSB will survey its own BME staff with the aim of identifying any perceived equality issues and introduce reverse mentoring.

22. Amanda Pinto QC welcomed this initiative which can dovetail with others discussed at a meeting held earlier in the day between the Law Society, the SRA, the BSB and the Bar Council.

23. **AGREED**

to note the report and to request the draft statement be presented at the September Board meeting.

(Post meeting note: due to the consultation time required, the draft statement will not be ready in time for the September meeting. It will be circulated to Members out of cycle as soon as possible thereafter).

MN

Item 9 – Chair’s report on visits and external meetings

BSB 030 (20)

24. The Board **noted** the report.

Item 10 – Any Other Business

25. None.

Item 11 – Date of next meeting

26. • Thursday 24 September 2020 (Board Away Day / Board meeting)

Item 12– Private Session

27. The Board resolved to consider the following items in private session:

- (1) Approval of Part 2 (private) minutes – 21 May 2020 & 26 June 2020;
- (2) Matters arising and action points – Part 2;
- (3) IGR Certificate of Compliance;
- (4) Financial prospects: framing the Bar Standards Board Business Plan and Budget 2021/22;
- (5) Director General’s Strategic Update – private session;
- (6) Any other private business.

28. The meeting finished at 4.50 pm.

Forward Agendas

Thursday 26 November 20

- PRP mid-year performance report
- GRA Annual Report
- Corporate Risk Report (summary)
- Computer based assessment – review
- Fee proposals – ethics examination
- Proposed changes to BSB Standing Orders
- Regulatory Decision Making Performance Report 2019/20
- IDB Annual Report
- Dates of Board meetings (January 2021- March 2022)

Thursday 28 January 21

- Independent Review – August examinations

Thursday 25 March 21

- Consolidated Risk Report
- Regulatory Return

Bar Standards Board – Director General’s Strategic Update – 24 September 2020

Public session

1. This paper provides a high-level strategic update on external issues and trends that are of relevance to the BSB but that are not the subject of substantive separate papers for the Board, to be noted by the Board.

Bar examinations

2. As approved by the Board, we announced on 11 September our renewed apology to those students adversely affected by the August sitting of the centralised examinations and plan to put things right for those students by working with providers to offer a pen and paper sitting of the examinations in early October. We explained our plans at a meeting of the Bar Council on 12 September. In the course of discussion, members of the Bar Council raised two issues, summarised in the attached letter of 12 September, from Nick Vineall (Annex A): namely, whether it would be possible in practice and right in principle, to release the results of the August examinations early in sufficient time to inform students’ decisions about whether to sit the October examinations; and what provision to make for students unable to sit the October examinations for work or religious reasons. We have given careful consideration to these issues [and replied on 16 September (Annex B)].

Pupillage

3. We recently published the results of research about the impact of the health emergency on pupillage, which was largely conducted earlier in the year as lockdown measures were in place. The findings are based on engagement with 122 of the 260 organisations that are authorised to provide pupillage, including 98 responses to a survey we issued. We found that, while chambers and other organisations have shown a commendable commitment to sustaining pupilages in difficult circumstances, there is likely to be some pressure on the supply of pupilages available from 2020 to 2022.
4. Our research shows that all pupilages that had already started when lockdown began in March have been able to proceed, with many pupillage providers overcoming considerable challenges. Only one pupillage was suspended and has since been resumed.
5. While the vast majority of chambers and other organisations have said that they remain committed to offering pupillage, a number have considered deferring the start of pupilages that they have already offered, which may have the effect of reducing the overall number of pupilages over the coming years. At the time of the survey, ten percent had already decided to defer the start of pupilages and around a quarter were thinking about doing so. One chambers has said that it has decided permanently to reduce the number of pupilages it intends to offer.
6. The emerging evidence suggests that the biggest impact has been on pupilages that are in areas of law most affected by court closures, especially Criminal and Family. We are conscious that women and BAME barristers are more strongly represented in these publicly funded areas of practice and will carefully monitor the effect of Covid-19 on pupillage and any implications for diversity at the Bar.

Part 1 – Public

7. We shall of course continue to work with the profession to help them maintain pupillage opportunities where possible. We remain committed to encouraging chambers and other organisations to take on pupils and we welcome applications for authorisation to provide pupillage from those who have not done so before.
8. In accordance with the Board's wishes, we have also raised this matter with the Ministry of Justice.

Reverse mentoring

9. Our Race Equality Taskforce – which advises us in the development of strategy, policy and activity to improve race equality in the profession – launched a reverse mentoring scheme earlier this month. The scheme sees senior barristers from White backgrounds being mentored by pupils or Bar students from BAME (Black and Minority Ethnic) backgrounds. It is designed to provide an insight into people's experiences of racism by pairing individuals who might not otherwise come together, aiming to address barriers to race equality and foster a more inclusive culture at the Bar. We are currently publicising the scheme and we hope that many barristers will sign up to take part.

