

BAR
STANDARDS
BOARD

REGULATING BARRISTERS

By email to: iclar@justice.gov.uk

2 July 2021

Dear Sir Christopher

Response to the call for evidence - Independent Review of Criminal Legal Aid Review of Legal Aid

I realise that you are now digesting the evidence submitted to your review, but I hope it is not too late to let you have a digest of relevant evidence compiled in recent weeks by the Bar Standards Board.

You will understand that, as the regulator, we have an interest in the current and future supply of barristers because of our responsibilities to promote both access to justice and competition in the provision of services. With those regulatory objectives in mind, we have taken a close interest in trends in recruitment to, and progression at, the Bar, particularly at the publicly-funded Bar. We have also used our quinquennial Regulatory Return to gather evidence from chambers on the impact of the health emergency on current and future plans to offer pupillage places.

The cumulative evidence from these and other sources is summarised in the attached note.

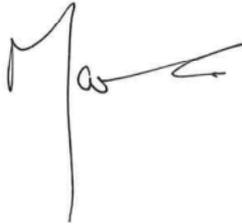
You will draw your own conclusions, but, as the regulator, I would highlight that:

- Generally, this is an ageing profession, but criminal barristers are, on average, older than the Bar as a whole: this comes about because recruitment to pupillage is well down on the levels of the 1990s, but retention has generally been strong in the period since. Retention cannot, however, go on for ever.
- The health emergency hit pupillage recruitment hard in the short-term – with 2020 numbers down 35% on 2019 – but is now bouncing back across most of the Bar. The exception, however, is the Criminal Bar where pupillage continues under pressure in part as a result of the health emergency, but, more fundamentally, because many chambers cannot afford to support pupils.

- These pressures on the Criminal Bar come through in the earnings statistics where the 2020 authorisation to practise exercise shows that 32.8% of barristers at the Criminal Bar earned less than £60,000 compared to 29.5% of all barristers; the equivalent figures for barristers within 15 years of Call are 44.1% and 29.5% respectively.
- These pressures on the Criminal Bar impact on diversity because barristers from ethnic minority backgrounds are over-represented among barristers relying on publicly-funded work and within smaller chambers. What is more, among barristers specialising in criminal work, barristers from minority ethnic backgrounds and women barristers earned less than their white counterparts.

If you or the members of your team would find it helpful to explore this evidence base and these findings in greater depth, I should, of course, be happy to set up a meeting.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Mark Neale', with a stylized flourish extending to the right.

Mark Neale
Director General

BAR STANDARDS BOARD

REGULATING BARRISTERS

Response to the call for evidence Independent Review of Criminal Legal Aid

Introduction

1. We are responding to the call for evidence because some aspects of the review, particularly in relation to theme 2 resilience, and theme 4 diversity, touch on the following Regulatory Objectives in the Legal Services Act:
RO1 Protecting and promoting the public interest.
RO3 Improving access to justice.
RO5 Promoting competition in the provision of services.
RO6 Encouraging an independent, strong, diverse and effective legal profession.
2. We have information from recent research and supervisory work that are relevant to the review.

Impact of COVID-19 on the profession

3. In September 2020, we issued a Regulatory Return to a selection of around 350 chambers, BSB entities and sole practitioners. In the Return, we asked a range of questions, including seeking views on the risks that the profession faces. We know that the current health crisis has impacted the Bar in different ways and five of the questions (four for sole practitioners) were designed to help us understand more about these impacts. People were asked to respond to those questions by 4 January 2021. The following themes are relevant to the Review because some chambers have had a very difficult year, particularly those areas of practice such as Crime which are court-based, as a result of court closures.
4. Whilst there is generally optimism about the levels of work and resilience of their chambers, some expect that there will be some movement between chambers and mergers in relation to the more financially vulnerable sets.

