



Bar Council response to the BSB consultation on BCAT

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the BSB's consultation paper on the future of the Bar Course Aptitude Test (BCAT).¹
2. The Bar Council represents approximately 17,000 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 (BSB).

Bar Council²
29 October 2021

¹ <https://www.barstandardsboard.org.uk/uploads/assets/9d3ea74c-5631-44f5-a81f0142c99ef1d9/BCAT-Consultation-Document-Sept21.pdf>

² Prepared by the Education and Training Committee.

Executive Summary

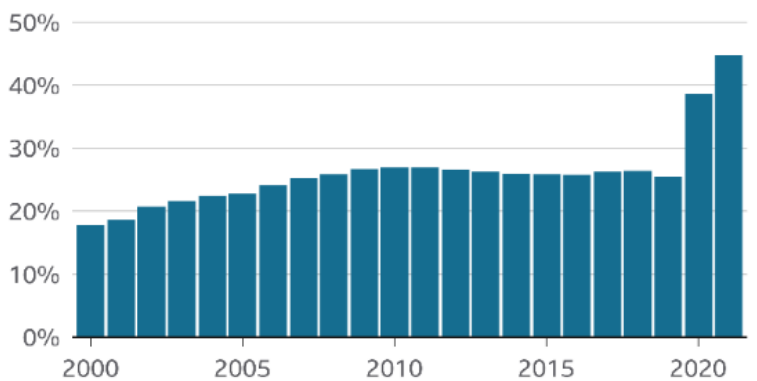
1. We are not persuaded that it is, at the moment, appropriate to discontinue use of the BCAT.
2. In particular, the recent data on pass rates for the new Bar Training Course suggests that some institutions, including some who are applying less rigorous selection criteria, are recruiting students of whom only a very small proportion pass the centrally marked assessments.
3. This is the problem which the BCAT was introduced to overcome. As the Consultation paper notes, that problem appeared to have significantly reduced. But the Consultation paper does not take into account the recent BSB data which suggests that the problem has reappeared. It seems to us therefore that this would be a very poor time to remove the possibility of using the BCAT as a mechanism to address the problem of too many students wasting money by embarking on courses which they will struggle to pass. This problem looks as if it is on the rise again.
4. We think there is another coincidental, but important, benefit of the BCAT, to which insufficient weight is given in the consultation paper. The BCAT has been established to provide a psychometric test of critical thinking and understanding of arguments – identifying different perspectives and the ability to distinguish facts from opinions and assumptions. The research cited by the BSB shows that BCAT scores are a reasonable predictor of success on the Vocational Stage. The BSB frequently and rightly stresses the need for evidence to support regulatory decision making. There is now almost a decade of BCAT data. It appears to provide an objective measure of candidates' facility in analytical skills which lie at the heart of the job most barristers do. It would be interesting to see an analysis of how strong a correlation there is between BCAT scores and obtaining tenancy³. Whether or not BCAT scores are used,

³ It seems to us the data must be available now to perform such an analysis.

in every year, as a filter to exclude the students who perform worst on the BCAT, having the data available over a long period will, it seems to us, inevitably improve the quality of the BSB's decision making in future years and its ability to spot trends and changes. The hiatus caused by COVID, and the degree class, A-level and GCSE grade inflation that has followed it, puts a particular premium on objective measures like BCAT marks which are available in a long-term data set.

Top A-level grades rise again

Percentage of students achieving A* or A grades at A-level, England, Wales and Northern Ireland

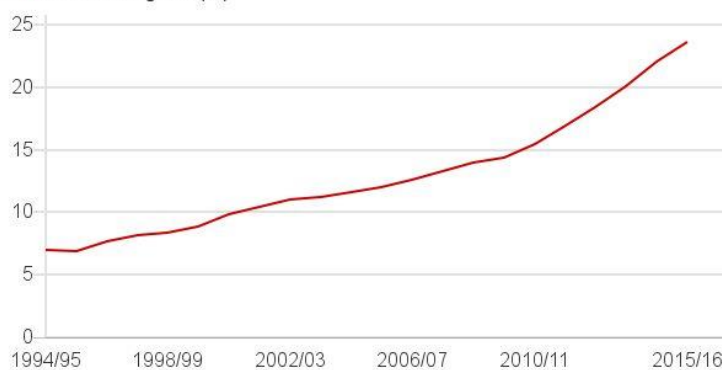


Source: Joint Council for Qualifications



The number of first class degrees has increased

— First class degrees (%)



