

OPEN KNOWLEDGE FOUNDATION
SUBMISSION TO INDEPENDENT REVIEW OF THE BAR STANDARDS BOARD'S
MANAGEMENT OF THE AUGUST SITTINGS OF THE CENTRALISED EXAMINATIONS

1. The Open Knowledge Foundation ("OKF") makes submissions below regarding the BSB's conduct of the remotely-proctored August 2020 Bar Professional Training Course (BPTC) and Bar Transfer Test (BTT) examinations.
2. In OKF's submission, the problems with the August 2020 BSB exams were pre-determined by two key decisions made at the outset, many months before:
 - (1) exam design (to persist with a closed book format and not to redesign the exam); and
 - (2) to use an online, remotely proctored format, provided by Pearson VUE.

Because these decisions could not really be changed once made, it was essential to anticipate at the outset what the potential data protection and equalities impact risks would be. This required a rigorous risk assessment process. Unfortunately, this did not occur.

3. The submissions are ordered as follows:
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A. INTRODUCTION

4. Remote learning and examination technology presents both opportunities and significant challenges. The August 2020 BSB exams demonstrate the importance of anticipating those challenges and making appropriate adjustments in order to ensure participation and transparency. COVID-19 has accelerated a shift already underway – towards online delivery both of course content and examinations. It is important that such a shift has transparency, inclusion and effective protection of data, privacy and non-discrimination principles at its core. The Independent Review is an opportunity to affirm this.
5. COVID-19 and the first lockdown in March 2020 led to course providers cancelling the April exams and the BSB took responsibility for arranging an August sit. We note that the terms of the review explicitly recognise that this aimed to counter the restrictions in place and enable candidates to sit the assessments from home.
6. Considerable difficulties were experienced by candidates with the booking process and the remotely proctored system and according to the BSB, 25% of exams were not able to be completed successfully. Students also reported significant privacy, data and equality

concerns both prior to and after the exams in respect of remote proctoring and the organisation of the exams. The Review will need to consider the impact of the uses of remote proctoring technology on the rights of students including their wider rights to privacy and non-discrimination and other harmful impacts of remote proctoring.

7. The Independent Review is a timely opportunity to assess these problems so that changes can be made for this year's bar exams, which are due to occur imminently, in April 2021. Although responsibility for these exams has reverted to the Authorised Education and Training Organisations (AETOs), the BSB has an important responsibility to ensure compliance with the objectives of ensuring access to the Bar and diversity, and to set the parameters for AETOs' use of technology.
8. Indeed, the Review provides an opportunity to establish authoritative guidelines for best practice in online examinations that will assist other professions and educational institutions faced with similar choices during the COVID-19 pandemic and beyond.

B. OPEN KNOWLEDGE FOUNDATION: BACKGROUND

9. OKF is a global, non-profit organisation incorporated in England and Wales as a company limited by guarantee. It advocates the open sharing of information at no charge, promoting open education resources and the transparent use of technology. It works with governments, civil society organisations and members of the public in ensuring accountable and transparent use of data and technology.
10. Since 2020, OKF has been working on accountability in the use of AI and algorithms, in particular in automated decision systems deployed by governmental, corporate and other large organisations to make decisions impacting individual citizens. Through its Justice Programme, OKF is equipping legal professionals with the knowledge and tools they need to start holding the deployers of these technologies to account in their practice. Through advocating for openness in their use, OKF aims to make AI and algorithms auditable in this context and therefore ensure fundamental principles of fairness are seen to be upheld, and corrected where they are not.
11. OKF is concerned by the proliferation of online tools, particularly during the COVID-19 pandemic that inhibit the free exchange of information through the adoption of opaque proprietorial software; inadequate data retention protection practices; and the use of algorithmic decision-making that has the potential for discriminatory impacts.
12. OKF wrote to the BSB on 9 October 2020, raising concerns about the conduct of the August examinations, pointing to procedural errors made by the BSB in the appointment of Pearson VUE, the selection of exam format and its assessment of the impacts that would follow. The BSB responded to those concerns and invited OKF to participate in the Independent Review. This may have informed the focus on equalities and data impacts at points 2-7, 9, 13-14 of the Terms of Reference.
13. We understand a copy of our letter dated 9 October 2020 has already been passed to the Independent Reviewer. We can provide any other correspondence upon request. This submission is intended to be freestanding so no further reference to the 9 October 2020 letter is necessary.

14. OKF is aware of the concerns already raised with the BSB (and, presumably, the Independent Review) by the student group SABER and prominent members of the legal profession regarding the many problems that occurred at the level of implementation of the exams, and the availability of different examination methods to avoid these. We seek to compliment these submissions by focusing on the equalities and data protections impacts of the exams.

C. DISCRIMINATION, PRIVACY AND EMERGING TECHNOLOGIES

15. Race discrimination concerns arising from emerging digital technologies were analysed and reported on by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance in June 2020.¹
16. Face matching and recognition is widely recognised to be less accurate for those with darker skin tones (particularly women).² This means that people of colour, already facing barriers to entry to the Bar, may face an additional anxiety or apprehension knowing that it may be more difficult for them to pass the proof of identity requirement and that they may face disproportionate human scrutiny by reviewers of algorithmic decision making.
17. This disproportionate impact is not limited to people of colour but extends to others with protected characteristics including those who wear certain forms of religious dress or have disabilities resulting in facial movements likely to be 'flagged' as suspicious by an algorithm.
18. Human review does not necessarily resolve the problems caused by algorithmic discrimination as humans are susceptible to confirmation bias.³ Moreover, the very fact that people with protected characteristics are more likely to be wrongly identified by an algorithm and thus subjected to increased human surveillance exacerbates the discriminatory impact.
19. Socio-economic factors including access to a reliable internet connection, technology with a sufficiently high technical specification and a suitable home environment in which to take an exam can also lead to exclusion from remote proctored examinations, and may correspond with protected equalities characteristics.
20. The consequence is that those most likely to experience difficulty with or exclusion from remote proctored exams are those already experiencing disproportionate barriers to accessing the Bar.

¹ A/HRC/44/57 'Race discrimination and emerging digital technologies: a human rights analysis' Available here: undocs.org/en/A/HRC/44/57

² Buolamwini, J and Gebru T, (2018) 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification' Proceedings of Machine Learning Research 81: 1-15, 2018 available at proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf

³ As an example Howard JJ, Rabbitt LR, Sirotin YB (2020) Human-algorithm teaming in face recognition: How algorithm outcomes cognitively bias human decision-making. PLoS ONE 15(8): e0237855. <https://doi.org/10.1371/journal.pone.0237855>

21. Emerging technologies using surveillance and data collection software give rise to significant privacy concerns particularly when used in the private home of a student.
22. The risks of discrimination arising from the use of artificial intelligence and automated technologies and the way in which they manifest are materially different to concerns that may arise from in person tests taken on a computer at a test centre. Recognition of these differences and an analysis of their impact was essential prior to the BSB's decision to hold computer-based assessments, so that they could be factored into exam design.

