THE COUNCIL OF THE INNS OF COURT

Response to the Legal Education and Training Review

Discussion Paper 02/2012: "Key Issues II: Developing the Detail"

Introduction

1. This is the response by the Council of the Inns of Court (COIC), the representative body of the Inns of Court, to the Discussion Paper 02/2012 "Key Issues II: Developing the Detail" produced by the Research Team of the Legal Education and Training Review (LETR - a body jointly commissioned by the Solicitors Regulation Authority (SRA), the Bar Standards Board (BSB) and the Institute of Legal Executives Professional Standards (IPS)).

2. The Inns of Court through COIC have actively engaged in the LETR, responding to each Discussion Paper as well as hosting a roundtable and focus group. Given the fundamental role of the Inns of Court in the education and training of the Bar, we will continue to provide input on matters of advocacy training and standards as required.

3. This response is not comprehensive and will only cover those issues that have not previously been addressed, focussing on those aspects that are of particular concern to the Bar.

4. COIC acknowledges the changes to the legal sector as a result of the implementation of the Legal Services Act 2007 (LSA). Predictions of the future changes due to LSA and particularly as a result of the introduction of alternative business structures have been thoroughly documented in the various LETR discussion papers. As previously noted, COIC appreciates the market benefits of anticipating likely sector transformations. On the other hand, recommending significant alterations to an established and respected legal education and training (LET) system based on anticipated changes, which the LETR acknowledges are far from certain, is unsound and carries with it considerable risk.

5. The uncertainty of future legal service development is shown through the variety of predictions provided in the Discussion Paper. For example, the view that "specialist skills and knowledge may be [increasingly] brought in for a project, rather than provided permanently in-house" (para. 18) does not correspond to the forecast that the Bar's "centre of gravity" will shift towards a greater proportion of employed barristers (para. 55). Constructing a new system of LET for the regulated legal profession(s) must be consistent, and relate to public and consumer needs as well as the realities of practice, rather than perceived future conditions that could readily change depending on economic, market and societal factors.

6. In this connection, COIC notes and endorses what is said in the Introduction to the Paper, in particular that "*in the absence of evidence to the contrary, evidence of current fitness [for purpose] calls for careful evaluation of the need/desire for change*" (para. 3). The lack of any evidence of unfitness for purpose is reiterated (with particular reference to the Bar) in para. 52. COIC was concerned in those

circumstances to read in the current (October) LETR bulletin that the Paper "*suggests the current system of legal education and training is not fit for purpose*". COIC has looked with care at the Paper, fails to recognise that an indictment such as this was expressed in (or justified by any remarks or suggestions in) the Paper and fails to understand how such an indictment can be consistent with the views of those in the Research Team who compiled the Paper.

7. The LETR has noted that there must be a separation between regulators and qualification bodies in order to distinguish "regulatory from non-regulatory functions", and clarify the role of regulators with regards to LET (para. M). LETR was established by the front-line regulators to review the regulatory framework of LET. If the LETR is of the view that LET is not, in fact, a regulatory function but one of standard-setting, its power to make recommendations would therefore surely be limited. Professional bodies should presumably in that case have a greater role in the direction of the remainder of this Review.

8. COIC does not believe that a "common framework" (p. 140) for all LET will be to the benefit of students, consumers or the public. In trying to meet the skills of the entire regulated (and even currently unregulated) sector, a lowest common denominator approach may be advanced. Furthermore, we find simplicity – though specifically stated as an aim for the LETR – missing from this proposed schema (p. 46). We are particularly concerned by the assertion that authorisation to practise would not require achieving intermediate qualifications or baseline legal knowledge. We consider this point in greater detail below.

9. COIC stressed throughout its response to the first Key Issues paper that the public interest is at the forefront of its approach. At the risk of repetition, we refer to our invitation to the LETR Research Team in paragraph 35 of our earlier response:

> "to draw the conclusion that there is an obvious public interest in the continued availability of a highly trained and skilled cadre of lawyers able to provide detailed analysis and competent advocacy, as well as specialist legal education that no other institutions would be able to provide in such a cost-effective way. There is an obvious consumer interest in legal services being provided as cheaply as possible. That interest is served in particular by the Bar, where a large number of self-employed individuals with low overheads compete for work. As these paragraphs show, therefore, the Bar serves both the public interest in the maintenance of the rule of law and the delivery of justice; and also the interest of the consumer in the cost-effective delivery of an essential service."

10. COIC understands the temptation for change, but this is a system that has served the public interest well for many years. Unless, therefore, there is cogent evidence to support the need for change in the way the Bar and its governing bodies regulate LET, needless and disruptive proposals should be avoided.

