



Bar Council response to the Future Bar Training Consultation: The Threshold Standards and Competences consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Bar Standards Board (BSB) consultation entitled Future Bar Training Consultation: Threshold Standards and Competences¹ (“the Consultation”).
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council recognises the challenge of creating detailed competencies and threshold standards for a diverse Bar and welcomes the opportunity to comment.
5. Subject to the points noted in this response, the detailed standards and competences broadly cover the wide range of qualities and minimum skills that we would expect of a newly qualified barrister.

¹ [Bar Standards Board \(2015\) Future Bar Training Consultation: The Professional Statement](#)

The Interrelationship between the Professional Statement, the Threshold Standard, and the Competences

6. As we understand the BSB's approach there are to be three distinct sources for the answer to the question of what may be expected of a barrister on day one of practice: the Professional Statement, the Threshold Standards, and the Competences. It is obviously important that the answer to the question "what standard should a day-1 barrister meet?" is clear, because it will determine the way in which providers train Bar students.
7. Annex 1 to the Consultation Paper sets out the relationship between the Professional Statement, Threshold Standards and Competences. It explains that Competences are assessable, and explains that the Threshold Standard is the minimum standard to which the competences must be performed on day one of practice. In our view the three sources proposed are not easy to read together, the inter-relationship between them is unclear.
8. We would therefore have expected the Threshold Standards and Competences *first* to set out competences, and *then*, for each competence, to set out the standard to which that competence must be met by a Day 1 Barrister. Instead, the Threshold Standards begin by setting out the threshold, and that is then followed by setting out, in a box, the Competence. We find this confusing. It seems to us that it would be easier to understand if the Competence came first, followed by a short statement of the threshold standard that a Day 1 barrister must meet in relation to that competence. It is particularly confusing that every competence is introduced by the words "Barristers must". If Barristers *must* do something, it would seem that the only appropriate threshold standard would be that they do that thing.
9. We understand that what is intended is that the competences sets out a particular type of skill, or area of knowledge, and the threshold standards then set the level at which each competence should be demonstrated before a barrister starts practice. We find confusing the statement in Annex 1 that "Standards are also incorporated within the competences: the threshold standard and competences must be read together." We do not see that this is workable; and, if it is workable, we think it unnecessarily complicated.
10. We would expect that there are some competences which have to be fully met by a Day 1 barrister, and others for which something less than complete mastery is acceptable. The document should clearly distinguish between them. Where the competence is one which must be fully met, we would suggest that the Threshold Standard need only say that the Competence must be fully met. That would be preferable to verbiage which restates the Competence in slightly different terms.
11. We give as an example proposed Threshold Standard 1.8, which appears as follows:

1.8 Exercise good English language skills.

They will have an effective command of the language and be able to use it appropriately, accurately and fluently so as to handle complex and detailed argumentation. They will use correct English grammar, spelling and punctuation.

Barristers must:

- a) Use correct vocabulary, English grammar, spelling and punctuation in all communications.
- b) Speak fluent English.

12. We think it would be clearer if the competence came first. Then it could be followed by a simple statement that the competency must be fully met. If necessary (though we think it better avoided) that could be given some further elaboration.

13. So for instance

Competence: English language skills

- (1) Use correct vocabulary, English grammar, spelling and punctuation in all communications
- (2) Speak fluent English

Threshold Standard

This competence must be fully achieved. In particular, a newly qualified barrister must be capable of clear expression of complex and detailed argument, both orally and in writing.

14. We have tried to identify from the draft document the competences which the BSB is suggesting need *not* be fully met on qualification, and those which must be, but we have not found it easy to draw the distinction. We think it should be easy to identify which competences have to be fully met and those for which less than complete mastery is acceptable. We think that considerable redrafting will be required before the distinction is clear.

