

The College of Law
Response to Discussion Paper 02/2012
from the
Legal Education and Training Review

Introduction

The College is disappointed by the direction of travel in the thinking of the Review team, as illustrated by this discussion paper. The College prefers, in broad terms, the analysis and strategic direction set out in the Strategic Discussion Paper published by the Legal Services Institute in October 2010 “The Education and Training of Solicitors: Time for Change”, copies of which have been supplied to the review team.

Specifically, the College has the following general concerns with the approach set out in the Discussion Paper:

- There is insufficient consideration of the strengths of the current competitive market for flexible provision of the LPC, in ways which meet employer needs. Too many of the ideas canvassed in the Discussion Paper have the potential to increase prescription and reduce flexibility.
- Overall, there is insufficient recognition that the process of professional formation, of which legal education and training is the central part, needs to be shaped substantially by current employment needs; and in particular by recognition that the profession itself is now more diverse than it has ever been. Outcomes for the process as a whole need to be shaped by those diverse employment needs, with the outcomes for each stage being shaped by the requirements of the stage which follows;
- Whilst there is some acknowledgement of the declining role of the current reserved legal activities in the day-to-day work of a majority of solicitors, there is insufficient consideration of the consequences of this for the matching of professional training to current employment needs;
- Whilst there is some acknowledgement of the potential for there to be new entrants, both as providers and regulators, to the market for reserved legal activities, there is insufficient consideration of the consequential public interest in common minimum standards for qualification and licensing.

The Preferred Approach of the College

THE CURRENT LPC MARKET

There is a need to reform the LPC, in the context of a more general reform of legal education and training, and the College supports broadly the reforms proposed in the Legal Studies Institute paper referred to above. Nevertheless, the strengths of the existing system should not be disregarded.

In particular, there is a flourishing competitive market to meet the training needs of those firms which, between them, take the great majority of trainees. The two major providers, the College of Law and BPP, deal with over 70 law firms, who invest directly in the LPC training they offer, in some cases through commissioning bespoke LPC provision for their own trainees. This competition is possible because the LPC has been allowed to evolve in a way that enables packages of electives to be offered which are relevant to particular firms, and which permits modes of attendance (often combining work and study) that meet both student and employer needs.

Reform needs to build upon and enhance that flexibility. Flexibility to respond to market needs facilitates competition which, in turn, has a positive effect on both the price and quality of what is provided. A decrease in flexibility or an increase in prescription would damage healthy competition.

SETTING OUTCOMES

The starting point, for any reform of legal education and training, must be the intended overall outcome of a threshold standard of competence which will enable the individual to undertake, to a proper standard, the work they will encounter in the early stages of their professional career. Therein lies the challenge, as a process which aims to equip a solicitor, at the point of admission, to be equally competent as a corporate lawyer in a 'Magic Circle' firm, or as a general practitioner in a small High Street firm is in danger of producing a lawyer whose skills are less than adequate for either role. This is why the College favours the separation of the professional title from the entitlement to undertake reserved legal activities, as discussed further below. The additional flexibility in programme design which would result, would allow multiple routes to be better accommodated.

The intended outcome of initial competence in employment must drive the design of the whole process. Employment-defined competence must govern the learning outcomes of the LPC. In turn, the legal knowledge, understanding and skills which LPC teachers assume to be possessed by law graduates, must govern the outcomes of at least a part of the qualifying law degree and the greater part of the GDL.

There is a risk that this process of working back from employment requirements will be seen as utilitarian, and as undermining the academic integrity of the law degree. In the view of the College, the opposite is true. By defining precisely the expectations of those who teach the LPC, in terms of knowledge, understanding and skills to be possessed by law graduates, a minimum requirement for the law degree can be defined. So long as that minimum requirement is satisfied, neither regulators nor LPC providers should seek to prescribe beyond it.

The LETR Discussion Paper falls in to the trap of trying to start with an overall definition of the purpose and outcomes of a law degree. That is not the right place to start; it is competence in

employment and, leading to that, the needs of the LPC, which should define that which must be prescribed. So long as the learning which supports that requirement is delivered, it is not the business of regulators to second guess academic judgments about the content of the balance of the degree, subject only, as with all degree programmes, to the generic intellectual skills required by the relevant descriptor of the QAA Framework for Higher Education Qualifications also being delivered.

THE RESERVED LEGAL ACTIVITIES

The College supports the proposal of the Legal Services Institute that in respect of all reserved activities (with the exception of the administration of oaths) the qualification of solicitor alone should no longer be an entitlement to practise in those fields. Instead, solicitors wishing to practise any reserved activity should obtain an endorsement to their practising certificates entitling them so to practise. An endorsement should be granted only after successful completion of a period of supervised practice in the field in question, during which prescribed competence standards would have to be shown to have been met.

Those students intending to enter employment in which entitlement to practise one or more of the reserved legal activities was likely to be required would be able to take appropriate electives on the LPC. Those students whose employment was unlikely to require them to undertake reserved work (which will be true of many primarily transactional lawyers undertaking corporate and commercial work) would instead take electives of greater relevance to their field of employment. This would increase the relevance of all LPC provision, as all of it would be more closely aligned with future employment. The option to obtain entitlement to practise a reserved activity would always be open to any qualified solicitor wishing to change career direction.