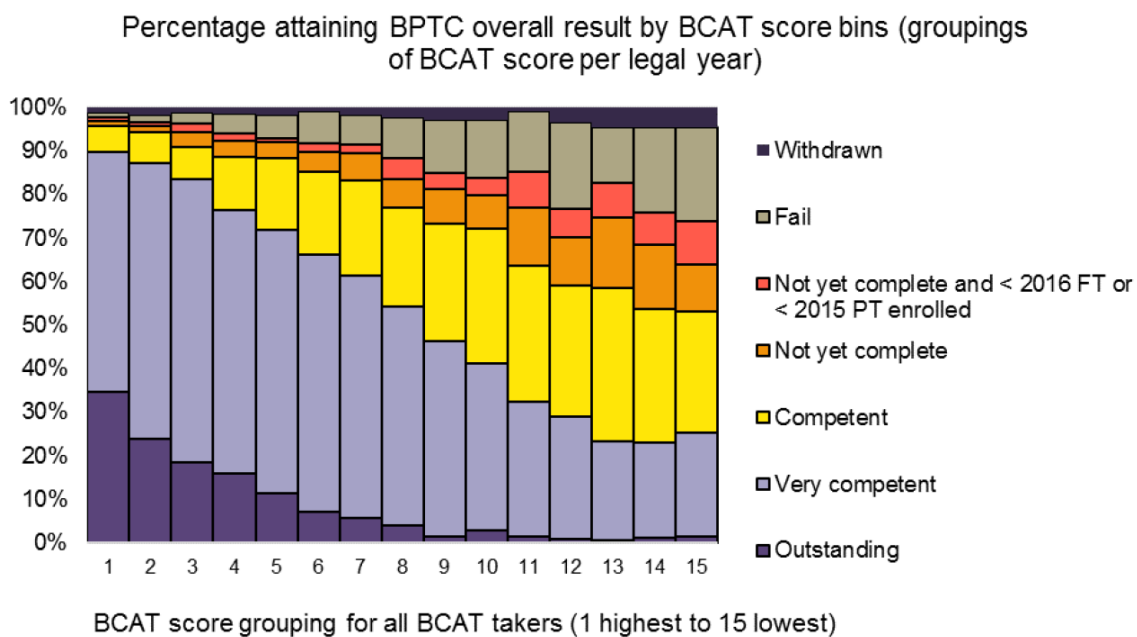
Source: Hesa



General points

5. Views about the BCAT, amongst those who have taken it, seem to vary. Some students regard it as an unwelcome and costly further hurdle to be overcome. This

may be particularly so for candidates from lower socio-economic backgrounds. Many students regard it as pointless precisely because the level at which the pass mark is set at the moment means that almost everybody passes it. It does not seem to us that students appreciate that there is a reasonably good correlation between BCAT *mark* and degree of success on the BPTC, as is demonstrated by this graph from the 2020 review:



6. So, if you did very well on the test (grouping 1) you had a 90% chance of getting an outstanding or very competent grade on the BPTC, but if you did poorly on the test (in groupings 12-15) you had a less than 30% chance of a very competent or outstanding grade.

7. It seems to us that if the BSB were to better publicise this sort of data the results of the BCAT test would be more likely to be regarded by students as a useful indicator of how they might fare at the next stage of their training.

8. We note that, at present, the mark obtained on the BCAT test is not available to the course providers, so that even if they wanted to use that mark as part of their selection criteria, they cannot do so.

9. We also wonder whether, if the Inns were to administer the test, it might be less expensive than using Pearson Vue. If so this would help to address any diversity concerns.

