I set out my thoughts on the discussion document 01/2012 in the hope they are of interest. There is no overall structure or narrative to my response, although headings will indicate broad topics under consideration. Nor are all the points and possibilities argued through to completion. This would have led to a rather long and wearying document. I am more than happy to discuss any matter should that be useful.

Timeframe and ultimate result

The review has been given a very tight timeframe within which to complete its work. This is particularly important given the general lack of evidence relevant to understanding what the education and training needs of lawyers are and which systems of education and training best meet those needs. Similarly, the needs of lawyers and legal service providers is in a process of flux. Rather than seeing the review as leading to a static solution to current difficulties in legal education (or even difficulties predicted by 2020) it may be wiser to consider what processes and structures need to be set up to ensure that legal education and training is responsive to changing circumstances and, in particular, is founded on a more secure evidence base. A longer term commitment from the professions to seeking evidence on the strengths and weaknesses, as well development, of education and training may be as or more important than short term decisions about changes to what and how to regulate at a point where information and understanding is modest (without diminishing the significant achievements of the LETR team).

Focus on competence

I agree with the Discussion paper that the current regulatory mix is not sufficiently focused on competence. In particular, the regulator has concentrated on the early stages of classroom education at the expense of considering what is genuinely effective in the latter stages of work-based learning and supervision. Evidence from will writing and a considerable body of work on legal aid has suggested that competence problems are significant in numerical terms. What is worth dwelling upon is the finding that competence was higher among specialists and amongst non-lawyers (compared to those practising solicitors firms). Also, the areas of work were often those falling out with the traditional curriculum (housing, debt and social welfare law). This suggests that the system of legal training was not fit the purpose but the research was not able to specify which elements of training, for instance, were not sufficient.

Shifting towards a competence based approach, particularly one which focuses on competence in practice, where there is likely to be horizontal and vertical specialisation (different people do different types of work and at different levels of sophistication) makes designing any system difficult.

Reasons for a single regulator

As the paper notes, the tendency of other jurisdictions to adopt a single regulator model is perhaps an indicator that it may be preferable (although it has also allowed more recently greater competition). The historical and somewhat arbitrary patchwork of reservations of particular areas of legal work and the strong divide between solicitor and barrister are probably at the heart of the reason for our current levels of regulatory complexity. As liberalisation leads to greater intra-professional competition, so the logic of separate regulators becomes less coherent.

Similarly as you note in paragraph 99, I believe in principle that, “what is required is simplification: a structure that increases choice the processes of qualification, whilst delivering greater certainty to the professions and consumers as to the quality of outcomes achieved.” The key question, of course, is whether such an approach can be delivered in practice. However, separate qualifications and titles and regulators as well as the potential complexities of activity-based regulation make this an enormously challenging agenda.

The qualifying law degree

I have no doubt that the current approach to regulating the qualifying law degree has encouraged a degree of scleroticism in the curriculum. It both over and under regulates: guaranteeing that a set of foundation subjects are included within the curriculum without providing sufficient impetus to innovation or thought about quality.

A shift away from content towards intellectual skills is still needed (quite separate from any discussion about whether narrowly “professional” skills should be incorporated within any degree programme). Universities are increasingly training their academics to be better teachers and this provides something of a platform upon which significant development in legal education could take place but the rigidities of the foundation framework and institutional conservatism have tended to mean that progress has been modest. Similarly, research and development of legal education is something of a Cinderella subject within the legal academy. Any developments which could shift cultures here and raise expectations would be most welcome.

I am not convinced that the regulator can do a better job than the market of deciding the content of the qualifying law degree (or optimal approaches to delivery). Equally, there will be dysfunctions associated with market-driven approaches. The College of law has already signalled its intention to act as a specifier of core outcomes for law degrees the students that it takes. Whether it is able to do so will depend, in part, on how law schools respond to any attempt by the College to assert itself in this regard. An interesting question, also, is whether the professions might helpfully insert themselves into the debate between law schools and their institutions as to the resourcing of what are traditionally regarded as “cheap” courses.

A better approach than regulating the content may be to research and provide information on legal education and training which could inform the decisions of students, firms and education/training providers and signal risks and the need for regulation as appropriate.

Abolition of the concept for qualifying law degree therefore appeals, albeit with some reservations. Introduction of a national assessment the point of entry will, however, mean that the qualifying law degree or some intermediate course has within it some conceptions of a qualifying core. I’m wondering what the difference would be other than to establish a cross check on (allegedly) different standards of degree award across institutions. The desire of institutions, particularly but far from exclusively less confident ones, to teach to the national assessment will be strong and may be to the detriment of broader quality outcomes. That said, it is an idea worthy of exploration. It may also have, over time, diversity benefits. Firms may be unwilling to take a student with a high 2:1 from NewUniversity College but be more willing to do so of someone who got into the upper quartile of a national assessment. It would also militate against grade possible inflation especially at the 2:2/2:1 boundary.

A shift to collaboration in the education sector

Paragraph 61 talks about encouraging collaboration in cohesion between education providers across the education sector. It is certainly the case that few institutions have the resources to engage in significant development of courses. It depends on the energies and resources of individuals and collaboration could lead to significant improvements in course design and content. I find it hard to see this developing, particularly against the current evolution of markets in higher education. Institutional pressure to differentiate seems likely to overcome benefits to individuals within institutions (and their students) in relation to collaboration.. It may be that regulators could force the pace here both through soft power (funding collaboration) and hard power (regulating the sharing of information, course materials, etc?).

