BSB Education and Training Committee

Response to LETR Discussion paper on the Review of Legal Education & Training

Executive Summary

1 This response sets out the comments of the Education and Training Committee of the Bar Standards Board ('BSB') on the LETR Discussion Paper 01/2012 'Key Issues(1): Call for Evidence' due 10 May 2012.

2 The Education & Training Committee of the BSB is comprised of 15 members (8 practitioners, 5 lay academics and 2 lay persons including a medical practitioner). The Chair is lay, ie a legal academic. This membership includes the chairs of the relevant subcommittees (BPTC, Pupillage and CPD). Representatives of the BSB Equality & Diversity Committee, BPTC Providers, the Employed Bar, the JASB and the Inns of Court are also included or invited to attend and their views taken into account.

Key messages derived from the consensus of opinion of members are as follows:

1. There is lack of information concerning the specific regulatory problems which are perceived as needing to be fixed.
2. There is lack of evidence to underpin the emerging issues for consideration, even though these are not presented as 'emerging recommendations' and further evidence is being called for. It is understood that further research and evidence gathering (eg use of focus groups and questionnaires) is taking place, although details have not been released.
3. There appears to be a far greater focus on academic issues rather than practice, which should play a much more pre-eminent role in a process that is looking at Legal Education and Training and its regulation.
4. A great deal of work seems necessary on projections for the likely changes in the provision of legal services, and possible consequences for the education and training that all types of lawyers and paralegals may need in the future. The workforce analysis is thus awaited with interest.

General

3 Generally, the paper is helpful and outlines some key areas that are in need of consideration. More distinction should be made between the basic quality management concept that there is always room for improvement and quality can always be enhanced, and the quest for radical alteration for its own sake when no real need for major change has been evidenced. The slogan "*If it ain't broke, don't fix it*" is often adopted by those who are complacent, arrogant or even lazy. Maintaining that if something is working adequately well it should be left alone can be an excuse for inaction. But on the other hand "*if it ain't broke, don't break it*" can also hold true. Good should not be discarded along with the bad due to inattention or haste, and there is no

need to reject or radically overhaul an entire concept or framework simply because it is not all 100% perfect.

4 The purpose of the LETR paper is a little unclear. On the one hand, it is described as a "call for evidence"; however, it also asks for feedback on the many issues it raises. These are scattered throughout rather than being conveniently summarised as a number of consultation questions, which will no doubt be formulated at a later date when there may be firmer proposals on these matters.

5 The paper does not specify or provide evidence for what exactly is the regulatory issue that the research work and eventual proposals are trying to address. What evidence is there that the current system does not work and will not continue to operate effectively, albeit with some necessary modifications due to the LSA 2007? Since the LETR is now presented as a review not only of Legal Education and training but also of the Regulation of Legal Education and training, then the emerging issues and proposals will need to follow the Regulatory Objectives of the Act much more closely. It will also be important to consider the Better Regulation principles most carefully and to place the research in the context of the LSB Regulatory Framework (published December 2011) and based on an outcomes-driven approach; understanding of risk to consumers; supervision of the regulated community; and any necessary compliance and enforcement approach (p. 4). Any suggested proposals must of course be proportionate to the nature and scale of the regulatory problems or concerns with the current system that have been evidenced.

Evidence base

6 Much of the paper consists of somewhat vague impressions deduced from an inadequate evidence base, for example para 77: 'One (!) senior barrister interviewed by us … wondered whether the BPTC was worth anything at all for their pupils other than a rite of passage' or 'One senior barrister complained …' (para 84), 'one respondent suggested ' (para 85). Questionnaire distribution (para 19) plus 10 focus groups seems very limited, but details have not been made available. In short, it is not apparent that the perceived inadequacies of legal education and training that are cited in the paper are either widespread or based on any evidence. Further, such criticism appears to disregard the vast amount of work that has been done by the BSB in its three stage systematic review of all stages of education and training for the Bar 2007-12. The Wood Reports, including background work, evidence and research (all of which have been offered to the LETR research team) are hardly cited at all, whilst some less relevant and rather esoteric academic works appear to play a predominant role (as listed in the Literature Review).