D. COVID 19

23. We recognise that COVID 19 presented a significant challenge to an exam provider seeking to accommodate examination candidates across the globe. Such challenges included: local and international travel restrictions, quarantine periods and the closure of test centres.
24. We also explicitly recognise that candidates with illnesses, those who are carers or otherwise have specific vulnerabilities to COVID 19 would have been shielding and will continue to need to shield for some time. This means that they will most likely be unable to travel or sit in an examination hall without risking infection. Furthermore, in light of the more recently identified strains (the UK and South African mutations) the risk of contracting COVID 19 by sitting an exam in person is likely to have increased and may now extend to all exam candidates. This could mean that in person exams in test centres are simply not possible.
25. Any future exam format decision or invigilation for the foreseeable future will inevitably have to take into account public health considerations. It is therefore all the more important that if these exams are to take place outside a test centre equality and privacy protections must be in place.

E. RELEVANT BACKGROUND

Facts (1): Bar Standards Board

26. In line with the regulatory objectives set out in section 1(1) of the Legal Services Act 2007 the BSB, as an authorised regulator, is required *inter alia* to protect and promote the public interest, encourage an independent, strong, diverse and effective legal profession and promote and maintain adherence to the professional principles.
27. There is no doubt that maintaining the integrity of the qualifications system is in the public interest and that the BSB has a duty to set appropriate criteria which 'in its judgment, ensure[d] that a candidate evidenced appropriate skills and attributes before entry into the profession...and that it ha[s] a wide discretion as to the nature and form of the precise requirements...' (*The Queen on the application of Steven Prescott v The General Council of the Bar and University of Law (Birmingham)* [2015] EWHC 1919 (Admin) [44]).

28. The BSB places significant emphasis on work to promote equality and diversity at the bar. This can be seen through those documents setting out its equality objective, strategic plan and risk outlook. There are additional extensive requirements in the BSB handbook at C-110-112.
29. The strategic plan aims to encourage an independent, strong, diverse and effective legal profession and notes that the Bar is not yet fully representative of the wider population and that although strides have been made more remains to be done. The regulator states it will 'continue to improve our understanding of the factors that influence diversity within the profession and the role that we, as the regulator can play to help improve diversity.'
30. The outcomes sought by the BSB include to understand the factors that influence diversity at entry to and within the profession and it notes that it has put in place regulations to help support diversity at the Bar and remove barriers to entry and progression and to be seen as a regulator that *'influences, directly or indirectly, change in the diversity of the profession and which has constructive relationships across the sector to support us in that aim.'*

Facts (2): BSB and Pearson VUE

31. The BSB has used technological solutions to deliver online examinations prior to the 2020 Bar exams. Following the Wood Report of 2008, the BSB introduced the Bar Course Aptitude Test (BCAT) as a method for reducing the number of poorer quality students who were unlikely to reach the standard required to pass the BPTC being accepted to undertake the course.
32. Pearson VUE were selected to deliver a computer-based pilot of this course following an open tender process concluding in about 2009. As set out in the Aptitude Test Consultation document of 2012, a detailed programme of development, testing, evaluation and consultation followed the Wood report prior to implementation of the BCAT including two pilots in 2009-2011, an independent expert assessment and open consultation.⁴
33. Operational considerations and equality impacts formed a significant part of the assessment of the BCAT prior to the formal roll out by the BSB in 2013. A detailed handbook relating to the test was produced.⁵
34. The Equality Impact Assessment conducted for the BCAT noted that all exams were to be taken at Pearson VUE centres and therefore under like circumstances. As a consequence it was concluded that 'This will be completely fair because everyone has to do it in the same way.' The document also noted that the provider has systems in place to cater for students requiring adjustments.⁶
35. The only location in which tests could be taken were at test centres provided by Pearson VUE. At para 9 of the BCAT Handbook the following is recorded:

⁴ Information taken from Consultation Paper available on the BSB website under 2012 at www.barstandardsboard.org.uk/news-publications/consultations.html

⁵ www.barstandardsboard.org.uk/uploads/assets/c80aa292-6142-4c34-98a116fe030bb666/BCAT-Handbook.pdf

⁶ Equality Impact Assessment at p137 Consultation Paper

“9.1 In order to ensure the highest quality standards of the test environment the BSB has agreed that only the test centres that adhere to the most stringent quality controls will offer the BCAT, therefore not all Pearson VUE test centres offer the BCAT.”

36. The BSB therefore had a long-standing relationship with Pearson VUE and had previously conducted an extensive investigation into some parts of the examination system. The following features of the BCAT system are significantly different to the BPTC exams introduced for August:
- i) All exams were to be taken at a test centre;
 - ii) Identity was checked in person at the centre rather than through use of face matching software; and
 - iii) Exam invigilation was in person and not via remote proctoring. It did not therefore involve the use of new technologies and biometric information

Facts (3): BSB and the BPTC

37. The BSB was one of the first professional regulators to adopt the use of remotely proctored exams (ahead of, for example, the solicitors' profession and schools) during the COVID-19 pandemic. It did so using 'off the peg' software provided by Pearson VUE and created outside of the EU data protection environment which used a novel 'remote proctoring' model. While we acknowledge the pressures brought about by the pandemic, deploying novel technology was a risky course to take. The risks which materialised are well-documented and we will not go into detail about them here. We have prepared a chronology of the incidents and we can provide this on request.
38. The BSB stated in their response to us that Pearson VUE were chosen as the provider on the grounds that the BSB had an established relationship with Pearson VUE which was utilised to put in place arrangements quickly.
39. Pearson VUE had developed a system to run BSB exams that individuals could take at home rather than attending a test centre. From the Pearson VUE website the option to 'Get Certified from your home or office' appears to have been in place by January 2020 and a short video explains what candidates should expect. This noted three simple requirements:
- i) A quiet, private location;
 - ii) Reliable device with a webcam; and
 - iii) Strong internet connection.
40. The ability to take a test at home or in the office was therefore relatively new and does not appear to have been tested and assessed for impact before being implemented by the BSB and certainly did not go through anything like the rigorous procedures undertaken for the BCAT. It may be that the BSB believed that because such a significant process had been undertaken in respect of the BCAT there would be no significant additional concerns arising from contracting Pearson VUE to run the BPTC exams. But taking exams outside a test centre using remote proctored exam software raises additional serious and significant different considerations that can give rise to practical and other problems leading to discrimination and breaches of rights.

