

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

**THE BAR STANDARDS BOARD
CENTRAL EXAMINATIONS BOARD
CHAIR'S REPORT**

**Pupillage stage Professional Ethics
January 2023 Sitting**

1. EXECUTIVE SUMMARY

The fourth sitting of the pupillage component Professional Ethics examination was held on Thursday 5 January 2023 at 2pm. The summary of results is as follows:

Total Number of Candidates	213
Number Passing	196
Passing Rate (%)	92.0%

The January 2023 sitting involved the largest cohort to date. The passing rate for the January 2023 sitting is consistent with that achieved in both the April 2022 and July 2022 sittings. There were no interventions required in respect of any cohorts of candidates for January 2023, and no interventions required in respect of any of the assessment items. For more detail on candidate journey data see 5.7.1.

2. EVOLUTION OF THE ASSESSMENT OF PROFESSIONAL ETHICS

2.1 BPTC

From 2011 to 2020, Professional Ethics was one of three centrally assessed components of the Bar Professional Training Course (BPTC). Examinations in Professional Ethics were devised by the Central Examinations Board (CEB) on behalf of the Bar Standards Board (BSB) and initially comprised a Multiple-Choice Question (MCQ) paper and a Short Answer Question (SAQ) paper. In due course, the assessment evolved into a paper comprising six SAQs, each comprising two sub-parts, set and marked centrally under the oversight of the CEB.

2.2 Bar Training

In 2020, following on from the Future Bar Training reforms, the BPTC was replaced as the vocational stage of training by a range of permitted pathways that could be used to deliver Bar Training. Authorised Education and Training Organisations (AETOs) providing a Bar Training course are required to provide tuition in, and assessment of, professional ethics to a foundation level. The CEB does not directly oversee the assessment of professional ethics as an element of the Bar Training courses delivered by AETOs.

2.3 Professional Ethics assessment during pupillage

Students successfully completing the vocational component of Bar Training and Bar Transfer Test candidates who were assessed after the BTT was aligned to the new vocational assessments who are taken on as pupils are now required to pass a Professional Ethics examination during the pupillage component. Pupils will not be able to obtain a full practising certificate until they have been deemed competent for the purposes of the pupillage component Professional Ethics assessment. The setting and marking of the pupillage component Professional Ethics assessment is overseen by the CEB, on behalf of the Bar Standards Board. The first sitting of the pupillage component assessment was in April 2022. In order to be eligible to attempt the assessment, candidates must have completed three months of pupillage by the date of their first attempt at the examination (unless granted a reduction in pupillage).

Examinations are normally offered three times per year and there is no limit on the number of attempts by candidates. For more information on the background to the introduction of the pupillage component Professional Ethics assessment, see the BSB paper published in April 2020 available here:

<https://www.barstandardsboard.org.uk/training-qualification/becoming-a-barrister/pupillage-component/intro-of-professional-ethics-assessment.html>

3. THE PUPILLAGE COMPONENT PROFESSIONAL ETHICS EXAMINATION

3.1 What is assessed – syllabus

A Professional Ethics syllabus team, comprising academics and practitioners advises the CEB regarding the syllabus for the Professional Ethics assessment and a final update, for all 2023 sittings, was provided to candidates in September 2022: see BSB-Professional-Ethics-Pupillage-WBL-Assessment-Syllabus-22-23.pdf (barstandardsboard.org.uk)

3.2 How is Professional Ethics assessed during the pupillage component?

The Professional Ethics assessment is an exam comprising six questions. Each question has two sub-parts. All sub-parts are equally weighted. Sub-parts within a question may or may not be connected. The exam is three hours long and is open book: candidates have access to the BSB Handbook in electronic format for the duration of the exam. The questions posed consist of scenarios set within professional practice, each of which requires the candidate to engage with one or more issues, applying ethical principles in order to identify, critically analyse and address the matters raised, and to reach an appropriate resolution of those issues. Candidates are required to provide responses in the form of narrative prose or short answer and to apply their knowledge of ethical principles and, using the provisions of the BSB Handbook, guidance, and other syllabus materials, provide comprehensive analysis and sound reasoning in their answers.

3.3 What constitutes competency in the examination?

The pupillage component examination in Professional Ethics is designed to assess whether or not candidates have achieved the threshold standard expected of barristers on their first day of practice as defined in the Professional Statement; see <https://www.barstandardsboard.org.uk/uploads/assets/0279b209-dab6-40c9-a554af54994e2566/bsbprofessionalstatementandcompetences2016.pdf>

3.3.1 In terms of notification of results, candidates will be awarded one of two grades in respect of their overall performance. Those achieving the required standard overall will be graded as 'Competent', and those not achieving the required standard overall will be graded as 'Not Competent'. As part of the internal marking process a candidate's answer to any given question sub-part is allocated to one of four categories:

- Good (Competent)
- Satisfactory (Competent)

- Poor (Not Competent)
- Unacceptable (Not Competent)

See **Appendix 1** for a more detailed definition of the key characteristics of an answer deemed to fall within any of these four categories.

3.3.2 In order to be awarded an overall grading of 'Competent', a candidate would normally be expected to have achieved a grading of at least 'Satisfactory' in respect of 8 out of 12 question sub-parts. For details of scripts that are treated as automatic passes, scripts that are subject to holistic review to determine whether the candidate has passed or not, and those scripts resulting in automatic fails, see further sections 4.3.3 to 4.3.6 (below).

3.3.3 Notwithstanding 3.3.2 (above), where a candidate has three or more sub-part answers graded as 'Unacceptable' the candidate will be graded 'Not Competent' in respect of the overall assessment, regardless of the grades awarded in respect of answers for other sub-parts.

3.4 How candidates prepare for the examination

The BSB does not prescribe any programme of prior study by way of preparation for the examination. A practice assessment that candidates can use for developmental purposes is provided on the BSB website, along with an example mark scheme, and guidance on the grading system. Information about all BSB and external support materials can be found here: <https://www.barstandardsboard.org.uk/training-qualification/becoming-a-barrister/pupillage-component/intro-of-professional-ethics-assessment.html>

3.5 How the assessment is administered

The assessment is a computer-based test. Candidates are required to register their intention to take the examination with the BSB and book either a remotely proctored online assessment, or computer-based assessment at one of the designated test centres – full details are available here:

<https://www.barstandardsboard.org.uk/training-qualification/becoming-a-barrister/pupillage-component/intro-of-professional-ethics-assessment/professional-ethics-exam-candidate-guide/part-1-about-your-professional-ethics-assessment.html>

Reasonable adjustments, including the provision of a pen and paper-based assessment, are available for candidates who notify the BSB of their needs within the timelines set out in the online guidance.