7 The paper appears to have been heavily influenced by providers of all types, with much less from practitioners and virtually nothing from potential users and consumers. The summary at paragraphs 98 to 100 presents a disparate, almost random, selection of issues for consideration without any rigorous connection with any preceding analysis or any attempt to produce this. What are the problems to which these paragraphs point solutions? What are the values and principles that underpin their selection? We are not told. However difficult this may be, more information seems necessary to answer the key questions outlined below. This is what the research should aim to do:

- What are the likely changes in demand (affecting knowledge, skills, and understanding) that are likely to confront lawyers and paralegals over the next 10 years?
- How far will the new business models generate new pressures for different competences?
- What will lawyers and paralegals need by way of education, training, CPD, and higher post qualification specialisation support in order to meet new demands?
- How far can differentiation by skill (eg advocacy), role or title be justified, and what bearing does that have on education?

8 Several passages are highly pertinent – largely those commenting on literacy; ethics; heuristics; devolution; numbers of traineeships; selection; the heterogeneity of requirements in the LPC; and the NY Bar model. Yet these (eminently practical) matters are neither followed through, nor discussed to any clear purpose. Much is lost in the attempt to address the objectives of different approaches to regulation, and jargon and generalities about cross sectoral or institutional collaboration of the kind found at para 61.

Consumer needs

9 If a more competitive market for legal services that responds to consumer need directly is to be promoted, then competencies will have to become more differentiated and their regulation will have to accommodate more titles. The public will want to know what they are 'buying'. They want choice and guaranteed standards. So what needs investigation is how that can be achieved through education and CPD, given the new and existing business models and practitioner titles. This seems to be the debate that the paper intends to stimulate but a greater lead needs to be provided by those commissioned to do the research. The Literature Review is clearly a major piece of work but, as a 'gathering exercise', it is not focused in a way that can influence practical policy making. The lessons that can be conveyed from academic research to the legal profession must be made explicit, such as what can be learnt from other professions. Analysis of the extent to which frameworks that work in one context is likely to work in another is vital in considering how far experiences in other (selected) countries and professions can work in England and Wales. It is not possible to extrapolate direct analogies and the Workforce analysis paper is awaited with interest.

10 Correlations also need to be made with the research into Equality and Diversity – stated as a 'central and overarching concern of this Review' (opening sentence of the E & D paper). Since Equality and Diversity issues are such a significant part of the LETR, it will be vital that proposals made by the team have been properly assessed for potential impact on the wide range of consumers. If consumer needs are to play an important part in shaping future provision it will be important that there is adequate consultation with consumers by the LETR team, and that appropriate impact assessments are carried out before related recommendations can be made.

Research and recommendations

11 Whilst it is acknowledged that this is a 'discussion paper' the findings of the research, matters for discussion and emerging recommendations seem to be conflated and hence unclear (para 4). It is not correct that 'Previous reviews of LET have commissioned relatively little research. Much of the debate about the fitness for purpose of the current LET regime has proceeded by assertion, based often on limited evidence.' (see Wood Reviews and compare the approach so far publicised by the Research Team (above, para 4). Assertion is also simply used with regard to the competence issues (para 14). These assertions may be correct, but neither evidence nor argument is offered. Future focus group discussions (para 20) give some confidence that they will be tested, but there appears to be little direct understanding of the range or type of work undertaken by barristers. It is difficult to see how (para 24) the 'strengths and weaknesses' of the current system (which are conclusory) can be laid out at this stage. Is there in fact an 'overarching structure' for Legal Education & Training? Is it not the possible need for this that is now being discussed? Weaknesses and willingness should perhaps be treated as two separate matters (para 20).