This approach would have the additional benefit of freeing up time on the LPC for a fuller treatment of areas such as advocacy, which would then be required only by students proposing to enter employment in which advocacy skills were needed.

NEW ENTRANTS TO THE MARKET

In circumstances in which more than one approved regulator may authorise their members to undertake the same reserved legal activity there is a powerful public interest in ensuring that the same minimum standards of competence apply, regardless of which approved regulator authorised a practitioner to act. Such common standards of competence should then form the basis for defining the learning outcomes of programmes of study leading to an entitlement to practise a reserved legal activity; and there should also be common minimum standards for the accreditation of such programmes.

All of this places a greater premium on activity focused regulation than appears to be envisaged in the Discussion Paper.

COLLEGE INITIATIVES

The College recognises that the LPC requires reform to match it more closely to the demands of legal employment. To this end it has applied to the SRA to run two pilot elective modules to evaluate portfolio assessment as a more accurate means of assessing student achievement of the LPC Outcomes. The College wishes to match assessment more closely to the intentions of the outcomes.

The approach of the College is supported by some of the research findings of the LETR. Research Update 12/01 reports on deficiencies perceived by employers in their new recruits. The most significant of these, ranked by the proportion of employers reporting them, are as follows:

- 18% Attention to detail
- 15% Common sense/sense of proportion
- 9% Initiative
- 9% Interpersonal skills
- 8% Ability to deal with difficult issues/people
- 7% Personal presentation/articulacy/confidence/grooming
- 6% Problem-solving skills
- 6% Responsibility
- 5% Time and project management skills
- 4% Aspects of legal practice

The College takes these reported deficiencies seriously, as is consistent with its belief that competence in employment must drive the LPC. What is significant about all of the attributes in which deficiencies are perceived is that they do not lend themselves to assessment through the conventional means of assessment regarded as the norm by the regulators. The nature of time-bound, supervised assessment in which a pass can be secured by achieving a proportion of the available marks means that attention to detail, in particular, is not necessarily measured.

By contrast, portfolio based assessment has the potential to take in to account attention to detail, in exercises which more closely simulate the circumstances of legal employment. It is an assessment vehicle which can also facilitate assessment of other of the attributes in which deficiencies are now perceived.

The Discussion Paper is silent on the question of assessment methodology. Ensuring that the assessment instruments used are valid and reliable in relation to the achievement of outcomes they seek to measure is essential. In piloting portfolio assessment the College is seeking to evaluate whether this could provide greater validity in relation to certain of the outcomes of the LPC, whilst addressing also some of the more significant perceived deficiencies of current recruits. Assessment methodology needs to be considered as a central part of reform of the LPC.

The Questions Posed by the Discussion Paper

Against the background set out above, the College offers the following responses to a number of the questions posed in the Discussion Paper.

QUESTION 1

The scope of the foundation subjects which must be taken to enable a programme to be recognised as a qualifying law degree/GDL should be determined in the manner set out above under the heading "SETTING OUTCOMES". The College commends to the LETR the discussion on the academic stage of training in Chapter 2 of the Legal Services Institute paper referred to above, and the discussion in section 3.8 of the same paper on the provision of guidance to students and programme providers on recommended pathways within qualifying law degrees which would be particularly effective in preparing students for the LPC.

QUESTION 2

The College regards as wholly inappropriate the suggestion that the approach of the ICAEW might be adopted. The ICAEW approach involves a centrally set examination, with scope for candidates to apply for exemptions from parts of it that have been covered in accountancy and other degree programmes.

The reasons why the centrally-set Solicitors Final Examination was replaced by the LPC remain as valid now as when the change was made some 20 years ago. The curriculum was driven by the requirements of a centrally set examination, thus teachers felt no ownership of it. This led to unimaginative teaching and rote learning. A return to that system would remove the flexibility that enables LPC programmes to be tailored to the needs of individual firms or types of legal practice. A centrally set examination cannot cater for the assessment of practical skills. A major criticism of the former Final Examination, and of the programmes leading to it, was that trainees entered employment with wholly inadequate skills. To the extent that the Final Examination addressed skills at all, it was by expecting students to write about them, rather than to demonstrate their possession.

There are no benefits to the re-adoption of such a system, and significant risks to the quality and relevance of the LPC.

QUESTION 3

Questions about the relevance of parts of the core of the LPC arise primarily because the LPC now has to cover preparation for the exercise of the rights to conduct reserved legal activities, regardless of whether those rights are likely to be exercised in employment. As argued above, the content of the LPC should be driven by employment needs, with sufficient flexibility to cater for a fairly wide range of likely employment destinations. Central to reform of the LPC is the separation of entitlement to conduct reserved legal activities from the professional title. If the reserved legal activities had to be studied only by those who expected to have to undertake them it would be possible for each variant of the LPC to be aligned more closely with anticipated employment requirements.

