

# Independent Review of the Bar Standards Board's management of the August sittings of the Centralised Examinations

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## **Context leading to the review, provided by the Bar Standards Board**

The Bar Standards Board (BSB) is the independent regulator of barristers in England and Wales. The BSB has responsibility, amongst other things, for the education and training of people who wish to become barristers. The BSB has authorised a number of Providers to deliver the Bar Professional Training Course, a vocational course which teaches and assesses students on the skills and knowledge required to practise as a barrister. Whilst Providers are responsible for candidate assessment in the majority of subjects, the BSB manages the assessment of the three core knowledge based assessments – professional ethics, criminal litigation and civil litigation. For these, the BSB sets and marks the assessments, but it is the responsibility of the Provider to make the arrangements for the candidates to sit the exams. These assessments usually take place in the Spring (April) and the Summer (August) using a pen and paper format. There are around 2200 students sitting these assessments each year.

In the light of restrictions put in place by the Government in response to COVID-19 the BSB took the decision to postpone the April sit. Universities were closed and restrictions on travel and social distancing were in place. Exceptionally, the BSB agreed to take on responsibility for the arrangements for an August sit and, given the restrictions in place, commissioned the development of computer-based testing so candidates could sit assessments from home. The BSB agreed to step in to deliver the August exams to enable students to complete their assessments and to continue with their career plans.

The BSB contracted with Pearson VUE to deliver the exams. Pearson is a leading supplier of computer-based testing and has physical test centres around the world. Under the contract, Pearson VUE agreed to deliver the exams via remote proctoring at a candidate's home and via computer-based testing at their test centres and to manage the candidate booking process.

The exams took place on 11-14 August (Professional Ethics), 17 and 18 August (civil litigation) and 20 and 21 August (criminal litigation).

Candidates experienced considerable difficulties with both the booking process and the remotely proctored system provided by Pearson VUE. As a result, only ¾ of exams were successfully completed. In the light of these difficulties and given the BSB's desire to identify and learn the lessons from the August exams, this independent review of the events leading up to the exams and their delivery in August was established.

## **Introduction to this Review**

The BSB is responsible for authorising Providers to deliver the Bar Professional Training Course (BPTC) and the Bar Transfer Test (BTT; for ease of reading, we use the term BPTC to refer to both for the purposes of this Review). In academic year 2019-2020, there were eight Providers of the BPTC; BPP Law School, The City Law School, The University of Law, Cardiff Law School, Manchester Metropolitan University, Nottingham Trent University, the University of Northumbria at Newcastle and the University of the West of England. Providers deliver a number of local (skills-based) assessments but the BSB sets and marks the core knowledge assessments in professional ethics, criminal litigation and civil litigation.

In 2020, having postponed the exams in April because of restrictions put in place in response to COVID-19, the BSB decided to make arrangements for computer-based testing through Pearson VUE to be delivered in August 2020. This arrangement created a three-way relationship, between the BSB, Providers and Pearson VUE. This triangular relationship ultimately contributed to the complexities in the booking and delivery of the examinations. The negative impacts of this were felt on the most important stakeholders, the candidates.

The BSB had an existing contractual relationship with Pearson VUE which delivers the Bar Course Aptitude Test (BCAT), a one-hour online test, booked on demand and usually taken in a local test centre. Students are required to pass the BCAT before they can commence the BPTC.

Throughout this report, whenever we use the second person plural in respect of the Review, we are referring to both the Independent Reviewer, Professor Rebecca Huxley-Binns, and Expert Advisor, Dr Sarabajaya Kumar.

Soon after our appointment in late October 2020, the Director of Regulatory Operations of the Bar Standards Board provided us with a full briefing note, documentation including the Equality Impact Assessment, documents and policies relating to governance, numerous emails between the BSB and Pearson VUE since April 2020, and with Providers since March 2020. The BSB provided us with Board papers, papers of the Governance, Risk and Audit (GRA) Committee, and correspondence between the BSB and members of the Bar, as well as with candidates. We also met with various officers and employees of the BSB, including the Chair of the Board and a lay member of the Board, the Director-General, the Director of Regulatory Operations, the Exams Team, the Director of Communications and Public Engagement and colleagues from the communications team, members of the Equality and Access to Justice team, the Legal Support Team and the General Council of the Bar Data Protection Officer. All meetings were conducted virtually and everyone we met responded promptly to all of our follow-up enquiries. We also met with the chair of the Centralised Exams Board, who also provided additional written evidence.

We immersed ourselves in the social media created by candidates and members of the Bar ahead of and during the August 2020 exam sittings. We have had access to all communications issued by the BSB on the website, in the press and on Twitter. We also met virtually with student representatives from Students Against the BSB Exam Regulations (SABER), who also provided valuable additional evidence by email. SABER is a group of students, around 200+ at its peak, who came together to voice concerns about the handling of the 2020 centralised examinations.

We hosted three open meetings, attended by 18 candidates and/or their family members. We also invited and received numerous written submissions from candidates.

We had sight of the minutes of the Bar Training Forum meetings and also met with the Providers who also provided extensive further evidence by email.

We met with members of the Council of the Inns of Court, the Chair of the Bar Council Education Committee, a representative of the Thomas Pocklington Trust, and we received evidence from the Association of Disabled Lawyers (the Chair of which was a BPTC student at the time) and the Open Knowledge Foundation.

We also met several times with the Pearson VUE Strategic Account Manager - VUE Indigenous Business Development, the Programme Manager (who was the main contact for the BSB), Assistant General Counsel, the Vice President - VUE Indigenous Business Development and the Product Manager.

We instructed independent counsel and received legal advice from Catherine Casserley, Cloisters Chambers in respect of the Equality Act 2010.

It is the purpose of this Independent Review to provide a commentary on the facts we have found, conclusions based on those facts and recommendations as part of a 'lessons learned' exercise. We have had the benefit of considering the evidence with hindsight. We have been well placed to connect evidence and events to understand what happened and the consequences for the candidates, but we have tried to be careful in forming judgments as to whether past decisions were correct given the information available at the time. We have formed our judgments based on the evidence made available to us.

We have also received considerable correspondence from a variety of interested parties relating to decisions in respect of the October and December 2020 BPTC assessments. The scope of the Review does not extend beyond the delivery of the exams in August 2020.

We wish to thank everyone who contributed to this independent Review. There was a genuine intention by all parties to assist in this complex process.

## Executive Summary

It is perhaps easy to forget the complexity relating to our professional and personal lives in the Spring of 2020. During March 2020, the UK Prime Minister announced the closure of cafés, bars, pubs, restaurants, theatres, cinemas, gyms and then schools; people were instructed to stay at home. Inevitably this meant the closure of access to university teaching spaces where previously the BSB examinations had been held. Accordingly, the BSB took the decision to cancel the April sit for the centralised examinations. Prevailing Government advice prohibited the physical gatherings necessary to hold the exams in the usual way and it was not feasible to set up a suitable, secure alternative to a physical sit of the exams in April. As spring turned to summer, it was unclear whether and to what extent University campuses would open sufficiently to hold pen-and-paper style examinations.

In these circumstances, the BSB made the correct decision to take responsibility for the August examinations. This was the almost unanimous view of candidates who attended the open meetings, as well as the representatives of the Inns of Court and Providers, one of whom reflected, “the BSB went to extraordinary efforts to bring this about”. Only one candidate disagreed, asserting that the BSB did not have the infrastructure to take on such a complex project in such a short period of time during a pandemic.

The BSB also made the correct decision in the circumstances to contract with Pearson VUE to provide the online examinations, taken at home or by attendance at a test centre.

It is crucial to note that the BSB made two key decisions at the outset; first, to stick with the closed book format for the examination methodology, in the interests of integrity and assessment rigour, and second, not to permit unsupervised breaks. As we shall see, some of the complexities in the delivery of the examinations were a direct result of these two decisions.

In our opinion, the August 2020 examinations were a ‘perfect storm’. There was not one single causative factor, but a variety of factors contributed to the various difficulties experienced by candidates, including:

- the professional nature of the assessments
- the time window within which the assessments had to be completed
- the range of reasonable adjustments to which candidates were entitled
- under-capacity in terms of human resources to enable bookings for candidates with reasonable adjustments to work as intended
- a lack of focus on the candidate-experience
- the reduction of capacity in test-centres to approximately 50% (due to physical distancing rules because of the pandemic)
- the challenges faced by candidates required to travel to test centres safely and conveniently to sit their examination
- the decision by the BSB not to allow unproctored breaks during the online exams.

It is also our opinion that the statistical analysis provided by Pearson VUE to the BSB during and immediately following the August examinations was inaccessible to any client unfamiliar with the reporting style adopted and lexicon used. The statistics produced by Pearson VUE are evidently very useful internally for the company to identify trends including technical issues with candidates and technical issues with the platform. However, they do not easily translate into accessible data for the client. It is therefore impossible for us to conclude with confidence how many of the examinations were successfully completed without incident.

## Terms of Reference

1. Governance of the decision to postpone the April examinations and the decision that the BSB should take on responsibility for the management of the August centralised examinations. This should also cover the overall accountabilities between BSB and the Providers for the delivery of examinations. Were these clear in the run-up to April and August and do they need re-visiting in the light of recent developments?
2. The quality of the Board's oversight of the decision to stage the examinations in August and the arrangements to deliver them
3. The decision to hold computer-based assessments, the process for the selection of Pearson VUE as the BSB's supplier and the adoption of OnVUE as the preferred mode of delivery
4. Equality impact assessment prior to contracting with Pearson VUE and during the delivery of the August exams, including anticipating the impact on protected characteristics beyond those with a disability
5. Contracting with Pearson VUE including the management of the administration of the contracts
6. Management of data protection implications arising from the August exams and the preparation of a Data Protection Impact Assessment
7. Development of the assessment methodology for the August exams, including:
  - a) The decision not to allow breaks for remotely proctored exams
8. Engagement with BPTC Providers, including:
  - a) Support and guidance from Providers to the BSB on arrangements for scheduling the centralised assessment
9. The handling of reasonable adjustment needs of candidates by the BSB, including:
  - a) Reasonableness of the general BSB approach
  - b) The provision of information by BPTC Providers to the BSB about the reasonable adjustment needs of their students
  - c) The booking of candidates with reasonable adjustments by Pearson VUE
  - d) Management by Providers of the finding of alternative venues for candidates who could not be accommodated through the Pearson VUE system, either remotely or at a test centre
  - e) Decisions relating to those candidates who could not be reasonably accommodated
10. The BSB's communication strategy and its effectiveness. How successfully did the BSB provide information about the assessments to the key parties? In particular, how well did the BSB communicate with students during the examination period?
11. The booking process for candidates with no reasonable adjustments
12. The delivery of the assessments by Pearson VUE including:
  - a) Technical and other difficulties in accessing and using the Pearson VUE OnVUE platform
  - b) Pearson VUE customer services
  - c) Accessibility of statistical information about the assessments
13. The management by the BSB of the relationship with Pearson VUE
14. The effectiveness of risk management throughout the exam period. How were risks identified and mitigated?

## TERM OF REFERENCE 1

**Governance of the decision to postpone the April examinations and the decision that the BSB should take on responsibility for the management of the August centralised examinations. This should also cover the overall accountabilities between BSB and the Providers for the delivery of examinations. Were these clear in the run-up to April and August and do they need re-visiting in the light of recent developments?**

**Governance of the decision to postpone the April examinations and the decision that the BSB should take on responsibility for the management of the August centralised examinations.**

Immediately following the BSB's decision to cancel the April 2020 sittings, the Executive started to consider what contingency arrangements could be put in place to enable students to complete their assessments. In April, the Executive proposed to the Board that the BSB itself should take on responsibility for the August exams.

Section 1(1) Legal Services Act 2007 places a statutory responsibility on the BSB to uphold regulatory objectives including protecting and promoting the public interest, improving access to justice and encouraging an independent, strong, diverse and effective legal profession. In their communications with us as well as third parties, the BSB has always asserted they had to reassure stakeholders that standards had been maintained; they had to sustain the value of the BPTC qualification for students; ensure that learning outcomes leading to the professional qualification were appropriately assessed; assure the profession, and Chambers in particular, that those commencing pupillage had the requisite skills, knowledge and ethical grounding as set out in the Professional Statement; and ensure that the public, and those being represented legally in particular, were confident that new members of the Bar had demonstrated the necessary skills, knowledge and ethical grounding. In summary, they set three objectives for the delivery of the August 2020 examinations; to maintain rigour in the assessment in the public interest, to ensure inclusivity and to enable students to progress.

The BSB was under considerable pressure to find a solution to enable students to take the examinations during the academic year in order to progress to pupillage or Call to the Bar. Call to the Bar is a significant step, the culmination of years of academic and professional study, completion of assessments, and the entry to the profession. The Director-General received a letter dated 19<sup>th</sup> March 2020 signed by 200 BPTC/BTT students urging the prompt delivery of the assessments (albeit in an alternative format). The letter pointed out the impact of any delay on the visa status of international students, possible consequences if pupillage had to be delayed, as well as on those who had job offers or needed to complete the BPTC to commence practise in their home jurisdiction, and the pressure on students with a variety of other commitments including work and caring responsibilities. Similarly, the Bar Council and the Inns of Court were actively encouraging the BSB to find a solution to allow students to complete the BPTC in that academic year. In our opinion, there was significant risk of reputational damage to the BSB if they had not put in place alternative arrangements quickly.

Throughout our meetings with stakeholders, there was unanimous support that the BSB was correct to take on responsibility for the management of the August centralised examinations. Various reasons were given; at the time the decision was made, lockdown could have been for an indeterminate period of time, the BSB has regulatory responsibility for the profession and there was considerable pressure from students to enable them to progress with their careers.



During April 2020, it became evident the only option was to adopt a secure computer-based approach which would safeguard the integrity of the examinations and which could be taken in August or as soon as possible thereafter. The BSB was an existing customer of Pearson VUE. The BCAT was delivered at Pearson VUE test centres, albeit not via Pearson VUE's online proctoring assessment system - OnVUE. Through discussions with Pearson VUE about adopting the OnVUE system for the centralised exams, the BSB was assured the computer-based platform works on low bandwidth and candidates could take the test on their own computer, securely because OnVUE locks the computer and browser. Candidate identification verification could be completed online, and the candidates would be monitored live by humans, and the examination fully recorded. OnVUE was an existing product – not built or developed only for the BSB – and not bespoke.

In its proposal to the Board to approve the adoption of OnVUE with Pearson VUE, the BSB acknowledged the limitations of online examinations, as well as some of the needs of candidates entitled to reasonable adjustments. The Board was assured a full Equality Impact Assessment would be completed as well as a full review of previous reasonable adjustments to see whether and how they could be accommodated in a computer-based assessment. The Board dealt with this proposal “out of cycle” by email, emails which have been made available to this Review. Members of the Board asked the Executive for assurances in respect of, for example, equality issues, the operation of the platform, and the lack of opportunity to open for a full tendering process. On 20<sup>th</sup> April 2020, the BSB Director of Regulatory Operations assured one member of the Board that, “when the Board is asked to ratify the decision taken out of committee at its May meeting I will ask them to acknowledge the absence of a formal tendering process and the reasons for that decision”. Unfortunately, this assurance was absent from the minutes of the BSB Board meeting of 21<sup>st</sup> May 2020. However, we do not feel this omission signifies a lack of governance by the Board. The Board unanimously supported the proposal which was then confirmed at the May Board meeting. It was at about this time that the BSB put in place waiver arrangements to enable those with pupillages due to start in the Autumn to take up those places pending completion of the BPTC prior to starting their practising period of pupillage.

Members of the Board with whom this Review met considered that they were fully informed at all times of the plans in respect of the delivery of the August examinations.

A contract variation between the BSB and Pearson VUE was signed in May which added the additional services to the contract that already existed with Pearson VUE.

**The overall accountabilities between BSB and the Providers for the delivery of examinations. Were these clear in the run-up to April and August and do they need re-visiting in the light of recent developments?**

Overall accountabilities between the BSB and Providers were clear in the period prior to April 2020. The BSB delivered and marked the centralised examinations, and the Providers hosted them. However, in the period prior to the August 2020 examinations, the accountabilities were not as clear as they could have been.

The BSB continued to set and mark the exams, and for most candidates, Pearson VUE was responsible for booking and hosting the candidates sitting the exams online. What is opaque, however, is which party had responsibility for candidates entitled to reasonable adjustments who could not be accommodated by additional time and/or taking the examinations from home or in test centres. We shall return to the candidate-experience, and of these students in particular, in detail under Term of Reference 9 below. Here, we consider only the questions of responsibility and accountability.

Responsibility for ensuring reasonable adjustments were in place was shared. Providers were initially responsible for *capturing* the reasonable adjustment needs of candidates required to undertake a remotely proctored exam, but they could not be responsible for *delivering* them as the delivery responsibility had been taken by the BSB. Some additional time online could be accommodated through the OnVUE platform, so would have been a Pearson VUE responsibility. Where the BSB asked Providers to host the assessments (either on campus or at a venue they sourced) for those who could not be accommodated on the OnVUE platform or at a test centre, Providers agreed to make arrangements to facilitate the BSB discharging their responsibility. Although this arrangement appears straightforward, candidates with more complex reasonable adjustment needs reported to the Review that they were unclear who had responsibility or accountability for making arrangements for them. We explore this further in Terms of Reference 9 and 10 below.