Code Review

10. Phase one of the Code Review, in which we gathered evidence and developed our approach to the review, is nearing completion. Our intention is to build on the approach of the existing Code of Conduct, with the overall aim of a simpler, less prescriptive Code that is accessible, outcomes-focused and fit for purpose. Phase two will involve redrafting the Code, and phase three will consist of updating the BSB's policies and procedures to prepare for the implementation of the new Code.
11. By building on our current approach to regulation, we hope to make the Code more future-proof with a lower risk of gaps in consumer protection, less prescriptive and more compatible with innovation in the market. It will remain the responsibility of practitioners to achieve good outcomes for consumers.

Regulatory return

12. Earlier this month, we issued the Regulatory Return to a sample of 350 chambers, BSB entities and sole practitioners. The Return is an important data collection exercise that takes place once every five years. Its results form a vital evidence base that enables us to target our resources on risks to our regulatory objectives and on those organisations that would benefit from supervisory attention.
13. In the Return, we have also included questions about the risks and opportunities that have arisen from the health emergency and what chambers and entities have done in response. This information should be of great assistance in helping us to understand the impact of the pandemic on the Bar and we are therefore strongly encouraging all organisations that received the Return to complete it.

Transparency: CMA review

14. The CMA has announced its intention to re-visit its 2016 market study of legal services with a quick, focused three-month exercise to examine whether the actions taken by the regulators in response to the market study have had an impact on competition. CMA will undertake this work by reviewing available research and data and by talking to stakeholders.

15. We shall do everything possible to inform the review. We shall not have quantitative research available on the impact of our transparency rules on consumers until 2021 because the rules did not come into effect until January and because the market, including direct access, has been disrupted by the health emergency. However, we have conducted a spot check exercise of chambers and a sweep of chambers websites that have given us evidence as to the profession’s levels of compliance with the transparency rules and changes in price transparency over time. We also have research from 2018 bearing on what matters to consumers. And we are commissioning further qualitative research this Autumn to inform both the Handbook Review and our continuing work on transparency.

12 September 2020

Dear Mark

1. Two points if I may following this morning's Bar Council:
 - (1) Release of results
 - (2) Position of those who cannot take advantage of the October resits

(1) Release of results

2. As I said I would this morning at the Bar Council meeting, I wanted to have another chance to ask that results of the August sittings be released as soon as they are available, in the hope they can be available before students take October resits, and perhaps even before they have to decide whether to take October resits (which they must do by 21 September).
3. The advantages of doing so seem to be obvious:
 - 3.1. some students will be uncertain of the extent to which the well-publicised technical difficulties have adversely affected their results. It is only fair that, if the information can be made available, they know whether and to what extent the technical difficulties have compromised them;
 - 3.2. making the information available is likely to reduce the extent to which people wish to resit – saving money, sparing resources and relieving anxiety in what is, for some, an acutely stressful situation.

4. You suggested that making results available before the resits take place is contrary to normal policy and practice.
5. As to that:
 - 5.1. this is not a normal case: here we have a large number of students who, through no fault of their own, have been unfairly compromised in demonstrating their competence by way of the assessments;
 - 5.2. as a result they have to decide whether to reorganise their schedules and take time out to take the October resits;
 - 5.3. in this case there is therefore no proper justification for concealing from them results which are in fact already available.
6. I cannot see anything in the BPTC Handbook which would preclude releasing marks as soon as they are available. The Handbook does say (on page 41) that students may not retake assessments for the sole purpose of improving a mark which is already at or above the pass level, unless there is a substantiated case of extenuating circumstances; but you have already, quite rightly, decided that all students resitting in October will not be subject to that constraint; and so you have already acknowledged that these are atypical circumstances. In any event this wording does not on its face prohibit release of results; and there clearly are extenuating circumstances
7. Finally on this point, I understand that last year, following a problem with the April 2019 BPP ethics exam, a special resit was provided by BPP and the BSB approved BPP's decision to release the results before students had to choose whether to resit in August 2019 as a first sit. Precedent would therefore seem to support prompt release of the results.

(2) Position of those who cannot take advantage of the October resits

8. We raised this point before you made your announcement, but I would like to revert to it now we know exactly what is intended.
9. There may be some students who for perfectly valid reasons both (a) were unfairly compromised in August and (2) *cannot* for good reason take advantage of the (perforce) hastily scheduled October resits.

Part 1 – Public

10. The reasons for (2) might for instance include (a) that people have unavoidable work or caring commitments (which may disproportionately affect female students) (b) religious grounds.
11. The Public Sector Equality Duty applies to all protected characteristics under the Equality Act 2010, including sex and religion or belief. The BSB therefore has a duty to promote equality which goes further than avoiding discrimination. An assessment should be carried out to discern the impact of your proposed measures. The suggestions made here will undoubtedly go some way towards ameliorating any discrimination.
12. I continue to believe that people who for good reasons cannot take advantage of the October retakes should, if they were unfairly compromised in August, be treated, when they retake in December, in the same way as those who can take advantage of the October resits.
13. This may or may not turn out to be a small group of students in terms of numbers, but it seems to me that they deserve, and indeed are entitled to, fair and equitable treatment.

I very much hope you and the Board can revisit these two specific issues as soon as possible. I will be in chambers next week if it would be helpful to speak.