15. We are also concerned by the level of overlap and duplication *between* competences, which we think will create uncertainty and/or confusion. So for instance 1.13, Advocacy, includes by cross-reference good use of English and good communication skills. We think it would be better to avoid cross-over; and to be clearer about what is required as a threshold. So for instance in place of the present, vague, paragraph 1.13 one might have:

Competence: Drafting

- (1) Draft accurate and legally effective documents
- (2) Utilise precedents where appropriate and also be able to draft without them
- (3) Address all relevant legal and factual issues
- (4) Comply with appropriate formalities

Threshold Standard

This competence must be satisfied in relation to the Claim Forms, Statements of Case, witness statements, applications, skeleton arguments and orders and appeal documents which might reasonably be required in relation to a civil claim of medium complexity (for instance a two-day trial of a personal injury action); and must be satisfied in relation to the indictment applications, orders, witness statements and appeal documents which might reasonably be required in relation to a straightforward two-day Crown court trial.

16. As a general comment we think the drafting could usefully be reviewed with a view to improving and tightening up the language and avoiding verbiage. For instance:
 - (a) In Standard 1.3, the sentence beginning “For example” does not have a verb.
 - (b) At the beginning of Standard 1.5, the expression “relevant facts of a matter” is unwieldy. What do the words “of a matter” add?
 - (c) We find the addition of “using appropriate communication skills” to the injunction in Standard 1.5 to “seek clarification of instructions” wholly unnecessary. How else would a barrister attempt to communicate? And if he or she needs extra help in this regard, how is the reference to “appropriate” going to assist?
 - (d) In Standard 1.7(f), what do the words “depending on the outcome” add to “appropriate” – a word which surely conveys all that is necessary?

The Future use of the Threshold Standard and Competences

17. There are two overriding points that we think should be made about the way in which these new documents should be used in practice. The first is that the BSB should not be over-reliant on the Professional Statement and Threshold Standards as standard-bearers to the course providers but should continue to be prescriptive about the content and standard of legal training, which remains the primary means by which aspiring barristers can be educated and measured. Our concern is that in focusing too heavily on outcomes, the BSB risks threatening the high standards and quality of education and training which currently differentiate the barrister profession.

18. We are concerned that, in focusing upon outcomes at the expense of the means by which those outcomes are achieved, the BSB approach to future Bar education neglects the importance of prolonged periods of study and apprenticeship in developing maturity, critical reasoning and sound judgment. These we consider to be central components of training, but they are not ones that we think are possible to instil other than by prolonged exposure to competent trainers. Moreover, although academic learning is possible to test by appropriate examinations, vocational skills are less easy to assess. We stress the importance of this point: not only is it in the public interest that barristers should have received a thorough grounding in their training; it is also critical to the confidence and wellbeing of newly qualified barristers that they should feel that their training has properly prepared them for practice.
19. The second point concerns the regulatory intention and effect of these documents. If the intention is that they should set the standard by which a barrister is to be assessed for disciplinary purposes, then there should be a clear statement to that effect (see for a good analogy the preamble that accompanies the RICS practice statements and guidance notes). We find no such clear statement in these documents. We should say that we would be firmly against any notion that these documents should have a disciplinary effect. In some cases, the documents seek to impose standards that are already imposed upon barristers by other sources, and in respect of which the BSB has no jurisdiction or cause to add its own requirements.

Question 1: Are there any competences missing?

20. We think some competences are missing and others are inaccurately or too widely drawn. We collect together here some specific suggestions for additions or omissions.
21. Standard 1.3 should refer to “courts or tribunals” in order to capture arbitral and other tribunals.
22. We think that barristers should be required to familiarise themselves with the support and advice lines that are available to assist with ethical difficulties. This competence could be included in 1.16 and could identify the Bar Council’s ethical advice line.
23. There are some types of document which barristers in many areas of practice will come across, but the threshold standards do not give any indication to course providers as to the range of material which a newly qualified barrister ought to be expected to be able to understand. We think that every barrister ought to be able to understand what a balance sheet and profit and loss account show, and every barrister ought to have some familiarity with expert reports, including medical reports. Barristers intending to specialise in

particular areas ought to be familiar with documents applicable to those areas. None of the competences are directed to such specific categories of material.