We received very concerning evidence from two students with visual impairments who reported that it was they who contacted the BSB in May 2020 to enquire about how their needs would be accommodated, to be told throughout May, June and July it was for the Providers to arrange. In their particular cases, this should have been regarded as the highest priority because of the limitations of Pearson VUE's systems. They cannot support screen reading software such as JAWS, a programme which allows blind and visually impaired users to read the screen with a text-to-speech output. It took weeks and weeks of proactive intervention by the students with their Providers and the BSB to reach a solution, with support of the Thomas Pocklington trust. A solution was found with only days to go before the exam started. In their final written submission to this Review, SABER also reported, "many students felt that there was a lack of clarity as to who was responsible for sorting reasonable adjustments (and for resolving issues with the exams, e.g. technical failures)". We address the latter point under Term of Reference 10 below.

The correspondence and documentation provided to this Review fails to clarify ultimate responsibility for delivery of reasonable adjustments between the BSB, Providers and Pearson VUE. When we met with Providers virtually in person, and we asked who was responsible for reasonable adjustments for candidates, there was a variety of different answers given. Members of the BSB Exams Team provided evidence to this Review that it was incumbent upon Providers to find alternative venues if candidates were entitled to adjustments which meant neither online proctored exams taken from home or in test centres were feasible. This is borne out by email correspondence seen by this Review with candidates and Providers. This comment was further echoed by the BSB Legal Support Team as well as the Head of Equality and Access to Justice.

However, when we met with the Director of Regulatory Operations and the Director-General of the BSB, they assured us that the BSB had the responsibility for reasonable adjustments as the examining body. In effect, they had taken this responsibility from the Providers as soon as they took control of the centralised examination delivery.

The problem, as we see it, is that the Providers were not aware of this, students were not aware of it, and some members of the BSB were not aware of it. It was certainly not the lived experience of many candidates entitled to reasonable adjustments which were not accommodated simply by adding extra time to the online exams.

The communications between the BSB Exams Team and Providers were regular and frequent, but the evidence suggests that accountabilities were determined on a piecemeal approach without a clear project plan. The complexities in arrangements and communications are expanded below, particularly under Terms of Reference 8, 9 and 10. Ultimately the BSB had both full responsibility

and a non-delegable duty. The evidence suggests that some of the accountabilities between the BSB and Providers were not as clear as they could have been in respect of the August exams.

### **Conclusion**

The decisions to postpone the April examinations and that the BSB should take on responsibility for the management of the August centralised examinations were made with the interests of BPTC students in mind, to counter the restrictions in place and enable candidates to sit the assessments. Governance of the decision to postpone the April examinations was conducted properly and Governance of the decision that the BSB take responsibility for the centralised examinations was conducted properly. Accountabilities were not as clear as they could have been between the BSB and Providers in respect of delivery of the examinations.

### **Recommendations**

In December 2020, the BSB invited expressions of interest from suppliers to provide new centralised assessments in Professional Ethics from January 2022 during the pupillage component of the training. The invitation to tender (ITT) is available on the BSB website. Although we have not written our recommendations in light of this ITT, we are conscious that the BSB wishes to continue to offer online exams, and that any recommendations we make that impact upon computer-based testing will need to be picked up by any supplier.

Accordingly, our first recommendation is that the roles, responsibilities and accountabilities of each stakeholder will need to be set out clearly either in contractual terms or by written agreement. Candidates should understand who is responsible and accountable for the elements of their candidate experience for assessments.

## **TERM OF REFERENCE 2**

### **The quality of the Board's oversight of the decision to stage the examinations in August and the arrangements to deliver them.**

There are two elements to this Term of Reference. First, the quality of the Board's oversight of the decision to stage the examinations in August, which we have addressed in our findings and conclusion under Term of Reference 1.

Secondly, we are asked to comment on the Board's oversight of the arrangements to deliver them. We are unconvinced the Board required oversight of the arrangements to deliver the examinations. Following Board approval of the decision to stage the examinations in August, the operational details of the delivery of the examinations were delegated to the Director-General. The BSB Scheme of Delegation provides, "(t)he Bar Standards Board delegates the powers below to the Director General, ... to... (i)mplement rules, systems or procedures required to give effect to policies and regulatory arrangements previously agreed by the Board with regard to formal assessment of standards for qualification / authorisation."

One of the Committees of the BSB is the Governance, Risk and Audit (GRA) Committee. Under Standing Orders, the purposes of the GRA are to support the Board in achieving its strategic objectives by providing assurance on the effectiveness of governance structures, risk management processes and internal controls; and to monitor and recommend to the Board action in respect of the effectiveness of the strategic arrangements for governance, risk management and internal audit. In respect of risk, the GRA is required to provide oversight of risk management processes, monitoring compliance and challenging management on the adequacy of actions taken and planned.

It would therefore have been the GRA rather than the Board who would have required assurances in respect of the risks surrounding the arrangements to deliver the examinations in August. During the course of this Review, we met with the Chair of the GRA. She shared with us her reflection that the GRA meeting schedule did not allow them to interrogate the detail of the intended delivery of the August examinations, and said with the benefit of hindsight she would have considered an extraordinary GRA. We agree that would have been helpful. That said, the Director of Regulatory Operations attended the GRA meeting on 7<sup>th</sup> July 2020, and gave a full oral update including a full risk analysis and details of mitigation plans. When questioned by members of the GRA, he responded that the BSB thought all reasonable adjustments had been accommodated, bar a very small number which would be further investigated to make bespoke arrangements. Although the GRA would not normally expect to see an Equality Impact Assessment (EIA) or a Data Protection Impact Assessment (DPIA), it would have been reasonable for them to have asked whether they had been started and/or completed.

### **Conclusion**

The Board, working through the GRA, had a clear picture of the intended delivery plans of the August examinations. There is also evidence that GRA members challenged the BSB management on the adequacy of actions taken. However, as we will consider further under Terms of Reference 4 and 6 below, such was the risk involved in these assessments, both the EIA and DPIA should have been placed before and approved by the GRA.

### **Recommendations**

See Terms of Reference 4 and 6.

We also recommend that the BSB considers the development of a Crisis Response Policy or Emergency Planning Framework. The GRA would have oversight of this policy/framework, the operational detail of which would be delegated to the BSB Executive.

### **TERM OF REFERENCE 3**

#### **The decision to hold computer-based assessments, the process for the selection of Pearson VUE as the BSB's supplier and the adoption of OnVUE as the preferred mode of delivery.**

There was (and still is) a global pandemic involving a highly transmissible virus. Holding computer-based exams was the best decision to allow the assessments to be taken safely during academic year 2019-2020 and for the students to progress with their careers. It was unclear in March and April how long lockdown might last.

In a written response to this Review from the Open Knowledge Foundation, they make the irrefutable observation, “(r)emote learning and examination technology presents both opportunities and significant challenges. The August 2020 BSB exams demonstrate the importance of anticipating those challenges and making appropriate adjustments in order to ensure participation and transparency. COVID-19 has accelerated a shift already underway – towards online delivery both of course content and examinations. It is important that such a shift has transparency, inclusion and effective protection of data, privacy and non-discrimination principles at its core.”

#### **The process for the selection of Pearson VUE**

In normal times, the BSB would issue a formal invitation to tender for bids to deliver computer-based exams, as it did in December 2020 for the professional ethics examinations to be delivered from January 2022. In April/May 2020, the BSB did not have the time to run a tender process. Instead, they had various informal discussions with a number of potential suppliers of computer-based testing. It was clear from those discussions, given the unprecedented demand on suppliers of computer-based testing, that existing clients were being prioritised. This significantly restricted the Board’s options. Because of the existing contractual relationship with Pearson VUE there was no alternative but to contract with Pearson VUE. Pearson is the largest supplier of online assessments and has test centres across the world.

Pearson VUE asserted to several members of the BSB that they had capacity to support the exams, including at the global test centres if they were open. The BSB Director of Regulatory Operations told this Review, “(w)e were also assured that the remotely proctored system provided by Pearson VUE was reliable and stable. It was used by hundreds of thousands of students each year with a success rate of at least 95%. In addition, we were assured that the OnVUE platform had plenty of capacity (around 7000 slots per day).” It is unfortunate that these assurances were neither explicitly documented nor critically explored. However, we believe they were made because in mid-June the BSB provided SABER the following assurance “from Pearson VUE that there will be enough capacity in their testing centres to meet the needs of those who require adjustments or have a specific need to take the exam in a testing centre. Indeed, as stated above, there will be extra capacity in testing centres for students who have not notified their provider about the need for an adjustment. The first group will, understandably, be given priority when booking opens.”

Clearly, it would have been better to have had the opportunity to receive tenders (see further under Term of Reference 1), but in the circumstances it would have led to additional delay when discussions between the BSB and other providers of computer-based assessments had already proved unsuccessful.

However, we have not seen evidence that any further due diligence was carried out by the BSB on Pearson VUE. BPTC students and the Inns of Court had pointed out the negative reviews of Pearson VUE they had found online to the BSB. Online reviews are of course notoriously unreliable, but they

should not be dismissed. Although the BSB discussed the online reviews internally, they considered they had no choice but to contract with Pearson VUE. The BSB could however have borne the reviews in mind when contingency planning.

### **The adoption of OnVUE as the preferred mode of delivery.**

We conducted a walk-through of the OnVUE platform by way of demonstration by the Product Manager of Pearson VUE. The system appeared to be user-friendly. Candidates receive an access code to enter the system, whereupon they have to download the OnVUE software and run the application. The OnVUE system then undertakes a series of equipment checks to ensure the computer and Internet connection meets the requirements of the system. Candidates are advised to close all applications except OnVUE (see Term of Reference 12 below). Candidates then have easy-to-navigate instructions to provide a phone number, to supply photo identification and provide workspace verifications. Very few candidates who successfully completed the online exams (with or without interruptions) reported difficulties with the platform itself as an assessment tool. A few did report some complexities around the usability of the whiteboard, which we explore further in Term of Reference 12 below.

In our opinion, the adoption of the OnVUE platform, for the majority of candidates, was suitable.

As we explore in considerable detail in Term of Reference 9 below, it was less the choice of the OnVUE platform that caused the difficulties, it was the failure to prioritise students for whom the system was known not to be suitable.

### **Conclusion**

Given the nature of the pandemic and the public health risk, the decision to hold computer-based assessments was correct. In other circumstances, the BSB would have tendered for a supplier, but given the information available at the time and the lack of alternative suppliers, the process for the selection of Pearson VUE as the BSB's supplier was understandable.

The evidence suggests that the BSB knew in April that online proctored exams did present risks particularly in respect of some students who require reasonable adjustments. However, those risks were weighed against the need to provide an opportunity for as many students as possible to complete their assessments and proceed with their careers.

## TERM OF REFERENCE 4

### **Equality impact assessment prior to contracting with Pearson VUE and during the delivery of the August exams, including anticipating the impact on protected characteristics beyond those with a disability.**

As the regulator of the Bar of England and Wales, the BSB has a statutory regulatory objective to “encourage an independent, strong, diverse and effective legal profession” (section 1(1) of the Legal Services Act 2007).

The BSB also has obligations under section 149 of the Equality Act 2010 (“EA”) which provides:

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
  - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
- (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
  - (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
  - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
  - (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons’ disabilities.
- ... (7) The relevant protected characteristics are—
  - age;
  - disability;
  - gender reassignment;
  - pregnancy and maternity;
  - race;
  - religion or belief;
  - sex;
  - sexual orientation

This is known as the ‘public sector equality duty’ (psed).

The Equality and Human Rights Commission has produced technical guidance in respect of the psed. Though not a statement of the law, it is of evidential value and courts have said that authorities must be able to justify a departure from such guidance – see *R (Brown) v Secretary of State for Work & Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506 at [119-120]. The technical guidance sets out the overarching aim of the psed at 2.10:



The broad aim of the general equality duty is to integrate consideration of the advancement of equality into the day-to-day business of all bodies subject to the duty.

The general equality duty is intended to accelerate progress towards equality for all, by placing a responsibility on bodies subject to the duty to consider how they can work to tackle systemic discrimination and disadvantage affecting people with particular protected characteristics

There are three aspects to the duty – elimination of discrimination, promotion of equality of opportunity and fostering of good relations. It is the first two limbs which are of most relevance to the BSB in respect of the 2020 examinations. The obligation is to have ‘due regard’ to the need to eliminate discrimination etc. Section 149(3) EA 2010 sets out what is involved in 'having due regard to the need to advance equality of opportunity' between persons who share a relevant protected characteristic and persons in practice. Subsections 149(3)(a) and (b) state that giving due regard to the need to advance equality of opportunity involves:

- identifying the causes of inequality and disadvantage associated with a protected characteristic;
- addressing the questions of how those disadvantages can be removed in the performance of the public function, including the *active steps* needed to address the different needs of those with protected characteristics from those who do not share them; and
- considering those findings having due regard to the need to advance (rather than hinder) equality of opportunity between such people.

Section 149(4) EA further specifies that: “the steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.” There is specific recognition here that disabled people have particular needs which must be met in order to grant them “substantive” equality. This reflects the language of the duty to make reasonable adjustments in section 20 EA which requires that adjustments be made to overcome the barriers that disabled people encounter in accessing dealing with their day to day lives (see further Term of Reference 9).

There is no obligation to produce a solution that makes, in this case the centralised examinations, accessible to *every* candidate. Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) said, at [78], “The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors.”

The clearest evidence of ‘due regard’ is through an Equality Impact Assessment. The BSB’s first version of the EIA (EIA v1) for the centralised examinations was completed on 28<sup>th</sup> April prior to contracting with Pearson VUE. We heard evidence from the Chair of the Centralised Examinations Board, as well as the BSB Exams Team, that they had discussed compliance with the BSB’s psed. The completed EIA v1 was signed off by the BSB Head of Equality and Access to Justice. However, these efforts notwithstanding, it was very brief. It noted, “(t)he remotely proctored computer-based solution does not discriminate against any of the other protected characteristics outside of disability. For the other characteristics, the system is equally accessible, fair and reliable and no other group is therefore disadvantaged.”

EIA v1 acknowledges:

“The proposal to hold remote online assessments presents some obvious challenges as regards accessibility for disabled students, the most obvious being students with a visual impairment.

We know that we will not be able to accommodate:

- Students who need to use screen reading software such as JAWS (a programme which allows blind and visually impaired users to read the screen with a text to speech output). The remote proctoring tool shuts down all other software during the test.
- Students who require a reader or a scribe.
- Students who require a braille copy of the exam, clearly this cannot be accommodated on a computer.
- Students who require breaks. As breaks are not proctored, it would compromise the integrity of the assessment.
- Students who require more than 4 hours to complete an assessment. As Pearson VUE’s remote proctoring is one on one, they are reluctant to place a burden on the proctors and students by allowing longer testing times, especially as breaks are not allowed.”

The difficulty for the BSB in respect of characteristics beyond disability was timely access to information about those characteristics and their potential impact on the delivery of the examinations. At the time the EIA v1 was written, it was unknown whether test centres would be open in August. That said, consideration was not given to the impact of the decision not to allow breaks on candidates with protected characteristics beyond disability, for example for people who menstruate. Further, it says under ‘impact related to sex/gender’ that “(i)ssues relating to childcare have been raised as discriminatory against women, but such issues are not necessarily related to gender”. Any cursory glance at statistics or scholarship shows that women are likely to be the main carer for children. Similarly in relation to age, it is said that “it is not clear that mature students disproportionately hold full-time or part-time jobs in addition to the BPTC”, but the BSB could have obtained that information or it could have said that it could not obtain the information. Otherwise, the BSB does appear to have considered the other protected characteristics and considered the issues in relation to them.

The EIA was updated on the 9<sup>th</sup> June 2020 to expand on the provision in respect of test centres: “Since contracting with Pearson VUE, we have established that it will be possible to offer the option of taking the exams at a test centre more widely than just to those with formal learning agreements. We hope to be in a position by the end of June to be able to advise students of the process for registration with Pearson VUE for the exams. Students who have had specific needs identified will be in a priority group. Once the priority group has been registered, general registration will open for all other students to choose whether they wish to register for a remotely proctored exam or a computer-based exam at a test centre. We will need to explore the possibility of bespoke solutions for some students individually outside this process ...”.

The BSB evidently based this statement on Pearson VUE’s assurance that there would be sufficient test centre spaces for all candidates. In the event, we now know this was not the case. In the written submission from SABER to this Review, they commented, “... the BSB thought that this would improve equality of opportunity as students were able to take the exams online instead of having to travel. This ignores: 1. The fact that students who needed test centres had to travel and that these students were more likely to be disabled students and/or those who do not have adequate internet/quiet space at home. 2. The financial impacts associated with the significant delay of exams for students e.g. students would have to forego work in order to revise for longer leading to financial hardship.”

When EIA v2 was tabled before the Board on 16<sup>th</sup> July 2020, they requested the scope should be broadened to include all the alternatives available in making reasonable adjustments in the context of Covid-19. The discussion was held in private session so is not recorded in the public minutes. EIA v3 swiftly followed on 31<sup>st</sup> July 2020, in which the BSB indicated that of the students entitled to reasonable adjustments, 285 could be accommodated through the OP (online proctored) system, 384 would require attendance at a test centre, 80 could attend other venues sourced by BPTC Providers, and five could sit the exams at home with individual invigilators in person.

Discrimination on grounds of socio-economic status is not protected by the Equality Act. But it is fair to say that socio-economic factors may correspond with protected equalities characteristics. Access to a reliable internet connection, technology with a sufficiently high technical specification and a suitable home environment in which to take an exam can also lead to exclusion from remotely proctored examinations. However, this element of intersectionality is absent from the EIA and digital inequalities are considered only superficially in the EIA v1, “(w)e will try to work with the Providers and Inns to allow students to access hardship funds if they need to purchase a computer.”

