

<b>To:</b>	Legal Services Board
<b>Date of Meeting:</b>	30 May 2012
<b>Item:</b>	Paper (12) 37

<b>Title:</b>	BSB Aptitude Test Rule Change
<b>Workstream(s):</b>	
<b>Author / Introduced by:</b>	Crispin Passmore, Strategy Director <a href="mailto:Crispin.passmore@legalservicesboard.org.uk">Crispin.passmore@legalservicesboard.org.uk</a> /020 7271 0086 Chris Baas, Regulatory Project Manager <a href="mailto:christopher.baas@legalservicesboard.org.uk">christopher.baas@legalservicesboard.org.uk</a> / 020 7271 0055
<b>Status:</b>	Protect

<b>Summary:</b>
<p>The Bar Standards Board (BSB) submitted a rule change application on 26 April 2012 to introduce an aptitude test (Bar Course Aptitude Test (BCAT)) for students before they commenced the Bar Professional Training Course (BPTC).</p> <p>The application can be found on our website<sup>1</sup> and a copy will be available on the day, as will the full issues log.</p> <p>The BSB consider that the BCAT will address concerns about poor quality students with no prospect of passing the BPTC disrupting the learning environment for others and spending significant amounts of money on a course that they are unlikely to pass.</p> <p>While engaging with the BSB about the aptitude test application we have raised a number of significant issues about whether it is a proportionate and targeted regulatory intervention for the BSB to be making. These have been raised with the BSB as part of the normal rule change process.</p> <p>This paper also explores in more detail the statutory refusal criteria for rule change applications.</p>

<b>Recommendation(s):</b>
<p>The Board is invited to:</p> <p>(1) to note and comment on our approach to assessing the proposed rule change against the statutory criteria, recognising that this assessment will involve a degree of judgement.</p>

<sup>1</sup> [http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/applications.htm](http://www.legalservicesboard.org.uk/what_we_do/regulation/applications.htm)

Risks and mitigations	
[REDACTED] :	[REDACTED]
[REDACTED] :	[REDACTED]
[REDACTED] :	[REDACTED]
[REDACTED]	[REDACTED]

Consultation	Yes	No	Who / why?
Board Members:	X		Barbara Saunders, Steve Green and David Wolfe were provided with an early draft of this paper and the application from the BSB.
Consumer Panel:		X	

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Risks and mitigatons	s36 - inhibit (or likely to inhibit): (i) the free and frank provision of advice and (ii) the exchange of views for the purposes of deliberation	

## LEGAL SERVICES BOARD

<b>To:</b> Board	
<b>Date of Meeting:</b> 30 May 2012	<b>Item:</b> Paper (12) 37

### **Bar Standards Board Aptitude test rule change application**

#### **Background**

1. On 26 April 2012, the Bar Standards Board (BSB) submitted a rule change application, the effect of which, if approved, would introduce a mandatory aptitude test (Bar Course Aptitude Test (BCAT)) for prospective students prior to commencing the Bar Professional Training Course (BPTC).
2. The proposal has been formulated as a result of concerns about the number of poorer quality students who undertake the BPTC and who are not likely to reach the standard required to pass the BPTC. These students are reported to have a negative impact on the learning environment of other students on the course. The BSB also believe they have a duty to ensure that only those who have a hope of passing the BPTC are admitted as the fees for the Bar course are high, with most being between about £10K to £16K. Any student who ultimately fails the BPTC receives no professional qualification or academic reward.
3. The BSB conducted two pilots on the proposed implementation of BCAT in 2010 and 2011, and conducted a full consultation process which ended in February 2012. Prior to submitting an application, LSB colleagues met with the BSB on three occasions to discuss the consultation paper and two versions of the draft application. We discussed several high level issues of concern about the application and sought further information. This paper sets out some of these issues that warrant further consideration. This paper also outlines more detail on the criteria we need to use when considering an application.
4. The decision on approval is technically delegated to the Chief Executive. However, as on previous occasions where the decision appears likely to be far from straight-forward, the Executive considers it appropriate to brief the Board in detail and take NED views fully into account.

#### **Overview of the proposal**

5. The process to become authorised as a barrister has a number of sequential steps. Each of these has rules associated with the qualification requirements of becoming a barrister:
  - The first step in the process is the pre-vocational stage. In order to progress to the vocational stage (the BPTC) the aspiring barrister must have a law degree (with a minimum of a lower second class) or a degree in another subject plus the Graduate Diploma in Law (GDL) and be a Member of an Inn.

