

Response to 'Future Bar Training' Consultation

By Dr Steven Vaughan
Birmingham Law School

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For more information on this Working Paper Series, please contact:

Dr Steven Vaughan, CEPLER Director of Education: s.vaughan@bham.ac.uk

or Lesley Griffiths, CEPLER Senior Administrator - l.griffiths.1@bham.ac.uk

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Dr Steven Vaughan, Law School, University of Birmingham

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I am a Senior Lecturer in the Law School, University of Birmingham and Director of Education in its Centre for Professional Legal Education and Research. I began my life as a solicitor in the City of London, spending almost a decade in practice advising clients on complex cross border mergers and financings. I have sat on the Education Committee of the Solicitors Regulation Authority since 2011, was a Panel Member on the Legal Education and Training Review Steering Panel and acted as the final Chair of the Joint Academic Stage Board. My research is primarily concerned with the legal profession: with how it is regulated, with its various actors, with the educational provisions for would-be and qualified lawyers, and with specific questions of diversity and inclusion. This response is made in my personal capacity and does not necessarily reflect the opinions of my employer, or any other body with whom I have an affiliation. I am happy for it to be made public, and to be attributed to me.

Below, I have set out my responses to Parts 1 and 4 of your consultation.

Part 1: The Academic stage

QA1: Does possession of a lower second class degree provide good evidence that an individual possesses the intellectual abilities that are consistent with those described in the draft Professional Statement (paragraph 63 above)?

Requiring an upper second class degree is based on three false assumptions. The first is that all degrees are comparable, in that QAA review and/or internal QA processes by universities are sufficient to ensure that a degree at X level from X university is equivalent to degree at Y level from Y university. A report published by HEPI found that it was “neither feasible nor desirable” to try to compare the outcomes of all degrees in today's diverse higher education system.”¹ Institutional level review (QAA etc) and subject level review (a system of external examiners for law, appointed and used ad hoc by each university) does not guarantee equivalence.

The second false assumption is that all degrees (law and non-law) will assess the intellectual abilities in which you are interested in the same way. Where is the evidence that, for example, “effective research skills” are taught in comparable ways in Maths degrees as in Law degrees? Are you sure that subject level learning outcomes, and marking criteria are the same (such that “analysis” in subject X is understood and assessed similarly to “analysis” in subject Y)?

¹ <http://www.hepi.ac.uk/wp-content/uploads/2014/02/47-Comparability-of-degree-standards.pdf>

Third, and relatedly, the consultation notes that students with upper second class degrees may have had some marks at lower second level. This is true. What is also true, but not acknowledged, is that universities (and Schools/Colleges within those universities) differ significantly when it comes to the calculation of overall awards (i.e. what combination of what marks at what level gives someone an overall upper second, lower second etc).

I also take issue with the lack of evidence set out in relation to this statement in para 71: “we believe that there is a significantly lower risk that an individual with an upper second-class degree would not possess the relevant intellectual abilities than that an individual with a lower second-class degree would not possess them.”

You rightly acknowledge, in paras 74-76, the “attainment gap” in relation to BAME students. What these paragraphs do not acknowledge, however, is that the gap is significantly different depending on the particular university and the particular subject.² I am not convinced that the statement in para 76 is sufficiently clear to allow for how you will avoid this attainment gap imposing a material discriminatory burden on BAME students should an upper second class degree be required. Save for disability, no other protected characteristics are mentioned. How comfortable are you as to the equality and diversity implications of this proposed course of action? Giving, as you note, the increasing number of upper seconds over time, all this requirement may do is serve to exclude (even more) BAME entrants from the Bar.

In addition, the following points are relevant to this part of the consultation:

- Para 63 – sub-para 2.4: if this is to form part of a statement of what might be expected at the vocational stage, how will this be assessed/how will you be certain that students meet this standard?
- Para 63 – sub-para 4.1: in my research on corporate finance solicitors,³ I found that the principle of “independence” was poorly understood by those in practice. Given this, is it appropriate to use it here? What does “independence” mean?
- Para 6.3 – sub-para 4.3: What impacts does this have for allowing students to re-submit work/to re-sit assessments?
- In para 61, you say: “These arrangements tend to give prominence to the acquisition of knowledge, rather than understanding of principles and concepts and the development of transferable intellectual and legal skills.” As far as I am aware, little work has been undertaken in relation to threshold concepts in law. Given this, how comfortable are you in setting out the “principles and concepts” (para 63) which might form the basis of a qualifying law degree?

QA2a: If an individual does not hold a degree, or the degree that they hold was not passed at the required level, are there alternative means by which these abilities can be demonstrated?

QA2b: If so, how?

See response to QA7 below.

² https://www.heacademy.ac.uk/sites/default/files/bme_summit_final_report.pdf

³ To be made public by the SRA by the end of October 2015.

QA3: Are there any other issues in relation to intellectual abilities and degree classification, as set out above in paragraphs 65 to 77, which we have failed to identify?