Facts (4): BSB Risk Assessment Process

41. The decisions as to both exam format, provider and technology to be deployed were announced on 7 May 2020. The BSB has stated that it was aware at that time of the salient features of the Pearson VUE software: its use of artificial intelligence; live video monitoring; recordings; and IT equipment requirements. Further, that students would be specifically required to consent to ‘the video and audio recording of your face image, voice, desk and workspace for the purposes of test quality, security and the integrity of the testing process’. It was also clear that this would require a student to have access to quiet, undisturbed space for the duration of the exam.

Equality Impact Assessment

42. Section 149 of the Equality Act 2010 (“EA”) provides that:

“(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.”*

43. The duty requires a “*rigorous approach*” and “*specific regard, by way of conscious approach to the statutory criteria*”: see *Bracking v SSWP* [2013] EWCA Civ 1345 at §26 (per McCombe LJ).
44. The BSB should have had due regard to how the exam format and remote proctoring model would eliminate discrimination against those with protected characteristics, advance equality of opportunity and foster good relations for those cohorts. This was an integral part of ensuring that the exams – the crucial gateway to the profession – provide an equal opportunity to all students.
45. There are other freestanding duties in the EA in relation to persons with protected characteristics. Sections 53 and 91 EA impose obligations on education institutions and qualifications bodies not to discriminate as well as to make reasonable adjustments in relation to disabled persons, as set out in sections 19 and 20 EA.
46. The BSB conducted an Equalities Impact Assessment (EIA) on 28 April 2020 in advance of the decision announced 7 May 2020 to adopt remote proctored exam, on 28 2020. This document did not anticipate the additional impacts that arose from an online remotely proctored exam model. Instead, it proceeded on the basis that the equalities impact of an online remotely proctored exam as opposed to an in-person exam was neutral and therefore focused on the estimated 12% of students who required adjustments for physical pen and paper exams. The assessment concluded that there were no other impacts on

protected characteristics other than disability⁷. These were all significant errors in approach.

47. The EIA also concluded that there were sufficient test centre places available. This turned out not to be the case, as noted below and in part because the BSB underestimated the demand for in person places by those without a disability.
48. This EIA was later amended on 9 June 2020 after significant objections to the BSB's decision were aired drawing attention to the manifold impacts of the decision. However, by this point the impacts being assessed were ones of a decision that had already been taken. The first EIA is important, because it shows the regard given to equalities impacts at the time of the initial exam decision: when deciding on exam format (closed book) and technology. The 9 June update identified a wider (but still incomplete) list of identified impacts and concluded that, as the decision was by then effectively made, it was better to proceed despite those impacts. It concluded that this was achievable as there would be sufficient alternative test centre spaces for all students, however in the event this was not the case.
49. In its correspondence with the BSB, OKF sought disclosure of all of the equalities impact assessments ("EIAs") carried out before and after the August examinations as well as the data protection impact assessments ("DPIAs"). A further EIA, dated September 2020, was disclosed to us. However, it noted that the BSB did not at that time "*have reliable data about the number who fall into*" the category of persons who failed to receive reasonable adjustments for the exams.

Data Protection Impact Assessment

50. Art.35(1) of the GDPR sets out the requirement to conduct a Data Protection Impact Assessment ("DPIA") as follows:

"Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data..."

A DPIA needs to be conducted at a sufficiently formative time in the decision-making process to be able to inform the design of the new methods of data processing. It serves no purpose for it to be a bureaucratic box-ticking exercise that cannot prevent or mitigate the data protection impacts that it identifies.

51. The requirement to conduct a DPIA and the level of rigour required was considered by the Court of Appeal in *R (on the application of Edward Bridges) v the Chief Constable of South Wales Police* [2020] EWCA Civ 1058. The Court found that the DPIA in relation to the adoption of facial recognition techniques by the South Wales Police Force "*failed properly*

⁷ "*The remote proctored computer based solution does not discriminate against any of the other protected characteristics outside of disability. For other characteristics, the system is equally accessible, fair and reliable and no other group is therefore disadvantaged.*"

to assess the risks to the rights and freedoms of data subjects and failed to address the measures envisaged to address the risks arising from the deficiencies we have found”.

52. The BSB made no public reference to the carrying out of a DPIA in accordance with Article 35 GDPR in the run up to the exams. When we raised this with the BSB, the BSB stated a DPIA “*was not completed before the decision to contract with Pearson VUE*” but that one “*was worked on while the examination arrangements were being finalised with Pearson VUE (with their input)*”. The BSB refused to disclose the DPIA (while disclosing the EIAs). However, they have now stated they will consider the request for disclosure under the spirit of the Freedom of Information Act and will endeavour to respond to us within 20 days.
53. **We would welcome the opportunity to make more detailed submissions upon receipt of this document if it is disclosed to us or publicly. In the event the BSB does not disclose the document to us it is important that the Independent Review obtains (and publishes) this DPIA.**

Facts (5): Data Protection Issues

54. We set out below the salient aspects of the exam process in relation to data protection. When considering these issues, the Independent Reviewer should have regard to the principal provisions of the GDPR: Art. 5 GDPR (which sets out the data protection principles governing the processing of personal data, which require it to be, *inter alia*, fair; transparent; lawful (as to which, see Art. 6 GDPR); and limited to what is necessary); and Art.s 7 and 9 GDPR (which concern the giving of informed consent and “special category” (sensitive) personal data respectively).
55. When logging into the exam software, students were presented with the following consent options, all of which were **mandatory** to take the test (emphasis added):

“By accessing this website and ticking the box *you indicate your acceptance of Pearson VUE's, a business of NCS Pearson, Inc., Privacy and Cookies Policy ("Privacy Policy"), Terms and Conditions and use of cookies to support your experience. You also understand, acknowledge and agree that the testing programme sponsor has its own, possibly different, privacy policy.*

By providing your personal information, as stated in this Privacy Policy, for the purpose of registering for a licensure, certification or academic admission test, including the administration of such test, you acknowledge, *agree and consent to the video and audio recording of your face image, voice, desk and workspace for the purposes of test quality, security and the integrity of the testing process, and you consent to the processing of such personal information and test data by Pearson VUE and to the transfer of such data to Pearson VUE's hub server, located in the USA, as the data processor, its authorised third parties, if any, both in the capacity as data processors for the processing of your personal information and test data on behalf of the testing programme sponsor, as the data controller, located in the USA or elsewhere....*

If you choose to take the test through our on line proctoring function, which is not mandatory in the event that there are other ways of taking the test as determined by the testing programme sponsor, you will be monitored during the testing session in real time so that your face, voice, desk and workspace will be captured and possibly recorded during

the testing session. You understand, acknowledge and agree that you have no right to privacy at your current location during the exam testing session and you explicitly waive any and all claims asserting a right to individual privacy or other similar claims. By accessing this website and ticking this box you signify your acknowledgement and agreement that any inappropriate or wrongful conduct, as determined in Pearson VUE's or the test proctor's sole discretion, witnessed while monitoring your testing session at your current location will be reported by Pearson VUE to the testing programme sponsor and may also be reported to the appropriate governmental authorities, including, but not limited to, any law enforcement officials.

