Bar Council response to the LETR Discussion Paper 02/2012

Key Issues II: Developing the Detail

1. The General Council of the Bar of England and Wales (the Bar Council) welcomes the opportunity to respond to the Legal Education and Training Review discussion paper entitled Key Issues II: Developing the Detail[1].

2. The Bar Council is the governing body and the Approved Regulator for all barristers in England and Wales. It represents and, through the independent Bar Standards Board (BSB), regulates over 15,000 barristers in self-employed and employed practice. Its principal objectives are to ensure access to justice on terms that are fair to the public and practitioners; to represent the Bar as a modern and forward-looking profession which seeks to maintain and improve the quality and standard of high quality specialist advocacy and advisory services to all clients, based upon the highest standards of ethics, equality and diversity; and to work for the efficient and cost-effective administration of justice.

3. The Bar Council welcomes the circulation of this new Discussion Paper. The Paper indicates a clear development and concentration of the LETR Review Team's approach to the many issues raised by the Review; and it enables respondents to give more focused answers to the questions now raised.

4. The Bar Council also gratefully accepts the invitation extended to all respondents not to repeat material previously contained in their responses to Discussion Paper 01/2012. Close reading of Paper 02/12 shows that the Review Team has already taken note of the contributions which the Bar Council has previously made to the discussion; and we will in this response avoid repetition except where it is necessary to illuminate our answers to the specific questions which the Review Team has now put to respondents.

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[1] Legal Education and Training Review 2012 *Key Issues II: Developing the Detail* http://letr.org.uk/wp-content/uploads/2012/08/Discussion-Paper-02_2012final2.pdf

5. References in this response to paragraphs are references to paragraphs in Paper 02/12 unless otherwise stated.

6. The Bar Council shares the Review Team's disappointment at the low level of response to its earlier papers (see paragraphs 22 and 24). It notes the caveat in paragraph 24 that composite responses made by representative groups may not necessarily be representative of the sector as a whole. So far as the Bar is concerned, we wish to disagree. The Review Team is aware of the very high level of participation of practising members of the Bar in education and training, of the network of bodies and groups of barristers which actively support it, and of the thoroughness of the reviews which have been recently carried out on behalf of the Bar Standards Board. The views expressed by the Bar Council in its submissions to the Research Team are grounded in all this knowledge and practical experience. While we cannot capture every individual's viewpoint (especially in a disputatious profession such as ours) the Bar Council would nevertheless claim that it and its colleagues in the Inns of Court will provide the Review Team with the most reliable guide to the views and experience of our branch of the profession.

7. We now discuss in sequence those parts of the Paper on which we can usefully comment.

SECTION I – Introduction and SECTION II- Considering future training needs

8. The status of the Paper as an "issues" paper, aimed at generating discussion relating to the "possible reform" of legal education and training (para 1), rather than a consultation paper is noted, and the Bar Council responds on that basis.

9. The predictions in Section II on the size of the future workforce are noted. The prediction that, by 2020, there may be as many as 18,000 barristers in practice (presumably both employed and self-employed barristers, holding practising certificates) comes as a surprise. Footnote 4 states that this is based on past trends, which in the view of the Bar Council (and as the footnote itself acknowledges) should be treated with the utmost caution. The Bar Council's own figures are that there were 15,387 practising barristers in 2010 and 15,142 in 2011/12. This decline is expected to continue in the immediate future: the Bar Council's projections are for 15,000 in 2012/13 and 14,750 in 2013/14. While these are only estimates, the Review Team is aware of supporting evidence in the shape, for example, of the recent decline in the number of pupillages. Moreover, the figure given for solicitors (136,000) would appear to show a reduction in numbers.

10. The bullet points in paragraph 8 represent a number of factors which are likely to have an impact of the structure and size of the legal workforce, taken as a whole, but

their effect is difficult to evaluate. The Bar Council looks forward to receiving the Research Team's more detailed reasoning.

11. The suggestion that new roles and training needs may create "issues for legal education and training" (paragraphs 14-19) is not unduly challenging, if one recognises that this is not a new phenomenon which has suddenly and without precedent overtaken providers of legal services. Legal education and training develops and has always developed organically in response to economic, political, social and cultural changes in society. The ways in which lawyers have worked and have conducted legal business in changing conditions have likewise changed and adapted.