Mention has not been made of the market for pupils, and (i) the knowledge, skills and behaviour that chambers seek from their would-be entrants; and (ii) how those matters are assessed by chambers/which proxies chambers use in relation to those matters.

It is striking, given the findings of LETR, that “ethics” is not mentioned in the consultation document until The Vocational Stage part of the document.

QA4: Do you agree that “knowledge and understanding of the basic concepts and principles of public and private law within an institutional, social, theoretical and transnational context” provides an essential foundation for the legal knowledge and understanding that our [draft] Professional Statement requires? Please tell us why or why not.

As an aspirational statement of what one might want a law student to study, this approach has some merit. However, I am concerned about specificity and about quality assurance. Para 83 provides that, “Instead of the current requirement to cover a specified list of “foundation subjects”, the requirement would be as set out in paragraphs 82 and 83.” Paras 82 and 83 are wide and vague and subject to various degrees of interpretation. Does para 83 mean that the BSB will not engage in any form of quality assurance of the academic stage? I am not convinced the BSB has the resources to undertake such QA, but a firm response one way or the other would be useful. This links to comments below in relation to regulatory approach (QA5). In addition, para 83 (“...the requirement *would be...*”) seems at odds with the range of options discussed in QA5.

As a former Lecturer at Cardiff Law School, I was pleased to see the reference to “and Welsh law” (para 81). Where is this reflected as regards what you expect students to study?

QA5: Assuming you agree with the formulation in paragraph 83, which of the above ways (a to e) do you think we should use to make sure that those seeking to be barristers and completing the academic stage have sufficient legal knowledge and understanding to progress towards full qualification as a barrister? Please explain the reason why you have chosen these.

The tone of the consultation in relation to the academic stage seems to be in favour of liberalisation. I would agree, subject to concerns about about quality assurance.

- Option A gives the regulator some certainty as to content, but not as to assessment and not as to reliability as to approach between institutions. If the BSB is not to engage in QA itself, this option seems inappropriate.
- Option B assumes that ‘time spent’ is a magic bullet. If I spend all of Semester 1 in my first year studying Contract Law (and nothing else), is this any indication (at all) that I will have any knowledge of Contract Law by the end of my final year?
- Option C seems to go against the tenor of the approach outlined in the consultation, but gives law schools at least some form of guide.
- Option D would be preferable, save for the use of the word “appropriate”. “Indicative” might be better. The risk, however, is that the regulator may need to take on faith that law schools are compliant with the guidance. How will this risk be managed?

- Option E is based on too many assumptions. For example, there is no necessary overlap between the approach put forward in this consultation as to content and the approach taken in the recent review of the QAA Benchmark Statement for Law.⁴

QA6: Would your answer be different if a student had taken a non-law degree plus a GDL?

The “dead hand” of the GDL has its own set of problems that have not been addressed in this consultation.

QA7: Are there any other ways of doing this that we have not identified?

Yes. Given concerns outlined in the consultation as to quality and competence, you might have a system whereby the BSB is not concerned with the academic stage at all and, instead, requires an expanded form of BCAT.

QA8: Are there any other issues associated with the academic stage of training that we have not identified and to which, given our role as a regulator of barristers, we should be turning our minds?

There has been no reference to the work done as part of ‘Training for Tomorrow’ by the Solicitors Regulation Authority.⁵ It would be useful for the BSB to set out why it has taken a different view to the SRA, and to set out how it will ensure that would-be entrants to the Bar have clarity on their qualification pathways. If, as may occur, we are moving to a system where the BSB will exercise some regulatory oversight of the academic stage but the SRA will not, then this should be made clear as soon as possible.

It would also be useful for some further statements to be made about likely transitional arrangements (para 169). This is particularly important for part time students.

Part 4: Publication of key statistics

Q11: Do you agree that the BSB has this responsibility? If not, why not?

I am confused by the question. Is such (or, at least, some part of this) data not also required via The Equality Act 2010 and statutory guidance issued by the Legal Services Board? Equally, I would argue that the regulatory objectives outlined in the Legal Services Act 2007 militate towards the publication of key data about the Bar.

I have spent this summer looking at diversity reporting by the BSB and by 180 chambers. The following is taken from the travelling draft of the paper I am working on. My conclusion is that diversity reporting by the BSB is ad hoc and concerning.