By accessing this website and ticking this box you signify that you understand, acknowledge and agree that if any third party is: 1) detected as being present in your physical location, whether visible or not; or 2) overheard in any manner, whether physically detected through movement and making of noise or through sounds irrespective of whether they are in your current location or not during your testing session, the test will be terminated and you will not receive any score or in the event you've completed the test and received a score your score may be invalidated or revoked. Further, you understand, acknowledge and agree that if your testing session is terminated for this or any other reason you will not receive a test fee refund, credit or voucher."

56. Pearson VUE's privacy notice⁸, incorporated into those consent options, governed the students' use of the software⁹:

(a) The definition of "personal data" that it employs is very broad:

"personal contact detail (name, street address, email address, phone number, fax number, credit/debit card information, company and title). We may also collect or receive the following additional Personal Data at registration or in the testing process, as necessary or appropriate, including, but not limited to: language, date of birth, social security number, test sponsor's identification number, employment Data, previous examination history, education Data, and source of financing for the test.; assessment details, including candidate ID number; credit card information; residence and country of citizenship; signature and photograph. In some cases, we may handle so-called 'special categories of Personal Data' about you, which may be considered sensitive. This would be the case, for example, if you at your test sponsor's request, (i) provide your race or ethnic origin; (ii) provide your biometric (palm vein) template where permitted by law; or (iii) provide medical or health information when requesting a testing session accommodation."

⁸ <https://home.pearsonvue.com/Legal/Privacy-and-cookies-policy.aspx>

⁹ Regarding Pearson VUE's role, the policy states: "when you register and schedule to take a test sponsor's test on Pearson VUE's or Certiport's website you will be entering into a Candidate Agreement by and between you, Pearson VUE or Certiport, and the test sponsor for the purpose of permitting us to collect, use, transfer, process and store your Personal Data consistent with this Privacy Policy". "We provide testing services as a service provider under the instructions of and on behalf of our test sponsors (that act as an autonomous data controller) and we provide testing services on behalf of ourselves."

The definition is incomplete as it fails to note the processing of video images of the user, although this noted at a later point in the policy¹⁰.

- (b) Regarding the use of facial recognition software and associated algorithms, it states that images may be retained for software development:

"We will use the ID authentication protocols in conjunction with biometric facial comparison technology to authenticate your identity. You understand and agree that Pearson VUE may, for some test sponsor's, use facial comparison technology for the purpose of verifying your identity during the testing session by comparing your facial image to that presented on your ID and to your facial images captured during the testing session. In addition, you agree that Pearson VUE, for its internal use only, may use images of your IDs for the purpose of further developing, upgrading, and improving our applications and systems"

- (c) Under the heading 'Data Categories', the policy reserves a broad power of data collection and transfer to third parties, including in relation to special category data:

"Depending on the Services, we may collect and/or disclose to third parties the following categories of data in order to manage day to day business needs including, but not limited to, providing you with our services, performing services on behalf of a business, payment processing and financial account management, business planning and forecasting, system improvements, security and fraud prevention, and compliance with legal and regulatory obligations:

- (A) Identifiers such as a real name, address, unique personal identifiers, or email address
- (B) Customer records such as signature
- (C) Characteristics of protected classifications under California or federal law
- (D) Commercial information, such as products or services purchased, obtained, or considered
- (E) Biometric information (any disclosure of biometric information is limited to the purposes described in the OTHER DISCLOSURE AND TRANSFER OF INFORMATION section below)
- (F) Internet or other electronic network activity information such as information regarding a consumer's interaction with an Internet Web site, application, or advertisement
- (G) Geolocation data
- (H) Sensory data, such as audio, electronic, visual, or similar information
- (I) Professional or employment-related information
- (J) Education information
- (K) Inferences about preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes...

- ... *"We do not provide your Personal Data to any third parties who are not connected with the services we provide or relate to such products or services unless you agree. Except as disclosed in this Privacy Policy, we will not provide your Personal Data to third parties..."*

¹⁰ "Online proctoring means that you will log on to a test platform through the internet to take your test and you will be monitored during your entire testing session in real-time so that your face, voice, desk and workspace will be captured and a recording will be made of these images for the purposes of test security and the integrity of the testing process..."

...We do not monetize Personal Data. We have not sold, within the last twelve (12) months, any Personal Data collected through this site, except to the extent that third party targeted advertising cookies are ultimately determined to involve a sale of personal information under California law."

There is, apparently, no possibility for a student to consent to their privacy being breached for the purpose of ensuring that cheating does not take place but to refuse to consent to their biometric data being retained and used for the private commercial purposes of Pearson Vue.

- (d) As noted above, the policy contains a general unspecified retention period:

"We will retain your Personal Data for as long as needed to provide our services and for such period of time as instructed by the test sponsor."

The policy does not indicate any shorter retention periods for video or photographic images. It details that the images will be retained in order to provide to test sponsors if required.

- (e) Regarding security of data, the policy doesn't give assurances regarding encryption, but instead a disclaimer:

"Information and Personal Data transmissions to this Site and emails sent to us may not be secure. Given the inherent operation and nature of the Internet, all Internet transmissions are done at the user's own risk."

- (f) Regarding transfers of data from the EU to the US, which occurred in this case, the policy relies on the – now invalid - EU-US Privacy Shield. This was a mechanism for authorising transfers of data out of the European data protection area to the US, but it was declared to be unlawful in the run-up to the exams by the CJEU Case C-311/18 - *Data Protection Commissioner v Facebook Ireland Ltd and Maximilian Schrems (Schrems II)*. The European Data Protection Board ("EDPB") Guidance (issued in the form of FAQ document, 24 July 2020) stipulated that there was no grace period during transfers of data could continue to the U.S. without assessing the legal basis for the transfer. The ICO guidance of 27 July has also underlined the need to conduct risk assessments. The purported legal basis for transferring the data to Pearson VUE did not therefore exist.

- (g) The policy also made broad 'cookie' reservations:

"The following categories of personal information may have been collected and shared through such cookies and related technologies during the past 12 months within the digital advertising ecosystem: Identifiers (limited to a numeric identifier, such as an IP address) Commercial Information, Internet or Similar Network Activity, Geolocation Data and Inferences draw from other Personal Information."

"We may also collect information via third party websites such as Google, or via social media such as Twitter and Facebook. This information may include your name, address, username, email address, website visited, content posted, IP address, nationality, language, and other publicly available demographics. This information is used to improve

the products and services that we offer, to identify and resolve customer service issues, and to provide the information and services you request.”

“Below is a list of the main types of cookies we use and what we use them for:...

... Targeting or advertising cookies: These cookies are used to deliver advertising materials relevant to you and your interests... Most of our Sites do not use targeting cookies. By using this Site you agree we may place these types of cookies on your device.”