5. When looking to the future, there is widespread expectation that there will be a move to more remote hearings. This is seen as having advantages and disadvantages. The advantages include the experience that that less work has to be returned because a barrister can service clients across different courts more easily on the same day. Reduced travel also means reduced costs for barristers. However, this potentially disadvantages junior tenants, who would usually pick up the returned work and for whom less work may in future be available.
6. We are also about to publish the results of research that we have commissioned to explore barristers' clients' expectations, experience, and understanding of the legal services they receive. This includes some positive feedback about experience of virtual hearings:
 - Of 14 interviewees, all but two felt that they had enough information before a hearing, including specific guidance on any virtual hearings, for example how the virtual proceedings would work, how to contact barrister during hearing if needed. One was given a print-out in advance explaining the proceedings, but all the others were given verbal guidance. The two that felt that there was not enough information in advance both stated that they needed more information on the technicalities of running a hearing virtually.
 - Most were comfortable with remote hearings compared with a physical court date. In fact most preferred a remote hearing because it was more convenient, logistically less challenging (parking, childcare, travel), more informal and less traumatic, despite the odd technical glitch. Several felt that legal professionals appeared more accessible by Zoom or in a home environment. Most were familiar with Zoom and able to conduct their case remotely without difficulty, and their barrister was able to support them with this if necessary.
 - The focus group participants that had been through a virtual hearing or consultation were also comfortable with the way that these had been conducted. However, there were three participants that would not accept a virtual hearing and would expect to have their day in court. The reasons for this include the facts that the judge can see you directly and you can consult easily with your barrister.

Impact of COVID-19 on pupillage

7. We published two reports on the impact of COVID-19 on pupillage in [September 2020](#) and [February 2021](#). The analysis was drawn from engagement with 157 out of around 260 chambers and other organisations that provide pupillage (Authorised Education and Training Organisations or "AETOs"). Of the 157 with whom we have engaged, 133 had pupils at the time.
8. The *potential* risks that we are alert to include the following:
 - a) whether the Bar remains an attractive career prospect to students.
 - b) the impact on the number of junior barristers and the ability of the profession to deliver access to justice, particularly in the most affected areas of law.
 - c) the impact on the good progress that has been made to improve diversity at the Bar.

- d) damage to the financial resilience of some chambers and other Authorised Education and Training Organisations (“AETOs”).
9. A total of 386 pupillages were registered in 2020, compared to 592 in 2019, a significant drop of 35%. The impact of the pandemic on the profession looks set to affect pupillage numbers in 2021, for reasons set out below, although recruitment levels are picking up.
10. In September we reported that 26% of the pupillage providers that we engaged with, that had pupils, had confirmed that they intended to delay planned start dates. Most were deferring start dates between one and six months, but some were deferring for a year from October 2020 to October 2021. The deferrals are now starting to show in the statistics for 2021, as January registrations were higher than usual. There were 51 pupillages registered in January 2021, compared with 15 to 17 in January in the years 2018 to 2020.
11. We reported in September that 13% of those with whom we engaged that had current pupils told us that, in order to sign off their pupil they were considering extending, or had already decided to extend, the practising period of pupillages. Some were planning to extend the period of pupillage to give pupils a better chance to build their practice and continue to receive financial support from chambers.
12. This pattern is now reflected in the statistics for 2020:
- As of 1 December 2020, there were 39 pupils undertaking pupillages that commenced more than one year ago. The equivalent average figure from 2015-2019 was around eight such pupils.
 - Of the pupillages that commenced from March to December 2019 which should have been completed in the period since the March 2020 lockdown, 54 pupillages were extended.
13. In September, we reported that an encouraging proportion of pupillage providers were pressing on with recruitment plans but the knock-on effect of the next intake of pupillages being deferred could affect plans for pupillages in future years up to 2022. We also reported that the Bar Council’s statistics from AETOs that recruited via the Pupillage Gateway in the November 2019 to May 2020 recruitment period, indicated that the number of pupils recruited for 2021 through the Gateway last year (which accounts for about half of AETOs) had fallen significantly.
14. We have now mandated the timetable for pupillage recruitment in order to promote diversity through a more transparent and accessible process. The mandated offer date was on 14 May 2021. We recognised that there may be some pupillage providers who were undecided about their ability to take on pupils, so we provided more flexibility by allowing those who did not feel confident enough to advertise for pupils between November and January to advertise subsequently, provided they complete their recruitment by the end of August 2021. We continue to monitor the ongoing impact on pupillage recruitment.
15. There is clear evidence that ethnic and gender diversity at entry to the Bar is improving. These groups are, however, significantly less well represented in the senior ranks of the

