

JDD CONSULTANTS

ANALYSIS OF THE PEB 2018 EXAM RESULTS

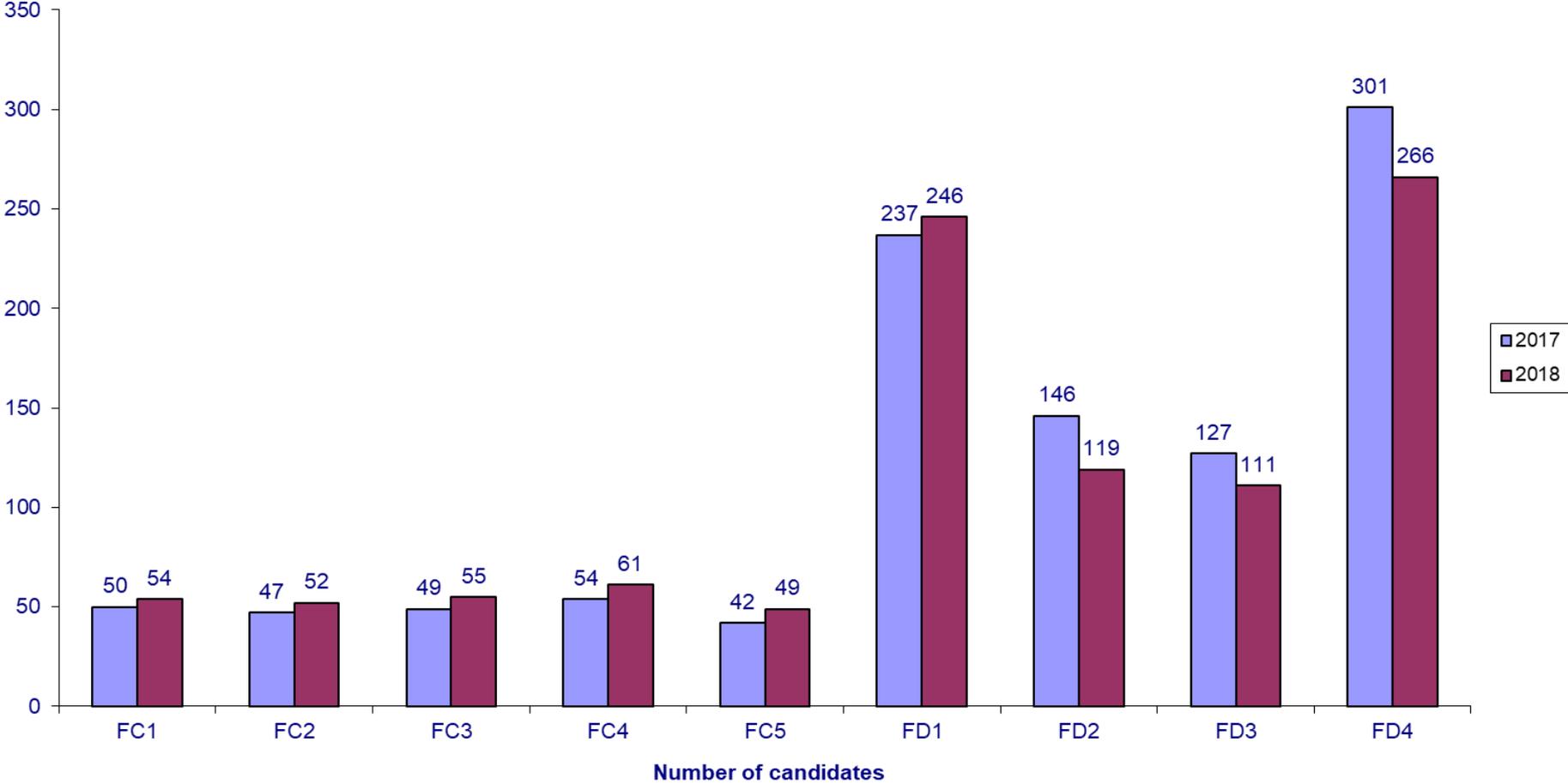
[MARCH 2019]

Candidate numbers

- **Foundation Certificate (FC) papers:**
the number of candidates ranged from 49 on FC5 to 61 on FC4 and, overall, were up by 12% on 2017 (**Figure 1**).
- **Final Diploma (FD) papers:**
the number of candidates ranged from 111 on FD3 to 266 on FD4 and, overall, were down by 9% on 2017, with fewer sitting FD2, FD3 and FD4 (**Figure 1**).

Figure 1

Candidates taking the PEB papers in 2017 and 2018



Pass rates

- **FC papers:**
pass rates rose for FC4 (D&C Law), were stable for FC1 (UK Patent Law) and FC2 (English Law), but fell for FC3 (International Patent Law) and, most sharply, for FC5 (Trade Mark Law). (**Figure 2**).
- **FD papers:**
pass rates rose significantly for FD1, FD2 and FD3, but fell for FD4 to a 20-year low (**Figure 3**).

