Legal Education and Training Review

Literature Review

2013

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Literature Review Summary

Chapter 1: Framework and methods

1. This Summary condenses the review of the legal educational literature conducted by the Legal Education & Training Review group, October 2011 – April 2013. The review is based upon literature published during the period between 1971 and April 2013. The main purpose of the literature review was to assist the Research Group in analyzing the complex relationship between legal education and regulation in England and Wales today; with particular attention given to the analysis of regulatory attitudes and understandings in standard reports and secondary texts. There is a substantial comparative element to this literature review, and as such it is extended beyond the existing literature relating to legal education and training and England and Wales, synthesising literature from other jurisdictions and professions in order to reframe existing debates and create an original analytical framework for discussion.

2. Nine thematic areas were identified in the project remit as being important to fulfilling the stated objective of the review. They are as follows:
    1. The role of legal education and training and its relationship to maintaining professional standards and regulation in the sector
    2. The role of formal education and training requirements in working in concert with other regulatory tools to deliver conduct of business regulatory objectives
    3. Educational standards for entry to the regulated profession
    4. The requirements for continuing education, accreditation and quality assurance for regulated individuals and entities
    5. The requirements placed on approved providers of legal education and training;
    6. Existing equality and diversity issues
    7. Comparative analysis of international systems and other relevant sectors and professions
    8. Possible impacts of the proposed 2012/2013 reforms in the higher education sector on legal education and training and in particular the increases in undergraduate tuition fees
    9. Impact of the Legal Services Act 2007 on education, training and practice models.

3. The content and structure of the literature review reflects the nature of the field under study. While chapters are broadly based on the above structure, the overlaps, contingencies and dependencies created by the interplay of multiple regulators, regulatory codes and different forms of legal service employment, as well as the different forms of legal education, have required a degree of re-structuring within, and inter-linking between, chapters.

4. The final topic in the list above has not been addressed in detail here. The trends in that topic will begin to emerge more clearly through the online professional journals as new model enterprises are launched; and we are aware of a number of educational institutions and entities that are making preparations to alter legal educational provision in response to the Act and who are preparing to document the changes. The literature, however, is still relatively sparse. Where appropriate we have discussed aspects of the topic in the Discussion and Briefing Papers and the LETR Report itself.

Chapter 2: Legal education, professional standards and regulation

5. This chapter is an overview of developments to date, using the key reports on legal education and training, among them Ormrod (1971), Benson (1979), Marre (1988), the ACLEC Reports (1996), the Training Framework Review Reports (2003), and the Wood Report (2008)) to provide a chronological framework for understanding developments in the relationship between legal education, professional standards and regulation. It analyzes the reports' substantive content, and identifies educational and regulatory issues that were left unaddressed by them.

6. The chapter highlights the persistent lack of engagement with general educational theory in legal education reform and, based on the literature, argues for the need to generate legal educational theory within the discipline. It argues that throughout most of the period under consideration, a lack of engagement with the debates that sought to evaluate critically the concept of the curriculum in context of the social, political, cultural and economic forces that influence its development has been to the detriment of policy-making within legal education.

7. The persistence of the division between the academic and vocational stages of legal education is explored in the context of wider epistemic uncertainty about the purposes of legal education. The literature on educational standards, professional legal standards and legal educational standards is analyzed. Whilst the term 'legal standard' generally refers to a quality standard, 'educational standard' generally denotes a threshold of learning attainment. The manner in which standards are defined is primarily context-driven, often according to stage of education. In the early reports it is not clear from where such standards are derived.

8.   Historically, standards have occupied a contested position in pedagogical literature, as emblematic of a particular political perspective on the proper nature of the educational process. The literature on legal education has not sufficiently engaged with these debates on the whole, and as such the standards established have tended to be those of the profession or of the academy, and only in the last few decades have they been developed with reference to wider political, social and policy debates. Little attention has been paid to establishing a rigorous definition of standards; and further work both at research and pilot and implementational level is required if the provisions of the Legal Services Act 2007 are to be met successfully.

9.   The lack of a consensus definition of legal professionalism, and attendant lack of awareness of critical debates in other jurisdictions and professions has constrained the development of a coherent body of values and attitudes in legal education that can be subscribed to by key sectors in the profession. This has in turn impacted negatively on the ability of the profession to develop a coherent body of legal educational standards.

10. The literature points to factors that have made it difficult for both the academy and the profession to design and sustain a coherent network of pathways into the legal profession. These factors include the increasing pressures upon the resource-base of HE, the changing nature of academic role and discourse, an ever-shifting political framework, a proliferation of regulators and the increasingly diverse and fragmented nature of legal employment.

Chapter 3: Legal education and conduct of business requirements

11. This chapter traces the rise to prominence of Conduct of Business Regulation (COBR) as a regulatory paradigm and distinguishes it from other extant regulatory practices. COBR has been described both as the rules and guidelines that govern client/customer relations and the voluntary self-regulatory codes of conduct developed by businesses. The primary justification for this approach is its potential to limit the risks associated with information asymmetries that often accompany the delivery of professional services. There is also evidence, however, that a 'pure' COBR approach may struggle to deliver regulatory outcomes. The chapter seeks to examine the implications of the application of COBR to the delivery of legal services for the regulation of legal education and training.

12. It is noted in the literature on COBR that a move to this form of regulation necessarily implies that businesses become increasingly responsible for applying the principles and achieving the outcomes of COBR across the workforce. This shift will result in the creation of new training needs for those in compliance roles, as well as at the vocational stage and throughout the initial and continuing professional development curricula.

13. The chapter's discussion links trends in financial services regulation with those of legal services regulation: the FSA, LSB, SRA and IPS have all opted to move to a model of Outcomes Focussed Regulation (OFR) which is risk-focussed, differentiates between high-level principles, rules and guidance, and is prescriptive as to the outcome to be achieved, rather than the processes by which this achievement is managed. OFR may be understood as a form of COBR that encourages flexibility and innovation on the part of businesses and providers of legal education alike.

14. The shift in focus from prescriptive, rules-based regulation to regulation that is outcomes-focused may help to foster a learning environment that encourages providers of legal education to reflect on their role as educators and on their own developing educational professionalism in the widest sense, resulting in benefits for educators and students alike. However, with greater freedom comes the potential for greater risk, as increased reliance is placed on the internal control systems of the organisations supervised by regulators.

15. For regulators this creates a dilemma between what the literature defines as the solutions of hierarchical intervention (top-down command and control) and the solutions of design (where the field of practice is designed by regulators in order to mitigate the risk of misconduct); and between the controls of marketplace (largely competition) and the practices of community (the nurturing of social norms). There is, however, a body of regulatory literature from other domains (urban planning and traffic management, for instance) that points out the ethical disadvantages inherent in both hierarchy and design, and advocates different approaches to both risk and regulation.

16. Some of the literature on the use of OFR as COBR points to the requirement for the creation of a new relationship between providers of legal education and regulators. The move towards shared outcomes across the sector, combined with economic pressure to lower costs for students and entrants to the profession, may encourage providers to collaborate and develop shared learning spaces, or communities of practice, across both providers and stages. As such the regulatory role may shift from that of a body, which

tacitly encourages market competition in the provision of legal education, to one that encourages collaboration and cohesion between education providers across the sector.

Chapter 4: Education standards and entry to formal legal education

17. From a regulatory point of view admissions policies have been viewed as crucial in mediating access to the profession. However, there are a number of complex forces that prevent regulators from exercising sole control over these gateways. The key issue for regulators is the design of entry processes that is fair, promotes equality and diversity, and ensures candidate quality in a highly competitive market. Controlling the number of entrants to the profession has historically been a preoccupation of the profession more than the regulators: changes to the legal services market brought about by deregulation and the Legal Services Act 2007 will thwart attempts to control numbers alone. Gatekeeping by regulation at every stage of legal education requires general revision.

18. Given the context of the LSA 2007 and the changes being brought about by the Act, some of the literature argues that the JASB Statement will require re-negotiation, in alignment with recent changes to professional standards, as these are developing within the profession and within professional legal education. Given an increasing emphasis placed on critical reasoning skills by entry tests such as the LNAT and BCAT, it may be that greater emphasis should be placed within the Statement on the acquisition of critical reasoning skills.

19. There is little literature on the function and effect of standardized admissions tests in England and Wales. There is, however, a sophisticated body of critical literature in the US and elsewhere on the effects of such tests for admissions issues such as gender, BME entry, socioeconomic effects, and the like. Further research on the effect of standardised admissions tests should be conducted; and the tests themselves should be further developed. There are alternatives to the LNAT that should be explored by regulators, education providers and educational researchers with a view to creating a test that is fit for purpose as a predictor of lawyer performance. The work of the BSB on aspects of the BCAT is instructive in this regard.

20. The literature points to the principles of fair admissions put forward in the Schwartz Report (2004) as the benchmark standard for admissions processes. These principles state that admissions processes should: i) be transparent; ii) enable institutions to select students who are able to complete the course as judged by their achievements and potential; iii) strive to use assessment methods that are reliable and valid; iv) seek to minimise barriers for applicants; and v) be professional in every respect and underpinned by appropriate institutional structures and processes. Widening participation strategies must be matched by a commitment to ensure retention.

Chapter 5: Continuing Professional Development (CPD)

21. It is possible to describe CPD schemes, and regulatory approaches to CPD schemes in a number of different ways. For example as
    - A 'benefits' model, focussing on personal development
    - A 'sanctions' model, focussing on compliance
    - An 'inputs' model, where regulation/recording is by number of hours undertaken
    - An 'outputs' model, where regulation or focus is on what has been learned.

22. There are three models outlined by Friedman and Woodhead (2008) that emphasize or report different aspects of a cycle of identification of weakness/reflection, planning for improvement, learning activity and application of what has been learned:
    - A reflective practitioner approach, with 'A strong emphasis on the reflection and planning phases of the cycle, with less accuracy measuring at the outcome phase';
    - A more cyclical planning for professional development value approach, where outputs are tied to competence frameworks and there is '[e]mphasis on planning with various levels at reflection and outcomes phases, generally measuring action phase by input'; or
    - An outputs-based system with a '[f]ocus on measurement at the outcome phase of the cycle, minimal or no measurement of action, and varying degrees of measurement at the planning and reflection phases'.

23. Other variables include whether the scheme is voluntary or mandatory; the effect of non-compliance; whether providers are accredited by the regulator or not; whether there is any mandatory content (including mandatory content related to ethics and regulation); how reporting is undertaken (and what is reported); and whether practitioners should, or should not, be allowed to reduce their level of participation pro rata. A further issue for many professions is cross-accreditation of CPD activity, where carried out abroad. Overarching CPD schemes for a number of related professions have been established to promote consistency, ease of regulation and cross-accreditation.

24. CPD schemes for lawyers examined in the chapter (including schemes in Scotland, Northern Ireland and the Republic of Ireland, Europe, North America and Australasia) are consistently characterizable as inputs models, with variations as to number of hours, mandatory content, allowable content (e.g. whether private study is or is not included), carry over and pro-rata proportions based upon work patterns. This is in contrast to a trend seen in some of the cross-disciplinary studies, for professions as a group to be moving towards more consciously out-put focussed models which, in some cases, measure only outputs and include recognition of experiential learning in the workplace.

25. Such a trend is visible, for example, in the current proposals of the General Medical Council and in developments in accountancy CPD, and is already manifested in teaching, nursing and midwifery, for the Chartered Institute of Personnel and Development and in the Royal Institution of British Architects CPD schemes in different ways. Other professions (e.g. the Construction Industry Council) adopt an approach demonstrating the cycle described above whilst others (e.g. dentistry) continue to emphasise recording of inputs more explicitly.

26. Questions arising from the literature for debate include:

- Who owns CPD: the individual, the employer, the regulator?
- What is it for: inputs or outputs?
- Should there be mandatory content, pro-rating for part-timers and returners, different requirements for juniors and seniors? What activities should "count" for CPD purposes?
- Where do higher degrees fit in? Where does experiential learning fit in?
- Should regulators or professional bodies accredit providers, or not?
- How should CPD activity carried out abroad be recognised?
- Is there scope for a sector-wide scheme or alignment of schemes?
- What equality and diversity issues arise and how should they be managed?

Chapter 6: Requirements made of approved providers of legal education and training

27. This chapter describes the requirements currently made of approved providers of legal education and training. It also provides a comparative analysis of the requirements made of such providers in England and Wales with three other jurisdictions (Scotland, USA and Australia). Through exploring the experience of other professions such as medicine and accountancy, building on the valuable work already carried out by the Legal Services Board, emergent patterns in the focus, nature and assessment of these requirements become visible.

28. The debates surrounding the reform of the Scottish curriculum are instructive in helping to further an understanding of the key issues and tensions involved in setting requirements for providers of legal education and training.

29. Across the range of jurisdictions and disciplines analyzed a clear convergence is evident in the preferred form and nature of regulation; a single regulator model that focuses on monitoring outcomes.

30. In addition, there is a growing consensus on the importance of technology as a platform for administration of programmes, management of learning resources, providing access to legal education, and enabling communication and deeper learning of many aspects of knowledge, skills and values.

Chapter 7: Current equality, diversity and social mobility issues

31. This chapter sets out the key issues facing the legal profession in terms of equality, diversity and social mobility. It also serves to highlight the challenges facing the review, in particular: (i) in recommending changes to the regulation of entry to the profession; (ii) in avoiding introducing or perpetuating arbitrary distinctions and hierarchies; and (iii) in addressing discrimination by the market, within a system that increasingly looks to the market when setting regulatory outcomes or standards.

32. Undoubted progress has been made over the last twenty to thirty years in increasing equality and diversity in legal education and training. However this success remains qualified. There is no single, identifiable, barrier to access to legal education: multiple factors are implicated. The complex and multi-faceted nature of the problem makes the provision of solutions all the more challenging. Key barriers to wider access remain the training contract and pupillage. Over-provision of capacity at LPC and BPTC level indicate that these do not present a significant numerical barrier, however they may act as a limited socio-economic filter based on cost, attainment and ascriptive criteria.

33. The gap between the percentage ethnic population in undergraduate legal education and BME participation rates in practice as solicitors and barristers is large. Whilst the traditional legal professions may be performing well in terms of gender and ethnicity relative to broad population trends, they are still under-recruiting relative to ethnic minority participation in earlier stages of legal education. There may be a case for taking the latter figures more into account in assessing the performance of the sector.

34. Whilst the most successful solution in the short term to improving social mobility in the legal profession might be to improve the participation of currently under-represented groups at elite universities, such gains are likely to remain limited without greater adjustment of ascriptive criteria at the recruitment stage.

35. Global trends obscure the extent to which the legal services sector remains segmented in terms of gender and ethnicity. Examples include the tendency for ethnic minority solicitors to work in smaller high street and legal aid firms, or as sole practitioners, the male bias of the commercial bar, and the feminisation of the legal executives profession. Such segmentation matters, if only to the extent that it may limit opportunities to participate in the power and authority networks and structures that shape the future of the sector.

36. The existing research base has significant limitations. There has also been little consideration in the literature of the role of regulation in shaping equality, diversity and social mobility practices in legal education and training. There is also a significant lack of longitudinal, quantitative data, particularly on equality characteristics beyond gender and race/ethnicity, and generally in relation to the smaller approved regulators. Further research in these areas should be encouraged, and supported where possible.

Chapter 8: Key regulatory issues: International comparisons of professions and jurisdictions

37. This chapter analyzes some key regulatory issues in the teaching and learning of legal education, and compares legal educational practices and regulation in England and Wales to models in other jurisdictions and professions.

Legal educational heuristics and regulations – quality assurance in Scotland

38. Legal educational heuristics at undergraduate and postgraduate vocational levels are affected by quality assurance (QA) processes. Scotland has adopted a quality enhancement regime aimed less at evaluation of quality and more at the enhancement of it – Enhancement-Led Institutional Review (ELIR). Student experiences are much more to the fore in this process, as is the concept of partnership – not just between stakeholders in an institution (students, academics, administration), but between national bodies (National Union of Students Scotland, Scottish Funding Council, the Scottish Government and Universities Scotland for instance) and between institutions themselves. The partnership approach extends to the review process itself, and the means by which standards are maintained. The literature points to a number of useful approaches in this QA process that might be adopted by legal regulators in England and Wales.

Problem-based learning

39. Some approaches to teaching and learning focus more on the outcomes of study, and less on the area of substantive knowledge that students are required to acquire. One example of this is problem-based learning in the domain of medical education. Problem-based learning (PBL) is generally taken as being a significant force for good in medical education, but this has not stopped the flow of research literature in medical education analysing why, under what conditions and to what extent it is effective in the education of doctors, nurses, dentists and others. While a number of the extensive studies on PBL are contradictory, what the great majority of them agree upon is that PBL is a sufficiently powerful heuristic to have changed the way that medical teachers now teach problem-identification and problem-solving. The method has become popular in the health sciences, and not least with regulators. The literature demonstrates that it has many other benefits that traditional approaches to health education do not offer – for example students enjoy problem-identification and problem-solving, and engage more readily in active learning. They make greater use of background reading, have more positive attitudes to the instructional milieu, and they take greater personal responsibility for their work.

40. It is important for medical regulators and accreditors to have access to a body of evidence such as this that may persuade new medical schools to commit to the PBL approach who otherwise might be reluctant to enter the field. It is also evidence of effectiveness that gives reassurance to regulators and to the representative bodies of professionals, eg the British Medical Association. The literature also acts as a filter to new approaches to PBL by medical schools.

Ethics and educational regulatory structures: Australia's Learning and Teaching Academic Standards project

41. In England and Wales there is a complex debate about the place of ethics in undergraduate studies. The debate is of interest to regulators if, as some of the literature suggests, ethics ought to be the subject of study and action in the

undergraduate degree. Similar debates have taken place in Australia; and a recent initiative has attempted to map out ways to implementation. Developed with a range of stakeholders, the Learning and Teaching Academic Standards (LTAS) project in Law has developed a set of what it terms six Threshold Learning Outcomes (TLOs) for the LLB. TLO 2 is the statement on 'Ethics and professional responsibility', and its four points show a sophisticated view of the content of such an outcome, and indicators as to how the general outcome may be achieved with undergraduates on law programmes.

Pro bono, ethics and legal education

42. Few would dispute that ethical awareness is essential in professional education and training, both at primary stages such as the BPTC and LPC, and in CPD. How regulators might ensure that such education and training takes place and how they might ensure its quality is a more complex issue. One method is the development of pro bono activities in law schools. The development of pro bono as an institutionalized practice is examined extensively in the US literature. Some authors make the case for creating a culture where pro bono is more accepted as part of the cultural *habitus* of lawyers' working environment, and argue for much more pro bono at law schools, noting that there are obvious educational benefits to pro bono service, particularly in the development of legal skills and client-centred values. Literature, particularly in the US, would seem to suggest that regulators in the UK have a part to play in this, for instance becoming more involved in the creation of a hub for the dissemination of information, commissioning of research such as meta-reviews, collation of research results, dissemination of briefing papers and acting as an intermediary between policy-makers, the profession and educators.

Legal education, regulation and democracy

43. In a number of jurisdictions and professions the relationship of regulation, education and democracy has come under scrutiny. The reasons for this are many, and include the realization that professionalism itself, as a construct, requires renewal. In one jurisdiction, namely Scotland, the literature describes attempts by the regulator to deal with the problem of professionalism across the whole range of legal education, from undergraduate to qualification and CPD. Following extensive consultation and redrafting of learning outcomes for undergraduate to CPD stages of legal education, a set of professionalism outcomes was drafted which goes beyond the social contractual nature of professionalism to a moral understanding of the role of justice in society. It thus goes beyond the network of values normally associated with lawyering, and which find its statement in lists of values in nearly all common law jurisdictions. The re-focus and implementation of professionalism in Scotland, as the literature makes clear, is an attempt to find a common ground to what is otherwise incommensurable in the values of democratic commitment, and could therefore be of value to legal educational regulators in England & Wales.

Technology and legal education

44. Technology, particularly internetworked technologies, presents regulation with unique opportunities and problems that require separate analysis. The recent literature on technology in law schools reveals how curriculum structure encourages or constrains innovation. It also reveals the integration of technology with information dissemination processes. It shows, however, that there is a need to develop technologies that are specifically developed for the requirements of the discipline of law and its programmes of study, where learners are given more control over their learning environments, and where technology is used to enhance specific educational approaches.

45. Some of the literature points out that regulators should be aware of the powerful indirect effect that environments such as Learning Management Systems have upon the systemic context of learning. Regulators are encouraged to facilitate initiatives such as Open Educational Resources (OER), and Open Educational Practices (OEP), and learning technologies identified in reputable horizon reports. They may also learn from the regulatory debates of the last decade or so that surround the ABA's attempts to regulate distance-learning programmes of study in US law schools.

46. Other regulators have recognized the importance of integrated approaches to education and technology. Recently the General Medical Council assumed statutory responsibility for all stages of medical education. Part of its educational remit is to ensure that the standards it sets provide a framework for excellence. *Tomorrow's Doctors* (2009) currently sets out the standards for use of technology. There, it is interesting to observe that discussion of technology is not an issue separated out from other educational issues and topics but an integral part of them.

Change processes in legal education

47. Change processes are affected by many factors, cultural, economic, regulatory, professional work routines, and by fundamental concepts of professionalism and knowledge. The literature on change in Higher Education points to a number of key issues that regulators will face in implementing change. This includes 'bi-lingualism', in which apparently equal and multiple sets of cultures and attitudes compete with each other for dominance. An example is the dual system of *staatsexamen* and modified LLB in Germany; another, as the literature points out, is the direction of reform to Japan's legal educational system over the last decade. Both examples are useful learning points for regulators.