24. Although Threshold Standards 1.6, 1.13 and 1.14 deal with written advice and advocacy, we can find no reference to drafting non-contentious documents (such as wills, settlements and trusts), which form an important part of much civil work, nor to the important skill of producing an advice about evidence.
25. In relation to witnesses, we find the treatment of witnesses (briefly alluded to in Standard 1.15, where it is rolled together with advocacy) too sparse. We suggest that the topic merits separate treatment from the topic of presenting argument. The competence should identify the need to be able to distinguish between examination in chief, cross examination, and re-examination.
26. Standard 1.7 obliges barristers to “Develop and formulate best options for meeting parties’ objectives”. The word “parties” should be changed to “the client’s”, there being no duty upon barristers to take into account the objectives of the opposing party, save where that would further the client’s own interests.
27. Standard 1.18 says that:

Barristers must decline to act where necessary and refer a client to an appropriate other where this serves the client’s best interests.

Barristers owe no duties to individuals for whom they have declined to act. The requirement to refer a person to an appropriate other where this serves the client’s best interests, misunderstands a barrister’s ethical duties. A barrister does not have a duty to ‘act in the best interests’ of these individuals, because they are not their clients. Including this as a duty would add an unnecessary burden on barristers and requires them to be a triage service for members of the public who are seeking legal help.

28. Standard 2.5(e) says that barristers must:

Take appropriate action to manage personal difficulties that might otherwise affect their work.

We consider that this should be rephrased as follows, in order to bring a proper balance to the issues:

At all times act in a professional manner, including taking appropriate steps to ensure that personal difficulties do not affect their work.

29. Standard 3.1 says that:

They will apply this core barrister's duty in every case except where it conflicts with their duty to the court in the administration of justice.

This misunderstands a barrister's ethical duties. Where there is a conflict between the best interests of a client and a barrister's duty to the court, that barrister would have to consider whether to withdraw from the case. The wording of this competence suggests that, where there is a conflict between the duties, the barrister ought simply to cease to apply their duty to act in the best interests of their client.

Question 2: Is the scope of each knowledge, skill and attribute sufficiently captured by its corresponding competences?

30. Please see our general comments at the beginning of this response. We consider that the overall treatment of standards and competences is confusing; we take the view that the competences are often little more than repetitions of the standards; and we also think that the overlap between competences is unhelpful.

Question 3: Do the competences contain the appropriate level of detail?

31. Generally we think not. We have already given some examples. The competences are drawn in very abstract terms. We think there needs to be more definition, either in the way the competences are drawn or in the threshold standard that is defined. In some respects, further, we consider that the competences exceed their remit, by setting out matters that we do not consider are required of any barrister. We give some examples below.

32. Standard 1.4 is couched in opaque language. Is the intention to refer to citizens' advice bureaux? What are "the other elements"? What is meant by the reference to "the sources of advice and funding", if not legal aid or the pro bono unit? What exactly is meant by the reference to "additional responsibilities in cases that are not self-funded"? Given that the Threshold Standards are intended for public consumption, all these points should be made explicit. We would add that, while it may be useful for barristers to know about sources of advice and funding in some cases, we do not consider that such knowledge should be a prescribed part of a barrister's skillset.

33. Standard 1.8 says that:

Barristers must use correct vocabulary, English grammar, spelling and punctuation in all communications.

We suggest that the words ‘and appropriate’ are inserted after ‘correct’. There are some instances where it is possible to use grammatically correct language which is wholly inappropriate for the audience or situation. A good command of the English language includes an appreciation for a choice of tone and words.

34. Standards 1.9(h) and 1.12(e) say that:

Barristers must exercise good English language skills [1.8].

As we said in our overview, this is at odds with Standard 1.8(b), which says that barristers must be fluent in English. It is our firm view that the appropriate Standard is fluency, and that the Threshold Standards ought firmly to articulate this.

35. Standard 1.12 deals with research skills. It refers to “the need to research areas beyond the law” (surely an opaque phrase), without making it clear that such research does not fall within the remit of a barrister.

36. Standard 2.4 requires barristers to “establish the basis for charging fees”. Although we recognise that barristers owe their obligations under rC22 in relation to the basis on which their fees are charged, in practice this task is largely delegated by the most junior barristers to their clerks, and a barrister’s clerk continues to have an important role in relation to fee negotiations throughout a barrister’s career. We are concerned that the wording of this obligation does not take this into account, and may cause concern among newly qualified and very junior barristers in particular.

