



BACFI SUBMISSION TO THE LEGAL EDUCATION & TRAINING REVIEW

Introduction

The Bar Association for Commerce, Finance and Industry (BACFI) was founded in 1965 to promote the interests and professional status of barristers employed in commerce, finance and industry. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed and non-practising barristers working outside chambers. BACFI is represented on the Bar Council and its General Management committee and has members on several Bar Council and BSB committees and working groups.

Most of our members are employed in large commercial organizations and work alongside solicitors, foreign lawyers and legal support staff in dedicated legal departments serving multidisciplinary internal and external clients. These departments routinely procure legal services in the UK both from solicitors firms and from the Bar but also in a plethora of other jurisdictions around the world. We are thus clients of the English legal profession, as well as practitioners.

Collectively, our members have direct experience of working with lawyers in many legal jurisdictions and also have exposure to the workings of those jurisdictions. Our members thus have a uniquely broad view of commercial legal needs and possibilities for growth.

BACFI's comments are based on our experience in commerce, finance and industry, but we think they have relevance for the profession as a whole.

In this paper we cover:

- The changes to the legal market
- Some strengths, weaknesses, opportunities and threats
- The making of a modern legal professional
- Our vision of education and training

Executive summary

- The current system of legal education and training is not serving consumers/clients, the profession or students. It is becoming wasteful of and unfair to the latter
- We need a system that is fit to serve a modern, dynamic legal market both at home and overseas and to exploit the opportunities arising
- To preserve the pre-eminence of English law, we must retain what is good but urgently address current weaknesses and failings
- We should take a holistic approach to legal education and training to produce a wide variety of legal professionals with multiple entry and exit points, so as to create a greater variety of first class vocational options for law students as well as the traditional professional options (barrister/solicitor)
- Such a reformed system would not only better serve the domestic market but would also provide a wider, deeper talent pool from which to draw world class players and the judiciary at the top of the “legal pyramid”

Changes to the legal market

It is over 40 years since the Ormrod report in 1971¹ and 16 years since the First Report of the Lord Chancellor’s Advisory Committee on Legal Education and Conduct in 1996 (the 1996 Report)², with many of whose unimplemented recommendations we find ourselves in agreement.

The worlds of law and of business have changed considerably. In 1970 word processors were a thing of the future, the Internet was science fiction and the UK was outside the EU. Those three factors have revolutionised both law and business. Our legal product is different, legal research to produce that product is done differently, and EU law, human rights law and the growth of regulation have seen the development of whole new bodies of law and opportunities for expanding legal services. Those same forces and others have changed the world of industry and commerce. Products and services that were not anticipated in 1970 are major contributors to our economy, particularly in the field of financial services and our market focus has shifted from the old Commonwealth to Europe and the world as a whole. New economic powerhouses (the BRICs – Brazil, Russia, India and China) are changing the global landscape of trade and commerce and with it, the types of legal services demanded.

As a result, commercial law has become increasingly complex and business dealings frequently have a cross border nature; many sectors are now heavily regulated. Multinational corporations often have large legal departments with lawyers from many jurisdictions reflecting the international footprint of that company. There is an increasing demand for greater expertise and a trend for lawyers to specialise very early on in their careers. As the role of a commercial lawyer has evolved, so has the skill set required of a modern commercial lawyer. BACFI members have lived through these changes with their employer corporations.

¹ Report of the Committee on Legal Education. Cmnd Paper 4595 (1971)

² Lord Chancellor’s Advisory Committee on Legal Education & Conduct, 1st Report April 1996.

Some strengths, weaknesses, opportunities and threats

English law, together with New York law, currently holds a privileged and pre-eminent position in the global commercial legal services market. London is still the jurisdiction of choice for major international litigation and English Law makes a substantial contribution to Rule of Law and governance templates adopted in emerging nations.

It is vitally important that we retain the elements of education and training that have supported this pre-eminence. However, we have observed falling standards in young UK lawyers even in City law firms. This may be due to commercial pressures on time, over ambitious business targets or lack of supervision or even the result of falling educational standards generally; but it must be addressed. It is essential that education and training of lawyers keeps pace with business developments in the modern world and can adapt to changing requirements.