4. QUALITY ASSURANCE

4.1 Pre exam: paper drafting and confirmation process

The bank of material used for compiling the pupillage stage Professional Ethics assessment is comprised of questions written by legal practitioners and professional legal academics who have received training from the CEB. The question writers are allocated topics from the syllabus by the Chief Examiner, and all submitted

questions, along with suggested mark schemes and indicative content (suggested answers), are reviewed by the Professional Ethics examining team (which has a strong practitioner representation). The Professional Ethics examining team compiles a draft examination paper, ensuring that it complies with core assessment principles including level of difficulty, fairness to candidates and syllabus coverage. Each draft paper and accompanying draft mark scheme and indicative content statement is considered at a paper confirmation meeting, convened by the Chair of the CEB. The purpose of the paper confirmation meeting is to ensure that the assessment is suitably rigorous, fair to the candidates, and that the content is both sufficiently plausible and comprehensible. In addition, the mark scheme for each sub-part is reviewed to ensure that it is accurate, appropriate, and proportionate. Following the paper confirmation meeting, the paper, mark scheme and indicative content statement will undergo a syllabus check by the syllabus officer before being reviewed by a Pilot Tester (Paper Scrutiniser) and Proof-reader. The Chief Examiner responds to comments and suggestions arising from these further checks, incorporating changes to the paper where necessary. Once these processes have been completed the examination paper is uploaded to the online system by the BSB Exams Team ready for use in the next scheduled examination.

4.2 Post exam: standard setting and mark scheme development

4.2.1 Standard setting takes place following the sitting of the examination. Standard setting is the process of differentiating between the levels of candidate performance and, in this context, whether a level of candidate performance is to be deemed 'Competent' or 'Not Competent'. This process ensures that a consistent pass standard can be maintained notwithstanding that the level of challenge offered by one examination paper may vary compared to another due to the nature of the questions set. The standard-setting team is comprised of legal practitioners and academics, supervised by the CEB.

4.2.2 The standard setting exercise requires standard setters to identify the pass standard for each of the 12 question sub-parts. In effect this requires standard setters to identify what should appear in the answers of a candidate displaying the threshold level of competence in Professional Ethics as referenced in the Professional Statement as well as the definition of the classifications of Competent and Not Competent respectively, details of which have been published on the BSB website (see above). Standard setters do not expect candidate responses to be of the quality that might be expected from a KC or leading junior, but of an individual who has completed three months of pupillage and who, on the basis of their answers, can be regarded as "comfortably safe".

4.2.3 Standard setters also bear in mind the context in which the Assessment is sat namely that:

- (i) candidates have had exposure to professional practice for a minimum of three months (unless granted a reduction in pupillage), having successfully completed the vocational element of training, including foundation level Professional Ethics;
- (ii) the assessment is a three hour long open book exam; and
- (iii) the objective of the assessment is to test candidates' application of knowledge.

For the first part of the standard setting process, standard setters are asked to identify (independently of each other), the content for each sub-part they consider the notional 'minimally competent candidate' should be able to provide by way of a response for each sub-part. The standard setters are provided with copies of the draft mark scheme and indicative content statement produced by the Professional Ethics examining team and confirmed as part of paper confirmation process and are also provided with a sample of candidate answers for each sub-part. During this period, members of the CEB review a wider sample of candidate answers, collecting additional material or content for discussion. Responses from the standard setters regarding expected content for each sub-part is collated by the CEB (along with the additional content) and circulated for discussion at a plenary meeting attended by all standard setters, the CEB, and BSB Exams Team. The submitted content is discussed at the plenary standard setters' meeting and the pass standard for each sub-part is agreed, along with the content of the mark scheme to be provided to markers, detailing the criteria for four possible gradings: 'Good'; 'Satisfactory' (both 'Competent'); 'Poor'; and 'Unacceptable' (both 'Not Competent').

4.3 Post exam: markers' meetings and the marking process

4.3.1 Before any 'live' marking is undertaken, a markers' meeting is convened to give markers the opportunity to discuss the operation of the mark scheme. Prior to the meeting, markers are provided with a number of sample scripts (drawn from the candidate cohort) which they mark independently. Markers submit the marks and the feedback to be given to the candidate before the meeting. "Think-aloud marking" takes place using the sample scripts along with further samples so that all markers within the team understand the application of the scheme. Following this meeting, the mark scheme may be further amended to include instructions to markers in respect of specific content of the scheme for particular sub-parts.

4.3.2 Markers are allocated a specific question to mark (both sub-parts). Marking teams are supervised by a team leader (an experienced marker) who also marks scripts and moderates the marking of their team. Team leaders meet with the CEB in advance of the markers' meeting and are given guidance on how to perform their role. Feedback is given to all markers during the moderation/calibration process which takes place following the markers' meeting, and the CEB carry out dip sampling during the live first marking period. All scripts are double marked, and where the two markers disagree a further review process is instituted to resolve differences. Markers are instructed to escalate scripts to their team leader where guidance or clarification is required, and team leaders escalate to the CEB Professional Ethics examining team, if necessary. Clarification and/or guidance is provided by the CEB Professional Ethics examining team to all relevant markers when required during the process. Where an answer is graded 'Unacceptable' by two markers, this is escalated either to the team leader or, where the team leader is one of the pair of markers involved, to the CEB team either to approve the Unacceptable grade or otherwise.

4.3.3 Once marking and moderation is completed, scripts that have nine or more 'Satisfactory' or 'Good' and no more than two 'Unacceptable' sub-part answers ("automatic passes") are removed from further review processes. All such scripts are graded overall 'Competent'. Scripts with four or fewer 'Satisfactory' or 'Good' sub-

part answers (“automatic fails”) are also removed from further review processes. All such scripts are graded overall ‘Not Competent.’

4.3.4 Scripts with three or more sub-part answers graded ‘Unacceptable’ will be reviewed again by a member of the examining team. Confirmation that a script contains three or more sub-part answers graded ‘Unacceptable’ will result in the script being removed from further review processes. All such scripts are graded overall ‘Not Competent.’ If a script is found, as a result of this process, to contain two or fewer sub-part answers graded ‘Unacceptable’ it will be allocated for holistic review.

4.3.5 Scripts containing between five and eight ‘Satisfactory’ or ‘Good’ sub-part answers (and no more than two ‘Unacceptable’ sub-part answers) will be subject to a final holistic review. This review involves a “read through” of a complete script to enable the reviewers to judge whether or not the candidate has met the competence threshold (bearing in mind the threshold criteria contained in the Professional Statement and the General Descriptors). The overriding criterion for grading a script as ‘Competent’ is that, on the basis of the candidate’s performance across the paper as a whole, there is no reasonable doubt that s/he had displayed an awareness of Professional Ethics issues commensurate with the granting of a full practising certificate. The rebuttable presumptions are: (i) that those scripts containing eight ‘Satisfactory’ or ‘Good’ sub-part answers will meet the threshold for competence; (ii) and that those scripts containing five sub-part answers graded ‘Satisfactory’ or ‘Good’ will not. Scripts with six or seven sub-part answers graded ‘Satisfactory’ or ‘Good’ will be carefully scrutinised, using the same principles, reviewers being mindful that this category contains scripts which are very much on the competence threshold. Each script is reviewed independently by two reviewers. If there is disagreement between the reviewers as to whether a candidate’s script meets the threshold for competence, a final review will be undertaken by the Chief Examiner.

