

# **Application by the Bar Standards Board to Amend its Training Regulations**

A report by the Office of Fair Trading to the Ministry of Justice on the likely competition effects of the Bar Standards Board modifying Regulation 25 of the Bar Training Regulations under Section 29 and Schedule 4 of the Courts and Legal Services Act 1990

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# 1 GENERAL SUMMARY

1.1 The advice below concerns the application made by the Bar Standards Board ('BSB') to make a modification to Regulation 25 of its Bar Training Regulations ('the Regulations'). This advice is given on the basis of information which the Office of Fair Trading ('OFT') was provided with by the Ministry of Justice in a letter dated 9 February 2009 and also the following,

- The Bar Training Regulations (BTR) dated 9<sup>th</sup> October 2008.
- The BSB Review of the Bar Vocational Course Report of the Working Group dated 3<sup>rd</sup> July 2008 ('the BSB Review').
- Responses from the BSB to questions submitted by the OFT dated 17<sup>th</sup>, 24<sup>th</sup> April 2009 and 19<sup>th</sup> June 2009.
- Discussions between the OFT and the BSB at a meeting dated 28<sup>th</sup> May 2009.

1.2 The BSB is the body responsible for regulating the barristers' profession within England and Wales.

1.3 Under the Courts and Legal Services Act 1990 ('CLSA90') Section 29 and Schedule 4 (as substituted by Schedule 5 of the Access to Justice Act 1999), if the BSB wishes to modify its regulations it must make an application to the Secretary of State for Justice. Under section 29 and Schedule 4 of the CLSA 1990, if a body authorised to grant rights of audience or rights to conduct litigation makes an alteration to its qualification rules or rules of conduct, the alteration shall not have effect unless approved by the Secretary of State. The Secretary of State may seek the advice of the OFT who shall consider whether the proposed alterations would have, or be likely to have, any significant effect on competition.

1.4 The BSB wishes to modify Regulation 25 of the BTR by adding an additional requirement that students pass a Bar Aptitude Test before taking the Bar Vocational Course ('BVC'). The BSB has stated numerous

aims for the amendment to Regulation 25 of the Regulations. In a meeting with the OFT it emphasised that the objective of the Aptitude Test is primarily to filter out students who would not pass the BVC. The BSB does not expect it to have any appreciable impact on the absolute number of people passing the BVC.<sup>1</sup> The BSB argues that the Test will lead to three benefits:

- Students with a poor chance of passing will not incur fees on the BVC
- Students on the BVC will not have the quality of their education diminished by the existence of a 'weak tail' of pupils on their course and
- The Inns of Court will not incur unnecessary time and expense on training and educational opportunities for BVC students with no prospect of passing the course.

1.5 I am authorised by the OFT, under paragraph 12 of Schedule 1 of the Enterprise Act 2002, to carry out a competition scrutiny of the proposed alteration as required by the provisions of the CLSA (as amended) set out above.

1.6 Having considered the relevant information we have come to the conclusion that the proposed change to Regulation 25 has the potential to have a significant effect on competition through unnecessary restriction of entry into the profession.

1.7 While the manner in which the BSB intends to impose Regulation 25(c) at the moment may not be intended to have a significant impact on competition, it is our opinion, that without constant regulatory oversight, there is a very real risk that Regulation 25(c) could, over time, be used

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<sup>1</sup> We note that if the Aptitude Test is meant to affect the number starting the BVC, and is not meant to affect the number passing the BVC, then it necessitates a concurrent increase in the percentage of people passing the course.

to restrict entry. Since such oversight is not set out in the rules we can only conclude that introducing Regulation 25(c) is likely to have a significant effect on competition in the following three markets:

- In the market for the acquisition of students by course providers and provision of the BVC
- In the market for those who have passed the course and can apply for pupillages, and
- With a similar effect upon the market for advocacy services generally.