Figure 2

% Pass Rates (for all candidates) in 2017 and 2018 FC Exams

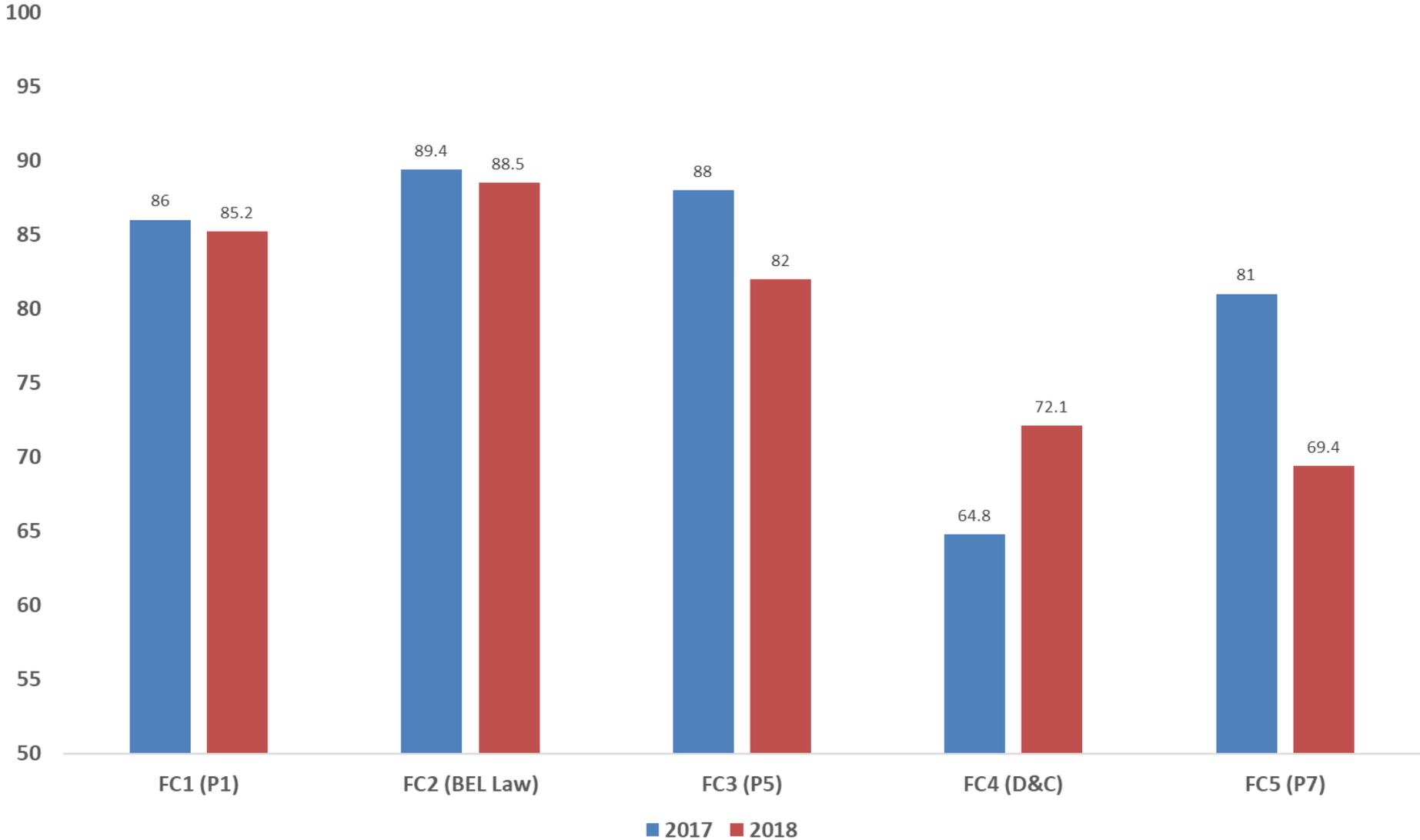
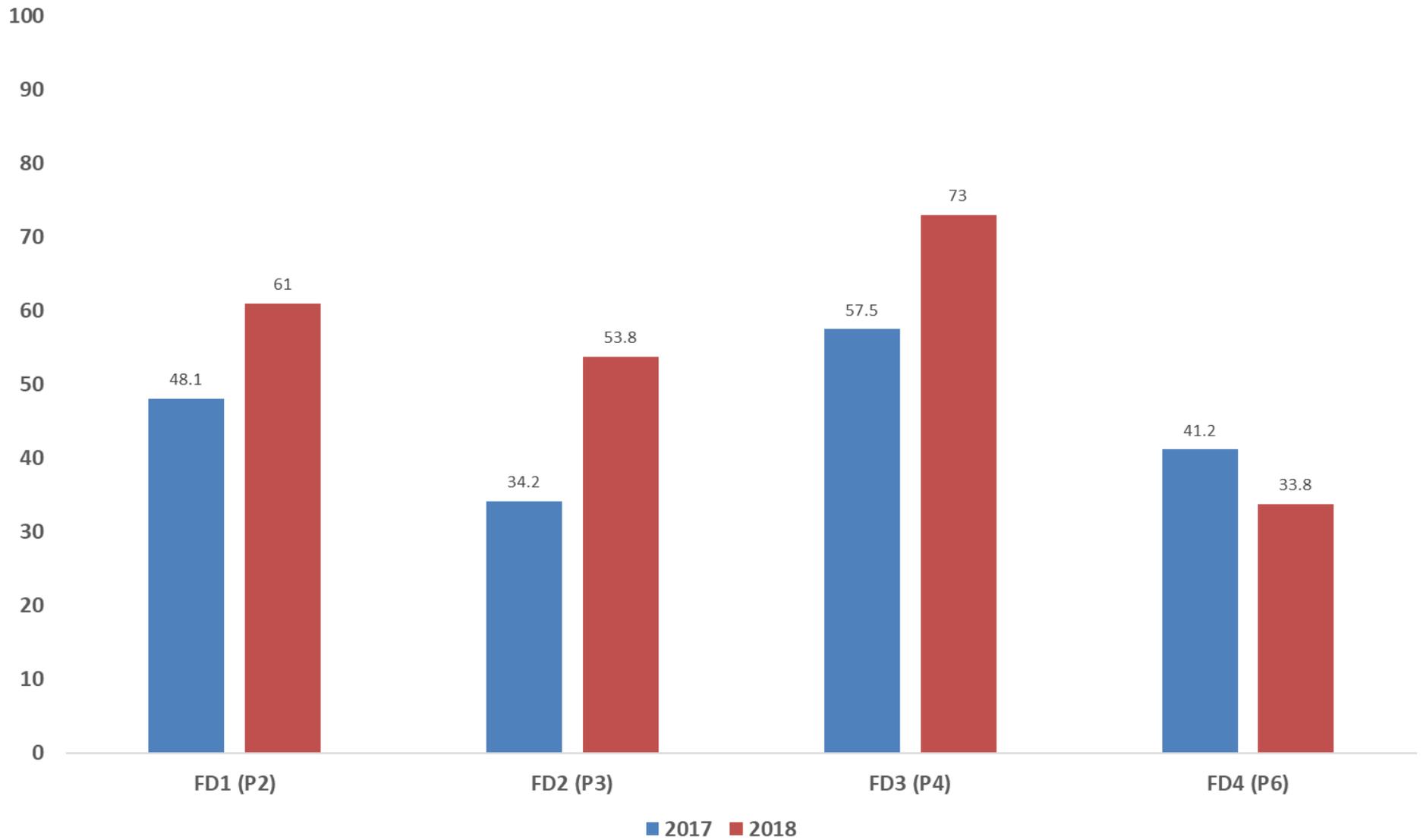