12. While the Bar Council accepts that the Bar's principal model of the self-employed practitioner is already becoming more diffused, and that the content of education and training must be constantly reviewed and refreshed to reflect change, it does not foresee the overthrow of the core skills and knowledge which the public and clients expect of lawyers in general, and barristers in particular. (Some of them are usefully summarised in para 133 and have been discussed in our earlier response). Nor does it consider that regulators have a significant role to play in overseeing change. All branches of the profession, in their own self-interest, are quick to pick up the need for change, and better placed to judge what is needed.

SECTION III - Issues with the current system

13. In this Section we confine ourselves to answering the specific questions on which the Bar Council is qualified to comment.

Question 1: in the light of limited evidence received so far we would welcome further input as regards the scope of Foundation subjects, and/or views on alternative formulations of principles or outcomes for the QLD/GDL.

14. We refer to our previous answer to this question. The teaching of ethics at the academic stage, and its expansion at the professional stage is, as the Review Team will know, being actively considered by the Advocacy Training Council. The Review Team's consideration of this topic is awaited with interest. The observation that the GDL "rests like a dead hand" over the debate concerning the QLD (paragraph 40) is unfair, although it is fair to say that it does exercise some constraint on the amount of compulsory subject-matter which can be injected into the QLD, the expectation being that non-law graduates undertaking the GDL will cover in one year the compulsory content of the QLD. However, the Paper also notes that there has to be a reasonable trade-off between the two pathways to qualification, because of the value which the profession attaches to graduates in subjects other than law, and its need for them. Accordingly, if an argument can be made that the content of the compulsory part of the

QLD should be reformed (which is an open question), that should not be affected by the GDL provided that the amount was kept under control.

Question 2: Do you see merit in developing an approach to initial education akin to ICAEW? What would you see as the risks and benefits of such a system?

15. The ICAEW system embraces a much wider range of recruits and provides many more pathways to qualification and practice as an accountant than the legal profession. The direct recruitment of school-leavers, and its attitude to university degrees, provide strong contrasts with, at least, the solicitors' and barristers' branches of this profession. The Paper is short on detail as to how the ICAEW system might be adapted to the law, and it is not possible to give a worthwhile answer to the two questions without such detail.

Question 4: should greater emphasis be placed on the role and responsibilities of the employed barrister in the BPTC or any successor course? If so, what changes would you wish to see?

16. Not at the BPTC stage. The BPTC concentrates on the core, basic skills which all barristers must possess: oral and written advocacy skills, a sound knowledge of criminal and civil litigation procedures, the ability to give effective legal advice in conference and writing, the various procedures for resolving disputes out of court, client-handling and most importantly ethics. Moreover the Review Team will know that there is no such single thing as an "employed barrister". Employed barristers will be found in many different environments, from the Government Legal Service and the Crown Prosecution Service to private practitioners in law firms and ABSs, and as in-house counsel in the private business sector. The time for more diverse training follows immediately on the heels of call to the Bar, in pupillage and in the New Practitioner Programmes. The rules prescribed for pupil supervisors, and the programmes delivered by the Inns of Court, make full allowance for this diversity. The New Practitioner Programmes split participants into different categories, and the 4 Inns co-operate in providing tailor-made sessions for the employed Bar.

Question 5: do proposals to extend rights to conduct litigation and the extension of Public Access to new practitioners require any changes to the BPTC, further education or new practitioner programmes, particularly as regards (a) criminal procedure (b) civil procedure (c) client care, and (d) initial interviewing (conferencing) skills?

17. There are several questions here rolled into one. The extension of rights to conduct litigation has a regulatory impact on those who are receiving new rights: their education and training, and the disciplinary rules by which they are bound, should be no less (or more) stringent than the regime which affects current holders of those rights. It has no bearing on the education and training of Bar students or barristers at any stage. The

extension of Public Access to new practitioners does not affect criminal or civil procedure as such, but it does raise client management issues for junior barristers which do need to be reflected at the appropriate stage in their training. It may be doubted whether the BPTC is the appropriate stage – it is too early, and the relevant training is best delivered by practitioners at the pupillage and new practitioner stage. The Bar Standards Board is reviewing the Public Access course structure and content to improve the client management training and to accommodate the specific needs of newly qualified practitioners. It is expected that this improved training course, coupled with existing regulation, will avoid potential damage to the justice system caused by poor mentoring, ethical or client managerial training as evidenced by experience in the United States.