48. Another more positive form of change involves facilitation of innovation. Studies point out that a key element in institutional change is the extent to which institutional culture shapes an institution's change processes or strategies. If change is to be brought about successfully on a regulatory topic it is probably the case that a regulator would need to engage with institutions on the level of cultural dialogue as well as regulatory. Examples of such change processes are cited and discussed.

Themes arising from debates

49. There are a number of themes that arise from the debates in this chapter. What the literature on the two examples above on mandatory ethics and the development of Threshold Learning Outcomes (TLOs) in Australia point to is the necessity for ongoing and genuine collaboration between providers and regulators. The debates on professionalism outlined above go to the heart of regulatory activity and in many respects shape the legal curriculum and are shaped by them. This has become more important in a globalized legal educational market, where jurisdictional boundaries and practices are more porous and more open to cultural and economic pressure from other professions and other jurisdictions. The re-integration of a sense of professionalism within the fundamental values of democratic responsibility is an emerging theme in at least one jurisdiction.

50. Another theme discussed above with relation to technology has been the ways in which the technologies used by lawyers can be used by law students at any stage of legal education to enhance their learning. Another is the opportunities that exist to harness

the use of technology as consumer and leisure practices – in casual reading, games, virtual environments, social networking, etc. – and the roles that regulators can play in encouraging innovation, sustaining good practice and disseminating it throughout the field. The same is true of curriculum developments. In the adoption of PBL, for example, medical regulators were involved not only in oversight of the changed curriculum processes, but often in learning about and disseminating good practice with medical schools, as well as ensuring that good practice was developed and sustained.

Chapter 9: Recent HE reforms and their impact on legal education and training

From grant funding to loan systems: HE financial provision and widening participation

50. The shift of HE funding in England from a system of grant funding to loan systems has accelerated and intensified in the last five years, with the proposals of the Browne Report and the Coalition Government White Paper. The effects of the withdrawal of the state from funding large sectors of HE are sharply debated in the recent literature. Some have argued that the proposals to withdraw public investment in this way go too far, in contrast to the funding regimes of England's HE competitors and partners in Europe, US and Asia. Others point out that the reforms of the White Paper increase the risks of failure and decline faced by institutions that will result, for those institutions at least, in increased regulatory burdens. The conceptual bases have been critiqued in depth, and particularly the concept of universities as engines of potential wealth, rather than as sites of education and personal and intellectual growth.

51. The longer term costings of the Coalition Government have been challenged, with one paper outlining a potential increased cost base of over £1B per year; while a university think-tank estimates the combined costs of increasing HE fees as being 6½ times as great as the potential Treasury expenditure savings. The Coalition Government's fiscal plans have also been criticised as likely to engender complexity and uncertainty, and thus deter students from poorer backgrounds. The effect of the reforms in widening participation in HE, one of the Government's aims, is strongly disputed. While some commentators argue that other educational factors such as poor achievement in secondary education matter more than barriers at the HE stage, and that the poorest students may be better off under the new system than the previous one, others point to the problems created by the new fee system in increasing debt aversion amongst poor students. For those commentators, debt aversion will deter those students to whom widening participation policies are constructed in the first place. It is too early to conclude from application figures that the reforms have discouraged students in general, and disadvantaged students in particular, from applying to university. Nevertheless it is clear that mature application rates, particularly for part-time students, in age groups 24-29 and 30-39 have declined significantly. HEFCE has called for a 'deeper understanding of the risks of large and swift declines in part-time numbers'.

Devolutionary alternatives

52. Political devolution has brought about differentiation in HE policies in Wales and particularly Scotland. The devolved countries tend to emphasize lifelong learning, coherent pathways into education, and the role of universities in serving social as well as economic aims. Their routes to funding universities are much less marketized than that of England, but they still face significant problems in funding Higher Education.

HE reforms and institutional restructuring

53. It is likely that as a result of the reforms, some institutions will become more fragile. Institutional restructuring will be probably increased in the form of takeovers, mergers, and the like. Some commentators have observed that the climate of anxiety and uncertainty may lead institutions to become less innovative and entrepreneurial than

they otherwise might have been. Here, as with much of the research on the new reforms in England, the evidence is slight.

HE reforms and legal education

54. There is little literature on how this affects legal education in particular. It has been argued that since Law is a subject that offers relatively high career rewards, the large rise in fees will have little detrimental effect on entry figures. Others point out that the reforms will increase pressure on many degree programmes to vocationalize their content and method – for instance introducing placements, professionally-related modules in undergraduate curricula and the like.

Chapter one
Framework and methods

1. Stage 1 of the Legal Education and Training Review (LETR) is a comprehensive review and analysis of the research literature on the system of legal education and training in England and Wales. This includes some aspects of the academic stages of qualification, the vocational training and education stages, educational standards for entry to the regulated profession, continuing educational requirements, legal education accreditation and quality assurance for all sections of the profession as well as the requirements placed on providers of legal education and training. The review team has been requested to include comparisons with relevant international systems and other sectors and professions, and to draw on that experience where applicable.

2. In more detail, nine areas were identified for review, all broadly focused on the relationship between regulation and legal education:
   1. the role of legal education and training and its relationship to maintaining professional standards and regulation in the sector
   2. the role of formal education and training requirements in working in concert with other regulatory tools to deliver conduct of business regulatory objectives
   3. educational standards for entry to the regulated profession
   4. the requirements for continuing education, accreditation and quality assurance for regulated individuals and entities
   5. the requirements placed on approved providers of legal education and training;
   6. existing equality and diversity issues
   7. comparative analysis of international systems and other relevant sectors and professions;
   8. possible impacts of the proposed 2012/13 reforms in the higher education sector on legal education and training and in particular the increases in undergraduate tuition fees;
   9. impact of the Legal Services Act 2007 on education, training and practice models.

3. The final topic in the list above has not been addressed in detail here. The trends in that topic will begin to emerge more clearly through the online professional journals as new model enterprises are launched; and we are aware of a number of educational institutions and entities that are making preparations to alter legal educational provision in response to the Act and who are preparing to document the changes. The literature, however, is still relatively sparse. Where appropriate we have discussed aspects of the topic in the Discussion and Briefing Papers and the LETR Report itself.

4. The LETR literature review is constructed as a narrative divided into appropriate sub-topics, taking into account the parameters set out above. Chronologically, the scope of the review begins with the publication of the

Ormrod Report in 1971. Its endpoint is two months prior to the publication of the Review itself in June 2013. The following sources have been taken into account:

- all major modern reports into English and Welsh legal education up to the start of LETR, including the Marre (1988) and ACLEC (1996) Reports, and more recent work from the Training Framework Reviews conducted by the Law Society/LSRB/SRA, the Bar Standards Board, ILEX Professional Standards and other regulators.
- relevant reports commissioned by bodies other than legal regulators, eg OFT's *Competition in the Professions* (2001) and publications commissioned by the Legal Services Board.
- secondary literature including meta-analyses and critical literature on all aspects of legal education applicable to the criteria set out above, and the work of LETR in stages 2 and 3 of the review.
- international reports and literature where applicable to aspects of the review and largely, though not only, sourced from USA and Australia.
- multidisciplinary literature where appropriate to the criteria above.

5. In compiling the literature review, relevant material has been identified by conducting searches of:
   - British Education Index
   - ERIC (Education Resources Information Centre)
   - HeinOnline
   - Index to Legal Periodicals
   - LexisNexis
   - Sociology Abstracts
   - Westlaw
   - Specialist bibliographies (eg Goldman, 2008) and meta-reviews (eg Maharg & Nicol, forthcoming).
   - online resources such as regulator websites, legal repositories including The Berkeley Electronic Press (bepress), the Social Science Research Network, ISI Web of Knowledge and Google Scholar.
   - Texts that summarise aspects of the history of legal education in England and Wales and in other jurisdictions (eg Boon & Webb, 2008; Sonsteng *et al,* 2007).

6. With regard to fulfilling the remit as set out above, standard practice in literature reviews has been followed in the analysis of primary reports, key texts in the secondary literature; and of other materials, resources, and events within our timespan (Cooper, 1998; Maxwell, 2006). The literature is very considerable at points (though at other points rather sparse), and we have had to be, of necessity, highly selective. One of the criteria for selection was to underpin the composition of the LETR Report, and where appropriate we reference there the debates described in the literature review.

7. The main purpose in the literature review is to illuminate the complex relationship between legal education and regulation in England and Wales today, so as to be better able to make recommendations for the future.

Literature reviews, however, have other purposes. One of them is to re-consider the ways that we have come to understand the past and to re-evaluate that understanding. Often the assumptions of an author or the absences in a report can be as revealing as what is written in the text, for what is not discussed contributes to our understanding of what is said in many subtle ways. We shall therefore analyze regulatory attitudes, understandings and absences in this literature review, as well as the content of reports and texts.

8. Given that, we should make our own assumptions clear about the nature of the field under investigation. Legal education is regulated by a range of regulators, all quite different, all with their regulatory regimes that are historically situated and with their own political micro-climates. Multiple regulators operating multiple regulatory regimes make for a complex regulatory system. To a considerable extent we currently have what we might term 'decentred regulation' and, as Black (2002) points out, such a field is often characterized by five factors: complexity, fragmentation, interdependence, overlapping public and private interests, and ungovernability. If we examine this in more detail we can start by observing that, as we shall see, the contemporary field is complex because of the number of regulators and the number and interests of the regulatees. Regulatory cause and effect is therefore difficult to trace and problematic to analyze. It is fragmented because legal education includes at the very least undergraduate courses, formal programmed learning, open learning, distance learning, work-based learning, vocational training, traineeship, continuing professional development (CPD) and any blend of these and more. These forms of learning are different across different occupational groupings, eg solicitors, barristers, legal executives, paralegals, legal secretaries, patent lawyers, notaries and the like. One regulator may appear to be governing a particular field (eg licensed conveyancers) but the field itself is under constant review, and the edges between fields are blurred and frayed.

9. As a consequence, there are interdependences between regulatory regimes that are sometimes not visible to the regulators, or are visible but about which they can do little – an example is the complaint from solicitors that vocational programmes do little to train students for office life; or that trainees seem to know little of the principles of fundamental areas of law. With interdependence comes overlap: the felt need at the vocational stage to review basic academic education, for instance; or the regulatory overlap between regimes where there is interdependence between regulatory fields; or the overlap between the private interests of educational providers and the public interest in the quality of the education they offer. Finally these factors tend to make the field ungovernable. It is one of the paradoxes of regulation that more regulatory activity by government and regulators can tend to make a regulatory field more chaotic and more ungovernable, giving rise to the felt need for constant review and further regulatory activity that increases tension and competition between the actors and further destabilizes the field (Healy and Dugdale, 2009).

10. These issues affect the content and structure of the literature review. While the structure of the chapters identified at paragraph 2 above is fairly clear, for example, the review will require to cross-refer between chapters, and to dovetail debates from other professions and jurisdictions. It is hoped that the literature review will thus give a rich and sophisticated portrait of the key issues and actors that regulators need to consider when regulating legal education in England and Wales; and that this portrait, inevitably a historical one from the point of publication, will be of use to future commentators and scholars.

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Chapter 2
Legal education, professional standards and regulation

Introduction

1. We should perhaps preface our discussion of the place of standards and regulation by noting some general historical movements. The relationship of education, professional standards and regulation has always been present in the modern period as an uneasy triangle of concerns and stakeholders. In the nineteenth century, for instance, a Parliamentary Select Committee in 1846 warned of the current poor standards in legal education, while a Royal Commission reiterated many of the same recommendations (Boon & Webb, 2008, 83). The relationship has intensified in the modern period, however, particularly post WW2, as professional standards developed a higher profile in debates surrounding the professions generally, and as professions themselves moved from being elite and privileged structures, formed on kinship lines, to institutions whose ethos was bourgeois and at least claimed to be meritocratic (Abel, 2003, 96-7). In addition a number of social movements have contributed to this process: the bureaucratization of professions; the rise of credentialism and concomitant occupational closure; the erosion of professional autonomy and subsequent breakup of specialist practice and associated knowledge and practices; stratification and conformity to niche norms (Abel, 2003, chapter three).

2. The concept of a professional standard shifted, too, in the latter half of the twentieth century. As lawyers and their regulators reacted to the increasing interests of government and lay bodies, so their perception grew of the importance of stated standards in maintaining the aura of professionalism and the independence of a professional cadre. We shall see this movement in the key reports from 1971-2008 – the Ormrod, Benson, Marre and ACLEC Reports, and the reports commissioned by regulators thereafter – the Training Framework Review Group Reports and (slightly later) the Wood Reports.

Ormrod Report, 1971

3. The *Report of the Committee on Legal Education* is one of the key documents for English legal education in the second half of the twentieth century. It was instructed and written at a time when it was recognized that much more information about legal education was needed if the profession were to define what its future might be (Wilson 1966; Wilson & Marsh 1975, 1978, 1981). The Committee's remit was at once wide but directive, and defined by two of the three terms (the third being a catch-all term):

    1. To advance legal education in England and Wales by furthering co-operation between the different bodies now actively engaged upon legal education;
    2. To consider and make recommendations upon training for a legal professional qualification in the two branches of the legal profession, with particular reference to:
        a. The contribution which can be made by the Universities and Colleges of Further Education; and

> b. The provision of training by The Law Society and the Council of Legal Education, the co-ordination of such training, and of qualifying examinations relating thereto (Ormrod, 1971, 1)

4. From the outset the terms do not envisage that the Committee would investigate radical change to the historical directions that legal education had taken to date. 'Furthering co-operation' was as far as the Committee was to go, while the second term of remit envisages no fundamental change to the bifurcated nature of legal education and training. From the start, the Committee acknowledged the 'duality' of English legal education, noting that the profession had played 'a prominent part in the education of future professional lawyers (particularly of solicitors)' and that 'universities [had] not yet attained the dominant influence over professional legal education which their counterparts in other countries [had] enjoyed for a great many years' (and those counterparts included Scotland and Ireland). Their acceptance of this duality is evident in their own literature / historical review, eg their quotation of the words of the 1846 Select Committee on Legal Education: '"The province of the University is to teach the philosophy of the science, and to secure instruction in those branches for which it might be apprehended the more technical character of the special institution would inadequately provide"' (7).

5. The recommendations of the Committee were based upon a three-stage model of legal education: an academic stage, a professional stage (comprising 'institutional training and in-training') and continuing education or training stage (94). As the Committee observes, there was general support for such a model, though the submissions from regulators and scholarly bodies vary in what they expected to be the shape of such a model. The Committee observed that one important advantage of such a model would be that 'legal education will be in the hands of professional educationalists', whereas the profession itself could 'never be more than enlightened amateurs who can only give part-time attention to its problems' (47). The subsequent literature on legal education would contest at least one half of this assumption, and draw a distinction between professional academics and professional educationalists within universities. It was not until recently that academics were given even the most basic training in educational methods, and even now the provision of such training is left to the institution, and is not a mandatory element of professional training, as it is for schoolteachers, for example.

6. Perhaps because the Committee recognized the academy as professional in its teaching, the Committee gave only a sketchy outline of curriculum content (it suggested five '"basic core subjects"', 48) and no mandatory structures, eg core and elective curriculum. There was no indication in the Report as to how the Committee had arrived at this outline or, perhaps more significantly, who was consulted in the process, though clearly the subjects support at least to some degree the reserved legal activities.[1] The lack of information at this point is very significant. Most educational reports would examine the foundations of content choice. They would seek confirmation that the knowledge content described was valid and relevant, and had a deeper purpose in the curriculum; and that purpose would be specified,

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[1] The history of what came to be known as the reserved activities is analyzed comprehensively by Mayson (2010). He notes that they continue to be 'a fundamental pillar of the Legal Services Act', at s.12(1)(1). It should be noted that the Committee acknowledged that the aims and content of academic degrees extended well beyond the bare mention of the five core subjects.

together with the process by which the report would have collected and analyzed data. Often the knowledge content would be described in terms of aims, objectives, standards or outcomes. The Ormrod Report does not engage in this process at all. Instead, it passes over this essential stage of educational foundation work, and moves on to structure.

7. Recognising the need for communication between the various stages that it approved, the Committee advocated the setting up of an Advisory Committee on Legal Education, comprising stakeholder representatives from the Council of Legal Education, the Law Society and the Society of Public Teachers, among others. This recommendation arose out of the recognition by the Committee that 'for the purpose of training for the legal profession, academic and vocational legal education should as far as possible be integrated into a coherent whole' (94). This is the Committee's first main recommendation and it is symptomatic of two views. First it is the culmination of many statements scattered throughout the report where the Committee attempts to bring together the two halves of legal education. Second, it reveals why such a convergence should take place: 'for the purpose of training for the legal profession'. Many academics in the decades to follow would disagree with this statement and as a result distance themselves from professional legal education, to the detriment of both halves of legal education.

8. Ormrod's uncertainty about the structural roles and content should be seen in the context of the general change that Higher Education in England was undergoing at the time the Committee was reporting. The Committee was set up *post*-Robbins, and the striking new context of university study, introduced in the late sixties, is sketched out (15-16). While the Committee were well aware of the changing status of universities and the conditions under which staff and students were then studying, what they were studying and how, the Committee did little to look to the future and pursue the issue of how such conditions would change the nature of the relationship between tertiary education and professional forms of education that had subsisted throughout most of the twentieth century. Nor did it pursue in general terms the likely effects of Robbins upon the HE system and the more local effects of that upon legal education, eg in terms of access.

9. Others did sketch out some of these conditions and consequences. In Appendix F, 'Memorandum by the Society of Public teachers of Law, January 1969', SPTL cite with approval L.C.B. Gower's statement of the aims of academic education in law. These include the nature of law and its function, what the law is and application of it to new situations, legal system, general principles of the 'more basic legal subjects', and the relationship of law 'to the other social sciences and to the general framework of society' (Gower, 1967, 434; see also Gower, 1950). SPTL here make the case for legal education as more than vocational training – 'the basic legal education of the future practitioner is not the only concern of a university law faculty' (226). The Committee however did not analyze what exactly 'basic education' might be, what one might presume more advanced education might look like, who might be involved in this study and where it might take place, under what conditions of study / work balance, and at which stages in a legal career.

10. If a law degree were to be recognised as a royal road into both branches of the profession (with exceptions for mature students, graduates of other disciplines and

from institutions outwith the UK, and legal executives, for whom a two-year programme and CPE was advocated), the Committee's sharing of powers on dual recognition of such a degree were apportioned in an interesting way. Professional bodies were given the right to withdraw recognition if the law degree 'were drastically altered in such a way as seriously to reduce its value as a professional qualification' (47). The Committee advised that '[b]eyond this the professional bodies in our opinion ought not to go', and the Committee urged a process of negotiation between the academic and professional bodies, hoping that 'both sides will be able to agree on the objectives of the academic stage in the professional training scheme' (47). It is interesting that the Committee should, on the one hand, describe the profession as 'enlightened amateurs' on educational matters, yet give them an effective veto on academic curriculum design. At the same time the 'professional educationalists' (ie academics) are given no such regulatory power over the professional curriculum. In spite of the statements that both sides needed to work together, it would appear that in some respects there were boundaries put up by the Committee between the professional bodies' legal educational work and the legal educational work of academics that made it more difficult for them to do so.

11. The Committee was clear that vocational courses were as necessary as in-training (57), though once again the theoretical bases for this opinion were not made clear. It was more explicit about the structure of the vocational curriculum than it had been for the academic one, stipulating 'practical exercises in professional problems and procedures', 'additional law subjects of a practical nature', and an 'introduction to certain non-legal subjects' (61-4). The vocational course was to be 'strongly orientated towards practice' – lectures, for instance, were to be 'kept to the absolute minimum' (62). Legal aid clinics 'should be explored', and there was to be common training for barristers and solicitors (65). Paragraphs 138-149 (64-72), dealing with provision and design of vocational courses, are among the most interesting sections in the Report, where a number of crucial conclusions are not unanimous but stated explicitly to be majority only, reflecting the strength of feeling and the difficulty attending the topics. The first issue concerned whether vocational courses should be provided in institutions provided by the profession, or in 'the existing structure of higher education' (64-6). The majority of the Committee favoured the latter, with their arguments set out in 12 points. The first point acknowledged that institutional teaching should be 'administered and organized by professional educators' (66). The key issue, of course, is what is meant by course administration and course organization. How creative might a university become? Would there be a danger, in spite of the Committee's insistence on the practical nature of the vocational course, that law faculties would interpret the course in the way that was easiest for them to understand, organize, teach, and assess?

12. The Committee was perceptive in a number of points in the debate – the potential to be flexible about course content, and the ways that the Inns of Court School of Law could be brought within the university structure, for instance. The College of Law was cited as another institution that could similarly be brought within universities (it is interesting that in recent years the College has opted to take a different route, and sought degree-awarding powers for itself). In other points the Committee assumed too much about the effectiveness of current university courses – for example when they pointed out the 'satisfactory arrangements for vocational training for the medical profession' (67) as a model of how professional vocational

education might work within a university. This was at a time when the changes that would transform medical education were just beginning in the UK, precisely because such courses were seen as less than satisfactory as a preparation for life as a physician. Medical education then, as has been often described, 'included two elements – the content or what the students studied, and the examinations which were designed to assess the extent to which the students had learned the content' (Harden, Crosby and Davis, 1999, 7). This traditional, academic form of education was never really going to be an effective model for professional education, either in medicine or in law.