The UK economy has increasingly become service based and law is one of our most significant and valuable services. There is an opportunity to grow this sector of our economy and to provide high quality employment for a large number of the next generation. Many UK law firms have global footprints and are strong players in non UK markets; for instance, the largest law firm in Paris is an English firm. However, in a global market place, without good legal education and training in the UK, we will lose out to competitors overseas.

The new legal services market requires a different approach to the traditional methods of training barristers and solicitors, For example, litigation is rapidly being supplemented by ADR – young barristers need to be trained in non court based advocacy and negotiation as well as in the traditional skills.

We also need to maintain the balance between commercial innovation in legal services and preserving our reputation for ethical behaviour and independence of thought.

We believe that the problems of mounting debt and reducing numbers of practical training placements facing modern students cannot be allowed to continue. This wastage and unfairness risks building up cohorts of dissatisfied part-qualified lawyers, who will do nothing to enhance the reputation of the profession. There is therefore an urgent need to review the training process.

The making of a modern legal professional

There have been a number of attempts at compiling a list of the attributes, skills and knowledge required of a “good lawyer”. Allen and Overy, on its website, suggests open-mindedness, interest in people, evidence of teamwork, motivation and drive, communication skills, planning and organisation, critical thinking, commercial awareness, commitment, a mindset to explore, complete professionalism and an international mindset (“it is no longer a useful quality – it’s an essential part of the job”). Allen & Overy, like most BACFI members, are hiring commercial lawyers.

BACFI has developed its own list of desirable attributes and acquired skills for a barrister in business, which include the general attributes compiled in the Neuberger Report³.

³ Entry to the Bar: Final Report of Bar Council & Inns of Court Working Party, November 2007.

Temperament • Honesty – essential • Courage • Commitment • Common sense • Perseverance	Acquired skills • Business understanding/commercial nous • Eye for legal risk and nose for solution • Able to understand complex factual scenarios and identify key issues • Ability to think strategically / to see the big picture and not get bogged down in detail • Excellent written and oral communication and presentation skills • Financial understanding • Ability to execute decisions • Acute understanding of professional obligations and ethical boundaries • Accepts imperfections of a commercial environment • Works well in a team environment within diversity of ability and background • IT skills
Character • Robust • Proactive • Common sense • Problem solver/creative solution finder • Decisive • Pragmatic	
Talents • Analytical skills • Intellect • Persuasiveness • Organisational skills • Good judgment • Fluency	

Every specialism will have its own list, and the trick will be to identify the core attributes common to all.

BACFI has also considered the skills and attributes that appear to be missing from (or are given reduced prominence in) today's legal professional training. These are:

- Understanding of comparative law and languages

Businesses operate in a global commercial world and we live in a diverse and racially mixed society. An understanding of comparative law and comparative legal families and, crucially, languages are now rarely taught even in law degrees and the conversion course.

- Commercial awareness – by which we mean “how businesses operate”

This includes awareness, amongst students, of the variety of legal professional roles available in modern businesses and the skills and competencies needed to fill them. In concentrating on the requirements of an elite in the profession and treating all vocational careers as second class, we have failed to recognise the potential opportunities in providing first class professional training for a wider variety of specialised legal professionals to support traditional “Lawyers” in business as well as private practice.

➤ Ethical training and guidance

Ethics as a discrete subject has been gradually removed from both law degrees and legal training and replaced by a notion that professional ethics centres on observance of our own rule books and codes of conduct. Some institutions have realised this and are teaching the wider notions of legal and commercial ethics. BACFI believes that ethics in these forms are a crucial element of legal training and must be revived as a core subject. Resignations of in-house lawyers on ethical grounds demonstrate the independence of thought and professional standards which should be shared by all English legal professionals. Legal trainees need to be taught to recognise professional conflicts of interest - as they are in Scotland -and to understand the governance principles applicable in the commercial world. The regulators have a key role to play in this as well.

Finally, though it is no part of the Review to address the general educational system, every lawyer needs the ability to write logically and grammatically and to conduct legal research and summarise that research succinctly. We have found that even graduates, in increasing numbers, are unable to do these basic things.

BACFI's vision

Our vision for legal education and training is a long term view. We are suggesting a system which is “future proof”.