12 Lack of evidence will presumably be addressed when this work goes beyond the discussion stage. In many places, sweeping statements are made without any supporting evidence for example para 46 (care should be taken in making comparisons with other common law jurisdictions because they may well not teach law as an undergraduate subject 'on its own' but in combined honours options where law is not normally a first year element or where it is a post graduate subject only); para 57 ('a weak point'); para 67 (alternatives that are not necessarily mutually exclusive); para 67 ('absence of professional ethics from the law degree'). Paras 81ff are particularly lacking in evidence as sweeping statements are made about the lack of standing of UK

Legal Education & Training globally. It is stated, most surprisingly, that 'the best people tend to do LLMs in the US' and yet vast numbers study law in the UK (17% of undergraduate law students, 34% of BPTC students and nearly 80% of postgraduate Law students are non UK domiciled – HESA). Overseas student numbers on UK LLM programmes are dramatically higher than they were 20 years ago. The New York Bar entry qualification of an LLM plus $750 fee may have a bearing on its popularity, but there is a 34% failure rate in foreign trained lawyers taking the examinations, which might suggest these were not 'the best people'). The importance of remaining competitive in an increasingly international market is recognised but the impact of overseas students on those who are more able might also be a matter that merits further reflection.

The case for radical as opposed to incremental change

13 The paper focuses upon the possible need for further subject areas and skills to be studied as part of legal education and training and the possible need for more common training and ease of transfer between different areas of the legal profession. Whether, once assessed, this should be achieved by radical overhaul or incremental changes and adaptations when future needs become known, requires much debate and discussion (para 97, of which the last sentence is difficult to comprehend). The autonomy of universities and other providers of legal education and training must clearly be maintained at the same time as ensuring that candidates are adequately prepared for future professional training.

Comments on individual issues raised in bullet points in para 98

- ***The Qualifying Law Degree – are the Foundations still a sufficient knowledge base?***

14 It is curious that it is posited (para 98) that the QLD has changed so much that it is no longer fit for purpose, at the same time as it is argued that the requirements of the QLD are so constraining as to prevent flexibility and development (para 97). The Foundation subjects would benefit from being revisited, as has been planned by the JASB for some time (but not progressed, due to the LETR). Possibilities might be an increased emphasis on ethics, international law or human rights. Less emphasis on property and land law has been proposed by some in the past but strongly argued as necessary by others. Tort, contract and crime appear to be essential but the other foundation subjects also play a role. It is difficult to see how land and trusts (which are pervasive subjects) could be non compulsory. The same applies to EU and human rights which now form a fundamental part of our legal system. The concept of foundation subjects and, indeed, the specification of the foundation subjects, is mirrored closely in other common law countries including the United States where they form the core of the first year of most JDs and are required by many states before taking the state Bar Exam. US law schools also generally make Civil Procedure a "core subject", due to the need to teach the distinction between the federal and state court jurisdictions without which it is difficult to understand some of the substantive law.

15 The use of student transcripts which vary so enormously could not possibly suffice to ensure those with the right subject mix were ready for postgraduate professional training (unless common QLD transcript formats were required for professional training purposes). Additional courses would need to be provided and the flood gates would open for those who had been wrongly or poorly advised on subject choices. Lack of entry criteria (such as the QLD) would lead to confusion and a proliferation of appeals for those not accepted for professional training, in favour of a candidate with a preferred portfolio of courses. Students need to know how to work with legal skills, use case law and interpret primary and secondary sources and legislation. Specific professional skills are however better taught as part of professional training courses. Discussion is needed about the most appropriate stage of education in which to introduce and develop these different skills.

16 The Foundation subjects only comprise 50% of the QLD and the lack of constraining features of the QLD is demonstrated by the fact that there are over 600 QLDs in the UK, many of which are joint programmes with other subjects. Universities are of course

free to deliver law degrees that are non-QLD but they are unlikely to prove popular with students who want to keep their options open. The proposed inclusion of compulsory management skills seems hardly necessary at such an early stage of training; it would dilute the intellectual coherence of degree programmes that are not management-related; and it ignores that fact that most Law Schools do not include (and would find it difficult to include) staff who have the knowledge and experience to teach them. In fact with the exception of Barrister only partnerships, it seems there will be less need in future amongst the professions for management skills than now, since such partnerships will be run by professional managers. It is important for aspects of professional training to be included in some way at undergraduate level in order for students to gain a meaningful experience and understanding about practice as a lawyer so they can make informed choices about their future career aims. Good Law Schools will provide extra-curricula (including Work Based Learning) opportunities to help students become acquainted with the legal profession, which can also improve their employability and help them with career choices. This type of extra curricula enhancing of employability should be additional to any professional aspects that are touched on or covered as part of the curriculum.