13. The Committee then addressed the arguments for siting vocational courses in institutions other than law schools, which were also set out neatly, in 13 points. *Inter alia* the Committee pointed to the comparative simplicity of course organization if a 'single professional school with a few branches' organized the curriculum (68). Professional bodies would, under this model, 'provide the central direction and control which will be necessary' (69). It was acknowledged that 'in the world of teaching the practitioners are amateurs', but against this it was argued that 'in the practical application of the law the practitioners are the professionals and so should be solely responsible for the content and control of the vocational courses' (69). The contradiction is hard to miss: practitioners are acknowledged to be less than competent educational professionals, but they are held 'solely responsible' for the whole curriculum. It was an issue that the Committee was insufficiently troubled about to seek a more radical solution. It is symptomatic that the educational consequences of allowing professional bodies to control an educational project without major educational design support are not addressed by the Committee – a lacuna in Ormrod and subsequent legal reports.

14. The secondary literature on the Ormrod Report is extensive, as one might expect of a key report. Arthurs (1971, 642) questioned the Committee's adherence to an evolutionary approach to legal educational change, and observed that while the profession's influence over legal education was explored, it was not resolved in the Report. For him there was in the Report 'a failure to confront the issue of professional control as a matter of principle' which prevented 'definitive statement of the role of the academic branch as a vital force within the profession' (644). He also pointed out the failure of the Report to make a 'public interest rationale for university-based professional education' (644). The argument as to efficiency, he observed, occluded the more important issue that the interests of the public and the profession would be best served by the existence in the universities of 'a vital centre of legal scholarship in which new ideas and skills and values will continuously be generated' (644). In its argument for a three-year degree Arthurs argued the Report created a 'flimsy foundation for continuing professional development' and could not contribute to a 'properly integrated educational experience' (647). He foretold accurately what was to be the oft-repeated experience of students who at the academic stage were engaged in abstract intellectual debate, and were then asked to engage at the professional stage in 'mundane, quasi-clerical work' which would lead to a 'severe loss in morale and idealism' (647, 648).

15. Arthurs' critique is persuasive because he draws parallels from medical education and from other jurisdictions to argue that the Report did not think radically about the future of legal education. He also argued, and rightly, that the Committee's

calculations of what might be needed for the future provision of lawyers should not be predicated on the then current requirements (652-3).

16. Robert Stevens also commented on Ormrod, from the point of view of US legal education, and while agreeing with Arthurs in many particulars, he went further in his scepticism of the liaison between the universities and the profession. Citing Weber, he wondered ' will the profession really be prepared to abandon the Bar exams and the system of exemptions and hand over control of the syllabus to the universities, subject only to the teaching of five core subjects?' (249).

17. Wilson, a member of the Committee, pointed out in an article on the Report that
    > [t]he Ormrod Committee had two limbs in their terms of reference. The first was to consider and make recommendations on training for a legal professional qualification. This they have publicly done. The second was to advance legal education by furthering co-operation between the different bodies now actively engaged upon legal education

    but he observed that 'it is yet to be seen what progress they have made in this' (Wilson, 1971, 641). In a sense that element of the remit was always going to take a lot longer, since it required bodies that, historically, were suspicious of each other's motives and backgrounds to work out methods of working with each other across a divide that, arguably, was exacerbated by the work of the Committee. Working as a Committee member and coming from a background in academia, Wilson was aware of the need for university law degrees to achieve status in the academy generally, as well as within the profession.

18. Others were prepared to be more radical. Commenting on Ormrod and critiquing the system of legal education as well, the organization Justice (1977) concluded that '[a] law degree should not be a necessary condition for admission to the legal profession' (1977, 12), and that barristers' clerks were important enough in the legal hierarchy to need professional training (14).

19. In more detail, Justice argued that deep knowledge of the detail of the law is not required: what is required is 'a deep understanding of the *principles* of the law, and of the rules of construction, procedure and evidence, and a knowledge of where the finer details can be found when they are needed' (98). They go on to state that 'it is a fact that success in either branch of the law is not necessarily dependent on earlier success in university law schools' (102), and from this they argued that a law degree should not be a necessary precondition for entry to the profession. They state the case for *any* degree being a useful foundation; acknowledge the usefulness of the 'discipline of academic law' (101); attach importance to 'variety' and diversity, and wanted to see greater emphasis on 'practical training', including 'some training in office management' for both branches of the profession, including 'professional ethics' (104).

20. Hepple spoke for many commentators when he identified in Ormrod the establishment of the duality of legal education in England and Wales: academic study on the one hand, and vocational or professional legal education on the other (1996, 477). He saw evidence of a rapprochement attempted by the Committee, but given the sheer weight of detail supporting the split, it is hard to see that much effort was made to integrate the two sides. There were, of course earlier attempts, not least Gardiner & Martin (1963), to consider plans for integration, but these failed to achieve much.

21. Boon & Webb (2008, 91) point to two different though related consequences: 'while stressing the need for a continuum, [Ormrod] succeeded in establishing an often-tense dynamic around academic legal education. Second, it marginalized academic legal education in professional formation'. Boon and Webb are right to deal with these two issues together because it could be argued that the second consequence is actually a cause of the first. Once a separation is set up between academic and professional learning, many unintended and often quite negative consequences result. Part of the reason has to do with labelling: what is academic learning, what is professional learning, and so forth. Once the dichotomy has been set up, however, then there are issues that arise of knowledge drift between the two stages, and the theory by which academic learning is applied to professional practice. In such circumstances theory about practice can be, as Eraut points out, an oppressive force within a profession: a body of prescriptive concepts which, though widely circulated, and attaining the status of revered shibboleths, 'offer no practical advantage' to professional practice. As Eraut points out, the reality is more complex. The prior knowledge that professionals acquire in academic curricula is rarely used in professional contexts in the form that it is learned: it needs to be transformed by its use in a new context (Eraut 1985; 1994).

22. Perhaps the most significant effect of the Ormrod Report was to influence the direction of future debates in legal education in England and Wales in how it set out the terms of the debate at a fairly deep level. Two issues will illustrate this. First, Ormrod tends to assume, in spite of much evidence to the contrary, a relatively stable state for legal education. Even before Ormrod this had been called into question for education generally and higher education in particular. Donald Schön, for example had developed this concept in his early books, *Invention and the Evolution of Ideas,* (1969, first published as *Displacement of Concepts*, in 1963) and *Technology and Change, The New Heraclitus* (1967), as well as in the publication of his 1970 Reith Lectures, *Beyond the Stable State* (1971). It could be argued that many of the problems of legal education are associated with an ever-increasing tempo of change, and the need to develop systems to learn and adapt to this state. Schön characterized typical institutional tendency in this regard as 'dynamic conservatism – a tendency to fight to remain the same', and we can see this at work in much of the politics of legal education subsequent to Ormrod.

23. Second, in many passages Ormrod conflated two quite separate things, practices and institutions, assuming that certain practices would take place in certain institutions. But institutions and practices are different and practices tend to be much more vulnerable to the cultural and political direction of the institution.[2] In this, we can see the seed of the later debates and attempts by stakeholders to control legal educational institutions, knowledge, values and practices.

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[2] Alasdair MacIntyre drew an important distinction here: '[p]ractices must not be confused with institutions. Chess, physics and medicine are practices; chess clubs, laboratories, universities and hospitals are institutions. Institutions are characteristically and necessarily concerned with what I have called external goods. They are involved in acquiring money and other material goods; they are structured in terms of power and status and they distribute money, power and status as rewards'.' As MacIntyre points out, the result of this is that 'institutions and practices characteristically form a single causal order in which the ideals and the creativity of the practice are always vulnerable to the acquisitiveness of the institution, in which the co-operative care for the common goods of the practice is always vulnerable to the competitiveness of the institution'. (MacIntyre, 1985, 181. See Maharg, 2007).

24. The conflation of practices with institutions also brings with it, as Giroux and other educationalists have pointed out, too simplistic a view of how the hierarchical division of labour in capitalist society reproduces itself in education, and fails to account for the many subtle ways that students and teachers resist this process. Giroux give us an example of this – we can, he wrote, thus be blind to how 'the dominant culture is mediated in schools through textbooks, through the assumptions that teachers use to guide their work, through the meanings that students use to negotiate their classroom experiences, and through the form and content of school subjects themselves' (Giroux 1981, 92-3). The same can be said of the means by which professions reproduce their values in educational systems. As Giroux says, 'reproduction is a complex phenomenon that not only serves the interest of domination but also contains the seeds of conflict and transformation' (1981, 109).

25. Legal education as a process of learning was also viewed by the Ormrod Committee in rather a conventional form. Two points illustrate this: 'sandwich' courses and distance learning. The Committee considered what it called 'sandwich courses', whereby 'practical training becomes an integral part of the academic stage' (76). While acknowledging that such courses were 'a worthwhile attempt' to avoid the dichotomy of theory and practice, and while pointing out that sandwich courses were held at Trent Polytechnic (later Nottingham Trent University) and Brunel University, the Committee held that the benefits of converging theory and practice were 'in fact achieved by the more usual three-year degree structure'. The Committee also rejected sandwich courses on practical grounds: they considered that the problems of organization of 'suitable practical experience on a large scale are so formidable that we cannot recommend it as the normal method of training' (77). What evidence base there was for these decisions is not given, probably because there was none. It is something of an irony that the following section, entitled 'In-training' (77-80) deals with the organization of both pupils and solicitors, the training of whom is not dismissed as overly elaborate or having taken place at the earlier academic stage – indeed pupillage at the Bar is described as having 'no practical alternative' (77).

26. The same attitude pervaded other innovative forms of learning, such as distance learning. The Committee did not consider it as a viable form of legal education – this in spite of the fact that the University of London LLB by External Study had been a route into legal study since 1858 and, later, to the profession (so long as the Qualifying Law Degree requirements were met by candidates). The Committee did note the rise of the BCL degree in Oxford in 1855, the Cambridge Tripos in 1873, and the foundation of law schools at LSE, University College and King's College (8-9). Interestingly, while the Committee points out that university law faculties in the 'provincial cities' sprang from 'courses financed by The Law Society to provide teaching for articled clerks for the Law Society's Intermediate Examination', it omits to mention that the faculties also prepared students for the UL external degrees in law – at Exeter, Nottingham and Keele for instance (9). In spite of the Committee's view on the matter, distance learning was something that law schools were at least interested in developing, and not only in this jurisdiction. Twining (1990) noted that in Australia CLEA, at the suggestion of Professor John Golding, initiated an ambitious project to 'explore the needs, possibilities and methods of developing distance learning in law *at international level*' (Goldring 1989, 58; see also Goldring 1990); and Maharg (2011, 158) notes the extensive developments in distance learning in

the US, by private providers and higher education institutions such as Columbia University, as early as the 1920s.

Benson Report, 1979

27. The Benson Committee (1979) reported on legal services generally, and unlike the Ormrod Report, only a small proportion of the entire Report was given over to legal education. The Conclusions and Recommendations (790-93) did not depart substantially from the direction taken by Ormrod. The law degree was confirmed as the 'normal but not the exclusive mode of entry to the profession' (790). There was more detailed prescription of the law degree and vocational training – 'cramming' was to be discouraged (790), and pupillage training records were to be kept in a prescribed form (791), and the training record was to be triangulated with a report from the pupil's master confirming a pupil's fitness to practise (791).

28. Some of the detailed recommendations and the discussion that give rise to them lack evidential discussion. In their discussion of the future of legal education, for instance, the Committee discussed the use of spoken and written English by lawyers and law students, and observed that a student's 'capacity for clear expression on paper can readily be tested in the course of his written work and examinations' (646). However there was already, by 1979, much research in rhetoric and compositional studies to show that capability in spoken and written language depends heavily on context: a student may achieve competence in academic writing for essays, dissertations and examination, for instance, but this is no guarantee that he or she will be able to write a straightforward business letter to a client. The context and the needs of the two audiences are quite different, and students need to practise as a matter of habit these new forms of writing in their new contexts (Flower, 1994; Stratman, 2002).

29. Given the Benson Report's date of submission (1979), it could be argued that much of the legal educational discussion pre-dated the rise of the skills agenda in Higher Education. This is true, but it is also the case that Benson takes into account neither the literature on poor communication standards in the legal profession nor the body of research into writing practices generally. The Commission cites The National Centre for Industrial Language Training, but not the research that underpinned work of Centres such as this – work that stretched back to the 1950s. Moreover it assumed good practice was current in the profession. When, for example, it is argued that 'practitioners […] should be attentive to their students' abilities with the spoken word and should train them to present arguments concisely and clearly and to avoid prolixity' (646), the Commission is implicitly assuming that those practitioners have sufficient expertise in such qualities themselves, and have the necessary skills and training to train others. These were significant assumptions that could not be warranted, as subsequent research and experience demonstrated.

Marre Report, 1988

30. The Marre Committee (1988) was given a wide remit on legal services. Perhaps the most important element of its work was not legal education, but the structure and practice of the profession, dealt with in Part IV of the Committee's report. This followed on disputes between the Law Society and the Bar over, *inter alia*, solicitors' rights of audience in the higher courts, the Bar's monopoly of judicial appointments and barristers' rights of direct access to clients. Legal education was therefore, it

has to be said, a minority interest for the Committee. Its remit on legal education was to 'identify those areas where changes in the present education of the legal profession, and in the structure and practices of the profession, might be in the public interest' (3).

31. In the period since Ormrod there had been substantial change that showed no sign of letting up. Student intake to law schools had more than doubled; the conventional duality of the HE system itself was breaking up, with the rise of the post-1992 institutions (the 'new universities') and the diversity of intake into those institutions adding to a more diverse student body[3]; growing diversification in academic programme content and structure (including the slow change-over to modularized courses and semesters); increasing use of distance learning; an emphasis on skills as well as knowledge (first the Bar introduced extensive skills education in the BVC, followed by the Law Society's development of similar initiatives on the LPC), and a growing interest in student-directed learning (Walker 1993). In addition, in the early and middle eighties there was a sharpening of the debate between what might be termed the liberal and vocational views of law schools. The debate had existed long before Ormrod of course, but the parties had managed to keep their distance from each other. Now, in the growing rapprochement between regulators, academics and professional schools, positions and roles were clarified – the debates in a 1987 edition of *The Law Society Gazette* are examples of such (Bradney, 1987; 1988; le Clezio, 1987; 1988; Glasser 1987).

32. The title of the report, *A Time for Change* might have given rise to hope that educational change was envisaged; but in the event, little substantial change from Benson's position was proposed. Given the membership of the Committee, this is perhaps not surprising. Remarkably, none of the independent members on the Committee was trained in education or in professional education (Professor Sir David Williams, though a distinguished Cambridge legal scholar, was not an educational specialist).[4] Where the possibility of substantial change was mooted, it was elided – for instance in the convergence of academic and professional stages 'to form a four year university or polytechnic course (192). The Committee cited the complexity of the proposal, and the developments since Ormrod in the growth of the College of Law and the Inns of Court School of Law. Following Ormrod and Benson, the Committee proposed that the two professions share a common academic stage of training and therefore approved a Common Professional Examination. It examined the arguments for common vocational training (124-128), and in spite of making what looks like an impressive case for such an approach, it withdrew from radical change, observing that it was 'imprudent to make an positive recommendation for immediate change' (128). Smaller changes were proposed: data collection (145), the Erasmus Scheme (145). The Committee's replacement for the Lord Chancellor's Committee (the Joint Legal Education Council) was urged to investigate the possibility of a common system of vocational training (128). In the meantime, pupillage and articles were retained in more or less the same form, with more monitoring mechanisms in both (136-7), and improvements were recommended to pupillage awards, both in number and quality. The Bar's Code of Conduct was examined and found to be 'adequate' – 136). In terms of regulatory activity, there was little with regard to legal education that could be considered

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[3] Given status, in England and Wales, as proto-universities by the 1988 Education Reform Act and full university status by the 1992 Further and Higher Education Act.

[4] See http://www.lawgazette.co.uk/news/the-future-the-legal-profession-new-committee-appointed

significant; and as with the Ormrod and Benson reports, there was little interest in generating legal educational standards.

33. Perhaps the most interesting of the Marre proposals was for a 'vigorous Lord Chancellor's Advisory Committee on Legal Education. It was noted that this Committee had been set up after Ormrod, and that Benson had suggested improvements; but the Marre Committee proposed to invigorate it by replacing it with a Joint Legal Education Council (to be distinguished from the Council of Legal Education which controlled the Inns of Court Law School), which would provide regular written reports to both branches of the profession. In the event it was the Advisory Committee itself that took the next major step in legal education in England and Wales, and it did so with a vigour that surprised many.

ACLEC, First Report, 1996

34. The Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC) was formed in April 1991 under the aegis of the Courts and Legal Services Act 1990 and was responsible for a major review of all stages of legal education in England and Wales. In October 1992 it began a thorough review of legal education. As the Committee observed in its final Report, altering any single element of the educational process inevitably involved a consideration of others, so that what began as a review of aspects of the primary professional training stage drew in analyses of the academic and CPD stages as well (1996, 6). In 1994-5 papers that analyzed the academic and vocational stages as well as CPD were published, and a further two reports in 1995: 'Access To and Participation in Undergraduate Legal Education' and 'Funding Legal Education'. Further papers were issued in the period 1997-1999, including an extensive report on CPD for solicitors and barristers (ACLEC, 1997). ACLEC was disbanded in 1999.

35. By the time of the publication of ACLEC's first major report in 1996, the academic and professional wings of legal education had diverged further. The fast-changing nature of legal education had been outlined by the Heads of University Law Schools in 1983 in a submission to the then University Grants Committee, in part to argue for the resource-needs of a discipline that was in the throes of swift change (Heads of University Law Schools, 1984).[5] It cited an increase in the scale of legal education at every level; increased diversification of content and styles of undergraduate law degrees; entry into the EC and growth in international and comparative law courses; changes in legal practice leading to the creation of new subjects; the entry of universities and polytechnics to professional education; increased use of technology; increase in legal services and advice in law schools; diversification and intensification of legal research carried out by staff; European links and integration. To this one might add the emerging profile of access and diversity issues, a range of new teaching methods and further specialization in legal topics. In addition and beyond the universities, private providers had increased in profile – not just the expansion of traditional players such as the College of Law, but new institutions such as BPP and, later, Kaplan.

36. The Response made it clear that these changed conditions would, in their view, only intensify, and in that they were correct. But the professional arena was one of increasing turmoil, too. The boom of the later eighties, in both corporate and

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[5] Also endorsed by Heads of Polytechnic Law Schools and, unusually, by Heads of Scottish Law Schools

conveyancing work, had ended abruptly with the recession of the early nineties. The impact on legal education was considerable: the pinch-points of pupillages and training contracts exacerbated problems of excess-supply in both branches of the profession and, under these conditions, regulators increasingly faced questions of access and socioeconomic and ethnic diversity of intake to the profession. The profile of the profession itself was shifting, becoming more stratified and polarized, and with pressures increasing on both corporate and high street lawyers, under very different working conditions, to increase billable hours.

37. The ACLEC Review acknowledged these conditions. ACLEC, though, went considerably beyond the earlier reports on legal education, and marked a new maturity in dealing with education in its complex educational, social and political contexts. The Consultative Committees comprised many figures from the academy and those involved in legal education in the professions – not only what might be termed figureheads (Committee Chairs and suchlike) but persons involved in legal educational practice at every level and at all stages, as well as legal academics with a knowledge of legal pedagogy and the wider world of legal education. The Committee even went beyond the bounds of the jurisdiction and made study visits to New York, Leiden and the European Court of Justice, as well as liaising with practitioners and educators from Australia, Canada and Japan. This clearly went beyond the desk research and consultations of earlier reports, which had described legal education in other jurisdictions only in terms of procedure, as if an *educational* system could be described as if it were a *legal* system.

38. The breadth of consultation matched the breadth of vision. The First Report describes a 'new partnership' based, in the words of the Chair (Lord Steyn), on 'a broad and intellectually demanding legal education, attuned to the context and needs of a modern European democracy' (3). These words mark a new departure from previous approaches that viewed legal education as a process that see-sawed only between a narrowly-understood academic foundation and a vocational stage that was largely dominated by sets of increasingly profession-oriented rules. In particular the European and democratic dimensions were significant, one being an acknowledgement of the international dimension of legal education in a globalized world (given the effect of the Bologna Declaration and the future Lisbon protocols), and the other stating what might be regarded as a fundamental political and regulatory ground for legal education, in the concept of democratic engagement within legal educational processes and outputs.

39. The detailed working-out of this statement was more problematic, as might be expected. Recommendation 4.1 stated that 'the degree course should stand as an independent liberal education in the discipline of law, not tied to any specific vocation' (91). The statement seemed to strengthen the separation of academic from professional education: the key question was how specific the 'specific vocation' might be. What of programmes of undergraduate study that sought to integrate academic and professional learning, such as the exempting degree at Northumbria University? Recommendation 4.2 seemed to deal with this, in that it gave law schools the freedom to decide the structure and content of the curriculum (91-2); and the mechanism for this was set out at R4.4 and subsequent recommendations (92). In this we can see a strategy in ACLEC when dealing with problematic issues that is repeated throughout the document: a guideline is set broadly, more as a general direction, and then the detail of benchmarked

performance is laid out in some detail that makes the general direction slightly less general than at first glance; but without specifying in detail the content of the guideline. Thus ACLEC avoided being drawn into micro-management over detailed curricular matters such as the content of Foundation subjects.

