The Council of the Inns of Court

Response to the BSB Consultation document:

Proposed amendments to the definition of Academic Legal Training and related exemptions

Response from the Council of the Inns of Court (on behalf of the Inns of Court) 27 March 2024

Summary

1. This response by the Council of the Inns of Court (**COIC**) sets out the collective views of the four Inns of Court (Lincoln's Inn, Gray's Inn, Inner Temple and Middle Temple) on the proposals made in the consultation paper published by the BSB on 9 January 2024 (the **Consultation**). It has been prepared by a working group consisting of representatives of the Inns and the Inns of Court College of Advocacy. Further details about the constitution of the working group are given in Annex A.

2. In summary, COIC does not support the first three of the proposed the key changes. It is more neutral as to the fourth, but does not consider that its rationale is strongly supported by evidence.

- The Professional Statement sets out necessary requirements for practice. The "qualification route" to demonstrate professional competence needs to provide

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transparent assurance that those meeting it have obtained qualifications which themselves demonstrate that the requirements of the Professional Statement are met.

- The proposed changes would lower standards, make them inconsistent and opaque, and transfer judgments that properly belong with an independent and accountable regulator to AETOs that are not well-qualified to make them or properly accountable for them.

- They also show a misunderstanding of what a Level 6 qualification requires, and of its significance as part of the qualifications route.

- The BSB should continue to require those who wish to rely on qualifications to demonstrate either a 2:2 Level 6 degree in which they have studied and passed all the Foundations of Legal Knowledge, or a 2:2 Level 6 Degree and a GDL.

- It should not delegate to AETOs power to determine "equivalence" to such qualifications, much less to make any "holistic" assessment of whether prospective barristers who do not have such qualifications should be able to proceed without them. Such decisions should continue to be made as exemption decisions by the BSB itself.

- Delegation of decisions about equivalence of non-UK non-law degrees held by prospective candidates for a GDL might be justifiable, provided it is adequately guided and supervised so that standards remain as they now are. The Consultation does not, however, provide evidence for any significant regulatory benefit of such a change, which will not have positive equality impacts.

3. This response addresses each of the questions posed in the Consultation and is summarised at paragraphs 52–58 below.

Introduction: General Principles

4. COIC's response is based on the following key general principles:

   4.1. The regulatory objectives of the LSB under section 1 of the Courts and Legal Services Act 2007, which form an overarching framework for regulatory policy in this area and inform the proper interpretation of LSB guidance, are:

> *(a) protecting and promoting the public interest; (b) supporting the constitutional principle of the rule of law; (c) improving access to*

justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of services [by authorised persons]; (f) encouraging an independent, strong, diverse and effective legal profession; (g) increasing public understanding of the citizen's legal rights and duties; (h) promoting and maintaining adherence to the professional principles; (i) promoting the prevention and detection of economic crime.

4.2. Standards for qualification and training clearly impact—directly—objectives (a), (b), (d), (f) and (h).

4.3. LSB statutory guidance[1] includes, as paragraph 4 of the Consultation points out, a requirement that regulators place no "*inappropriate direct or indirect restrictions on the numbers entering the profession*". It also includes a requirement that "*education and training requirements focus on what an individual must know, understand and be able to do at the point of authorisation*".

4.4. A key task facing the BSB in this area is to ensure that *inappropriate* barriers to entry to the profession are not erected and maintained, and that education and training requirements focus on what an individual must know. But that is not intended as any sort of invitation to remove necessary requirements. The LSB's statutory guidance recognises that promoting the public interest, protecting the interests of consumers, and supporting the constitutional principle of the rule of law requires *appropriate* standards to be specified and applied.

4.5. In specifying those standards, the BSB should take into account the particular characteristics of the barrister's profession. Those include:

4.5.1. From the first day of practice, barristers may be representing clients in relation to matters of real significance for them and the public interest. For example, a criminal conviction (even a "minor" one) can have life-changing consequences.

[1] LSB, *Guidance on regulatory arrangements for education and training .(version 1, 2014) issued under section 162 of the Legal Services Act 2007*

4.5.2. They do so (unlike junior lawyers in solicitors' firms) without direct supervision, and often with limited access to support from more experienced colleagues.

4.5.3. The nature of a barrister's work, especially in court, often requires them to make immediate decisions in the face of unexpected events. Litigation, whether civil or criminal, is fast-moving and unpredictable; rapid decisions can have important consequences.

4.5.4. The areas of law in which barristers practise early in their careers are not simple or straightforward. A practitioner may confront cases that raise issues of real legal complexity even at the outset of practice.