57. The BSB’s privacy notice¹¹ confirmed the Bar Council/BSB’s role as data controller (as opposed to Pearson VUE’s role as a data processor). It confirmed that it collects information about data subjects from Pearson Vue. It also notes that *“they may collect facial images of you and ID...they may also make video and audio recordings for the purposes of identity verification and to ensure the integrity of the testing process”*. However, it did not note the retention of data for the improvement of Pearson VUE’s testing processes & algorithms, nor did it clearly specify retention periods for data gathered via the remote-proctored examinations. It also stated that *“Pearson VUE store data they hold on behalf of the Bar Standards Board in the United States. This arrangement is covered by Standard Contractual Clauses.”* This was in conflict with Pearson VUE’s Privacy Notice which refers to the EU-US Privacy Shield.
58. For the avoidance of doubt, as regards the BSB’s status as a data controller, the EDPB’s draft guidance on controller definitions, clarifies as follows (emphasis added):
- “A controller is a body that decides certain key elements of the processing. Controllership may be defined by law or may stem from an analysis of the factual elements or circumstances of the case. Certain processing activities can be seen as naturally attached to the role of an entity (an employer to employees, a publisher to subscribers or an association to its members). In many cases, the terms of a contract can help identify the controller, although they are not decisive in all circumstances. A controller determines the purposes and means of the processing, i.e. the why and how of the processing. The controller must decide on both purposes and means. However, some more practical aspects of implementation (“non-essential means”) can be left to the processor. It is not necessary that the controller actually has access to the data that is being processed to be qualified as a controller.”*
59. As the convenor and organiser of the examinations, the BSB was the data controller for the students’ personal data and this is further confirmed by Pearson VUE’s own privacy policy set out above.

F. OKF SUBMISSIONS

Submission 1: The Exam Process was Undermined by the Failure to Conduct a Data Protection Impact Assessment in Breach of Art.35 GDPR

60. With particular reference to paras 3, 5 and 6 of the Terms of Reference, our submissions on the BSB’s Data Protection Impact Assessment (“DPIA”) process are below. As noted

¹¹ <https://www.barstandardsboard.org.uk/privacy-statement.html>

above, the BSB has so far not disclosed any DPIA however we understand from correspondence that this is currently being considered.

61. As a data controller, the BSB was responsible for the carrying out of a DPIA in accordance with Art.35 GDPR. The threshold in that article was made out in this case: the decision involved the use of “new technologies” and there was a high risk to the rights and freedoms of students, both in terms of their data protection rights but also more broadly regarding their fair participation in the exams and any impacts on protected characteristics.
62. By its own admission, the BSB did not carry out a DPIA before contracting to use the ‘off the peg’ Pearson VUE software, in contrast with more timely assessments early in the pandemic such as the Bar Council’s consideration of the use of zoom video-conferencing at the start of the pandemic.¹² As noted above, to be rendered effective, the data protection impact assessment duty needs to be conducted at a material and formative stage. This omission was an error and a breach of Art 35 GDPR.
63. Because the DPIA has not been published, we do not know at what stage a DPIA was concluded by the BSB; what data protection impacts it anticipated; how rigorous it was; what its conclusions were; and what actions the BSB was able to take in response due to the late stage at it was conducted. The Independent Review should examine these questions, as they relate directly to the exam model and the impacts which were later felt by those unable to use the exam software, or who were excluded by it or felt uncomfortable using it.
64. A DPIA is an important document. Had such an assessment been carried out before contracting with Pears VUE, then proper consideration would have been given to a number of data protection issues, such as:
 - i) The use of facial recognition/matching software: There was no recognition of the known difficulties with facial recognition software and in particular the race and sex discrimination issues it raises. There was no consideration of the issue of the use of biometrics at all.
 - ii) The technological and other requirements: These are set out on the Pearson VUE website and any proper consideration of them would have led to a conclusion that certain groups of students would be disadvantaged either owing to their socio-economic status or geographical location.
 - iii) The intrusiveness of remote proctoring: there was no consideration of the privacy issues involved in inviting a remote proctor into your home nor of the potential discriminatory effect of this, for example for female Muslim students.
 - iv) Whether a valid consent could be given to the level of intrusiveness? In circumstances where the BSB had not accurately gauged the level of demand for in-person test centre

¹² <https://www.barcouncilethics.co.uk/wp-content/uploads/2020/04/Video-conferencing-and-data-protection-FINAL.pdf>

places, the BSB failed to analyse and thus understand the coercive nature of effectively requiring consent to the privacy intrusions.

- v) Whether any of these concerns were adequately addressed by the privacy policy of Pearson Vue: as noted above and below, this policy was defective in a number of respects. Scrutiny of this document would have prompted the BSB to amend the policy and the process.

65. Many of the impacts which later occurred would have been anticipated and mitigation measures or alternative methods put in place had an effective DPIA been conducted.

Submission 2: The Exams Resulted in Data Protection Infringements

66. With particular reference to paras 6 and 12 of the Terms of Reference, our submissions on the data protection impacts that resulted from the BSB exams, which should have been anticipated in a DPIA, are below.

67. A number of data protection infringements can be identified and summarised as follows:

- (a) Inadequate privacy notices: several aspects of Pearson VUE's privacy notice failed to guarantee adequate protection of personal data (as set out at [56] above). For example, it expressly required students to confirm that they had "*no right to privacy at your current location during the exam testing session*" and to "*explicitly waive any and all claims asserting a right to individual privacy or other similar claims*". It was this privacy notice which students were directed to when signing-into the examination software. The BSB's privacy notice, while acknowledging that it was the data controller in relation to the data collected by Pearson VUE, conflicted with and failed to resolve these inadequate guarantees. Students were left unclear as to what protections applied to them.
- (b) Disproportionate intrusion: the software used by the BSB required all students to carry out a 'room scan' (showing the remote proctor around their room); they were then surveilled by an unseen human proctor for the duration of the exam. Many students felt this was unsettling and intrusive. The Independent Review will wish to examine carefully whether there were impacts for example on female Muslim students who were unable to specify the gender of their remote proctors. There were other intrusive impacts such as the use of tracking cookies, as noted at [56(g)] above. This would not have been necessary if another exam delivery model had been adopted. It was compounded by the lack of availability of in-person exam centre places, both domestically and for international students.
- (c) Excessive data collection: the Pearson VUE privacy notice noted above at [56(a)-(c)] reserved a power of data collection of very broad classes of personal data, linked to broadly defined purposes (below), including biometric information; internet activity information (gleaned through cookies or otherwise); "*Inferences about preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes*"; and protected characteristics. ("we may collect and/or").