17 For the QLD as for the GDL, there is a core of knowledge and skills without which the designation 'Law degree' will have little meaning. It is not reasonable to expect a postgraduate professional course to cater for those who do not have the basics, or where there is wide variation in ability. This would increase the length (and cost) of any professional course. But the question of what the 'basics' are should be discussed with rigour. In particular, there seems no reason why a Law degree should have any specified content over and above that which is contained in the GDL programme, nor does it do so at present. It is surprising that the QAA benchmark statement for law does not receive attention (other than a cursory mention in para 46).

- ***The GDL or equivalent – could there be a larger range of possible entry qualifications?***

18 This would be acceptable as long as minimum requirements/standards were similarly met for this (as every other) stage. The existing GDL route caters admirably for those who have done a non-law degree as their first degree.

- ***The LPC / BPTC – Does the BPTC provide sufficient training for any of those actually beginning pupillage, and if not should there be another form of course or qualification which would also suit those who will not achieve pupillages? Are either the LPC or BPTC necessary or desirable elements of the qualification pathway?***

19 It is not possible for the E&T to comment on the LPC. The BPTC has been recently revised and redesigned so as to be tailored to its designated purpose. As thoroughly considered in the recent review, it is designed to cater for those who aim to progress to the Bar. It cannot cater for those who eventually have other career pathways or aims (either by accident or design). The BPTC is an essential element as a bridge or transition between the academic stage and professional practice (by means of an apprenticeship model – ie pupillage). There is widespread comment that (unlike the individual cited in para 77) the top Bar Course graduates are as good or better, and better prepared, than ever. The new course is specifically designed to equip students to progress to pupillage. Detailed investigations were carried out during the Wood Review into the length of the course with calls for a diminution by those who found it too long, and an increase proposed by those who found it too short. The present length of one academic year seems correct in the absence of evidence and reasoned argument to the contrary. There is a clear divide between different aspects of the solicitors' and barristers' professions.

- ***The Training Contract / Pupillage – are these now such bottlenecks, so totally controlled by the existing professionals, that they fall foul of any attempts to achieve fair access? Are they insufficiently regulated to assure the quality of training? Or are they the best possible training for those who will be our professionals of the future, already well-funded by those organisations benefitting from them?***

20 Rather than a 'bottleneck' this is a gateway or 'sift'. There is a difference between completion of pupillage as a stage of training and pupillage as leading to eventual joining of a business. Numbers of pupillages were falling even before the introduction of compulsory funding and advertising. Ways to increase the number of pupillages available are under continuous consideration, but a proliferation (not that this is possible) would simply lead to 'gateways' and 'bottleneck' elsewhere as jobs or tenancies might not be available. Pupillage is carefully monitored – although as mentioned above it is acknowledged that there is always room for improvement. Recruitment methods are aimed to achieve fairness in the process. Discussion regarding the desirability of a unified compulsory system (or at least a common timetable) remains under discussion. The recent review of pupillage has made the systems much more robust. The last sentence of the bullet point implies that benefits accrue more to the training organisation than to the trainees which is not so. There is no consideration of the fact that such sifts/bottlenecks occur in relation to other professions eg medicine, accountancy, investment banking.

- ***The 3 year rule and tenancy– even if the apprenticeship bottleneck disappeared, barristers would have to be selected for tenancies and solicitors would have to practice under others for 3 years before they could put up their own brass plate. Is this still necessary?***

21 Recently qualified professionals continue to need supervision for a specified period after the initial gaining of a practising certificate. Experience is gained over time so supervision in the early stages remains vital.