11. As before, this Response is supplemental to, and supportive of, the separate response of the Bar Council.

Activity-based authorisation and regulation

12. It remains the view of COIC that activity-based authorisation and a corresponding LET system would neither be in the public interest, nor would it benefit the rule of law. While greater specialisation may be inevitable in some parts of the sector, this does not imply that broad foundational legal knowledge is not necessary. Increasingly, complex cases require a broad understanding and application of several areas of law and the current LET provides an essential common body of knowledge to practitioners.

13. Will-writing activity, a subject referred to repeatedly by the LSB, and now apparently to be designated a reserved activity, illustrates the point made in the last paragraph. A non-lawyer might readily suppose that the training for the will-writer should be confined to drafting with the aid of a checklist. In practice, however, the competent will draftsman needs a working knowledge at the very least of tax, matrimonial, trusts and property law. The training should be sufficient not merely to make the draftsmen of wills fit for purpose: it should also acquaint them with a knowledge of matters at times perhaps peripheral to their daily tasks, in order to alert them to the existence of potential problems that need to be addressed.

14. Appendix 1 of the Discussion Paper points to the many disadvantages of activity-based regulation. We would like to draw particular attention to:

    (a) the risk to consumers if practitioners no longer possess a common body of knowledge;

    (b) the substantial variations of standards of legal advice on offer that may result;

    (c) the risk of over-specialisation at too early a stage of LET, before the practitioner's views as to choice have fully formed; and

    (d) (crucially) the potential damage to the UK economy through international reputational damage.

15. This last factor contrasts vividly with the assertion of LETR respondents that there is a "high degree of success and respect achieved internationally by lawyers trained in England and Wales, the preservation of which skills base is vital to the UK economy" (para. 125).

16. There is a continuing need for specialist advocates and advisors with broad foundational legal knowledge. We note the view of the LETR that there is likely to be an increase in the proportion of barristers required in the future, although these occupational projections are in contrast to the Bar Council's own statistics, which show a decline over the period 2010 to date, with a further decline in the coming year. At any rate, however, the numbers in the future remain substantial, reflecting the high regard in which barristers continue to be held.

Discussion Paper 02/2012 Questions

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

17. COIC does not have anything further to add to its previous submissions. We consider that it would be incautious to prescribe additional subjects to the detriment of required subjects, particularly as this might prolong the GDL. The skills learned through the QLD/GDL, such as: the fundamentals of law in practise; case law analysis; legal research; drafting and structuring legal arguments; critical thinking and problem-solving; reviewing complex documents and making connections between relevant points of law, are all essential and should not be diluted.

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?

18. The Bar Finals were replaced by the Bar Vocational Course (BVC) in 1989. The former system does not appear to be wholly dissimilar from the ICAEW examinations. One of the main priorities of the LETR is simplicity. Further routes into LET through examination or exemption would not only further confound prospective legal professionals and paralegals, but also potentially add a further level of administration. COIC is not convinced that this would have positive benefits on equality and diversity, nor does previous experience necessarily suggest this.

Question 3: We would welcome views on whether or not the scope of the LPC core should be reduced, or, indeed, extended. What aspects of the core should be reduced / substituted / extended, and why?

19. No comment.

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?

20. In approaching the response to this question, COIC is not entirely clear what is the precise nature and scope of the additional training that LETR has in mind. There appear anyway to be a number of reasons why this sort of additional training ought not be incorporated in the BPTC: firstly, additional material would either extend the length and cost of the course, which will make it more difficult for disadvantaged applicants to afford it, or the material can be accommodated only by replacing other material which the BSB has judged to be essential for training. Secondly, we do not believe that the specific requirement of different employers can conveniently be formulated in a course appropriate for all employers. And just as the knowledge and skills required for training the specialist in (for example) marine insurance, marine construction or tax advising is more appropriately left for the stage of pupillage, so also is appropriate training for the employed barrister left to the employer, subject to the post BPTC training courses offered by the Inns of Court.

21. The Inns of Court offer an employed barrister stream as part of their new practitioner advocacy and ethics courses. A panel and question and answer session is also being incorporated as part of the Pupils' Practice Management Course. One of the two Education Days for BPTC students also includes talks from pupils and pupillage committee members including those from the employed Bar. These sessions along with the BPTC provide rigorous training for employed barristers.

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?

22. The Inns will carefully monitor the proposals to extend rights to conduct litigation and the extension of Public Access to new practitioners in co-ordination with the BSB. We will, as always, make changes to our complementary courses as appropriate.

Question 6: we would welcome any additional view as to the viability and desirability of the kind of integration outlined here. What might the risks be, particularly in terms of the LSA regulatory objectives? What are the benefits?

