By e-mail
Legal Education and Training Review (LETR)
letrbox@letr.org.uk

MACFARLANES

22 October 2012

Our ref SET

Dear Sirs

Legal Education and Training Review (LETR)
Response to Discussion Paper 02/2012 - Key Issues (II):
Developing the Detail

We are pleased to respond to LETR Discussion Paper 02/2012 Key Issues II: Developing the Detail ("the paper"). Please read our response together with our response to Discussion Paper 01/2012 (see our letter of 10 May 2012).

Macfarlanes LLP is an English law practice based in the City of London. We have approximately 500 members of staff, of which 300 are legal staff and 75 are partners. We take on between 25 and 30 trainee solicitors each year. We therefore have a significant interest in the future of legal education and training.

City of London Law Society

This firm is a member of the City of London Law Society. We have been involved in discussions within the CLLS about the LETR generally and the paper specifically. We have been involved in the preparation of the CLLS's response to the paper and agree with the points they make.

Our own submissions

We believe that the work being undertaken in the LETR is of fundamental importance. For this reason, we feel that it is appropriate to submit our own response to the paper. Our comments are set out below and should be read in conjunction with the CLLS's response.

We have generally limited our comments to the solicitor profession but many of the points we make would also apply to the Bar.

General

We respond below to the specific questions posed in the paper.

As a general point we should like to express our concern that the paper raises a number of very significant issues for which, in our view, there is currently insufficient evidence to enable views to be taken. Any changes to the regulation of legal education and training must be proportionate and should not impose on law firms and lawyers compliance obligations which are overly burdensome or costly.

Macfarlanes LLP is a limited liability partnership registered in England with number OC334406. It is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business are at 20 Cursitor Street, London EC4A 1LT.

The word 'partner' is used to refer to a member of Macfarlanes LLP. A list of members is open for inspection at the above address.

Without meaningful evidence of current failings in the quality of service delivery, proportionality cannot be properly assessed.

Further, we would be concerned if the compliance obligations imposed by the regulators of education and training in the English legal sector were significantly more onerous than or otherwise vastly different from those of legal sectors in other countries or of those relevant to other English professional services sectors.

Question 1: in the light of limited evidence received so far we would welcome further input as regards the preferred scope of QLD Foundation subjects, and/or views on alternative formulations of principles or outcomes for the QLD/GDL (We would be grateful if respondents who feel they have already addressed this issue in response to Discussion Paper 01/2012 simply refer us to their previous answer).

We refer to our response to Discussion Paper 01/2012 in our letter of 10 May 2012 in relation to the scope of the QLD foundation topics ("Foundations").

We would point out that we believe that a one year conversion course, like the GDL, should be retained. A significant number of non-law graduates join the legal profession and bring to it diverse ranges of skills and experiences. We accept that this will place significant constraints on extending the Foundations. However, we agree that a good starting point is to identify what a rounded graduate level education in law should leave students with knowledge of (paragraph 42). In our view the list of topics set out in paragraph 42 does provide a good base for discussion, along with the law of trusts and some work on legal research and drafting.

Question 2: Do you see merit in developing an approach to initial education and training akin to the Institute of Chartered Accountants of England and Wales? What would you see as the risks and benefits of such a system?

We assume that the approach upon which views are being invited would entail examining individuals on the Foundation subjects presently covered in the QLD/GDL and the subjects covered in the LPC whilst they worked in some trainee capacity in a law firm or other legal practice environment. This would require a very different approach from law firms. First, firms would need to find tasks which non-law graduate trainees who had no legal knowledge at all could perform. We believe that accountancy firms are better able to employ trainees on audit tasks which do not require prior accountancy skills. Secondly, law firms would need to operate their businesses in a way that enabled them to send trainees out for study courses but still service clients' needs. In our view, it would be difficult for firms to cope with the disruption to their business.

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?

We believe that it is right for the LPC to have a common core so that there is a minimum level of general legal knowledge across the solicitor profession. The current core subjects appear to be working well and we do not think they need to be changed. In our experience, many LPC students who succeed in private practice have not made decisions about the areas in which they wish to work (beyond perhaps whether they want to work in a commercial/City law firm or in a high street practice) before they commence the LPC. Indeed, many do not decide which specialism they want to follow until well into their two year training contract.

We note that some respondents favour greater integration of the LPC with the training contract. It is already open to firms to disengage the LPC electives. We think that the reason that few firms have done this is the practical difficulty of releasing trainees from fee-earning work to study.

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?

No comment.

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?

No comment.

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?

In common with many other City law firms, we have worked with LPC providers to ensure that the LPC offered to our students is transaction based and emulates the "real world" of work. Flexibility in the regulations for the provision of the LPC has allowed us to do this.

We can see the theoretical advantages of the type of integration described in paragraphs 61 and 62. We think that what is suggested is very similar to what is already permitted by the disengagement of the LPC electives. However, we note that law firms have not been quick to move to this model and we believe that this is due to the practical difficulties of releasing trainees from their fee-earning activities for significant periods during the training contract. There would be a risk that some firms would put pressure on trainees to forgo training.

We are in favour of such integration being allowed but do not believe that it should be compulsory.

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.

We are not convinced that evidence shows that systems of education and training based upon on-the-job and off-the-job learning in parallel are more effective than those (such as for solicitors and barristers) that involve these components in sequence.