1.8 The OFT believes that these concerns could be ideally addressed by adopting a simple market-based mechanism to resolve the issues that the rule change is designed to address. This may not even require a change to the regulation of the BSB. While we note that it is not necessarily the OFT's role to propose alternatives, a voluntary adoption of an Aptitude Test by students, course providers, chambers and other employers might resolve the difficulties of determining the quality of BVC candidates without any impact on competition. A compulsory test (which we strongly oppose) would require ongoing, potentially costly, regulatory oversight to ensure it did not become an unnecessary restriction on competition.

## **2 REGULATION 25 (C)– PROPOSED BAR APTITUDE TEST AND ITS LIKELY COMPETITIVE EFFECT**

### **Background**

- 2.1 The qualification requirements for entry to the barristers' profession are contained in the BTR. The academic stage consists of a qualifying law degree or the Common Professional Examination following a degree in another discipline, or being accepted by the BSB as a mature student.
- 2.2 The second academic stage is the Bar Vocational Course (BVC). This is a compulsory course which must be successfully completed by those who wish to be eligible to undertake pupillage. Once successfully completed the student is 'called to the Bar' and may use the title of barrister. Pupillage is a twelve months practical apprenticeship under the guidance of one or more barristers authorised by the BSB to act as a supervisor.
- 2.3 The BSB sets out course requirements in its Bar Professional Training Course training handbook<sup>2</sup> and it chooses course providers through submitted tenders. The BVC is currently taught and assessed by eight institutions.<sup>3</sup> The BSB has informed us that in its most recent assessment of institutions accredited to supply the BVC all existing providers were re-accredited, and one new provider will be added with effect from September 2010. The number registering for the BVC has risen over the period 2003 to 2008 from 1406 to 1827 although the number of pupillages offered by barristers chambers in independent practice fell over the period 2004 to 2007 to less than 500 per year.<sup>4</sup> However as in other vocational courses such as accountancy and the Legal Practice Course, students who do not secure training positions in

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<sup>2</sup> Also known as the Golden Book.

<sup>3</sup> Universities of Cardiff, City, Manchester Metropolitan, Northumbria, Nottingham Trent, West of England, BPP and College of Law.

<sup>4</sup> BSB Review of the Bar Vocational Course Report of the Working Group dated 3rd July 2008, page 17.

those professions are able to pursue other careers. The BVC is marketed by some providers as such a course.<sup>5</sup>

2.4 The BSB wishes to modify regulation 25 by the addition of sub paragraph (c) which would require applicants to pass a Bar Aptitude Test before taking the BVC.

25. Before commencing the Vocational Stage, a person must:

- (a) have completed (or been exempted under Part VII of these Regulations from) the Academic Stage, and
- (b) be a member of an Inn of Court, and
- (c) have passed the Bar Aptitude Test.

'Bar Aptitude Test' means an examination administered by the Board which is designed as an indicator that candidates for the vocational stage of training have the potential to complete successfully the BPTC.

2.5 We understand that the test will be a multiple choice test and the initial cost estimate is £57. The National Admissions Test for Law (LNAT) , was discussed by the BSB Review. LNAT was introduced in 2004 and consists of a multiple choice verbal reasoning test which is compulsory for entry into 11 of the top UK universities. It should be noted that the former Department for Constitutional Affairs<sup>6</sup> Working Party on

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<sup>5</sup> [www.city.ac.uk/study/courses/law/bar-vocational-course.html](http://www.city.ac.uk/study/courses/law/bar-vocational-course.html)

[www.law.mmu.ac.uk/bvc/](http://www.law.mmu.ac.uk/bvc/)

<sup>6</sup> Now part of the Ministry of Justice.

Diversity<sup>7</sup> expressed concern as to the bias of the results against women, state school pupils and minority ethnic candidates.<sup>8</sup>

2.6 The BSB informs us that it is seeking counsel's advice on whether the Aptitude Test has diversity implications and that it does not intend to model the aptitude test on LNAT. It is currently engaged in discussions with a different provider, Pearson Vue and an independent educational psychologist to identify and finalise an appropriate model. The BSB also intends to undertake a programme of piloting and sampling to ensure that the aptitude test is not biased against any socio-economic group.