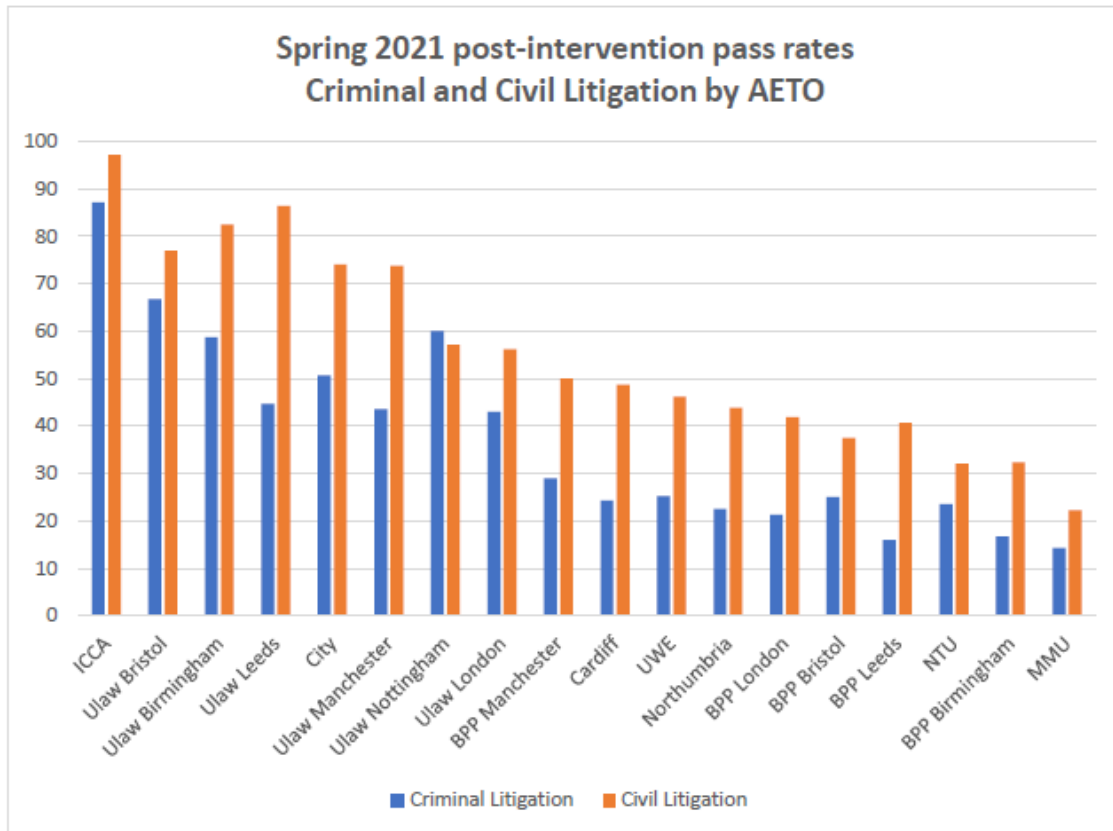
10. We note too that much of the discussion in the Consultation Paper seems to be predicated on the argument that, because almost everyone passes the test, it has little utility. The implicit premise of this argument is that the pass mark is set at the right level. We are not persuaded that this is necessarily correct, and rather doubt whether it is correct. On the basis of the BSB's data there is good evidence to suggest that if the pass mark were higher, fewer students would end up with poor BPTC results, and we know (for instance from the Pupillage Gateway Report) that those with poor BPTC results are often unsuccessful in obtaining pupillage.

The new data on Bar Training outcomes, and how it contrasts with the data reviewed in the Consultation Paper

11. The Consultation Paper is based exclusively on data collected on the BPTC. It records BPTC failure rates between 2013/14 and 2017/18, although it aggregates the data across all providers.

12. Data on Bar Training (the new vocational course) was published by the BSB in July 2021 in the form of the Report of the Chair of the Central Examinations Board.

13. It demonstrates enormous disparities between the pass rates achieved by students on different courses. The results, for the Criminal and Civil Litigation exams, by course provider, are as follows:



14. These results are extremely striking. We imagine that the BSB is urgently investigating the cause of these very troubling disparities in outcomes. The data seems to suggest that we are back to a very serious problem of lots of students wasting large amounts of money on courses that they are unlikely to pass.

15. We note that MMU, the Institution with the lowest pass rates, does not require a 2.1 degree.

16. Aggregating by course provider gives these results:

AETO Group	Average passing rate across both subjects across all centres
ICCA (1 centre)	92.1%
Ulaw (6 centres)	62.4%
BPP (5 centres)	40.5%
University group (6 centres)	35.6%

17. It seems to us that these results must reflect either a poor standard of teaching in some institutions, or that those institutions' entry requirements are inadequate at ensuring students have sufficient aptitude to have a reasonable prospect of passing the course⁴.

18. In the Consultation Paper the BSB observes (at 49, emphasis added) that "retaining the BCAT does not seem to be a necessary or proportionate response to a *low risk* of students enrolling on a Bar Training Course without required aptitude for the course."

On the basis of the data reviewed in the Consultation Paper that may not have been an unreasonable position to take. But it seems to us that the more recent BSB analysis of the new Bar Training results shows that the risk can no longer fairly be characterised as low. Indeed, it seems to us that there must at the moment be a very high risk that some institutions are permitting too many students to waste their money on a course which they are unlikely to pass.

19. We appreciate that the course is new, that COVID has had widespread consequences, and that it might conceivably be that these striking disparities between institutions will reduce without regulatory intervention. But unless and until it is clear that the problems have been resolved, it seems to us to be premature and unwise to jettison the tool that was developed to address precisely such problems. An appropriate tool – the BCAT - is available to help. If it is to help, it seems likely that a more challenging pass mark is likely to be needed, but that is an argument for raising the pass mark, not for jettisoning the tool.