Figure 3

% Pass Rates (for all candidates) in 2017 and 2018 FD exams

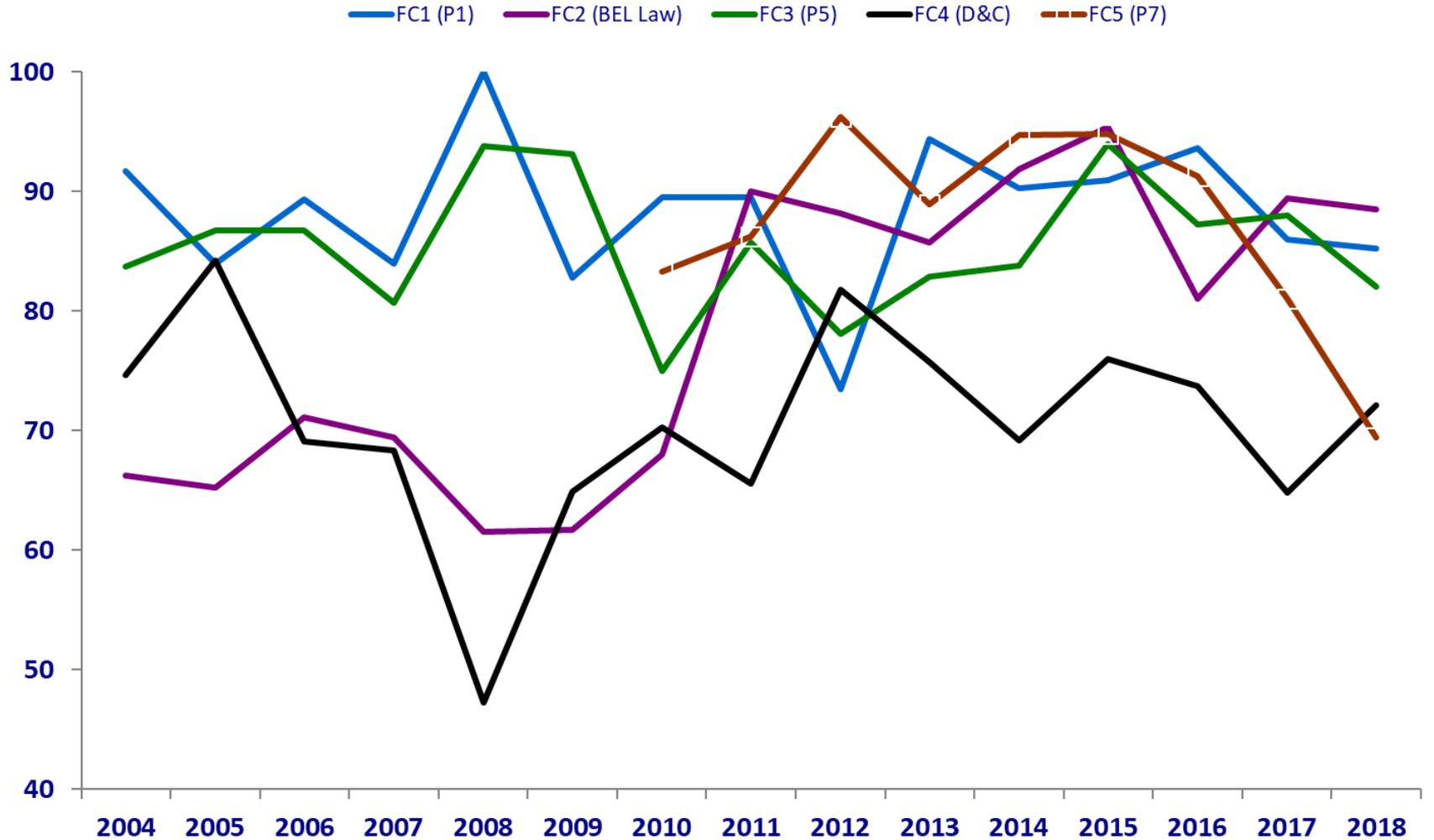


Trends in FC pass rates

- Pass rates have consistently been high for FC1, FC2 and FC3 and have improved for FC4 (D&C) over recent years (**Figure 4**).
- Since 2016, the FC5 pass rate has declined significantly (from 90% to under 70%). During this period the syllabus has changed and the exam format moved to one in which there is more emphasis on candidates needing to critically apply (rather than recite) knowledge.
- Unusually, in the 2018 exam one of the seven compulsory questions in Section A, question 5 (worth 8 marks – so potentially taking up 15 minutes of a candidates' time) was omitted from the marking process because the Examiner judged it assessed knowledge beyond the syllabus requirements. The Examiner's Report states that *“Accordingly, candidates' marks were adjusted upwards based on their total marks for the other questions. PEB applied processes to ensure no candidate had been disadvantaged as a result of Question 5 having been discounted”*.

Figure 4

Trends in % Pass Rates for All Candidates in Foundation Certificate Exams



Trends in FD pass rates

- Year-to-year fluctuations in FD paper pass rates have traditionally been greater than for FC papers. Again, this was evident in 2018: the pass rates for FD1, FD2 and FD3 rose significantly while the FD4 pass rate declined to a 20 year low (**Figure 5**).
- For FD1, FD2 and FD3, there has been a long-term trend since 2000 of improvement in the pass rate:
 - for FD1 the average pass rate has risen from 48% between 2000-03 to 52% between 2016-18;
 - for FD2 from 34% to 40%; and
 - for FD3 from 46% to 63% (**Figures 6-8**).
- For FD4, there has been no discernible long-term trend: on average, 39% passed between 2000-03 and similarly 39% between 2016-18 (**Figure 9**).

Figure 5

Trends in % Pass Rates for All Candidates in Final Diploma Exams

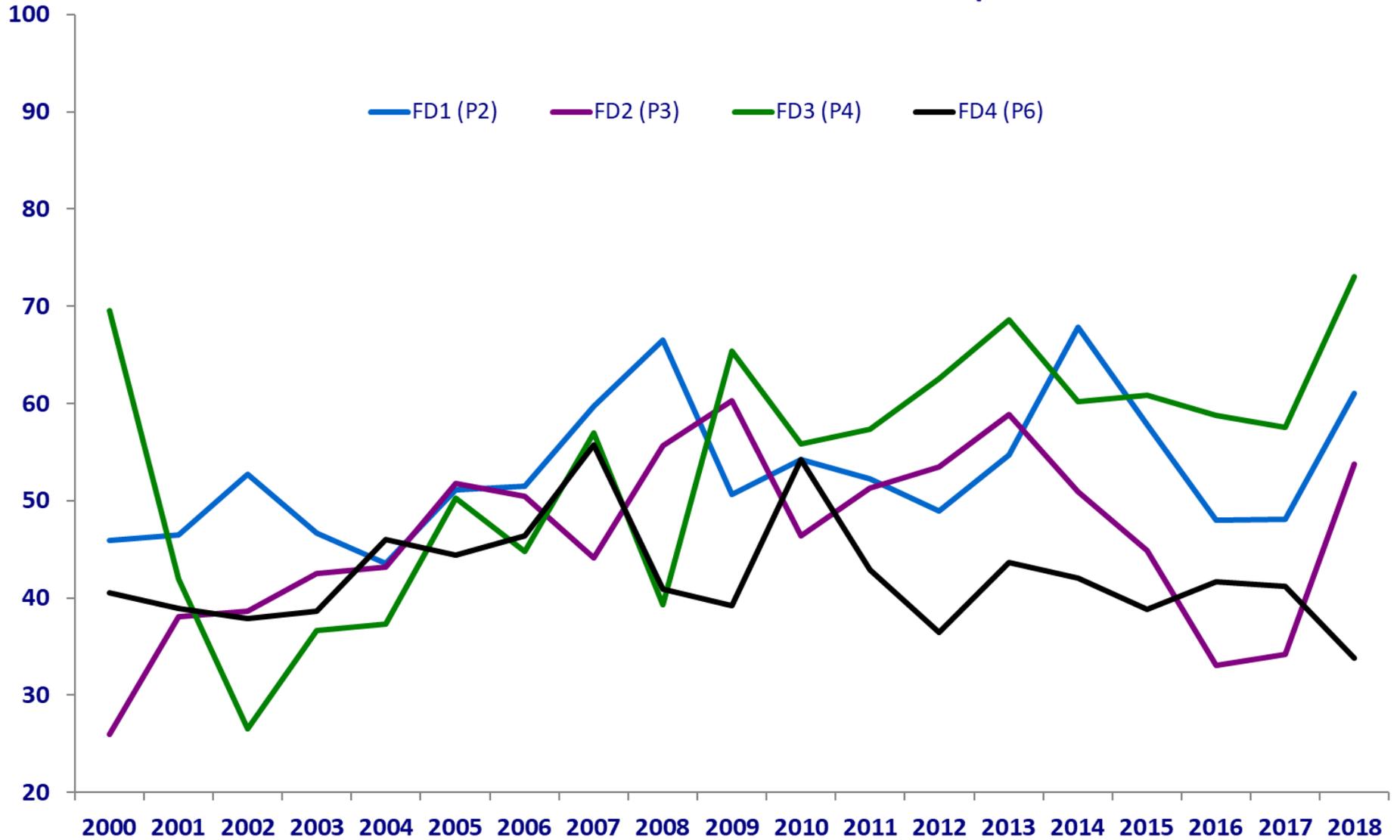
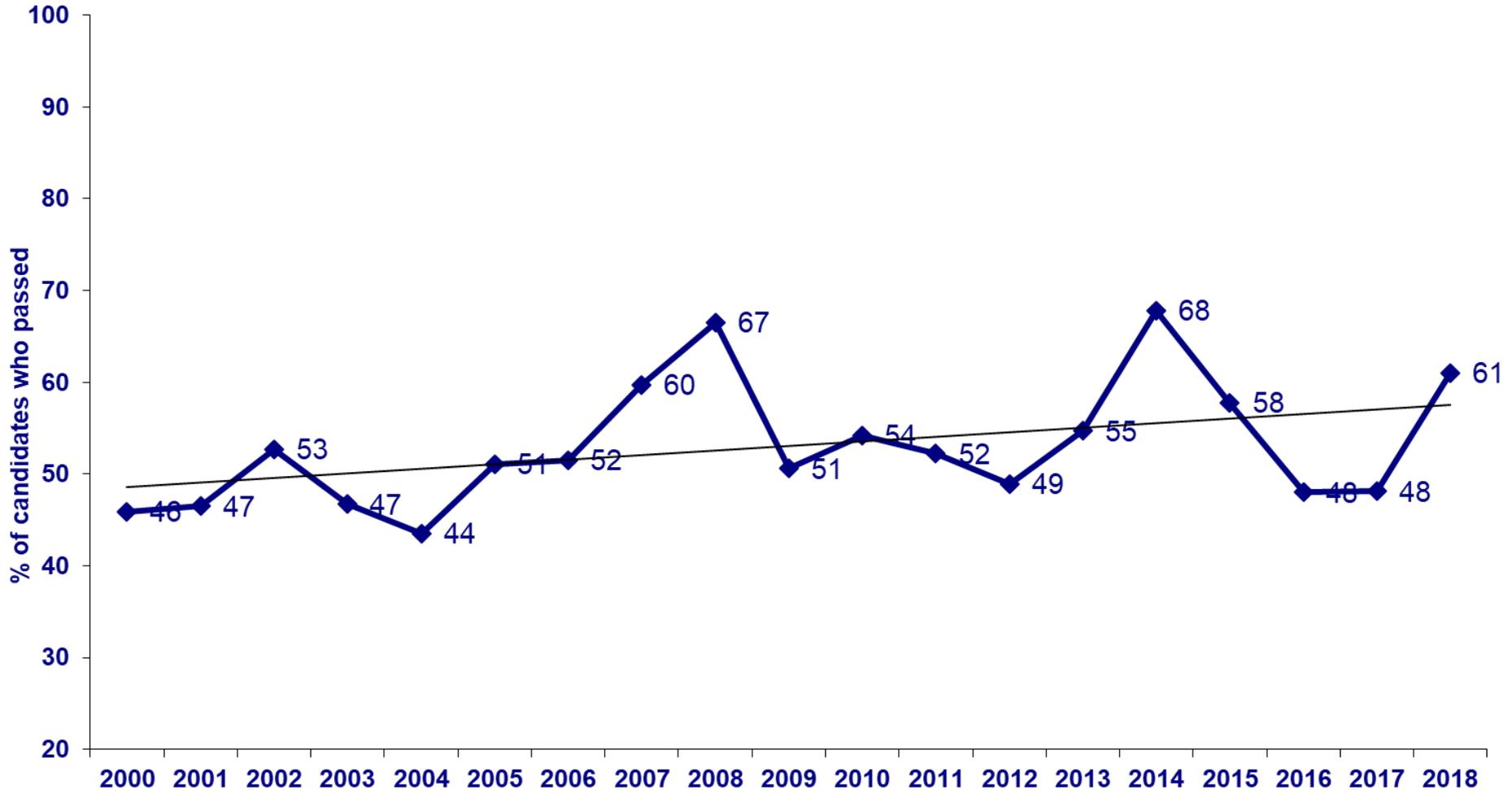