profession, where progress is slower. Some chambers have highlighted that where there is a reduced amount of work currently, it is likely to be prioritised for more senior barristers. This may mean less work for practising pupils and junior tenants. If this affects some areas of the Bar that recruit more diverse pupillages, there is a risk that the progress made may stall.

16. Our data suggest that candidates from minority backgrounds are more likely than white candidates to get taken on by smaller chambers, which could be less able to withstand the financial impact of COVID-19.
17. The impact in publicly funded areas of law is likely to be greater because they are typically court-based and have been most negatively impacted financially by the closure of courts during lockdown. They are also the most diverse areas of practice:
 - Barristers from minority ethnic backgrounds and/or state educated barristers are more likely to be in publicly funded areas. 55 per cent of barristers from minority ethnic backgrounds earn more than half of their income from Legal Aid work, compared to 47 per cent of white barristers ([Bar Council Covid-19 Survey](#)).
 - Income data from the practising Bar in 2020 currently also indicates that the loss of earnings is likely to have a disproportionate effect on the publicly-funded Bar:

32.8% of barristers listing Crime as their main area of practice earned less than £60k; this compared to 25.9% across the Bar as a whole. The equivalent figures for those under 15 years of Call are 44.1% and 29.5%.

Among barristers giving Crime as their main area of practice:

- 44.9% of barristers from minority ethnic backgrounds declared earnings of £60k or less, compared to 30.3% of white barristers.
- 43.9% of female barristers declared earnings of £60k or less compared to 26.3% of male barristers.

Among barristers under 15 years of Call giving Crime as their main area of practice:

- 51.0% of barristers from minority ethnic backgrounds declared earnings of £60k or less, compared to 40.0% of white barristers. (For the Bar as a whole, the proportions for those under 15 years of Call were 40.3% of barristers from minority ethnic backgrounds, compared to 27.3% of white barristers).
- 51.0% of female barristers declared earnings of £60k or less compared to 37.4% of male barristers. (For the Bar as a whole, the proportions for those under 15 years of Call were 34.8% of female barristers compared to 24.8% of male barristers).

This further reinforces the point that anything that impacts on income is going to have a disproportionate impact on female and BAME barristers in particular.

18. The [2020 Diversity at the Bar](#) report shows that, compared with 2019, there has been a relatively large change compared to previous years in the following areas:
- Whilst the proportion of female and male pupils as of December 2020 was the same, at 50 per cent, the proportion of female pupils has fallen by 4% since 2019. This is the first year since 2015 where the percentage of female pupils has not been greater than that of male pupils.
 - The proportion of pupils from a minority ethnic background increased by 4 per cent compared with December 2019 to 23 per cent. This is the highest proportion of pupils from minority ethnic backgrounds, and the largest year-on-year increase seen since the first Diversity at the Bar Report in 2015.
19. We will continue to monitor diversity data as future pupillages are registered.

Retention at the Bar

20. We will shortly be publishing a report on trends seen in recruitment and retention at the Bar of practising barristers (employed and self-employed) in England and Wales covering the 30-year period from 1990/91-2019/20. The research was undertaken by the BSB Research Team with input from the Bar Council from October 2020-May 2021. Key findings relevant to this review are as follows.
21. Overall, the number of practising barristers each year has grown substantially from 1990/91-2019/20. The proportion of practising barristers who are female and the proportion from an ethnic minority group has almost doubled.
22. The Bar has become notably older in terms of average age during the period.