Standard of writing

Interestingly, but perhaps parochially, I and some colleagues have noticed that the standard of undergraduate writing in the last two or three years has improved significantly at Cardiff (without there being a noticeable improvement in admissions standards). It is also worth emphasising that thorough supervision and development of writing skills and the conduct team of sustained writing assessments is extremely resource intensive. Market and institutional pressures are towards improving feedback mechanisms within the University sector. One would expect, therefore, for there to be some improvement in this area.

Professional ethics in the law degree

I strongly endorse the view that the “relative absence of professional ethics from the law degree has acted as a constraint on its development as an academic subject.” Whether this has inhibited the ethical development of students and neophyte practitioners I think is much more debatable. Nevertheless, the profession’s evolution depends on it having a more durable research base and more critics and critical friends overseeing its activity. It is not an implausible claim that the legal services act changes were informed, in part, by academic critiques of the professions but equally were somewhat dominated by economic critiques of the professions. Without criticising the Clementi process, it would still be fair to say that a larger and better developed evidence base may well have led to more considered changes.

The numbers game

Historically the mismatch between the number of students studying the LPC and then going on to graduate comfortably and the number of training contracts is one of close match (See, the history of LPC numbers). We are currently in the depths of a prolonged recession and it would be unwise to base a discussion of education and training on concerns about numbers at that point in the cycle. It is possible, of course, that because of structural changes within the profession we will not return to the position after the last two recessions: changes resulting from the legal services act and the liberalisation of legal services may either increase or decrease the number of roles for qualified lawyers (of whatever stripe) and technological change (be it greater outsourcing or greater use of information technology they also increase, but sees will likely to decrease, the number of high-value legal occupations).

As will be well known to the team, there are significant risks in intervening in the market to inhibit the number of people who can qualify or seek to qualify. Also, as a matter of principle, concerned for education and training should reflect concern for the outcomes of that education and training and not with attempting to fix markets to work at levels that fit current economic circumstances. That said,

the capacity of the market for students and courses to respond to the market further training contracts, pupillages and jobs is inhibited by the extent to which training and education is broken into blocks that are too large and by the time period across which decision-makers (students) must try and calculate the costs and benefits of proceeding with legal training. For that reason, the more flexibility that can be built into training requirements consistent with high-quality outcomes the better. So, for example, I have long advocated a sandwich approach to the LPC and training contract which would break up the cost of the LPC and encourage a much stronger match between those proceeding deep into LPC training and a number of training contracts. Allowing training and work to be experienced in parallel would also make the process more affordable (either firms would pay or trainees would have supported the process from salary). There may also be educational benefits to working and training simultaneously as long as there was a proper respect for the needs of both the employer and the trainee as a student. The main disadvantages seem to be a reluctance amongst training providers to incur the extra costs associated with greater flexibility (and the greater risk that numbers would drop significantly) and the desire of firms to have trainees who can, in effect, become full-time fee earners or full-time support staff very quickly. I would like to see these counterarguments more robustly tested.

It may be possible to design a system which allows qualification on entry into a period of supervised practice with a course as competitive as the New York bar proceeding it. I do however believe that great care should be taken around the award of title in this way. The capacity for ordinary consumers to be misled by title such as nonpractising barrister or solicitor is significant. One approach would be to only allow an individual to hold themselves out as a barrister or solicitor whilst they participated in supervised practice (all reached the point where they could practice on their own). Titles praying on an association with a qualification (such as non-practising barrister) should be prohibited. It is debatable whether this would remove any bottleneck but it would reinforce the importance of adequate supervision and training post qualification and, perhaps, render what is currently the training contract more flexible.

The same arguments could be employed in relation to the BPTC and pupillage. Indeed, one might expect greater flexibility to be easier in Chambers contexts.

Selection Systems

I have written a number of blogs in relation to the bar standards board's approach to aptitude tests which appears to be inadequate in a number of respects and, in particular, has tended towards justifying why aptitude test should be implemented rather than considering in a more independent sense whether an aptitude test is the most proportionate way of promoting the public interest in proper admission and training within the Bar (see here).

It is also worth noting that the importance of vacation experience as a precursor to securing training contracts has substantially increased since the seminal work of Shiner et al showed how important and, indirectly, how potentially discriminatory such entry 'opportunities' can be.

It is also worth saying that work conducted by the Sutton trust suggests that the recruitment criteria of universities, particularly elite law schools, is likely to favour students from public school over State school backgrounds because of the bump in performance public schools give, some of which (about two A-level grades worth across three subjects) is *not* reflected in their future performance at universities. In other words, University admission is not geared towards those with the greatest aptitude for undergraduate education but to those with the highest grades at the end of their schooling. Given the concentration of elite law schools at the very upper end of A-level grades, this is likely to have a very significant effect on who succeeds in gaining entry to the better law schools and, therefore, to the best (or at least the most remunerative and highest status) more jobs. It also diminishes the quality of those entering the profession. Progress towards contextual admission, however, is of course controversial and slow.

That is not to deny that there are other causes for concern (there is evidence that state schools discourage students from attending the more elite universities and, in part but in part only, poorer performance diminishes the quality of some students). Many issues are, therefore, associated with much larger social problems and educational policies but University admission and law firm/Chambers admission is more within the purview of professional influence and regulators might like to consider that more directly.

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