- The vocational stage is the BPTC which the candidate must pass. This is delivered by 11 validated providers including the College of Law, BPP, Kaplan and the University of the West of England<sup>2</sup>. In 2009/10 there were 2,657 applications, 1,793 enrolments and 1,432 students were successful at the end of the course.
  - The final stage before becoming a barrister is being called to the Bar and then completing pupillage. In order to complete pupillage an aspiring barrister must be selected by a chamber. This process has been very competitive in recent years for instance in 2010/11 there were 2,865 applicants for pupillage and only 446 first six pupillages<sup>3</sup>.
6. The proposed BCAT would add another requirement to the first step outlined above that a student would have to be met before they commenced the BPTC.
  7. An important distinction to be made is that the BCAT is not intended to select the best students; rather it is calibrated to identify the students that are likely to fail the BPTC programme. The “cut score”, the minimum threshold of attainment for the test, has through pilots been tested to identify approximately the bottom 10% of students who would otherwise be admitted to the BPTC.
  8. The BCAT will be compulsory for all applicants to the BPTC at a cost of approximately £67 per test. There is no limit to the number of re-sits although those who fail will be required to wait three months between re-sits. The BCAT would be administered by a private testing provider who has the ability to administer the test across the UK and abroad. The scores of the candidates will not be provided to the BPTC providers.
  9. The BSB argues that the introduction of the BCAT is necessary as there are a number of students on the course who are unsuitable to participate and subsequently fail, and whose presence has a serious impact both on the quality of the delivery of the course and on the learning experience of more capable students. The BSB states that the learning experience of other students on the course is affected as much of the course consists of small group sessions and therefore input by all participants is important. However, it has also indicated that it has absolutely no concerns about quality or skills of the individuals who eventually enter the profession, having passed all stages outlined in paragraph 4. This suggests that any detrimental impact of the current process on quality is either non-existent, short lived or mitigated by the selection pressures on candidates who undertake pupillage.
  10. If the BSB’s application is approved, the requirement to pass the BCAT before being accepted on the BPTC will apply from September 2013. The BCAT system would be available to potential applicants from September 2012.

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<sup>2</sup> <http://www.barstandardsboard.org.uk/qualifying-as-a-barrister/bar-professional-training-course/bptc-providers/>

<sup>3</sup> <http://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/pupillage-statistics/>

## Issues identified

11. The introduction of any new requirement in relation to the qualification steps to becoming a barrister that may ultimately affect the supply of barristers needs to be carefully examined. The LSB executive has engaged at an early stage of this proposal given the potential impact and complexity of the change to arrangements. A number of issues about the BSB's proposals were discussed with the BSB prior to the rule change application being made. While the following paragraphs use broad "public policy" language, the analysis stems from our construction of the BSB's powers as an AR under the terms of the 2007 Act. This resulted in some additional information provided in the BSB's application, although it may not resolve all the issues. An issues log has been sent to the BSB for their response. A response has been requested by 28 May and there may therefore be more detail to be presented orally at the meeting.
12. The first issue is one of **regulatory scope**. Given that the proposal is to eliminate only the very worst students from undertaking BPTC, a vocational course, we asked the BSB why it saw this to be its concern as the regulator of qualified barristers. That is to say, if the students who are no longer eligible to start the BPTC had very little chance of passing the course and an even slimmer chance of gaining pupillage and becoming an authorised person, why is it the job of the BSB to exclude these students at such an early stage, which is still some steps removed from full qualification as an authorised person?.
13. It was suggested to the BSB that the proposal would be most likely to promote the regulatory objectives if the net effect of change was to increase the supply or quality of authorised persons in the market. Since the supply of barristers is constrained by the number of pupillages rather than BPTC graduates, then this proposal would need to show an increase in quality of pupils. This would thereby require the BSB to show that there is currently a detrimental impact on those who obtained (and successfully completed) pupillage from the others on the course. The BSB responded, in discussion, that the quality of candidates who obtained pupillage was as high as ever, so it therefore seems that the proposal would have no obvious benefit on the quality of those who become authorised persons.
14. The BSB, like the LSB, must have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases where action is needed<sup>4</sup>. On this basis (if the role of the BSB is construed in this manner) the proposal may have little discernable value i.e. the individuals who become, and go on to practice as, barristers will be of no higher quality, it must inevitably raise questions over its proportionality and appropriateness. Conversely, if the analysis of the beneficial effects of this intervention holds water, then there is a question about why the BSB considers this style of intervention appropriate to control entry to a vocational course when it is markedly laissez faire in relation to the selection processes for pupillage itself, the stage at which there is far less scope for ambiguity in its role.