- (d) Inadequately limited purposes: as noted above [(56c)], Pearson VUE required students to consent to them disclosing to third parties the above categories of data “*in order to manage day to day business needs*”; and to consent to the future use of their “*images of your IDs for the purpose of further developing, upgrading, and improving our applications and systems*”. We understand that the BSB claim that this was disregarded by Pearson VUE for these exams, but (i) their basis for this and the assurance they have that Pearson VUE modified its systems accordingly are unclear; and (ii) this does not answer the confusion that students would have felt when trying to reconcile the different policies.
- (e) Unlawful data retention: Pearson VUE’s privacy notice states in relation to data retention that “*We will retain your Personal Data for as long as needed to provide our services and for such period of time as instructed by the test sponsor.*” [56(d)] Although the BSB said in its briefing of 24 June 2020 that retention periods would be short, there is a clear conflict between these two positions. We understand that the BSB claim that the shorter BSB period took priority, but (i) their basis for this and the assurance they have that Pearson VUE modified its systems accordingly are unclear; and (ii) this does not answer the confusion that students would have felt when trying to reconcile the different policies.
- (f) Data security risks: given the sensitivity of the relevant data, high standards of data security are required¹³. The Pearson VUE statement gave no assurances regarding the use of encryption, instead there was a disclaimer that “*Information and Personal Data transmissions to this Site and emails sent to us may not be secure. Given the inherent operation and nature of the Internet, all Internet transmissions are done at the user’s own risk.*” [56(e)-(f)] We understand that the BSB state that data was encrypted, but again the (i) basis for this is unclear; and (ii) this doesn’t answer the confusing picture presented to students.
- (g) Mandatory ‘opt-ins’: the consent sought from students was illusory, as it did not enable students to exert any control over the use of their personal data. If they did not tick all the boxes, they could not participate in the exam. Students could not give a valid consent to the invasion of privacy occasioned by online proctoring when their professional qualification depended on it. They were in effect coerced into surrendering their privacy rights. While acknowledging the importance of the BSB’s regulatory role, there was still scope to permit students to control their data and to exert informed and real consent, which must be “*freely given and not imposed as a condition of operation*”.
- (h) Unlawful data transfer: Pearson VUE is a US company and holds users’ data within the US, according to its privacy notice. In relation to EU-US data flows, it relies on the EU-US Privacy Shield, which was declared invalid by the CJEU in the *Schrems II* case noted above. Pearson VUE still has not altered its privacy policy to address this. In contrast the BSB privacy notice refers to the use of standard contractual clauses. The

¹³ Another company, ProctorU confirmed the leak of the data of 440,000 remotely proctored exam users in July 2020 (<https://www.bleepingcomputer.com/news/security/proctoru-confirms-data-breach-after-database-leaked-online/>).

BSB stated in October 2020 that they were working with Pearson VUE to change this, but the policy remains unchanged.

- (i) Unfair algorithms: it appears that the Pearson VUE software used algorithmic decision-making in relation to the facial recognition identification of students and behavioural analysis during the exams. This gave rise to potential discriminatory impacts (for example, requiring female Muslim participants to remove their veil) and carried obvious risks of others. For example, the consistent news reports of facial recognition software failing to identify black and ethnic minority faces with the same accuracy rate as with white faces should have been examined closely. While a workaround might have been possible, a refusal to admit a student to their exam linked to their ethnic origin still needed to be eliminated due to the effect it might have on a student. The BSB appears to rely on a distinction without a difference between “facial matching” (which they say this was) and “facial recognition”. Facial matching still relies on facial recognition techniques and carries the same exclusionary risks. The Independent Reviewer will wish to examine carefully whether any such impacts resulted.

- 68. In mitigation of the above impacts, the BSB needed to ensure that additional flexibility was built-in to the software and that sufficient in-person exam places were made available to allow all persons who did not wish to undergo the intrusive remotely proctored process. However, this does not appear to have happened and the impacts noted above resulted.

Submission 3: Lack of Rigorous Equalities Assessment

- 69. As an authorised regulator the BSB is required¹⁴, inter alia, to protect and promote the public interest, encourage an independent, strong, diverse and effective legal profession and promote and maintain adherence to the professional principles. The regulator has made public commitments to ‘continue to improve our understanding of the factors that influence diversity within the profession and the role that we, as the regulator can play to help improve diversity’. These should have been reflected in a rigorous and timely risk assessment process. However, in common with the BSB’s approach to a DPIA, this did not occur.
- 70. Moreover, unless the novel challenges and risks posed by new technologies are properly understood (the purpose of the DPIA) an EIA is likely to be deficient for failing to anticipate those matters.
- 71. As set out at [42] above, s.149 EA imposes a duty on all bodies performing a public function (as the BSB was in this case) to carefully consider the equalities impacts of its decisions by having due regard to the statutory equalities considerations. Such regard should be rigorous and includes a duty of inquiry so as to ensure that the decision making is properly informed when taking relevant decisions (see *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at § 26(8)). At its most basic level, that means correctly identifying the protected characteristics and cohorts affected and the way that they will be affected. As noted above, the BSB’s first EIA failed to do this.

¹⁴ s1(1) Legal Services Act 2007

72. The 'due regard' duty must be fulfilled before and at the time that a particular policy that will or might affect people with a protected characteristic is being considered by the public authority in question (*R (on the application of Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin)). The BSB's first EIA, shortly before the decision to contract with Pearson VUE, was inadequate. It:

- (a) Failed to note any impacts on persons with protected characteristics other than disabled students.
- (b) Proceeded on the basis that the remote exam format was effectively 'neutral' and thus only engaging the same impacts that an in-person exam would have.
- (c) Did not ask whether ethnic minorities (particularly those with dark skin) would be excluded by the facial recognition software that was a gateway to the examination process, with reference to the many examples in the public domain. Nor did it consider whether the requirement to undergo algorithmic face matching in the knowledge that such technology was discriminatory was itself a discriminatory factor.
- (d) Did not examine the impact on requiring students to remove religious dress for the facial recognition software.
- (e) Did not examine the negative impact on some female students, particularly those of certain religious background, of permitting male proctors to observe in their homes.
- (f) Did not examine the impact of the decision not to permit students to go to the toilet on groups with protected characteristics (disability, maternity).
- (g) Did not consider whether technological barriers to participation (the relatively advanced system requirements in terms of computer and broadband connection) would disproportionately impact on persons with protected characteristics or on socio-economic grounds.
- (h) Did not consider whether elderly students might struggle with the use of I.T.

All of these impacts should have been recognised as potentially discriminatory and disadvantaging persons with protected characteristics, and action taken as a result. To the extent that discrimination on grounds of socio-economic status is not protected by the EA, ensuring no discrimination on this ground clearly falls within the regulatory objectives of the BSB.

73. The 9 June 2020 EIA was unfortunately too little too late. Further, it failed to address [72(c)-(e)] above. Despite the known concerns as to the potentially discriminatory nature of facial recognition software the EIA continued to assert there would be no impact on race and/or sex and aside from the scheduling of exams.