SABER provided this Review with a spreadsheet on which they had recorded candidate testimonials during the examination period. There is a total of 374 rows of reported difficulties. In this Review, we have extracted a few of them which we think best illustrate the candidate experience in respect of the term of reference under consideration. We have selected those testimonials where SABER was given permission to Tweet about the situation, anonymously. In respect of the impact on candidates who were not explicitly considered in the EIA but nevertheless experienced accessibility challenges:

“I was only able to sit the Civil exam earlier in the week by using my wife's phone to take the log-in pictures of the room, my ID, etc. I have an older model phone, and the ProctorCam program does not work on my phone. My wife works full time and is not at home today so I cannot use her phone. Today I attempted to sit the Criminal exam and use my webcam to take the pictures of the room, my ID, etc. The page would not load, it crashed several times. I called Pearson to resolve the issues, but they left me on hold for 30 minutes, at which point I rescheduled my exam for later today (as I believe you can't reschedule after the start time). I finally got through to a person at Pearson after having my call terminated twice. The man on the phone promptly told me that his computer had crashed, put me on hold, then hung up. I don't know how I can possibly sit this exam today. I am about to go and vomit or cry I am not sure which. I can't afford a new phone just to sit these exams, I have already updated my laptop (as between the Ethics and Civil exam they removed Windows 7 from the list of approved systems without telling anyone!), and I can't keep using my wife's phone as she has a life...”

## **Conclusion**

Over the course of April to August 2020, the BSB considered many of the issues, but not necessarily at the right time. The EIA evidences consideration of equality issues. That said, more stakeholders should have been invited to contribute to the EIA. This would have allowed many of the key questions to be asked earlier, due consideration given to the candidate experience, and contingencies could have been put in place in the event that anything went wrong. The BSB could have called upon expert advice from the profession, Providers, the Inns of Court, and students, to name a few.

This Review also acknowledges that we have not heard from all candidates impacted by the centralised examinations. Unless consequences are properly examined and fully understood, valuable opportunities to learn from mistakes will be lost.

## Recommendations

- We accept that an Equality Impact *Assessment* was completed, but as part of its continuing obligation under s.149 Equality Act 2010, we recommend that the BSB completes an Equality Impact *Analysis* of the August 2020 exams. Equality impact data should be reviewed to include an evaluation of, *inter alia*
  - any direct or indirect discrimination in respect of protected characteristics and socio-economic status including on an intersectional basis
  - an assessment of requests to take the exam in a test centre and the basis of such requests, where possible
  - whether the use of remote proctoring is, or can be, consistent with the BSB aim of increasing access to and diversity at the Bar, including the achievement of students from a BAME background
- The BSB should appropriately regulate the conduct of any future online examinations to ensure they are consistent with the regulatory objectives at s1(1) Legal Services Act 2007.
- The BSB should promote equality as per the Public Sector Equality Duty. This includes fostering a culture of inclusivity and encouraging disabled people and other minority groups to join the profession.
- Future EIAs should be prepared in consultation with stakeholders including disability experts, Providers, and (should integrity of the exams be in issue) previous BPTC candidates.

## **TERM OF REFERENCE 5**

### **Contracting with Pearson VUE including the management of the administration of the contracts**

It bears repeating, it was a crisis. It was a global pandemic. No other online assessment providers had capacity to offer the BPTC exams. The BSB was an existing customer of Pearson VUE. However, the contract with Pearson VUE for the 2020 exams was a contract variation to the 2013 contract for the BCAT.

There are significant differences between the BCAT and the centralised examinations. Until June 2020, the BCAT could be sat at a test centre only, the examination was only 60 minutes in length, was booked by the candidates themselves and was available on demand. The BCAT is a relatively low stakes exam and it can be retaken. The BPTC assessments are high stakes exams at master's level, and there are only so many opportunities to pass, and therefore become a barrister. The centralised assessments consisted of three different examinations taken by more than 2,000 students, within an assessment window covering a two-week period, taken online in test centres or from home. The examinations were considerably longer and, for the ethics examination, candidates were required to type short answers to complex problems. Notwithstanding these substantial differences in assessment arrangements and methodology, there were no additional contractual terms in respect of agreed timelines or accountability. In part 6 of the contract variation, Pearson VUE was responsible for registering candidates and providing information about technical requirements needed, but these were all standard terms, and did not reflect the true nature of the BPTC exams. For example, the contract variation also refers to a candidate "refund" policy, which was not applicable to the BPTC August examinations (see further under Term of Reference 13).

When we asked the BSB Exams Team if there was a formal project plan in place from the outset, they explained they did not have the time. Everything was changing on a daily basis and rapid decisions had to be made. However, the formation of a timeline and project plan would have been time well spent to consider the contingencies needed. Contingency planning is not based on the assumption that everything will go smoothly.

### **Conclusion**

Although a contract variation with an existing supplier is common practice, neither party gave full acknowledgement to the scale of the task involved in delivering the August examinations, and did not add specific contractual terms and conditions that would have covered the complexity of the project.

### **Recommendation**

Timelines covering roles, deadlines and deliverables of the respective parties must be agreed in writing as an auditable document.

## TERM OF REFERENCE 6

### **Management of data protection implications arising from the August exams and the preparation of a Data Protection Impact Assessment**

The General Council of the Bar (known as the Bar Council) is the legal entity registered with the Information Commissioner's Office as the data controller, so all policies and practices mentioned here refer to both the Bar Council and the BSB.

Data protection training is compulsory at the BSB. Two courses are available online, one on Data Protection and another on Information Security. The online system records when they are completed. All members of the BSB involved in the delivery and decision-making in respect of the August centralised examinations had completed the mandatory training.

In the original contract between Pearson VUE and the BSB in respect of the BCAT, dated 2013, both parties acknowledged their respective duties under data protection legislation, but the clauses of the contract go no further than summarise the duties and obligations of either side *if* they are acting as data processor or data controller. They do not specify which party *is* the data processor or data controller in any given situation. In the contract variation of 2020, there is an additional clause in respect of candidate identification validation, facial comparison, and automated processing of candidate personal data by Pearson VUE. This seems to indicate implicitly, that Pearson VUE was the data processor for these purposes rather than data controller, although this was not agreed in terms between the parties.

Art.35(1) of the GDPR sets out the requirement to conduct a Data Protection Impact Assessment ("DPIA"): "Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data..."

Online proctored examinations necessarily involve the processing of personal data. In our opinion, the decision to hold computer-based assessments where data processing would be conducted by a third party should have led to the immediate realisation that a DPIA was necessary. It needed to be completed in order to inform the design of the new process and anticipate and address risk, as well as inform communication with students, so they could understand the basis on which their data were being processed. This initiative created sufficient risk to conduct a DPIA early in the process, concurrent with or immediately following the signing of the contract variation with Pearson VUE. Candidates deserved fully to understand the privacy and security implications. Adopting the words of the Open Knowledge Foundation, "(e)merging technologies using surveillance and data collection software give rise to significant privacy concerns particularly when used in the private home of a student."

Some candidates have submitted written evidence to this Review expressing concerns about data protection and security, particularly in respect of risks. An example:

- a. Proctors intruding into my private space,
- b. Anonymisation of my personal information where possible and
- c. The prompt deletion of information provided to a third party (Pearson)."

The evidence shows that if a DPIA had been carried out at the appropriate time, everything else that was necessary to ensure GDPR compliance would have flowed from that – updating the BSB's

Record of Processing Activities (RoPA), checking and updating the Privacy Statement, ensuring candidates were given the correct information about data protection issues, plus checking the security of the processing and the international transfer of data were compliant.

Unfortunately, the Data Protection Officer (DPO) was neither fully nor early enough involved in the development of the proposal to hold computer-based assessments. She worked alongside but not within the teams responsible for the delivery of the examinations. For example, in mid-May, having heard from a source within the BSB that some FAQs about the exams were going onto the BSB website, she was able to add valuable data protection information to these.

There was a considerable (email) debate about a term in Pearson VUE's privacy statement in respect of the use of biometric data for "*the purpose of further developing, upgrading, and improving our applications and systems*". This would inevitably have made Pearson VUE a data controller. The DPO had several email exchanges with Pearson VUE in respect of this and Pearson VUE finally agreed in writing that this would not apply to the BPTC candidates' data. The DPO was then able to amend the Bar Council's privacy statement on the BSB website on 22<sup>nd</sup> May 2020, which confirmed their role as data controller, but not explicitly confirming that the use of data for "*the purpose of further developing*" *et cetera* of Pearson VUE's testing processes would not apply. Issues relating to the encryption of data and international data transfer were also not clarified.

The DPO raised the issue of the DPIA on numerous occasions, and it was agreed one would be completed. A DPIA was started but is still ongoing. We were told it could not be prioritised over the operational necessities relating to the delivery of the August exams.

## **Conclusion**

What unfolded was piecemeal, and ultimately not ever completed. It is therefore our opinion that candidates were unclear as to what legal protections applied to them.

Although the most complex questions relating to data protection appear to have been resolved by the time of the exams, the data protection implications were not considered early enough, or with sufficient rigour in the process, and they did not receive the recognition they deserved immediately following the signing of the contract variation.

Many of the impacts which later occurred would have been anticipated and mitigation measures or alternative methods put in place had an effective DPIA been conducted. This Review has considered the steps taken by the DPO and finds them to have been conducted diligently and professionally. However, she should have been involved in discussions before the contract was signed, and the DPIA should have been started earlier and completed concurrently with the EIA. As the Open Knowledge Foundation explains, "unless the novel challenges and risks posed by new technologies are properly understood (the purpose of the DPIA) an EIA is likely to be deficient for failing to anticipate those matters." Given the unprecedented circumstances, we contend that the GRA should have actually seen the completed DPIA and EIA to be satisfied that all relevant issues had been addressed.

## **Recommendations**

- For any future online examinations, the BSB should produce and publish a clear Data Protection Standards statement for all providers and require adherence to the same.
- The BSB's Data Protection Standards statement should be subject to governance by the GRA.
- The BSB and/or Providers must carry out and publish both an EIA and a DPIA for any subsequent remote proctored exam process.

- The BSB should make it clear to candidates what will and will not apply in respect of any third-party providers terms and conditions or privacy statement. Inconsistencies between the two, if any, should be clarified.
- The BSB should ensure candidates are aware of how their data will be processed and to ensure systems are GDPR compliant.
- The BSB must make it clear to candidates the legal basis for the processing *et cetera*. of data.



## TERM OF REFERENCE 7

### **Development of the assessment methodology for the August exams, including the decision not to allow breaks for remotely proctored exams**

Moving the centralised assessments online did not change the assessment methodology of the August exams in a fundamental way. The exams took place on 11-14 August (professional ethics), 17 and 18 August (civil litigation) and 20 and 21 August (criminal litigation) 2020. It is important to note each examination could be taken only in a particular, specified assessment window.

On 24<sup>th</sup> March 2020, the Chair of the Centralised Examinations Board prepared a briefing paper about the postponement of the centralised exams. Its purpose was to bring to the fore the issues facing the BSB in respect of the centralised assessments. The next scheduled assessment point after April was August 2020, and this was considered to be a suitable period for the re-arranged assessments. The briefing paper considers a variety of alternative assessment methodologies including access to the examination papers at home without proctoring, using the students' mock examination marks taken by some students at their Providers prior to lockdown, adopting the skills assessments marks as a proxy for the knowledge examinations marks, and indefinite postponement of the centralised assessments. The benefits and disadvantages of each were considered in detail, and the only option considered feasible was to explore remote options for delivery in August 2020. The option to set the same assessments in an open book format receives only brief mention, "(i)f candidates have uncontrolled access to materials the examinations would have to be recalibrated as open-book, with the likelihood that the pass standard will be set much higher." In our meeting with the Chair of the CEB, we explored this in far more detail. He explained that the assessments are carefully calibrated as closed book exams. All learning outcomes have to be assessed. These are high stakes examinations. They are the gateway to pupillage. If the BSB had reduced the number of questions, it would have rendered the examinations unreliable. If the BSB had moved to an open book assessment, that would have had an impact on the pass standard. In general terms, moving from a closed book exam methodology to an open book exam methodology takes at least two years, involving initial research, consultation, modelling, a pilot, evaluation of the pilot and finally, launch.

The BSB Director of Operations also observed that open book exams would still have needed to be invigilated, reinforcing that one of the factors underpinning decision-making was maintaining rigour in the assessment in the public interest.

The letter from BPTC students of 19<sup>th</sup> of March 2020 (see Term of Reference 1 above) urges the BSB to approach these assessments flexibly: "First, many of our other BPTC assessments are open-book. Second, using software like Exemplify would enable the exams to remain time-constrained, thus limiting students' ability to rely on the books too much. Third, the assessments are due to become partly open-book from next year anyway, presumably because the BSB's primary concern is whether future Pupils are able to find the correct information quickly rather than whether they have memorised it; and there is no credible reason why similar arrangements could not be brought forward to the current academic year. Fourth, to mitigate the danger of collusion, the BSB could require us to sign a "Declaration" sheet in the same way we are currently required to do for many of our Provider-set assessments."

SABER also wrote to the BSB on 1<sup>st</sup> June 2020, asking for exams to be converted to an open book format with breaks. As they pointed out, other examinations (such as Opinion Writing and Drafting) were sat at home by some students, with only prescribed materials allowed. The Opinion Writing and Drafting exams form part of the same qualification as the central examinations. The Opinion Writing exam is weighted at 10% of the overall BPTC qualification, whereas the Ethics exam is 5%.

Therefore, SABER argued, it was not consistent to apply ‘higher’ standards to the Ethics exam in comparison to the Opinion Writing.

There is some validity in these arguments. We are not persuaded that the examinations should necessarily have been open book. They would still have required remotely proctored invigilation. When we met with representatives from SABER, they conceded there was perhaps not enough time between April and August to set open book alternatives. Nevertheless, the BSB should have demonstrated more flexibility in considering its assessment methodology in August 2020 to reflect the crisis of the global pandemic and the challenges students were facing. For example, bearing in mind that BPTC students would take open book exams at home, or would already have taken the skills-based assessments at Providers, the BSB could have given due consideration to making the CEB exams pass/fail only. A pass mark would reflect competence of the candidate. This would also have reflected the changes made across the higher education sector at the time, including the introduction of safety nets, no detriment policies and the adaptation of closed book invigilated exams to open book online examinations, by many providers. Again, we are emphatically not advocating one model over another, but rather pointing out the need to be seen to be demonstrating flexibility during a pandemic.

### **The decision not to allow breaks for remotely proctored exams**

Notwithstanding numerous representations from students as well as members of the Bar, the BSB decided very early in the process not to allow breaks for remotely proctored exams because of the impact on the integrity of the assessment. It would have meant candidates would have been unsupervised at those points whilst their exams were still live. Under remote proctored conditions, if a candidate moves away from their desk, the exam is terminated.

The Bar Council Education and Training Committee submitted a statement to the BSB Director-General on 8<sup>th</sup> July 2020 suggesting the BSB consider splitting the exam into two parts. Technically, it was possible to build breaks in the delivery of the online examinations, but that would make it, in effect, two separate examinations. Candidates would have needed to book each sitting as a separate session and go through the detailed environment checking and identification check-in again. The BSB gave consideration to this option but decided at the time it would be administratively burdensome and complex for candidates and Pearson VUE.

It was not foreseen that providing no breaks would have the impact that it ultimately had. The BSB clearly expected candidates who could not sit in front of a computer screen for up to 3 hours to book their examination at a test centre. The Head of Authorisation of the BSB told us she had received assurances in late-May 2020 from the Pearson VUE Strategic Account Manager that sufficient test centre capacity would be available in August 2020 to accommodate all those who needed it.

One of the reasons that the decision not to permit breaks ultimately caused such issues, including candidates taking to social media reporting they had to urinate into bottles, is because the BSB could not foresee the delays many candidates would experience from logging onto the system to being able to start the examination, see further Term of Reference 12 below.

“Exam due to begin at 10:30am so I signed in at 10am and did the checks as it’s recommended to do so 30 minutes before. I was sat waiting for over an hour for my exam to begin, just looking at a blank screen in exam conditions too scared to move. I had a lot of technical issues with my ethics exam so I pretty much sat in a state of anxiety and stress for an hour before the exam began, meaning of course, I wasn’t in the best mind set to sit the exam. Given that I was at my screen for over 4 hours, I

desperately needed the bathroom. I tried not to drink much water before the exam but I suffer with migraines for which I am medicated and because I had a migraine attack this morning I had to drink more water. I understand the argument that we can't have toilet breaks because of 'integrity' but if that's the case then the least that can be done is to start the exam on time. Imagine if courts didn't allow jurors to use a restroom for 4 and a half hours. The sheer anxiety and stress has been completely overwhelming and I almost feel broken from it all. I'm very upset and I feel majorly let down."

When we met with representatives of the Exams Team from the BSB, they told us that much later after deciding against breaks, they discovered that some online assessment systems do support breaks during the examination, provided candidates understand that their previous answers would be locked, and they could not go back to check or change an answer. It is far from clear whether any other provider would have been available to offer this sort of functionality at the time of the August examinations, bearing in mind that the contract was signed in May. Nor is it clear whether candidates would be happy with this, but it is worth investigating for future examinations delivered online.

The BSB tried to take into account the additional pressure that the online examination conditions would put on candidates, including for instance not being able to stand to stretch. The Candidates' Guide (see Term of Reference 10) says reassured candidates that, "(p)roctors are trained to differentiate between when someone is looking around naturally and when, for example, they might be repeatedly referring to a note or a similarly prohibited aid. If you are looking around naturally, they will not intervene. If you have a disability which means that you are prone to sudden head or shoulder or neck movements, simply mention this to your proctor when your exam starts so that he or she can disregard any such movements during your exam."

