



THE BAR STANDARDS BOARD'S (BSB) "OUR PROPOSED STRATEGY FOR THE NEXT THREE YEARS" CONSULTATION PAPER

Response: January 2022

A response from the Bar Association for Commerce Finance and
Industry

INTRODUCTION

Founded in 1965, the Bar Association for Commerce, Finance and Industry (“BACFI”) represents the interests of Employed Barristers, both practising and non-practising, working in commerce, finance and industry. BACFI’s members include barristers employed in commercial organisations and law firms, employed by the government legal services, and those working through their own consultancy practices.

BACFI is keen to play its part as a representative organisation in helping shape the development of the Bar of England and Wales, by bringing forward the views of its members. BACFI actively supports the objective of an independent and high-quality Bar, accessible to all.

GENERAL REMARKS

BACFI welcomes the opportunity to comment on the Bar Standards Board’s (BSB) “Our proposed strategy for the next three years” consultation paper and appreciate the on-going engagement that BACFI has with the BSB.

In summary, BACFI feels that the failure of the strategic plan to reference or acknowledge the existence of the Employed Bar is a serious omission. There are several key issues that flow from this omission that have a direct bearing on the BSB’s ability to fulfil its statutory objectives as well as the fundamental risks and opportunities noted in the strategic plan.

BACFI, on behalf of the Employed Bar as a whole, has worked hard to highlight the role that the Employed Bar already plays in supporting many of the BSB’s statutory regulatory objectives, in particular “supporting the constitutional principle of the rule of law”, “promoting competition in the provision of services”, “encouraging an independent, strong, diverse and effective legal profession”; and “promoting and maintaining adherence to the professional principles”. Employed Barristers within commercial organisations ensure their organisations’ lawful and ethical behaviour, however it must be recognised that Employed Barristers are also significant purchasers of legal services and therefore also have a key interest in the BSB’s objective regarding “improving access to justice”. More attention must be given to, and more weight placed upon, the importance of the roles and activities of Employed Barristers in connection with the BSB’s key objectives.

BACFI broadly agrees with the Risks and Opportunities noted however the strategic plan fails to recognise the risks associated with the continued alienation of the Employed Bar and the consequential risk of an overall reduction in individuals choosing to practise at the Bar, Employed or otherwise (for example due to lack of career progression for members of the Employed Bar and therefore lack of any feasible entry level for junior barristers that fail to obtain pupillage with the solicitors route being more attractive) and a failure to access potential solutions to some of the risks identified (for example sustainability and resilience in the form of Employed Bar pupillages).

On the issue of **pupillage**: The shortage of pupillages does not protect and promote the public interest. It is only defensible if it can be shown that every effort has been made to increase their numbers. This includes exertions to find pupillages outside of the Self-Employed Bar. More pupillages must be enabled. The efficacious way to do this is to reform the AETO accreditation process so it may be navigated more simply and quickly, especially by the legal departments of private commercial corporations unfamiliar with it. Anecdotally, as things stand, busy employed lawyers considering taking on those starting out in the law prefer to train solicitors rather than barristers as it is not worth their time to battle through to AETOs accreditation. The organisations that may employ barristers in their legal departments (where the distinction between barrister

and solicitor hardly counts in respect of the work that is done) have the capacity to deliver a significant increase in pupillage capacity.

On the issue of **career progression/recognition**, the QCA can and should change its rules to enable senior practising barristers to be appointed QC who have distinguished themselves whether in a non-litigious context or in contentious matters but have not acted as oral advocates in courts. The requirement that only candidates who perform advocacy in the higher courts, arbitrations or in tribunals should be eligible for consideration for appointment is wholly outdated and not in the public interest. Further, where the system is reformed it is likely to have a tangential benefit of improving the diversity of those appointed to be QCs, albeit that this does not diminish the serious challenges relating to diversity and QC appointments that exist in the present system and that must be addressed. The current system of QC appointments does not adequately promote competition in the provision of legal services as a result of the focus on court appearances and referees. For the same reason there is potential for the public interest objective to be in jeopardy as advocates focus as much on their potential career progression as the right outcome for the client. This is a clear risk to fulfilment of the BSB's regulatory objectives. In the fulfilment of the same objective, the numbers of Employed Barristers appointed as recorders and full-time judges must be addressed. The Employed Bar embraces meritocratic appointment to both the rank of QC and the judiciary from as wide a pool of potential applicants as possible as being in the public interest and likely to lead to the highest calibre candidates being appointed. Professional recognition of senior Employed Barristers would incentivise both them and their employer to devote time, resource, and effort to take on pupils.