Question 6: we would welcome any additional view as to the viability and desirability of the kind of integration [sc. integration of a 'BPTC 2' period of study and pupillage] outlined here. What might the risks be, particularly in terms of the LSA regulatory objectives?

18. The proposal will undermine the significant merits of the present linear arrangement of BPTC and pupillage, and is unnecessary, for a number of reasons. (1) Such a scheme would only be available to Bar students who had obtained pupillage. The BPTC is planned as a free-standing and complete period of training to prepare candidates for pupillage, having merit in itself. (2) Pupillage is seen and valued by the Bar (employed and self-employed) as a continuous period of workplace training. Although the period of twelve months, typically served in a single workplace – chambers or office – is normally divided by the pupil between two or more supervisors, the expectation is that the pupil will (subject only to attendance at the compulsory courses currently prescribed) commit himself or herself fully to the training delivered by his or her supervisors, or (in the second six months) to any professional work which becomes available. (3) The content of pupillage is fully covered by the BSB's Handbook, which prescribes substantive training both by supervisors and the Inns and Circuits which, in combination, must surely comprise any training which might appear in a "BPTC 2".

Question 9: Do you consider that current standards for paralegal qualifications are fragmented and complex? If so, would you favour the development of a clearer framework and more coordinated standards of paralegal education?

Question 10: If voluntary co-ordination (e.g. around NOS) is not achieved, would you favour bringing individual paralegal training fully within legal services regulation, or would you consider entity regulation of paralegals employed in regulated entities to be sufficient.

19. Neither of these questions affects the practising Bar to any significant extent at present, but with the likelihood that more barristers will, in new business models, be working with paralegals in the future, and with the possible growth of the number of paralegals working in chambers, some brief comment is called for. The evolution of the new training schemes for paralegals described in paragraphs 79-83 is welcomed, but they should not be allowed to develop into a set of new hurdles for entrants. The past practice has been that qualified lawyers are responsible for the supervision, training and actions of paralegal staff. Some of that training may be delivered externally, and the discussion in the Paper suggests that more may be. But the responsibility for assuring that staff are competent to perform the tasks they undertake rests with the qualified principal. In modern regulatory terms this would point to entity regulation, which would appear to be less cumbersome and more cost-effective than other schemes.

Question 11: Regarding ethics and values in the law curriculum, (assuming the Joint Announcement is retained) would stakeholders wish to see:

a) **the status quo maintained;**
b) **a statement in the Joint Announcement of the need to develop knowledge and understanding of the relationship between morality and law and the values underpinning the legal system;**
c) **a statement in the Joint Announcement of the need to develop knowledge and understanding of the relationship between morality and the law, the values underpinning the legal system, and the role of lawyers in relation to those values;**
d) **the addition of legal ethics as a specific Foundation of Legal Knowledge.**

In terms of priority would stakeholders consider this a higher or lower priority than other additions/substitutions (e.g .the law of organisations or commercial law)?

Would you consider that a need to address in education and training the underlying values of law should extend to all authorised persons under the LSA?

20. The Review Team is aware from the Bar Council's previous response to Discussion Paper 01/12 and its comments under Question 1 above of the importance which the Bar Council attaches to ethical training. It is already delivered to Bar students, pupils and new practitioners in some depth, but over what might be described as a too narrow canvas. If (1) there is space in the QLD curriculum for an additional subject, which can be correspondingly accommodated within the GDL (see above) and (2) ethics can be developed as an academic subject to the appropriate standard of intellectual rigour, it is to be preferred to the other options mentioned above. It follows that (a) above would not then be acceptable and (d) would take its place. As between (b) and (c), there is little to choose. If the extra element in (c) were not in the degree course it would be picked up in the course of professional training.

SECTION IV – LET and regulation

21. The order of questions in para 105 – what are the appropriate aims/outcomes of LET and second what role regulation has to play in securing minimum outcomes – is correct. The Bar Council considers that the aims of LET should be directed at the public interest, in which the interests of clients are subsumed; and that regulation has a role in setting minimum standards of performance. Its role can however be exaggerated, and it is not the principal driver in the quest for the very highest quality of service.

Question 12: Do you agree the need for an overarching public interest test in assessing the aims and outcomes of LET? If so do you have any view as to the form it should take?