4.3.6 Finally, a further check of scripts graded overall as ‘Not Competent’ at the holistic review stage is undertaken, along with a sampling of those scripts graded overall ‘Competent’ at the holistic review stage (particularly those deemed to be just on the borderline of competence).

4.4 The role of the exam board – psychometrician and independent observer, plus board rep

The Professional Ethics Examination Board comprises the Chair of the CEB, the Chief and Assistant Chief Examiners for Professional Ethics, the Psychometrician, the Independent Observer, either the BSB Director General, or the BSB Director of Regulatory Operations. Also in attendance will be the BSB Examinations Manager and Senior Examinations Officers, the Head of Authorisation for the BSB, and the BSB Assessment Lead. The Board meets to receive reports on the conduct of the examination, the performance of the assessment items, and to confirm which candidates have been deemed ‘Competent’ for the purposes of the assessment. The Board does not determine issues relating to extenuating circumstances or academic misconduct.

4.5 Extenuating circumstances

The BSB policy on extenuating circumstances in respect of the pupillage stage Professional Ethics examination can be accessed here:

<https://www.barstandardsboard.org.uk/uploads/assets/ddb1ca65-63b8-447e-99993ef80aca5e93/Professional-Ethics-extenuating-circumstances-policy.pdf>

4.6 Academic misconduct

The BSB Examination Misconduct Policy respect of the pupillage stage Professional Ethics examination can be accessed here:

<https://www.barstandardsboard.org.uk/uploads/assets/62449065-f1f2-4b52-a84f1a5712cc81b8/Professional-Ethics-Misconduct-Policy.pdf>

4.7 Reviews

Challenges against the academic judgement of examiners are not permitted. Under the candidate review process, examination answers are not re-marked but candidates may request:

(a) an enhanced clerical error check which involves the BSB checking that the results have been captured and processed correctly; and/or

(b) a review, on the grounds that the CEB, in confirming individual and cohort results for the centralised assessment in Professional Ethics, has acted irrationally and/or in breach of natural justice. Candidates may submit joint applications if they believe that the CEB has acted irrationally and/or in breach of natural justice in respect of cohort results (i.e., a decision taken regarding whether to make an intervention relating to a cohort as a whole).

See further: <https://www.barstandardsboard.org.uk/uploads/assets/1ec417a2-c574-4105-a5f36d40416d26f1/c8af002b-0266-41d0-a3980d5f73fcd07a/Professional-Ethics-regulations-governing-candidate-review-paper-based-applications.pdf>

5. THE JANUARY 2023 WBL PROFESSIONAL ETHICS EXAMINATION RESULTS

5.1 Report from the Examinations Manager on the conduct of the examination

The Examinations Manager confirmed that 219 candidates had registered to sit the January 2023 examination, of whom 213 sat and completed the exam (six candidates cancelled their exam in advance). Of the candidates who sat the exam, 147 (69%) sat Online Invigilated (OI) exams, and 66 (31%) sat Test Centre (TC) exams. TC candidates sat across 10 centres. There were no requests for pen and paper examinations for the January 2023 sitting, although some candidates did request paper copies of the Handbook as an adjustment. No significant problems were reported with the administration of the assessment.

5.2 Report from the Examination Manager on the academic misconduct

In accordance with the published Examination misconduct policy and procedure, the Examinations Manager summarised the details of reported incidents highlighted in the “Red/Amber/Green” (‘RAG’) report and confirmed the Online Invigilated proctors had advised of 11 ‘red flag’ and 2 ‘amber flag’ incidents all of which were reviewed by the Senior Examination Officers (SEOs), who also reviewed a sample of 13 ‘green flags.’ Two of these ‘red flag’ incidents arose from candidates accidentally closing the remote proctoring software. The SEOs conformed that no examination misconduct had been identified in any of the ‘red flag’ or ‘amber flag’ incidents.

5.3 Report from the Examination Manager on Extenuating Circumstances

The Examinations Manager confirmed that nine candidates had submitted extenuating circumstances claims, five of the cases relating to personal circumstances such as ill health, two relating to complaints about the proctoring and one relating to a glitch on the BSB Handbook when using the “CTRL+F” search function. The BSB Exams team will update guidance to candidates on the Handbook’s search features for future exams and following feedback from candidates, use a different pool of proctors for future examinations.

5.4 Report from the Chief Examiner on the standard setting process

The Chief Examiner confirmed the standard setting process had been conducted appropriately and there were no issues to raise with the board. It was also noted that ample time was given for standard setters to come to agreement regarding the content of the mark scheme. The examining team accessing a wider selection of scripts as part of the standard setting process, meant that there was an extensive pool of ‘observed’ responses for each sub-part raising issues which markers might encounter during the marking process. These additional matters were addressed by standard setters at the standard setting meeting.

5.5 Report from the Chief Examiner on the marking and moderation processes

The Chief Examiner confirmed the marking process had gone smoothly, detailing the markers’ meetings, calibration of markers, first marking, second marking and agreed marking processes. It was noted that any answers identified as falling within the ‘Unacceptable’ category had been escalated for verification at a higher level. The Chief Examiner confirmed that a revised version of the mark scheme had evolved reflecting the discussions regarding the operation of the scheme at the markers’ meetings. The dip sampling by the examining team during the first marking exercise provided an additional opportunity to ensure that the mark scheme was being applied appropriately.

5.6 The operation of the assessment – results for each question sub-part

5.6.1 The following is a summary of the distribution of candidate performance in respect of each question sub-part and a brief overview of any discernible patterns in terms of candidate answers, in particular areas that proved challenging. To preserve the integrity of its question bank, the BSB does not provide full details of the questions used in the assessment, although the broad syllabus area under consideration is identified.

