



The Council
of the Inns
of Court

Dr. Vanessa Davies
Bar Standards Board
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London
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28 February 2019

Dear Vanessa,

Response of the Council of the Inns of Court to the Consultation on Fees and Charges for the authorisation and supervision of Authorised Education Training Organisations (AETOs) by the Bar Standards Board.

I - Introduction

1. The Council of the Inns of Court (COIC) submits this Response on behalf of the four Inns of Court after due consultation with them. The Response addresses the above Consultation Paper (CP) dated December 2018 and the Supplementary Note (SN) dated February 2019.
2. To enable it to submit an authoritative Response, COIC appointed a Working Group on which all the Inns were represented. The Response was circulated, in draft, by the Working Group to all four Inns for consideration by their committees. The following committees have participated in the settling of this Response:

The Honourable Society of Lincoln's Inn- Planning & Development Group;
The Honourable Society of Gray's Inn - Management Committee;
The Honourable Society of the Inner Temple – Education and Training Committee;
The Honourable Society of the Middle Temple - Executive Committee & Education Committee.

The Response records the agreed views of the Inns on the various issues raised by the CP and the SN.

3. It appears to the Inns that two of the topics raised by the CP are of major importance. These are first, the examination in Professional Ethics which the BSB is planning to set for pupils; the

fee to be charged for that examination; and the way in which the fee is recovered; and secondly, the proposal to levy from providers of the BPTC an annual charge of £870 per registered student. The other questions raised are of less importance. On the major issues the Inns' views are summarised as follows.

4. (1) The Inns disagree with the BSB's proposals relating to the Professional Ethics examination, as it is described in the CP, both in principle and with regard to the calculation of the fee. They call for a constructive discussion between the BSB, the Inns, the Circuits and the Bar Council on the best way to teach and assess competence in Professional Ethics during pupillage.

(2) The Inns agree that the cost of any Professional Ethics examination, when it has been properly designed and its cost ascertained, should be borne by PCF funding. The Inns' analysis of the BSB's costs is set out in Part II below. With regard to the fee chargeable to a candidate re-sitting that examination for the second time, the Inns' view is that the fee should be limited to the marginal additional cost incurred by the BSB in examining that candidate.

(3) The Inns disagree with the proposed annual levy of £870 to be imposed on BPTC providers for each registered student. The basis on which it is calculated is flawed and needs re-consideration. For the reasons set out in Part III below, the Inns propose a levy of not more than £600. In the case of the split BPTC the levy should be charged in two separate amounts.

(4) In the light of the explanation given in the SN, the Inns make no comment on the approach to reauthorisation after the first 5 years of the new courses.

(5) The Inns disagree with the amount of the examination fee payable by candidates re-sitting any part of the BPTC.

(6) The BSB does not appear to have carried out any Equality Impact Assessment linked to the proposals in the CP. The proposed level of fees for the Professional Ethics examination, in the case of the small number of candidates who will have to pay them, and the suggested annual levy on BPTC providers, will have the effect of rendering qualification to practise at the Bar more expensive at a time when all parties are striving to make it less expensive. These fee proposals are likely to have a negative impact on the campaign to increase diversity in the socio-economic backgrounds of new recruits

5. Part II of this Response addresses the issues arising out of the examination in Ethics; Part III addresses the £870 levy; Part IV briefly discusses the other issues; and Part V contains the Inns' answers to the four questions set out on page 20 of the CP.