22. It follows from our paragraph 21 above that the answer to the first question is a qualified Yes; but that is not to say that the present system of LET does not currently meet that test. In our view it does. The second question is obscure, unless it refers to the two alternatives in para 109, in which case the right answer is the 'total welfare standard'. The relevant question, in broad terms, should be: does our system of LET serve the public interest? The answer requires detailed analysis: does it serve (and enable the profession to serve) the legal needs of the population in its various personal and corporate forms; does it promote access to justice (so far as that lies within the power of education and training); and does it promote the proper administration of justice?

SECTION V –Developing the detail

23. Para 127 lists "Key issues for the review" which do not exactly replicate but are presumably not intended to take the place of the various issues and questions set out in the earlier Sections of the Paper.

24. Point a. in paragraph 127 needs to be supported by hard evidence. It is also far from clear to what extent this is suggested to be the case with the Bar. In addition, we are doubtful as to the benefit of expending too much energy on trying to predict uncertain future needs in practice: to a large extent, these are necessarily the remit of professional training and development during practice, which is more easily altered to deal with changing circumstances, more flexible, and can be related more directly and conveniently to the needs of the affected market sectors.

25. Point b is not accepted. Education and training form part of a continuing process of professional development which does not stop on qualification; and the Bar Council is not aware of anyone who makes that claim. The nature of practice at the Bar is such that

development of legal knowledge continues throughout practice, as an inherent part of that practice, and this must not be ignored. It is reinforced by continuing professional development. We do not accept that this is properly regarded as primarily 'passive' competence, particularly when the exposure to scrutiny in the context of disputes and negotiations is borne in mind, or that it is weighted towards initial training.

26. Point c. certainly does not represent the Bar Council's position (see above). We do not comment on points d. and e.

27. We feel that it is worth stressing that we do not accept the premise (to the extent that it appears to be seriously advanced in paragraphs 115 to 123 of the Paper) that risk-based regulation, OFR or activity-based authorisation lead to a need – at least so far as the activities undertaken by most barristers are concerned – for any radical change of approach to initial training, or to continuing professional development. This is so irrespective of the extent to which (if at all) they are appropriate or desirable to the nature of practice as a barrister.

28. The first bullet point in para 130 is accepted. Strenuous efforts have been made at the Bar since the publication of the Neuberger and Wood reports to address this issue. The policy of full and early exposure of the realities of practice and the truth about career opportunities should be made universal. The third bullet point is concerned with an issue (equality and diversity) which the Review Team has said will form the subject-matter of a different report. The Bar will refer at the appropriate time to submissions previously made on this issue.

29. We note para 131 which states that the Research Team will be undertaking further work on the difficult question of the costs of training, and the equally difficult question whether it is a matter for regulators at all. The Bar Council will respond to the more detailed work on these questions when it is published.

Question 13: we would welcome any observations you might wish to make as regards our summary/evaluation.

30. Subject to our paragraphs above under this Section, and our previous response, we have no further comment to make.

31. **Questions 14, 15 and 16** cover topics on which the Bar Council has previously responded, although not in the exact terms of these questions. We repeat the observation that regulation will reach a point beyond which it has no part to play in professional standards, which are ultimately driven by other pressures. It has probably already reached that point.

Question 17: Would you consider it to be in the public interest to separate standards from qualifications? What particular risks and/or benefits would you anticipate emerging from a separation of standards and qualifications as here described?

32. This question attempts to pull together the various and disparate points made in para 136, which are themselves difficult to follow. Conceptually there is no distinction between standards and qualifications: a qualification is gained by achieving an assessment in stated areas of knowledge and skill at a given standard. The content of the qualification – what a candidate has to know and learn, and what is assessed – may in theory be specified by one body, and the minimum standard to be achieved may be monitored, if not set, by another. Candidates seeking different qualifications (or titles) which will authorise them to conduct the same activity, eg advocacy or will-writing, would on this basis be assessed at the same minimum standard – activity-based assessment. But it does not follow that the assessment of the activity, once the standard is set, would be carried out by the same body; and different qualifying bodies may not be satisfied with the minimum standard. The Research Team should give more detail of the apparatus which would have to be set up to achieve this result, (if the idea is to be pursued further) and explain its impact on existing arrangements, giving concrete examples.

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