We agree that the LETR should look at more evidence as regards the quality of education and training in the other legal professions but any comparison will need to take account of differences in the competences required of members of the respective professions.

On-the-job learning is absolutely crucial to the development of individuals in the legal service sector. We stress that any new regulation of legal education and training must retain this as a key feature, and recognise its value.

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)?

We believe that the qualification point for unsupervised practice of reserved activities should be set at not less than graduate-equivalence (plus LPC). Some of the reserved activities may involve simple and straightforward tasks but sometimes the wider context gives rise to more complex issues which require

deeper analysis. Clients are entitled to expect their legal advisers to give them appropriate advice requiring sufficient intellect and depth of knowledge to spot and resolve issues. Assuming that supervisors are performing their duties properly, the more difficult points should not be missed.

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?

See response to Question 10.

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?

The fact that current standards for paralegal qualifications are "fragmented and complex" is due to the fact that the term "paralegal" describes many different roles. This variety provides access to the sector at a number of levels, which is good for individual and provides a flexible resource for law firms.

It would be important that any regulation of the education and training of paralegals was neither costly nor cumbersome and allowed the diversity of the role to continue. Subject to these caveats, we would have no problem with the development of a more structured framework for qualification as a "paralegal" for those who wished to obtain such a qualification. However, we do not believe that firms should be constrained to use, for paralegal tasks, only individuals who obtained such a qualification.

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?

We believe that ethics and values should be covered in the Joint Announcement as described in either of paragraphs (b) or (c) of this question. We think that that case for adding the study of ethics and values to the QLD/GDL is of equal (but no more) importance as the addition of other topics previously suggested for the Foundations. In our view ethics and values should be addressed in the education and training of all persons authorised under the LSA.

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?

It is important that any changes in the regulation of legal education and training are made in the proper exercise of the regulators' duties under the Legal Services Act 2007 (especially section 1).

Question 13: we would welcome any observations you might wish to make as regards our summary/evaluation of the key issues (as laid out in paras. 127-31 of the Paper)

In considering the issues identified in paragraph 127, we believe that it is crucial that account be taken of (i) the high regard in which the current system is held (paragraph 125) and (ii) the acknowledgement in the paper (paragraph 93) that "there is a massive hole in the evidence base to allow a reasoned assessment about current levels of quality in the sector".

We agree that both over-supply and the cost of training are primarily matters for the market, and are not matters for the regulator.

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. [If you feel that you have already responded adequately to this question in your response to Discussion Paper 01/2012, please feel free simply to cross-refer]

Paragraph 134 refers to gaps in core knowledge and commercial skills and suggests that the system as a whole is not fit for its purposes. We are concerned that this suggestion is made on the basis of evidence which paragraph 93 describes as not being adequate to allow a "reasoned assessment" of quality.

We believe that standards in all the areas described in paragraph 133 in the larger city and commercial firms are generally high and doubt that there are many significant gaps.

We believe that the list in paragraph 133 is broadly an accurate description of the key competences/attributes required of lawyers. It seems to us that the question is which of these competences/attributes should fall within the regulation of legal education and training. We would suggest that the skills in the final three bullets are matters for the market to police and not for the regulators.

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.

We can see the logic of outcomes focused regulation, as the aim of education and training is to produce someone able to perform rather than simply someone who has had a learning experience. It would be crucial, however, that the outcomes were sufficiently clear that individuals could be properly judged against them and also sufficiently flexible to apply to a diverse range of legal service providers.

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?

We assume that this question relates to the pre-work academic stages of a solicitor's education (i.e. the QLD/GDL and the LPC) and to the training contract. We would not object to the development of detailed outcomes at any of these stages provided the outcomes were clear and flexible (as we describe in our answer to Question 15).

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?

The issue raised by this question is (we assume) whether there should be one body that awards legal qualifications and another that supervises the standards of behaviour and service of qualified individuals.

We are not persuaded that the points raised in paragraph 136 support the conclusion that these two functions need to be performed by separate bodies. Our key concern is that, whatever structure is used, existing standards are maintained.

Our general response to the points made in paragraph 136 is that we would support a system which awarded different levels of qualification within the legal sector and allowed individuals to upgrade from one to another. This would, presumably, entail those with a lower qualification being awarded exemptions or credits towards a higher qualification. However, it would be absolutely crucial that any credit or exemption system maintained existing standards. There is a risk, we fear, that "clarifying the core common competences" (sub paragraph (b)) and integrating paralegal and legal training (paragraph (c)) would tend to lower standards.

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.

We welcome flexibility between different branches of the legal sector. As already made clear, it is our view that any increase in career flexibility must not diminish existing standards and the reputation of the solicitor profession.

We would encourage development of existing pathways (such as CILEX) as well as consideration of new ones.

Move from "input" to "output" regulation

We are concerned that the issues mentioned in paragraphs 150 to 152 are mentioned in this final discussion paper but remain to be explored further. We do not feel that the paper contains information sufficient for us to take a considered view on these issues. What we can say is that any new regulatory regime must be proportionate, and neither unduly burdensome nor costly. As the paper acknowledges that there is little evidence of failings in the quality in the legal sector, we do not see that radical change in the regulatory regime is required.

Please contact Stephanie Tidball (Head of Education and Training) at this firm if you would like to discuss any of the points made in this letter. We would be happy for this response to the paper to be published anonymously. We shall be pleased to continue to engage with the LETR process.

Yours faithfully

Macfarlanes LLP

Macfarlanes LLP