40. We can see this in the way that ACLEC dealt with integration of academic and professional stages. Rather than dividing up curriculum content between the two stages, thus emphasising the split between the two, the Review described what both stages should aim for: intellectual integrity and independence of mind, core knowledge, contextual knowledge, legal values, and professional skills (20-1). In drawing these up the Review was careful not to label them as outcomes or aims and objectives or capabilities. The Review was also careful not to specify curriculum structure. At 2.9 for instance, the Review cited what it termed 'interesting examples of structural variety' – the Northumbria exempting degree, the external LLB London degree, part-time degrees at some 17 universities and sandwich law degrees (23-4). Reversing Ormrod's dismissal of this latter variety, the Review observed that '[d]evelopments such as these may provide models for the multi-entry and multi-exit system which we favour' (24).

41. In terms of professional structures, the Report suggested re-organizing the vocational stage into a 'licentiate' in general professional legal studies, around 15-18 weeks' duration, followed by a more specific 15-18 weeks in a BVC or LPC. The programmes could run continuously or separated by a six-month in-service training period. After completion of the BVC/LPC a trainee would complete training by taking another period of in-service training. The aim of this more granular and flexible period of training was to broaden the scope of professional education, create a number of entry and exit points, and to develop the initial Licentiate as an entry point for others in legal employment such as paralegals. What was seen by the Review as imaginative flexibility and granularity, however, was interpreted by the profession and by professional educators as fragmentation and dilution of content and standards.

42. The reception of the ACLEC Report was significant for later events. While the Report was broadly welcomed in academic circles, and met with little enthusiasm amongst professional educators, its effect was to enhance the independence and status of academic law at the expense of professional education, which remained mired in structures that were increasing seen as being out of kilter. For instance, while rights of access to the higher courts were finally extended to solicitors and others, the Bar Council actually consolidated the advocacy components of the BVC. In the LPC, eight City law firms, after much criticism of the existing LPC for its lack of commercial practice and drafting skills, formed firm-specific LPCs with three programme providers. This has continued to the present, with more firms liaising with providers to develop niche LPCs for their trainees.

43. If the new structures proposed by the ACLEC Report were a distinctly qualified success, the Report achieved much in the way of setting new directions in policy. Significantly, it was the first document to deal comprehensively with educational standards.[6] Its treatment of the subject is admirably wide, relating not just to the training of pupil barristers and trainees or academic standards, but the standards of

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[6] The word appears in an educational sense nearly a hundred times in the course of the Report, in striking contrast to all earlier reports where it appears only occasionally, and in the lay sense of the word.

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programmes associated with those educational processes. In part this arose from the remit of the Committee, which had a general statutory duty to assist in the 'maintenance and development of standards in the education, training and conduct of those offering legal services' (101).

44. The Review was the first major legal educational document to describe and analyze standards. It focused on standards in section seven: 'Quality Assurance: guaranteeing standards in legal education'. The section draws heavily on the structures and data developed by HE Funding Councils and the QAA generally to accredit and review the quality of programmes and institutions in HE. It is interesting that, here and elsewhere in the First Report, ACLEC'S focus on standards led them to draw upon the increasingly sophisticated data that was becoming available within the legal educational field. The Marre Report had already noted how little data had been collected by regulators and advocated that more be collected, and Ormrod, Benson and Marre did cite what was relatively administrative data; but ACLEC was the first report to use significant amounts of field data on education, as well as wide reference to the growing critical literature on legal education. The Report cites broad overviews such as Abel (1988) on the legal profession, to detailed surveys on law libraries (Clinch 1994) and detailed reports on law teaching by Harris, Bellerby, Leighton and Hodgson (1993).

45. ACLEC's view of standards, however, went beyond the descriptive and prescriptive standards that QA organizations and regulators would be interested in developing and enforcing. In the first section of the report, for instance ('The Changing Needs of Legal Practice in the 21st Century'), the Committee declared the need to maintain 'the high professional and ethical standards upon which our legal system and, it could be said, our democracy depend. Pro bono services had been remarked upon in earlier reports, but here the linkage of standards with democratic values that include pro bono services, and the growing significance of law 'between government and the governed at various levels' (1.5) reveal a much more sophisticated regulatory concept of what standards might entail.

46. ACLEC were prepared to step into this regulatory space and comment on the relationship between standards and ethics. Later in this section, the Report describes the high ethical standards of the 'close-knit professional communities represented by such institutions as the Inns of Court and local law societies', but commented that the ethical challenge goes beyond client-based services, to 'wider social and political obligations' such as protection of the rights of minorities (15-16). The eleven-point summary of this section (16-17) provides in many respects the core of the Report's thinking on legal education; and in every point it is closely related to standards of competence, behaviour, values and ethics.

47. The integration of academic and professional programmes, together with the upholding of institutional autonomy, were two of the key themes of the Report. They posed significant issues for the monitoring of attainment in both. ACLEC commented on the monitoring of the quality of both themes, where the Committee noted that 'traditional methods of professional validation' had been supplemented more recently by 'academic audit … teaching quality assessment … various industry standards … and even branding processes such as Investors in People' (46). The Committee described the common characteristics of these QA approaches as

- being an assessment not of an institution's objectives but whether those objectives have been met
- relying on institutional self-assessment, which is seen as a key element of quality enhancement
- having an ethos that is evaluative rather than prescriptive. (47)

The Committee observed the difficulty that these approaches presented to models of professional accreditation: 'old-style professional validation of qualifying law degrees will have to acknowledge the intentions of modern quality assurance systems by tolerating greater institutional autonomy' (47).

48. If the argument for greater institutional autonomy held for universities, might it not also hold for the professional stage of legal education? The Committee again took the general route to answering this question. The new professional programme it envisaged would be based on '*integrated learning*' (65, Committee's emphasis). The Committee also made it clear that, in terms of standards, it was never their intention to suggest that '"academic" education is intellectually rigorous, while vocational skills training is not' (72). In terms of standards, the system emphasised the construction of minimum standards, and envisaged that the professional bodies 'should delegate quality assurance to [a] new single audit and assessment body in respect of those institutions which receive financial support through the Funding Councils' or, if impracticable, a system of 'linked assessment exercises', with professional bodies and the CPLS Board 'adding their additional requirements for vocational courses and common professional studies to the basic HEFC audit and assessment requirement' (88).

49. In a curious way, what we see in the ACLEC Report is a move away from entity-based regulation, and towards activity-based regulation of legal education – this in spite of the autonomy that ACLEC afforded institutions. Whether or not the subtlety of this approach was fully understood is debatable for, as we shall see, this direction for the development of legal education in England and Wales was not facilitated by the next significant legal educational review.

Training Framework Review (TFR) & Wood Review

Training Framework Review

50. The debate shifted to an altogether more complex level after the millennium, matching the increased complexity of legal education in England and Wales. The profession had become more occupationally diverse and 'functionally specialized' (Webb & Fancourt 2004, 297). The LPC was criticized on its treatment of skills, ethics, even law practice and practice environments (Webb & Fancourt 2004, 300). The Bar did not escape: it was criticized for the length and expense of the BVC. The QLD was also criticized for declining standards. The regulatory context had shifted too, with the Clementi Review taking place more on less simultaneously with the TFR, and presenting regulators with the problematic of an uncertain future *qua* regulator of the professions, and an uncomfortable present *qua* regulator of legal education.

51. The answer, the TFR papers concluded, lay in increasing flexibility. Such 'flexibilisation', as Webb & Fancourt termed it, has been critiqued as helping to change legal education only in that it shifted the focus from learning processes

towards outcomes, thus encouraging 'the view that it is the destination that matters, not how you get there' (Webb & Fancourt 2004, 305). Flexibility is always helpful in curriculum design, but if it is emphasized over other values in education then the result can be a programme of study that is less than the sum of its parts.

52. The TFR marked a significant departure from earlier reform processes in a number of ways. First it was a regulator, the Law Society, that instructed the Review, rather than an external body. ACLEC had no regulatory power: its functions were purely advisory. The Bar Council, the Law Society and other authorised bodies still prescribed regulations, and the Lord Chancellor and other designated judges approved qualification regulations. Second, the Review was ambitious: it aimed at what it termed 'cradle to grave' review, going further than Ormrod several decades earlier. Third (and again departing significantly from Ormrod), where Ormrod, Benson and Marre considered the review of procedures and processes to be the core of reform (and considered that reform of the relationships between the stakeholders only went so far as this), the TFRG took a different direction. Influenced in part by the educational shift in workplace education from aims and objectives to a focus on the *outcomes* of legal education it advocated a set of competences as descriptors of outcomes. At its simplest and most radical form, outcomes education states that the attainment of outcomes is the goal of educational interventions. The approach does not specify *how* the outcomes are to be attained, and therefore it follows that they can be achieved in a variety of procedures and methods; and this was the intention of the TFRG.

53. The approach marks a significant departure from the prior culture of regulation. Where Ormrod, Benson and Marre focused on procedural relationships and dealt with forms of learning, they left assessment largely untouched. Standards, too, though progressively formed, played little part in educational attainment, as we have seen. ACLEC, by contrast, strongly focused on standards to be enacted through teaching and learning methods. The TFR's advocacy of outcomes led it to focus not on learning and teaching methods but on assessment – the means by which attainment of outcomes would be monitored and classified. The regulatory space thus shifted from a static description of knowledge, skills and values components (the seven pillars) to assessment of those components.

54. Outcomes approaches appear logical, and the monitoring of assessment would seem to be much easier than attempting to regulate teaching and learning, particularly if assessment is aligned with teaching and learning, as most descriptions of good practice advocate that it should be (Biggs, 1999). However there are significant difficulties in practice to the development of qualification routes linked to assessment of standards in a professional programme of study that attempts to be a bridge to a huge variety of practice situations. The TFR debates, as they dragged out, revealed the labyrinthine complexity of the system being proposed. Compromises could not, it seemed, satisfy the often-competing interests of the stakeholders, particularly the providers of LPC education and training firms. Indeed because the regulatory focus was on assessment of outcomes, the vacuum that was left on the subject of teaching and learning began to create anxiety about the very existence of hitherto stable features of the legal educational landscape – the JASB Joint Statement, the LPC, the training contract. It might be argued that outcomes-based education is best used in the context where there is a unified approach to education, and where there is no such competing interest. However the historical

development since before Ormrod has been to intensify the competition of stakeholders, and increase their number and voices in the domain of legal education.

55. The TFRG members were well aware of this – at the conference held in October 2001 the Chair of the TFRG raised the point, characterizing it as the problem of creating a training programme that satisfies the needs of a sole practitioner in Carlisle and a global practice in the City (Mathews, 2001). His answer revealed the general approach of the TFRG: the creation of a framework in which similarities could be identified, and agreement on a general core of knowledge and skills for all solicitors (Mathews, 2001). For a programme as radical as the TFRG set out in its first papers, it was a curiously conventional approach; but in the circumstances it was predictable that the regulator would take this approach, for as Webb & Fancourt point out, it was a statement of 'legitimative' value to the Law Society in retaining its regulatory function. It could be argued that the Chair was stating what was generally agreed in the profession; but there was no research stated to indicate that this really was the case.

56. Further, the common core of knowledge and skills, easy to state in the abstract, was much more difficult to implement across the profession; and part of the problem that the TFRG found itself in was a vicious circle of regulation. The very notion of implementing basic levels of competence, adopted with the best of intentions as regards multi-entry and multi-exit curriculum points, was hardly a convincing argument to those who were convinced that the LPC's standards required to be raised, not lowered to a basic threshold. Nevertheless, the multiplicity of entry / exit points was a bold solution to problems of access and diversity, for by refusing to match outcomes explicitly to stages the TFR created multiple routes to qualification. In turn, of course, this also multiplied the regulatory issues of quality and standards, as well as diversifying the structure and cultures of local LPCs; which brought the TFRG back to the notion of competence again. In the same circular fashion, the TFRG started out in its first consultation to address issues of over-assessment on the LPC: the process ended with the successor to the TFRG, the Law Society's Regulation Board, actually increasing the volume of skills assessment in the core modules of Business, Property and Litigation.

57. The TFRG's solutions involved centralizing assessment of much of the skills and knowledge in the vocational stage through accredited test centres; and it proposed a final test on practice readiness. In addition the work-based learning component of the stage was revised and a more exacting supervisory regime was constructed, using periodic appraisal, portfolio, closer monitoring by supervisors and closer monitoring of the whole process by the Law Society. The LPC elective subjects were also uncoupled from the rest of the core LPC and could be achieved later in the training period.

58. While the process of the TFR continued, the post-Clementi reforms took place. The statutory Legal Services Board was formed, and newly-formed 'frontline regulators' took responsibility for the regulation of legal education – the Law Society Regulation Board (later renamed as the Solicitors' Regulation Authority, SRA) and the Bar Standards Board, BSB. The TFRG was dissolved, but not before LPC providers and the Legal Education & Training Group had expressed considerable dissatisfaction

with many aspects of its work, not least the TFRG's refusal to match outcomes to stages in the educational process.

59. In spite of this, as Webb & Fancourt pointed out, there are many useful elements to the work of the TFRG:

> the broadening of the base beyond knowledge and skills narrowly defined; the potential to integrate academic and work-based learning, the capacity more generally to build-in greater innovation, to increase access to and diversity in the profession, to take ethics and values more seriously (323)

To this one might add the clarity of 'day one outcomes' that revivified the argument as to standards.

60. Boon, Flood and Webb described the TFR as 'aspiring to provide flexibility and accommodate diversity, differentiation, and mobility' and noted that it thus 'espouses distinctly postmodern themes' (2005, 473). This is true. It is the case that the TFRG was genuinely concerned to increase access to the profession by providing less costly and more diverse routes to qualification. The proposals also tried to cater for specialism by encouraging trainees to opt for routes that were focused on particular specialisms, thus mapping an educational path that moves with more clarity and pace out of general legal education at QLD and into practice-based specialisms. The international dimension to legal education was given fresh impetus by the Bologna Process and in particular by the *Morganbesser* decision; and the TFRG saw the move to an educational outcomes framework as a step in the right direction, since it would allow for the comparison of qualifications and experience that the European Court required in its judgement.[7]

61. One problematic consequence of the TFR proposals was the perception of a vacuum at the level of teaching and learning, where in fact it was generally held that these are the areas where relationships and standards are formed, enacted and valued. Another was the flat, cold language of the outcomes, and its application to a whole range of different situations. As Nick Johnson put it, making clear first that he did not disagree with the validity of the LPC outcomes and their assessment methods:

> My point … is the simple and obvious point that the achievement, *word for word*, of identical learning outcomes *in different contexts*, will mean radically different things. Furthermore, these differences will be concealed by the language of outcomes which will obscure the subtle developmental processes which go on during the shift from one learning context to another. The question whether this actually matters goes to the heart of the debates on The Law Society's Training Framework Review. (Johnson, 2005, 8, his italics)

62. The developmental issue is key to any outcomes framework, indeed to any educational relationship. The TFR appeared colourless, bleached-out, to adapt Wilkin's phrase, and in spite of its emphasis on practice routes, the personalization of legal learning and ethics, was curiously unfocused in its technical detail. In addition, the means constrained the ends. We can describe what its educational effects would have been more accurately by using the terms of the critical project on the 'educationalization' of education. As Depaepe and Smeyers describe it, within the context of what they term 'educationalization',

> the self constantly has to prove its market value by means of 'employability', 'adaptability', flexibility', 'trainability' and the like. This [leads] not only to the

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[7] *Christine Morgenbesser* v. *Consiglio dell' Odine degli avvocati di Genoa (Case C-313/01)* [2003] All E.R. (D) 190 (Nov.).

> erosion of the idea of permanent education – all creativity is subordinated to the regulatory discourse of the knowledge economy and technology – but also of learning itself (Depaepe and Smeyers, 2008, 383)

We might contrast the warmth of another approach:

> Education is at least partly about the overall aims that society has for itself and how these aims are realized in practice. It cannot, therefore, be a neutral technical exercise, but is invariably a deeply ethical, political and cultural one bound up with ideas about the good society and how life can be worthwhile.
> (Winch and Gingell, 2006, 6; quoted Bridges, 2008, 467)

63. As Johnson points out, the TFRG's emphasis on assessment was highly ambitious. One planned assessment was an external assessment, taken after a tranche of work-based learning, and designed to assess abilities such as the ability recognize and solve ethical dilemmas. In the final section of his article he quotes the experience of the Law Society of Scotland (LSS) in this regard. The LSS wished to construct a test of practice competence, called the TPC – the Test of Professional Competence – that was designed as an open-book problem-based examination. Over the course of several years the LSS drew up outcomes, assessment procedures, trained assessors, wrote and validated assessments. It then hosted two pilots where the assessments were drawn from a number of practice areas, with volunteer trainees (from first and from second year of their traineeships). Maharg (2002a & 2002b) constructed the educational evaluation of the TPC and drafted two reports for the LSS upon the pilots. The results showed beyond doubt that the TPC failed to assess trainees' practice competence; and indeed gave very little useful information about trainee performance to LSS, training firms or the trainees themselves. However the process was educative for the LSS, revealing as it did how essential it is to use situated assessment practices to assess situated learning in workplaces.

64. The work of the TFRG was never going to be as neatly bounded as Ormrod or Benson. The tempo of change, the highly-charged nature of the debates, the much higher commercial stakes in which both universities and private providers were engaged, the greatly increased number of stakeholders and their competing interests – all this meant that the TFR became a much more public process than its predecessors. Much of its perceived problematic status arose from the fact that a regulator that was implicated in many decisions being made was itself undergoing regulation and review. De Friend contrasted the length of the process with that of the Wood Review of the BVC:

> [The Wood Review] was completed in a remarkably quick time and this despite its having included a specially commissioned survey among students taking the BVC. All stakeholders were thus spared the blight, analysis paralysis and consultation constipation which afflicted the Legal Practice Course over the seven or so years that it took the Law Society to complete the Training Framework Review. (de Friend, 2010)

The Wood Review

65. Throughout the early years of the millennium the Bar, facing many of the issues that the Law Society tried to deal with through the TFR process, commissioned a number of reports on various aspects of its professional programme, the Bar Vocational Course.

66. In the prior decade the content had been prescribed as recently as 2000 by the Elias Working Party, which made often sensible suggestions regarding course content and

ways of teaching specific skills of advocacy, for example. Other major aspects of the course had been reviewed successively by Bell (Bar Council, 2005), Neuberger (Bar Council, 2007), Wilson Committee Report, and then Wood (BSB, 2008); standards and quality had been monitored on the basis of course providers' annual reports and by Bar Council-appointed, later BSB-appointed external examiners and panels. Much of the process of consultation is described in Burton (2008). But as de Friend (2010) pointed out (and the interesting regulatory point is discussed in chapter three of the literature review), in spite of all the earlier regulatory activity, including annual reports and monitoring, there still appeared to be a significant problem with the BVC, namely the '"gulf of misunderstanding"', as Wood put it, between practising Bar and BVC.

67. Most of the reports made helpful suggestions as to the design of the BVC, which undoubtedly was improved in its detail. Some, like the Wilson Committee, adopted educational design principles of previous years, and updated them – the Wilson proposals suggested a national assessment, with national standards, to counter the variation of standards that was one criticism of the BVC. Neuberger made five useful recommendations (the importance of a guaranteed income in the early years, mentoring in Chambers, guidance on disability in Chambers, and ensuring that women and those with disability are not discriminated against, and the monitoring of equality), all of which were aimed at remedying in the current educational context. The Bell Report was arguably the more innovative. Focusing on curriculum design Bell explored the possibilities of work-based learning; and his plan may have reduced cost (one of the deterrent access factors) and enabled situated learning within Chambers.

68. The Wood Report clearly drew upon earlier reports, as one might expect. Drawing on consultation that took place before publication, the strength of the report lies in its clarity and focus. The report's data-collation and use was targeted on the issues that were identified from the outset. The concern about numbers of prospective BVC students attempting to enter the course, for example (and the subsequent pressure on pupillages as a result), was recast in Recommendation 7: '**We do not recommend** that numbers should be cut for their own sake' (3). Instead, Wood put the case in Recommendations 8 and 9 that the BSB should raise admission standards by requiring students to possess a First or Second-class degree (or pass at CPE/GDL), and should pass an aptitude test. The aptitude test is discussed elsewhere in the literature review (chapter four); but it is worth noting that the criteria for the test is well-designed in general terms, under Recommendations 9-14.

69. The Report went on to state that the content of the course was fundamentally sound and proposed minor changes; that the teaching was satisfactory, and that the pass threshold should be raised. In these and other recommendations we can see the course undergoing minor repair and upgrade, but no new major re-designs. To undertake that would have been beyond the remit of the Report. The BPTC currently is subject to continuing review by the BSB.

Themes arising from debates

Place of general educational debates in legal educational reform

70. In many ways the history of legal education in England since 1971 has been characterized by a general avoidance of education theory. It is significant that

throughout this period, Twining (1967; 1994; 2000), Goodrich (1996), Cownie (2003), Webb (2007), Maharg (2007), to quote only some of the many commentators on the issue, have made pleas for the theory of education to be read and applied to legal education. There is also a pressing need for legal educational theory to be generated within the discipline and for this to become the focus for further research and development.