4.6. These factors make it extremely important, in the public interest, that barristers enter practice with a strongly grounded legal knowledge and understanding. That knowledge needs to be sufficient to enable them to have fundamental legal principles "at their fingertips". More importantly, it must be sufficient to enable them to analyse unfamiliar legal areas, research them effectively, and develop and deploy sophisticated legal arguments with accuracy and confidence.

4.7. In assessing the value and risk of regulatory change, COIC also considers that the BSB should pay close attention to section 28(3)(a) of the Legal Services Act 2007 which requires the approved regulator to '*have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted*.'

5. COIC supports the principle that regulation in this area should start from the BSB's *Professional Statement*. That requires "*good*" knowledge and understanding of the general principles of law underpinning the legal system of England and Wales. It requires that competence to include "*a good knowledge and understanding of the '… foundations of legal knowledge subjects': Criminal Law, Equity and Trusts … Obligations 1 (Contract), Obligations 2 (Tort), Property/Land Law, Public Law (Constitutional Law, Administrative Law and Human Rights Law*". (The current text also includes EU law. Although some retained EU law remains significant in some specialist areas, it may be open to question whether EU law in general remains fundamental.)

6. The Consultation rightly does not call into question those basic principles. It remains essential that barristers, from day one of practice, should have a "*good*" (not merely a rudimentary) knowledge and understanding of those specific subjects and a "*good*" (not merely a rudimentary) understanding of the general principles of law underpinning them and the legal system of England and Wales generally. That is indeed something that all barristers "*must know*" at the outset of practice.

7. In principle the regulation of the academic stage of training should be concerned with two things. First, that by some transparent and reliable means a competent person has verified that a potential barrister does demonstrate a "*good knowledge and understanding*" of those subjects. Unless the BSB is itself to undertake that verification by some centralised summative assessment (a proposal that in COIC's view is rightly not raised by the BSB) that requires the BSB to identify some reliable assessment body whose standards can be trusted.

8. Secondly, and in any event, the BSB should be concerned with *how* that knowledge has been acquired. A proper and thorough academic training in law is not an exercise in learning rules. It involves the development of skills and judgment through rigorous exposure to the process of legal research, analysis, and argument. There is all the difference between a summative assessment which is delivered following a learning process which has exposed a student to rigorous critical thinking about law guided by those who are themselves active scholars, and one which does not follow such a course.

9. That is also highly relevant when considering whether the possession of degree-level qualifications in a subject other than law should be regarded as relevant. At first sight it may seem that it should not: if a person can demonstrate the specifically legal knowledge required to pass modules in the core subjects, that might seem sufficient. In COIC's view, however, that is a false conclusion. Degree-level study develops intellectual maturity, and skills of critical reading, thinking, and argument, which may be highly relevant to the overall assessment of competence, even where the degree was not in law. They are important for effective legal research and analysis, and to developing the self-motivation and self-study skills that equip a barrister to develop professionally once qualified. There is an important difference between doing an intense course of study, such as the GDL, *after* already completing a degree and therefore *with* all the development of intellectual and study skills that come from a degree, and completing it at some other time. UK Degree courses also benefit from robust regulation and external scrutiny.

10. Many people graduate in law each year in the UK. In 2020-21 there were 21,650 UK students accepted to study law, and 4,640 overseas students.[2] If one considers the degree plus GDL route, there are more than 1.7m students studying in all subjects at undergraduate level at UK providers of Higher Education,[3] and in excess of 5,000 places available on the GDL.[4] The total annual number of undergraduate lawyers, and those studying GDLs is therefore far in excess (well more than 10 times) the number of enrolments in Bar Training,[5] which is in turn much greater than the number of those entering registered pupillage.[6] Given these statistics, it is implausible that the current qualification requirements operate as a direct or indirect restriction on the numbers entering the profession, or have any measurable effect on them. The pool of candidates qualified under the existing system is already more than an order of magnitude greater than those entering Bar Training or pupillage. The Consultation provides no evidence to the contrary.

The first proposed key change

11. As COIC understands it, this proposal is framed as being largely about achieving simplicity, with the objective that *all* the substantive requirements for academic legal training should be found in one place, namely the Curriculum and Assessment Strategy.

12. In and of itself, COIC would support a change which makes the key provisions transparently accessible. We would be concerned, however, if this change was regarded as demoting those substantive requirements to a mere matter of "strategy", making them susceptible to frequent alteration, or paving the way for substantial amendments to be introduced without wide, or any, consultation.