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<sup>4</sup> The better regulation principles. These are contained (respectively) at LSA 2007 s28 (3)(a) and s3(3)(a)

15. The second question is of **regulatory mandate**. While it appears that there could be a case for action being taken to ensure a good quality learning environment on the BPTC we asked the BSB why it was left to the BSB to be tasked with this (on the basis that regulators should take action only where there are no other alternative mechanisms). Success in the pre-vocational stage required both admission to an Inn of Court and admission onto a training course offered by a training provider. Both the Inns of Court and the training providers already applied some level of selection for would-be barristers. We asked the BSB for further information on why it was the role of the BSB to be responsible for adding further selection requirements.
16. Some providers have introduced very significant selection criteria requirements prior to students commencing the BPTC. The BSB have told us that the providers who have implemented selective entry have higher BPTC pass rates and anecdotally told us that the students of these providers are more successful in gaining pupillages. There is already some information about the relative success of training providers that is publically available.
17. The Wood Review of the Bar's routes to the profession identified the providers, the Inns and the BSB as possible administrators for an aptitude test. The BSB asserts reasons for neither the providers nor the Inns being suitable to be tasked with this: the BSB discounts the Inns taking on the role on the basis that they do not have capacity or authority for this task, citing inflexibility in the Inns' rules as one reason; The BSB also discounts the BPTC providers as providing the solution as they are seen to be commercially driven and have an interest in filling courses with students who may or may not be capable of passing the BPTC. Providers have control over most of the other parts the learning environment for the students on the course. However, we are yet to see that these assertions are well evidenced.
18. The third issue is the **choice of intervention**. The BSB was asked to provide evidence about other options aside from the introduction of the BCAT. These included the providers having a cap on the number of students based upon the number of available pupillages, increasing the information to potential students about the providers' courses, instituting streaming and increasing supervision on the course or a combination of one or more of these. The analysis also appeared to suggest that the BCAT score was only marginally more correlated with BPTC outcome than using the degree class of students.
19. It was also raised with the BSB that this proposed choice of intervention appeared to be pre-empting the outcome of the Legal Education and Training Review (LETR), a joint project of the Solicitors Regulation Authority (SRA), the Bar Standards Board (BSB) and ILEX Professional Standards (IPS).
20. There are a number of **other issues** that were identified in the application including poor analysis of competition impacts (most notably the impact of the introduction of a barrier to entry), potential for diversity impacts (noted but not explored in detail), weak justification against the regulatory objectives and little evidence that the proposal had properly had regard to the principles of well

targeted and proportionate regulation. There also appear to be issues with the analysis done on the pilot sample. For example, incorrectly identifying the sample of students so as to exclude those students who had applied but had not been admitted to a course by a training provider.

21. The BSB has also been asked questions about the impact on foreign law students who undertake the BPTC for the purposes of practising as a barrister in jurisdiction outside England and Wales where having been admitted to the Bar of England and Wales is considered to be qualification to practise regardless of whether or not pupillage was undertaken.
22. Analysis done by the BSB on BPTC applicants in 2009/10 found that approximately half of applicants were UK nationals; 3.5% were EU nationals and 44.2% were non-EU<sup>5</sup>. Of the non-EU students; Bangladeshi nationals constituted the largest proportion of students followed by Malaysian and Pakistani students<sup>6</sup>. Students were also asked about their expectations about debt at the end of the BPTC. Non-UK applicants were significantly more likely to expect to have no debt while UK applicants were more likely to expect to be in debt<sup>7</sup>. The BSB also undertook an investigation into the 2009 Pupillage Portal applicants; this showed that only 4% of applicants for pupillage were from non-EU nationalities<sup>8</sup>.
23. As part of the application, the BSB also states that the BCAT has been specifically designed to ensure that only those with appropriate skills, capabilities and ethics would be able to undertake the vocational stage. However, there appears to be no evidence provided that the BCAT specifically tests or ensures that those wishing to participate on the course have the ethics required to do so.

### **The statutory decision making criteria**

24. While the further information sought from the BSB may help to clarify their policy thinking, it is important that our subsequent analysis is then undertaken against the tests for rule approval set out in the Act. It is not the job of the Board to consider whether we would have reached the same policy decision or to seek to substitute our view for that of the frontline regulator. The decision is a far more tightly defined one.
25. The first question to answer is whether the proposed implementation of an aptitude test is a change to regulatory arrangements<sup>9</sup> and thus subject to our approval requirements<sup>10</sup>. Regulatory arrangements include “qualification arrangements”<sup>11</sup> including “any other requirements which must be met by or in respect of them in order for them to be authorised by the body to carry on an activity which is a reserved legal activity”<sup>12</sup>.

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<sup>5</sup> [http://www.barstandardsboard.org.uk/media/1087949/bptc\\_applicants\\_2009.10.pdf](http://www.barstandardsboard.org.uk/media/1087949/bptc_applicants_2009.10.pdf)

<sup>6</sup> *Ibid.* paragraph 3.7.1

<sup>7</sup> *Ibid.* paragraph 4.3.3

<sup>8</sup> <http://www.barstandardsboard.org.uk/media/1402895/pp09pss10vf.pdf>

<sup>9</sup> s21 LSA 2007

<sup>10</sup> Schedule 4 Part 3 LSA 2007

<sup>11</sup> S21(1)(f) LSA 2007

<sup>12</sup> S21(2) “qualification arrangements” (a)(ii)

26. We have considered how far back in the “learning journey” it would be reasonable for a regulator to impose requirements which had to be met in order for an individual to be authorised. It would be very difficult to argue that BCAT was too far back in the training process to be deemed unreasonable. As the BTPC is part of the integral training to become a barrister and therefore requiring a test at the start of that course was not too far removed from the time of authorisation. So the decision does clearly seem to be within the vires of the BSB to make – and the LSB to approve.