2.7 The BSB has given a number of reasons for introducing the test. These include:

- a) It believes it is wrong to admit so many students to an expensive course when so few will obtain pupillage and the less well off, of high ability, will be deterred from choosing a career at the Bar for this reason.<sup>9</sup>
- b) The standard of admission to the BVC is too low, particularly as to the fluency in English, and the weaker students impede teaching and learning within their groups.<sup>10</sup>
- c) That there are too many students taking the BVC with no realistic prospect of pupillage.<sup>11</sup>

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<sup>7</sup> Memorandum for the DCA Working Party on Diversity in the Legal Profession Admissions to University Law Schools, May 2006.

<sup>8</sup> Memorandum for the DCA Working Party on Diversity in the Legal Profession Admissions to University Law Schools, May 2006, Paragraphs 6.2, 8.3, 8.5.

<sup>9</sup> BSB Review of the Bar Vocational Course Report of the Working Group, paragraph 30. This was repeated in our meeting of 28<sup>th</sup> May.

<sup>10</sup> BSB Review of the Bar Vocational Course Report of the Working Group, paragraph 31. The 'weak tail' reason was repeated in our meeting of 28<sup>th</sup> May.

- d) To reduce the numbers of Bar Students to manageable proportions.<sup>12</sup>
- e) To reduce wasteful expenditure of Inns' resources in providing training opportunities to BVC students who have no prospect of passing the course.<sup>13</sup>

2.8 The BSB has told the OFT that its intention is not to affect the numbers of candidates passing the BVC but to sift out the so called 'weak tail' of students thus enhancing the learning experience of the remaining candidates. It also believes that it will encourage applications from more able students. We infer that if the Test is to work perfectly, the *only* people to fail the test would also be *certain* to fail the BVC. We note, however, that no test of this kind does work perfectly, and there will necessarily be a number of false negatives.

2.9 The BSB proposes that it, as opposed to BVC course providers, should have responsibility for the contents of an aptitude test whose administration would fall to an independent third party chosen by BSB. The BSB suspects that the introduction of such a test is likely to cause the numbers attending the course to fall and some providers may discontinue the course.<sup>14</sup> This could have a negative impact on the number of students who can pass the BVC, and the different learning environments from which they can chose.

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<sup>11</sup> BSB Review of the Bar Vocational Course Report of the Working Group, paragraph 60.

<sup>12</sup> BSB Review of the Bar Vocational Course Report of the Working Group, paragraph 180.

<sup>13</sup> This issue was raised for the first time in our meeting of 28<sup>th</sup> May.

<sup>14</sup> BSB Review of the Bar Vocational Course Report of the Working Group, paragraph 95,

'We suspect, but cannot prove, that by raising the admission standard in this way the number on the course would fall, and it may be that some of the providers would discontinue the course. We doubt however whether the numbers would ever fall to a number equal to the number of the pupillages available and it will continue to be necessary, as we point out later in this Report, to give students early and express warnings about the difficulty of becoming a pupil, however able the student may be.'

- 2.10 From the information provided it seems that providers of the BVC agree that it would be beneficial if the BSB set a minimum standard of English and that it may save course fees for some students likely to fail the BVC. However it may also deter some candidates not willing to incur the test fee. Some providers considered that an additional test would overburden prospective students and the test is disproportionate.<sup>15</sup>
- 2.11 One provider's response to the BVC review made the following points :-
- That barristers chambers normally offer pupillages before the student has completed the BVC and the BVC grade therefore is not part of that decision making process.
  - It saw little merit in an aptitude test and that it would deter prospective candidates<sup>16</sup>, and
  - That students who do not secure pupillages are able to take up other legal posts.
- 2.12 Another provider said that there were only 2-3 weak students out of 70 each year and that such a test would limit access, reduce diversity and may prove to be a blunt instrument rather than relying on academic selection.
- 2.13 Another provider said that it would be difficult to set such a test and costly to run and to deal with the academic appeals.

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<sup>15</sup> Bar Standards Board, BVC Providers Group Minutes of Meeting 18<sup>th</sup> January 2008, paragraphs 4.9, 4.10.