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2 Source: https://www.lawsociety.org.uk/career-advice/becoming-a-solicitor/entry-trends, last accessed 20 Feb 2024.

3 Source: https://www.universitiesuk.ac.uk/latest/insights-and-analysis/higher-education-numbers, last accessed 20 Feb 2024.

4 Source: https://www.lawcabs.ac.uk/sites/default/files/2022-05/CAB%20Annual%20Statistical%20Report%202021.pdf, last accessed 20 Feb 2024.

5 Source: https://www.barstandardsboard.org.uk/news-publications/research-and-statistics/statistics-about-the-bar/bar-training.html, last accessed 20 Feb 2024. In 2022-23, there were 2,323 enrolments for Bar Training.

6 Between 500 and 600: https://www.barstandardsboard.org.uk/news-publications/research-and-statistics/statistics-about-the-bar/pupillage.html, last accessed 20 Feb 2024.

13. In other words, wherever the requirements are expressed, it remains important to adhere to the basic principles that:

    13.1. However defined, the requirements should be stable over substantial periods of time, in order to enable prospective barristers to make informed career decisions and to ensure consistency and continuity.

    13.2. However defined, the requirements should not be changed without careful consideration and proper consultation.

14. Although COIC supports transparency, it is doubtful, however, that the proposed change achieves its aim, when considered alongside other proposals. In particular, on the BSB's current proposals, a member of the public, or the profession, or an aspiring barrister will *not* be able to find the relevant requirements in one place. The Curriculum and Assessment Strategy will, instead, leave critical aspects of the requirements for definition in (a) guidance that the BSB will give to AETOs about how to apply that document, (b) the AETOs own policies and practices (which may or may not be accessible, and may vary from AETO to AETO), and (c) the BSB's practice in supervising those AETOs. Taken together, that will be a notably less transparent, consistent or predictable system than the current one.

The second proposed key change

15. COIC notes that the Consultation does not directly invite comments on the second proposed key change, but assumes this is an oversight. It is, in COIC's view, a critical and problematic proposal.

16. The Consultation paper does not clearly set out the actual effect of the proposal. As COIC understands it, the position is as follows:

    16.1. Paragraphs (i) and (ii) track the existing requirements set out in Part 6 of the BSB Handbook (i.e. a Level 6 degree which *itself* demonstrates good knowledge and understanding of the general principles of law and the core subjects, in effect a law degree or joint degree including law *or* a Level 6 degree in a non-law subject together with the GDL). The changes are (a) the removal of any

requirement of a degree of at least lower second-class honours and of rules with respect to the mark achieved in the core subjects, and (b) the removal of a requirement that the degree was completed within a 6-year limit and that the law degree is not "stale" (more than five years old). In our comments, we describe these as the "**changes of detail**".

16.2. Paragraph (iii) introduces a new possibility, namely of a qualification (other than a degree) which is "equivalent" to one awarded at level 6 or above. That introduces the possibility of (a) some qualification akin to a GDL but undertaken without previously obtaining a degree, or (b) some other qualification "equivalent" (by criteria that are not explained) to a level 6 qualification: see paragraph 30 of the Consultation. In our comments we describe this as the "**change in principle**".

The changes in detail: lowering standards

17. So far as the changes of detail are concerned:

17.1. COIC does not support either (a) the removal of the 2:2 requirement or (b) the removal of any requirement that modules corresponding to the core subjects should at least have been passed. That is because we do not understand how a third class degree (nowadays, incredibly rare[7]) or a degree or GDL in which the candidate had *failed* one of the core subjects could reasonably be regarded as demonstrating "*good* knowledge and understanding" of those subjects. We think, therefore, that the rules should continue to require that performance be demonstrated to a "good" standard, and that the existing rules do that, with individual exemption by the BSB available in exceptional circumstances.

17.2. So far as the staleness requirement is concerned, the requirements exist in order to ensure that knowledge is at least somewhat current at the point of entry to the profession. We would be sceptical whether someone who last studied law in, say, 1990 could reasonably be assumed to have "good" current working knowledge to practise safely. In COIC's view, although there is room for debate about the precise limits, some "recency" requirement should

[7] Less than around 5 percent of all degrees awarded.

remain, with the possibility of seeking exemption from the BSB in cases where it can be shown that there are exceptional circumstances (e.g. where a candidate has been working in a legal role since graduation and therefore kept current).

18. COIC notes that the BSB has stated that "*standards … are not being lowered*".[8] But in this respect they incontrovertibly are. As things stand a person who had obtained third class honours and failed modules in contract and criminal law would not meet the academic standard. On the revised criteria, he or she would. That is beyond question a lowering of standards, and a lowering of standards below what could reasonably be regarded as showing "*good knowledge and understanding*".