71. One instance will suffice: the topic of curriculum. Even at the time of the earliest of the reports in our timespan, Ormrod and Benson, the debates in education surrounding the curriculum were vigorous and growing in sophistication. The debates dealt with, for example, how the curriculum is formed by elites (Bernstein 1971, Young 1971); how capitalist economics impacts on a curriculum (Goodson 1992); how bureaucracy shapes it (McKiernan 1993, Becher 1999), and the presence of the so-called hidden curriculum (Snyder 1971). The result of this critical investigation of what constituted 'curriculum' was that curriculum policy, whether created by institutions, regulatory bodies or the state, came to be seen less as coherent policy, and more as a field of conflicting debates – as Westbury (2003, 194) put it, 'the term "curriculum" must always be seen as symbolizing a loosely-coupled system of ideologies, symbols, discourses, organizational forms, mandates and subject and classroom practices'. None of these debates find a place in Ormrod, Benson or Marre. ACLEC acknowledges some of them, less so the TFR (perhaps when there was even more need to do so, given the complexity of the situation by then); but the full sophistication of that debate is nowhere explored in any of the formal reports.

Academic / vocational divide

72. Acceptance of the academic and vocational divide was assumed by Ormrod and continued by later reports. It was an assumption that was to characterize many of the subsequent fissures in legal educational provision in the next 40 years or so. There are many issues that were not examined rigorously by reports. Need the initial stage be a university degree? If so need it be sited in a specific place called a university? Can it be organized elsewhere? Need it be a conventional degree course? What do the substantial minority of students at the initial stage of academic legal learning who do not enter the legal profession take forward into their varied future careers from that initial stage? Does professional education only begin with training contract and pupillage? Is this an efficient way to learn professionalism? How does initial and ongoing professional learning fuse with continuing professional development?

73. Such questions are symptomatic of deeper issues. How the law is perceived and enacted in the world operates almost invisibly to shape our understanding of how future generations should be inducted into it. Unless we are aware of this shaping culture, it is difficult to change our fundamental approach to legal education. This point may seem trivial in abstract, but its effects are complex, often self-sustaining and have been the subject of varied analysis by many commentators. As Flood (2011, 3) points out, 'England has traditionally pursued education from [the] perspective of the profession rather than as an abstract body of knowledge', so that the process of learning law was 'essentially an empirical matter based on craft principles'. According to Flood (2011), and others have commented on this, the relation between knowledge and craft has been uneasy at best. Others have observed, often from a critical and jurisprudential basis, on aspects of these deeper

issues. As early as 1967, Twining outlined the general problem, updated by Sherr (1998). Hutchinson pointed to the endemic black-lettrism of academic education (1999); Boon & Webb pointed out that 'many of the changes and tensions facing English legal education result from both an underlying epistemic uncertainty about the nature of the English legal education project and a tendency to respond *ad hoc* to national, regional, and globalizing pressures' (2008, 79).

74. Epistemic uncertainty is one reason why the academic/vocational divide remains as it is, in spite of stringent criticism. That uncertainty extends to what the purpose of a law school is, and what the purpose of education for the profession might be. Such matters cannot be solved by reports that operate within a tight remit, as Ormrod, Benson and Marre did; nor by a critical literature that operates at the level of critique only, rather than critique and sustained practice. It can begin to be resolved by cycles of experimentation and implementation that involve academics from a range of disciplines, the profession and regulators, lay representation and many others.

Educational standards, professional legal standards and legal educational standards: general debates

75. The distinctions between the above three sets of standards was not always recognized in legal educational literature. An educational standard of drafting skill or knowledge acquisition is quite different from a professional legal standard of client care, for instance. The process by which one might arrive at an educational standard or an outcome or a competence is different, too (Resnick & Nolan, 1995). Because the standard is to be used in an educational context, the process in which the educational standard will be deployed will be different from the use to which a professional legal standard could be put. How learners come to attain an educational standard may be quite different to the process by which a professional comes to understand their performances and match them against a legal standard. The legal standard is a largely a quality standard. While an educational standard can be used as a quality standard, it is pre-eminently a statement about learning attainment. When a *legal educational* standard is created, it is primarily an educational standard, not a legal standard.

76. From the 1960s onwards, standards have been at the heart of many educational debates. Given their prevalence in the educational literature of the period, it is interesting that the parallel issues in legal educational standards are not referenced against these debates. Lawrence Stenhouse's work on the Humanities Curriculum Project (1967-72), for example, is a case in point. This was an extensive government-funded and cross-disciplinary project that aimed to educate school pupils via small-group work under the direction of a teacher as a 'neutral chairman'. It produced a wide variety of media for pupils and teachers to use – books, loose-leaf papers, posters, slides, filmstrips, and OHP transparencies. It employed innovative methods of discussion, project work, small-group work and evaluation (Stenhouse, 1983, xvii). Taken forward by Jean Ruddock's work in the late 1970s and early 1980s, it influenced methods of small-group teaching in HE (Hopkins and Ruddock, 1985). At the time, it was an innovative form of school discourse, using new forms of structured and interdisciplinary materials

77. There is an analogy to the development of the legal casebook here, possibly also the

law in context movement; but Stenhouse went further and developed a pedagogy that rejected the then-fashionable aims and objectives movement. Stenhouse criticized the movement for centering on teaching rather than learning. Objectives, according to him,

- being general, gave little guidance in planning interventions
- tended to become 'ad hoc substitutes for hypotheses' (1983, 81)
- gave the illusion of predicting what ought to happen
- implied the idea of 'teacher-proofing' the curriculum, thus losing the value of 'divergent interpretations' (1983, 82)
- stopped pupils having their own objectives
- inhibited speculation
- had unexpected consequences for schools as institutions as well as teacher practice[8]

In their place Stenhouse advocated 'standards', based on learning process or input, rather than learning outcomes or output. Instead of describing knowledge as a set of observable behaviours and being for teachers a blueprint of what was expected as the learning outcomes of a class, the standards tried to 'produce a curricular specification which describes a range of possible learning outcomes and relates them to their causes. The style of its formulation is: "If you follow these procedures with these materials with this type of pupil, in this school setting, the effects will tend to be X"' (1983, 82–3).

78. Stenhouse also had a distinct idea of the teacher-as-researcher: the teacher who researches his or her own teaching practice. Almost nowhere in any of the major legal education reports do we find this concept clearly set out. In its time, it was this aspect of the HCP that was perhaps most misunderstood. In the US, for instance, there was a parallel project to HCP in the Harvard Social Studies Project, where the teacher-as-researcher was similarly developed. The Project was abandoned, however, under the pressure for top-down, even 'teacher-proofed' curricula, following the post-sputnik return to conservative and instructionist educational practices.[9]

79. The teacher-as-researcher movement was an integral part of the educational movement in England in the sixties and seventies. It was taken forward by progressive LEAs such as Oxfordshire and Yorkshire, and by HMIs such as Christian Schiller and Robin Tanner, who began the process of holding regular professional practice seminars and workshops. Regulatory figures, in other words, led by example and gathered a community of practice around the idea of teachers learning about their practice, bringing their practices to show to other teachers, and developing expertise in a community that was dedicated to raising the standards of its own professionalism. Schiller and Tanner set the events, requested that teachers attend; but did not monitor this or the output of the events (which were very popular). Instead they wanted to see arising out of the workshops evidence of innovation, creativity, imagination and standards-setting in classroom practice.

80. Stenhouse's approach can be compared with Schön's project to develop a *phronesis* of practice and with other attempts to define an epistemology of practice. R.S.

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[8] It is striking that this list corresponds in a number of aspects to the summary of Boon & Webb's Report on Consultative Paper 1 of the TFR, particularly as summarised in Webb & Fancourt 2004, 312.

[9] Like HCP, the Harvard Project emphasized interdisciplinary resourcing, teacher-as-researcher and discovery teaching strategies. For an account of the Harvard Project see Oliver and Shaver (1966). True to the Deweyan tradition, it contains a ringing declaration of the ethical commitments of modern democratic society, much of which is aligned to the underlying transformational assumptions of the HCP.

Peters, for instance, was quoted by Stenhouse:

> … most of the important things in education are passed on […] by example and explanation. An attitude, a skill, is caught; sensitivity, a critical mind, respect for people and facts develop where an articulate and intelligent exponent is on the job. Yet the model of means to ends is not remotely applicable to the transaction that is taking place. Values, of course, are involved in the transaction; if they were not it would not be called 'education'. Yet they are not end-products or terminating points of the process. They reside both in the skills and cultural traditions that are passed on and in the procedure for passing them on. (1983, 48, quoting Peters, 1959, 92)

81. Other educationalists took up his idea of the teacher-as-researcher. Giroux for instance analyzed the ideological and contextual constraints that stopped teachers becoming 'transformative intellectuals' by reducing them to 'specialized technicians within the school bureaucracy, whose function then becomes one of managing and implementing curricular programs' (1988a, 124-8). The concept goes back at least as far as John Dewey in the early twentieth century.

82. None of these ideas, however, feed through to the major legal education reports in the last 40 years. Legal education standards are those of the profession or of the strengthening academy. Neither side paid much attention to the often intense debates going on between the political left and right on educational process during this period, a debate that culminated in the development of a National Currriculum under the first Thatcher administration (Lowe, 2007). As Giroux points out, the educational debates took place, in the 1980s, in a political environment where a newly-emergent and radical politics of the right recast public philosophy to define 'citizenship in a political vacuum, that is, as an unproblematic social practice' (1988b, 12). Few of these educational debates or the wider cultural and socio-political debates about the nature of knowledge, power, the professions and the like appear in the major documents that chart and guide legal education in England and Wales.

83.   Standards, however, are at the forefront of the debates engendered by the Legal Services Act (2007). Under s.4, 'Standards of regulation, education and training', the Board is required to assist in the maintenance and development of standards in relation to

(a)   the regulation by approved regulators of person authorized by them to carry on activities which are reserved legal activities, and

(b)   the education and training of persons so authorized.

The Board's Chair, Edmonds clarified the Board's role in his Upjohn Lecture. In his eyes Regulatory Objective 6 (encouragement of an independent, strong, diverse and effective legal profession) was inextricably part of the Board's role to 'assist in the maintenance and development of standards in relation to the education and training of authorized persons' (Edmonds 2011, 5, citing s.4(b)); and he saw these issues as underpinning 'the entirety of our wider agenda'.

84.   However, just what was interpreted as 'standards' was unclear. Edmonds described the need to 'constantly update both skills and knowledge', and makes it clear that it is a function of regulation to ensure that this takes place; but there is much more to be explored about the place of values, attitudes, ethics, what other professions consider what standards might be and how they could be developed, and the wider

democratic context to all of this. When one compares the definitions of standards created by Stenhouse and more recent critical thinkers in education such as Stronach (2002) and Giroux (1988a & b, 2006), and the wider debates in professional education (for example in medical education), it becomes clear that the debate over the educational standards within legal education needs substantial development at research level as well as pilot implementation.

The shifting professional agenda and identity

85. The professional dimension also needs discussion. None of the reports discuss in any detail the shifting status of the professional, and the extent to which legal professionals are manifestations of that shift. Only recently has legal educational literature begun to consider the wider literatures on professionalism, globalization, commodification of education, educationalization, segmentation of learning, and the implications of this for regulation of legal education. Very seldom at undergraduate stage and almost nowhere at the vocational or 'professional' stage is there any serious analysis or attempt to create a systematic description, narrative or metanarrative of legal professionalism, and this at the time when the very notion of unitary professionals is called into question, not just by occupational conditions but by the larger economic ecosphere – recently, the appearance of ABSs, for instance. It might be easier to think of professionals not in a typical postmodernist fashion as fragmenting, but as if there were a scattergram of identities on XY axes of purpose and culture. Professional narratives, therefore, far from being unitary, will be coherent given purpose and culture, but only as subplots or instances within a much larger and more complicated picture of role-plurality, uneasy allegiances and mixed motives, caught, as Stronach expressed it, between 'economies of performance' and 'ecologies of practice' (137).

86. From Ormrod to TFR and the Wood Report there is little in the primary reports to suggest that the legal profession was generally aware, or taking seriously, this critical literature. Commentators such as Abel pointed out some of the issues involved but it was not until the ACLEC Report that the nature of professionalism, often a source of unease, became problematic. In part this was because of the link between standards and outcomes; but it was also partly the result of the historical process of a fragmenting profession that, by the time of ACLEC, could no longer be ignored. The situation in the early twenty-first century is even more pressing, with a multiplicity of regulators and regulated niche or sub-professions in law; and it applies even to the sectors of the legal profession whose purpose and identity was traditionally strong – the Bar, for instance.

87. This has direct effect upon legal education in many ways. As we have pointed out, it is not possible to have outcomes unless there is first some body of standards to which the outcomes can be referenced; but a body of standards suggests a unitary core of values and attitudes to which each professional fragment will assent. We shall explore aspects of the literature on this in subsequent sections of the literature review.

Political context and the fragmentation of consensus

88. Finally the political context should be mentioned. From Ormrod to Marr, the political debates involving state and regulators shifted from an understanding to a consensus to a more fissured set of agreements and disagreements. ACLEC

increased the process of that fissuring; but it is with the fiercely argued disagreements surrounding the TFR that we see the real fragmentation of interests and the breakdown of consensus. It appeared vividly to the participants at the time, who commented on the abrasive nature of the debates, and who explained why they thought this came about (Johnson, 2005; Boon & Webb, 2008).

89. It also became clear in the process of the TFR debates on different routes to qualification that the diversity of legal employment made the educational routes less of a defensible unity construct. For some time it was unclear what, apart from qualification, defined a solicitor, as niche practice grew more elaborate and more regulated. The same began to be true of CILEX, which required to define more clearly the position of its members in the growing activities and status of paralegals, legal secretaries and other employment categories.

90. If the context of professional work contributed to the fragmentation of educational discourse in ACLEC and the TFR, the changed political framework did not help to bring together interests. Ormrod was instructed as a Committee that was safely external to regulatory structures, as was Benson and Marr. ACLEC's conclusions, ambitious, unattained, were blessed by the Lord Chancellor's Dept. However the TFR was instructed by the Law Society of whom it might be said that it was too close to the participants to give *imprimatur* to the results. In addition the Society was, more or less at the same time, dealing with the possibility of Clementi reforms; and it could be said that this lessened the authority it might otherwise have had to implement TFR. This was particularly true of the development of standards and the relation of standards to educational practice.

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Chapter three
Legal education and conduct of business requirements

Introduction

1. The field of conduct of business regulation (COBR) within regulation is a considerable one, developed largely over the last three decades. The Index of All Codes website, maintained by the European Corporate Governance Institute, lists 32 COBR codes and reports that amend the codes in the UK alone. Many of these directly affect corporations and larger firms, but as Pattberg points out, they also influence many other commercial concerns, including smaller enterprises along the supply chain (Pattberg, 2006, p. 241).

2. The reasons for the rise of COBR as an arm of regulation are complex. As Chandler & Fry point out with regard to the piecemeal and reluctant introduction of accounting standards by the legal profession over the past century, regulation is often introduced only at moments of public pressure or crisis, in response to particular issues. But in spite of being targeted at particular issues, the intentions behind regulation are often multi-layered, and the subsequent effects of regulation are often difficult to foresee; and the same can be said for COBR.

3. To date there has been little literature that deals with the intersection of COBR and legal education. This is not to say that the subject is not an important one. Indeed it could be said that of the many recent developments in the regulatory field none go to the heart of the regulatory relationship more than the subject of COBR. In addition, the framework of analysis is often narrowly restricted to either legal profession practice or that of cognate professions. But as Mary Douglas has pointed out with regard to risk and justice, it is 'currently impossible to make sense of the concept of risk in the compartmentalised, individualistic frame of analysis normally employed' (Douglas, 1992, p. x), and the same could be said of the concept of COBR. In this section of the literature review, therefore, we shall range quite widely in the literature to present a view of COBR within the field of regulation, and explore possible future relationships between regulators and those involved in legal education in England and Wales.

4. The term 'conduct of business regulation' seems to originate primarily in the financial services and banking sector. In simple terms it describes all those 'rules and guidelines about appropriate behaviour and business practices in dealing with customers (Llewellyn, 1999, p. 11). In this literature (and increasingly in regulatory practice) it is distinguished from 'prudential regulation' that addresses the larger issues of financial institutions' stability, and the risks associated with systemic effects (i.e., externalities) on the financial sector as a whole (Llewellyn, 1999, p. 10;

Pacces, 2000). COBR has also been used to describe the voluntary, self-regulatory, codes of conduct developed by businesses.[10]

The focus of COB regulation

5. In modern regulatory theory COB regulation is primarily justified as a means of limiting risks associated with the information asymmetries that accompany the delivery of (most) professional services. Where there is a knowledge or information gap that tends to favour the service provider, clients are exposed to the risks of both adverse selection and moral hazard: they may choose a dishonest or incompetent provider, or the chosen provider may use its position to put self-interest (or the interests of another client) above those of that client.

6. As Llewellyn points out, COB regulation tends to focus on:

> mandatory information disclosure, the honesty and integrity of firms and their employees, the level of competence of firms supplying financial services and products, fair business practices, the way financial products are marketed, etc. Conduct of business regulation can also establish guidelines for the objectivity of advice, with the aim of minimising those principal-agent problems that can arise when principals (those seeking advice) and agents either do not have equal access to information, or do not have equal expertise to assess it.
> (Llewellyn, 1999, p. 11)

COB regulation thus incorporates most of the areas of traditional professional regulation: competence standards, confidentiality, conflicts of interest between (potential) clients, etc. The use of 'suitability criteria' is an important feature of much COB regulation in the financial services sector (Pacces, 2000). This may map onto traditional notions of (individual) fitness to practice and integrity, but may extend also into entity authorisation[11] and 'fitness to own' criteria – as with the regulation of ABSs. Moreover, in financial services, intermediaries may be required by regulations to refrain from recommending or performing on their investors' behalf transactions which are not "suitable" in terms of size and/or frequency, in the light of the customer's financial needs and objectives. Such criteria are also used to try to prevent 'churning' – a term used in financial services to describe excessive trading on a portfolio with the intention of generating commission. In the legal context churning involves 'working a file' in such a way as to maximise billable hours or otherwise generate unnecessary costs to the client, and has been a difficult practice to police.

7. COB regulation in the legal services sector presently involves a relatively complex regulatory matrix, comprising a mix of entity and individual regulation largely delineated by title. Regulation by title is the primary mechanism used to distinguish different professional jurisdictions, and is one aspect of regulation that clearly extends downwards into the setting

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[10] The "commitments voluntarily made by the companies, associations or other entities, which put forth standards and principles for conduct of business activities in the marketplace" (OECD 2001: 3)

[11] Eg, adherence to COB rules may be made a requirement of entity authorisation, eg, claims management businesses authorised by the Ministry of Justice must abide by the Conduct of Authorised Persons Rules 2007.

of entry criteria and relatively content-heavy prescription of education and training.

8. Regulation by title involves an element of what we might call 'activity-focused' regulation – the regulation of reserved activities is an obvious example, but these are still largely delineated by (and, to an extent, used to justify) title, despite the fact that there is little coherent policy rationale behind the protection of at least some of those activities (Mayson, 2010). There are some partial exceptions, notably in terms of the co-ordination of conduct rules and standards (eg, under the proposed QASA regime) for advocacy, whereby regulation might more properly be described as activity-based.

9. A desire to move towards more entity and activity-based regulation, organised around defined risks, has recently been signalled by the Legal Services Board (2011). A proper system of activity-based regulation could bring with it a number of advantages and efficiencies: a reduction of regulatory co-ordination problems; greater rationality (insofar as it involves an element of risk-based standardisation), and with it, possibly some reduction in search costs for consumers.[12] On the supply side, regulation by title has been a blunt instrument. Regulation by title may serve as a means both of maintaining a higher quality of service, and, conversely, of obliging providers to 'gold-plate' service standards. By creating higher compliance-driven transaction costs it may make the offer by regulated service providers expensive or even uneconomic relative to unregulated competitors.[13] Another obvious area where regulation by title creates relatively high transaction costs is in respect of education and training itself. It might be argued that the requirement for uniformly high levels and long periods of training, much of which is relatively generic and not targeted towards activity-led needs, is excessive, at least in the context of certain activities and client groups.

10. Activity-based regulation might help reduce costs of regulation, and possibly also reduce what the LSB calls barriers to innovation for 'regulated' providers who want to compete effectively with unregulated competitors for unregulated work. However, there may also be some structural and political challenges in moving to a substantially activity-based system in conditions where frontline regulation is in the hands of title-based regulators, and where a principle of regulatory competition is enshrined in the Legal Services Act. Moreover, as the LSB also observes, 'there is asymmetry of information between many consumers and providers of legal services and title does provide a useful, if not perfect, signal to consumers about regulation and thus consumer protection' (Legal Services Board, 2011, p. 33). At present we note that, aside from

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[12] Though these might be offset, as noted below, by new informational problems if there were to be a radical departure from established titles.

[13] In practice the anti-competitive effect may not be so great because of market externalities – eg information asymmetries and lack of transparency as regards price across the sector – note for example the evidence that some non-admitted will-writers are charging as much as or more than some solicitors for their services.

the LSB consultation and responses, there is relatively little literature to provide guidance on these issues.