II – An Ethics Examination for Pupils

6. **The Proposal** Paragraph 28 of the CP states that from December 2021 pupils will be required to take a Professional Ethics examination during their pupillage or other form of work-based learning. The BSB states that it will have to charge a fee of £800-900 for each candidate. For the first sitting, and a first re-sitting, it is proposed that the fee will be recovered by the BSB from the funds it receives, as the Bar's regulator, from the Bar Council. The ultimate source of this funding will therefore be monies raised from barristers' Practising Certificate Fees (PCF funding). On the assumption that approximately 400-450 pupils will take this examination at any one time this proposal will, on its face, impose a charge on PCF funding of +/-£400,000.
7. Candidates who fail a second time will be entitled to re-sit the examination again. On this occasion the fee of £800-900 will be paid by the candidates themselves or their AETO.
8. For the purposes of this discussion the Inns make two assumptions. First, it is assumed that pupils will take their first sitting of the examination in the first six months of pupillage; and that it will be a condition of the issue of a Provisional Practising Certificate that the pupil must have passed. This would place the Ethics examination on a footing analogous to the test of competence in advocacy. In the case of advocacy, pupils, having attended one of the mandatory Pupils' courses delivered by the Inns and the Circuits, must be assessed to have achieved a satisfactory standard of performance and the Provisional Practising Certificate is not issued until that standard has been achieved. The second assumption is that the examination will take the form of Short Answer Questions (SAQs).
9. On the facts presented by the BSB so far, the Inns strongly oppose the BSB's proposal. They record two main concerns. The proposal that there should, in principle, be such an examination has not been the subject of any consultation. The form and timing of the examination seem to the Inns to carry to a number of risks and uncertainties which by themselves call into question the charging of the fee which the BSB has in mind. These risks need to be carefully measured against other possible options for training and assessment in Ethics at the stage of pupillage. Secondly, the manner in which the amount of the fee has been calculated has not been adequately justified or explained.
10. **No Proper Risk Assessment**
 - (1) While the Inns fully endorse the BSB's concern that pupil barristers, and newly-qualified barristers, should not be authorised to appear in court, or otherwise advise or represent members of the public, without possessing a thorough grounding in the ethics of the

profession, the manner in which the BSB proposes to test this competence is highly controversial. It will know from past criticisms of the Ethics examination in the BPTC that a simple pass/fail based on SAQs on this subject can produce arbitrary results. The marking of Ethics papers has on many occasions in the past been highly contested. The Inns possess substantial evidence from students who were examined in 2018 of an arbitrary, mechanistic and unfair marking scheme. This is unfortunately inherent in the assessment of ethical competence based on SAQs. Ethics is a complex subject. Unless the examination simply takes the form of a memory test of the contents of the Code of Conduct (and the Inns assume that the BSB intends something more challenging than that) the correct ethical answers to examination questions can be far too nuanced and subtle for the kind of analysis which will satisfy a SAQ.

(2) The problem is exacerbated in the scheme under discussion because of the point in the pupil's career at which it is to be taken. They will be subjected to this test during (as assumed above) the first six months of pupillage. The BSB makes no proposals as to how pupils will be prepared, or prepare themselves, for the examination. AETOs and supervisors must of course observe the requirement in the pupils' checklist that their pupil has a good awareness of ethical principles, but it is impractical to expect their supervisor, or their AETO, to deliver the training necessary to prepare them for a formal examination. AETOs and supervisors have neither the time nor the expertise to do that; and the BSB does not identify any other teaching organisation or teaching resource. Nor has the BSB addressed the cost – to the pupils or their AETOs - of preparation and it has not considered how the time involved in preparing for a formal examination will affect the time spent on other aspects of training in pupillage.

(3) For the reasons stated in (1) and (2) above, the scheme exposes both pupils and AETOs to risks which are unacceptable. Unless the examination is too rudimentary to be worth setting, there will be a high risk of failure at a critical tipping-point in the pupil's career. Failure will almost certainly postpone the award of a Provisional Practising Certificate beyond the first six months. The pupil's ability to start earning fees will therefore be delayed, and there may be a serious impact on the pupil's AETO. The BSB will know that pupils in their second six months can significantly add to the effective functioning of chambers, particularly those which undertake publicly-funded work, by appearing in court on short hearings and uncontested matters. This resource will be lost until the pupil passes the examination at a second sitting, or later.

(4) Moreover, if the fee stands at the proposed level of £800-900 any pupil who has failed at the first and second sitting will have to think very carefully about continuing with the examination at all, since that fee will now, under the BSB's scheme, have to be paid by the pupil or their AETO. It is foreseeable that some AETOs, notably chambers undertaking publicly-

funded work, will feel unable to finance a second re-sit at this level of cost; and it is questionable whether many pupils, already under financial pressure, will be able to pay for themselves. A prospective career at the Bar may thus simply be thrown away, on the basis of a questionable pass/fail examination, just at the time when, finally, it is about to start.