However, candidates fed back to us that some proctors permitted natural movement, but other proctors interrupted them, disrupting the examination. Word seemed to spread amongst the candidate community to keep eye contact with the screen at all times, or risk having the assessment terminated. Candidates became anxious to restrict their natural bodily movements; we are not designed to sit still in front of a computer for hours at a time. The lack of breaks compounded the situation.

## **Conclusion**

Giving candidates breaks during these exams deserved further consideration in developing the online assessment methodology. When this Review met with the Director-General of the Bar Standards Board, we asked him if he would, in retrospect, have made different decisions. His response was provided in writing and extracts are reproduced in this Review. In respect of breaks:

"I am sorry that we did not provide for a break in the examinations to enable students sitting the examinations at home to move away from their desks for a short period. I do not believe the lack of a break would have mattered had all the students who wanted to been able to book a place at a testing centre and had all the examinations started promptly. It's not unusual in many aspects of professional and personal life to have to manage three hours without a break. But the lack of a break clearly did put unnecessary pressure on some students, especially when there were also severe delays in signing in. Avoiding the pressure and indignity that resulted would have been worth the extra administration and cost."

## **Recommendations**

- The BSB must consider ways to incorporate breaks during the assessments.
- The online provider should be able to track the mean, median and range of time from candidates checking-in to the end of the examination.

## **TERM OF REFERENCE 8**

### **Engagement with BPTC Providers, including:**

#### **a) Support and guidance from Providers to the BSB on arrangements for scheduling the centralised assessment**

It became immediately apparent in our meetings with Providers that they would have welcomed the opportunity to have been more engaged with the BSB, from the time the April exams were cancelled and throughout the planning and delivery of the August examinations. The Providers have decades of experience of delivering examinations, and some had experience of online proctored examinations. They also have many years of experience of managing reasonable adjustments (see Term of Reference 9 below).

The BSB told us, from their perspective, they had involved Providers regularly, frequently and consistently: “We absolutely did invite and welcome their challenge – we have always sense-tested things with them.” However, in a meeting with us, the Providers reflected they had not always felt like they were “on the same side” as the BSB. They appreciated the situation was highly stressful and quick decisions needed to be made, but when they raised concerns, particularly in respect of international students who might not be able to attend the test centre for medical reasons, they felt their concerns were dismissed out of hand. In reviewing their emails ahead of their meeting with us, many Providers realised the long hours into the very late evenings that the BSB Exam Team had been working, and they wanted to emphasise they were very sympathetic to the BSB’s predicament in the circumstances. They reflected the BSB might have found it difficult with limited resources to put these highly complex arrangements in place to meet the deadline to provide the August exams. They also did not understand why the BSB had not asked Providers for advice and guidance in relation to how to manage delivery of exams and particularly the reasonable adjustment arrangements. An astute observation from one of the Providers, was that the BSB did not think of the questions that students would raise, something at which Providers are particularly adept.

Once the examinations started, and technical and other difficulties came to light, Providers were in an exceptionally difficult situation. The BSB directed candidate complaints to Pearson VUE. Pearson VUE sometimes redirected candidates to the BSB. In frustration bordering on exasperation, candidates turned to their Providers, who were at a loss for solutions to help their students and had no choice but to redirect their enquiries back to the BSB or Pearson VUE. Providers had no direct means of contacting Pearson VUE themselves to make representations on behalf of their students. Candidates were entitled to have a clear pathway for raising concerns, technical or otherwise, that arose during the examinations. This is illustrative of the unfortunate piecemeal basis on which the project operated.

### **Conclusion**

This Independent Review presents an opportunity for the BSB and Providers to work together in genuine partnership.

### **Recommendation**

It is very difficult to make a clear recommendation, but we encourage the BSB and Providers to open a dialogue about how to better work together in future.

## TERM OF REFERENCE 9

### **The handling of reasonable adjustment needs of candidates by the BSB, including;**

#### **a) Reasonableness of the general BSB approach**

We have, under Term of Reference 4 above, considered s. 149 EA 2010. For the purposes of this Term of Reference, we add that under s. 149(6), compliance with the duties encompassed in s149 may involve treating some people more favourably than others, so far as is permitted by or under the remainder of the EA 2010. This reflects not only the reach of any reasonable adjustment provisions but also those relating to positive action (s.158 EA). This specifically permits proportionate positive action to enable or encourage people who share a protected characteristic to overcome disadvantages connected to it (s158(1)(a) and 158(2)(a)) and proportionate positive action to meet the needs of persons who share a protected characteristic who have needs that are different from the needs of person who do not share it.

We have also explained the process involved in producing the Equality Impact Assessment (EIA) in Term of Reference 4. The EIA v1 identified in April 2020 that approximately 12% of candidates would be entitled to reasonable adjustments. The EIA was not shared with Pearson VUE who, as we shall see below, told this Review that they were unprepared for the volume of candidates with reasonable adjustments, based on their experience and delivery of the BCAT. Contrary evidence was provided by the BSB who told this Review that they had spoken with Pearson VUE on several occasions about the need for them to expect a large number candidates requiring reasonable adjustments. The BSB said they provided the approximate figure normally expected for pen-and-paper exams with the caveat that the number would go up when Providers gave the BSB the new data to reflect the new form of delivery. There is also scholarship and literature widely and freely available indicating that upwards of 10% of higher education students are entitled to reasonable adjustments. It would be reasonable therefore to expect Pearson VUE to be aware of these sorts of educational reports, given their specialty is providing online assessments. Although it would have been helpful for Pearson VUE to have had sight of the EIA, they should not have been unprepared for the volume of BPTC candidates with reasonable adjustments.

On 13<sup>th</sup> May 2020, the BSB Exams Team made it clear to Providers that candidates did not need to have formal learning agreements in advance to be entitled to reasonable adjustments during the online exam in August.

The BSB was already aware that blind and severely sight impaired candidates could not be accommodated by Pearson VUE's system as it does not support JAWS screen reader capacity. It was noted in EIA v1 that "We know that we will not be able to accommodate ... students who need to use screen reading software such as JAWS (a programme which allows blind and visually impaired users to read the screen with a text to speech output). The remote proctoring tool shuts down all other software during the test. In EIA v2, they say, "We recognise that this will leave a small number of students, particularly those who would prefer to use JAWS or need a braille exam, without a suitable solution. We plan to explore whether bespoke solutions for those individuals are possible in consultation with them." As we shall see, if the BSB had engaged with these particular candidates, proactively and early, they would have felt engaged with, listened to, and properly accommodated reasonably.

The issue of inaccessibility of the Pearson VUE system and screen reader technology had been raised with the BSB in June 2019 in relation to the BCAT examination, administered in Pearson VUE test centres. When these same candidates contacted the BSB in May 2020 about their concerns with

reference to the August 2020 BPTC exams and the inaccessibility of Pearson VUE's system, the BSB replied: "It is important, however, to be clear about the very different context for the BCAT and for the centralised exams ... It will not be helpful to open old discussions about what happened last year – that was a very regrettable situation as we acknowledged at the time but it is not relevant to the current situation."

On the contrary, we think this was a highly relevant comparison for the candidates to have made. They were understandably anxious about their opportunities to sit the BPTC examinations at all. They had already endured five months of uncertainty in relation to their BCAT assessment during 2019. They had been unable to sit to the BCAT at all in the end, because their reasonable adjustments could not be accommodated. As a result of this, the BSB had granted them a waiver on the BCAT. The candidates told us:

"We [were] ... happy to do the [BCAT] test. We had no ambitions to get a waiver, and just the way it was phrased, ... that they were doing us a favour... We have constantly found that ... attitude... 'We're doing you a favour', 'What are you complaining about?'"

As one external observer noted:

"The biggest red flag was that [the BSB] knowingly selected a system that was inaccessible. They had used it before, they knew exactly what the issues were going to be, they picked it again, and they demonstrated that nothing had been learned from the instances in the previous year... They were dealing with a difficult situation, but the point is that they still made that decision, that it was okay for those students not to be catered for."

As things transpired, the candidates' fears were realised as they entered protracted and stressful negotiations again in 2020 in relation to the August sit:

"The amount of pressure that we were under at the time, not knowing, trying to revise, while not knowing whether we'll be able to take the exams... We were put through that from May up until our exams. And that wasn't right."

Evidence presented to this Review illustrates the experiences of disabled candidates. They reported experiencing "ableist attitudes" and opacity in relation to the BSB's decision-making. Candidates reported they felt they were being treated like balls in a pinball machine, being passed from Provider to the BSB and back again. They considered this was "unreasonable". They were told they had to contact their Providers as the responsibility for reasonable adjustments had been delegated to the Providers. From the students' perspective, the BSB had taken responsibility for the centralised examinations and therefore, for organising the reasonable adjustments:

"All this time we were told that, 'Just don't get in touch with the BSB!' And, you know, these exams were due to place take place in August... The dates were given to everyone at the same time... So it was ... a bit of a stressful time, because everyone else could revise."

Providers worked closely with these candidates to put forward suggestions to the BSB about how to accommodate the candidates' reasonable adjustment requirements. However, these suggestions were rejected by the BSB. The basis on which the BSB was making decisions was unclear both to the Providers and the candidates. The candidates felt it was because the proposals were coming from them.

“[My Provider] had suggested can we use the solution used by the SRA, the Solicitors Regulation Authority, for their students because it's accessible.”

“It seemed from my email correspondence ... that they were vetoing everything that the providers had suggested.”

“They've not given an explanation why those suggestions were not reasonable.”

One possible solution (of the six) proposed by these candidates, was for the examinations to be sent securely to them in a Word document, so that their screen reader could facilitate their access to the assessment. The Pocklington Trust suggested to the BSB that the candidates could be invigilated remotely via screen sharing and/or webcams. However, when asked by this Review to explain why this was not considered a viable option, the BSB explained:

“We were concerned about the integrity of the assessment. If we were to send out by email exams to one person, then why would we not do it to all of them?”

Factors to be taken into account in determining what is “reasonable” are set out in the statutory Code of Practice (Employment and Occupation: Statutory Code of Practice, EHRC, which is admissible as evidence and which must be taken into account where relevant – s.15 Equality Act 2006) at 6.28 (though references are to employer, this is taken to include qualification bodies as the Code covers employment and occupation):

“The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer.”

Once a potential reasonable adjustment has been identified, the burden of proving that it is not a reasonable step for a service provider to have to take shifts to the Respondent (see s.136 of the Act and *Project Management Institute v Latif* [2007] IRLR 579 53 - 55). Maintaining the integrity of the examinations is a relevant factor and if integrity could genuinely have been compromised, that might be sufficient reason to refuse the request. However, the duty to make adjustments is objective, and the burden, once a potential reasonable adjustment has been suggested, engages on the respondent to prove that it is not a reasonable one to have to make. It was incumbent on the BSB, having chosen a method of testing which excluded a section of the cohort, actively to consider what alternatives might be available, ideally in co-operation with Providers.

Frustrated by their lack of progress, two severely sight-impaired candidates contacted external bodies in July 2020. This included charities, who advocated on their behalf. This finally meant that they made some progress with the BSB.

“The BSB ... not once did they make any alternative suggestions, up until ... the Thomas Pocklington Trust got in touch. And they said, Oh, well, we're looking into a home invigilation option. And that



was definitely mid-July, and that was just them *looking into it*. So we were still not sure what would happen because of Covid restrictions” (emphasis added).

“It took us months and we were told never to contact the BSB. However, when external bodies contact them, they’re suddenly back in contact with us.”

In the midst of a global pandemic, disabled people are most at risk of contracting Covid-19, hospitalisation, and early death. According to ONS data recorded between March and July 2020, two-thirds of the UK’s deaths by COVID-19 were disabled people<sup>i</sup>. Whilst we acknowledge that a significant proportion of disabled candidates requiring reasonable adjustment do not have complex medical conditions or severe impairments, several candidates do.

Many of the latter group had very little choice but to travel to take their assessments. Since non-disabled people were able to take their examinations in the safety of their homes, disabled people felt that disadvantage was being added to them as an already disadvantaged group. From their perspective this was unnecessary and heightened their levels of anxiety.

“Covid was possibly rampant and it would require ... unnecessary travel in the middle of a global pandemic, for the BSB to be satisfied. [This] put me, my family, and ultimately other people ... at risk of virus transmission, which is crazy and beyond stupid. And I would understand it if they had a legitimate reason, but ... all they could say is ‘It’s not secure enough’, which again I think you have to explain why it’s not secure enough.”

“Disabled persons traveling is virtually impossible because you can’t ask someone for help... A lot of people struggling to get ... assistance.”

Some candidates reported to the Review they had found the BSB lacking empathy, understanding, openness and willingness to engage with them. Many felt that rather than being facilitative and supportive to enable them to take their exams, the BSB was being “obstructionist”.

“They’re just unwilling to engage. They [are] just so unbelievably set in their ways, ... if it’s anything outside their spectrum of comprehension.”

“It’s the mindset that’s the bigger problem.”

Stakeholders reported that they felt the BSB had frequently misjudged the tone of their communications:

“I really had to encourage them, to get off their high horse and become a bit more human and sympathetic. And they moved towards that, as ... they began to realise the data they were receiving from Pearson was inaccurate... I think, if they’d have just taken greater care with their tone sooner, ... it would have helped.”

As we have said, and repeated, an important focus for the BSB was the integrity of the examinations and ‘control of the paper’. It was reasonable, therefore, to consider how to make reasonable adjustments *consistent with the rigour of the closed book examination format*. However, it is not clear to us why accommodating disabled candidates *necessarily* poses a risk to the integrity of the assessments. It is not an ‘either/or’ situation. Concerns about ‘downgrading the examinations’ by giving disabled people reasonable adjustments is a false dichotomy. They merely want a level playing field and the opportunity to take their exams like everybody else.

“It was all about maintaining the integrity of the exam. And that point was hammered in, to the extent that, you know, it really felt that they were saying that if we allow you, if we accommodate for your disability, you're going to cheat. It really did feel like that.”

“From my experience, from the get-go, the BSB’s attitudes to any suggestions made by a disabled person regarding their adjustments has been one of suspicion and hostility. They think: ‘are they trying to get around our stringent noble regulations, which we are doing to uphold the integrity of the profession?’”

Some disabled candidates expressed concerns about other disabled students, who were not as well supported as them in organising the reasonable adjustments. They wondered how others would be able to handle a similarly difficult situation.

“My bigger concern is, we were in a certain privileged position, ... we both had scholarships, and we both came from ‘reputable ... academic institutions’. We’re both members of [an] Inn [of Court], ... [have] a charity supporting us. If someone didn't have that, ... if we were treated with such disdain, I really don't know, how these people would have dealt with someone else.”

Finally, some disabled candidates expressed the view that accessibility and inclusion were only now being considered as a result of the poor experiences of non-disabled candidates. They felt that had non-disabled students not had difficulties with their online examinations in August, the issues of exclusion and poor practice would not have been addressed:

“(The BSB) only thought about accessibility as a consequence of what happened to the non-disabled people. And I think had that not happened, I think what happened to [us] and other disabled people would have just been brushed under the carpet. I don't think it would ever have come to the fore.”

The consequences of these experiences for disabled candidates were serious and profound:

“I've had a disability all of my life and it's never been a hindrance in such a way. You know, there's been challenges, but I've never been made to feel that my disability is a problem for others... There was one point at which I was so frustrated, I did even write an email saying, ‘I'm very regretful of being born with a disability because of the treatment that you've subjected me to.’”

“I think the wider point is, that they, for me at least, I think showed a complete disregard of disabled lives, disabled livelihoods, and disabled accessibility of the profession.”

We are required by this Term of Reference to comment on the reasonableness of the BSB’s approach in respect of the handling of reasonable adjustment needs. Taking all issues into consideration, and the evidence provided to the Review by various key stakeholders, the BSB’s general approach to the handling of reasonable adjustment needs fell short, notwithstanding the unprecedented circumstances of a global pandemic. This might be because the BSB did not have specialist in-house expertise or capacity in relation to the handling of reasonable adjustments for assessments. We recognise that the BSB would not normally deal with reasonable adjustments, as it is a regulator, whilst the Providers would usually organise and invigilate the exams. This is not to say that the BSB did not give consideration to their approach to organising reasonable adjustments from the outset - they did. The BSB was entitled to maintain the rigour of the examinations and make reasonable adjustments *consistent with that objective*. However, some candidates reported through written or oral submissions to this Review, that the BSB treated the situation as

integrity *versus* reasonable adjustments. The examinations can ensure accessibility and inclusion with no loss of integrity.

Whilst it is acknowledged that the BSB did later meet with educational and disability experts, as well as with Providers to discuss and present their plans, such discussions did not take place early enough in the decision-making process. Having identified such a significant impact upon cohorts of candidates, the BSB should have given significant consideration to mitigation measures and sought advice. As one stakeholder recounted, “I was quite concerned that they didn’t really understand their responsibilities for students requiring reasonable adjustments.”

As an external stakeholder representing disabled students observed:

“The majority of students who were having to attend a test centre were those with reasonable adjustments and disabilities... Surely that is a clear demonstration of indirect discrimination, because ... if you got one group of students who was being kept safe, who got adjustments made to make the best of a really difficult national situation, they are perfectly comfortable and they have known what their situation will be months before their exams. So, they are quite happy to do their revision and prepare mentally for these exams, because they’ve known since May what they’re doing in August. And then you’ve got a separate group of students, who don’t even know if it’s going to be possible for them to sit these exams, let alone ... how they revise or prepare for it or if their needs are going to be accommodated. There’s a chance they would turn up on the day and not have what they needed. And you got this group that is almost entirely students with disabilities. How is that not indirect discrimination?”

If existing organisational structures, systems, processes and cultures are experienced as ‘ableist’, this needs to be addressed as a matter of urgency and priority. Approaching equality, and in particular, disability from the social model (i.e., the well-established model that argues that the ‘environment’ is disabling and not inclusive) is a critical perspective for the BSB to consider, and it needs to inform their approach going forward.