<sup>16</sup> 'Again we consider the proposal to require students to take an aptitude test as an unnecessary measure to adopt. Students already sit such a test – it is called degree! Aside from the doubt as whether such as test could predict a student's competency in both oral and written skills it is unwelcome from a diversity view point as one presumes students would have to pay a fee and our experience of the LNAT test for prospective LLB students is that even a comparatively small amount of money can dissuade a potential applicant with limited finances'.

- 2.14 Students from two providers were in favour of such a test. Students from another provider suggested applicants for the BVC should be interviewed by course providers.

### **Likely competitive effects of the proposed change**

- 2.15 The OFT recognises the importance of ensuring that the level of education and training to become a barrister is sufficiently high in order to adequately protect consumers of legal services. However, where entry requirements are set too high this will have the effect of unnecessarily restricting entry to the profession thereby impeding competition. There is already a process to assess quality at the point of becoming a barrister. Greater competition in the provision of legal services is in the interest of consumers and efficient legal services providers, as long as adequate safeguards are in place.
- 2.16 In order to ensure that consumers of legal services, and efficient service providers, are not unnecessarily denied the benefits of competition, the right balance must be struck between requiring levels of training which are sufficient to ensure competence and imposing unnecessarily stringent requirements which have the effect of restricting entry to the profession.
- 2.17 The OFT's position on entry requirements is summarised in our 2001 Report on Competition in Professions (the 2001 Report).

The openness of markets to new entrants is important to effective competition. This does not mean that requirements to pass a test or pay a subscription are never permissible under competition law. A requirement to have demonstrated basic competence is clearly justified where consumers are not well placed to assess the quality of service, as is usually the case in markets for professional services. Provided that necessary qualification thresholds are not manipulated to limit supply and force up price, there will not be a significant adverse effect on competition. This proviso cannot lightly be assumed to be met, however. There is a straightforward pecuniary incentive for incumbent producers,

who largely control the professional bodies, to constrain entry below the level that would most benefit the public generally.<sup>17</sup>

*Concerns with current proposal for the Aptitude Test*

- 2.18 It seems apparent that introducing an Aptitude Test is, all else equal, likely to reduce the numbers of candidates applying for and taking the BVC course although we will not know for certain until after the Test has been introduced. If the numbers were to fall this would raise concerns and may have an impact not just on the market for barristers.
- 2.19 The OFT believes that the introduction of a compulsory aptitude test may initially have an effect on the market for the acquisition of students by course providers and the provision of the BVC since students eligible to apply for the course will decrease. As the number of places taken falls, there is a chance that courses may be withdrawn by some providers and the cost of the courses may rise, thus potentially deterring candidates, including those who may have passed the Aptitude Test.
- 2.20 This may result in a consequent reduction of students who pass the course and who can apply for pupillages. The fact that there is a current imbalance between this number and the number of pupillages on offer does not alleviate the OFT's competition concerns, not least because a proportion, around 23 per cent,<sup>18</sup> taking the BVC, are overseas students who usually intend to return to their home jurisdictions. Further, a decrease in the number of qualified candidates applying for pupillages will also depress the demand to increase the number of pupillages. This may have medium-term implications for the quantity of supply of advocacy services to the final consumer.

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<sup>17</sup> Competition in Professions, Office of Fair Trading, March 2001 paragraph 27  
[www.offt.gov.uk/shared\\_offt/reports/professional\\_bodies/oft328.pdf](http://www.offt.gov.uk/shared_offt/reports/professional_bodies/oft328.pdf)

<sup>18</sup> BSB Review of the Bar Vocational Course Report of the Working Group, paragraph 27

2.21 The OFT appreciates that it may not be the intention of the BSB to limit the numbers passing the BVC, but notes that the above concerns may arise in the future regardless.

*Concerns with future use of Regulation 25 (c)*

2.22 More importantly, the rule change as drafted provides the BVC with a wide power to set a test as it sees fit and to determine the pass rate. This can be done without notification to the MoJ or the OFT, and raises a very real risk that Regulation 25(c) could, over time, be used to restrict entry.