SAQ 1A							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
0	0%	18	8%	148	69%	47	22%
<p><i>Broad syllabus areas covered: Duty to act in best interests of client; conflict between client and co-defendant; duty to maintain confidentiality; duty to act with honesty and with integrity</i></p>							
<p><i>Key observations from Chief Examiner on cohort performance:</i></p> <p>The question concerned the ethical issues arising where a barrister was instructed to represent a criminal client of good character whose co-defendant was his sister. Issues arose regarding the co-defendant's previous convictions, and her request to sit in on the conference between the barrister and her brother. CD2, CD6 and CD7 were engaged. Most candidates successfully identified that the barrister was not instructed to (and could not) represent the co-defendant and went on to deal with the conflict, or real risk of conflict, due to the circumstances of the allegation and/or the potential bad character application. They also concluded that the barrister should politely explain to the co-defendant that she could not sit in on the conference. A very small number of weaker answers failed to highlight the conflict and/or the co-defendant's request that she sit in on the conference, and thus failed to address key issues such as CD6 in respect of the barrister's duty to the client. Better responses to this question included references and full discussions not only of the application of CD2, CD7 and CD6, as well as considerations of the client's potential vulnerability, but also the application of CD1, CD3 and CD5, were the barrister to allow the co-defendant to sit in and "assist" the barrister's client.</p>							
<p><i>Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates</i></p>							

SAQ 1B							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
0	0%	20	9%	130	61%	63	30%
<p><i>Broad syllabus areas covered: Duty to provide competent standard of work and service; duty to mitigate breaches of handbook/correct advice; honesty and integrity</i></p>							
<p><i>Key observations from Chief Examiner on cohort performance:</i></p> <p>The question concerned the ethical issues arising where a barrister failed to deal with a key piece of evidence, with consequences for the client in terms of plea. CD1, CD2, CD3, and CD7 were engaged. Candidate responses were, on the whole, satisfactory addressing adequately the key aspects of the question, having identified the seriousness of the error made by the barrister and the steps required to resolve the issues. Of the very few poorer responses there was a failure to identify the remediation steps the barrister needed to take. There were a number of responses which went beyond what was required for a satisfactory answer, illustrating a high degree of competence across the candidature for this sub-part, for example, discussion of the full effects of the incorrect advice given, the need to put the client's needs before the barrister's and the need to ensure that if the client did wish to plead guilty, then the barrister should ensure that the matter was listed at the earliest opportunity.</p>							
<p><i>Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates</i></p>							

SAQ 2A							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
4	2%	65	31%	92	43%	52	24%
<p><i>Broad syllabus areas covered: Duty to act in best interests of client and provide a competent standard of work and service; honesty and integrity; duty to the Court in the administration of justice; need to advise client of weaknesses of case</i></p>							
<p><i>Key observations from Chief Examiner on cohort performance:</i></p> <p>The question concerned the ethical issues arising in relation to a barrister who was being pressured to embellish evidence and/or to put forward an implausible defence case. CD1, CD2, CD3, and CD7 were engaged. Candidates needed to identify that the barrister had to explain the key principles regarding how the barrister should represent the client but also needed to advise him about the weakness of his defence so that he could make an informed choice as to the next steps. In the main, the question was answered well. Most candidates were able to identify the application of CD1 in relation to both allegations. There were some better than satisfactory answers where candidates were able to provide a more detailed and nuanced answer about the approach to the first allegation where there was still a partial alibi which could be put forward. The better candidates also identified the need to withdraw if the client insisted on putting forward a defence which was untruthful and would mislead the court. The majority of poorer answers were due to the failure of those candidates to identify that the barrister must advise the lay client of the weaknesses of his case regarding the second allegation.</p>							
<p><i>Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates</i></p>							

SAQ 2B							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
0	0%	85	40%	88	41%	40	19%

Broad syllabus areas covered: Cab Rank Rule; duty to act in client's best interests/provide a competent standard of work and service; offer of additional fee; duty to maintain independence

Key observations from Chief Examiner on cohort performance:

The question concerned the ethical issues arising in relation to a barrister having to represent a client in a criminal matter where the client had strong views with which the barrister did not agree. The client had also suggested they would pay more for an acquittal. CD2, CD4, and CD7 were engaged. Most candidates identified that the Cab Rank rule applied, and that the barrister must act in the client's best interests (CD2) and/or provide a competent standard of work and service (CD7). The candidates who provided better than satisfactory answers were generally those who were able to expand on the issue regarding the client asking about the views of the barrister by detailing that, despite the requirement for the barrister to act in accordance with CD2, if the client was not happy, they could choose to instruct another barrister as there was still time to do so. The candidates who did not achieve a satisfactory grade generally did not identify or apply CD4 in this scenario, either in addressing the extra fee situation or how the barrister treated the client's views.

Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates

SAQ 3A							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
2	1%	77	36%	110	52%	24	11%

Broad syllabus areas covered: Returning instructions; public access rules; non-payment; returning client's documentation; delivery of documentation drafted by barrister

Key observations from Chief Examiner on cohort performance:

The question concerned the ethical issues arising in relation to the circumstances in which a barrister may cease to act when they have not received payment of fees in accordance with the terms agreed. It further required candidates to differentiate between documentation belonging to the client, which must be returned upon demand regardless of whether the barrister has been paid for any work done, and documentation drafted by the barrister for the client, which does not need to be delivered to the client until payment has been received. Most candidates correctly identified that the non-payment of fees was a basis upon which a barrister may withdraw, and the need to give reasonable notice to the client in such circumstances. The main weakness in relation to this question related to the application of rC131 and the documentation. Many candidates failed to distinguish between the two categories of documents (the client's original documentation and the documents drafted by the barrister), and a number of candidates answered that the barrister must deliver the documentation she had drafted to the client, regardless of whether she had been paid. While there was some reasonable discussion to be had on this point in relation to the application of CD2, weaker candidates often failed to justify their answers on this basis.

Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates

SAQ 3B							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
0	0%	44	21%	111	52%	58	27%
<p><i>Broad syllabus areas covered: CD10 (managing your practice); delegating work; duty to act in client's best interests and to provide a competent standard of work and service; vulnerability; personal responsibility for one's own work.</i></p>							
<p><i>Key observations from Chief Examiner on cohort performance:</i></p> <p>This question raised three distinct issues: (i) the basis upon which work may be delegated to a pupil; (ii) the steps to be taken when dealing with a vulnerable client in a criminal case; and (iii) a failure by the barrister to check his post regularly and read his instructions promptly. CD10 was engaged. In general the question was reasonably well-answered. Whilst many candidates failed to specifically identify the overarching breach of CD10, this was not considered fatal where the candidates had otherwise gone on to identify the specific failings in respect of each of the three issues, and how they should be resolved. Most candidates dealt well with the issue involving the work done by the pupil. Many candidates also identified the vulnerability of the client, and the failings on the part of the barrister in terms of not checking his post regularly/reading his instructions promptly. However, weaker candidates struggled to address adequately how the issues should be resolved, ie, the practical advice as to how the barrister should now proceed. Some weaker candidates also failed to appreciate that the criminal client was a vulnerable witness. Candidates who performed better in relation to this question tended to give equal and adequate weight to the three separate issues, with their answers not only identifying what the barrister had done wrong, but also giving practical advice as to the steps needed to remedy any breaches.</p>							
<p><i>Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates</i></p>							

SAQ 4A							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
1	0%	122	57%	59	28%	31	15%