Disabled people are experts by experience. Co-produced, creative solutions could have been found between them and the BSB. It would also have been prudent for the BSB to draw on and facilitate conversations with expert resource networks, not only in times of crisis such as the pandemic, but as a matter of good practice. All the stakeholders who contributed to this Review would welcome this.

The BSB’s lack of capacity was further compounded by Pearson VUE’s lack of capacity to deal with students requiring reasonable adjustments, see Term of Reference 9c.

**b) The provision of information by BPTC Providers to the BSB about the reasonable adjustment needs of their students**

The BSB asked Providers to ascertain from their students what reasonable adjustments they would require for the August sit. Providers identified whether the candidates requiring these adjustments could be accommodated through online proctored exams and/or through test centres.

On 13<sup>th</sup> May 2020, the BSB told Providers at the Bar Training Forum meeting that:

“The format of remote assessment that will be used in August 2020 means that there may be candidates who now, because of the changed examination arrangement, will want to identify as needing to have reasonable adjustments made, or those who already identified as needing adjustments may now have different needs. *We therefore ask providers to liaise carefully with all*

*candidates to ensure learning needs are reassessed and details of any new learning needs agreed between the candidate and the provider are made known to the BSB.* The BSB will then advise providers which reasonable adjustments can be accommodated by remote proctoring.

... Please can you send a complete list of reasonable adjustments needed for all the candidates on your list, including any changes from the original list we were sent, and any additional candidates now requiring adjustments. The earlier you can do this, the better, but please aim to do it by *5 June* at the latest.” (Emphasis added)

The BSB had to collate all the information they received from Providers according to the seven categories below, and then merge the information from several spreadsheets. For example, if a candidate was taking all three assessments, the BSB received their information separately, in relation to each subject. To understand the scale of this complexity, given the new format of the assessments, it may be helpful to see the following list of categories of students’ reasonable adjustment (RA) needs which was provided by the Exams Team at the BSB:

1. Students with no RAs or other requirements who would have been able to sit their exams via remote proctoring.
2. Students with no RAs but had expressed a concern about sitting their exams at home (for example, poor internet connections or a noisy house or wished to use the toilet during the test). These students were advised to book their exams at test centres.
3. Students with no RAs but had expressed a concern about having a male proctor (for religious reasons). PV could not guarantee that a female proctor would be available so we advised these students to book their exams at a test centre or to sit at their Provider.
4. Students with RAs who would have been able to sit their exams via remote proctoring (for example, their total time including additional time took them up to 4 hours – the limit for OnVUE exams).
5. Students with RAs who would not have been able to sit their exams via remote proctoring (for example, they needed more than 4 hours or were entitled to rest breaks, needed a recorder/scribe/reader) and their RAs could be accommodated at a test centre.
6. Students with RAs which could not be accommodated at a test centre (for example, they required screen reading software which PV could not offer, or specialist equipment which PV could not offer). These students were to take their assessments at their Provider or at a Provider supplied venue.
7. Students with RAs who were not able to sit at their Provider. These students were offered home invigilation.

The BSB evaluated whether each requested reasonable adjustment could be accommodated by Pearson VUE at a test centre or by the remotely proctored exam, or neither, in which case it would have to be accommodated by a Provider.

There were, however, some delays in Providers relaying the information to the BSB, regarding candidates requiring reasonable adjustments. Although the majority of required reasonable adjustments were received by the time that the BSB had sent the spreadsheet to Pearson Vue on 7<sup>th</sup> July 2020 (which was the day before the telephone bookings were due to open for candidates requiring reasonable adjustments), the information continued to trickle through beyond this date. The BSB did acknowledge that “it was an extraordinarily difficult task, because [the Providers] themselves were dealing with difficult circumstances and then suddenly they needed to find all this new information out... So it was really just the sheer logistical difficulty of the Providers, having the resources to have a lot of really quite difficult and sensitive conversations with a lot of students in a very short period of time.”

Some candidates told us that the advice was highly inconsistent and also that various different deadlines were being offered by different Providers. Some set exceptionally short deadlines for candidates to inform them of their reasonable adjustment requirements. One Provider required reasonable adjustment information to be produced overnight for the deadline of the 5<sup>th</sup> June 2020. Whilst it is not the role of this Review to investigate complaints against particular Providers or the BSB, we are aware that Bar students are a close-knit community which pulls together and shares information, so inconsistency will be revealed; we consider this to be to their credit.

In our meeting with Pearson VUE in December 2020, they confirmed that the BSB had shared a draft of their template of reasonable adjustments with them. After which, both parties worked on it together to finalise the details. Pearson VUE also confirmed that they had had an indication by the 25<sup>th</sup> June 2020, that the number of candidates requiring reasonable adjustments would greatly exceed what they had previously encountered on the BCAT. In evidence provided to this Review, they stated that they had expected that approximately 1% of candidates would require reasonable adjustments. In contrast, the BSB informed us that, “(w)hen we contracted with them, we certainly told them what volume of students we normally had, who would normally have reasonable adjustments. But again, because they weren't necessarily clear, what could be done and what couldn't be done, you know, it's a little difficult to gauge whether that number would be accurate for them... And we've never given them the impression that it was going to be 1%. I mean, I don't know where they got that figure from. That's not consistent with our exams or any other exams.”

Perhaps understandably, given the changed assessment methodology, the Providers had not fully appreciated that there would be an increased number of reasonable adjustments that would need to be considered. The changed environment now meant that reasonable adjustment requirements would not be limited to those with existing learning agreements. Thus, new information had to be gathered quickly and from all candidates. One Provider emailed the BSB on 1<sup>st</sup> July noting that they would “need to write to all of our students and ask them if anyone has a condition that requires them to eat and/or drink anything other than water more frequently than every 2.5 hours”. The BSB team replied by repeating information they had previously given to Providers in May: “(yes), you need to ask about anything that students think may affect them adversely ... we (have) made it clear that we understood you'd need to be able to say things to students to have the right conversations.”

Providers expressed the view that the BSB, “were changing their mind about certain things as we went along. One example of that is the sort of guidance we were getting what category of students would be eligible to sit in Pearson VUE test centres. Initially that wasn't very well defined, and it seemed initially that it was supposed to be reserved for students with learning support needs, but then that got more and more widely defined. And we were having to keep revising the guidance to students, and I think as a consequence some students who may well have been eligible to sit, didn't get a place, because they hadn't booked, because they didn't know that they were eligible soon enough. And that was one of the frustrations, the fact that everything was being worked out as we went along.”

We appreciate that it was a dynamic situation, yet because there was no single source of information available to Providers, and because the communications were piecemeal, it has become clear that Providers were confused about: (a) what was expected of them; (b) what information they were expected to provide; and (c) the arrangements they should make. In addition, they also reported a lack of clarity in relation to which of these responsibilities fell to the candidates, the BSB, and/or the Providers.

Several candidates requiring reasonable adjustments discussed their experiences of contacting Pearson VUE on 8<sup>th</sup> July on Twitter. When they attempted to book their exams, they were informed that their names were not on the approved database.

The process was complex. There were misunderstandings and confusion between various stakeholders, the lack of expertise, experience and capacity (described by some respondents as 'bandwidth') in dealing with reasonable adjustments, both within the BSB and Pearson VUE. Therefore, it was perhaps inevitable that the bookings relating to candidates with reasonable adjustments would not be able to be prioritised before the opening of the bookings for candidates without reasonable adjustments, see below.

In the future, the BSB could fully engage with the Providers and other stakeholders such as the Inns of Court, student representative bodies, and disability advocates from the outset. There is no doubt that they will be able to contribute productively to a project plan (see Term of Reference 13 below). The Providers could also, for instance, advocate proactive engagement with candidates who require reasonable adjustments, and they could further advise the BSB of some of the complexities in relation to implementing reasonable adjustment accommodations.

### **c) The booking of candidates with reasonable adjustments by Pearson VUE**

Pearson VUE were responsible for making the bookings for all candidates, including those with and without reasonable adjustments, who could be accommodated online or at a Pearson VUE test centre.

We anticipated being able to report in this Review how many successful bookings were made at test centres and what proportion of students with reasonable adjustments who wished to book at a test centre were able to. We are unable to do so. We do not know where these numbers are (or if they exist) and if they do exist, whether they reflect reality. Monitoring this could have been a part of the contract between the BSB and Pearson VUE. Given that eliminating discrimination and promoting equality for disabled people is part of BSB's public sector equality duty, it would have been in their interest to have required Pearson VUE to have gathered data on this for the BSB to monitor it.

The online booking system for candidates sitting the exams online and not requiring reasonable adjustments opened on 1<sup>st</sup> July. Candidates requiring reasonable adjustments, however, could not book online and needed to telephone Pearson VUE's customer services. This phone booking system was available from the 8<sup>th</sup> July. These candidates were required to telephone to book their assessments, either online-proctored exams (with extra time) or at a test centre. It was intended that this would mean candidates requiring reasonable adjustments would be prioritised for bookings at a test centre.

What actually transpired was that Pearson VUE was unable to manage the telephone bookings and the system collapsed on the very day it opened. Candidates told this Review that they were held in queues for several hours, only to then have their phone calls terminated. Some reported just giving up. Several international students also said that they had to pay for their phone calls, which were expensive and added to their stress.

We surmise that this was caused by insufficient resources at Pearson VUE. In a meeting with the BSB, they suggested that Pearson VUE call centre operators had not been adequately trained to deal with students requiring reasonable adjustments.

Having been alerted by candidates that the telephone booking system was not working, the BSB Exams Team escalated the issue to the Director-General, who contacted Pearson VUE to register their concerns. On the 9<sup>th</sup> of July, the BSB and Pearson VUE responded by moving to an email booking system. This change meant that some candidates with reasonable adjustments, who had actually been successful and managed to book their assessments through the telephone booking system, had to start the process all over again. This is because it was deemed too complicated by Pearson VUE to retain the information from the telephone bookings.

The new plan was for Pearson VUE to email candidates with reasonable adjustments to ask them what arrangements they needed. Candidates replied and bookings were meant to be confirmed swiftly. However, this system also proved problematic, as candidates did not get quick responses to their requests.

“Part of the complaint was, they would try to book and they would need to allow a four-day turnaround for whatever they said to Pearson VUE, meanwhile other people who didn’t require reasonable adjustments, but did want to sit an exam in person, were taking a slot. Because of the way that worked, it was harder for you to book if you had reasonable adjustments than if you didn’t. Whereas the whole purpose of allowing some in person sittings was to help people with reasonable adjustments.”

Furthermore, Pearson VUE realised that their test centre capacity had already been reached in densely populated areas. The Review received evidence that how places “were allocated was opaque to students and pretty unacceptable.” This culminated, for example, in one case where a candidate with reasonable adjustments, who lived in Belfast (Northern Ireland) had been allocated a sit in London (England). Providers also recounted another incident: “We ended up with students being allocated the most bizarre places. Somebody who was allocated a place in Rotherham, a non-driver, worked out that it would take 2.5hrs each way to travel [there] on public transport.” When the BSB was alerted to this, they tried to find alternatives. However, rather than risking not being able to take the examination, some candidates accepted the inconvenience, whilst others sat the exams online and waived their reasonable adjustments.

“It did seem to me lots of people soldiered on with really unsatisfactory circumstances that put themselves under a lot of stress and distress during that period, where there probably was a better solution.”

This Review had sight of an email chain in respect of one student who Pearson VUE had contacted to say his case was being considered on 24<sup>th</sup> July 2020. The student followed this up on the 17<sup>th</sup> August 2020, and the response from Pearson VUE was that the student’s appointment needed to be arranged by his Provider. The upshot of this was that the student did not have an opportunity to sit the assessment at all; since he required test centre attendance, he had no choice but to defer his assessments until December.

We also received evidence from Providers that during the booking process “students’ experience of communication with Pearson VUE was *pretty shocking*. They were getting conflicting information, or no information at all, when they were being told that Pearson VUE were the only people who could help in their circumstances.” (emphasis added)

Bookings for assessments at Pearson VUE test centres were initially planned to open to all remaining candidates (including those without reasonable adjustments) from the 15<sup>th</sup> of July. This date was later changed to the 20<sup>th</sup> of July to give candidates requiring reasonable adjustments more time to

book their test centre assessments. However, because these bookings had still not been completed by then, several candidates had not been prioritised as intended.

Having considered the evidence, it is clear that the Pearson VUE booking system was chaotic. The combination of a lack of capacity and trained staff, together with the change from a telephone to an email booking system, led to unnecessary distress and considerable anxiety among the candidate cohort, and especially for those requiring reasonable adjustments, who were further disadvantaged.

**d) Management by Providers of the finding of alternative venues for candidates who could not be accommodated through the Pearson VUE system, either remotely or at a test centre**

The BSB seemed to presume that the Providers would make arrangements for candidates who could not sit their assessments online at home, or in test centres (see Term of Reference 2). Alternative venues were booked for candidates who could not be accommodated through the Pearson VUE system. They sat their assessments at a Provider campus (where open), at alternative venues arranged by them, or through home invigilation arranged by the BSB. The BSB provided us with the following figures for candidates accommodated through these arrangements: professional ethics (101 candidates), civil litigation (91 candidates), criminal litigation (83 candidates).

The notes and minutes we have seen of meetings with Providers suggest that the BSB announced decisions that had already been made rather than consulting with Providers, who told us, “There could have been a more consultative approach to the planning of how the assessment would be delivered at an earlier stage... It just felt like a really conflictual process, I think, more than consultative.”

Some Providers and the Inns of Court raised concerns with the BSB about their candidates requiring reasonable adjustments which could not be met by Pearson VUE. They offered to assist the BSB including use of their facilities very early in the process. At the time, the BSB did not take up these offers.

“And what we, the Inns, did collectively, was approach the BSB and said ‘Look, anything we can do to help in terms of facilities, rooms, etc etc, we’re here on standby. But the longer notice you can give us, the more we can assist.’ And to cut a very long story short, they didn’t come for much assistance, if any.”

“I ... persuaded our Chief Operating Officer that we should offer to the BSB that we would host all of our students, who could make it on campus, because I thought at least then, you know, I can make sure that as many people as can get on campus can have their reasonable adjustments. The BSB actually turned that offer down at the time, because they’d already entered into the contract with Pearson VUE.”

We have also seen correspondence between Providers and the BSB, where the latter emphasised that Providers would have to make alternative arrangements for “in person adjustments”, through facilitating contact with the Inns of Court, or across the circuits. The BSB also provided further information about British Council locations. This proved difficult as several locations were closed due to the COVID-19 pandemic, as one Provider recalled:

“We ended up with kind of three categories of student: those who could sit at home remotely, those who sat in Pearson VUE test centres, and those who could not be accommodated in either of



those ways. And those were the ones where there was the least clarity around who was responsible, because the BSB, I think, when they created those categories rather assumed, I think, that providers would have buildings that would be open and therefore we could accommodate students. None of our buildings were open in August and that put us in a really difficult position, because there wasn't an easy solution. We got around it as much as we could, by using British Council venues, for example, and other approved venues. But they weren't open in every location and where neither our buildings nor external venues were open for assessments, in some cases we were left with no options for students."

The arrangements did not always run smoothly. For example, we have had sight of correspondence between the BSB and one Provider, where there appears to have been a misunderstanding about who would be responsible for providing an invigilator for a candidate who was sitting their examinations at one of the Inns of Court. "It was almost tangible - the stress that these students were going through at that time... It was an incredibly stressful time that really affected their focus, and an unnecessarily long process of finding that solution." One cause of great anxiety was the protracted negotiations between candidates and the BSB, Pearson VUE, their training Providers and/or the Inns of Court. Candidates did not know (in some cases until just a few days before their exams) whether they would be able to be accommodated to sit their assessments.

In the future, this Review recommends that the BSB starts from the needs of those candidates who require reasonable adjustments. Starting with the needs of these candidates will transform any project - from its inception, planning and operationalisation. This would satisfy the observation made by one stakeholder that the BSB's attitude seemed to be "This is a mostly good solution, so let's go with that and then we'll fix everyone else, who doesn't fit in that box, afterwards."

#### **e) Decisions relating to those candidates who could not be reasonably accommodated**

The decisions relating to candidates who could not be reasonably accommodated were considered by the BSB, led by the Director of Regulatory Operations. The Director of Regulatory Operations spoke individually to each of the eleven candidates who had been identified as being in need of an alternative accommodation to explore the possibility of home invigilation. The BSB felt this was the only option they had left at that point. This option worked for five candidates, but not the others due to the pandemic. Some students were 'shielding' or 'at risk', or had family members who were, meaning that it was unsafe to have someone from outside of their household entering their homes. This was acknowledged by the BSB as being difficult for the unaccommodated students.

"A couple of them put forward alternatives to the options that I had given them, for example, us emailing them the exam, and then us setting up a Zoom call so we could effectively invigilate remotely... But we were concerned about the integrity of the assessment. So we concluded then, that we weren't able to offer that as an option for them and they were advised that they would need to sit the exam in December."

Although five candidates agreed to in-person invigilation in their homes, they remained anxious and concerned about the risk presented by the virus. Even if the invigilator had tested negative for Covid-19, they could have been infected between the test and the examination. Several of these students had been self-isolating up to that point.

"But given the time and the fact that it was their futures on the line, they kind of agreed to it regardless."

This was clearly an unsatisfactory outcome for six candidates, who would have to take their exams at a later date. There were other options that were put to the BSB by candidates and other stakeholders, but these solutions were not considered to be reasonable in the circumstances, including the need to maintain integrity of the assessment. This put the candidates in the difficult position of having to choose between their health and taking the exam, as the only remaining option of home invigilation put those candidates at risk of contracting Covid-19. This was unnecessary and avoidable, as the BSB could have considered plausible alternatives.