(5) This increased risk may lead some AETOs to proceed even more cautiously in the appointment or selection of pupils and raise further doubts and anxieties in the minds of some pupils. It would be even more regrettable if some AETOs also decided to attach conditions to their pupillage awards leading to discontinuance of the award or repayment in the event of failure. The proposal as it stands undermines the policy of the BSB, the Inns and the practising profession to encourage the award of more pupillages. It may have the opposite effect.

11. For these reasons alone the Inns call into question both the setting of the examination in principle, which is unfair, and the proposed fee. The two are inextricably interconnected. The BSB should in the opinion of the Inns be examining different options for testing competence in Professional Ethics at the pupillage stage which carry less risk and can be implemented at a lower cost.
12. **The Calculation of the fee** Quite apart from these more fundamental concerns, the Inns also question the amount of the proposed fee. Paragraph 3 of the SN explains how the sum of £800-900 has been arrived at. It brings into the calculation the figure of £120,000 “Indirect Costs”, which appear to be an apportionment of the fixed and variable overheads incurred by the BSB in the running of its organisation. Since the bulk of those costs is mainly borne by PCF funding in any case (see the BSB’s accounts for 2017-8, which are referred to in more detail in Part III below), and the cost of the first and second sittings of the examination will be met by PCF funding, it is difficult to understand why, for the purposes of this particular exercise, apportioning these monies and recharging them to the very fund from which they are drawn is necessary at all.
13. In the opinion of the Inns the only figure which is relevant in the present context is the marginal additional cost to be incurred by the BSB in the setting and marking of the examination, which is estimated in the SN to amount to £274,000. That is the true cost which, in the first instance, is to be met by additional PCF funding from the practising Bar. This is also the only figure which is relevant to the pupils who fail the examination twice and present themselves for a second re-sit.
14. The number of these pupils is likely to be very small. If they decide to take a second re-sit, thereby incurring the fee themselves, or passing it on to their AETO, the fee charged should

simply reflect the marginal additional cost to the BSB of their re-sitting the examination. If, as may be expected, they will re-sit the same examination which is undertaken by the next cohort of pupils taking it for the first or second time, whose costs are met by PCF funding, the marginal additional cost of their candidacy is likely to be negligible – the cost of marking one extra paper. This re-calculation will go a long way to meeting the problem referred to in paragraph 10(4) above.

15. It is felt that no useful guidance can be obtained by looking at the widely ranging examination fees charged by other professional organisations. Their economic circumstances, their cost-modelling, and the subject-matter of the examinations, are likely to be very different; the career point at which the examination is taken will not be the same; and very few of these organisations focus on the prospective self-employed practitioner who, at the point of examination, will not have earned any income from practice. This issue is essentially an internal issue to be resolved between the BSB and the Bar on the specific facts and circumstances of our profession.

16. **A More Constructive Approach** Before committing itself irrevocably to what the Inns see as a flawed scheme, they invite the BSB to enter into a discussion with the Inns, the ICCA and the Bar Council as to how training in Professional Ethics can be enhanced, and competence assessed, after Call to the Bar, in a more fair, reliable, practical and effective manner. The aim must be to lower risk and cost and to exclude potentially arbitrary decision-making which can have a devastating effect on careers.

17. The BSB will know that the Inns and Circuits already have a body of knowledge and experience in the teaching of ethics on which an improved system can be built. The mandatory pupils' courses require pupils to undergo at least 2 hours of training in "Practice Management". This is routinely interpreted as including instruction in Professional Ethics, expanded and conducted by senior barristers and members of the judiciary. It will also know that, after the former Advocacy Training Council (ATC) had commissioned a ground-breaking survey of ethical competence among new practitioners, the Inns of Court College of Advocacy (ICCA), as the ATC's successor, established an expert group chaired by one of its Governors to carry out further study into the delivery of this subject at practitioner level. This is an active on-going piece of work.