- ***CPD – is this one area where there is a broad consensus for reform? Is there particular agreement on the need to move away from input-driven approaches? Is sufficient emphasis being placed on 'CPD' for the growing numbers and greater range of paralegal staff?***

22 It seems there is a general consensus for a need for revision to CPD systems. A comprehensive review was again carried out by the BSB in this area. The findings and recommendations are currently on hold so that the proposed new model can be meshed more fully with the LSB Framework that requires an outcomes focused approach – the possibility of establishing the outcomes of CPD being very challenging to establish.

- ***Mobility within the sector – where are they key restrictions on mobility? Are the pathways within and between occupational groups within the sector sufficient and sufficiently transparent? What more should be done to facilitate career mobility?***

23 There is considerable mobility at present, with the common training to the QLD/CPE stage, activities now crossing the traditional divides and transfer tests available (QLTS and BTT). More could perhaps be done to facilitate mobility for non-standard entry into other areas of the legal profession (eg para-legals) but with the flexibility now possible in FE and HE, there are greater possibilities than ever for the accreditation of prior experiential learning (APEL) and advanced entry onto more standard routes, namely degree study.

Comments on individual issues raised in bullet points in para 100

- ***Abolition of the concept of a qualifying law degree;***

24 This is not recommended. The resulting disparity would be so great that additional courses and assessment would simply be needed at a later stage, which would increase the cost to students. There is no reason why the fundamentals (reviewed as they may be) should not continue to be included in a prerequisite qualification for postgraduate professional training. Universities and other providers are free to deliver non-QLDs if they wish, and students to do them.

- ***The introduction of national assessments at the point of entry to the profession***

25 The cost of introduction of national assessments to test some 11,000 candidates who undertake the vocational stage each year (1700 BPTC and 9300 LPC students) plus 6,300 completing the professional stage each year (combined pupillages and Training Contracts) must be fully examined before any such recommendation is made. Who would set, assess, mark and moderate such tests? Experience gained from setting BPTC centralised examinations in Ethics, Civil Litigation and Criminal Litigation is offered to be shared. This would be even more challenging in skills/competency areas, than in 'knowledge' areas.

26 In addition, the regulatory objectives should be considered here, one of which is to promote competition in the marketplace. A standardised single system of qualification will tend towards a type of fusion which will also tend towards the elimination of competition of the professions. This would not be in the public interest.

- ***The specification of sector-wide national standards for key areas of work, and a move to greater activity-based authorisation/regulation***

27 This relates to the possibility of national assessments at the training stages (as above) and, for practice, the QASA scheme. Variation in practice is so considerable that this would be almost impossible to determine.

- ***Removal of at least some of the linear breaks and distinctions between 'vocational courses' and work-based learning, whether through the training contract, pupillage or paralegal experience***

28 The current division into phases appears to work well. Work Based Learning (WBL) at undergraduate or even postgraduate level is a very different matter from the professional 'apprenticeship' stage of pupillage or training contract. Assessment is also likely to be very contentious since at senior levels this must be done by practitioners not academics.

- ***Facilitation of greater common training between regulated occupations, both course-based and work-based (insofar as that distinction is retained)***

29 The nature and extent of the various branches and specialisms in training would make more common training in the early stages (ie beyond the undergraduate stage) complex. For example, to extend the common period of training would be likely to require some candidates to spend time, money and effort pursuing training that they were never likely to need. A common core for postgraduate professional training would be likely to double the length (and hence cost) of training. Those who had decided which route they would prefer would effectively be penalised in doing courses in which they had no interest - for the sake of those who remain undecided about which of the various routes to take. The difficulties of some students finding it hard to choose too soon should be off set against those who had early on determined their career aims.

- ***Replacement of the pupillage/training contract with a more flexible period of 'supervised practice'***

30 How flexible? This is the issue. It would be a great obstacle for those wishing to specialise to have to undergo generalist training first and then spend more time (and expense) developing specialist skills in which they were interested in the first place. One-to-one supervision is a proven highly effective method of training.

- ***Development of a sector-wide CPD scheme or alignment of schemes?***

31 This might be worth considering, depending on how any new model was derived and implemented. Needs vary tremendously and so any overall scheme would need to be flexible enough to accommodate this – which may in turn lead to such a scheme being too all-embracing and vague

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