Other candidates informed us that they were not aware of home invigilation as a possibility. This Review heard of one candidate in particular, who could have benefited, as they had complex medical conditions, which made taking the exam online from home difficult.

## **Conclusion**

Only a tribunal can determine whether the BSB failed in its duty to make reasonable adjustments. Clearly, it was not possible to address individual needs until Providers advised the BSB of these needs, but once the information was forthcoming, it was incumbent upon the Providers and/or the BSB to finalise those arrangements. Candidates deserved to know early what arrangements had been made for them, so they could focus on preparing for the examinations. The BSB did not appear to consider that they would have to prove that examination integrity was a reason not to make the adjustment. All of these factors contribute to the reasonableness or otherwise of the duty to make adjustments.

## **Recommendations**

- The BSB needs to ensure *all* candidates can sit the assessments at the same time.
- The BSB needs to 'consult' through 'involving' rather than just 'informing'.
- The BSB needs to have the candidates' experience at the centre of their decision making. This includes both candidates with and without reasonable adjustments.
- The BSB needs to prioritise the needs of the most disadvantaged students and this includes ensuring all assessments can accommodate all required reasonable adjustments.
- The BSB should draw on and engage with networks of experts for advice and support. Integral to this is the need to recognise and value different expertise, including lived expertise.
- The BSB needs to have an inclusive approach to their regulatory framework.
- The BSB should give clear explanations and be more transparent about their decision making, especially in relation to reasonable adjustments.
- The BSB needs to take account of the social model of disability to inform their work going forward.
- The BSB needs to consider integrity in conjunction with accessibility and inclusion.
- The BSB needs to work collaboratively with internal and external stakeholders.
- The BSB needs to recognise that candidates are one of their key stakeholders.

All of the above factors can enable the BSB effectively to meet its obligations to make reasonable adjustments.

## TERM OF REFERENCE 10

**The BSB's communication strategy and its effectiveness. How successfully did the BSB provide information about the assessments to the key parties? In particular, how well did the BSB communicate with students during the examination period?**

We have not received evidence from candidates who booked and sat their examinations without interruption or difficulty. For those students, we assume they saw the communications from the BSB that the April exams had been cancelled. They would subsequently have seen that the examinations would be replaced with online examinations in August. They would have kept abreast of the developments in respect of those exams through the BSB website, and perhaps have followed developments in the legal press and on Twitter. It is likely they would have accessed the Candidates' Guide online in late June or early July. They would have run systems checks, perhaps a few times, to ensure their IT capacity and bandwidth was sufficient for the examinations. They would have booked their examinations online in mid-July using the Pearson VUE booking system and would successfully have completed their examinations in August. We assume they might have submitted evidence to this Review that the communication strategy was clear and effective.

However, this was not the narrative provided by the candidates who spoke with us in our open meetings or who provided written evidence. As we mentioned in the Foreword to this Review, there was a three-way relationship, between the BSB, Providers and Pearson VUE which contributed to the complexities in the bookings for and delivery of the examinations, as well as the communications received by some candidates. It is for those candidates, commonly those entitled to reasonable adjustments, and those who encountered barriers in their ability to raise complaints, for whom the communications strategy failed.

The communication strategy adopted by the BSB was to rely predominantly on website updates through their FAQ pages. However, for individual arrangements for examinations, Providers were also required to communicate directly with candidates, during May and throughout June and July, to capture the information required both from students with existing learning agreements, and from students who would now require accommodations because of the assessment methodology adopted. Subsequently, students with reasonable adjustments were contacted by Pearson VUE by email, after the telephone booking system collapsed, to secure those reasonable adjustments either by booking an online examination slot or by arranging to take their exam at a test centre. Where candidates could not be accommodated either online or by attending a test centre, they were invariably redirected back to their Providers, and in some cases had to negotiate directly with the BSB to find a suitable assessment accommodation solution.

There was no clear framework for these communications. Students regularly reported to us they felt they were "ping ponging" between the BSB, Pearson VUE and Providers. One candidate who attended our open meetings told us she, "felt in the middle, battered by both sides, and no one accepting responsibility." In many cases, in respect of reasonable adjustments, solutions were not found until days before the first examination sitting. The anxiety this caused to candidates cannot be overstated, and it is worth emphasising that on the whole, these are students who require additional support, not less. We agree entirely with SABER's conclusion in the written submission to us that, "(t)he groups disproportionately affected by the mismanagement of these exams include international students, students with limited financial resources and disabled students."

There clearly should have been a project management board in place who could have facilitated proactive communications with this group of candidates, with the resources and capacity to be able to prioritise these bookings.

More generally, for the BSB to rely on their own website predominantly for communications which affected the whole cohort is logical, to maintain a single source of fact. It bears repeating, things were happening at a great pace, and the BSB often had to publish information promptly for the candidates. Wherever possible the BSB gave Providers advance notice of what was coming and, in many cases, invited their comment. However, when this was not possible, it meant Providers saw the updates at the same time as their students without having received notice in advance. Providers reported to us that they were inundated with questions from students after a BSB update, to which they were unable promptly to reply. Candidates reported to us they were confused when their Providers could not provide prompt clarification.

The BSB regularly relies on Twitter to highlight updates to its website. Twitter is very heavily used by members of the Bar as well as Bar students. Although some criticism has been made of the BSB's use of Twitter, it was an entirely appropriate platform to use to supplement (not in place of) communication updates.

The BSB also produced a Candidates' Guide to the August Examinations. Version 1 was released to candidates on 29<sup>th</sup> June 2020 and it was updated on 14<sup>th</sup> July 2020, to reflect the changes which had had to be made in respect of bookings for candidates entitled to reasonable adjustments, when the phone booking system collapsed.

Created by the BSB Communications Manager, the Candidates' Guide is written in an accessible way, with a very supportive tone. Generally, it is very clear and helpful. The Communications Manager had hoped to find suitable student-facing material regarding the OnVUE platform from the Pearson VUE website. However, it struck him that some information was obviously missing, and he therefore felt unable to tell students what to expect and how to prepare. So, he sat a BCAT exam himself to experience it (for which he is to be commended) and then he wrote the Candidates' Guide effectively from scratch. We have reviewed the Pearson VUE website. The brief videos on the website explain the check-in process, but do not explain the online assessment experience. We infer much of the material is written with clients in mind, rather than users.

It was reasonable for the BSB to expect all prospective candidates to read the Candidates' Guide in full ahead of the exams. However, there was very limited information with reference to how to escalate problems ahead of the examination period and also during the examination, including technical difficulties. This observation is endorsed by the written evidence provided by SABER to this Review:

"The guide simply stated that if technical problems occurred, students should contact the proctor, attempt to reconnect and relaunch the exam and notify their provider. The only technical issues seemingly addressed in the guide were those which interrupted a test, as opposed to those which prevented the test from being completed at all. When technical issues did arise (...), students contacted their proctor and/or Pearson VUE as advised but were either unable to reach them or told they would have to wait 3-5 days for their exam to be rescheduled - by which time the BPTC exam period would have ended. The only way through which students managed to resolve their issues was by sharing numbers and email addresses which they found themselves and by sharing tips on navigating technical faults. These contacts and tips were shared by SABER. In the absence of further information from the BSB, our group chat and Twitter became a signposting resource and support group for students experiencing issues."

Further, "(i)nformation within this guide was not always accurate ... It was not updated to reflect the software update that took place between the Ethics and Civil Litigation exam. This update had

different minimum requirements for operating systems from what was mentioned on the guide. The BSB offered no update on this point; students found out via Twitter and our group chat and some subsequently had to source alternative laptops overnight in order to sit their exams the following day.

...The BSB did not properly take responsibility nor adequately apologise for the mismanagement:

- I. In response to the difficulties surrounding booking exam slots, the only apologies offered to disabled students were in a short tweet and one line at the end of the BSB statement dated 14 July 2020.
- II. In response to issues during the exam period, the 14 August statement includes a single line apology for those experiencing difficulties and expresses regret for the lack of test centre availability, but once again focused on the fact that “many students” had managed to sit the exam in test centres.
- III. Although the statement by the BSB Director General on 18 August is more apologetic, no responsibility was taken for failures despite the issues being foreseeable and no mention was made of any measures taken to address issues that may have arisen during the exams that still had yet to be completed.
- IV. Many were also unhappy with the Director General’s interview with Legal Futures, where he stated that he felt “the BSB has done exactly what we should have done to enable students to progress with their careers and ensure standards.”

The tone of the BSB statement published on 14<sup>th</sup> August 2020 is indeed very defensive. It is evident that the scale of the problem was not well understood. The BSB suggested candidates should have elected to take the examination at a test centre; “(i)f candidates felt that they were not going to be able to stay in their room — for example, if they might need a lavatory break during their exam — they were offered the opportunity to take their exam at a test centre, where lavatory breaks are available, or an alternative venue supplied by their BPTC provider, if their needs could not be met by computer-based testing at all.” The statement goes on: “Despite completing the required system tests in advance, inevitably, with any online testing platform, students may face technical issues that prevent them from accessing or completing their exams. These technical issues could include a variety of problems such as a disrupted power supply, interrupted broadband services, or a hardware or software issue with the student’s computer, and, unfortunately, these types of issues are beyond our control.” Candidates inferred that the BSB was putting the blame on them.

The statement does offer a qualified apology, “Our test delivery partner, Pearson VUE, has assured us that at this stage their statistics suggest that 89% of our exams have been delivered without any reported incident and 97% of exams have been successfully completed in all. We are very sorry that some students have encountered difficulties, however, and together with Pearson VUE, we are committed to investigating any issues as quickly as possible.”

We explore the issue of the 97% statistic in Term of Reference 12 below.

SABER described the statement as “woefully inadequate in light of the systematic failings” and demanding the BSB take full responsibility by apologising “properly, fully and unreservedly”.

With the benefit of hindsight, the Director of Communication at the BSB said this statement would have been more apologetic, the tone would have changed, and they would have made it very clear that candidates were not being blamed. His personal lesson learned from this is, in a crisis, only tell people what you know to be helpful and true. The BSB found it difficult at the time to be either. At the time, Pearson VUE were adamant that the problem was not at their end. It was also at this time

that the BSB felt hampered by not having individual student email addresses, so the only methods of communication with students were through social media, the BSB website or via Providers.

It would of course have been preferable for the BSB to have had the email addresses of all candidates for the August exams, as early in the planning process as possible, and permission to contact them directly. A project team might have foreseen the need for the BSB to communicate directly with candidates. In written evidence to this Review, one candidate emphasised that the BSB missed an opportunity to communicate effectively, which “is important because opposition from bar students to the proposed methods could have been partially alleviated by the creation of a sense of co-ownership between students, providers and the regulator... If a genuine bilateral dialogue had been created from the outset, and the BSB had shown an interest in hearing the input of students as to the complex impact that various models of assessments would have had on students, the regulator might have better come to understand the plight of students, and students might have come to better understand the dilemmas of the BSB.”

In mid-August, when the difficulties encountered by candidates came to light, the BSB Executive decided not to reply to every tweet but collectively to agree a public announcement. The Chair of the Board reflected in a meeting with the Independent Review in December 2020 that perhaps the Board should have led with an unreserved apology and unreserved acceptance that things had gone wrong. In our opinion, this would have made a difference if released on by 14<sup>th</sup> August 2020. On the 18<sup>th</sup> of August 2020 the BSB Director-General released a statement apologising:

“The BSB very much regrets the difficulties that some students have encountered while seeking to complete their centralised assessments as part of their Bar Professional Training Course. We understand the strength of feeling from those affected, who have worked so hard to prepare for their examinations, and we remain committed to enabling as many students as possible to take their exams as soon as we can.”

The statement goes on to give assurances that the BSB was trying to sort a pen-and-paper sit for September 2020 if at all possible (ultimately held in October 2020), and announcing this Independent Review, but by the 18<sup>th</sup> August, most candidates’ goodwill had expired.

## **Conclusion**

In his response to the Independent Review, the BSB Director-General reflected, “our communications were also hampered by the fact that students’ relationship was with providers rather than direct with us. Accordingly, we relied heavily on providers to relay messages to students and, when the examinations were in progress, could not ourselves send messages direct to students, but had, instead, to publish general statements on our website. I know that the students found this frustrating.”

## **Recommendations**

- The BSB needs to have a mechanism and permission to communicate with candidates individually at times of crisis.
- Candidates deserve to understand which party is responsible for making exams bookings: themselves, the online provider, the Bar course provider or the BSB.
- A clear statement (or flowchart) showing candidates how to raise or escalate concerns should be provided.
- If the BSB decides to adopt the recommendation in Term of Reference 2 above, a communications strategy should be considered in the development of a Crisis Response Policy/Emergency Planning Framework.

## **TERM OF REFERENCE 11**

### **The booking process for candidates with no reasonable adjustments**

It was the responsibility of Pearson VUE to manage the booking of examinations.

A significant number of candidates were overseas. These presented particular challenges as, depending on where they were located, wifi connections were poor and test centre availability limited. The BSB worked with Providers to try to secure suitable venues for them to take their assessments, but this took a great deal of time and a proportion were unable to be accommodated. Although travel restrictions and local lockdown rules are clearly beyond the control of the BSB, many overseas students felt unsupported in making arrangements for their examination. We heard from students who had gone to considerable expense to book private office space with guarantees of good internet bandwidth. We heard from candidates who had themselves sought and found (and some who failed to find) British Council accommodation, for which they had to pay. Providers do sometimes levy charges to students for sitting exams overseas. This is not a requirement of the BSB.

SABER also reported that, “(i)nternational students faced difficulty in finding test centre slots. Malaysian students in particular reported that there was no option to book at local Pearson VUE centres and no arrangements were made for alternative venues. There were also no venues in Barbados.”

The only reported incident from UK-based candidates in respect of the booking process for candidates without reasonable adjustments was that the clock used to book the examination sitting was not in the 24-hour format. Several students reported they had accidentally booked themselves for a midnight examination sitting, having thought they had booked for a midday slot.

“I booked my exam months in advance. No RA's so I wasn't unduly worried. I saw another student's tweet about having their exam scheduled for the middle on the night and wanted to double check mine on the off chance there was a mistake. Lo and behold, 12:30...AM. AM. The middle of the night. The mind boggles. I don't know what to do. This is already a resit for the exam which I took last year.”

Pearson VUE have since amended the online booking system to the 24-hour clock with global time zone functionality.

### **Recommendation**

The BSB must ensure that candidates who have to sit examinations at an overseas venue, know who can provide them with advice and support, whether that is the BSB or Providers or another party.

## TERM OF REFERENCE 12

**The delivery of the assessments by Pearson VUE including:**

- a) Technical and other difficulties in accessing and using the Pearson VUE OnVUE platform**
- b) Pearson VUE customer services**
- c) Accessibility of statistical information about the assessments**

### **a) Technical and other difficulties in accessing and using the Pearson VUE OnVUE platform**

In its initial consideration of the OnVUE platform, the BSB was assured the system would work for candidates with “low bandwidth.” This is documented in the proposal to the Board which was considered out of cycle (see Term of Reference 1). However, we are of the opinion that the OnVUE system does not work effectively if candidates have low bandwidth.

In its letter to the BSB on 1<sup>st</sup> June 2020, SABER opined, “The proposed format is dependent on an internet connection and power supply strong and stable enough to support continuous video streaming for the duration of the exam, which many students have difficulty in accessing. 79.1% of respondents to our survey [of 335 BPTC students from all eight Providers] said that they were concerned that their internet might cut out during the course of a continuous video-stream. This is a particular concern for students taking the exam in parts of the world which do not have reliable power supply or internet connection.”

As we explained in Term of Reference 3, the first thing a candidate needs to do to commence check-in is download the OnVUE system. This can take a few minutes to download, but with low bandwidth it can take up to 30 minutes. Then the candidate needs to undergo the identification process, involving taking a ‘selfie’ and providing authorised photographic identification for comparison. They must also provide pictures of their workspace and close all applications running on their devices. Pearson VUE do not and cannot track how long this takes on average for candidates, as they do not have control of the candidate’s device until the test is launched. Candidates were told in the Candidates’ Guide that check-in could take up to 30 minutes in total, but candidates were not told how long this could take if they had low bandwidth. Pearson VUE have not undertaken a user-group analysis of how long it can take from starting, through check-in, to the examination launch.

Once the identification and environment checks are finished, the greeter launches the test, at which stage the candidate is under exam conditions and is transferred to a proctor. Candidates are told to sit still as the exam is about to launch. One proctor may be the invigilator for multiple candidates at any given time. Pearson VUE informed us that this could be up to 15 candidates maximum. The proctor ‘picks up’ the candidates one at a time out of an online queue after the greeting stage is complete. Candidates could experience a change of proctor during the exam. Proctors could have different candidates taking different exams with different clients at any given time.

In the brief for the Independent review, the BSB helpfully summarised the technical difficulties candidates reported to them:

- i. Difficulty in accessing the Pearson VUE OnVUE remote proctoring system – despite in most cases having previously run the test to check that their computers met the system requirements
- ii. Lengthy delays in the remote proctor introducing themselves to candidates and completing the ID process



- iii. Technical difficulties during the exam which meant that candidates were thrown part way through and could not re-access their exams
- iv. Candidates at test centres not receiving their reasonable adjustments
- v. Candidates informed by Pearson VUE that they had successfully completed their assessments despite not being able to access their exams or being kicked out part way through

During the Review, we received inconsistent responses from Pearson VUE about the technical difficulties experienced by candidates using the OnVUE platform. Too often technical difficulties were blamed upon candidate digital capacities, and internet bandwidth. However, we received expert evidence to the contrary. Reproduced with the permission of the Director of Education and the Head of IT, Gray's Inn:

"Gray's Inn has 14 Residential (Bar Course) Scholars, the majority of whom sat their examinations online with Pearson Vue in August 2020. When it became clear that there had been technical issues with access to the Pearson Vue online platform, the Inn's Head of IT was on site to support our students and ensure we provided adequate connectivity in the flats where the students reside. Many of the student's difficulties were experienced first-hand. We were very careful to ensure that Wi-Fi provision was monitored and we removed all necessary corporate firewall settings which could have interfered with the effective operation of the platform. System checks were conducted using the Inn's Wi-Fi ahead of exams on the 13<sup>th</sup> August and for all subsequent exams – All were successful. The checks were conducted by both the Head of IT and the students themselves.