BACFI's vision for the future of the legal services market is underpinned by the following principles:

- Setting a gold standard of technical excellence and ethical conduct
- Fair and open access to the profession, drawing from the widest talent pool
- Serving the needs of “consumers” (from retail to “Business to Business”) and upholding the rule of law
- Increasing the global footprint of English law as a governing law of choice internationally and maintaining global recognition of the excellence of English law qualified lawyers
- Multiple entry and exit points to achieve maximum flexibility

We agree with Jacqueline Kinghan of UCL (‘Counsel August 2012’) that there should be many paths to a career in law and that educational providers must promote diversity and facilitate choice. The legal profession needs to take a more holistic approach and produce the wide variety of legal professionals that the market now requires; not just solicitors and barristers. Maximum mobility within this wider legal profession has become necessary to serve a dynamic legal services market.

In order to sustain a high earning and attractive world class legal elite, we must ensure that the training of the pyramid of recruits that feeds it is of the highest quality. This pyramid must not be restricted merely to people who intend at the outset to become professional lawyers. The pool of talent must be fed by many streams: those who have changed career in later life, those who have dropped out for a period, those who have qualified in related professions, etc. The current concentration of both the bar and solicitors professions on training only those that they wish to employ themselves means that the full diversity of possible recruits is not being achieved.

Recruitment is not the only issue. The Review needs to recognise that it will take further post qualification training, mentoring and experience to produce lawyers with the depth of knowledge and the skill and judgment that will be required to maintain and develop our position in the global legal market place. Box ticking CPD can be replaced by genuine career progression.

We do not believe that the current system provides the basis for the strong, world class and robust legal profession that can maximise the benefits for the UK from the global legal opportunities that we foresee.

Nevertheless, the concept of fair access to the profession is rather abstract. Not everyone who wishes to be a lawyer has the competence to become one. What is required is fair access for those with the necessary intellectual and interpersonal skills to become a good lawyer. It is one of the roles of the legal education programme to provide alternative routes to professional vocational qualification that match the capacity, ambition and career requirements of the individual. Fair access does not mean that anyone can become a lawyer, however unrealistic their chances of employment.

Our vision of the future is based on legal education and training in three distinct parts:

1. Pre-professional
2. Professional
3. Continuing

Pre-professional stage

The end point of this stage should be to achieve the requisite level of academic competence in law to enable students to embark upon professional training. It could also be an end in itself, for those who do not necessarily wish to have a legal career but whose chosen field of employment values basic legal training. It is the current academic stage. We do not advocate that this stage be post graduate only, as in the US.

We would also like to see this stage being completed by graduates (law or other discipline), postgraduates and suitably qualified and experienced non graduates (Legal Executives, Immigration Advisers, Probation or Police Officers, Court Clerks etc). There would continue to be a need for a form of conversion and credit or exemption process, so that those with relevant experience may enter the system.

The legal profession would thus have multiple entry and exit points, with intermediate stepping off points to a variety of legal careers; none of which should be considered in any way “second class”. It will be vital to serve the need for first class vocational as well as professional qualifications for staff in support and legal facilitative roles. The 1996 Report (see chapter 5) also recommended “one course with many exits”.

Professional stage

This is the most radical aspect of our proposal. Recognising that on the job learning is a crucial part of the making of a lawyer, we propose that the professional qualification be obtained at the end of a period of blended learning which incorporates technical, practical and academic learning in the same programme. We would envisage that this period would last between 2 to 4 years, during which period the student could undertake part time, shared or day or block release programmes devised for his/her needs and the needs of his sponsoring firm, department or chambers.

The training and education at this stage would be common to all lawyers and would avoid premature career choices, whilst giving the trainee a high degree of control over his own learning package.

We do not propose the fusion of the various branches of the profession. There is client demand for a choice of legal specialists and we do not see this reducing. We do propose that the solicitors’ and barristers’ training contracts, as presently organised, should be replaced by this combined and common period of supervised practice and blended learning.

We propose that the trainee's supervised practice should be undertaken full or part time in any approved practical setting where a significant part of the work has a legal context, including, but not limited to, solicitors' offices or barristers' chambers, the Government Legal Service, commercial organisations' legal departments, local authority legal departments, legal regulators, statutory undertakings and others including "Alternative Business Structures", both here and in approved EU states and international organisations. It would be the Regulator's responsibility to provide the blueprint for required learning outcomes, leaving the choice of programme to the student and his sponsors.