Broad syllabus areas covered: Clash of hearings; CD7; honesty and integrity; misleading the Court; public confidence in the profession; serious misconduct; duty to report

Key observations from Chief Examiner on cohort performance:

This scenario required candidates to identify the relevant ethical principles that apply when a barrister was faced with a clash of listings. Candidates needed to identify that the barrister should not have returned the appeal instructions, that she failed to comply with CD7 and that, fundamentally, not only had she failed to act with honesty and with integrity (CD3), but she had also allowed the court to be misled (CD1). Candidates needed to identify that the barrister's dishonesty amounted to serious misconduct and that she should report herself to the BSB. The performance of the candidature in this question was mixed. There was some misunderstanding regarding the opposing litigant in person: many candidates treated him as the barrister's client. While this led to confusion when discussing the issues, such as making reference to acting in the opposing party's best interests with a consequent misapplication of the Clash of Hearings guidance, this often did not lead to erroneous conclusions as regards the action which needed to be taken or the identification of the key issues, and therefore did not prevent candidates from achieving a satisfactory grade. A large proportion of candidates failed to connect the barrister's actions with misleading the court and a breach of CD1. Due to the failure to identify this key issue, responses which had met the other requirements of the satisfactory descriptor could not be graded as such. A high number of candidates did not recognise that the dishonest conduct amounted to serious misconduct, and there was a consequential duty to report to the BSB. As regards the Clash of Hearings guidance, by and large candidates attempted to weigh up the various factors in considering which set of instructions should be returned, but some candidates did not provide a definite conclusion.

Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates

SAQ 4B							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
5	2%	21	10%	131	62%	56	26%

Broad syllabus areas covered: Duty to act in best interests of client, maintain independence and to act with honesty and with integrity; bullying/insulting remarks and discriminatory behaviour/harassment; reporting to HOLP/serious misconduct and reporting to BSB

Key observations from Chief Examiner on cohort performance:

The question concerned the ethical issues arising in relation to how a junior tenant in chambers, co-defending in a trial with other members of chambers, should deal with: (i) pressure from the judge to abandon an application to exclude evidence in a criminal trial; and (ii) a co-defending barrister making comments of a bullying/insulting and discriminatory nature. CD2, CD4 and CD7 were engaged. This question was generally answered well with a good number of candidates providing better than satisfactory responses. Candidates commonly identified and applied CD2 and/or CD7. In addition, most candidates addressed the engagement of CD4, albeit on occasions only implicitly. Most candidates were able to provide a satisfactory resolution and highlighted that the co-defending barrister's behaviour needed to be addressed either by the junior barrister reporting her to HOLP or, having concluded that the co-defending barrister's conduct amounted to serious misconduct, that she should be reported to the BSB for harassment, although there was some hesitation as to who should report her. The weaker candidates failed to identify CD4, even implicitly, as regards the judge's and/or co-defending counsel's behaviour. Very weak candidates suggested that the junior barrister should cease to act given the circumstances. Stronger candidates were able to identify and discuss not only the points alluded to above, but also issues such as the application of CD3 in that the barrister needed to continue with the application if he considered it had merit, and more nuanced points regarding discrimination and the engagement of CD5 when considering the conduct of co-defending counsel.

Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates

SAQ 5A							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
17	8%	98	46%	80	38%	18	8%

Broad syllabus areas covered: honesty and integrity; misleading the court; public confidence in the profession; junior counsel's duties; independence; serious misconduct

Key observations from Chief Examiner on cohort performance:

This scenario involved ethical issues regarding a decision by leading counsel prosecuting a serious criminal case not to disclose evidence that would have provided the defendant with an alibi, and the obligations on junior counsel who believed this non-disclosure to have been improper. CD1, CD2, CD3, CD4 and CD5 were all engaged. Most candidates identified the CD1 and CD3 issues. There was also reference to other relevant duties e.g., CD2 and CD5, as well as the Code for Crown Prosecutors. The need to take steps to mitigate the breaches was also recognised. Often candidates gave reasoned answers discussing the core duties and the requirements for prosecutors to apply the Code, but failed to conclude that leading counsel's conduct was or could be serious misconduct. Candidates often focused on one barrister or the other, when the answer was expected to consider both in similar detail. There was often a failure to articulate CD4, although this was at least implied in the discussion as to how to resolve matters. Poorer candidates also failed to recognise that leading counsel's conduct amounted to serious misconduct and should be reported. Very poor answers failed either to identify the key issues or to address them. Some did not realise that the barristers were prosecuting and therefore provided incorrect advice.

Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates

SAQ 5B							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
16	8%	56	26%	108	51%	33	15%
<p><i>Broad syllabus areas covered: Duty to the court – wasting Court’s time; independence (rC20); inappropriate applications; cross-examination; questions designed solely to humiliate/upset witness; ceasing to act</i></p>							
<p><i>Key observations from Chief Examiner on cohort performance:</i></p> <p>The question raised issues related to a CPS barrister being pressurised by an investigating officer into changing his decision not to adduce a defendant’s previous convictions, on the basis that the barrister did not view them as relevant. CD1, CD4 and rC7.1 were all engaged. Most candidates answers identified CD4 and were very consistent in recognising and applying rC7.1. Most identified the officer’s role in that he was neither a client nor an instructing solicitor; better candidates also went on to identify the complaint processes. It was possible to answer this question satisfactorily by applying the provisions of the Code for Crown Prosecutors; some candidates used this method in addition to or instead of using the relevant provisions of the Handbook: this approach was acceptable as long as the key issues and principles were addressed satisfactorily. Poorer candidates failed to recognise that making the bad character application itself was a breach of CD1. A sizeable minority of candidates seemed confused about the police officer and his role, confusing him with an instructing solicitor. It is noted that many candidates, in answering both 5(a) and (b) did not provide fully reasoned answers. This may be because this question is towards the end of the paper and exam fatigue caused candidates to fail to pick up on the words ‘employed’ and/or ‘prosecution’, and to presume that the police officer was a client/instructing solicitor. In both parts the core aspects of the ethical dilemma were addressed, but candidates either failed to articulate the issue, or provided a response in which the relevant core duty was only implicit or tangential. On some occasions there was a failure to provide a resolution to the problem.</p>							
<p><i>Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates</i></p>							

SAQ 6A							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
2	1%	23	11%	128	60%	60	28%
<i>Broad syllabus areas covered: Private dispute; abuse of position; honesty and integrity; public confidence</i>							
<i>Key observations from Chief Examiner on cohort performance:</i>							
<p>The question concerned the ethical issues arising where a barrister used his professional standing to threaten and undermine another party in a private dispute, including sending an email using his work email address and an email signature that identified him as a barrister. Overall, candidates performed well in this sub-part, often identifying points which went beyond what was required for a satisfactory grade. Many candidates did struggle to identify remedial action to be taken by the barrister but holistically were still able to demonstrate an understanding of the key issues that arose within the factual matrix.</p>							
<i>Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates</i>							