2.23 As set out above, restrictions on entry to a profession are one of the OFT's primary concerns. Restricting pupils entering the BVC in a way that reduces the number passing will very likely lead to a decreased pool of potential barristers, decreased choice for chambers, decreased pressure on the industry to increase the number of pupils<sup>19</sup>, and a combination of decreased quality and availability and increased price in the final market for advocacy services. It may also have an impact on the market for providing professional training for those who do not wish to, or cannot due to lack of pupillages, go on to become a barrister.

2.24 The OFT believes that it is for providers of the BVC to ensure quality of education and equality of opportunity and to provide realistic information to applicants about the benefits and likely success of the course they provide. We are not convinced that there is an inherent educational deficiency which requires such an intervention.

2.25 Furthermore the BVC is taken by some students for purposes other than for a career at the Bar. We believe that some of the concerns the BSB raises in paragraph 2.7 above are wider public policy issues for education and that it is not for the BSB to impose such a decisive restriction which affects the market for education.

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<sup>19</sup> We note that this effect may be especially significant with the advent of Legal Disciplinary Partnerships and Alternative Business Structures.

- 2.26 The OFT has not taken a view as to whether the proposed rule change raises concerns, or that the use of the rule in one way or another may raise concerns, determinable under the Competition Act 1998.

*Alternative mechanisms*

- 2.27 It is not necessarily the OFT's role to suggest less restrictive alternatives to the proposed rule changes. However, in the interests of constructiveness we suggest below how a voluntary aptitude test would realise most of the benefits of the proposed rule change without raising any of the competition concerns.
- 2.28 We appreciate that some students may be incurring large expense in return for little reward, and that Inns and Chambers wish to maximise the value of the time they invest in providing training opportunities to BVC candidates.
- 2.29 We note that both of these concerns arise from an information deficiency about the likely quality of BVC students. This could be resolved by those who need it requiring students to merely take an aptitude test, without any further restriction on the students' eligibility for the BVC.
- 2.30 This would allow individuals making large financial decisions to assess whether they have the necessary attributes, thus meeting the BSB's stated aim whilst not providing a barrier to entry. It would be for course providers, chambers and other employers to decide if, and how, they wished to use this test in their application process.
- 2.31 This would signal to course providers, Inns and Chambers the likelihood of any particular student passing the BVC allowing more efficient allocation of training resources. Further, students could decide the usefulness and suitability of the test in respect of their own needs and requirements, including the likelihood of passing the BVC.
- 2.32 Another advantage of a voluntary test is that if that the standard were set too high then some course providers may decide not to adopt it thus ensuring that the supply of BVC candidates is not overly restricted.

2.33 If the BSB were permitted to introduce a compulsory test (which we strongly oppose) then we believe this would require a commitment by the BSB to ongoing oversight to ensure that the Test does not reduce the number of students completing the BVC. However, it is unclear which body would wish to take on such a role since oversight would be cumbersome, costly, and may be blunt.

*Other concerns*

2.34 While not directly relevant to the assessment of the introduction of Regulation 25(c), we note that the OFT has previously advised that the Bar retains unnecessary restrictions on organisations wishing to offer employed pupillages.<sup>20</sup> We again suggest that these restrictions are reviewed. Such a review should be expedited bearing in mind the market changes likely to result with the introduction of Legal Disciplinary Partnerships and Alternative Business Structures. We anticipate that this will cause an increase in demand for barristers and the offering of pupillages.

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<sup>20</sup> OFT 874, Application by the General Council of the Bar to amend regulation 47 of the Consolidated Regulations relating to the provision on pupillage training , December 2005 paragraph 1.8.

### **3 CONCLUSION**

3.1 For the reasons given above the OFT believes that the modification of Regulation 25 with the addition of Regulation 25(c) will have, or be likely to have, a significant effect on competition :-

- In the market for the acquisition of students by course providers and provision of the Bar Vocational Course – not all of whose students expect to go on to be called to the bar
- In the market for those who have passed the course and can apply for pupillages, and
- With a similar effect upon the market for advocacy services generally.

3.2 Further the OFT believes that the BSB's aims could be achieved by a less restrictive route.