Critically, students would be able to earn as they learn. The continuance of a common academic course during the whole blended learning period will ensure that the highest standards are maintained and that objective assessment of the performance of the trainee is provided. This will avoid any perception that some providers of practical training are less rigorous than others. This joint academic training will provide valuable cross-fertilisation of ideas between barristers and solicitors and reinforce ethical values.

We are aware that the SRA has recently commissioned a study on work based learning and this will provide a valuable test bed for the development of such a scheme. British Telecom has for some years had a programme of training for solicitors which follows this model. At the Bar, the Royal Navy has for many years sent a series of commissioned Executive Officers to one or two sets of chambers as sponsored or "paid" pupils in the middle of their working careers.

Permitting the practical training to be undertaken with a wider variety of providers will reduce the problem of the increasing backlog of trainees without training contracts, whilst avoiding putting pressure on chambers and smaller firms to take more trainees than they can afford.

We would envisage some initial common foundation period; after which those intending to enter paralegal or related legal professional careers might depart for full time employment.

The foundation period should provide an intellectually rigorous basic education in common professional values and transferable skills, in both domestic and EU contexts and should include legal research skills and professional ethics.

We are attracted to the award of a *Licenciante*, recommended by the 1996 Report. This recognisably European terminology would enable the award to be used by students seeking employment in the EU. Similar "cadet" schemes are successfully operated by the Associations of Accounting Technicians⁴ and Tax Technicians⁵. ILEX of course offers progressive qualifications and part time blended learning aimed at producing both first class legal professionals and entrants to the Solicitor's profession. Exit with a *Licenciante* to pursue a recognised legal vocation career should not represent a second class standard of achievement, but should be recognised as a first class professional achievement in its own right and a marketable vocational qualification.

We would envisage that to meet the increasing demand for specialisation, there would be specialist modules in the later periods of the blended learning, in which the student would be able to specialise. Court advocacy might be one such specialism, though common training would be offered to barristers and solicitors to maintain overall quality. We would envisage specialist colleges or "Faculties" (see below: CPD) involved in assisting the Regulator to set the levels of expertise required for specialist training. These would include the Law Society and the Bar Council. The Inns of Court could take a pivotal role as ultimate centres of excellence in advocacy training and could later oversee the accreditation of all higher court advocates, whether barristers or solicitors. Other existing legal

⁴ www.aat.org.uk/qualifications

⁵ www.att.org.uk/about_us

professional organisations such as ILEX could provide optional academic or practical training modules.

During the course of this blended learning stage we envisage different exits for different vocational and professional qualifications. The professional qualifications of solicitor or barrister (Call or Admission) would be conferred at the end and would entitle all lawyers to exercise basic rights of audience in the lower courts.

Continuing education

All lawyers and legal professionals should make a lifetime commitment to continuing professional development, either for the maintenance of their basic training (e.g. after maternity or other long absences) or for acquired specialisms (at any time in a lawyer's career). CPD should also incorporate other forms of accreditation, such as child case handling, mediation, advanced litigation or anything else currently requiring additional qualification and training including FSA qualifications or specialist training required by employers.

We would envisage that the specialisms we have referred to above would be developed under the aegis of specialist "faculties" as in other professions such as Medicine, Engineering and Accountancy.

BACFI envisages that higher rights of audience (HCAs) would be attained by a mixture of practical experience and specialist training as part of CPD and that the Inns of Court could be the centre of specialist advocacy training for both solicitors and barristers.

There is a role for the Regulator in prescribing the content and learning methods for specialist faculty admission and tailored CPD packages for new practitioners, return to work after absences, moving from one area of specialism to another and even judicial training.

We believe that continuing professional development should be retained but not in its current form and we have made detailed recommendations to the Bar Standards Board (BSB). We view the key features of CPD as:

- CPD should not be prescriptive but that the practitioner should identify his or her needs, including the development of "soft" skills as well as "hard" law;
- CPD should not need regulator accreditation of providers;
- CPD should be self-certified by the practitioner;
- CPD should be backed up by a strong and credible enforcement capability.

We have noted that the pressures of the commercial world have reduced the time available for individual mentoring and supervision of legal trainees and junior lawyers. BACFI believes that a place could be found for professional counselling and mentoring in a CPD programme.

BACFI General Committee

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