QUESTION 6

Two issues arise with respect to the possible blending of vocational training and work-based learning. First, a number of the modes of study now available for the LPC enable students to combine study and employment. There is sufficient flexibility to allow bespoke programmes, which can integrate more closely learning on the programme and learning in the employment of the firm commissioning the programme.

Second, the proposal from the Legal Services Institute to separate entitlement to practise the reserved legal activities from the professional title would mean that, for many students, a conventional training contract would no longer be required, so issues of integration between LPC material and material now dealt with in the training contract would not arise to the same extent. At the very least we see potential for radical change to the existing training contract model allowing transactional lawyers to attain practice rights under a far more flexible model within the workplace.

QUESTION 8

This question is misconceived. It is not appropriate to set an arbitrary level for qualifications. The starting point for any qualification is the competence necessary to perform the functions which make up the professional job. That involves the possession of the knowledge and understanding needed to underpin the required competence. Depending upon the nature and relative complexity of that knowledge and, in particular, conceptual understanding, a level can be assigned to any qualification which attests to its possession. There should not be a presumption that a qualification of a particular level is required for a function, level should be determined by the application of the descriptors of the qualifications framework to the required content of the qualification.

A presumption that a graduate-level qualification must be required for the conduct of any reserved legal activity runs the risk that a qualification will be designed to meet the expectations of the qualifications framework, rather than the needs of the job. This could add to the cost of the qualification, and thus constitute a barrier to entry.

It may well be likely that graduate-level qualifications are required for reserved activities, but that should be demonstrated by reference to the content, not arbitrarily assumed. In terms of the full professional qualification of solicitor, many of the intellectual skills involved may be closer to Masters level, a qualification standard required in many jurisdictions and, equally, an internationally recognised educational qualification. Consideration of setting full qualification at this standard may be warranted, as it could open a range of possibilities for more flexible, accessible and creative programme design whilst securing standards at a national and internationally recognised level. As before, this approach should first be established by rigorous mapping of the content required to develop employment-based competence against the relevant descriptors of the qualifications framework.

QUESTIONS 9 AND 10

There should be common standards to underpin paralegal qualifications, and it is appropriate for these to be developed by Skills for Justice.

QUESTION 11

This appears to invite regulators to go further in defining the content of a law degree than is justified. It is necessary for professional ethics and the codes of conduct relating to the profession to be fully covered within the LPC. There is a clear work-related requirement for there to be a sound understanding of professional obligations and the standards of ethical conduct expected in professional work.

Providers of qualifying law degrees should give consideration to the extent to which study of legal ethics, in a wider sense, might provide a useful foundation for the specific study of professional ethics in the LPC. However, this is probably best approached on the basis of the sort of guidance proposed by the Legal Services Institute and mentioned in response to question 1 above, rather than being the subject of prescription.

QUESTION 12

The College sees no utility in applying a further public interest test to legal education and training, given that explicit public interest tests are already in place.

There is a clear public interest in a professional title attesting to competence in the professional field in question. Ensuring that this is the case is one of the prime purposes of a professional body.¹ Under the current regulatory regime, it is for the Legal Services Board to be satisfied that the front-line regulators are effective in upholding this public interest.

There is a clear public interest in degrees meeting generally recognised international standards of achievement, and attesting to possession of the abilities set out in the relevant descriptor of the Framework for Higher Education Qualifications, supported by (in this case) the QAA Law Benchmark Statement.

Adding an additional overarching public interest test would add complexity, but not value, and would be likely to lead to duplication and confusion.

QUESTION 13

For the College's views of key issues, please see the earlier sections of this paper.

QUESTION 14

As argued throughout this paper, the College considers that the primary design principle is that programme design should be driven by the competences needed in employment (LPC level) and adequate preparation for the LPC (QLD/GDL level).

QUESTION 15

As the intended outcome of a process of professional formation is competent performance in the professional role, it follows that individual competence should be specified on an outcomes basis. As discussed above, it is then necessary to ensure that that the methodology used to assess

¹ See, for example, Ormrod "Professional Ethics" in British Medical Journal 1968

achievement of the intended outcomes is valid and reliable. Some existing assessment instruments may lack validity, thus contributing to perceptions of shortcomings in the LPC. Establishing robust and relevant outcomes is a necessary, but not sufficient step in ensuring that programmes are able to meet employment needs. It is equally important to ensure that achievement of those outcomes is measured in a valid and reliable manner.

QUESTION 16

For the reasons given earlier in this paper, the College is concerned that greater prescription carries the risk that the scope for the flexibility which enables LPC variants to reflect differing employment circumstances might be curtailed. Proposals for model curricula raise difficult issues with respect to the valuable intellectual property rights associated with curricular materials developed by individual providers, especially in relation to bespoke courses.

QUESTION 17

In its comments (above) on standards for reserved legal activities in which more than one regulator has an interest, the College accepts that standards may well be developed separately from qualifications that are subsequently based upon those standards. However, both standards and qualifications are subject to regulatory processes, albeit different.² The section of the Discussion Paper leading up to this question is confused.

² For example, the Legal Services Board is the ultimate regulator of standards of competent legal services, whilst the QAA is the ultimate regulator of degree standards.