11. A move to greater levels of entity-based regulation could also have significant training implications. As the term implies, an entity focus makes the business increasingly responsible for applying the principles and achieving the outcomes of COBR across its workforce. It will thus create new training needs for those taking on compliance roles and building the ethical and compliance infrastructure necessary to meet the demands of outcomes-focused regulation (discussed below). The move to greater entity regulation also has the potential to encourage legal service providers to take their organisation's training needs more seriously. Following regulatory reform in New South Wales, data demonstrates that 'supervision of staff' was one of two areas in which the greatest number of Incorporated Legal Practices (ILPs) initially assessed themselves as non-compliant or only partially compliant with regulatory standards. Indeed 'some of the comments on the self assessment forms suggested that many practices, especially smaller ones, had never thought about systematising staff induction and training' (Parker, Gordon and Mark, 2010). In this regard we hypothesise that changes to the overarching regulatory infrastructure as well as the introduction of new forms of business organisation will create both new and increased demands for training at the vocational stage, and particularly for initial and continuing professional development.

The form of COB regulation

12. There is generally no prescribed form of COB regulation. To quote again from Llewellyn (1999: 48; see also Llewellyn, 1998):
> The skill lies not so much in the choice of instruments, but in how they are combined in the overall policy mix. It is not a question, for instance, of rules *versus* principles, but how the full range of instruments are used to create an overall effect. In this regard, much of the debate about regulation is based on false dichotomies. The various instruments can be used in a variety of combinations, and with various degrees of intensity.

13. Interestingly, despite Llewellyn's assertion, there has been some tendency in the UK over the decade from 1999-2009 to align COB regulation in practice more to either a risk- or principles-based approach. The rationale behind this move tends to be that over-extensive or too-detailed regulation:
- increases compliance and hence transaction costs (Trebilcock, 2001; FSA, 2006)
- lacks adaptivity and requires more constant oversight and review as highly detailed regulations may be more difficult to 'future-proof' (House of Commons, 2009, p. 15)
- reduces incentives on the owners and managers of regulated firms to monitor and control themselves (Llewellyn,1999 p. 51)
- discourages or reduces incentives for consumers to undertake appropriate due diligence

- limits business owners' and managers' flexibility in deciding how best to meet their obligations and deliver services to the marketplace (FSA, 2006, p. 16)
- limits business owners' and managers' ability to innovate and compete more effectively in delivering services (FSA, 2006, p. 16)

14. We can see this happening in the insurance industry, one that has driven the development of COBR – unsurprising, given the amount of economic data that has been gathered on the operation of insurance markets. Various reports give an indication of this. The FSA's *ICOB Review Interim Report* (2007), for instance, focusing on consumer experiences and outcomes in general insurance markets, (and in particular on unsuitable and expensive insurance purchases, as well as failure to purchase) summarises the approaches used in the development of COBR. These include the development of Market Failure Analysis tools (MFA), described as a form of microeconomic analysis 'typically involves identifying relevant markets, applying economic principles to them to form a view about how these markets are working and then seeking data to test whether that view is, or is not, likely to be correct' (FSA 2007, p. 12). The FSA also developed a form of research triangulation, targeting market-oriented questions from different angles to ensure validity and robustness of their results (FSA 2007, p. 13). These were largely quantitative research results based upon extensive datasets; though there was also qualitative research carried out into market behaviour.

15. All this research activity underpinned the FSA's re-designed approach to COBR that included:
    - a move towards high-level rules that focused on outcomes rather than processes, with the minimum necessary prescription
    - improvements in structure and presentation
    - easing the regulatory burden for small firms. (FSA 2007, p. 16)
    The latest update to the FSA's COB Sourcebook indicates that the industry approved this approach, and particularly the web-based updates of the Sourcebook based upon 'the FSA's assessment of specific responses from firms to changed requirements' (FSA 2010, 4). In other words, regulated firms welcomed an approach where the regulator acted in open, swift and transparent engagement with its members.[14]

16. Although it is questionable how far the financial crisis saw a failure in the form of regulation, rather than in regulator performance (see, eg, House of Commons, 2009; Masters 2011), regulators' attention has turned again to asking questions about the regulatory mix and ensuring that regulation is 'right-touch' rather than simply 'light-touch' (House of Commons, 2009, p. 14). Until recently the advice of the UK Better Regulation Task Force (2000) was that when presented with policy issues, regulators should first consider whether they should act, then consider self-regulation, and

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[14] See www.fsa.gov.uk/Pages/Doing/Regulated/newcob which contains case studies, Q & As, and examples of good and bad practice.

only then if the situation warrants, more hierarchical interventions.[15]
This approach is also taken by the Regulatory enforcement and Sanctions
Act 2008, which required regulatory authorities to which it applied to
review their performance and remove unnecessary regulation. This
accords with the Regulators' Compliance Code, a statutory code of
practice that came into force in April 2008.[16] The Code relied upon the
Arculus, Macrory and Hampton Reports on good regulatory practices, and
the principles derived therefrom.[17]

17. Recently and in the light of the banking failures of recent years and
subsequent recession, the Coalition Government proposed a new shape to
financial regulation in the UK. The regulatory architecture is composed of
a macro-prudential regulator, the Financial Policy Committee (FPC), a
new prudential regulator, the Prudential Regulation Authority (PRA), a
micro-prudential supervisor, and a conduct and markets regulator,
namely the Financial Conduct Authority (Cmd 8083). Amongst the many
changes is the move from the FSA's early 'nonzero failure' approach
(which, in the current and still unresolved crisis appears hubristic to say
the least) to one that emphasizes financial stability (Black 2011, p. 2).
Prudential enforcement structures will change, but what is of interest is
that the COB enforcement regime will probably change too. Black (2011,
p. 10) observes that the recent FSA initiatives such as Treating Customers
Fairly were constructed to ensure

> consumer protection by adopting reforms that go to the core of business
> structures, processes and cultures rather than rely on traditional "command and
> control" strategies: detailed rules backed by legal sanction. (Black 2011, 10)

and she commends these 'deep due diligence and ongoing assurance
strategies' to conduct regulators.

18. Nor is this approach restricted to the UK. At a European level there are
broadly similar approaches aimed at changing the culture and formation
of regulation and regulatory regimes. The open method of coordination
(OMC) is an example – a 'legitimizing discourse' operating at policy level,
the key features of which are participation, problem-solving and the
diffusion of knowledge and learning across countries (Radaelli 2003, p. 8).
As Radaelli describes it, the approach seeks 'a balance between
benchmarking and context-sensitive lesson-drawing' (Radaelli 2003 p.
12). Education became a focus of OMC from 2004 as the Bologna and
Copenhagen processes made higher education a 'core object of the OMC
process' (Gornitzka 2006, p. 27).

19. In this wider context, the main frontline regulators in England and Wales
are moving towards more pragmatic forms of regulation. The FSA, LSB

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[15] As Scott puts it, 'regulatory reform programmes have nowhere led to a substantial reduction in governmental
activity in regulation, nor more importantly, a qualitative change in the character of regulatory governance'
(2008, 26).

[16] http://www.berr.gov.uk/files/file45019.pdf

[17] 'Regulation – less is more' March 2005 - www.berr.gov.uk/files/file22967.pdf; 'Regulation – less is more' March
2005 - www.berr.gov.uk/files/file22967.pdf; Regulatory Justice: Making Sanctions Effective, November 2006,
www.berr.gov.uk/files/file44593.pdf.

and SRA all characterise their preference for what is now being called outcomes-focused regulation (OFR) as a move towards an adaptive and pragmatic mix of regulatory forms and styles that will deliver 'right-touch' regulation (Turner Review, 2009; SRA, 2010; LSB, 2011). This accords with the three themes that the LSB has at the core of its vision for the legal services market, namely:

    a. consumer protection and redress should be appropriate for the particular market
    b. regulatory obligations should be at the minimum level to deliver the regulatory objectives
    c. regulation should live up to the better regulation principles in practice. (LSB 2011, pp. 6-7).

20. The evidence for this is beginning to be seen. In a recent Consumer Impact Report compiled by the Legal Services Consumer Panel, for instance, it was observed that OFR rulebooks are 'more consumer-friendly and have greater flexibility to respond to a diverse and changing market' (Legal Services Consumer Panel 2011, p. 5).

21. Amongst the larger legal professions, the Bar has been rather more ambivalent about the move to OFR. The BSB consulted in June 2012 on the development of a new Handbook and its proposals to move to risk-based supervision. The new Handbook will provide a consolidated set of COBR, revising the existing Code of Conduct and, for the first time, including rules and guidance for the regulation of entities, but excluding the Bar Training Regulations (as these are not COBR). The approach proposed remains predominantly rules-based, but with what the BSB refers to as more 'outcomes-focused rules' (BSB, 2012a). The intended approach was explained further in the BSB's consultation response in December 2012 (BSB, 2012b, 9):

> outcomes are intended as justifications for and aids to purposive construction of the rules, but are not the basis for charges of misconduct. The intention is that charges would continue to be for breaches of Core Duties and/or rules. However, the outcomes will have an important role in the BSB's enforcement strategy. The presence, or otherwise, of an adverse impact on an outcome will be at the heart of any decision about whether to take enforcement action against a BSB-regulated person and at what level the penalty should be. The BSB therefore intends to be operationally outcomes-focused, while maintaining an element of prescription in rules that is of value to all parties.

The BSB anticipates that both the new Handbook and its risk-based supervision model will be in place in 2014.

22. IPS takes a different but not dissimilar approach to that of the SRA. All members of CILEX are subject to a code of conduct, outlining general standards of behaviour. This code is less a set of COBR or OFR and more of a statement of governing principles.[18] CLC has also moved to an OFR-led approach, specifying prescribed principles and outcomes, whilst preserving the power to lay down 'specific requirements' of its regulatees.[19]

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[18] Available at: http://www.ilex.org.uk/ips/ips_home/for_ilex_members/code_of_conduct.aspx
[19] CLC Handbook available at http://www.conveyancer.org.uk/regulatory_arrangements.php

23. OFR itself is less of a strict or doctrinaire approach to regulation, and involves a form of regulation and regulatory activity that tends to be:
   - less detailed than, or at least 'differently detailed' from, rules-based regulation[20]
   - (more) clearly structured/differentiated as between 'high level' principles, rules and guidance
   - more attuned to the level of risk represented by the type of service provider/activity/client (or some matrix of these)
   - more reliant on 'output regulation' (Trebilcock, 2001) and hence prescriptive as to the outcome to be achieved (not processes by which they are achieved)
   - proactive in identifying and monitoring risk rather than reactively handling non-compliance

24. An example of these qualities is given on the SRA webpage entitled 'Outcomes-focused regulation at a glance'.[21] In section 4.2 is a table comparing the 2007 Code with the OFR Code. Client care is described as follows:

Issue	Old approach – 2007 Code	New approach – new Code
Client care	Rule 2 – sets out a detailed and prescriptive list of the type of information that you must give to clients.	Chapter 1 – general outcomes, eg clients are in a position to make informed decisions about their matter. Indicative behaviours set out how you might go about this eg agreeing an appropriate level of service with the client. Allows greater flexibility, according to the needs of the client and the type of work you do, but there is also greater emphasis on the needs of the individual client, particularly those who are vulnerable.

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[20] It would be wrong to assume that OFR standards are necessarily more loosely defined. Within an OFR approach one could have a highly prescriptive, quantitative, outcome that closely prescribes regulatees' expected performance. An example would be the requirement imposed on rail operators to achieve a specified service level, below which financial penalties are imposed. This still leaves the regulatee free to decide how it achieves that outcome.

[21] Available at: http://www.sra.org.uk/solicitors/freedom-in-practice/OFR/ofr-quick-guide.page#ofr-2

Table 1: extract from 'Outcomes-focused regulation at a glance', Table 4.2.

COBR and legal education

25. There is no set of COBR for legal education directly, in the way that the SRA, for instance have set out OFR for solicitors. They do not exist for students or trainees and it would be hard to envisage a set that might encompass both educational and practice-based regulation even at the professional end of legal education. The current variety of traineeships, from very small High Street firms to global law firms, might also defeat any attempt to implement such a regime. Indeed, taken to a logical extreme in a system of OFR, much specific regulation of formal education could be said to be redundant, because formal education is ultimately a *process*, and only one of a number of potential processes by which the outcome of competence is achieved. As will become apparent we do not intend to follow that particular line of thinking, or at least not to that extreme. Two aspects do require comment however, as arising from the literature – COBR as educational content at various legal educational stages, and the function of COBR in the regulatory relationship between legal education providers and regulators.

26. There is clearly a role for COBR in continuing professional development. An inherent tension is identified in the literature (of which there is a very limited amount devoted to CPD in the legal professions) between CPD as accountability mechanism for the safeguard of the public, as regulatory mechanism (arguably, compliance with a CPD requirement for its own sake) and as an aspect of individual personal development. This is discussed further in section 5. The link between a COBR professional standard of competence, as output, and participation in COBR-mandated CPD activity, as input, is frequently assumed, rather than demonstrated through the CPD system itself. Ways in which COBR impact on legal continuing professional development, then, include:
    - accreditation of CPD providers (not universal, even in legal CPD systems): imposing COBR standards on educational institutions;
    - COBR as content of CPD activity (several legal CPD systems demand a minimum mandatory content involving study of their own codes and professional rules);
    - inter-relationships between competence, standard of service and compliance with a mandatory CPD participation threshold imposed by the regulator. This aspect is, for example, a key point in current consultations about the General Medical Council CPD scheme.

    COBR could quite easily form part of CPD content, therefore, given that the content is so close to the working lives of many lawyers. Edmonds sees this closeness as an essential element of CPD, characterized as a 'constant interplay between practice and education, with the two spheres in constant dialogue, each driving improvement and innovation in the other to the broader public good' (Edmonds 2010, p. 10).

27. COBR also has a role to play in professional legal education. If, as Edmonds argues, the market is now marked not just by 'increasing plurality, but a rather unique plurality in which there is *both* more commoditisation *and* more specialisation', then COBR is more important to forms of primary professional education in providing the scaffolding of best practice for students, trainees, apprentices (Edmonds 2010, 9). In the same lecture he posits a 'changed and earlier emphasis on the teaching of professional ethics and wider responsibilities to the client' (Edmonds 2010, p. 11); and COBR could be an essential toolset for critiquing and learning the ground of professional ethics.

28. COBR may appear to have little to do with higher education, and legal education in particular at undergraduate stages, with the possible exception of specialist modules or programmes on the legal profession, where it clearly provides material for critique and analysis. There is, though, an analogy to the extent that both academic and professional learning environments can be over-engineered with learning outcomes, module handbooks, reading lists, information on assessments and the like. Helpful though much of this can be, it may diminish learner responsibility, curiosity and attention, and institutionalize the process and product of learning (Stenhouse 1983; Maharg 2007). Where guidance from regulators is overly constraining or unnecessarily complex or restrictive, it is clear that an approach that tends towards OFR would help to mitigate complexity and costs to both providers and learners.[22]

29. COBR does, however, have an educational parallel in the guidelines set out for providers of legal education. The BSB and the SRA currently regulate the accreditation of providers through an accreditation regime the terms of which, while not overtly COBR, do present as a form of educational regulation. The BSB, for instance, has set out guidelines for CPD providers. The document comprises advice on the administration of accreditation and 'Programme Components'. The components consist generally of objectives, eg under 'Skeleton Arguments' there is listed 'Clarity of Purpose', 'Logical structure and organisation', etc.[23]

30. The SRA has a more detailed Authorisation & Validation document that, together with a 97-page guide ('Information for Providers of Legal Practice Courses', as of September 2011) gives information for providers on LPC accreditation, monitoring the regulatory framework. In addition to explaining how the SRA QA framework works in practice the Information guide set out, at 2.10-2.13, the regulatory framework, which is clearly less prescriptive than earlier LPC QA frameworks. This is evident from the detail of the regulations. It is made clear, for instance, that the SRA do not seek to impose model assessment regulations on

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[22] This may apply to topics in legal education such as the reserved areas. As Mayson points out (and Edmonds (2011) agreed with him, the reserved areas are ripe for reform, and this is certainly the case in the mandatory use of them, for instance, in the LPC.

[23] Available from the BSB website at: http://www.barstandardsboard.org.uk/regulatory-requirements/for-chambers-and-education-providers/education-and-cpd-providers/

providers: instead, providers 'will need to draft their own assessment regulations in accordance with the SRA's assessment requirements' (Information 2011, p. 97).

31. If COBR has a minimal and variable effect on legal education at present, in the future, we suggest the concept will be much more important to the regulatory relationship between LSB and frontline regulators on the one hand, and between educational providers and learners on the other. We shall now explore some aspects of that relationship, starting with some general comments on law and regulation.

Law and regulation

32. While COBR has had a relatively recent history in legal practice, law and regulation has had a much longer relationship; and if we are to appreciate the wider context of COBR it would be helpful to map out some of the features of this relationship. There are precedents for regulatory activity in the profession – increasingly in Common Law jurisdictions the law has been subjected to forms of regulation, the Uniform Commercial Code being one such (Whaley, 1982).[24] However regulation of professional life and commercial activity was another matter. It is true, as Maute proves, that there has been regulation of legal activity by what might be termed the 'state' since the medieval period (Maute, 2003); but recently the speed and scale of activity in the sector has increased almost exponentially, not least, as Flood points out, because of the 'deeply imbricated relationship of state and professions in providing the basis for governmentality' and allied to this, lawyers' potential access to political power and leverage (Flood, 2010, p. 4, citing Foucault (1979).[25] But regulation has increased also because the nature of legal service itself changed. Galanter & Roberts point to the change in the later nineteenth century from a profession composed predominantly of familial elitism, almost a kinship model of legal service, to a hierarchy based on partnership alone, which in the twentieth century moves into a bureaucratic phase where line management and ever-deeper control of aspects of work (characterized often as 'workflow') come to dominate (Galanter and Roberts, 2008; Nelson, 1988, pp. 7-11; Abel 2003).

33. Flood charts the rise of regulation on the large firm as government and policymakers became aware of the growing power and capitalized power of the law firm. As he puts it, 'anti-monopoly sentiment' in Europe allied to the growth of a consumer movement, resulting in part from dissatisfaction with the results of self-regulation in the legal profession led to first the Clementi Review (2004) followed closely by the Legal Services Act 2007 (Flood 2010, p. 17), in effect the removal of autonomous regulation from law firms large and small. As instruments of control and monitoring, regulatory codes and Conduct of Business

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[24] Flood notes, quoting Abel (1989, 142), that codes were formulated in the US much earlier than in UK jurisdictions, with the ABA promulgating its first code in 1908 (Flood, 2010, 31, note 2).

[25] Flood deals with large law firms in this article, but many though certainly not all of his observations could be extended to other forms of legal entities.

regulations were implemented and prudential measures were adopted (Llewellyn 1999; Flood, 2010, pp. 17-18).

34. As Flood points out, though, the recent Smedley (2009) and Hunt (2009) Reports, instructed respectively by the City of London Law Society and the Law Society of England & Wales, went against the grain in that they advocated measures of self-regulation within existing organisations, either the firms or the Law Society (Flood 2010, 18). In part as a result of these Reports, and in part responding to the changing regulatory environment outlined briefly above, the SRA implemented in October 2011 outcomes-focused regulation, a new form of business regulation that took a different view of the regulatory relationship (Gibb, 2010; Suddaby, Cooper & Greenwood, 2007) and now creates in the law firm a responsibility for shaping its own regulatory culture. Flood describes the regulatory space created for large law firms where 'new modes of regulation' are developed:

> they have the capacity to produce internal regulatory structures that fit the state's purpose. Their position is augmented as the new regulations open up the legal market to alternative providers of legal services. (Flood, 2010, p. 23)

If large law firms are carving out a regulatory space for themselves, it could be argued that legal education providers and regulators similarly need to shape their regulatory space and the relationships that govern it; and a key element of this is the nature of the relationship between regulator and provider.

Regulation of legal education: hierarchy and design

35. It is axiomatic that regulation involves relationships between regulator and regulated. Such relationships depend on a history of prior contact, the numbers to be regulated, form of regulation, and many other factors. Sometimes a regulator can have a relationship with a key or dominant player in the field. Ofcom's relationship with BT is a typical and oft-quoted example of this (Hall, Scott & Hood 2000), where the corporation heavily influenced the nature of the relationship because of the informational and knowledge asymmetries that its dominant position in the marketplace created. Or there may be a small number of key players, as in the regulation of power utilities; or a much greater number of regulated entities, as in the Financial Services industry. On either side there will be forms of expertise that the other side may not have. Hardwig (1985) has described the acknowledgment and acceptance of such expertise as 'epistemic dependence' – the situation where we can have reasonable belief that others (experts) have more knowledge than ourselves, and where we accept this situation in order to advance our own knowledge or intended actions.

36. Hardwig puts forward the notion of a community of knowledge that itself produces knowledge, taking Peirce's idea that 'the *community* of inquirers is the primary knower and that individual knowledge is derivative' (Selinger 7 Crease, 2006, p. 339). As a result of this Hardwig

acknowledges the extent to which 'even our rationality rests on trust' – trust that we place in experts and their established positions. Whilst such a position appears to contradict the idea of the rational agent as one who thinks for herself, as Hardwig points out it is 'sometimes *irrational* to think for oneself... *rationality* sometimes consists in deferring to epistemic authority' (1985, 336). Trust is a critical element of the regulatory function; and trust is built upon relationship (Earle, 2010; Mayer, Davis & Schoorman, 1995; Webb 7 Nicolson, 1999; Willman, Coen, Currie & Shiner, 2003).