19. COIC also doubts that the change would operate to improve access significantly. The BSB's data[9] shows that success on the Bar Course is highly correlated to degree performance. Although the BSB believes that a majority of those with 2:2 degrees will ultimately pass the course, the pass rate is far lower than those with firsts and 2:1 degrees, and (obviously) the cohort with 2:2 degrees will include many who narrowly failed to achieve a 2:1. The change would therefore involve lowering standards and, in practical terms, do so by introducing a very small cohort who have poor prospects of obtaining financial support through scholarships or bursaries, or of passing later stages of the course (or, we would expect, of obtaining pupillage and successfully completing the pupillage stage).

The change of principle: "equivalence"

20. The change of principle is more troublesome. It is put forward as a change which would enable (in effect) non-graduate diplomas in law, similar to the GDL, to suffice. It refers to a qualification "equivalent" to a Level 6 qualification. But the proposal sets out no criteria by which such "equivalence" would be judged. Level 6 corresponds to bachelor's degrees and graduate diplomas (which are already covered by the existing qualifications). The Consultation gives only one concrete example of any qualification

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[8] BSB, *FAQs relating to the public consultation on amending the definition of academic legal training* (https://www.barstandardsboard.org.uk/news-publications/consultations/definition-of-academic-legal-training-faqs.html, last accessed 9 Feb 2024) ("FAQ").

[9] BSB, *Bar Training Report* (2023).

currently available which might be "equivalent to" a Level 6 qualification capable of demonstrating the necessary competences, but which would not be such a qualification.

21. The BSB has suggested (in its FAQ) that "*a wide range of qualifications*" might fall within this sub-paragraph, but has given as an example only the Solicitors Qualifying Examination (SQE), which the Consultation (paragraph 22) suggests it is "*obvious*" is such a qualification. For its part, COIC does not regard it as obvious that the SQE (which is normally taken by those who have *already* obtained a Level 6 degree) is equivalent to a Level 6 qualification. Its requirements are determined by the SRA's assessment of "functioning legal knowledge" which is defined (in a circular way) as the level of knowledge required of a newly qualified solicitor. If one compares its assessment criteria to the definition of a level 6 qualification,[10] many elements are lacking. It is no part of the SQE's assessment criteria that it should establish "*a systematic understanding of key aspects of their field of study, including acquisition of coherent and detailed knowledge, at least some of which is at, or informed by, the forefront of defined aspects of a discipline*". It is no part of the SQE's assessment criteria that it should establish, as set out in the level 6 descriptor, "*conceptual understanding that enables the student: - to devise and sustain arguments, and/or to solve problems, using ideas and techniques, some of which are at the forefront of a discipline - to describe and comment upon particular aspects of current research, or equivalent advanced scholarship, in the discipline*".

22. It is troubling that the BSB has asserted, without argument, that the SQE would be equivalent to a Level 6 qualification without engaging in any reasoned explanation of why this is, when it is in fact a quite different qualification, which does not attempt to assess (or require candidates to have followed a course of study designed to produce) many of the elements of a Level 6 qualification. Level 6 is properly understood to include skills acquired incrementally over a three year degree in any subject area (e.g. critical thinking, analysis). Time is required for those skills to develop and part of that learning process is the iterative application of those skills to a range of different subject matters within a degree, with an increasing level of substantive difficulty as the degree progresses.

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[10] QAA, *UK Quality Code for Higher Education—The Frameworks for Higher Education* (2014) 26: https://www.qaa.ac.uk/docs/qaa/quality-code/qualifications-frameworks.pdf, last accessed 20 Feb 2024.

23. We consider that this change fails crucial tests of regulatory soundness:

    23.1. It is not *transparent*. Within degree awarding bodies, there is a clear understanding of the requirements for level 6 qualifications. The BSB, candidates, employers and AETOs, and the public can safely rely on decisions taken by regulated degree-awarding institutions about the classification of qualifications they award. But there are no reliable standards by which "equivalence" to such qualifications could be assessed, so that those stakeholders would have no ability to predict what qualifications would or would not be covered.

    23.2. It is not *accountable*, because it gives no detailed guidance on *how* particular qualifications would (or would not) be treated as "equivalent" to a qualification awarded at Level 6 or above of the Framework for Higher Education Qualifications.

    23.3. It will not produce *consistency* because, in the absence of clearly defined criteria for equivalence (coupled with the BSB's further proposals for how equivalence will be assessed) it will not operate consistently in practice.