18. This is not the place to lay out detailed proposals. It is sufficient to say that much of what is already done by the Inns, Circuits and the ICCA can provide useful tools in collaborative planning for the future which may well be able to deliver much better ethics testing through one of a number of models. Such delivery might relieve the BSB of much of the administrative

cost of an ethics examination whilst preserving its oversight of the process, and without compromising the public interest in ensuring that barristers practise in accordance with best ethical practice.

III - The £870.00 Levy on BPTC Providers

- 19. The Present Position** The Annual Report of the BSB for the year 2017-2018 shows that its income for the year comprised two components: a direct grant of £7.695m from the Bar Council, derived from PCF funding, to underwrite the cost of regulation, and a further £1.469m derived from what is described as “generated income” or “directly controlled income”. The principal components of this latter sum are £268k from fees paid by candidates for examinations (including the Bar Transfer Test and the Bar Course Aptitude Test) and £900k from “Education and Training” (E&T). Rightly or wrongly the BSB describes this generated income as “payment for specific services provided to individuals and organisations.” However, that may be, it is the income stream derived from E&T which is the focus of this part of the BSB’s proposals.
- 20.** The E&T income stream arises mainly from an annual levy or tax which the BSB imposes on each provider of the BPTC for each of their registered students. The purpose of the levy is to defray some or all of the various costs incurred by the BSB in administering and overseeing the BPTC, its providers and the Bar examinations. Originally set at £550 per registered student it now stands, as a result of indexation, at £585. In the hands of the providers the levy represents a direct additional overhead, and in practice it is passed on without deduction to the students themselves. The reality therefore is that it is a fee paid by the students, through the medium of their BPTC provider, to the BSB.
- 21. An Increased Levy** The proposal made in the CP is that, in respect of students registering for the first time on a course beginning in 2020, this annual levy or tax should be increased to £870 per registered student. This is a very substantial increase on the present figure (some 49 %) and will make the course more expensive for future students at a time when the BSB, the Inns, the Bar Council and the profession more widely are looking for ways and means of reducing that expense. The aim of making the Bar more accessible and affordable, thereby encouraging a more diverse pool of recruits, has not been expressed more clearly than in the BSB’s own policy statement on the Future of Bar Training in March 2017. In the opinion of the Inns the time has therefore come to look more closely at the way in which this levy is computed, what exactly it represents, and why it should be set at this level.

- 22. No Equality Impact Assessment (EIA)** Paragraphs 52-55 of the CP state that the BSB carries out EIAs to assess the impact of, among other things, increases in fees on “*socio-economic status and disability*” (i.e. that of students); and with that policy in mind it seeks to mitigate the burdens imposed on “*commercial training providers*”. This policy has led to the decision not to charge existing providers of “*the pupillage component*” any fees, and to limit the authorisation fee charged to new providers of pupillage or “*existing providers who propose new pathways*” a one-off fee of £250 (para.54). Providers of pupillage are not commercial training providers and the two categories should not be confused. These paragraphs make no reference to the impact on students of the £870 levy to be imposed on BPTC providers.
- 23.** In paragraph 12 of the SN the BSB refers to an EIA which it annexes as Annex A. It claims that it includes, in Section 2, an estimate of the impact on prospective students of their having to reimburse their AETO in full for the annual levy of £870 paid by the provider to the BSB.
- 24.** Annex A comprises two documents. The first is dated April 2018. It sets out plans for the conduct of an EIA which will include the impact of fees on equality, once the fees are ascertained. The second, which appears to be the EIA itself, is dated May 2018. Referring again, simultaneously, to “*commercial training providers which train hundreds of students annually and small chambers which take on one pupil*”, Section 2 reminds the BSB that care has to be taken to ensure that existing providers do not leave the market; and that fees do not act as barrier to deter new training providers. It ends with a concern about “*Increased fees for students or pupils as [sic] passed on by the AETOs*”. There is no evaluation of the impact of the £870 levy on students, the amount of which appears to have been settled some time after May 2018.
- 25. Discussion** In discussing the merits of the £870 proposal, two points must be acknowledged at the start. First, it is accepted that the BSB’s E&T actual costs will increase in the future, not least because it is increasing the number of the centrally assessed Bar examinations from two to three a year to accommodate the innovative two-part course advocated by COIC and the Bar Council. The ICCA itself will be applying for authorisation to deliver this course from 2020 onwards. Secondly, it is accepted by the Inns that, apart from this generated income, the only other source of the BSB’s funding is PCF funding; and it would be both superficial and controversial simply to recommend, without further analysis, that all the monies claimed to support E&T should in the future be charged to the practising Bar, and no longer be charged to the students.