37. Standard 3.6 refers to barristers’ “*duty not to take unfair advantage*” when acting in certain circumstances. This drafting is loose and unclear, and we consider that the formula set out in the Bar Handbook should instead be adhered to.

38. Standard 4.4(a)(i) requires barristers to “share work when necessary” in the workplace. The addition of the words “when necessary” shows how uncertain is this new duty. When is it necessary to share work in the workplace? If that cannot be specified, then what business is it of the BSB to be laying down such a requirement? We take further exception to Standard 4.4 as a whole, which we consider is more appropriate to the role of a chambers’ administrator or head of chambers than a day one barrister. We appreciate that there are similar obligations in the Code of Conduct, but they are less prescriptively drawn and more workable as a matter of practice.

Question 4: Have the competences been drafted sufficiently widely to enable educators, training organisations and pupil supervisors to design training and develop more detailed outcomes and assessment criteria?

39. We are concerned that the document is so widely drawn that there will be enormous scope for variation in the courses that are designed. We think the Threshold Standards and Competences would be more useful, and be more likely to lead to high standards, if they were more prescriptive.

40. Standard 1.9(g) says that:

Barristers must recognise and respond appropriately to communications from others (whether in writing, verbal or non-verbal).

Course providers may need further guidance on what non-verbal communication includes and how to deal with it.

Question 5: Do the standards in the threshold standard and competences when read together reflect what would be expected of a barrister on “day one” of practice

41. The standards are in parts so vaguely expressed that it would be difficult to say that they do not reflect an appropriate standard; but the problem is that because they are so widely and vaguely drawn they will not provide very much help to those trying to decide what the appropriate standard is, or whether that standard has been met.

Question 6: Will the threshold standard and competences be a useful tool to help educators, training organisations, pupil supervisors, prospective barristers and consumers understand the required competences of a barrister on day one of practice?

42. Generally speaking we think not. This is mainly because the language used is vague and the threshold standards are mostly insufficiently defined.

43. We think it is helpful that the competences do manage to capture many of the “soft” skills that barristers need. We agree that these skills are important. They assist in getting the best result for the client and they assist in making the client feel they have received a good service. But we think it is important to remember that most clients would ultimately be better served by a barrister who is good lawyer and a good advocate, but has less good client skills, than a barrister who has wonderful client management skills but gives poor legal advice or is a poor advocate. The second barrister, with good client skills, may well develop a more successful practice than the first, but the clients of the first will have received the better service. A balance has to be struck between the relative importance of judge-facing competences and client-facing competences, and we are not persuaded that the balance has been struck in the right place.

Question 7: Do the threshold standard and competences strike the right balance between the broad qualification which our research tells us is encompassed by the title barrister, and the degree of focus which comes in time with practice in a particular area?

44. Broadly speaking, the competences cover the wide range of qualities and minimum skills that we would expect of a newly qualified barrister. The document provides some guidance as to the level of skills and competences that a barrister would need, but the standards are usually couched in such a vague form that we do not think it will help course providers understand what their courses should in fact cover, nor give any really useful guidance as to the standard which must be met. We think that many sections of the document should be given more detail and we have provided some examples above.

Question 8: Have we articulated sufficiently the distinction between (a) the Professional Statement Threshold Standard and Competences (in particular its use for education and training) and (b) the role of the BSB Handbook and Code of Conduct (in defining how a barrister must conduct themselves throughout their career.

45. Broadly speaking, yes.

46. As noted above, we think it is unfortunate, and potentially confusing, that the competences are couched in mandatory language (“Barristers must...”). If the format we have used in our example at paragraph 16 were used, it would avoid the risk of the competences being read as mandatory requirements in a professional conduct sense.

Question 9: Are you aware of any impacts in equality and diversity, either positive or negative, which might result from using the threshold standard and competences as a tool to assist our regulatory activities. If yes, what are these?

47. No.

Bar Council²

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² This response was drafted jointly by the Bar Council Education and Training Committee and the Young Barristers’ Committee.