When examinations commenced, students had a range of technical difficulties. Some students failed to get access at all and some failed to have examinations commence after successful enrolment and ID checks. When these technical issues arose, our Head of IT checked the quality of the Internet connection and again ensured that all firewall settings had been disabled to enable Pearson Vue – Everything was working well and should have enabled the effective operation of the platform, according to the technical specifications provided. We are firmly of the view that the technical failure was with the online platform itself."

In the Candidates' Guide, all candidates were encouraged to do a system check in advance:

"We recommend running the simulated test more than once. You should run the test on the same device that you will use to take your actual exams and with the same internet connection. We also recommend you run the test in the same room and at the same time of day that you will take your exams. This will enable you to replicate, as far as possible, the conditions at the date and time of your actual exams."

Pearson VUE told this Review they do not know who is running the system check at any given time and are therefore unable to be sure whether candidates have completed a system check before their examinations. They are hoping to build this functionality into the developments of the platform in future.

Many students also experienced significant delays after successful completion of the greeting stage to the start the exam. Pearson VUE suggested to the Review that this was due to 'ghosting', meaning candidates were waiting but not yet met by a proctor. It seemed "a small number of candidates" could be placed into a queue but were not visible to proctors in order to start the examination. They have since added a "patch to the software" which has resulted in the problem being reduced by more than half. However, there are simply too many reports of unexplained delays for which Pearson VUE cannot account.

We are of the opinion that Pearson VUE must have had too few proctors available during the BPTC assessment window. In a meeting with Pearson VUE, this Review received evidence that they did have reduced staffing as a result of COVID-19 and had made a decision to reallocate some staff working from home to general duties to service all clients' needs. Pearson VUE also informed us of a huge increase in global demand for their services during March and April 2020. It is logical therefore to infer that there was an insufficient number of trained proctors available. This opinion is also reached on the inference that students did not receive a sufficiently prompt service from their proctors.

We have reproduced below a number of the testimonials provided to us anonymously which we believe best illustrate the candidate experience on the day. It is a very small percentage of those reported. These unedited testimonials have not been corroborated independently, but such is the volume of testimonials which tell a similar story, we have concluded there must be truth in them.

"It took 75 minutes for Pearson VUE to "launch" my exam from when I had submitted all the check-in details / photographs. This meant that, from starting the check-in process to completing the exam, it was a period of 4.5 hours during which I could not move and had to stare at the screen – totally unacceptable! After about 30 minutes of waiting, I tried to contact Pearson VUE using the online chat feature, but just repeatedly received a message saying "A chat agent will be with you shortly. Your expected wait time is 0 minutes". Needless to say, they never actually arrived..."

"I was sat for my exam, the check in went fine, I had a black screen, which I presumed was whilst they finished off the checks. The chat function opened and they asked me to keep my face towards the screen (which I then did and shows the chat function was working). I then asked where my exam paper was multiple times over around 10/15 minutes. The chat function then disconnected and I couldn't contact them using it. I sat for 2 hours with a black screen (plus the little box showing that the webcam is working). Due to the software I couldn't even exit the program or ask for assistance."

"I logged into my exam to start the online check in process at 11:00am. After having almost completed the process, I waited for the exam to start for over 50 minutes. My exam started at 12:00pm. Sitting in panic and anxiety for almost an hour, and then having to complete a three hour exam is just unacceptable. By the time the exam started I was in such a state of anxiety and simply praying for the exam to start that it took me a while to get into it. Having to sit there for an additional amount of time for an already lengthy exam caused me serious bladder issues as I was dying to go to the loo. That morning I had been multiple times before the exam, to ensure I would be fine. But sitting for that additional waiting period was horrendous. I am lucky I got to complete my exam, but my ability to perform well seriously impacted by the substandard PearsonVue proctoring system."

When we asked Pearson VUE about the technical difficulties encountered by candidates, they suggested the possibility that the candidate might not have shut all applications on their computer on this occasion. They explained that OnVUE shuts down all of the software on the computer, but if OnVUE cannot shut down the unauthorised application, the exam will not download. In response to a written request for additional evidence, Pearson VUE responded "if the exam does not download, it is 90% certain that it is a candidate's insecure browser." In the BSB Candidates' Guide, there is one brief mention of this to students... "[proctors will] perform checking procedures to verify... has been shut down". The OnVUE system test also makes it clear to candidates that all applications except OnVUE must be closed. It explains for Mac and Windows, "your exam will not launch if any apps "except for OnVUE" remain open. It is suggested this might account for the following technical problem:

“Told my laptop did not meet the minimum operating system requirements despite having already taken one exam. Have not yet been resolved, still unsure when I will be able to try again”

Other technical problems also occurred during the examination as illustrated by the following anonymous testimonials:

“I was in the middle of my ethics exam (finished Q4a) when a technical issue occurred. The exam cut out and it was left saying unconnected. It then re-connected and was sat loading. It would not reconnect. My most recent answer to question 4B had been deleted and the timer was still counting. However, it simply would not reconnect. I tried to use the VuePearson chat function but each time it said the proctor had been notified and someone would be with me shortly. However, this did not happen. After waiting 20-25 minutes I called Pearson VUE to raise the issue. A case has been raised in respect of the technical issue and I have been told to wait 3-5 days for the investigation to be carried out and a response. The last sitting for ethics is Friday. Therefore, they may not investigate in time. I will be calling tomorrow and every day thereafter to chase it up.”

Many candidates also complained they had not been told in advance they would be required to read the guide to the platform and the system, before they could start the exam properly, whilst the exam clock had started counting down. Although we accept this is not a major issue in the grand scheme of things, it regularly contributed to increased anxiety for candidates. Candidates deserve to understand the examination experience before they sit the assessment.

“... I just lost 5 minutes of time. I thought once time started it would reset after I had read the information about the exam and the navigational information. But it didn't. So I lost 5 minutes of exam time. Reading how to use the system. Turns out I didn't need to and was pointless reading it”.

Other reports of technical issues include losing completed work midway through the examinations:

“Due to a technical difficulty, my proctor told me that the exam should be restarted. I checked with him that my work would not be lost and he confirmed this position. When my exam restarted I had lost all of my work. The proctor told me to carry on with the exam despite having lost all of my work AND 40 minutes of exam time whilst the proctor was trying to advise me on what to do. The proctor told me to carry on whilst he tried to resolve the issue. The issue could not be resolved and he gave me a choice of either carry on with the exam with the limited time I had remaining and without recovering my work OR he would end the exam and give me a number to ring to reschedule the exam. I decided to carry on but then due to the same reoccurring technical fault, the proctor ended my exam. The customer service by PearsonVUE was absolutely unacceptable both on the phone of the number I had been told to ring and by the proctor. I was in tears when I realised that I had lost my work and had to do it all over again, and then the same fault happened again. I have been in contact with both Pearson and the BSB who have been of absolutely so (*sic*) assistance or support whatsoever.”

In respect of notifications to students that their exams had been “successfully completed”:

The programme crashed at the end and wouldn't pull me out of the exam. So I waited an hour desperate for a wee. And when I finally got through to Pearson Vue they said “it says it's been successfully delivered but we cannot guarantee it's been delivered so you'll hve to wait til we email you to see if it's worked”. So I am unsure whether my exam has been successfully completed or not.

This Review asked Pearson VUE how candidates could be told they had successfully completed their exams when they had not, “(t)he exam is scored as the candidate answers the questions during the testing session. If the testing session is prematurely terminated, the results will still be collated, If (*sic*) the candidate has answered enough questions correctly to pass, that candidate will receive a “Pass” grade. However, because the exam ended prematurely, the proctor will raise a case, so the exam will also have an associated case. All the results that we receive are sent through to the client in their results feed. Along with the appropriate grade, the exam disposition of “Delivered” will be designated for the Athena -Browser Edition test driver.”

Pearson VUE assured the Review that no issues had arisen at test centres, other than where students failed to attend. However, the evidence provided by candidates contradicts this:

“I had a reasonable adjustment of extra time, which in my booking said 179 minutes. However, I got the standard 160 minutes with a break - no additional time to finish my work. The worst thing is, the exam timer starts while you are reading instructions on how to use the software. Which was ridiculous- are we meant to learn how to use the software or are we meant to start doing the paper. Then my invigilator informed me that I have no additional time, however, I could take a bathroom break and the clock would be paused. The exam room was unbearably hot and suffocating. It was impossible to concentrate. I asked if the ac was on (wasting my time) they said yes it was. A USB fan would have been better. The software started acting glitchy too. The issue arose when I was trying to insert something in the middle of my sentence. While typing after some time I realised that my words were getting erased as I typed more and that anything I wrote afterwards were getting erased. It’s a really badly made software, you think if you pay so much money, they would get standard software to type in. I had also asked for a later slot as I am a medicated sleeper. Then a day before the exam I realised they shifted my exam to 8am, which meant I had to leave the house at 6am and since I had to skip my medicines, I ended up staying awake the whole night. I tried calling them several times with no avail. I am truly disappointed how badly these exams are being held. They seem to have no regards for any students, disable students, or students with reasonable adjustment.”

And also from a test centre:

2 minutes before the end of the whole exam the internet went down at the centre so the exam crashed, which affected all Ethics-sitters. They then had to spend 40 minutes trying to recover our exams. Thankfully it could all be recovered, but it was stressful not knowing whether my whole exam was saved or whether I could actually submit my answers.

Similarly, testimonials we had received from students about complexities with the online notepad, or whiteboard, were dismissed by Pearson VUE as unheard of. One candidate who attended one of our open meetings explained his main issue during the exams was with the periodic deletion of the notes he was taking on the whiteboard. He explained that each line of text he was putting into the whiteboard was over-writing the text already there. If he closed the notes, they were all deleted. He sought help from the proctor, but no one answered. In our opinion, candidates who encountered this problem would have under-performed in their examination.

“Whilst attempting my first sit of Civil Litigation, I made notes on the in-platform word pad to assist me in checking my answers later. Around 50 minutes before the end of the exam all of these notes were deleted. I attempted to use the in-platform chat feature to inform a proctor that this was the case but no proctor answered my request. I attempted to bring my concerns to their attention around 20 times from that point, but to no avail. Had I been able to use the note-taking feature of

the platform I would have been able to check my answers later on in the exam but I could not and feel that I lost several marks because of it.”

Another student provided evidence that the ‘flagging’ system did not work. Candidates could ‘flag’ a question as they progressed to remind them to go back to check it at the end. She recalls flagging five or six questions, and with 16 minutes to spare before the end of the exam, she went back. All flags had gone. She had deliberately left time at the end of the exam to return to the questions she had flagged. Another student also pointed out that it proved impossible to get a record of the chat he had had online with his proctor during the exam or afterwards. This strikes us as exceptionally unusual practice nowadays, as that evidence might be crucial in applications for mitigating/ extenuating circumstances or appeals.

When we raised these concerns with Pearson VUE, their response was one of surprise and denial. They simply had no idea this had happened, or how. Of more concern to us was their apparent lack of interest in finding out what could have caused the problems. Our impression of Pearson VUE has been that they were not prepared to accept or even acknowledge the usefulness of the critical feedback that candidates were providing.

#### **b) Pearson VUE customer services**

Echoing some of the candidate comments above, it became clear to us that Pearson VUE customer services had not been sufficiently well briefed to understand the nature of the BPTC examinations or the assessment windows. The candidates were told far too often that they should try to rebook the examination a few days later. We raised this with the BSB who assured us they had fully briefed Pearson VUE, that any generic messages about being able to rebook exams at a later date would not be appropriate and had to be changed. The message apparently did not reach the customer service staff:

“I was scheduled to take my exam at 10am this morning. In the previous days I have run system tests and they have all worked successfully. I logged in at 9.30 as instructed and completed the check in process. The proctor told me that my exam was going to be released and she asked if I could see the welcome screen. As I began to type to say I could not, the chat box disappeared. My whole laptop screen went blank, except for a toolbar at the top which showed my webcam and had the chat function. I tried to click the chat function and the coloured circle started spinning on my laptop, indicating that the application had crashed. I was no longer able to contact the proctor. I decided to wait patiently to see if the situation would rectify itself but by 10.15 I was starting to get concerned. I tried using the online chat function on my phone to send a message to which I was told I had no choice but to wait 3-5 days for an investigation to be completed. I tried explaining that I had more exams next week and that this exam was only available until Friday, but that made no difference. I then phoned Pearson VUE and eventually got through to someone who told me they would try and mark the investigation as urgent. I said I wanted to do my exam today as I was prepared and waiting to do it. He told me there was no choice but to try ringing back in 24-48 hours to see if they would be able to reschedule. I asked if I could have some reassurance that I would be able to do my exam in the next few days, but he was unable to guarantee this. I have been told that I will have to just keep ringing back and trying to see if they can reschedule. I asked if he could forward me the email he was sending on my behalf and the reference number and he said he could not. I asked him if I were able to make a complaint and he told me no, that was not an option. I began to get upset and explaining that I did not think this was good enough. And if it wasn’t already bad enough... he then hung up on me”

“My exam was scheduled to start at 2.30pm local time. I started checking in 30mins before the exam. I sent them my picture my passport picture and the surroundings. They accepted it at first through the proctor website system and then they said the my passport pictures aren't clear. They said I have to resend it but I couldn't as the system didn't let me. Finally my exam started after 40 mins of hassle. I don't know on what basis they want us to believe the technology when they themselves can't trust it! My second issue was it was only 20 mins left and I still had one more question to answer. They suddenly messaged me saying they can't see me even though my video recording was on. They said I have to restart my computer and my time won't be counted as it was a fault from their side. After restarting and going through the whole process my screen was blacked out for a good amount of time. After complaining them multiple times my exam came back and I saw only 2 mins left to answer the question. I was shocked. I have got photo evidence of it as well. On the Pearson VUE customer services point, discussed the lack of capacity caused by the global pandemic. But it is quite clear that some of the work is in the customer services team did not understand the nature of the BSB examinations, and the narrow window of availability for the exams, often advising students to rebook an examination in five days time, when the exam window was closing imminently or had already closed.”

As one candidate who attended our open meetings pointed out, “it would be reasonable to expect an online provider to have a quicker process to address technical issues to facilitate a prompt fresh sit.”

It would also be reasonable to expect customer services at Pearson VUE to understand that BPTC candidates were not themselves paying for these exams, something on which the BSB had also briefed Pearson VUE:

“My exam was scheduled to commence at 10.30am this morning, I logged on at 10am to begin the check in process. I uploaded my documents and got onto the page where it states ‘we have nearly finished the check in process’ where you are under exam conditions and are on a web cam and being recorded. I sat there until 10.42 when the webcam screen went black, my computer would not respond. I tried to resolve the matter, then decided the only option was to reboot my computer. I was very mindful that if I wasn't 'checked in' by 10.45am I would be recorded as a no show. Upon rebooting, I immediately again went into my Pearson VUE account, into start the exam, uploaded my documents and got to the same screen, where at 11.15 a Pearson VUE screen came up which said ‘Hmm.... Something’s wrong. Don’t worry we’ll reschedule your exam free of charge’  
By this time I was distressed and felt very sick.  
I tried again, rebooted my computer, immediately logged back into begin your exam, I uploaded my ID and photos and sat there again.  
At 11.58 – after sitting at my computer for 2 hours already under exam conditions a proctor came on to start my exam. By this time I was distressed and didn’t know quite what to do with myself.  
I then had to sit at my computer for 3 hours to complete an exam not knowing if I was going to experience yet another problem with the system.  
I chose to sit the examination despite the level of distress I was under because I did not want to run the risk having to defer until December.  
My pupillage starts in October 2020, I had revised hard for this assessment and wanted to get it done.  
I had completed all the necessary system checks prior to the assessment.”

### c) Accessibility of statistical information about the assessments

There have been several complexities in management information reporting to the BSB. We start by suggesting the following testimonial is linked to the complexities in obtaining clear management information in respect of the successful completion of the examinations.

“My exam was scheduled for 11:15, if was started on time it would have ended at 2:15pm. At 2:45pm I could still only see blank screen. Was unable to contact the proctor as the chat option wasn’t available. PearsonVue was not picking up the phone. I was trying to call and email since 12:30pm. I have been sat in front of a blank screen for over 4 hours and even if the exam did eventually start it would mean that I would have to sit through another 3 hours without a break, food and water. Eventually the exam switched off and website indicated that it was “delivered successfully”.”

Pearson VUE did accept the statistical information gathered was not as complete as they would have wished: “As a result of focusing all our efforts on exam delivery and expansion of the service to accommodate our clients and their students requesting home testing, we had to sacrifice the reporting tool to a later date in the development cycle. This has now been developed and is in place internally, and we can report delivery statistics based on numbers of exams, technical and candidate issues and causes of delivery failure.”