On the issue of **diversity**, it must be noted that women and ethnically diverse barristers are significantly better represented at the Employed Bar than they are at the Self-Employed Bar. BSB Research and Report Income at the Bar by Gender and Ethnicity, 3.10 "Both female and BAME barristers are over-represented at the Employed Bar compared to the profession as a whole." The Employed Bar has much to offer and there is a risk to the profession overall if it is ignored as an enabler. Figures released by the Bar Council demonstrate the impact of the pandemic on Self-Employed Barristers, particularly those in publicly-funded practise, and suggests there will be a significant contraction of the Self-Employed Bar with the consequences that a higher percentage of the practising Bar will be employed in future.

BACFI, on behalf of the Employed Bar, has been, and continues to be, engaged with the BSB on a number of these fundamental issues which cut across several of the BSB's strategic plan, risks, and objectives, and is disappointed that the strategic plan is not drafted in a way that is fully inclusive of, and provides recognition of, the Employed Bar, its structure, membership, or strengths. In being drafted as it is, the strategic plan itself falls foul of the very risk that the plan itself highlights – "the continuing need to improve the culture at the Bar, tackling discriminatory practise in all its forms and ensuring a supportive environment for all barristers and pupils."

Finally, in line with our comments regarding the "Consultation on THE BAR COUNCIL's 2022/23 Budget and Practising Certificate Fees (PCF) PROPOSAL" we do not think that the strategic plan provides sufficient detail to underpin the significant BSB recruitment and associated costs proposal.

1. WITH REFERENCE TO OUR REGULATORY OBJECTIVES DO YOU AGREE THAT THESE ARE THE MAIN RISKS AND OPPORTUNITIES FACING BARRISTERS AND THE MARKET FOR BARRISTERS' SERVICES: IS THERE ANYTHING YOU WOULD ADD OR OMIT?

Whilst BACFI broadly agrees with the risk and opportunities set out, it does not agree that they provide sufficient recognition of the risks associated with failing to address the current unnecessary separation of pupillage provision and career recognition for the Self Employed and Employed Bar. See narrative above.

2. DO YOU AGREE WITH THIS VISION FOR THE BSB AND THE BAR: IS THERE ANYTHING YOU WOULD ADD OR OMIT?

Critically, the Vision is almost entirely focussed on the Self-Employed Bar. We do not support this Vision and would propose the BSB seek a more inclusive statement that embraces the Bar as a whole.

3. DO YOU AGREE THAT THESE SHOULD BE THE BSB'S PRIORITIES: IS THERE ANYTHING YOU WOULD ADD OR OMIT AND HOW WOULD YOU RANK THESE PRIORITIES?

BACFI does not agree that the priorities adequately connect to the risks identified. Again, the priorities are focussed on the Self-Employed Bar, with particular reference to the urgent need to address the pupillage needs (pursuant to the main areas of challenge "A Bar for the Future" and "Skills and Training"), the need to "[Promote] a Fairer and more Inclusive Bar" and "A Bar for the Future". The priority to "[ensure] that new barristers join the profession in sufficient numbers to meet the future demand.....and that new recruits are drawn from diverse backgrounds" is weak in the context of both of these identified risks and needs to be strengthened with actual action items.

4. DO YOU AGREE THAT THESE ARE THE KEY AREAS WHERE THE BSB NEEDS TO DEVELOP AS AN ORGANISATION?

See narrative above.

5. ARE THERE ANY PARTICULAR AREAS ON WHICH WE MIGHT COLLABORATE WITH YOU, OR WITH OTHERS, TO FURTHER THE PRIORITIES SET OUT ABOVE?

As noted above, BACFI is already engaged on the issue of pupillage (and other discrete issues) and would welcome further engagement around the subject of career recognition for the Employed Bar as a priority in the context of both "Promoting a Fairer and more Inclusive Bar" and "A Bar for the Future".

6. HAVE YOU IDENTIFIED ANY RISKS OR OPPORTUNITIES IN RELATION TO PROMOTING EQUALITY, DIVERSITY AND INCLUSION FOR THE PROFESSION OR THE PUBLIC?

See narrative above. On the issue of diversity, there are significant opportunities for the Self-Employed Bar to collaborate with the Employed Bar and emulate current good practice in this regard. On the issue of inclusivity, much more work needs to be done by the regulatory bodies and the Inns to ensure that the Employed Bar is recognised as "equal" in terms of worth and recognition to the Self-Employed Bar.

FURTHER CONSULTATION AND CONTINUED ENGAGEMENT

BACFI is grateful to the BSB for the opportunity to respond to this consultation and looks forward to continued engagement in the future.

Bar Association for Commerce Finance and Industry

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