Figure 6

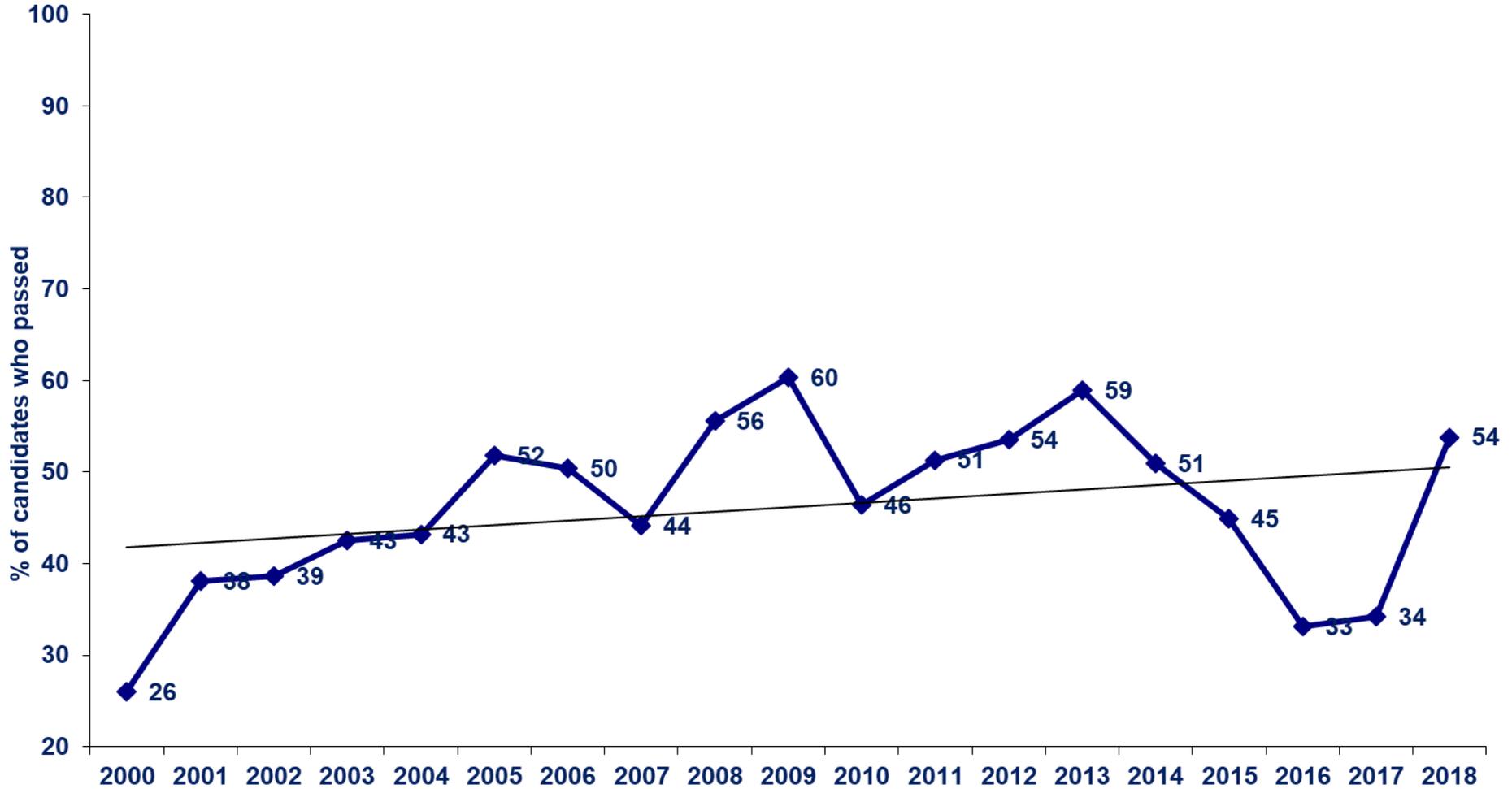
Trends in FD1 (P2) Pass Rate for all Candidates: 2000-18



The pass rate for FD1 showed a steady trend upward until 2014. It has risen from an average of 48% in 2000-03 to 52% in 2016-18.