On the accessibility of the management information, Pearson VUE adopt very different lexicon from that used across the UK higher education sector. For example, this Review was sent a long email chain between the BSB and Pearson VUE where the former was trying to understand the difference between exams successfully completed, and exams successfully completed without incident, exams successfully completed notwithstanding an incident, and exams not successfully completed due to either candidate incidents or Pearson VUE incidents. This Review did not see resolution of these queries. Indeed, some of the data supplied to this Review by Pearson VUE were impenetrable without a narrative, which was not always provided.

On the 22<sup>nd</sup> May 2020, at the Bar Training Forum, the BSB had told Providers that Pearson VUE had given an undertaking to provide the BSB a technical report after each exam, indicating where a student had a technical problem with the exam including internet outage; and also providing a remote proctor report after each exam, including instances where a remote proctor had intervened in any way, for example, by contacting students to ask them about a behaviour that was concerning, or to revoke an exam. It is quite clear that the BSB expected to receive regular statistical analysis from Pearson VUE, and it is also quite clear that what the BSB expected to receive was ultimately not forthcoming.

That is not to suggest Pearson VUE did not provide data to the BSB, but it is to suggest that the information provided was not accessible to the client. For example, the case summary report snapshot provided on 13<sup>th</sup> August 2020 reads as follows:

Delivery Mode	Count of Type
Online Proctored	64
Standard Test Center	24
Grand Total	88
Delivery Mode Case Type	Count of Type

<b>Online Proctored</b>	<b>64</b>
Problem with Pearson VUE application	55
Medical emergency	3
Candidate complaint about exam content	2
Candidate error or misconduct	2
Registered for wrong time	2
<b>Standard Test Center</b>	<b>24</b>
Score report request	7
Problem with testing environment	3
Backup admissions data	2
Problem with computer software	2
Problem with Pearson VUE application	2
Approved accommodations site notification	1
Candidate complaint about exam content	1
Candidate left before finishing exam	1
Exam results not in client database	1
Hardware issue	1
Missing results - run RMA	1
Missing results - technical reason	1
Problem or complaint with approved testing accommodations	1
<b>Grand Total</b>	<b>88</b>

We attempted to analyse this table and found it very difficult to take any meaningful information from it. Unfortunately, it also became apparent that some reports included statistics relating to the BCAT.

A further example may serve to illustrate this point. In response to an apparently simple question from the BSB, “of the 828 people due to complete exams on Tuesday and Wednesday how many actually did so?”. The Pearson VUE response was not at all simple:

“The exams scheduled to be taken on Tuesday and Wednesday = 830 - 23 candidates ( all OP ) our records are showing without a result being received so 807 exams were taken, the 23 affected exams happened during yesterday. The 98 cases raised so far relates to OP & test centre deliveries and this number will increase and decrease as the events continue - should these case figures be used to calculate the stat's for delivered exams or success rates, as some of these cases can be for informational purposes, its the 23 candidates that couldn't start or complete their exams that require investigation.”

The BSB quickly escalated this response to managers in Pearson VUE. They were at a loss because the figures and explanation were “utterly baffling”.

The BSB took very seriously its responsibility to report to candidates on the success rate of the exams, however this was exceptionally difficult, as Pearson VUE records completed exams whether incidents occurred or not. They reported only the number of examinations that did not start at all, or stopped partway through. After a long exchange of emails, the BSB, with the explicit support of senior leaders of Pearson VUE, published the following statement on 13<sup>th</sup> August 2020:



“Our test delivery partner, Pearson VUE, has assured us that at this stage their statistics suggest that 89% of our exams have been delivered without any reported incident and 97% of exams have been successfully completed in all.”

It was this statement, in particular, that contradicted the candidate experiences of so many. This caused much anger within the student community. Please see Term of Reference 10.

It may be worth pointing out that we asked in our meeting with Pearson VUE whether, for example, if a student had booked to take an examination at midnight, and then realised their mistake, cancelled and rebooked at midday, would they be counted in the ‘total cancelled’ column? Pearson VUE accepted it was a possibility but did not confirm either way. We produce here, the tables provided to us by Pearson VUE, to indicate the success rate of the August examinations:

**Reconciliation with BI data via IntelliVUE and combined OnVUE and Test Centre deliveries:**

	<b>Total Appointments</b>	<b>Total Canceled</b>	<b>Total Delivered</b>	<b>Total No Show</b>
OnVUE	5202	1209	3839	154
Standard Test Centre	990	207	698	85
<b>Grand Total</b>	<b>6192</b>	<b>1416</b>	<b>4537</b>	<b>239</b>

**Breakdown of total delivered exams by Subject:**

	<b>Civil Total Delivered</b>	<b>Crime Total Delivered</b>	<b>Ethics Total Delivered</b>	<b>Grand Total</b>
OnVUE	1305	1273	1261	3839
Standard Test Centre	234	240	224	698
<b>Grand Total</b>	<b>1539</b>	<b>1513</b>	<b>1485</b>	<b>4537</b>

**Further breakdown of Exams delivered vs Cancelled vs No- Shows by Subject:**

<b>OP &amp; Test Centre - No Shows</b>			<b>Test Centre Only - No Shows</b>		
Civil	58		Civil	26	
Crime	102		Crime	29	
Ethics	79		Ethics	30	
	239			85	
<b>OP &amp; Test Centre - Cancelled Exams</b>			<b>Test Centre Only - Cancelled Exams</b>		
Civil	534		Civil	71	
Crime	504		Crime	74	
Ethics	378		Ethics	62	
	1416			207	
<b>OP &amp; Test Centre - Delivered Exams</b>			<b>Test Centre Only - Delivered Exams</b>		
Civil	1539		Civil	234	
Crime	1513		Crime	240	
Ethics	1485		Ethics	224	
	4537			698	

		<b>Candidate Issue</b>	<b>Technical Issue</b>	Percentage
Started CheckIn	<b>4162</b>			
Did not get past first OnVUE screen or did not launch OnVUE	18	18		0.43%

Failed Bandwidth/Hardware Test	11	11		0.26%
Abandoned after starting to upload photos	10	10		0.24%
Abandoned while waiting for greeter	40	40		0.96%
Candidate not picked up by greeter	48		48	1.15%
Revoked during greet process for candidate connectivity issues	13	13		0.31%
Revoked during greet process for video issues (technical)	10		10	0.24%
Revoked during greet process for other issues	0	0		0.00%
Failed to launch secure browser	70	70		1.68%
Revoked during exam due to secure browser issues (candidate)	2	2		0.05%
Revoked during exam due to secure browser issues (technical)	24		24	0.58%
Revoked during exam due to video issues (candidate)	42	42		1.01%
Revoked during exam due to video issues (technical)	9		9	0.22%
Revoked during exam (other issue)	20	20		0.48%
<b>Completed session</b>	<b>3845</b>	<b>226</b>	<b>91</b>	
		<b>5.4%</b>	<b>2.2%</b>	
<b>Success</b>	<b>92.4%</b>			
<b>Candidate Issue</b>	<b>5.4%</b>			
<b>Technical Issue</b>	<b>2.2%</b>			

One issue with these data is that they do not differentiate students with reasonable adjustments sitting online, students with reasonable adjustments sitting at the test centre, students without reasonable adjustments sitting online, students without reasonable adjustments sitting in a test centre. Surely, it is this sort of information the client needs in order to analyse the success of the assessment delivery.

The more important problem is this, and here we adopt the BSB's words, "These statistics indicate a successful completion of the assessments by 92.4% of the candidates that sat them, with only 2.2% experiencing technical difficulties arising from Pearson VUE's systems. We do not think these statistics can be relied upon and believe instead that the large number of no shows and cancellations included in the statistics above cover the candidates who experienced difficulty accessing and completing their assessments. That would better support the hundreds of emails from students unable to sit their exams. We continue to challenge the statistics ...."

When we discussed the Review with the BSB Director-General, he reflected, "we should have specified and agreed in advance with Pearson VUE what management information would be provided about both the process for booking test centre places and the delivery of the examinations themselves. Particularly once the examinations were in progress and difficulties became apparent, we were inhibited from communicating effectively with both students and with stakeholders by the very poor quantity and quality of information available from Pearson VUE. I remain even now puzzled by Pearson VUE's apparent inability to generate real-time information about the numbers of students sitting or failing to sit on-line examinations"

## Conclusion

It is evident that if the BSB had understood in April 2020 there was a chance that a quarter of candidates would not be able successfully to complete their examinations, they would not have gone ahead with these arrangements.

Pearson VUE has not, throughout our meetings with them, acknowledged the volume of problems that have been reported to us. In fact, when asked to reflect on why the BSB commissioned an Independent Review of the August examinations, they simply responded:

“As there were significant differences in opinion between Pearson VUE and BSB on the outcomes of the testing programme, BSB likely wanted a neutral and objective analysis of the issues. In situations such as this, often an outside viewpoint can add a unique perspective that is more difficult to obtain from parties that are very close to the issues. We welcome that approach and think it will significantly increase the legitimacy of any resulting recommendations and actions.”

In the interest of balance, when the BSB commissioned this Review they reflected:

“There are undoubtedly lessons that we can learn from this experience and it is our hope that through this review we can make any necessary improvements in how we manage our exams function but also how we operate as a regulator.”

In our opinion, Pearson VUE have not understood the scale of the problems encountered by candidates. For example, even on the “demo”, walk-through demonstration of the OnVUE platform with the Independent Reviewer and Expert Adviser, when the latter’s system was lagging as we worked through a PowerPoint presentation on a shared screen, the inference was that it was because of her internet quality.

## Recommendations

- The BSB must have valid and reliable data on how long candidates may have to wait from check-in to launch of the examination and then to completion of the examination. This should be factored into any future Candidates’ Guide in respect of the length of the exam, and it should also be factored into the thinking underpinning the assessment methodology, and the decision as to whether to permit breaks.
- The BSB must have valid and reliable data on the number of examinations completed successfully without incident.
- The BSB must have valid and reliable data on the number of examinations successfully completed notwithstanding incident, and the incident needs to be explained.
- The customer service of the online provider must be fully briefed on the nature of the assessments with which they are dealing.
- Candidates must be given the opportunity to take as many practice assessments in exam conditions as possible.
- If an assessment can be taken only in a short assessment window, systems must be put in place to facilitate a swift re-set of an assessment which fails for technical reasons.
- The BSB is entitled to request to see evidence of the Proctor/candidate ratio of any online assessment provider.
- For time limited assessments, exam time should not be used making candidates read information that could have been provided before the clock started.
- The BSB should consider using an online provider only if they can provide assurance of user group satisfaction or evidence that user group complaints are received constructively and positively.

## **TERM OF REFERENCE 13**

### **The management by the BSB of the relationship with Pearson VUE**

The BSB had two main contacts at Pearson VUE, the Strategic Account Manager and the Programme Manager. The Independent Review was not provided with any project plans, agreed timelines, deadlines or agreed outputs. This is very important in respect of the management of the project.

The BSB reported that on the 8<sup>th</sup> July 2020 when the telephone booking system for candidates with reasonable adjustments appeared to be failing, it was the BSB who contacted Pearson VUE and not the other way around. In fact, the BSB suspected severe capacity issues at the Pearson VUE end, something which in our opinion is borne out by the facts.

There is no doubt that the relationship between the BSB and Pearson VUE became increasingly challenging from May to July. We received evidence from the BSB that a Pearson VUE locum project manager, appointed temporarily in the absence of the assigned programme manager in mid-July 2020, was efficient and effective. For example, for the first time, virtual meetings were followed up with written notes and agreed actions. BSB requests for the locum to be appointed on a permanent basis went without response from Pearson VUE. In late July, in correspondence between colleagues at the BSB and since made available to the Review, one stakeholder said, “the way the discussions are now being handled is feeling almost hostile and certainly unhelpful”.

In response to a written request for additional evidence from Pearson VUE, we asked them to describe the nature of the day-to-day management of the planning of the August exams with the BSB. Pearson VUE replied, “Our team has handled implementations for numerous clients and PRINCE2 methods were used to efficiently manage the implementation and operation of the August exams. Pearson VUE provided BSB support with their Candidates’ Guide, supplying the client with responses to their questions regarding the OnVUE service, this was in preparation for the August exams. The program manager, and Pearson VUE’s customer service team were in contact with BSB daily throughout the event.”

We disagree with Pearson VUE’s position that, “for addition of an OP delivery for an existing customer, we would not create a unique project plan, nor would one be necessary due to our close interaction with our customers.” In our opinion, such was the difference in scale between the August centralised examinations and the previously delivered BCAT examination, a project plan was indeed necessary. Even if we are incorrect in this, it is our opinion that PRINCE2 project management methods were not implemented effectively to manage the August examinations. At the heart of the PRINCE2 methodology is a detailed project plan which includes plans for scope, time, quality, communication and risk. Project deliverables are meant to be tested thoroughly in preparation for the user’s acceptance. Any request to change the procedure is meant to be formally documented and reviewed by each affected stakeholder in terms of its impact on time, quality and cost. This Review has not seen any evidence that these processes and outputs were in place.

For example, had PRINCE2 methods truly been implemented in the project, the BSB would have been aware in advance that Pearson VUE was running a scheduled update to their systems on 15<sup>th</sup> August 2020. This scheduled release, in the middle of the August examinations created a backlog of candidate enquiries, but more importantly created incredible anxiety amongst the candidate body.

Complexities around project management issues arose regularly. In numerous emails which have been provided to this Review, it was notable that Pearson VUE did not always answer the specific questions asked by the BSB. In fact, in respect of candidates with reasonable adjustments, it was the Exams Team who suggested to Pearson VUE how they might go about managing the exceptionally

complex information required, rather than Pearson VUE providing a template that would work with their systems. In fairness, Pearson VUE worked constructively with the Exams Team to finalise the template, but it was the Exams Team who were proactive in this respect. Further, the BSB sent the Pearson VUE project manager a draft Candidates' Guide on the 12<sup>th</sup> June 2020, requesting a careful review and reply by close of business on Tuesday 16<sup>th</sup> June. It was returned with comments on the afternoon of the 18<sup>th</sup> June 2020, however there were many matters which still had to be resolved before finalising it. Although there was much to-ing and fro-ing over some of the guidance to students, Pearson VUE never formally signed off the Candidates' Guide. It is exactly the sort of customer care and focus on customer needs that we found lacking, throughout the course of this Review.

## **Conclusion**

When we met with the BSB Director-General, we asked him to reflect on lessons learned. He reflected, "it would have been better, I think, to have bound Pearson VUE, our partners in delivering the examinations, into a project structure. We relied on the assurances we received from Pearson VUE that the processes of booking in students to testing centres, of delivering the examinations themselves, including the provision of support to students and of providing reliable management information would all work smoothly. In the event, they did not. There was much engagement with Pearson VUE at all levels, including mine, as these issues manifested themselves, but a more formal project approach – covering the key strands of delivery and communication – might have helped to identify and manage risks and keep on top of progress".

Once the contract variation for the August examinations had been signed, the BSB should have assembled a project management team which should have included representatives from the Providers. The Providers have extensive experience of delivering assessments, including online, and particularly in accommodating students' reasonable adjustments. They could have foreseen some of the complexities before they arose.

## **Recommendation**

To oversee and quality assure any future online proctored exam, whether delivered centrally or by Providers, there needs to be a central BSB project team, at least at the start of the project. We recommend this should consist of:

- BSB Director of Regulatory Operations
- BSB Head of Authorisation
- (An)other member(s) of the BSB Exams Team
- Two representatives from Providers, especially one with experience of student services including disability support services
- At least one representative from the online provider
- At least one representative from an organisation representing disabled students
- An expert project manager (possibly an external consultant) with experience of managing high-risk projects, planning and logistics, who manages the project team

## TERM OF REFERENCE 14

### The effectiveness of risk management throughout the exam period. How were risks identified and mitigated?

Individuals working at the BSB identified up and escalated risks as soon as they became apparent. For example, when the Exams Team at the BSB discovered on 17<sup>th</sup> July 2020 that Pearson VUE agents were using phrases to candidates such as, “we request you to co-operate” which led to “a perception that PV is requiring them to waive accommodations that have been agreed – that would be unacceptable”, they informed Pearson VUE immediately. In fairness, this was addressed by Pearson VUE upon receipt of this notification. Unfortunately, the perception that candidates had been requested to waive reasonable adjustments continued throughout the evidence gathering phase of this Review. In some cases, candidates reported that they had decided to waive the reasonable adjustments because they felt they had no other choice as the alternatives were untenable.

SABER opined, and we agree, it appeared that the BSB was reactive instead of proactive about foreseeable issues: “It appears as though the BSB did not adequately plan for the technical failures that occurred or simply assumed that students could sit the exam in December if needed. It seemed that the BSB let Pearson VUE handle the resolution of issues, which led to students receiving generic troubleshooting advice. It does not appear that the BSB took any specific measures prior to the exams to ensure that students could swiftly reschedule exams given the limited dates during which they could be sat. It was only on the last day of the Ethics exam that a specific email address was set up to handle complaints by which time it was too late to be useful for anyone who had issues with previous exams.”

As explained in Term of Reference 10, the Candidates’ Guide was vague and did not set out the pathways candidates could use to escalate concerns. We know from a series of Twitter posts during August 2020, candidates were directed to Pearson VUE to raise complaints about technical problems with the exams, who redirected them to the BSB, who redirected them back to Pearson VUE. Distressed and stressed students took to social media. Because so many were confused about how to resolve their problems, they contacted their Providers with whom they generally had an in-person relationship, but this exacerbated an already stressful situation, as the problems were beyond the control of the Providers to solve. Candidates also reported on Twitter they could be held on the phone with Pearson VUE for hours, ultimately to be disconnected.

Clearly reputational risk was high here, and not always swiftly mitigated.

We have no separate recommendation in respect of this Term of Reference. It is our view that the recommendations made in this Review, taken collectively, will ensure in future that risks are assessed, mitigated and managed.

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