

CONSULTATION ON THRESHOLD STANDARD AND COMPETENCES

CHANCERY BAR ASSOCIATION RESPONSE

The Chancery Bar Association (“ChBA”) is one of the longest established Bar Associations and represents the interests of over 1,250 barristers. Its members handle the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales and in cases overseas. It is recognized as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

The Chancery Bar Association (ChBA) has responded to the Bar Standards Board’s consultation on the draft threshold standard and competences.

Question 1: Are there any competences missing?

There are no freestanding competences missing.

However, we consider that 3.6 (responsibilities in cases involving direct access) and 2.4 (ensure work does not incur unnecessary fees) do not provide sufficient protection for persons instructing counsel on a direct access basis. Unlike the rules of professional conduct in other jurisdictions, the code of conduct does not specifically forbid charging unreasonable or unconscionable fees.

In ordinary circumstances, an experienced solicitor ought to have a reasonably clear idea of what an appropriate fee should be for a given piece of work. The solicitor is able to protect the lay client’s interest by proper fee negotiation. In a direct access case, the lay – and only – client cannot be expected to have similar knowledge or

experience. We consider that additional protection is needed to ensure that a fair and appropriate fee is charged.

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

For the most part, there is a reasonable relationship between the knowledge, skills and attributes and the corresponding competences. However, there are two points that concerned us.

First, the competences are expressed in mandatory terms, which gives them the feel of a code of conduct or definitive statement of duties, rather than a description of what a barrister should do. We feel that undermines the distinction between the Code of Conduct and the Threshold Standard.

Second, we felt that some of the competences unnecessarily repeated the content of the knowledge, skills and attributes that they accompanied. By way of example, the box under paragraph 1.4, setting out the competences, appears to be an almost complete duplication of the words under the paragraph, setting out the threshold standard.

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

Our response to this question is closely related to the answer to Question 2. Where the words in the box setting out the competences merely duplicate the content of the main text of the threshold standard, we consider either that there is not enough detail or that the content of the box is superfluous.

Similarly, we consider that the more detail in the box, the closer the Threshold Competences comes to a code of conduct or a definitive statement of barristers' duties that could, for example, be the basis of a negligence claim or a professional

complaint. We did not understand that to be the function of the threshold standard or the competences.

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?

We consider that the competences have been drafted to cover such a wide field and in such detail that there is little that could usefully be added to them. Use of mandatory language conveys the impression that the statement is a definitive one, which in our view is likely to dissuade most organisations from gold plating an already highly detailed standard.

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?

For the most part, the standards and competencies reflect what could be expected of a pupil barrister on the first day of their second six or a practising barrister on the first day of their junior tenancy.

However, under paragraph 4.2, we are doubtful that any barrister in the early years of practice could be expected to “put in place human resources” or to “lead and direct” in a chambers context, if that is what is meant by those subparagraphs. We consider those to be aspirational goals towards which barristers ought to work in their early years of practice. Again, we find that the use of mandatory language to describe a future goal is unhelpful.

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?

With the exception of consumers, we consider that the threshold standard and the competences are a useful tool for evaluating the education and progress of student barristers and pupils.

However, we do not believe that the threshold standard and competencies provide any particularly useful tool for consumers. At best, there is a confusing multiplicity of sources of official information about barristers' activities, services and duties. At worst, those sources may lead to misguided expectations or complaints. Moreover, it is difficult to see what the public is expected to make of paragraph 4 (management of practice), which appears to be a purely internal standard, rather than one that would have a direct impact on the consumers of legal services.

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?

In our view, the threshold standard and competences do not begin to strike any such balance. The use of the term "threshold", the use of mandatory language and the focus on 'day one' of practice together create the impression that the requirements are all directed at barristers at the outset of their careers.

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)?

We consider that there is a clear distinction between the two documents, in that the former refers explicitly to the latter. However, there is no particularly clear

explanation, comprehensible by a member of the public, as to what the consequences are for failure to meet the threshold standard or the absence of a competence. If there are intended to be any such consequences, then they ought to be spelled out. If the document is intended to be used primarily for training purposes, then that ought to be made clear.

Question 9: Are you aware of any impacts on 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?

Without a concrete example of how the threshold standard and competences might be used as a regulatory tool by the BSB rather than a training tool for educators, training providers and pupillage providers, we are unable to answer this question.

Question 10: Do you have any other comments?

No.

**ON BEHALF OF THE ChBA:
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June 2016**