SAQ 6B							
Unacceptable		Poor		Satisfactory		Good	
#	%	#	%	#	%	#	%
5	2%	62	29%	131	62%	15	7%

Broad syllabus areas covered: Employed barrister; supply of legal services; duty to act in best interests of client and maintain independence; personal conflict

Key observations from Chief Examiner on cohort performance:

The question concerned the ethical issues arising where: (i) an employed barrister agreed to act on behalf of his fellow tenants of an apartment block in proceedings against the block's management company to which he would also be a party, and (ii) the same barrister sought assistance from a solicitor colleague at the bank at which he worked to lodge the proceedings on behalf of the residents. The question posed some difficulty for a number of candidates. The complexity of the question required candidates to draw out a multitude of factors from the fact pattern. While some candidates were able to do this comprehensively, many failed to identify the employed status of the barrister, or to recognise the potential conflict of interest for the barrister were he to act in matter in which he was a party. Accordingly, some candidates were concluding that the barrister could act in these circumstances as their interests were aligned, which was originally an unacceptable answer. There was concern that the array of issues contained in the question may have resulted in a disproportionate outcome if this 'unacceptable' descriptor remained. The examining team formed the view that in fairness to candidates and to reflect the niche area that this question addressed, this particular descriptor be moved to the poor category. The outcome would be that candidates would still 'fail' the question if they reached this conclusion but would not be cross the 'dangerous' threshold; accordingly, the integrity of the question could be maintained.

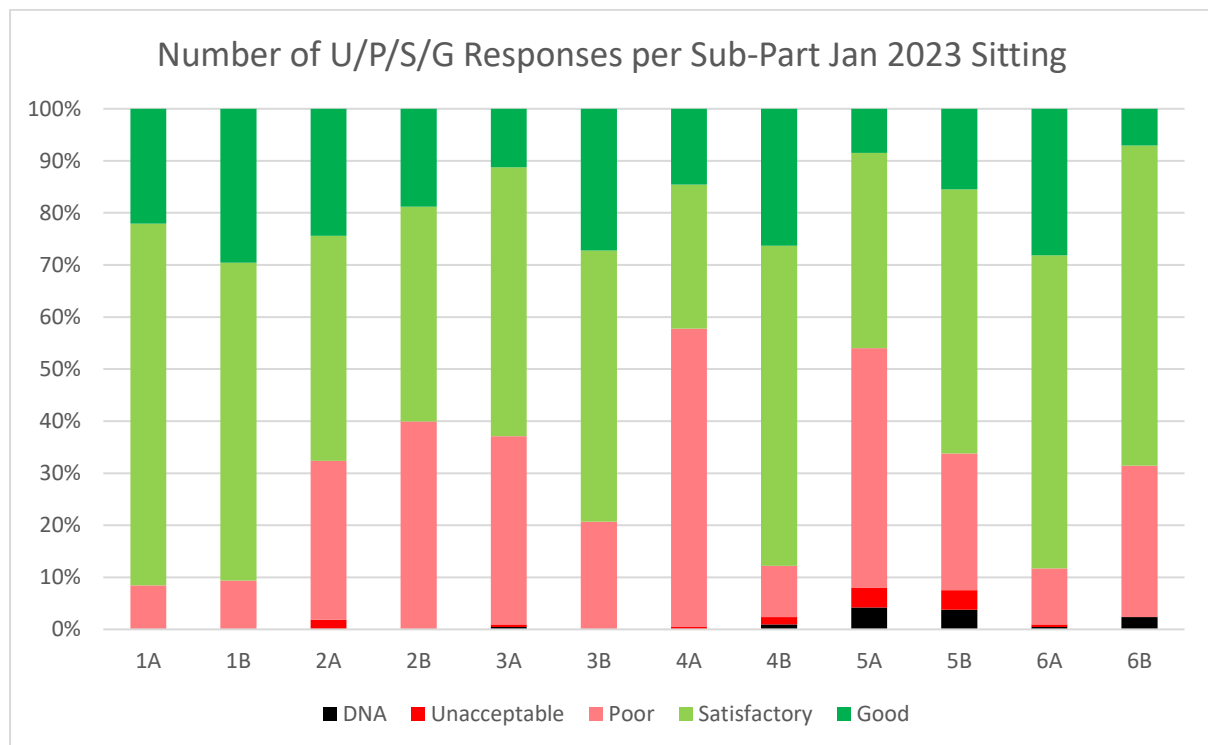
Decision of the exam board in relation to sub-part: no intervention necessary; results for sub-part confirmed and applied to candidates

5.6.2 Taking the 12 item responses across 213 candidates produces 2556 answers which were graded as follows:

Grading	% of all responses January 2023
Did not answer (DNA)	1.02%
Unacceptable	1.02%
Poor	27.03%
Satisfactory	51.49%
Good	19.44%

Across all 12 sub-parts the average competency rate (ie answers rated either 'Satisfactory' or 'Good') was 71%. The overall candidate passing rate for the January 2023 sitting as a whole at 92%, is higher than this figure, as candidates can be rated 'Competent' overall, without having to achieve a 'Good' or a "Satisfactory" grading in respect of every one of the 12 sub-parts.

5.6.3 Distribution of categorisations across question sub-parts January 2023 sitting



The graphic above shows the distribution of answer categorisations across all 12 sub-parts of the assessment for the January 2023 sitting. As can be seen items 5A and 4A proved to be the most challenging. Looking at each sub-part on the basis that an answer rated either 'Satisfactory' or 'Good' falls within the 'Competent' grouping, results in just over 42% of responses to sub-part 4A were graded as 'Competent' and 46% for sub-part 5A. By contrast, sub-parts 1A and 1B both had competency rates of over 90%.

5.6.4 Assuming candidates attempted the questions in the sequence set, the data suggests a falling-off of candidate performance when comparing grades awarded for the first 4 sub-parts, compared to those awarded for the last 4 sub-parts. The competency rate (ie answers rated either 'Satisfactory' or 'Good') for sub-parts 1A to 2B was 77%, compared with 68% for sub-parts 3a to 4B, and 67% for sub-parts 5A to 6B. The CEB will continue to review the issue of word count and the cognitive load being placed on candidates in terms of the length and complexity of scenarios.