27. When considering an application for an alteration to an approved regulator’s regulatory arrangements, the LSB must apply the criteria set out in schedule 4, Part 3 of the Legal Services Act 2007 (LSA). These are refusal criteria and the assumption is that alterations will be approved unless of the criteria is met. The refusal criteria are set out in table form below.

<b>Criteria</b>	<b>Description</b>	<b>Possible Considerations</b>
Regulatory objectives <sup>13</sup>	The change would be prejudicial to the regulatory objectives	Is there evidence of likely prejudice? Where impact on the regulatory objectives varies, how can those impacts be balanced?
Against provision in the LSA or other Act <sup>14</sup>	The change would mean that the AR was acting unlawfully. This may include failure to meet obligations under the LSA to have regard to the better regulation principles.	Is the proposal <i>ultra vires</i> ? What evidence is there that genuine regard has been had for the better regulation principles and best regulatory practice?
Fails to meet the designation requirements <sup>15</sup>	Would the change mean that the AR would cease to have proper internal governance rules, competence, resources, rules that made proper provision, meet the obligations to manage regulatory conflict or complaints handling?	Is it reasonable to determine that the rules, if approved, will no longer make “appropriate provision”? Would it be correct to conclude that a requirement for prospective students to sit an aptitude test is an “inappropriate provision” for regulatory arrangements?
Public interest <sup>16</sup>	The application is not in the public interest	What is the “public interest” in this case?

<sup>13</sup> Schedule 4, Part 3, paragraph 25(3)(a)

<sup>14</sup> Schedule 4, Part 3, paragraph 25(3)(b)

<sup>15</sup> Schedule 4, Part 3, paragraph 25(3)(b) and Schedule 4, Part 3, paragraph 25(4)(a)-(c) linking to Schedule 4, Part 3, paragraph 13(3)(c)-(e)

<sup>16</sup> Schedule 4, Part 3, paragraph 25(3)(c)



Allow the AR to regulate what it is not a regulator for <sup>17</sup>	The application would enable the AR to act in as a AR or an LA for activities where it does not have the power to do so	
Procedure <sup>18</sup>	The alteration has been (or will be) made in a way that is not in accordance with proper procedure	

28. In relation to this application, the key issues for further analysis therefore seem likely to be

- Is there evidence that the application is prejudicial to the regulatory objectives? – the most likely objectives to be engaged may well be the competition objective in so far as it can be argued to extend to legal education as well as legal services and the objective on a “strong, diverse, effective and independent profession”. One key issue is the extent to which prejudice can be clearly identified on a forward-looking basis at this stage as opposed to the need for proper monitoring to be instituted to rapidly identify any potential adverse effects in practice.
- All applicants, as approved regulators, are required to “have regard to” the better regulation principles and any other principle they considers to be best regulatory practice The LSB should be satisfied that the approved regulator has had genuine, rather than cursory, regard to those principles – the earlier discussion suggests that there is consideration to be given to both targeting and proportionality;.
- In relation to both the public interest test and the test of whether regulatory provision is appropriate, the LSB should consider whether the public interest is served by the addition of further regulation which is not anticipated to promote any improvement the quality of legal services. It might equally be argued that, as we may potentially be unlikely to allow similar provision to be made in rules put forward by a new regulator, that there is a question of “inappropriate” provision to be considered in relation to a change put forward by an existing body. However, defining precisely what constitutes both public interest and inappropriate provision in this context may prove to be difficult in practice.

29. At this stage, it seems unlikely that there will be significant issues of procedure or flaws of governance to be considered.

30. The final decision will need to involve taking a view on each of the factors listed above both individually and cumulatively. The final judgements may well be very fine ones, in which we should also take account of any further detail the BSB

<sup>17</sup> Schedule 4, Part 3, paragraph 25(3)(d) and (e)

<sup>18</sup> Schedule 4, Part 3, paragraph 25(3)(f)

provides about plans to time limit the duration of the rule change pending the outcome of the LETR and/or more specific proposals for targeted evaluation.

## **Conclusions**

31. The 28 day period for consideration ended on 23 May. We have issued an extension notice in order to have this discussion with the Board and consider the BSB's response to the issues log in detail.

32. The Board is invited to:

- note and comment on our approach to assessing the proposed rule change against the statutory criteria, recognising that this assessment will involve a degree of judgement.