- 26. The BSB's Methodology** With these points in mind the Inns have examined the explanation for the sum of £870, as it is set out in paragraphs 6 and 7 of the SN. The logic of the BSB's calculations is understood as follows.
- 27.** Broadly, the BSB estimates that the E&T costs it will incur in a BPTC year will amount to £1.228m. It then divides that sum by the estimated annual number of students registering on the new course from 2020 onwards. The number, averaged over 5 years, is 1420, i.e. $900 \text{ (for Year 1)} + (1550 \times 4 \text{ (for Years 2-5)}) \text{ divided by } 5$. This produces the sum of £865 per student for each of the 5 years, to which a contingency allowance of 0.5 % is added. The Inns make a number of comments on the detail.
- 28. The estimated cost of £1.228m** This sum is made up of three components.
- (1) £670k for examinations including question-setting, invigilation, marking, etc. (The Inns make the point in passing that at present the cost of invigilation is met by the BPTC providers).
 - (2) £260k for "Ongoing Costs for Training Supervision".
 - (3) £298k in respect of "Indirect Costs" such as administrative staff, rent and utilities and BSB direct overheads (e.g. IT systems, corporate support, Board oversight).
- 29. Item (2)** Some further explanation is required of this Item. It is not clear who is being trained and for what purpose, and who is supervising them. It is relevant to know whether this expense relates solely to the BPTC or whether it is an apportioned part of a more general expense (see Item (3)).
- 30. Fixed and variable costs** No distinction is made under any of these headings between fixed and variable costs. "Variable costs" in this context means costs which vary according to the number of students. Item (1) clearly contains some fixed costs, for example the cost of setting an examination, which is unaffected by the number of students who take it. By contrast, if examiners are paid a fee for each paper marked, that will be a variable cost.
- 31.** This consideration is especially applicable to Item (3) which appears to be the duly apportioned part of the BSB's general overheads. In the sense of "variable costs" as set out above, all these costs are fixed costs because none of them is affected by the number of students (even if, for other accounting purposes, some of them might be variable).
- 32. Apportionments** While item (3) is based on an apportionment between E&T activities and others, the manner in which the apportionment has been carried out (which may vary from item to item) is not explained. If the BSB wishes to charge an apportioned part of the whole of

its general overheads to the students, it needs to be more transparent in the way in which it arrives at the figures.

33. Dividing costs between the number of students The inclusion of fixed as well as variable costs, under each of these headings, within the total sum to be divided between the number of students exposes a problem inherent in the BSB's methodology. The Inns have assumed that the BSB, once it has carried out the appropriate calculation, intends that the resulting fee will be fixed for the whole of the 5 years. On that basis, it will make a loss when the actual number of students (compared with the average) goes down and a profit if it goes up. The inclusion of Item (3) in its scheme of charges will compound this anomaly.

34. An alternative approach would be for the BSB to re-calibrate the fee each year in the light of actual costs and actual numbers. That would eliminate the risk of loss or the chance of profit on the BSB's side. But the actual fee to be charged for any year could not then be predicted in advance, and the risk of falling numbers would be imposed on the students. It is assumed that the BSB has rejected this alternative.

35. Reducing the Fee In the light of these various considerations, the Inns request the BSB to examine other reasonable alternative approaches which would reduce the levy and thus support more effectively the overriding objective of keeping students' fees as low as possible.