37. Hardwig's position has been criticized by Fuller, among others, for conceding too much, and particularly to experts. Fuller argues in his book *Social Epistemology* (1994) and elsewhere that we should not simply trust experts. We should seek to understand how experts shape and sustain their position as experts, and the motivations behind the maintenance of that position. In particular he urges us to investigate how experts create in clients the perception that expert attention is required – a perception that of course works in the expert's favour (Selinger & Crease, 2006, 326). His view is borne out by the literature on informational, knowledge and power asymmetries within society generally (Coleman, 1982), and the debate is played out in key legal regulatory documents such as the Legal Services Consumer Panel Report (2011), which noted that:

> a relatively small number of providers accounted for a large proportion of the Legal Complaints Service's caseload. Effective targeting of these providers by regulators, whether through education or enforcement, is an absolute must if consumers are to be protected, diligent providers safeguarded and overall case volumes reduced (41).[26]

38. The debate has consequences for how we might view regulatory activity with regard to legal education. If regulators agree with Hardwig then they would seek to promote a community of practice among educational providers; and if they agreed with Fuller then they would seek to constrain the freedom of education providers to move beyond a highly restricted curriculum and mode of delivery. With regard to educational relationships Fuller's view would give rise to monitoring, audit by persons other than educationalists, and the creation of a competitive market, with market mechanisms in operation. The Hardwig view would lead regulators to emphasize communities of practice, sharing of resources and practices, and peer-review.

39. Our choices, though, may be much more nuanced than the binary approach of Hardwig or Fuller may seem to imply. More recently, others have mapped out in more detail how the concepts central to the regulatory debate play out within regulation. Colin Scott, for instance, has

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[26] The point regarding enforcement of the regulation of legal services has been made by a number of commentators. In the field of regulation of international business, for example, Picciotto argues for an approach that includes 'a framework agreement, which would link binding standards for corporate social responsibility in key areas, such as combating bribery and cooperation in tax enforcement, with traditional investor rights based on investor protection and liberalization rules (Picciotto, 2003/4, p. 131).

outlined a sophisticated position on the regulatory relationship when he defines at least four 'modalities of control' exercised by regulators, and he has investigated how these modalities play out in the regulatory relationship.

	Norms	Feedback	Behavioural Modification	Example	Variant
Hierarchical	Legal Rules	Monitoring Powers/Duties	Legal Sanctions	Classical Agency Model	Contractual Rule-Making and Enforcement
Competition	Price/Quality Ratio	Outcomes of Competition	Striving to Perform Better	Markets	Promotions Systems
Community	Social Norms	Social Observation	Social Sanctions – eg Ostracization	Villages, Clubs	Professional Ordering
Design	Fixed within Architecture	Lack of Response	Physical Inhibition	Parking Bollards	Software Code

Table 1. Modalities of Control (Murray & Scott 2002)

40. Scott observes that when governments consider a policy problem – unsafe food and passive smoking are two of the examples he considers – regulatory structures and processes have become the general approach to risk mitigation and behaviour modification. Scott advocates a different approach. Instead of replacing prior regimes with a regulatory agency, a 'more fruitful approach would be to seek to understand where the capacities lie within the existing regimes, and perhaps to strengthen those which appear to pull in the right direction and seek to inhibit those that pull the wrong way' (Scott 2008, p. 25). He quotes the UK Better Regulation Task Force guidance, issued in 2000 where, as we have seen, public policy decision makers are advised when considering regulatory change to consider self-regulation, and then 'if less costly alternatives were not viable, plan a more hierarchical form of intervention' (Scott 2008, p. 26). Observing that 'regulatory reform programmes have nowhere led to a substantial reduction in governmental activity in regulation, nor more importantly, a qualitative change in the character of regulatory governance', Scott advises the use of what he calls 'meta-regulation', namely the idea that 'all social and economic spheres in which governments or others might have an interest in controlling already have within them mechanisms of steering – whether through hierarchy, competition, community, design or some combination thereof' (Scott 2008, p. 27).[27] Scott outlines two challenges to this approach – identification of the mechanisms at play, and creating ways to steer those that are not securing 'desired outcomes'.

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[27] Scott also cites Parker's definition of meta-regulation, 'the regulation of self-regulation' (Parker 2002).

41. What is useful about Scott's approach is the co-option of culture and prior history of community practice into the regulatory project, while acknowledging the need for change and creating the ways by which change can come about. It is a subtle approach precisely because meta-regulation is an alternative to a governmental response to crises that is becoming more common, namely 'mega-regulation' (Scott cites responses to the BSE and Enron crises as examples of this). Scott names the Legal Services Act as one area where meta-regulation may be appropriate. At the same time, though, Scott acknowledges that the local conditions of any economic activity, including professional activities, will need to be governed by a hybrid mix of the approaches outlined in Table 1 above.

42. He gives an example of his approach in action that illustrates his view of a multimodal approach to regulation, namely the regulation of roads and road traffic. In that field, as part of meta-regulation, he has been involved in a process of building 'a stakeholder group to include local authorities, insurers, and groups representing local authority managers, lawyers and risk managers' (Scott 2008, p. 30). In his inaugural lecture and elsewhere (eg Scott 2006) he constructs a view of the design element of his table of modalities (above). Laws are promulgated on parking, for instance, that determine the illegality of parking vehicles in particular locales, eg on a pavement. But road furniture is also designed and put into place such that it is impossible to park on a pavement – high kerbs and concrete bollards are designed obstructions that prevent drivers from breaking the law should they wish to. Parking is thus an activity governed by both hierarchy (legal sanctions) and design (kerbs and bollards). Both regulatory modalities operate to govern our behaviour. Hierarchy is often less visible in the world, and therefore design supplies an enforcement of hierarchy in an immediate locale. But while enforcement is thus strengthened, the agency of road users is weakened. In limiting our agency both approaches, but design in particular, restrict the space in which we can think for ourselves in ambiguous situations. They remove the need for ethical thinking.

43. Scott acknowledges Brownsword's similar and earlier argument against design, which is that designed features of a regulated environment such as concrete bollards effectively remove human free will from the regulated context. The same argument applies to internet environments where digital rights management (DRM) is effectively regulated by the code of the environment that allows users only certain actions with regard to downloading music or video, but not others. Here, one's choice of action is constrained by code – as Lessig points out, code is architecture and the comparison with concrete bollards or raised kerbs or bus lanes is a close one. As Brownsword observes, though (and Lessig's position is close to Brownsword's here), the invisibility of regulation operating through design diminishes accountability and agency; and the practice of ethical choice is thus much more constrained.

44. Fuller's scepticism about our epistemic dependence upon experts can be extended to Scott's conceptual arenas of hierarchy, competition, community and design. Take the design of road traffic management, for instance. All of Scott's examples, indeed much of the academic discussion of road management, takes place within a number of frameworks that have, until relatively recently, remained largely unquestioned. One such framework for traffic management and regulation of traffic management is the Buchanan Report of 1963, produced by Colin Buchanan and instructed by Ernest Marples of the Ministry for Transport in the Macmillan administration. Buchanan's proposals, including one-way streets, traffic restrictions and the separation of pedestrians from traffic by use of kerbs, barriers and other street furniture, set the template for decades of traffic management and urban planning in the UK; and it was influential abroad too (in the USA and New Zealand, for instance). The Report also, while broadly setting out alternatives, clearly signalled a move away from public service vehicles such as trams, and the need to service the demands of private vehicles.[28] The design templates Scott discusses operate within this framework. They do not critique the principles underlying the framework, merely enact the templated design. Scott can argue that design is curiously limited, and not a freestanding modality because 'responsibility, accountability, and agency can only be supplied through one of the three other modalities', and it is therefore 'merely an adjunct or technique of the other three'. This is because a design template is used only to represent a particular cultural attitude towards urban planning and the place of traffic within it.

45. However it could be argued that design is more of a protean concept than Scott or Brownsword allows it to be. Design can be used to enhance responsibility and accountability, and extend agency within the world; indeed it can do so by clearing a space, as it were, in hierarchy so that self-governance, often according to extra-legal norms, is possible in ways that it would not otherwise be within communities of practice. Casey & Scott (2011) have analyzed the ways in which such norms are legitimized within a regulated community, and how they can be sustained. For example they note that in one domain, namely supply-chain contracts

> effective participation in the standard-setting process and the ability of a technical standard to facilitate market access may be crucial to whether or not suppliers grant legitimacy the technical standard institutionalized within a supply-chain contract (Casey & Scott 2011, p. 92).

46. Legitimacy is often a contested notion between stakeholder interests, of course, leading to a "legitimacy dilemma". Casey & Scott observe, quoting Black, that it "is simply not possible to have complete legitimacy from all aspects of [the regulated] environment" (Black 2007, p. 8) – a dilemma

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[28] One of the underlying metaphors for travel was the concept of roads as hydraulics: water moving through a pipe. The metaphor tended to minimize the psychology of pedestrians, vehicle drivers and intermediate travellers (cyclists, skaters, etc).

that, in the domain of legal regulation, both the Smedley and Hunt Reports struggled with.

47. Investigating norms and design templates, however, is one way in which regulation may be made more effective. Traffic management, used by Scott in his work and which we shall explore in more detail, is a useful example for the regulation of legal education because it gives us a case study of design and hierarchy in practice, specifically in the work of Hans Monderman, a Dutch traffic engineer.

48. Initially Monderman worked within the same design template embodied in the UK Buchanan Report. But in the small town of Oudehaske in Friesland, faced with urgent action required on road safety due to recent fatalities he abandoned a key principle of its road design, namely that vehicles are too dangerous to allow unenclosed into civic spaces, and therefore plenty of space should be designed around them and systems of precedence should be put in place, often giving them the dominating position on the road. By contrast, Monderman deliberately brought together vehicles (private and public service vehicles), cyclists and people in ambiguous contexts – traffic lights were uprooted, kerbs and road markings erased. By giving responsibility back to drivers and creating environments where drivers required to slow down because of the uncertainty of the context they found themselves in, his approach achieved speed reductions well below those normally brought about by chicanes and other traffic-calming measure (Monderman 1994) and he helped to renew civic space in Oudehaske.[29] He developed the approach in well over a hundred civic spaces in the Netherlands, and abroad in the UK and elsewhere.

49. One of the key issues in the new design was the psychology of driver perception. With conventional signage, drivers may pay more attention to them than the safety context (especially in the presence of speed cameras). When signs were removed, drivers required to pay attention to the relationship between how they drove and the immediate space around them. The new environment made space for the crucial part that eye-contact plays in road encounters as an indicator of intention, for instance, and the role that taken-for-granted safety technology such as traffic lights play in decreasing road user attention and increasing risk-taking. It also draws upon the literature of risk compensation theory (Adams 1995).[30]

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[29] It is interesting that Monderman was a driving instructor as well as an engineer and planner. Being an instructor rather than just a road user would have given him the opportunity to observe how driving novices become socialized to the culture and semantics of urban driving as they learn to drive, and how they adapt to an environment designed to diminish responsibilities beyond the interior of a car.

[30] Adams (2010, 15) provides some indication of the complexity of the approach to the field, for instance in his comments on the effects of antilock braking systems (ABS) on accident statistics:

> When introduced, their superiority persuaded many insurance companies to offer discounts for cars with antilock brakes. Most of these discounts have now been withdrawn. The ABS cars were not having fewer accidents, they were having different accidents. Or perhaps they were having fewer accidents, but no fewer fatal accidents; the evidence from various studies is less than conclusive.

50. If drivers had to become more aware in the new environment, so too did cyclists and pedestrians. Monderman used landscape, line of sight, desire lines, public art and novel road surfaces to re-orient all road users. Above all, he integrated traffic with civic spaces, achieving much more democratic spaces in towns, yet spaces that were still ruled by hierarchy – traffic laws were adapted, not abolished. He called this new environment 'shared space' (Monderman, Clarke & Hamilton-Baillie, 2006). As Hamilton-Baillie points out, Monderman is only one of a number of advocates of this approach to traffic regulation. Others include Alan B. Jacobs (1985; Jacobs, Macdonald & Rofé 2001), whose key perspectives Hamilton-Baillie summarizes as including close observation of modern street planning, which according to him was too often based on traffic assumptions rather than real research; and the integration of pedestrians and vehicular traffic (Hamilton-Baillie, 2008).

51. Monderman's initiatives not only dovetailed with existing Dutch traffic and transport policy, but also helped to improve aspects of its design (Kraay & Slangen 1994). In other words his work helped regulators to regulate the environment and create a new framework for urban planning. Aspects of it are still controversial: while the UK's Dept for Transport has published a recent comprehensive study in favour of shared spaces (2001, MVA 2009; 2010a; 2010b), others dispute these findings (Moody & Melia, 2011). The collaborative approach has, however, been adopted in other fields. Examples include the construction of Terminal 5 at Heathrow Airport. Casey & Scott cites Deakin & Koukiadaki's analysis of the approach taken by the client, BAA plc, who put into effect collaborative innovations such as risk pooling between subcontracts and learning mechanisms for '"effective diffusion of information, the use of frameworks, benchmarks and measurement and the operation of integrated teams working"' (Deakin & Koukiadaki, 2010, p. 108). As Casey & Scott describe it, 'the construction contracts were transformed, to some extent, from an instrument of hierarchy to an instrument of mutual learning' (Case & Scott 2011, p. 94).

52. In these examples design becomes much more of a meta-level activity that involves research and the transformation of norms, responses, inhibitions and practices. Design activity is thus used not only to rethink the 'architecture' but also to redesign the form and function of regulatory design. It may be, therefore, that the best position with regard to the regulatory relationship lies not in a choice between Hardwig and Fuller, but in a combination of community and monitoring, where the focus of regulatory activity moves from hierarchy and COBR (which is still present but backgrounded) to community-building, norm-strengthening and culture-transforming.

53. There are a number of useful general points that this literature exemplifies:
    1. The shift in legal regulation from closely detailed regulation to OFR

is paralleled in other regulatory domains and activities – in insurance and financial services generally, and in other domains such as the regulation of traffic management.

2. Regulatory activity, rather than changing behaviour directly, may well simply ratify what was already 'established public opinion' (Adams 2010, 7, citing Ross 1976).

3. Risk compensation theory points to the need for flexibility and a targeted approach to regulation; and to giving responsibility to the actors in the regulated field to regulate their own behaviour, subject to monitoring (more on this below).

4. COBR is a useful tool to illustrate best practice rather than to regulate directly the activities of regulated agents – an approach already begun with OFR.

5. 'Shared space' is a regulatory concept that could be applied to legal education, where regulators emphasize the mutual learning that can be leveraged between providers.

54. In the field of legal education there are already calls for this type of approach to regulation and COBR. SRA's recent relaxation of its guidance code to providers could move towards community-building (Maharg 2011a), but much more could be achieved in terms of a coherent strategy across the various regulated spaces in the educational continuum. Research in other professions has shown the need for such a continuum to be recognized as a key element of the process of professionalism. Papadakis et al., for instance, set out to determine if medical students who demonstrated unprofessional conduct in medical school were more likely to be disciplined by their State Board. Their study set out possible correlative factors, including gender, grade point average, Medical College Admission scores, school grades, National Board of Medical Examiner Part 1 scores and negative excerpts from evaluation forms. The study subjects were alumni graduating between 1943 and 1989. They revealed correlations between unprofessional behaviour at medical school, and practitioners who had been disciplined by their profession. As they reported:

> We found that UCSF, School of Medicine students who received comments regarding unprofessional behavior were more than twice as likely to be disciplined by the Medical Board of California when they become practicing physicians than were students without such comments. The more traditional measures of medical school performance, such as grades and passing scores on national standardized tests, did not identify students who later had disciplinary problems as practicing physicians. (Papadakis et al. 2004b, p. 249; see also 2004a, pp. 1100–1106)

55. This is not the only study to produce such results. Other studies have focused on the part that professionals can play in being role models for students. Kenny *et al.* outline the practical consequences of a new emphasis on professionalism as character formation (Kenny, 2003, pp. 1203–10). Misch has argued for the appointment of what he calls 'humanism "connoisseurs"' to the medical curriculum, namely staff specially trained to give feedback on qualities such as empathy,

compassion, integrity and respect, 'while evaluating physicians' behaviors as an integrated, cohesive whole' (Misch, 2002, pp. 489–95). Such initiatives are useful when one bears in mind the LSB's concerns whether 'initial qualification requirements are sufficient to ensure competence throughout the career of a lawyer, particularly in keeping up with changed practices.' As the LSB point out 'ongoing training and quality assurance is an important strand of the 'regulatory toolkit' for the regulation of conduct of business.' COBR, however, is only one tool amongst many to achieve a coherent and more effective educational continuum. More important for regulators may be the pro-active creation of educational 'shared spaces' – communities of practices across educational providers and across educational stages – and the development of a shared language of reform and transformation (LSB 2011, 24; see also Maharg 2007, citing Squire & Shaffer; Maharg 2011).

The risks of risk-based regulation

56. At point 4 above we mentioned that risk compensation theory points to the need for flexibility and a targeted approach to regulation. There is much to recommend this approach. To date, both HEFCE and QAA has taken the view that if QA is to apply to all, then cyclical programmes of review are necessary to ensure implementation of quality standards. The recent White Paper, 'Higher Education: Students at the Heart of the System (BIS, 2011a) proposes that risk-based regulation be introduced to English Higher Education, led by HEFCE, in association with QAA, the Office for Fair Access (OFFA) and the Office of the Independent Adjudicator (OIA). The implementation of the proposal is mapped out in more detail in a related document, 'A New, Fit-for Purpose Regulatory Framework for the Higher Education Sector' (BIS, 2011b). Risk-based regulation is more targeted in its approach than QAA's current processes, focusing on those sectors of the regulatory landscape where risk is potentially greatest. It would seem to be a more focused, streamlined approach to the problems of improving and sustaining quality standards.

57. However in a report written for the Higher Education Policy Institute (HEPI) Roger King summed up the problems with this approach:
   > While at the level of abstract general principles it is hard to cavil with a regulatory approach that seeks to be selective, focused, and proportionate, and which promises to relieve a number of institutions of unnecessary central control and bureaucratic impositions, risk-based regulation can be a risky business, not least for the regulators. Risk-based regulation principles are set to provide major operational challenges, particularly for HEFCE and for QAA. Nor is it clear that the principles of commercial risk-based competitiveness sit easily with established democratic beliefs of equality before the law and associated ideas of fair treatment and accountability, based on bureaucratic impersonality, the application of the same rules and processes to all, and standardization. (King, 2011, 2-3)

58. The organizational challenges of designing and implementing risk-based regulation, too, are not trivial. The transparent allocation of organizations to 'relational categories' (King 2011, p. 4) along with the

evidence required for the task means that regulators would need to be more knowledgeable about a range of governance issues. The problem here is that, as King points out, research has shown that 'assessors are especially poor in estimating the value of the internal control systems of the organizations they supervise'; and that there was wide variation in the standards adopted by assessors, and in their mode of operation (King 2011, pp. 4-5, citing Rothstein & Downer, 2008; King, Griffiths & Williams, 2007).

59. King points out, rightly in our view, that further risk to regulatory reputation arises from the nature of higher education and related institutions. These are, as King puts it, '"loose-couple" organizations' (King 2011, p. 6), not least because of the essential nature of the professional tasks that they carry out; and as such, regulators have less capacity to control risk arising from their activities. The White Paper makes it clear, too, that new providers will be scrutinized more than established providers. There is a strong possibility that the demarcation between elite institutions, with their intake of AAB students, and other institutions will be strengthened, and the elite institutions 'will remain largely free from the competitive pressures introduced for others in the new system' (p. 10). There may also be a tension here between the perceived role of HEFCE as champion of the consumer/student, and the light-touch approach to established organizations; and may lead to complacency and higher risk-taking by these institutions. Moreover, as King points out, it is not entirely clear if the proposed risk-based regulation of quality fits with the cyclical review processes envisaged by the Bologna Process; and sparse QA processes may well impact adversely on the global reputation of English Higher Education (pp. 7, 9).

60. Are there alternatives to current QA processes and the option of risk-based regulation? There are, and we shall describe an example when we deal with related issues in chapter eight of the Literature Review.

Themes arising from debates

61. It is part of the nature of the literature in this section that the debates are largely dealt with in the preceding sub-sections of this part of the literature review; and therefore this summary will be brief. There are three key debates arising from COBR and legal education generally, discussed below.

Regulatory change of focus

62. It is a curious feature of regulatory activity that when it has too high a profile, it can, in effect, infantilize those being regulated, so that the attainment of regulatory achievement ('excellent' course, rather than 'satisfactory', for instance) becomes the aim, not the achievement of high educational standards in themselves. As Richard de Friend points out, this was the case with the BVC. The Wood Report pointed to the expense of the course, content that did not challenge students and was neither

realistic nor was it aligned to contemporary Bar practice, a very low pass level and low standards of teaching. And yet, as de Friend rightly points out, 'over the last ten years the BVC has been subject to almost constant external scrutiny'. In the ten years prior to the Wood Report the content had been prescribed as recently as 2000 by the Elias Working Party; other, major aspects of the course had been reviewed successively by Bell (2005), Neuberger (2007) and Wilson (2008); standards and quality had been monitored on the basis of course providers' annual reports and by Bar Council (now BSB) appointed external examiners and panels (de Friend, 2010).

63. Part of the explanation is that there was a failure not of regulatory control, but of regulatory model: top-down control paradoxically removed the crucial responsibility from providers and teachers to think about their own developing educational professionality in its widest sense.

OFR as COBR

64. If OFR is conceived as different from rules-based prescriptive regulation because it is differently detailed, and more clearly structured as to principles, rules and guidance, then the implications for curriculum development are considerable. Providers will have more flexibility to design; and design will become a key activity for all providers, in the way that it currently marks out the most successful and innovative providers at present. Conceptualizing OFR as COBR may lead to an increase in innovation, not just in learning design and use of technology, but in the relationship of work-based learning to formal education, and in many other areas of legal education, legal policy and legal practice. In turn, this may require the drafting of guidelines, similar to medical educational guidelines discussed in chapter eight of the literature review.