    23.4. It risks lowering standards. There is in COIC's view significant merit in the *combination* of a degree with a post-graduate diploma. The degree, even though it is not a degree in law, does not simply serve as a redundant prequel to the GDL. The assurance that the prospective barrister will, during a degree, have been exposed to and trained in the elements of scholarly practice, evidence-based argument, intellectual discipline, and critical thinking that are inherent in a degree—and the maturity that it produces—is an essential part of the whole "package", which cannot safely be dispensed with.

24. The starting point in this area should be that access to higher education is widely available. It represents an established and carefully regulated system for providing precisely the sort of academic training that the public interest requires, and precisely the sort of assessment that the professional statement requires.

25. There will, of course, be some people who are intellectually capable of achieving the necessary standards but who have not obtained a degree. If the BSB had in fact proposed, or was in a position to propose, a well-defined range of qualifications which

could truly be relied on to demonstrate the equivalent standard of academic legal training, COIC might well be sympathetic to that. But if that is to be done, it should be done transparently and directly, by reference to *particular* qualifications, where the BSB can satisfy itself (and demonstrate to the public, to candidates, and the profession) that *that* qualification is equivalent. The proposal does no such thing. It signs a blank cheque, based on unspecified measures of equivalence. It contains nothing to require the qualification-awarding body to be regulated, quality-assured, or accountable. It is opaque, unaccountable, and highly likely to produce inconsistency.

26. To cater for the occasional rare case of someone who is clearly able to demonstrate competence without meeting the established criteria, and has a good reason for doing so, the BSB will retain its existing exemption power. That is likely to be necessary under any system. But COIC sees no evidence-based reason, given how wide access to higher education is, to think that the existing criteria are fundamentally in need of widening.

The third proposed key change

27. The third proposed key change relates to how competence should be assessed, and the proposal that this assessment should be carried out by AETOs in accordance with guidance that the BSB would develop, but in relation to which the consultation proposals are silent, save as to key provisions.

28. In COIC's view, the proposals in this respect, and the BSB's public comments about them, are problematic. There are two fundamental difficulties.

29. First, the BSB appears to be confused about the relationship between *admission by an AETO* and *qualification required to practise.* AETOs are, of course, responsible for their own admissions processes and may, therefore, apply higher standards than the BSB requires. But this is quite distinct from authorisation to practise. The FAQ states that the guidance for AETOs will "*enable them to admit only those who have achieved the threshold standard for entry and therefore have the potential to pass the course*". But meeting academic standards has nothing to do with passing or failing an AETO's *course*: it is a requirement for authorisation to practice. A candidate might be able to "pass the course", but lack the necessary academic legal knowledge to commence practice. These two points must be kept distinct.

30. What the BSB is proposing to do is to delegate to AETOs, under its supervision and guidance, decisions about whether individuals meet one of the essential requirements for practice, even though the requirement in question is *not* related to any of the training that the AETO is to provide itself.

31. Secondly, the Consultation appears confused about the difference between *qualifications* and *evidence of competence*. Even if amended as proposed under Key Proposal 2, the Curriculum and Assessment Strategy will require that academic knowledge should be *demonstrated by* (a) a degree or (b) a degree and a GDL or (c) a "*qualification*" equivalent to one awarded at Level 6. If that is right, the sole question is whether the *qualification* demonstrates that. There can be no question, on that definition, of the necessary competence being demonstrated by anything *other than a qualification*. In other words, what is being assessed is not whether a "holistic" view of an individual's qualification and other experience or training demonstrates competence, but whether a *qualification* that the individual possesses does so.

32. That is, in COIC's view, conceptually correct. The point of a "qualifications route" to authorisation is to specify a set of qualifications that can reliably (in themselves) assure that the competence has been reached. A person who does not possess those qualifications at an appropriate standard *might* be capable of authorisation, either by another route (such as transferring from another legal profession, or from a non-English profession), or by individual exemption. But not by virtue of his or her "qualifications".

33. That line of thought seems to be followed in the first, second, and fourth bullet points in paragraph 33 of the Consultation. However, the third and final bullet point of that paragraph, the contents of paragraph 31, and the terms of the FAQ suggest something different. The third and final bullet points suggests the ability to take a "*holistic view of [someone's] training, experience and academic record*". The FAQ says that it is "*highly unlikely that work experience alone would suffice to meet this requirement*". This is confused. If what is being assessed is the equivalence of a *qualification* with a Level 6 award, there can be *no question* that work experience would suffice. It cannot even be relevant. By no stretch of the imagination would work experience ever be a "qualification"; nor can what the *qualification* evidences or demonstrates be affected by any training or work experience which is not the subject of the qualification.