74. As noted above, the September EIA noted that it had not gathered further data in order to quantify the various disability impacts and, it is assumed, other protected characteristics impacts. It is important therefore that a further EIA analysing the August exams carefully is conducted before exams resume analysing these matters. The BSB currently resist this, but without such an analysis there is a clear risk that new examinations will repeat the

same impacts. The Independent Review will hopefully contribute to this process, but it is important to do so before the next round of exams.

75. We adopt the submission of the ACLU in their letter to The Supreme Court of California¹⁵ in respect of the use of facial recognition software (face matching) in identity verification process and in particular ask the reviewer to note: 'The possibility that the need for additional human review of a test taker's exam may be based on protected characteristics in and of itself warrants reconsideration of deploying remote proctoring technology.'

Submission 4: The Exams Appear to have had Unfair Equalities Impacts

76. The Independent Review will wish to examine the facts carefully from an equalities standpoint, to identify any unjustified equalities impacts. For example, we draw attention to the following:
- (a) The BSB's decisions as to exam format and software led to a high demand for the alternative exam centre places that had been put in place, but it appears that the arrangements did not give effective priority to disabled students requiring reasonable adjustments.
 - (b) It appears that female Muslim students were required to remove their veils for the purposes of facial recognition.
 - (c) It appears that female Muslim students were unable to select female proctors despite the negative cultural significance of unknown male proctors viewing them in their homes.
 - (d) The refusal to permit toilet breaks constituted indirect discrimination against persons needful of regular toilet breaks, whether linked to disability, maternity or their gender.
 - (e) Technological problems prevented some students from taking part in the exams. It is unclear if these had a disproportionate equalities impact.
 - (f) Some students reported deferring to the December examinations in anticipation of these problems, thus having to shoulder the burden of extending their study period and with knock-on impacts on when they can start work. Others reported waiving their adjustments in order to secure a place for the August exams.
77. In mitigation of the above impacts, the BSB needed to ensure that additional flexibility was built-in to the software and that sufficient in-person exam places were made available to allow all persons who did not wish to undergo the intrusive remotely proctored process. However, this does not appear to have happened and the impacts noted above resulted.

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www.aclunc.org/sites/default/files/ACLU_Opp_to_Remote_Proctoring_CA_Bar_Exam_2020.10.01.pdf

G. OKF RECOMMENDATIONS

78. We understand that the BSB currently intends to resume examinations in April 2021 and to arrange for provision to be by individual course providers and not centralised. It has required course providers to submit proposals for any computer based or remotely proctored testing and has produced a document entitled 'Parameters for AETO-run computer-based exams during the vocational component' (hereafter 'Parameters, December 2020').
79. It is important that this approval process incorporates recommendations from the Independent Reviewer and should not take place until your report. Further, it is important that the Independent Reviewer does not feel constrained by these plans from making recommendations that impact on them. Where appropriate we have commented on the Parameters, December 2020 document which focuses on the security and integrity of the technology and makes little reference to privacy, data and human rights considerations for students.
80. We make the following suggestions in order to avoid a repeat of the errors for the August 2020 exams:

Recommendation 1

The BSB should appropriately regulate the conduct of any future online exams by AETOs, including any conducted by any form of remote proctoring, to ensure they are consistent with data protection requirements and the regulatory objectives at s1(1) Legal Services Act 2007 of promoting the public interest, encouraging an independent, strong, diverse and effective legal profession and promote and maintaining adherence to the professional principles.

81. The BSB's intention to hand exam provision over to course providers has the clear potential to repeat and amplify the impacts of the August 2020 exams unless very clear parameters are set for course providers. Such parameters should seek to ensure consistency as between AETOs.
82. The December 2020 'Parameters for AETO-run computer-based exams during the vocational component' (hereafter 'December 2020 Parameters') are insufficiently clear in respect of equality, diversity, privacy and data protection minimum requirements.

Recommendation 2

Suspend the use of remotely proctored exams until the issues relating to data privacy, data protection and equality impacts identified by this submission have been resolved. Failure to do so risks repeating the exclusionary errors which marred the August 2020 exams.

83. For the reasons given above, more thought needs to be given to the design and implementation of exams in order to avoid the many impacts which marred the August 2020 exams. It would not be sensible to risk the same errors until these have been fully addressed given the impact on students.

Recommendation 3

Ensure open access to the type of technology being used where possible and in all cases ensure it is transparent and explained to the end user.

84. At present it is unclear what types of technology were being used within the software supplied by Pearson Vue for the August exams. Where algorithms, including behaviour analytics, iris scanning and facial recognition or matching software is used this should be made clear to the students including as to the nature of the process. It is in the interests of fairness that these facts are published openly, so that these new technologies are audible, and therefore those deploying them may be accountable for potential harms.

Recommendation 4

Change the format of the exams to open-book.

85. The BSB's insistence on using a closed-book exam process on the basis that revising the exams would take too long, can no longer be valid given the amount of time that has now passed since the start of the pandemic. Education authorities have taken decisions to suspend exams altogether. Other regulators like the SRA have introduced much greater flexibility¹⁶. Changing exam format to open-book would remove the need for remote proctoring and the complexities and impacts associated with it detailed above.

Alternatively, consider alternative forms of exam invigilation

86. Remote proctoring is not the only solution to provide online assessments. For example, Zoom or other video-conferencing software can be used to invigilate smaller groups of students in break-out rooms, supervised by staff from the educational provider faculty. This is an approach taken by the University of Nevada¹⁷, Northern Illinois University¹⁸ and Montana University, which produced this helpful guidance.

"Many exams can be safely proctored through videoconferencing tools like Webex and Zoom.

1. **Create the exam** either in your campus's learning management system or in another format (google forms, qualtrics, or pdf) to be sent to your students at the start of the exam.
2. **Schedule the videoconference**, leaving time at the beginning for instructions and for working through any technology issues. During setup, both Zoom and WebEx have options you can select to automatically record the session for later review.
3. **Communicate clear instructions to students**. For Zoom conferences, you can request for students to [share their screens](#) so that your or assistant proctors can observe (and record) whether students are using unauthorized resources on their screen. WebEx does not have this option. In any case, you should communicate clear instructions on how students should log on, confirm their presence and identity, and communicate to you if they have a question or problem. Both [Zoom](#) and [WebEx](#) have "raise hand" options that allow students to unobtrusively request your attention.

¹⁶ <https://www.sra.org.uk/sra/news/coronavirus-questions-answers/>

¹⁷ <https://www.unr.edu/tlt/instructional-design/instructional-technology-resources/web-conferencing/zoom/remote-proctoring>

¹⁸ <https://www.niu.edu/citl/resources/guides/proctoring-with-zoom.shtml>

4. For exams with a large number of students, both [Zoom](#) and [WebEx](#) have options for breakout rooms. Breakout rooms allow you to create sub-sessions of the larger video-conference which you or your assistant proctors can enter or exit in order to better observe or record small groups of students.