Figure 7

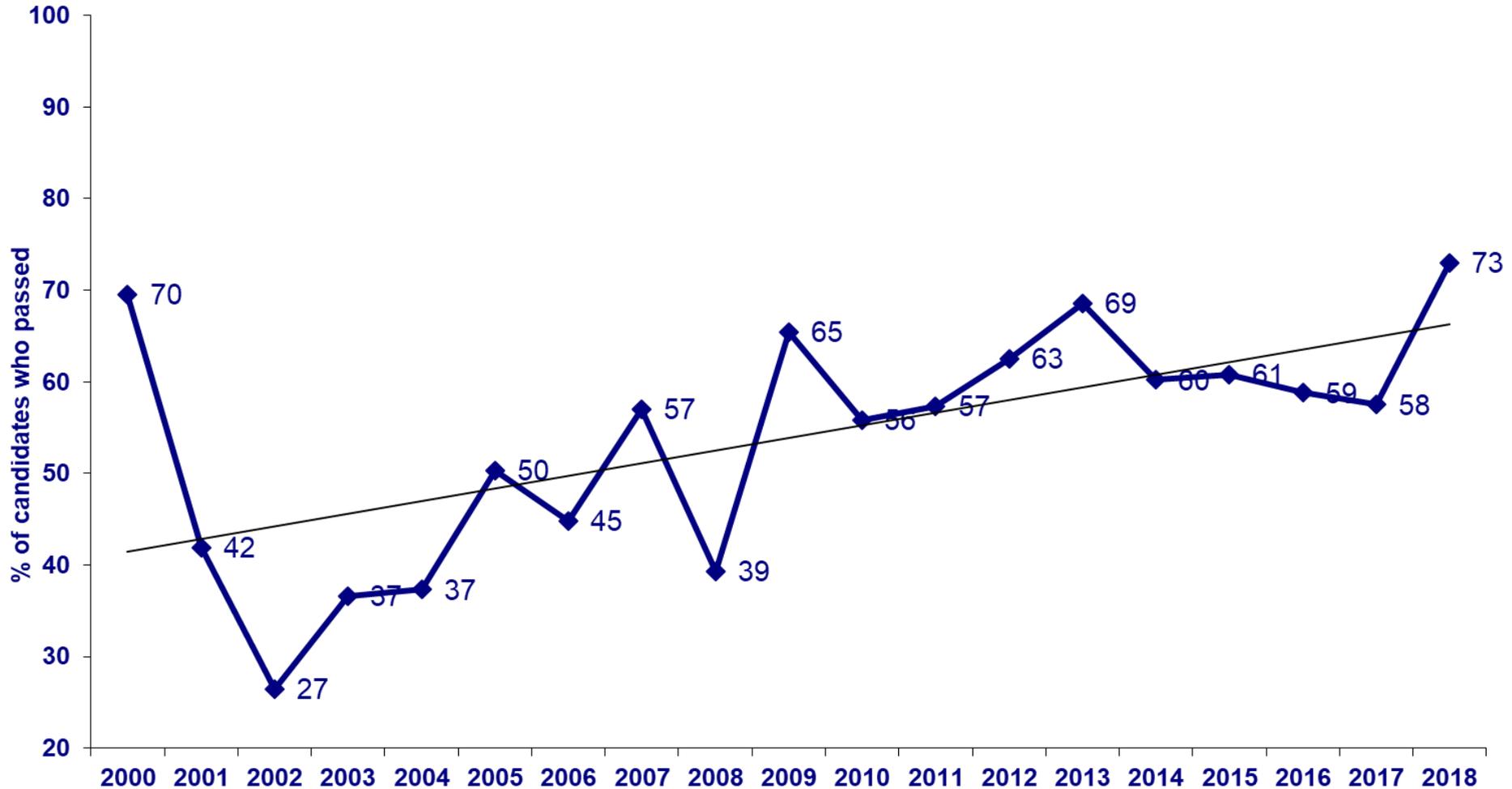
Trends in FD2 (P3) Pass Rate for all Candidates: 2000-18



The pass rate for FD2 showed a trend upwards until 2013. It has risen from an average of 34% in 2000-03 to 40% in 2016-18.

Figure 8

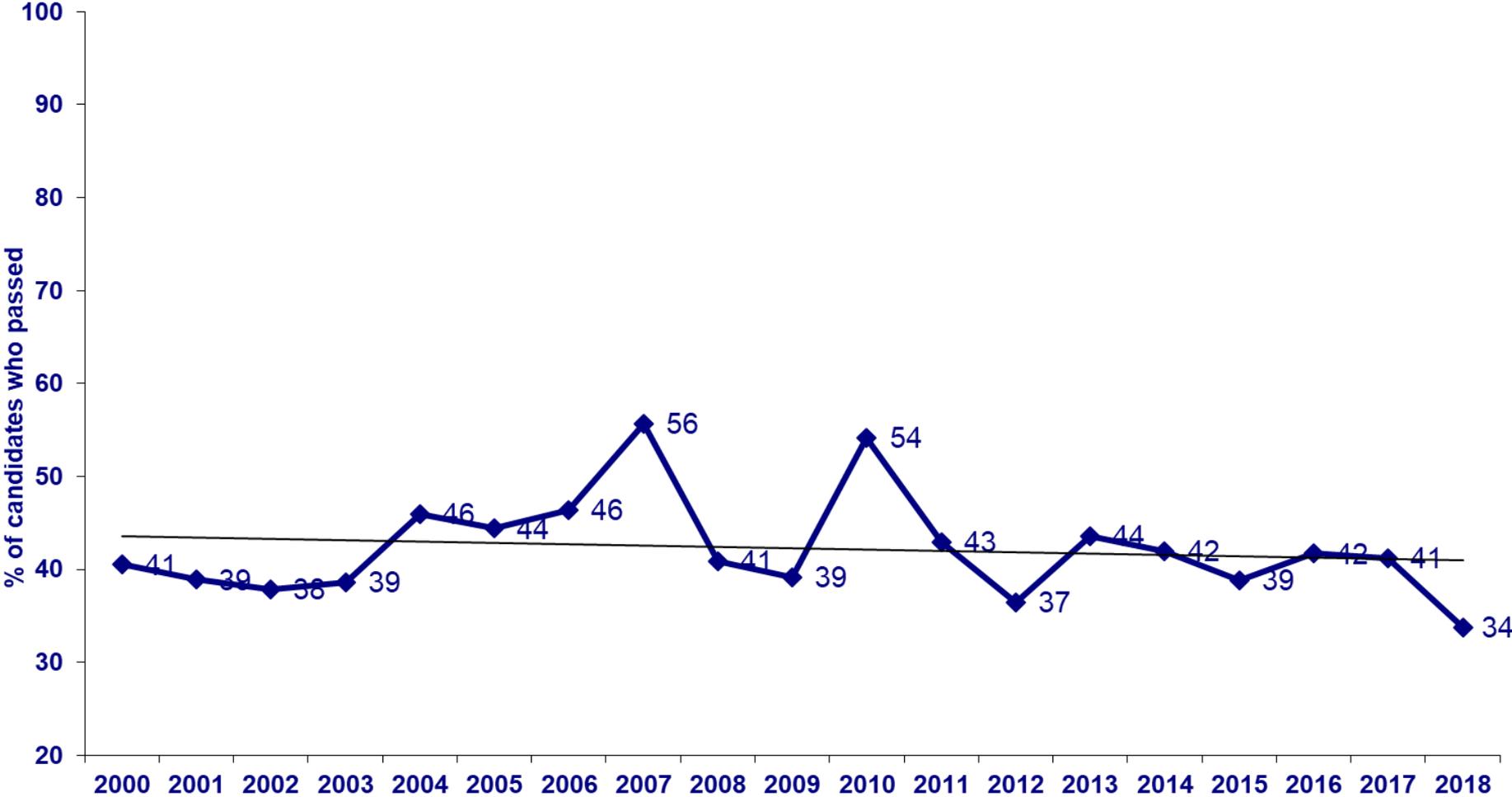
Trends in FD3 Pass Rate for all Candidates: 2000-18



The pass rate for FD3 shows a trend upwards, from an average of 46% in 2000-03 to 63% in 2016-18.