(1) **The average of 1420** It follows from paragraph 33 that by including in the averaging exercise the lower number of 900 for Year 1 the levy is higher than it would be if the BSB simply took a straight line of 1550 for all 5 years. A straight line of 1550 would reduce the levy to £793. If that lower figure were then applied to the 900 students for Year 1, the E&T revenue from those students for that year would be reduced from £787.5k (@£870) to 713.7k(@ £793), a net shortfall of £63.8k; but the additional revenue of 600 x £585 in respect of students registered at the previous figure has to be borne in mind: £351k. While the Inns understand that the inclusion of the 900 for the first year in the 5-year average is, by a "smoothing" exercise, intended to protect them from a higher fee for their study year, the Inns suggest a different approach which more closely promotes the policy of fee reduction. It is suggested that the net cost to the BSB of charging the 900 at the lower figure of £793 (i.e. £63.8k) is, in the context of the total E&T revenue earned from all students for that year, negligible. It should be treated as a sunk cost.

(2) **Item (3)** The Inns also suggest that Item (3) should be taken out of account altogether. There is no compelling reason why Bar students should make any contribution to the BSB's general overheads. In the context of a total advance of £7.695m made out of PCF funding, which is designed to cover the operational costs of the BSB, the sum of £298,000, which the

BSB considers should be subsidised by the students, is trivial. Allocating it back to PCF funding will make no discernible difference to the PCF; but its removal from the E&T account will make a substantial contribution to reducing the levy.

(3) Putting these considerations together the Inns propose an annual levy calculated as follows:

$$\begin{array}{r} \pounds 670,000 \\ + \pounds 260,000 \\ \hline \pounds 930,000 \end{array} \text{ divided by } 1550$$
$$= \pounds 600$$

(4) This figure may be reduced further, depending on the status of Item (2).

36. The Split Course The Inns request the BSB to divide the levy in respect of students undertaking the split course. It will be recalled that the aim of this model is to reduce the overall cost of qualification by providing, at the front end of a student's preparations (Part 1), a course at very low cost. It is accepted that, at the end of Part 1, the BSB will incur relatively high E&T costs, because that is the time at which the centralised examinations will be taken. Nevertheless, it is suggested that the levy should be split so that the larger portion is passed on to the students who, having passed Part 1, progress to Part 2. This will increase the affordability and accessibility of Part 1 and eliminate any unfairness on students who for any reason (examination failure or a change in direction of their career) do not progress to the second Part. The Inns' suggested split (subject to review after 3 years) is 1/3 for Part 1 and 2/3 for Part 2.

37. Reauthorisation Paragraphs 38 and 49 of the CP state that after 5 years existing providers of the BPTC will need to apply to the BSB for reauthorisation at a fee which "mirrors" the authorisation fee for Year 1. In paragraph 8 of the SN the BSB states that it expects that the fee for reauthorisation will be similar to that charged in Year 1. Paragraph 7 of the SN has now made it clear that, in Year 1, the levy of £870 per student will count as both the authorisation fee and the intake fee for that year.

38. In the light of that explanation the Inns have no comment to make at this stage on the process or cost of reauthorisation.

IV - Other Issues

39. The Inns have no comment to make on the fee proposals relating to the authorisation of existing and new AETOs providing pupillage; applications for authorisation by existing and new providers of the BPTC; or the examination of transferring lawyers.
40. With regard to the fee of £800-900 to be paid by candidates re-sitting any part of the BPTC (see CP p. 18 and footnote 16) the Inns repeat their argument in relation to the fee for the second re-sitting the Professional Ethics examination. A candidate should be charged no more than the marginal additional cost incurred by the BSB in examining that candidate.

V - Answers to the Consultation Questions

41. (1) The Inns' comments on the proposals contained in the CP are set out in full above.
- (2) The Inns disagree with the fees proposed for the pupillage examination, the proposed levy of £870 and the fees for re-sits of the BPTC examination for the reasons given above.
- (3) The Inns agree that the cost of the ethics examination, when properly calculated, should be borne by PCF funding. The cost of second and subsequent re-sits should be charged to the pupil or their AETO, limited to the marginal additional cost of examining that candidate.
- (4) The Inns have explained in this Response their concerns about equality impact and complain about the lack of a proper EIA.

Yours sincerely,



Derek Wood CBE QC
Chair of the Working Group