“On its website, the BSB has a webpage titled ‘Statistics’ which contains data for “the life cycle of the Bar - from entry to Queen's Counsel”.⁶ For practising barristers, there is data on

⁴ See: <http://www.qaa.ac.uk/en/Publications/Documents/SBS-consultation-Law-15.pdf>

⁵ <http://www.sra.org.uk/sra/policy/training-for-tomorrow.page>

⁶ <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/>

age, ethnicity and gender from 2010-2014.⁷ The same spread of data exists for Queen's Counsel,⁸ and for pupil barristers.⁹ Raw data is given and the BSB does not provide any percentages, which leaves the reader obliged to calculate overall numbers and then relative proportions for each part of the "life cycle" and each protected characteristic that is reported on. The numbers which follow are taken from those webpages. Male pupil barristers continue to outnumber female pupils (55% to 45%). Whereas, with the solicitors' branch of the profession there is almost parity in gender (until partner level), this is not true at the Bar. Since 2010, the proportion of female practising barristers has remained almost static. In 2014, 35.4% of practising barristers were female, but only 13.3% of Queen's Counsel are not male. 15.7% of pupils, 12.7% of practising barristers, and 6.7% of Queen's Counsel are reported as BAME but, unlike the Law Society,¹⁰ the BSB does not break this data down further (Black African, Chinese etc). It is unclear why the 'Statistics' page does not also report on disability, as data has been collected on this characteristic by the Bar for some time.¹¹

The BSB has produced 'Bar Barometer Reports' in 2011, 2012, and 2014.¹² The 2014 Barometer reports on a (slightly) wider spread of protected characteristics than reported on via the 'Statistics' webpage. In the Introduction to the June 2014 Barometer, the BSB comments that, "In line with changes in legislation, information relating to the majority of the protected characteristics is now collected for all the main stages of training to practise at the Bar."¹³ While this may be the case, such data is not disclosed on the 'Statistics' page. What is particularly striking about the 2014 Barometer is that data for 'first six' barrister pupils is given in relation to sexual orientation, secondary school attended, university attended, university grades and caring responsibilities (in addition to age, gender, disability and ethnicity) but such data is *not* given for any other part of the Bar "life cycle". The reasons for this are not set out in the Barometer. However, such data *can* be found if one looks at the 2013 and 2014 'Diversity Data Reports' that the BSB produces.¹⁴ These two reports contain snapshots of the Bar across each and every characteristic, and split between pupils, practising barristers and QCs. However, the amount of data is relatively poor, with low response rates for a number of characteristics. I discuss this further below. The two diversity data reports are housed on the BSB's 'Equality and Diversity' webpages,¹⁵ while the various 'Barometers' and the 'Statistics' pages are housed separately under a 'Research and Statistics' section to the BSB website, the former under 'Research' and the second under 'Statistics'.¹⁶ I make this point as the various reports and pages contain different amounts of types of information, such that varying perceptions as to diversity at the Bar could be gained depending on where a third party looks for the data and what they read. The current state of

⁷ <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/>

⁸ <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/queen's-counsel-statistics/>

⁹ <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/pupillage-statistics/>

¹⁰ <http://www.lawsociety.org.uk/policy-campaigns/research-trends/annual-statistical-reports/>

¹¹ See the discussion 'BSB 230114' – para 12

¹² <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/research-reports/>

¹³ BSB, 2014 Barometer, p8

¹⁴ See: https://www.barstandardsboard.org.uk/media/1643761/diversity_data_report_2014.docx

¹⁵ <https://www.barstandardsboard.org.uk/about-bar-standards-board/equality-and-diversity/equality-act-2010-publication-of-information/>

¹⁶ <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/>

affairs is, I would suggest, confusing and should be reviewed. In particular, I would argue that given the amount of data available in the two diversity data reports and in the Barometers, the lack of information in the Statistics pages is misleading and arguably demonstrates a lack of transparency on the part of a public body. This is something I suggest the LSB turns its attention towards.”¹⁷

Q12: Are there other categories of information you think we should collect and analyse? Please explain briefly why.

The commitment to publish such a wide range of data is admirable and should be commended. In relation to the “Overall Student Profile”, only some of the protected characteristic will be reported on. Why is this? If this is because of concerns as to identification, I would argue otherwise. Surely the population size is large enough that if, say, you commented that 3% of the population identified as LGBTQI this would not allow for those individuals to be identified?

Q13: Are there any categories of information we ought to collect, but that we should not publish, even if under relevant legislation we have the choice whether to do so?

I have argued elsewhere that it is a significant lacuna that legal services regulators do not require, and/or do not publish, data on internships/vacation schemes/mini pupillages.¹⁸ You have committed to publishing data on “success rates in securing pupillage” (para 346(d)). I would argue that effort would also be usefully well spent in devising a system that captured data on who applied for mini pupillages (and which decisions were made), and also on the range (and holders) of informal work experience at chambers that do not fall under the umbrella of a “mini pupillage.”

Can I also stress the importance of para 346(e) - “important correlations between these characteristics of the market for training and qualification.” My work has shown a significant lack of sophistication in how many of the legal services regulators present and use diversity data.¹⁹ Much more work can, and should, be done here and I am gladdened to see the BSB make the public commitment to explore potential correlations.

¹⁷ Steven Vaughan, ‘Prefer Not to Say: Diversity and Diversity Reporting at the Bar of England & Wales’ (forthcoming)

¹⁸ Steven Vaughan, ‘Going Public: Diversity Disclosures by Large UK Law Firms’ (2015) 83 Fordham Law Review 101-124

¹⁹ *ibid*