5.7 Trend data on candidate performance

5.7.1 Candidate journey

Candidate Journey April 2022 to January 2023 sittings				
	Apr-22	Jul-22	Oct-22	Jan-23
Candidates First Sitting	112	21	7	212
Candidates Resitting	0	4	2	1
Total Number of Candidates Sitting	112	25	9	213
First Sitting Candidates Passing	107	19	5	196
Resitting Candidates Passing	N/A	4	2	0
First Sitting Candidates Failing	5	2	2	16
Resitting Candidates Failing	N/A	0	0	1
Failing Candidates who had Accepted Extenuating Circumstances	1	0	1	0
Total Number of Candidates to Date	112	132	139	351
Total Number of Candidates Passing to Date	107	130	137	333
Candidates not yet deemed Competent	5	2	2	18

The table above shows that all candidates entering for the Professional Ethics examination in either April or July 2022 have now successfully completed the assessment. Two candidates who first entered the exam in October 2022 are yet to be deemed 'Competent'. In addition, 16 candidates who attempted the exam for the first time in January 2023 will require a further attempt. In total 351 unique candidates have attempted the exam to date, with 333 being deemed 'Competent' on their first or second attempt, and 18 yet to be deemed 'Competent.'

5.7.2 Cumulative data: total number of attempts and passes.

Sitting	Total Number of Candidates Sitting	Total Number of Candidates Passing at this Sitting	% of Candidates Passing at this Sitting
Apr-22	112	107	95.5%
Jul-22	25	23	92.0%
Oct-22	9	7	77.8%
Jan-23	213	196	92.0%
Cumulative Total to date	359	333	92.8%

The above table shows that, to date, there have been 359 candidate attempts in the Professional Ethics Exam, of which 333 have resulted in gradings of 'Competent' – and a cumulative passing rate of 92.8%.

5.7.3 Cumulative data: distribution of answer gradings by sitting

	April 2022 sitting	July 2022 sitting	October 2022 sitting	January 2023 sitting	Cumulative to date
Grading					
% DNA	0.00%	0.67%	2.78%	1.02%	0.72%
% Unacceptable	3.20%	4.33%	4.63%	1.02%	2.02%
% Poor	12.87%	23.00%	26.85%	27.03%	22.33%
% Satisfactory	48.21%	43.00%	49.07%	51.49%	49.81%
% Good	35.71%	29.00%	16.67%	19.44%	25.12%

The table above shows that the April 2022 cohort was arguably the strongest so far, achieving a competency rate (ie answers rated either 'Satisfactory' or 'Good') of 84%, compared to 65% for the October 2022 cohort (the October 2022 cohort comprising only 9 candidates). The overall competency rate across the 4 sittings is just under 75%. Whilst the percentage of answers falling within the 'Unacceptable' (excluding DNAs) category has never been above 5%, the CEB will be reviewing what gives rise to such gradings and advising the BSB accordingly.

5.8 Observations from the Chief Examiner for Professional Ethics on the operation of the assessment

The Chief Examiner confirmed that she was content that all standard setting, marking and review processes were followed satisfactorily and there was nothing to cause concern about any of these individual stages following the sitting of the January 2023 Professional Ethics Assessment. The addition of measures including

consideration of a more extensive sample of candidate responses or parts of responses during the standard setting process along with dip sampling during live marking has contributed to the quality of post-exam processes.

5.9 Comments from the Psychometrician

The Psychometrician was happy to endorse the decisions taken by the board and felt that the outcomes were reassuring.

5.10 Comments from the Independent Observer

The Independent Observer confirmed to the Board that he was happy to endorse the results.

6. COHORT AND CANDIDATE PERFORMANCE OCTOBER 2022 SITTING

Results for the January 2023 sitting of the pupillage stage Professional Ethics examination are as follows.

Total Number of Candidates	213
Number Passing	196
Passing Rate (%)	92.0%

6.1 Analysis of cohort performance

6.1.1 Based on the marking protocols relating to candidates automatically graded as 'Competent' and those candidates whose overall examination performance is referred for a holistic review (see further 4.3.3, above) 53% of candidates were deemed to be automatic passes, and a further 38% were deemed to have passed following a holistic review of their scripts.

Automatic Fail	11
Fail at Holistic Review Stage	6
Pass at Holistic Review Stage	82
Automatic Pass	114

6.1.2 The tables below show the breakdown of 'Competent' candidates by reference to the number of answers graded as 'Good' or 'Satisfactory' and the breakdown of 'Not Competent' candidates by reference to the number of answers graded as 'Unacceptable' or 'Poor':

Number of Passing Candidates With	
5 Satisfactory/Good Responses	3
6 Satisfactory/Good Responses	18
7 Satisfactory/Good Responses	27
8 Satisfactory/Good Responses	34
9 Satisfactory/Good Responses	42
10 Satisfactory/Good Responses	37
11 Satisfactory/Good Responses	24
12 Satisfactory/Good Responses	11

Number of Failing Candidates With	
3 Unacceptable/Poor Responses	0
4 Unacceptable/Poor Responses	1
5 Unacceptable/Poor Responses	2
6 Unacceptable/Poor Responses	4
7 Unacceptable/Poor Responses	1
8 Unacceptable/Poor Responses	7
9 Unacceptable/Poor Responses	2
10 Unacceptable/Poor Responses	0
11 Unacceptable/Poor Responses	0
12 Unacceptable/Poor Responses	0

6.1.3 The table below illustrates the operation of the grading and holistic review processes (outlined at 4.3.3 above) in respect of the January 2023 cohort.

Profiles January 2023 sitting	Unacceptable	Poor	Satisfactory	Good
Strongest profile - candidate automatically failing with 3 or more "Unsatisfactory" gradings	4	0	6	2
Strongest profile - candidate automatically failing with 4 or fewer "Good" or "Satisfactory" gradings	0	8	3	1
Strongest profile - candidate failing following holistic review	2	4	3	3
Weakest profile - candidate passing following holistic review	0	7	5	0

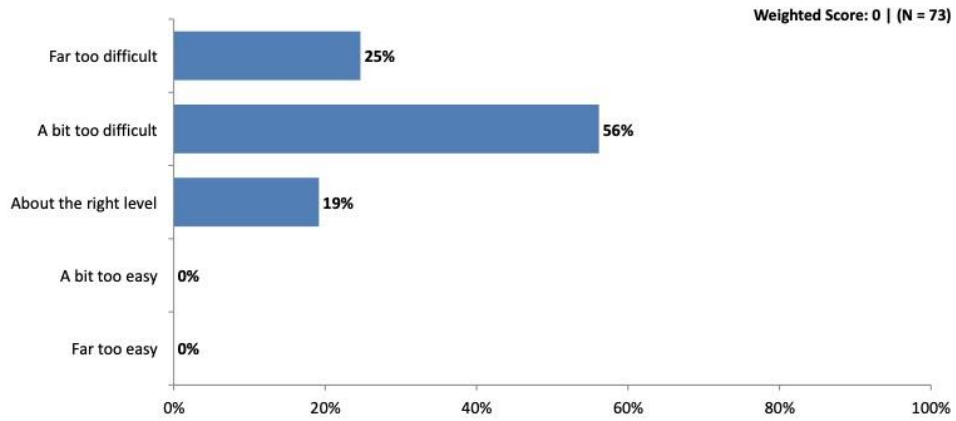
In respect of the candidates being considered in the holistic review process, it should be borne in mind that the determination of a “Competent” or “Not Competent” grading is not driven by a simple mathematical formula, but ultimately rests on the overall view of the quality of the script taken by the examiners. Hence, as the above table shows, the weakest candidate passing as a result of the holistic review process had no answers graded “Good” against the strongest candidate who failed following the holistic review process who had 3. The holistic reviewers were no doubt persuaded by the fact that the latter candidate had 2 answers graded “Unacceptable” and fewer “Satisfactory” answers. A further consideration for reviewers may be the nature and seriousness of the defect contained in an answer for example whether an answer is graded “Unacceptable” on the grounds of what the candidate has failed to address, or on the basis of what the candidate has (wrongly) asserted to be the correct ethical position.