34. It therefore appears unclear whether the BSB is proposing (a) revision to the range of qualifications by which academic legal competence may be demonstrated or (b) routes

other than qualification or *in addition to qualification* by which a (deficient) qualification may be supplemented by other information to arrive at a holistic judgment of competence. Those are quite different things: the second of them is not about assessing qualifications, but about providing exemption from them.

35. Moreover, COIC does not understand the relationship (or intended relationship) between bullet point 1 and bullet point 2 in paragraph 33. Bullet point 1 indicates that AETOs will "*assess whether the qualification … evidences that they have successfully completed academic legal training.*" Bullet point 2 indicates that AETOs will "*assess whether the level of degree or qualification put forward … evidence that they have successfully completed academic legal training*". These two requirements, however, are supposed to be identical. It is confusing to find what appears to be the same question put forward twice (as two of the five key principles).

36. AETOs are subject to a variety of pressures, including commercial pressures, which cannot be overlooked. They may have strong financial incentives to maximise admission. They have no statutory status as regulators of the profession. The proposal for delegating responsibility for assessing whether prior qualifications are equivalent and sufficient, if it could operate successfully at all, could only operate if guidance was clear, transparent, and consistently and effectively supervised. The difficulty in understanding even the "*key*" provisions identified as necessary in the Consultation, and their inconsistency with the proposed terms of the Curriculum and Assessment Strategy, give no assurance that this will be so.

37. In any event, COIC considers that on this occasion the basic regulatory pattern is unjustifiable. In its view, whether a qualification meets a basic and essential regulatory norm is not a matter that should be delegated to AETOs. AETOs could, subject to supervision, be relied on to verify that candidates in fact possess unambiguously specified qualifications. But any assessment of (a) the equivalence of qualifications or (b) whether a case-specific exemption should be permitted in an individual case for (e.g. a stale qualification or a "narrow miss" in one or two specific subjects where there are mitigating features or subsequent compensating experience) must raise a regulatory assessment for which the BSB should itself be accountable. The system proposed lacks accountability and transparency.

38. That lack of accountability and transparency may well have adverse impacts on individuals. The most obvious risk is that AETOs—which have a financial incentive to

maximise intake—will allow standards to fall. Even if that is identified by supervisory action, that action will not be able to correct errors retrospectively. By the time the problem is identified an unknown number of inadequately qualified people will in fact have achieved qualification. That is not in the public interest. A secondary risk is that if AETO standards are inconsistent (as they almost inevitably will be), actual or perceived low standards will cast a shadow over those trained in those institutions, and disadvantage them in the competitive market for pupillages, tenancies, and employment. In short, the reliable maintenance of consistent standards operates in this respect very decisively in the public interest, and the proposal puts that at risk.

The fourth proposed key change

39. COIC neither opposes nor supports the fourth proposed key change. The consultation gives no evidence about the burden on the BSB of performing its current role. It is to be expected that in most cases it is largely routine. The assessment clearly has value: on the BSB's own assessment around 10 percent of the applications are currently refused, which shows that it is operating as a necessary filter in a not insignificant number of cases.

40. There is a difference between this and the proposal to allow AETOs a general power to assess the equivalence of qualifications that attest legal competence. In relation to GDLs the assessment to be made relates only to the pre-law elements of the qualification which, although important, are not so directly related to the professional statement's requirements. COIC can see that it might make sense to delegate decisions about prior academic experience to institutions offering the GDL, provided they are properly regulated Higher Education institutions and the BSB provides adequate guidance and supervision, so that existing standards are fully maintained.

Possible benefits

41. **Paragraph 41(i).** COIC does not see "modernisation" as a benefit of the proposal. The existing rules are already aligned with modern standards relating to awards in Higher Education. Nor does the Consultation identify any respect in which the proposal aligns the BSB more closely with that of other legal professional regulators. The SRA has taken a fundamentally different approach. In any case, regulation for the Bar needs to take into account the distinctive features of Bar training and practice.

42. **Paragraph 41(ii).** COIC sees a marginal improvement in flexibility, but at the price of increased risk to the public interest and in particular the interest of consumers. The BSB recognises that the majority (it will almost certainly be the vast majority) of prospective barristers who can achieve the standards required for qualification will continue to proceed by the existing routes. The Consultation does not identify any significant group of applicants who are currently unable to qualify. The only respects in which flexibility will be increased are: (a) permitting those who have failed to obtain a lower second-class degree or failed one or more of the core subject to qualify, (b) permitting those who have stale qualifications and whose knowledge is therefore not up-to-date to qualify and (c) enabling the use of unspecified and unidentified routes "equivalent to" Level 6 qualifications. The first two changes will unquestionably reduce standards. The last change risks doing so, depending on how rigorous the assessment is. The first two changes are likely to have a very minimal positive effect in any event, since those affected could already apply for exemption.