Retention

23. Retention at the Bar appears to have improved substantially. The number of those leaving practice and having time away from practice has not shown an increase alongside the aging of the Bar, and the proportion leaving in the early stages of a career also appears to have decreased substantially, particularly when comparing with those that started practising in the 1990s. This was true across gender and ethnicity.
24. However, although retention appears to have improved, there is a consistent trend of female barristers leaving practice indefinitely after the early stages of their career in greater proportions than male barristers. Although the size of the relative difference has decreased over time, this difference between male and female barristers still exists. Minority ethnic barristers were found to not be more likely to leave practice indefinitely but were found to be more likely to not be practising during earlier stages of a career at the Bar overall.

Pupils

25. Throughout the 1990s, particularly the first half of the decade, there was a far higher number of pupils in comparison to the numbers seen during the 2000s and 2010s. From a peak of 882 pupils in 1992/93, the number decreased year on year until it plateaued at around 450 pupils each year until from 2008/09 until 2014/15. It then showed an increase from this point during the latter half of the 2010s.
26. From 1990/91-2019/20, the proportion of all practising barristers who were in their first year of practice has more than halved.

Practising Barristers

27. The number of those with a Practising Certificate at any point in a given financial year almost doubled from 1990/91 to 2019/20, going from 9,541 barristers in 1990/91 to 17,351 in 2019/20. Much of the increase came before 2008/09. For no year from 1990/91-2019/20 were there fewer practising barristers than in the year preceding it.
28. The average age of practising barristers increased substantially during the period, going from 38.5 years in 1990/91 to 46.5 in 2019/20.
29. The proportion of the practising Bar over the age of 50 has increased from around 13.1 per cent of barristers in 1990/91 to just under 40 per cent in 2019/20 (15% of this group were aged 60+).
30. In Crime, 47.3% are aged 45 and over, compared to 43.1% of the Bar as a whole:

	Crime as main area of practice	Whole Bar
Under 25	0.4%	0.3%
25-34	15.5%	17.3%
35-44	22.9%	25.6%
45-54	27.7%	25.0%
55-64	15.5%	13.8%
65+	4.1%	4.3%
No information	13.2%	12.9%
Prefer not to say	0.6%	0.6%
	4,829	17,078
	100.0%	100.0%

31. From 1990/91 to 2019/20 the proportion of practising barristers who were female increased from around 21.6 per cent to around 38.1 per cent.

32. There has also been an increase in the proportion of practising barristers from minority ethnic backgrounds from 7.8 per cent to 14.8 per cent, although there are some notable differences between those within this broader category, with the largest increases being seen for those from Asian/Asian British ethnic backgrounds and those from Mixed/Multiple ethnic group backgrounds.

Those leaving the Bar each year

33. Overall, the proportion of the Bar who leave each year, and who had not returned as of December 2020, remained relatively stable from the mid-1990s through to 2019/20 at around 2.5 per cent. This was an unexpected finding, given the increase in the proportion of those aged 50+ at the Bar, which might have been expected to lead to an increase in the proportion leaving practice in any given year due to the older profile of the profession.
34. More females in younger age bands have left practice indefinitely than would be expected considering the gender profile of the Bar.

Analysis of those starting practice during the period of analysis

35. The progression of pupils appears to have improved over time. The proportion of pupils who did not go on to practice for at least three years decreased markedly for those undertaking pupillage from 2000/01 onwards. This trend is seen across gender and ethnicity.
36. Data suggests that retention at the Bar improved during the period from 1990/91-2019/20. This is the case across gender and ethnicity. Data suggests a decrease in the likelihood of leaving the Bar during the earlier stages of a career.
37. Overall, years 5-15, and to a lesser extent 15-19 see a larger proportion of a female barristers leaving practice indefinitely than that seen for male barristers. The difference has lessened over time for more recent cohorts.

Bar Standards Board
2 July 2021