Figure 9

Trends in FD4 Pass Rate for all Candidates: 2000-18



The pass rate for FD4 has no real trend, averaging 39% in 2000-03 and 39% in 2016-18.

Pass rates for those attending JDD courses

When calculating pass rates for those attending JDD revision courses the following caveats apply:

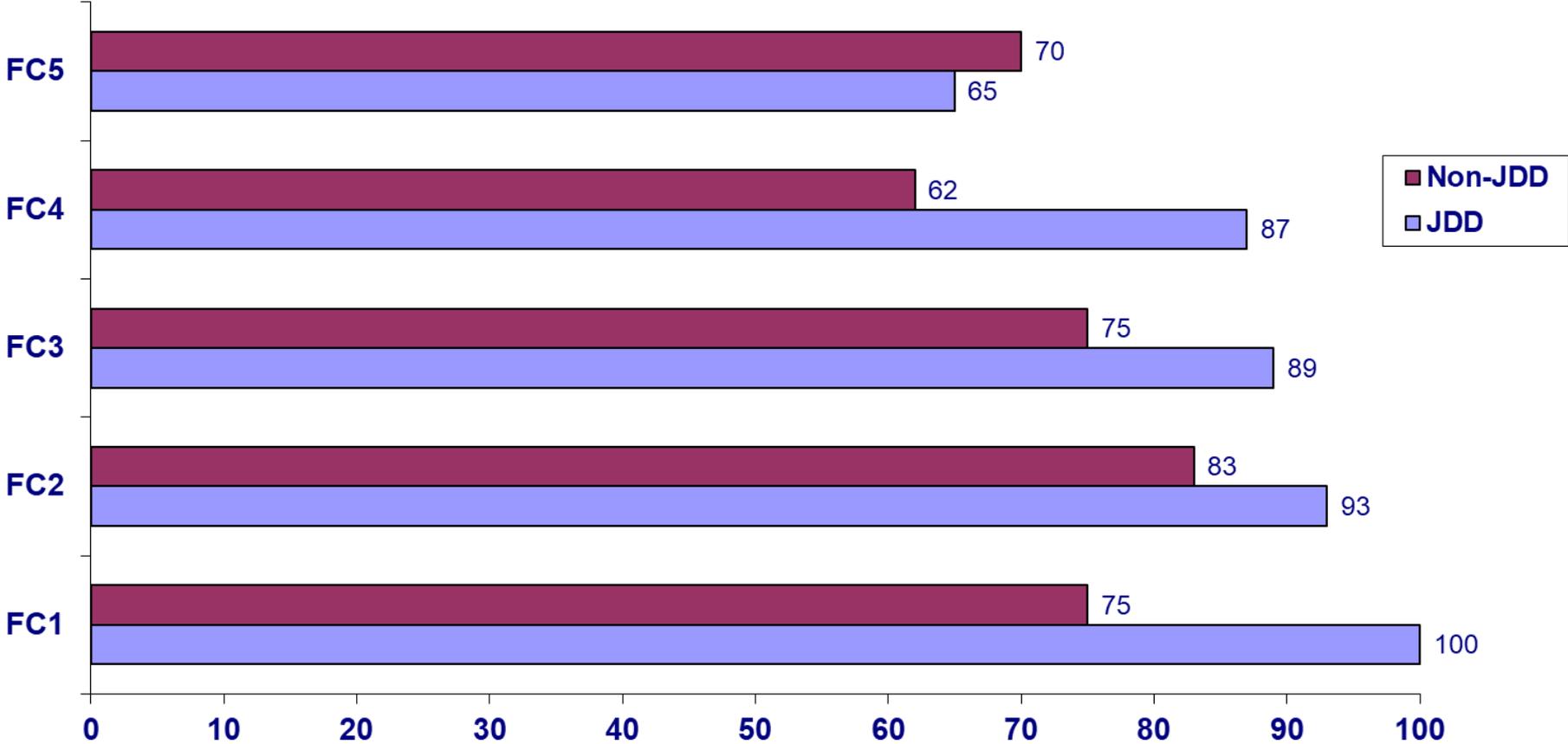
1. Some JDD course attendees do not sit the examination until the year following the course. In some cases, they advise us of this, but this is not always the case. This means that the pass rates shown in the following figures may understate the JDD pass rate.
2. In particular, some of our FD2 and FD3 course attendees do not take the PEB exam because, during the period between booking and the October exam, they receive notice that they have passed Papers A and/or B of the March EQE and so receive FD2 or FD3 exemptions.
3. Moreover, each year a substantial number of those who pass PEB papers and are shown as 'non-JDD' in Figures 10 and 11 (which follow) have attended a JDD course on the paper in the previous year or years. These candidates will have had the opportunity to build on the guidance, knowledge and pointers from the course during subsequent practice. So our courses may have partly contributed to these candidates' success in the paper at a second or further attempt.

Foundation Certificate courses

- FC pass rates, for all candidates, are typically high, but:
 - Between a third and two-fifths of all candidates attend JDD FC revision courses.
 - As in previous years, the pass rates for those who attended JDD FC1, FC2, FC3 and FC4 courses in 2018 were higher than for those who did not attend our courses. This was markedly so in the case of FC4 (**Figure 10**).
 - The one anomaly in 2018 was FC5, where the JDD pass rate was slightly below the non-JDD pass rate.