43. **Paragraph 41(iii).** The proposed benefit of "reflecting the various routes to qualification now open" is not understood. The proposed changes do not "reflect the various routes to qualification now open": they change them.

44. **Paragraph 41(iv) and (v).** COIC sees some modest advantage in tidying up the BSB's various documents to bring together all the relevant requirements in one place. Unfortunately, the proposals will not achieve that. Anyone wishing to understand the practical effect of regulation will still need to consult: (a) the Handbook, (b) the Curriculum and Assessment Strategy, (c) the BSB's guidance to AETO's on how to apply that, (d) the individual policies and guidance that AETOs will adopt and apply (which may vary, and may not be easily accessible), and (e) any reports of supervision of AETOs' application of that guidance (if the BSB chooses to publish them, which so far as COIC understands it currently does not[11]). The overall picture is likely to be less clear and less transparent, not more.

45. **Paragraph 41(vi).** The proposal does not concern "admissions decisions", but qualification decisions. COIC does not see "empowering" AETOs to take decisions as in itself a benefit. Whether AETOs, or the BSB, or some other decision-maker should take the decision is a matter of regulatory judgment, but the "empowering" of AETOs is not

[11] Limited and non-specific information is available in the BSB's Annual Reports on Bar Training.

itself of any public benefit. Because of their incentives, it also carries risk in a key area central to the public interest and the interests of consumers.

46. **Paragraph 41(vii).** The proposal does not concern "admissions decisions", but qualification decisions. COIC sees no evidence in the Consultation that AETO's are "best able" to take decisions on the equivalence of qualifications, particularly qualifications that they have not themselves awarded. On the contrary, in the interests of consistency, COIC thinks that the BSB is better placed than AETOs to take such decisions.

47. **Paragraph 41(viii).** The two positions are not equivalent, so that consistency is not necessarily to be expected. Where a candidate establishes competence through the GDL it is the *combination* of the GDL and the previous degree that establish competence, so that it is understandable and correct that the BSB should concern itself with the underlying degree not as a prerequisite for *admission* to the GDL, but as one component part of the overall qualification.

Equality impacts

48. In COIC's view, any positive equality impacts of the proposal are likely to be modest, and in fact may not actually be positive:

    48.1. The number of those with degrees below the lower second-class is very small. Their prospects of obtaining admission to a high-quality AETO and pupillage will be tiny. This change would undoubtedly involve the admission of less well-qualified applicants to practice (unless it is said that degree classification by regulated Higher Education institutions is not objectively justified—a proposition for which there is no evidence provided in the Consultation). The reported disparity in degree performance in outcome at Higher Education institutions is a matter that should primarily be addressed by Higher Education institutions and their regulators, and it would be wrong in principle to admit to the Bar people whose academic track record does not demonstrate competence.

    48.2. The suggestion that the proposal would benefit graduates from overseas is not supported by evidence. Such graduates will nearly always require training in

English law if they are to meet the standards of the Professional Statement, and therefore be likely to proceed through the GDL route. If there were evidence that the requirement for a certificate of academic standing constituted an unfair obstacle, there would be cause for concern. But the Consultation does not suggest that it does; it is administered (presumably fairly and appropriately) by the BSB, and apparently granted in most cases. Delegating that decision to GDL institutions should make no difference, unless the current standards are inappropriate.

48.3. The removal of any requirement that degrees should be "current" *might* help gender equality. But since those affected can already apply for exemption, it already lies within the BSB's power to address any issue in that regard. The abolition of any such requirement would pose risks to the public interest; there can be little assurance that knowledge and understanding of the legal system demonstrated perhaps many decades ago remains current and effective when a barrister enters practice.

48.4. The removal of the requirement for a certificate of academic standing seems not to have "only a positive impact". It should, if it simply involves (as it is said to) the application of the *same* standard by a different decision-maker, have no impact at all.

49. In COIC's view, the negative equality impacts canvassed by the Consultation are mostly not equality impacts at all, or not impacts of the proposal:

49.1. The proposal does not dictate (and should not) what standards AETOs apply for admission. In so far as any assumption is made that lowering admissions standards equates to a positive equality impact, the Consultation makes no case for that, and it rests on no justifiable evidence. A properly designed admissions process focused on attaining high but objectively justifiable standards when coupled with suitable outreach and selection procedures may have a positive equality impact.