23. COIC notes that the LETR is advancing a system of "modularisation" and "blending" whereby more work-based learning would be undertaken at the professional stage of training – pupillage for the purposes of the Bar – and correspondingly less at the vocational stage (paras. 54, 57-62). The suggestion is for a further distinction within the vocational stage - a 'BPTC 1' and a 'BPTC 2', the latter being integrated into pupillage with greater supervision and assessment.

24. This suggestion (among others) was considered in detail by the recent Wood review, and rejected, following a searching, evidence-based, consideration of the aims and function of the BPTC compared with pupillage. Paragraph 75 of our response to Discussion Paper I notes the position. In short, we consider that before work-based learning (in this case, pupillage) can be undertaken effectively, elements of vocational knowledge that can be imparted through class-based learning is the most proportionate way of delivering what is needed. The manpower to do all this during pupillage does not exist.

25. Moreover, while we recognise that there may be benefits in the combination of professional training and work-based learning for larger organisations and firms, the majority of sets of chambers would find further LET requirements at this stage difficult to adopt. This could lead to an undesirable position where fewer chambers are willing to offer pupillage given the burden placed on them by doing so. It could also add to longer pupillages, with corresponding increases to funding. Before moves towards this type of system are recommended, further formulation of how training of this type might be absorbed by the Bar should be undertaken.

26. The newly reformed BPTC is not structured in a way to make modularisation viable. The LETR has already noted that the current BPTC provides the sort of practical application and grounding. In addition, it would need to be evaluated as to whether having students on the 'BPTC 1' course who did not want to progress to 'BPTC 2'

would negatively impact the peer learning environment that is so fundamental to the current course.

Question 7: We would welcome additional evidence as regards the quality of education and training and any significant perceived knowledge or skills gaps in relation to qualification for these other regulated professions.

27. No comment.

Question 8: As a matter of principle, and as a means of assuring a baseline standard for the regulated sector, should the qualification point for unsupervised practice of reserved activities be set, for at least some part of the terminal ('day one competence') qualification at not less than graduate-equivalence (QCF/HEQF level 6), or does this set the bar too high? (Note: 'qualification' for these purposes could include assessment of supervised practice). What are the risks/benefits of setting the standard lower? If a lower standard is appropriate, do you have a view what that should be (eg, level 3, 4, etc)?

28. There is a direct correlation in the type of skills learned in undergraduate studies (Level 6) and those practised at the Bar of England and Wales. Some of these skills are listed above (para. 14 in this response). We therefore believe that graduate-equivalence is necessary. A lower standard is not appropriate for the level of legal service provision – often of a highly academic nature – required by barristers.

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?

29. While the current standard for paralegal qualifications may be complex, this is not to say that they need to be incorporated into a single pathway for LET as set out in this Review.

Question 10: If voluntary co-ordination (eg 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?

30. No comment.

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 retained;

(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 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 (eg 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?

31. The Inns of Court incorporate ethics into every stage of their training. They offer ethics courses in the form of Education Days for BPTC students, compulsory sessions during the Pupils Practice Management Course and New Practitioner weekends, and CPD Master Classes for established practitioners. Given the extensive amount of ethics that are featured in the Inns' courses, we feel that any of options (a), (b) or (c) will be likely to be more beneficial than a full foundation subject. Further, we would give lower priority to option (c), given the extensive coverage of the subject in Inn courses.

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?

32. Public interest tests are not an exact science and in other jurisdictions their use has been criticised. However, of the two forms, the *total welfare standard* must be the assessment method in the case of legal services, taking into account broader social impacts of decisions than consumers alone. While consumer interest (in the form of the *consumer welfare standard*) is important, there are many other interlinking groups, particularly in the case of legal services where high quality is vital to upholding the rule of law and wider public belief in the system.

Question 13: we would welcome any observations you might wish to make as regards our summary/evaluation of the key issues

33. There is concern over the issues identified by the Discussion Paper. While COIC appreciates that the LETR makes clear that "the issues identified do not arise equally in respect to all regulated occupations, or even parts of the occupations" (para. 127), we do not subscribe to the view that there is a mismatch between training requirements and skill sets of those successfully entering the profession. Other issues, such as the importance of generalist knowledge and centrality of ethics to LET, have been covered elsewhere in this response. In general, a 'one size fits all' system that tries to address the needs of all legal practitioners equally will fail to meet the skills needs of all.

34. Flexibility and 'off-ramps' have also been identified. While we can see benefits to paralegal qualifications, it must not come at a substantial cost to the consumer. It would not be in the public interest if such forms of qualifications impacted on the high-quality specialist advice.