Best wishes,

Nick Vineall

Chair of the Bar Council E&T Committee



By Email:

Nick Vineall QC
Chair
Education and Training Committee

16 September 2020

Dear Nick

BAR EXAMINATIONS

Thank you for your letter of 12 September 2020 following the discussion at the Bar Council on Saturday morning on our plans for the October sit of the centralised assessments. We have carefully considered the two matters you raise.

Before turning to those specific issues, I think it is worth underlining that we are offering students a choice. We want to put things right for students who were adversely affected by the August examinations. So, for those students who were affected by technical difficulties or who are clear that they were unable to perform to their best, there is the option of re-sitting in October, with the better of the August or October mark counting. Students who completed the August examinations or who have other commitments in October may on the other hand prefer to wait for the August results and only sit again in December if they have failed any of the exams.

Unfortunately, we cannot realistically give the option of an October sitting in knowledge of the August results. The release of marks from the August exams is not a straightforward process. I thought it might help therefore if I set out that process in a bit more detail so that you can see why it won't be possible logistically for students to have their results before they need to decide whether to sit the assessments in October.

Following the completion of marking the exams, each set of marks is analysed by our psychometrician ahead of exam boards for each subject. For each of the centralised exams there is a subject specific exam board. Each subject specific exam board formulates recommendations that are then presented to a unified final exam board where binding decisions are made. This two-stage process ensures a consistent approach across all three subject areas and allows for a reassessment of any proposals coming up from the subject level exam boards.

For each of the centralised assessments the psychometrician assesses the performance of each question on each exam paper, as well as the exam as a whole and produces a report for the benefit of each subject exam board. In the light of his report, the subject exam boards will consider what interventions, if any, may be appropriate as part of the moderation process, to ensure that each exam is a fair and valid assessment. The final exam board for the litigation subjects takes place on 28 September 2020, whilst the final exam board for ethics is on 20 October (which reflects the longer time needed to mark short answer questions over multiple choice). This is the earliest that we could hold those meetings given the analysis and quality assurance processes that need to be followed so that the exam boards can release the marks to Providers. Following the final exam board meetings, the executive takes forward any necessary action to prepare the marks to be released to Providers. We would expect to release litigation marks to Providers by 2 October 2020. Each of the Providers will, in turn, schedule their own award and progression exam boards to consider any mitigating circumstances or local factors that could impact upon individual candidates before results are released to students on the afternoon of 12 October.

What I have outlined above is a standard process in the lead up to the release of results. Each stage is necessary and important to the reliability and rigour of the assessment and cannot be expedited any further than we have already.

Let me turn to the issue of those candidates who would wish to sit their assessments in October but are unable to do so because they are observing religious festivals or holidays. As with all exam dates, the BSB checks meticulously to ensure that there is no clash with religious festivals and holidays. We are aware of Chol Ha'moed, a Jewish event covering the intermediate period of Succot, that takes place at the same time as the civil litigation and ethics assessments in October and have taken advice from the Office of the Chief Rabbi on whether it is acceptable to hold our exams over this period. The Office's advice is that there is no objection in Jewish law to students taking assessments during the period of Chol Ha'Moed, although some may prefer not to do so. Candidates who wish to observe Chol Ha'moed, and therefore not sit their exams over this period, should inform their Providers who will discuss, in conjunction with the BSB, potential alternative arrangements.

Candidates who are unable to sit their assessments in October for other reasons, such as work commitments, will have the opportunity to sit them in December if they have failed any of their exams (and will have received their August results before they must register for the December assessments).

A candidate who opts not to attempt in October, and subsequently finds that they have failed any of the August examinations has the option to attempt the examinations again in December, provided they are still within the maximum number of permitted attempts. Whether the mark the candidate achieves at the December sit is to be capped or not is determined by their Provider's award and progression exam board in the light of any mitigating circumstances that are agreed. Provider examination boards cannot alter a mark confirmed by the Central Examinations Board (CEB).

A candidate who opts not to attempt in October, and subsequently finds that they have passed any of the August examinations will be awarded that August sit pass mark by their Provider's award and progression exam board. There is no option to attempt an examination again in December to improve on a pass mark. Provider award and progression exam boards cannot alter a mark confirmed by the CEB. Mitigation by Provider award and progression exam boards does not arise in respect of candidates who have passed their assessments.

I hope that you will find this explanation helpful. In all this we are seeking to balance the need for academic rigour so that we can assure the public that candidates are truly competent to move on to the next stage in becoming a barrister - and in their second six, as you know, they may be directly representing clients albeit under supervision - with the need to help those candidates to progress with their careers.

Yours sincerely

Mark Neale
Director General

Chair’s Report on Visits and External Meetings from 17 July to 24 September 2020

Status:

1. **For noting**

Executive Summary:

2. In the interests of good governance, openness and transparency, this paper sets out the Chair’s visits and meetings since the last Board meeting.

List of Visits and Meetings:

2 September	Attended Special Board meeting
10 September	Attended Special Board meeting
15 September	Attended Chairs’ Committee meeting
22 September	Attended Board briefing