6.2 Feedback from candidates

6.2.1 The Examinations Manager reported that feedback was solicited from all candidates via a survey immediately following the exam, with reminders sent a week later. Responses were provided by 73 candidates (34%)

6.2.2 A summary of the general feedback: Level of difficulty

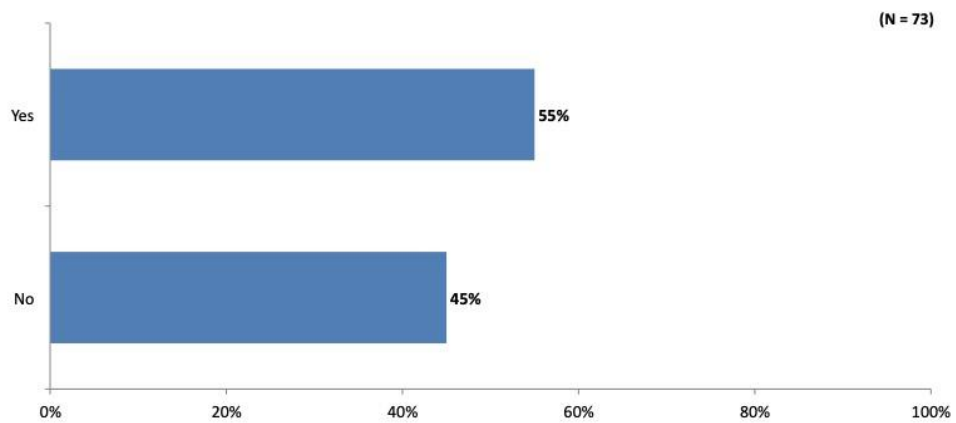
What was your impression of the overall difficulty level of the paper for a barrister at this level of training?



2

6.2.3 A summary of the general feedback: Sufficiency of time allowed

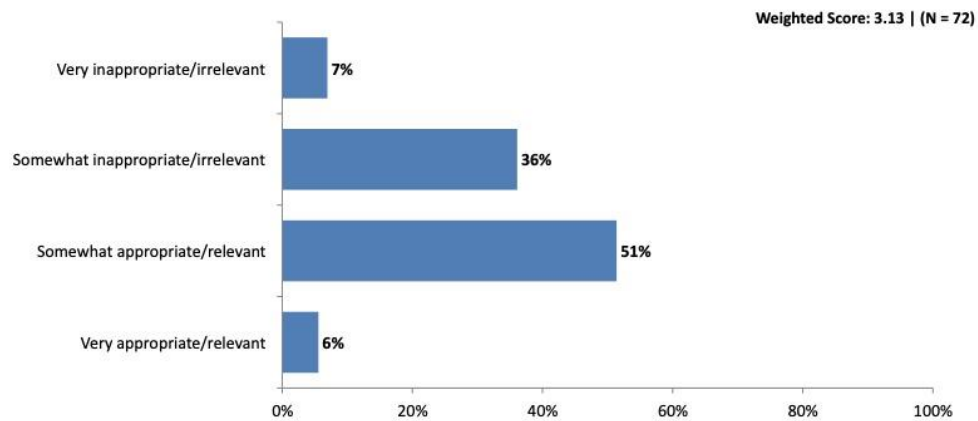
Did you leave any answers blank or incomplete due to insufficient time?



15

6.2.4 A summary of the general feedback: Relevance of scenarios

How appropriate and relevant did you find the scenarios were to the experience of early years practitioners?



16

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6.2.5 A summary of the general feedback: comments made by respondents.

There were many positive comments made by respondents, but amongst the concerns raised, the following themes emerged:

- the extent to which many candidates felt unable to fully answer the questions set in the time available
- the complexity of some of the scenarios
- the examination was perceived as being more challenging than the publicly available mock examination
- too many scenarios had a criminal practice setting
- repetition of various points throughout the paper
- syllabus coverage too broad or too narrow
- uneven level of challenge across questions

The CEB will take these points on board in advising the BSB on measures it considers necessary to facilitate the quality enhancement of the assessment.

Professor Mike Molan
Chair of the CEB
20 March 2023

Appendix 1

General Descriptors

Grade	Descriptor
Good = "More than Competent"	Content exceeds the criteria for a Satisfactory answer i.e., "more than Satisfactory"
Satisfactory = Competent	<p>A competent answer demonstrating satisfactory understanding of the key issues, but with some inaccuracies and/or omissions. Such inaccuracies and/or omissions do not materially affect the integrity of the answer.</p> <p>Analysis and/or evaluation is present but may not be highly developed</p> <p>Evidence of insight, but it may be limited.</p> <p>Use of appropriate information and principles drawn from syllabus materials.</p> <p>Shows an awareness of the key issues and comes to appropriate conclusions.</p>
Poor = Not yet Competent	<p>Poor understanding of the key issues with significant omissions and/or inaccuracies.</p> <p>Limited or completely lacking in evidence of understanding. Interpretation, analysis and/or evaluation is shallow and poorly substantiated.</p> <p>Little or no evidence of insight.</p> <p>Limited use of information and principles.</p> <p>Not evident that syllabus materials were understood and/or incorporated into answer.</p> <p>Shows a very limited awareness of the key issues and fails to come to appropriate conclusions.</p>
Unacceptable = Not yet competent	<p>The answer contains material which, in the view of the examiners, is so <i>clearly incorrect</i> that, if it were to be replicated in practice, it could significantly affect the client's interests or the administration of justice (such acts or omissions would include behaviour which would require reporting to the BSB) and/or place the barrister at risk of a finding of serious misconduct.</p> <p>An answer which, in the view of the examiners, fails to make a genuine attempt to engage with the subject-matter of the question (e.g., the candidate's response amounts only to "<i>I do not know the answer to this question, but I would telephone my supervisor for assistance</i>") will fall into the "clearly incorrect" category of answers.</p> <p>A failure by a candidate to provide any answer will be treated in the same manner as a candidate who provides a "clearly incorrect" answer.</p>