35. Cost and over-supply have already been noted as primary problems for the Bar and these have been briefly addressed by the LETR (para. 131). We agree that cost cannot override the need to assure sufficient quality but we remain concerned by the large number of students entering the BPTC without realistic prospects of practising at the Bar or in the broader legal profession. The LETR notes that over-supply may require "better information and careers advice on access to the professions and the other legal

service provider roles" (para. 130). As noted in previous submissions, the Inns undertake a large amount of outreach to schools and universities to do so but have not seen corresponding decreases in the number of students entering the BPTC.

Question 14: Do you agree with the assessment of the gaps (now or arising in the foreseeable future) presented in this paper in respect of the part(s) of the sector with which you are familiar? If not, please indicate briefly the basis of your disagreement

36. COIC broadly agrees with the skills and competencies listed of what the LET system should set to achieve (para. 133). It has been recognised, however, that there is "very little evidence" (para. F) of quality or specific skills gaps in the current system. The LETR has additionally observed that "the BPTC's strong focus on advocacy and litigation provides a good foundation for transactional learning and a good simulation of practice …" (para. F) and that the quality of supervision of pupillage appears high.

37. COIC accepts that greater emphasis may be required in the future on, for example, appearing against litigants in person (para. 54). It will monitor this situation carefully and make relevant addition to its courses for pupils and new practitioners to ensure that its members are trained for the most up-to-date situations that they might face.

Question 15: Do you consider an outcomes approach to be an appropriate basis for assessing individual competence across the regulated legal services sector? Please indicate reasons for your answer.

38. We do not wholly agree with outcomes approaches. Please see our response to Question 18 with regards to the need for hybrid approaches, particularly with respect to baseline entry and foundational knowledge.

Question 16: In terms of the underlying academic and/or practical knowledge required of service providers in your part of the sector, would you expect to see some further specification of (eg) key topics or principles to be covered, or model curricula for each stage of training? If so do you have a view as to how they should be prescribed?

39. COIC would not wish to prescribe any additional learning outcomes at this time. The Inns, through their advocacy courses, already set competencies in the form of passing various stages of training. For example, pupils are not issued a practising certificate until they pass their accredited Pupils Advocacy Course.

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?

40. It is unclear from para. 136 whether what is being suggested is (a) a separation between the setting of standards and the conferring of qualifications; or (b) something more fundamental (such as for example the imposition of training requirements for the Bar by a new entity).

41. If the Research Team have (a) in mind, it should note that this is precisely what occurred in the mid-1990s, when the Bar Council assumed responsibility for much of the training function (including standard setting) from the Inns, while the provision of

classroom vocational training was delegated to a larger number of Bar Vocational Course providers. This has led to the present system under which regulation/standard setting is now in the hands of the Bar Standards Board, whilst the Inns continue to confer the qualification/degree of Call to the Bar, and to set some practical training, separate from the classroom training functions of the providers and from vocational stage standard-setting and regulation by the regulator. No further separation is therefore required.

42. If the Research Team have (b) in mind, with a new entity remote from (and presumably lacking in the expertise of) those bodies such as the Bar Council, the BSB or the Inns to set the "standard", we would dispute that this could be in the public interest. The BSB has an important role to play in the standardisation of the BPTC through the central examinations and through its regular monitoring of BPTC providers. COIC does not envisage a system where standards could be appropriately assessed in terms of advocacy standards without a qualification that would not be a regressive step.

Question 18: Decisions as to stage, progression and exemption depend upon the range and level of outcomes prescribed for becoming an authorised person. A critical question in respect of existing systems of authorisation is whether the range of training outcomes prescribed is adequate or over-extensive. We would welcome respondents' views on this in respect of any of the regulated occupations.

43. The LETR has categorised different forms of LET intervention in the form of: *passive* versus *active* competence approaches and *input*, *process* and *output* regulation. For example, minimum entry standards such as graduate-entry restrictions are assessed as being passive (where competencies are presumed) and input (an achievement or qualification rather than through regular reassessment of standards). The LETR has suggested moving to an active/output model in order to "develop a risk-based and evidence-based system able to demonstrate actual rather than assumed competence" (para. 150).

44. COIC disagrees, and believes a hybrid system should be given greater consideration. COIC is not of the view that active/output alone will produce favourable results, particularly at the early stages. Retaining strong entry standards while potentially encouraging more active CPD requirements depending on the level of work being undertaken would clearly be of benefit to the public. The Inns of Court already use hybrid systems to authorise advocacy trainers, requiring them to have met certain entry standards (such as a set number of years of practising at the Bar) while regularly re-accrediting based on certain set standards for different levels of teaching.