Figure 10

% Pass rates for JDD and non-JDD FC course attendees in 2018



The FC5 paper and the question of Open Book

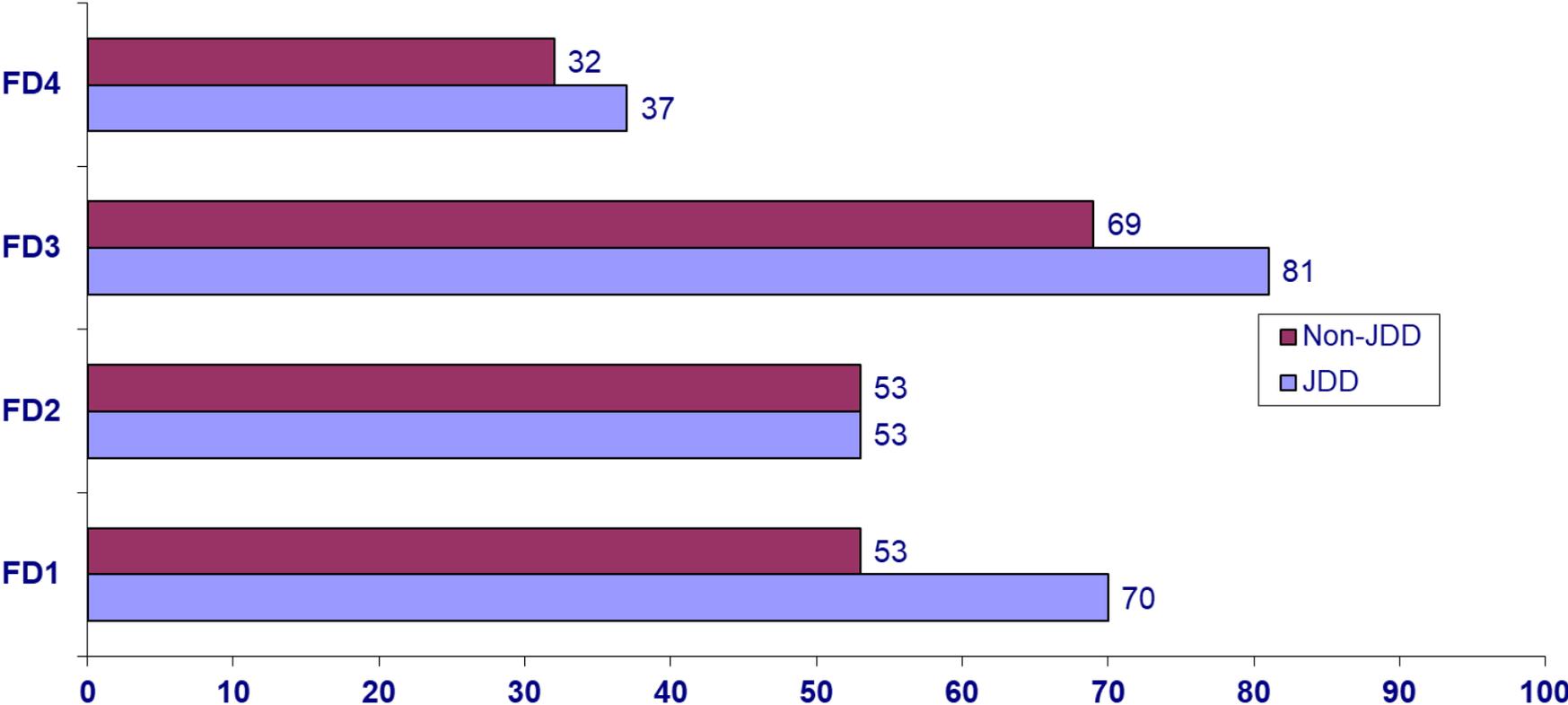
- The FC5 Examiner's Report notes: "Candidates appeared to have found this year's paper challenging. It tested some new syllabus topics and continued a move away from questions asking for the mere recital of statutory wording to requiring candidates to first identify the relevant statutory provision, and to demonstrate understanding of it.,,, most questions ... in **Part A still required accurate recall of statutory wording, even if the scenarios presented** were not ones they might have previously met. Generally, good answers to Part B compensated for poorer answers to Part A".
- The PEB's FC Programme Specification states:
 - **"Section A questions** principally **test knowledge and understanding of the law** specified in the syllabus.
 - **"Section B questions mainly test the candidates' ability to apply that knowledge through analysing a scenario and being able to offer appropriate advice and guidance** to clients".
- Several FC5 2018 Section A questions (e.g. Qs 3 and 7) involved scenarios, but the markers were looking in answers for accurate statement of statutory wording. The PEB has appropriately increased the emphasis at FC level on candidates being able to demonstrate critical understanding and application of the law rather than simple memorisation/recall of facts. It may be that it will take some time for candidates to adjust to what Examiners are looking for in Section A answers. However, perhaps with requirements changing, it would make sense for PEB exams to become open book like the European Qualifying Examinations – i.e. candidates being allowed to bring in annotated copies of the Acts and Rules (but not past paper and study materials). This would mean candidates would need to understand the law to know which sections of the Acts and Rules to check for the statutory wording required for Section A answers.
- Unusually, Q5 in Section A of the FC5 2018 paper, a compulsory question worth 8 marks, was omitted from the marking process because it "assessed knowledge beyond the syllabus requirements". The Examiner has stated that "processes were applied" and marks were adjusted to "ensure that no candidate was disadvantaged". It is not clear what adjustments were made, particularly as there is a risk that a candidate's overall performance might be affected adversely by being thrown by (and spending significant time) on a compulsory question which is off their radar. (This is another reason why an open book exam might help in such circumstances).

Final Diploma courses

- For FD1, FD3 and FD4, the pass rates for those who attended a JDD revision on the paper in 2018, were significantly higher than for those who did not (**Figure 11**).
- For FD2, the pass rate of JDD course attendees and non attendees were the same (but note the earlier caveat that some JDD FD2 course attendees may not have sat the exam if they had success in EQE 2018).
- Moreover, a significant proportion of those labelled in Figure 11 as 'non-JDD' (i.e candidates who passed a paper in 2018 without attending the relevant JDD course in 2018) had attended a relevant JDD course in the previous year or before. The proportion was **46%** for FD1, **43%** for FD4 and **24%** for FD2. This meant that nearly three-quarters (73%) of those who passed FD4 in 2018 had attended a JDD FD4 course in 2018 or earlier.