⁴ We recognise that the report presents incomplete information, and so we are cautious about attempting to draw firm conclusions from it. The report does not indicate how many students are entered by each provider (so we do not know how large the groups are) nor is it clear to what extent the results are for first time sitters or include resits. Nevertheless, the disparities between institutions are so high that we do not think the BSB can properly continue to take the view that the institutions' own selection systems are working well. In any event the BSB must have that data available to it and can (and it seems to us should) perform the analysis.

20. We would suggest, therefore, that the BCAT is retained, at least for the time being.

21. We do not have access to sufficient data to express a final and definitive view on whether the BCAT pass mark should be maintained or increased. But we would suggest that urgent steps are taken to analyse the reasons behind the very low success rates in some institutions. We imagine that modelling could easily be carried out to see the extent to which, had there been a rather higher BCAT pass mark imposed, overall pass rates would have improved at the institutions with the weakest results.

22. We would also be interested to see some further analysis to indicate the extent of correlation between outcomes in terms of (a) BPTC results (b) securing a pupillage and (b) securing a tenancy (or proceeding to practice as a registered barrister) with (i) degree class, (ii) BCAT score, (iii) degree class and BCAT score combined, and (iv) (for securing pupillage or tenancy) BPTC grade. The data in chart 12 of the Evaluation report suggests to us that the combination of degree class and BCAT score is probably a powerful and reliable predictor, and we note the BSB's conclusion that "the BCAT does appear to have some suitability as a tool for identifying those most at risk of not passing or completing vocational training for the Bar, particularly when combined with degree classification." (#100).

ANSWERS TO THE SPECIFIC CONSULTATION QUESTIONS

23. Insofar as we are able to answer them our answers to the specific questions are as follows.

General Questions

1. **Do you agree with our analysis of the risks associated with student aptitude and the appropriateness of the BCAT as a regulatory requirement?**

No. We do not dissent from the analysis of student aptitude set out in the consultation paper, but the new data on the Bar Training course presents a radically different picture.

2. Is there evidence of other risks we should consider in relation to student aptitude for Bar training as part of our review?

Yes, the information contained in the report on Bar Training Spring 2021 Sitting.

3. Does the BCAT help students make an informed decision on whether to enrol on Bar courses? If you are a current or former Bar student, did the BCAT help you to decide whether to enrol on a Bar training course? Please state how.

Given that there is a reasonable correlation between BCAT scores and success in the BPTC and given that there is also a correlation with classification on the BPTC and the likelihood of obtaining tenancy (see the Pupillage Gateway Report), the BCAT scores ought to provide rational students with useful information to inform their decisions. That is a good thing, whether or not students in fact pay any attention to it.

Option specific Questions

4. Which option do you prefer and why?

Either Option 1 or Option 2. We have explained why we do not have sufficient data to choose between them.

5. If you prefer option 2, what are the risks that should be addressed and how should the BCAT be amended/replaced to ensure it is addressing the risks identified?

If Option 2 were to be adopted it is obviously critical that, if there is any evidence of differential impact on groups with protected characteristics, steps are taken to ensure that the test is not operating in an unfairly discriminatory manner. The issue of cost

is particularly important and the potential for the Inns to offer access to the test at a lower cost than at present should be considered.

6. Are there any other options we should consider? If so, please state why.

No.

E&D specific questions

7. In addition to those already stated, does the requirement to take the BCAT before enrolling on a Bar training course have any negative equality impacts on those from disadvantaged or underrepresented groups, or those who are neuro-divergent? If so, please state why.

We do not know because we do not have access to the data. However, it may be part of a cumulative financial burden which operates as an effective deterrent for many deserving candidates with protected characteristics.

8. In addition to those already stated, do the proposed policy options have any negative equality impacts on those from disadvantaged or underrepresented groups, or those who are neuro-divergent? If so, please state why.

We do not know because we do not have access to the data. However, the multiple-choice format may discriminate against those with disabilities as per *Government Legal Service v Brooks* [2017] UKEAT 0302_16_2803 so there needs to be provision of reasonable adjustments where necessary.

9. Is there anything else you would like to tell us?

We think the paper gives insufficient weight to the long-term advantages of maintaining a database derived from a professionally designed test which is likely to provide a reasonably reliable objective assessment of aptitude in skills which are central to the professional skillset of a successful barrister.

For further information please contact
Rose Malleson, Policy Analyst: Education, Diversity & Inclusion, and CSR
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Email: RMalleson@BarCouncil.org.uk