49.2. The mitigation of poor decision-making by AETOs is indeed a major challenge of the proposal, but not one which COIC sees as having equality impacts as such.

50. In COIC's view the largest risk to equality lies in the perception that standards are not consistent. Consistent standards represent clear objective criteria which can be used by chambers and employers in taking pupillage decisions. Where they are perceived as reliable, they represent a safeguard against the operation of unconscious bias, and facilitate fair and equitable recruitment. The dilution of standards, or inconsistency of standards undermines overall confidence in the system and does not operate in support of fair and objective outcomes.

51. It is fundamentally wrong to approach requirements for higher education qualifications as obstacles to equality. Many people, from all backgrounds, devote great effort to obtaining such qualifications. They rightly value the objective measure of their achievement. The higher education sector is alert to the importance of equality, and heavily regulated in relation to it. AETOs are (as they should be) also alert to it when taking admissions decisions. The imposition of modest, widely achievable higher education requirements, which are amply justified by the public interest in ensuring that barristers can effectively represent their clients, is not a disguised form of discrimination. In this area, clear objective standards consistently and transparently applied operate in everyone's interests.

Answers to consultation questions

Question 1

Do you agree with our proposals for changing the definition of academic legal education as described above in the first key change?

52. No. COIC is indifferent as to whether the requirements are presented in the Bar Handbook or the Curriculum and Assessment Strategy, so long as they are reasonably stable and not subject to frequent change or change without consultation. But the proposal does not in fact, as framed, achieve that objective. It will produce a less transparent approach which will not be fully stated in a single document.

Question 2

Do you agree with our proposal to remove Part 2 of the Bar Qualification Manual?

53. No. COIC considers that the BSB should retain, and not delegate to AETOs, any decision regarding the *equivalence* of qualifications, or exemption from qualifications requirement. Those are key regulatory decisions.

54. In so far as this Question seeks comments on the revised definition in the Curriculum and Assessments Strategy, COIC disagrees with that proposal too. There is no justification for (a) removing requirements for a 2:2 and pass marks in core subjects before regarding a candidate as having demonstrated "good" legal knowledge and understanding, (b) removing requirements that legal qualifications should demonstrate reasonably current knowledge and understanding or (c) generally permitting unspecified qualifications to be regarded as "equivalent" to a Level 6 qualification. Those are all matters which might be the subject of specific exemption decisions in appropriate individual cases, but there is no justification for a general removal of the requirements, which remain necessary.

Question 3

Do you agree with our proposal that Authorised Education and Training Organisations make admissions decisions based on the revised definition of academic legal training and in accordance with our guidance?

55. No. COIC fundamentally disagrees with the characterisation of these decisions as "admissions decisions": they are decisions about qualification. They cannot appropriately be delegated to be taken by AETOs subject to supervision, or allowed to become "holistic" decisions in individual cases by AETOs. The BSB should continue to specify, with precision, the qualification requirements that must be met.

Question 4

Do you agree with our proposal to no longer require Certificates of Academic Standing?

56. COIC neither agrees nor disagrees with this proposal.

Question 5

Are there any potential equality impacts that you think we have not considered.

57. Yes. The inconsistency, lack of transparency, and removal of clear objective standards that the proposal involves is likely to have an overall adverse impact on equality. Consistent, transparent standards represent a safeguard against the operation of unconscious bias, and facilitate fair and equitable recruitment.

Question 6

Is there anything else you would like to comment on in relation to these proposals?

58. We have commented on each of the proposals above. In COIC's view:

58.1. It remains essential, in the public interest, for the BSB to specify with precision the qualification requirements needed to demonstrate the good knowledge and understanding that the professional statement rightly requires.

58.2. Those standards should continue to require (a) graduate-level competence to at least an overall 2:2 standard and pass-level performance in all core subjects at undergraduate degree or GDL which (b) is reasonably recent in order to demonstrate current knowledge and understanding.

58.3. Whether a given individual possesses a qualification that meets those standards should be clearly defined in objective terms which leave no room for discretionary or "holistic" assessment. Exemption should always be a matter for the BSB, not AETOs.

58.4. Regulatory decisions in this respect (which are about qualification, not admission) should not be delegated to AETOs.

58.5. Consistent and transparently clear standards better serve the public interest and the interests of consumers. They also better serve the interests of equality.

Annex A: Working Group Members

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