You can find more detailed guides on proctoring exams through Zoom [here](#) and [here](#).

No videoconference based proctoring solution will be able to fully replicate the security of a testing center or in-person proctoring. As such, you might also consider having students sign an academic integrity statement and/or employ a plagiarism checker for longer essay questions.¹⁹

This has several advantages:

- Students will be proctored by familiar faculty, who can answer student chat questions with clarity that a third party proctor would not be able to provide.
- Faculty have control over the conditions of the Exam, within the limitations of the video-conferencing software.
- Students who use the chosen software for other meetings will be familiar with the environment.
- Identification procedures need not have recourse to automated matching software such as facial matching and facial recognition, thereby mitigating the potential harms these
- The privacy intrusion of inviting a proctor into your home and viewing your surroundings for the duration of the exam is lessened, since the proctor is a known member of staff.
- Students' data is not retained following the conclusion of the exam."

Recommendation 5

Obtain equality impact data and conduct a full review of the equality consequences of the decision to use remote proctoring and use the results to inform the requirements of future equalities impact assessments by AETOs.

Such review should include analysis of:

- i) any direct or indirect discrimination in respect of protected characteristics and socio economic status including on an intersectional basis caused by the use of face matching software or algorithms based on face matching or monitoring.
- ii) whether test anxiety and/or performance was affected for groups known to be disproportionately impacted by such systems such as darker skinned black women.
- iii) Whether groups with protected characteristics were over-represented in the cohort who which experienced technical problems, for example due to bandwidth/technology issues.
- iv) An assessment of requests to take the exam in a test centre and the basis of such requests, where possible
- v) Whether the use of remote proctoring is, or can be, consistent with the BSB aim of increasing access to and diversity at the Bar.

¹⁹ <https://mus.edu/coronavirus/assess-learning.html>

87. It is imperative to ensure that no discrimination arose as a result of the decision to use remote proctored software and will not arise in future.
88. The BSB have informed OKF that there is no intention to conduct an analysis of the equalities impacts of all the negative outcomes of the August exams by protected characteristics as the circumstances of future delivery will be different²⁰. In the August BSB exam sit, it was overwhelmingly those students already marginalised that were most affected by the design of the remote proctoring software, either by their
- socio-economic status - poor quality computer equipment, poor quality wi-fi, shared small home environment
 - race - forced consent to removing headscarf in exchange for opportunity to obtain qualification, potentially (as yet unknown) increased difficulties in facial recognition for non-white students; even if no actual difficulty in recognition manifested for non-white students, the anxiety in subjecting oneself to a widely reported racially discriminative procedure at a time of already enormous stress is significant harm or
 - disability - the inordinate, excessive burden (both financial and in terms of emotional labour) to obtain previously agreed reasonable adjustment and in-person test places if desired and/or required
89. Unless the consequences of the decision to employ a remote proctored system are properly examined there is a real danger of repetition and an opportunity to learn from mistakes will be lost. An analysis of this data could properly be used to inform regulation of AETOs to reduce the risk of discrimination in future.

The Independent Reviewer may wish to consider whether the different equality impacts occasioned by remote proctored exams and facial recognition software were understood and considered when making the decision to move to a remote proctored exam system and undertaking any risk assessments.

90. We also note with significant concern that the December 2020 'Parameters for AETO-run computer-based exams during the vocational component' that we have been sent does not refer to ensuring an EIA is completed nor any equalities and diversity considerations that providers are required to take into account. Equality is not included as an outcome at all.

Recommendation 6

Require the BSB to publish its DPIA from the 2020 exam process and require course providers to carry out and publish a DPIA for any subsequent remote proctored exam process

91. This will be particularly important given that further untested changes to the exam procedures are anticipated. Again, we note that there is no requirement in the Parameters, December 2020 document for AETOs to conduct a DPIA nor what that assessment should contain although we accept that some of the issues identified in that document would be relevant.

²⁰ Capsticks letter to OKF 18.12.20

Recommendation 7

Consolidate and simplify the data protection framework: The BSB should set out clear data protection standards for all course and exam providers and require adherence to the same.

92. Unless clear steps are taken, the data protection framework for individual students will now only grow in complexity if they are faced with competing privacy notices from the BSB, course providers (which will vary between providers) and online exam providers (which will also vary between providers). The BSB needs to lay down clear standards for all course and exam providers and require adherence. Those standards should resolve the inadequacies in Pearson VUE's privacy notice and processes outlined above and obtain the necessary assurances re. retention periods; usage; encryption; standard contractual clauses etc.
93. Additionally, any exam format requiring facial recognition and remote proctoring should provide clear information regarding the accessibility and data protection issues relating to the software and ensure consent can be freely given.
94. We welcome the requirement for AETOs to ensure that candidates are aware of how their data will be processed and to ensure that systems are GDPR compliant however suggest it would be beneficial to require AETOs to additionally ensure students:
 - i) are not required to consent to multiple conflicting privacy notices;
 - ii) are able to opt-out of any data collection or privacy infringement that is not 'necessary' for the purposes of ensuring the integrity of their exam, in particular the use of private biometric data for the commercial, training and/or marketing purposes of the software provider

Recommendation 8

Centre the voices, needs and experiences of students in any future procurement and/or deployment of exam solutions based on emerging technologies.

95. Very few of us participate in the design of new technologies, although they have the potential to have significant impacts on all our lives. In particular, those that stand to be the most adversely affected by design decisions as regards novel use of technology are the least likely to be included in the design process. The Design Justice Network²¹ aims to centre those normally marginalised by design, creating a force to explicitly challenge, rather than reproduce, structural inequalities. 'Centreing' means input is sought from these communities throughout the pipeline of procurement to delivery in stakeholder engagement events or calls for submissions etc.
96. The Design Justice Network's core principles are of note here, In particular, core principle two:

"We center the voices of those who are directly impacted by the outcomes of the design process."

²¹ <https://designjustice.org/read-the-principles>

There is especially a need to put inclusivity at the forefront of designing and implementing new technology systems during the Covid19 pandemic: there is *the likely outcome that existing structural inequality gets deepened*²²; in a time of crisis when design decisions are taken at speed, under pressure - in this case, the need for exams to go ahead in some form for those students who needed their qualification not to be delayed - makes any perceived 'extra' work undesirable, such as engaging stakeholder groups from marginalised communities throughout the pipeline of procurement to delivery. We would submit that the potential discriminatory effects of using emerging technologies are so significant that this is not a short-cut that can be taken.

97. Thank you for your consideration of this submission. Please contact us if further information is required: info@okfn.org.

15 January 2021

²² <https://www.dezeen.com/2020/04/06/sasha-costanza-chock-design-justice/>, Sacha-Constanza-Chock, Massachusetts Institute of Technology