Figure 11

% Pass rates for JDD and non-JDD FD course attendees in 2018

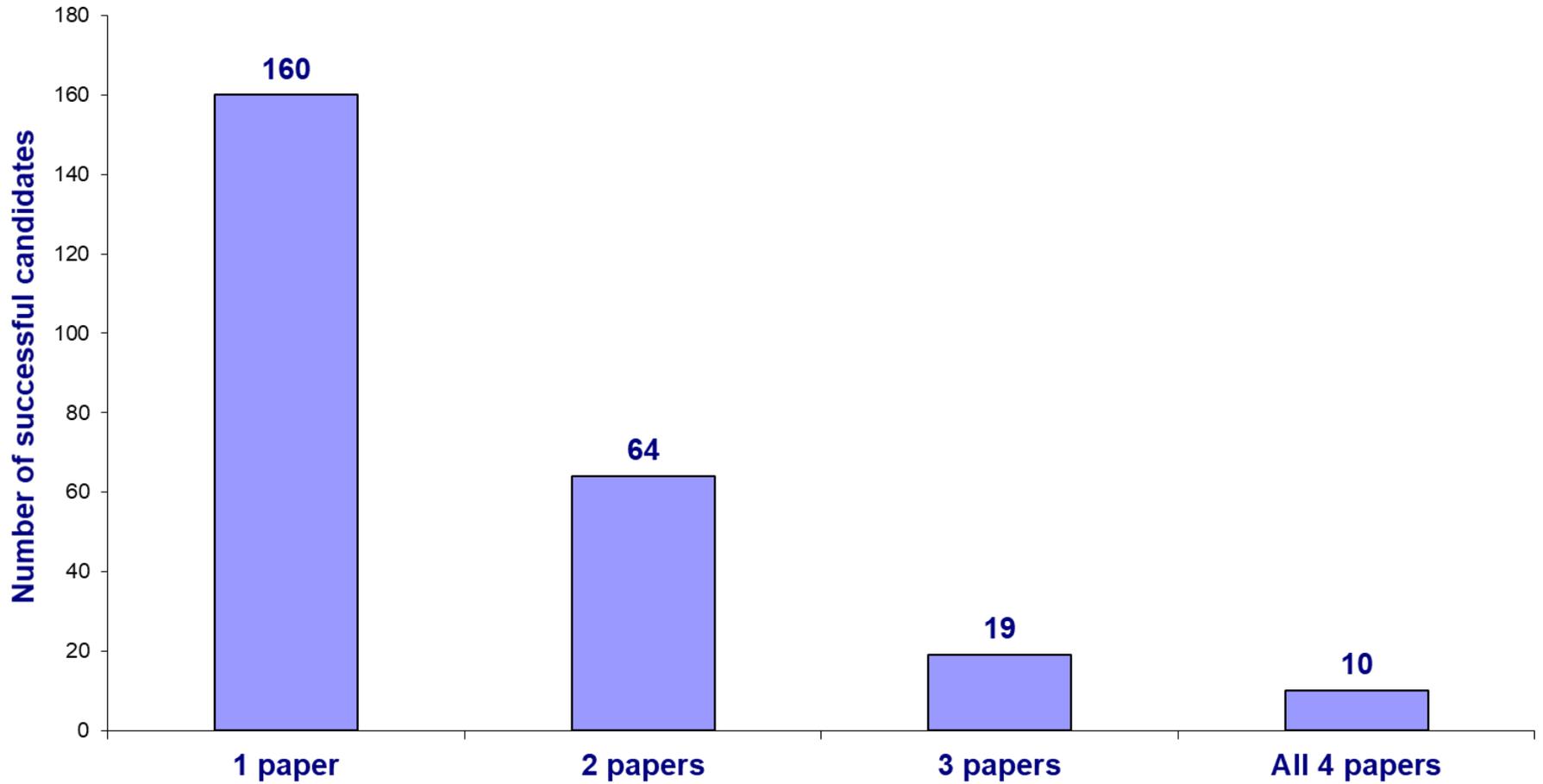


Successful FD candidates and how many papers they passed

- In 2018, the overall pass rate for FD papers was 52% (i.e out of 742 entries for the four papers there were 385 passes) and 44% of all passes were by attendees from JDD FD 2018 courses).
- Around a half of candidates attempted just one paper (typically FD1 or FD4) in 2018, some two (the most common combinations being FD1 with FD4 or FD2 with FD3), some three and some all four. We estimate that the average number of FD papers taken was 1.8 and that there were around 410 unique candidates.
- Some highlights from the FD 2018 results:
 - 253 candidates passed one or more FD paper: so around 60% of candidates had some success in one or more papers.
 - 160 of the 253 successful candidates passed one paper, 64 passed two papers, 19 three papers and 10 all four papers (see **Figure 12**).
 - Four of the 10 candidates who passed all four FD papers had attended all four of the relevant JDD courses. A further three had attended JDD courses for three papers and one had attended courses for two papers.
 - 114 of the 253 successful candidates attended one or more JDD FD courses in 2018. A further 62 successful candidates in 2018 had attended a JDD course on that paper in the previous years
 - Two-thirds of the 385 FD paper passes were achieved by candidates who had attended a JDD course on that paper in 2018 or in recent years.
 - Two-thirds of the trainees who attended a JDD FD course in 2018 passed one or more of the FD papers.

Figure 12

Successful candidates in FD exams in 2018: Numbers passing



Examiners' comments on FD1 and FD2

- The **FD1** pass rate in 2018 was relatively high, at 61%. Two main concerns were raised by the Examiner:
 - *“Too many candidates appear to take the paper before they had sufficient experience in handling a number of issues and giving clear, sound and reasoned advice to clients”* (a comment the Examiner has made in previous reports).
 - Unsuccessful candidates *“tended to recite everything they had learnt”* and *“to write incorrect statements, for example by paraphrasing”*.
- The **FD2** pass rate in 2018 rose to 54%, the highest level since 2013. The Examiner's Report was brief (as usual), but noted:
 - *“This year's paper seemed to be more accessible to candidates ... it was ... a straightforward invention with a number of embodiments that simply needed untangling from the information provided by the client”*.
 - *“Most candidates seemed to grasp the general concept of the invention and showed a good understanding of how to draft a patent specification”*.
 - *“Time did not seem to be an issue this year”*.
 - *“Candidates who did not achieve enough marks to pass either did not describe the interaction between the claimed features ... or failed to capture all the embodiments and so ended up with narrow claims”*.

Examiners' comments on FD3 and FD4

- The **FD3** pass rate in 2018 rose to 73%, the highest level in 20 years. The Examiner's Report noted:
 - *“Candidates appeared to have little difficulty in identifying significant differences between feature of the invention and the prior art given, and the question was on the whole well answered”.*
 - *“The allocation of marks in this paper continues to provide candidates who make a poor choice of amendment with the opportunity to pass, provided that they provide cogent and well-structured comments in the UKIPO letter and sensible advice in the memo”.*
- The **FD4** pass rate in 2018 fell to 34%, its lowest level in 20 years. The Examiner's Report noted:
 - *“It has been recognised that this year's paper did appear to provide a significant challenge to candidates. In the light of statistical and other evidence, by applying the **minimum pass descriptor**, the pass mark has been reduced to 47”.*
 - *“As with previous years there was a lot of feedback from candidates that the examination was time-pressured”.*

Reflections on the FD4 paper (1)

- The 2018 paper comprised 15 pages, comprising a Client Letter and four documents. It was long, but not unusually so – several recent papers have been longer.
- In a 26 February 2019 blog, IPKat commented that FD4 2018 candidates felt particularly time-constrained as “*there were 2 independent claims to different products and multiple embodiment of the potentially infringing product (and) the invention was not a simple one to understand*”.
- Furthermore, it noted that the 2018 paper was made more challenging as now introduced to the syllabus for the first time were the principles of the doctrine of equivalents (*Actavis v Eli Lilly*) and the paper included an infringing embodiment that required a consideration of equivalents.
- Additionally, the balance of marks between different key elements of FD4 was unusual in that inventive step counted for 25% of marks (as against an average of 16% in the 2008-17 papers) and infringement only 14% (versus 22% in 2008-17).

Reflections on the FD4 paper (2)

- The Examiner and PEB recognised that the 2018 paper was particularly challenging and so adjusted the pass mark downwards from 50% to 47%. However, even after this adjustment, the overall pass rate fell to a low of 34%. (This suggests fewer than 30% of candidates may have achieved a mark of 50 or more).
- It has been evident for a number of years, from our experience of seeing candidates on JDD FD4 courses score well during the pre-exam revision period on some past papers but poorly, that there appears to be inconsistency in FD4 papers in the degree of challenge (technical, invention-type and time-pressure), with some papers suiting some candidates better than others.
- However, the extent of the challenge posed by the FD4 2018 paper appears to have been unusually great, particularly the time pressure. Perhaps it would be sensible for the PEB to follow the example set over recent years by the EPO for EQE Papers C and D and **extend the time** allowed for FD4 to **5½ hours** (like Paper C and Paper D) or **6 hours**. This would provide candidates who have a sound understanding of FD4 (as many demonstrate during the practice/revision period) to have more adequate time to analyse the paper and get substantially towards finishing and refining their answer.

The profile of FD4 passers in 2018

- In 2015, when the FD4 pass rate fell to a low of 39%, a higher than normal proportion of the passers were experienced candidates who had been in the profession for a substantial number of years.
- This was less clearly so in 2016 and 2017. Our calculations suggested that 55% of successful FD4 candidates in 2017 had been in the profession for three years or under, a third for 4-5 years and a tenth for six years or more.
- The profile of FD4 2018 passers was similar: 56% had been in the profession for three years or under, 31% for 4-5 years and 12% for six years or more.
- The 2018 paper did not especially favour those who had sat FD4/P6 many times: severe time pressure appeared to be a problem for all candidates.
- However, a very high proportion of those who did pass in 2018, nearly three-quarters (73%), had attended JDD courses in 2018 or recent years. The courses' hands-on practice, tips and techniques may well have helped these candidates in coping with the time pressures.

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