OFR as shared space

65. Part of the problem for any regulator wishing to change or transform practice is dealing with terraform, with the landscape of habits, cultural attitudes, social and economic relationships created by prior regulation and expectations. We have described in the literature review of this section some approaches that may help to change the landscape.

66. The use of OFR, as a form of COBR, will have considerable consequences for the educational market, if it is defined as a form of 'shared space'. Currently most providers of formal education operate silo-based programmes of study, where sharing is not the norm. There may be little discussion between local undergraduate QLDs and LPC and BPTC. The sharing of resources between institutions and alumni on an ongoing basis is something we know almost nothing about in the literature, possibly because little of such sharing takes place. The economic basis for market

competition between providers would appear to be unchallenged. But as Benkler (2006) points out, and adapting his argument, there are four observations we can make about such economics. The first is that the market position is overstated – higher education is 'replete with voluntarism and actions oriented primarily toward social-psychological motivations rather than market appropriation' (2006, p. 461). Second, encouragement of silo economics benefits some (eg providers) at the expense of others (eg students, general public). Third, and as Benkler puts it, 'the basic technologies of information processing, storage and communication have made nonproprietary models more attractive and effective than was ever before possible' (p. 462). We shall discuss this more in chapter 8. Fourth, there are effective models of peer-production in the market already. In an era where Wikipedia and SourceForge flourish against all odds, regulators may want to consider the issue of collaboration between institutions. The growing importance of OER and OEP, together with economic pressures to reduce the costs of education for students and others may help to create shared spaces for legal education.

67. In turn, this will mean a redefinition of the position of the regulator that, hitherto, has allowed such market forces to be played out. OFR as COBR therefore may help to initiate a new relationship between regulator and educational providers.

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Chapter four
Education standards and entry to formal legal education

Admission to formal education and educational standards

Introduction

1. Admission is one of the critical moments of legal education. In spite of the often strong debates on methods of determining entry to both academic law programmes and the profession, there are as we shall see surprising gaps in our knowledge as to process and result. In this section of the literature review we give an overview of admissions and discuss some aspects of admission process and procedure, as well as some alternative admission assessments.[31]

Academic entry standards: the current position

2. GCSEs and A Levels[32] are still the major determinant of admissions to academic higher education in England and Wales. While there are no modern figures for the predictive value of A Levels as regards university performance in law schools there are data for other professions which show that A Levels are strong predictors of some, though not all, aspects of future academic performance (McManus *et al*, 2003). Below we summarise the position in brief for the regulated professions in law. We begin with the smaller regulated professions.

Costs lawyers

3. The minimum entry standards for a trainee costs lawyer, who must be at least 16, are set by the Costs Lawyer Standards Board as:
   a) four GCSEs at grade C or above, English and Maths being compulsory; or
   b) two A level passes and 1 GSCE level to include English; or
   c) three AS level passes to include either English or Maths; or
   d) GNVQ at intermediate or advance level, provided a communications skills element is included; or
   e) passing a written aptitude test set by the ACL.
    (CLSB, 2013)

4. Trainees then pursue a three-module distance-learning course, assessed by final examination over a minimum three-year period. Exemptions are available for holders of law degrees, LPC/BPTC (or their precursors) and CILEx qualifications. Final qualification is contingent on three years' suitable practice experience, which may be audited.

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[31] There is a useful table outlining some of the main legal career options and points of admissions at http://www.lawcareers.net/Information/Timetables/CILEX/. A useful and accessible site giving information to those interested in legal careers is http://www.lawcareers.net/Information/FirstSteps.asp .
[32] In which we include the Welsh Baccalaureate.

Licensed conveyancers

5. The Council for Licensed Conveyancers states (n.d., a, b) that basic entry requirements are four GCSEs at A-C passes (or equivalent) in English Language and three other approved subjects although mature entrants may have this requirement waived. Discretionary exemptions apply to this and other aspects of the training regime, on application and suitable evidence. CLC offer an online distance-learning course that is designed to be combined with in-office practice, alternatively some of the courses are provided, part-time, by colleges. Minimum qualification time is two years for the two-stage programme (Foundation followed by Finals), with most students studying for three to four years. There is a time limit of seven years for completion of the course. A minimum of two years certified and supervised "practical training" in the workplace is also required before a licence to practise can be obtained.

Notaries

6. Notaries (other than ecclesiastical and European notaries) must be at least 21, a solicitor, a barrister or graduate and prepared to take the relevant oaths (Master of the Faculties, 1998). There are a number of prescribed topics of study, although solicitors and barristers may qualify by completing the distance learning UCL Notarial Practice Course covering Roman Law, Private International Law and Notarial Practice over a two-year period.

Patent attorneys and registered trade mark attorneys

7. Patent attorneys occupy a peculiar position in almost inevitably being "dual" qualified both domestically and as representatives before the European Patent Office. The European Patent Office requires candidates to "possess a university-level scientific or technical qualification, or [be] able to satisfy the Secretariat that they possess an equivalent level of scientific or technical knowledge" (European Patent Office, 2011, p. 11). Consequently, although the ostensible minimum entry qualifications for patent attorneys are a degree, or LPC/BPTC, or any other qualification approved by the relevant examination agency (IPReg 2009, 2011) in practice patent attorneys will have at least a first degree in a science subject and often a doctorate. There is a discretionary exemption for "persons with substantial experience" outside these provisions.

8. Registered trade mark attorneys share their admission criteria with the patent attorneys. However, as the European Patent Office requirement is not of direct relevance, they may more frequently have degrees in other subjects.

9. Practice then diverges (IPReg, 2009, 2011). Trainee patent attorneys, as well as obtaining the European qualification, pursue a series of papers at Foundation and then Advanced level on a part-time basis. The position for trainee trade mark attorneys is in transition. Some may continue to qualify through a similar mechanism to the patent attorneys; others through a new system that involves an academic course delivered on a part-time basis, by Queen Mary University followed by a vocational course delivered by Nottingham Law School.

10. Prior to admission both trainee patent attorneys and trainee trade mark attorneys must have completed at least two years and in some cases four years, full-time practice.

11. Patent and trade mark administrators, operating in a support role, may pursue the CIPA Certificate in Patent Administration (CIPA, 2012) or the ITMA Trade Mark Administrators Course (ITMA, 2012).

Chartered Legal Executives

12. CILEx oversees a number of qualifications, including some for legal secretaries. There are no formal entry requirements although for entry to the level 3 certificate and professional diploma, although a minimum of four GCSEs at grade C or above, including English Language or Literature or equivalent qualification, is recommended (CILEX, n.d., a.c.). A City and Guilds/CILEx level 2 award, certificate or diploma in Legal Studies is available either for intending paralegals, or as an alternative precursor to the level 3 qualifications. Holders of qualifying law degrees may enter the level 6 stage through a graduate fast track and holders of the LPC or BPTC may be entirely exempt from the CILEx qualifications (CILEX, n.d., d).

13. The CILEx qualifications may be pursued online or part time at, for example, FE colleges. Some foundation and LLB degrees exempt against the CILEx structure.

14. A number of grades of membership of CILEx are available, including graduate entry (CILEX, n.d., b), and it is possible for entrants to, for example, terminate their studies at level 3. To become a Chartered Legal Executive, trainees from all entry routes have been required to complete at least five years of qualifying employment (CILEx, n.d.e) in a solicitors or licensed conveyancers' firm or in another organization where they are supervised by a chartered legal executive, barrister, solicitor or licensed conveyancer. The period of qualifying employment may run before, after, or more typically, during the period of study but at least two years of the five must follow acquisition of the level 6 qualification. Following consultation and pilot (IPS, 2011) of a work-based learning scheme, however the position will change from 2013. In addition, the definition of qualifying employment has been reviewed, and the period of qualifying employment reduced from five years to three (IPS, n.d.).

15. Skills for Justice is working with CILEx and others on a framework for legal services apprenticeships designed to recruit school leavers (Skills for Justice, n.d.; CILEx et al, 2012). There are no formal entry requirements but, as the apprenticeship is by definition embedded in employment, it is recognised that employers may set minimum formal academic qualification requirements. At present this structure may articulate more clearly, by way of progression, into the CILEx qualifications than into those of other professions, particularly those of solicitors and the bar.[33]

Solicitors and barristers: academic stage

16. The picture with regard to the actual academic entry standards for those wishing to qualify as solicitors or be called to the Bar is considerably more complicated. The basic principle, however, is that entrants must have a "qualifying law degree",[34] or a

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[33] Activity is currently in England only, although there are plans to extend into Wales in the near future.
[34] as defined by the JASB statement (JASB, 2011).

degree in another subject followed by a conversion course (GDL) or may proceed directly into the solicitors' vocational stage if they are Chartered Legal Executives. Common to both professions is the need to obtain a period of qualifying employment (pupillage or a training contract) before being able to qualify fully.[35]

17. This may be attributed to a number of factors, listed below.

Lack of transparency in the recruitment process

18. Whilst most law firms and some chambers and the Bar Standards Board[36] collect and publish information on the academic credentials of the individuals hired who then proceed to qualification, there exists a paucity of published data detailing the academic attributes of those applicants who are rejected. The ability to access this data is essential to any proper study of academic entry standards to the profession: without being able to study the academic profiles of those who are rejected it is difficult to draw conclusions regarding the quality of advice offered to young people wishing to enter the profession.

19 The general advice provided by careers websites is that candidates should aim to achieve at least a 2.1 in their university degree. In principle a 2:1 is a minimum requirement for entry to the BPTC and, as, for example, in 2010/2011, 32.4% of pupils were recruited prior to beginning their BPTC, (BSB, 2012, p. 47) the effect of academic performance at the later vocational stage may be more ambivalent. Although most shy away from discussing the relative weighting attached by employers to the educational institution attended by applicants, one article on the website *lawyer2b* stated the following:

> The importance of a stellar academic record cannot be stressed enough. A number of law schools at top universities insist on three A grades and the minimum requirement for securing a training contract at a reputable commercial law firm is typically a 2:1 degree.
>
> Historically, City law firms were notorious for their bias towards graduates from Oxford and Cambridge universities. Thankfully, nowadays firms are making a concerted effort to cast their nets wider. Nevertheless, some snobbery still exists. And with some top City firms receiving on average more than 2,000 applications for around 50 training contracts, they can be as fussy as they like. So if you do not make the grade, then getting beyond the dreaded rejection letter is unlikely. (Begum, 2009).

While hardly representative, these comments do give a snapshot of opinion on aspects of the process. The fact that, in 2010/2011, 34.5% of pupil barristers had completed their first degree at Oxford or Cambridge provides a further perspective (BSB, 2012, p. 47).[37] It is not easy to find similar data for solicitors although a 2010

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[35] BPTC graduates are allowed to call themselves "barristers" on completion of the BPTC although they are not permitted to practise without then completing pupillage. The same is not true of LPC graduates (although they may then move sideways to become, for example, Graduate Members of CILEx).

[36] The *Bar Barometer* (November 2012) for example, indicates (pp. 49-50) that 54.5% of pupils recruited in 2010/2011 held a 2:1, and 34.9% a first. This data does not differentiate between those whose first degree was in law and those whose first degree was in another subject.

[37] The next highest university was Bristol at 3.6%. 55.9% went to a state school (compared to 88.8% of the general graduate population). That said, there is evidence of attempts to recognise and counteract a perception that "I don't stand a chance unless I've been to Oxford or Cambridge" (COMBAR, 2007, p. 11).

survey of LinkedIn profiles reported in the *Law Society Gazette* suggested that 53% of partners in Magic Circle firms had Oxford or Cambridge educations (Dean, 2010).

20. A qualitative study by Rolfe and Anderson, published in 2003 reports the preference of larger firms for students from older universities based on: "a number of beliefs about old and new universities, which did not include the type of law course or its content" (Rolfe and Anderson, 2003, p. 321). Instead, the rationale for this preference was reported as being based on: 'the perceived quality of application and calibre of recruits, the position in the Times league table, the belief that universities with higher entry requirements will deliver more demanding courses and the graduates will be better and the image of the firm' (Rolfe and Anderson, 2003, p.321). The introduction of the LNAT and similar aptitude assessments may serve to further entrench these beliefs, though there is no direct research that supports this.

Lack of specificity in data published by UCAS and HESA

21. The way in which both UCAS and HESA collect data means that they group Qualifying Law Degree ("QLD") programmes (as defined by the JASB) together with non-qualifying law degree programmes. HESA data does not differentiate between 'broadly based programmes in law', 'law by area', 'law by topic' and the rather opaque category of 'others in law'. Furthermore, neither the HESA nor the UCAS websites provide definitions for these programme titles. Whilst it is possible to analyse the data from UCAS in reference to each of these different programme titles, HESA data cannot be interrogated further without enlisting the help of their statistics departments. There appears to be no literature that has done either, to date. As a result it is difficult to draw concrete conclusions regarding the academic entry standards for QLDs without undertaking new research. Whilst we discuss the QLD principally in terms of the two professions that, through JASB, currently mandate it, its discussion is also relevant for the many other legal professions, which accept it or provide exemption against it, in their own qualification structures. The situation is further complicated by the next issue below.

Lack of information on the use of the tariff systems by Universities when assessing applications

22. UCAS uses a tariff system to grade applications (UCAS, n.d. a, b, c, d). At present, there are 52 qualifications that attract tariff points (see Figure 1 below). Many universities will specify that their offer must include a certain number of points from a particular qualification although they may accept other qualifications which they deem to be "equivalent" (see Green and Vignoles, 2012[38]). Institutions also vary in the acceptability or otherwise of A level Law.

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[38] For the debate about potential progression from apprenticeship into HE, a potential which now arises in the legal field, see Thomas, Cox and Gallagher, 2012.

WHAT QUALIFICATIONS ARE INCLUDED IN THE TARIFF?

The following qualifications are included in the UCAS Tariff. See the number on the qualification title to find the relevant section of the Tariff table.

1 AAT NVQ Level 3 in Accounting
2 AAT Level 3 Diploma in Accounting (QCF)
3 Advanced Diploma
4 Advanced Extension Awards
5 Advanced Placement Programme (US and Canada)
6 Arts Award (Gold)
7 ASDAN Community Volunteering qualification
8 Asset Languages Advanced Stage
9 British Horse Society (Stage 3 Horse Knowledge & Care, Stage 3 Riding and Preliminary Teacher's Certificate)
10 BTEC Awards (NQF)
11 BTEC Certificates and Extended Certificates (NQF)
12 BTEC Diplomas (NQF)
13 BTEC National in Early Years (NQF)
14 BTEC Nationals (NQF)
15 BTEC QCF Qualifications (Suite known as Nationals)
16 BTEC Specialist Qualifications (QCF)
17 CACHE Award, Certificate and Diploma in Child Care and Education
18 CACHE Level 3 Extended Diploma for the Children and Young People's Workforce (QCF)
19 Cambridge ESOL Examinations
20 Cambridge Pre-U
21 Certificate of Personal Effectiveness (COPE)
22 CISI Introduction to Securities and Investment
23 City & Guilds Land Based Services Level 3 Qualifications
24 Graded Dance and Vocational Graded Dance
25 Diploma in Fashion Retail
26 Diploma in Foundation Studies (Art & Design; Art, Design & Media)
27 EDI Level 3 Certificate in Accounting, Certificate in Accounting (IAS)
28 Essential Skills (Northern Ireland)
29 Essential Skills Wales
30 Extended Project (stand alone)
31 Free-standing Mathematics
32 Functional skills
33 GCE (AS, AS Double Award, A level, A level Double Award and A level (with additional AS))
34 Hong Kong Diploma of Secondary Education (from 2012 entry onwards)
35 ifs School of Finance (Certificate and Diploma in Financial Studies)
36 iMedia (OCR level Certificate/Diploma for iMedia Professionals)
37 International Baccalaureate (IB) Diploma
38 International Baccalaureate (IB) Certificate
39 Irish Leaving Certificate (Higher and Ordinary levels)
40 IT Professionals (iPRO) (Certificate and Diploma)
41 Key Skills (Levels 2, 3 and 4)
42 Music examinations (grades 6, 7 and 8)
43 OCR Level 3 Certificate in Mathematics for Engineering
44 OCR Level 3 Certificate for Young Enterprise
45 OCR Nationals (National Certificate, National Diploma and National Extended Diploma)
46 Principal Learning Wales
47 Progression Diploma
48 Rockschool Music Practitioners Qualifications
49 Scottish Qualifications
50 Speech and Drama examinations (grades 6, 7 and 8 and Performance Studies)
51 Sports Leaders UK
52 Welsh Baccalaureate Advanced Diploma (Core)

Updates on the Tariff, including details on the incorporation of any new qualifications, are posted on www.ucas.com.

Figure 1: Qualifications included in the UCAS Tariff 2012)
Without access to data on the number of applications accepted and rejected for QLDs broken down according to both tariff score and composition of tariff score, it is very difficult to develop a meaningful picture of the true nature of academic entry standards for these courses.

Lack of information regarding academic standards required of candidates from non-law degree backgrounds

23. Again, the lack of published data on individuals from non-law backgrounds (in this context via the Graduate Diploma in Law (GDL)[39]) who are rejected when applying for training contracts/pupillage makes it harder to assess the academic entry standards for the profession. Whilst general guidance is that a 2.1 is minimum

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[39] CILEx transferees into the solicitors' profession may be exempted from the training contract.

academic benchmark for entry to the profession, it is difficult to assess how accurate this is. In terms of composition, several large firms publish statistics stating that between 40-50% of their trainees are from non-law backgrounds (Clifford Chance,[40] Taylor Wessing[41]). The most recent publicly available Law Society statistics indicate that 1,446 of the 8,491 people admitted to the roll in 2008/2009 did so with non-law degrees (Law Society, 2009, p. 48). Similar information does not appear to be publicly available for the bar.

24. Rolfe and Anderson found (supporting similar conclusions by Bermingham and Hodgson, 2001) an association between taking the CPE/GDL (rather than a law degree) and increased chances of securing a training contract. They present a number of explanations provided by firms for this, including the perception that the number of what might be regarded as acceptable law students is insufficient to meet demand and that 'more than half of all law students in the UK are at new universities… which are not targeted for recruitment and are not favoured by law firms when selecting applicants for interview (Rolfe and Anderson, 2003, p. 325). Rolfe and Anderson also assert that firms rely heavily on A-Level grades when recruiting trainees (rather than degree class mark). Theirs was a qualitative study but it adds to the argument for firms publishing more information on the individuals they reject if we are to understand fully the academic entry requirements for the profession (see also Braithwaite, 2010, on diversity for arguments in favour of information publication).

25. From the data collected by UCAS it appears that the number of accepted applicants to University (see Appendices 1 & 2 below) has risen across the period 2006-2011 whilst the number of those applicants gaining tariff scores of 360+ (the typical offer for a QLD degree) has fallen. Furthermore, the average tariff scores of students accepted to study all Law courses has fallen: this is mirrored by Accountancy but the opposite of the trend in Medicine (see Appendix 3 below).

26. In addition, pivot table analysis of the UCAS data on applicants/acceptances by tariff score for Law students in the UK in 2003 has consistently demonstrated more acceptances than applicants.

27. Although from autumn 2012, universities (but not private providers) are required to publish "key information sets" to inform potential applicants,[42] this does not include information on application of the tariff. Data on employment prospects is shown, but not in sufficient detail to address the points made in paragraph 17 above.

Solicitors and Barristers: the vocational stages

28. On one level, the criteria for entry to the LPC and BPTC, vocational programmes for aspiring solicitors and barristers, are fairly easily explained. The SRA requires that applicants enrol as a student and confirm they have completed the academic stage of training – a QLD, CPE or GDL at an English or Welsh academic institution – or that they have full exemption from the CPE/GDL,[43] or that they have obtained the

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[40] http://gradsuk.cliffordchance.com/faqs.html

[41] http://graduate.taylorwessing.com/faqs/

[42] http://unistats.direct.gov.uk/Search/SubjectList/C%2c24%2c060/ReturnTo/Subjects.

[43] There is some partial exemption from the CPE/GDL for, for example, entrants from the Republic of Ireland.

equivalent CILEx qualification. The administrative forms include the Suitability Test 2011 which deals largely with issues of 'character and suitability' which the SRA, under the Solicitors Act 1974, are required to deal with (SRA, 2012). Once again, the detail of who precisely is chosen by institutions and why is difficult to obtain. The pass rate in 2009 was 75.1% of all enrolled LPC students who sat the exams (Law Society, 2009, p. 35).

29. Applicants to the BPTC (BSB, 2011, the successor of the BVC from 2010/2011 as a result of the Wood Review, BSB, 2008b) go through a similar process. Application is made to the BSB, called BPTC Online, and there is heavy competition for places. The detail of admissions processing and choice by institutions may be difficult to research due to lack of comprehensive data, though some is available. A 2:1 is required and CILEx do not have automatic entry. The pass rate for the BPTC was 66% in 2010/2011 compared to 80% for the final year of the BVC (Bar Council/BSB, 2012). It should be said, however, that one element of the change in the course structure was to raise the minimum pass mark from 50% to 60%.

30. Following completion of the BPTC, graduate, although entitled to the title of "barrister", must complete a one-year[44] pupillage (BSB, 2012b) prior to being able to *practise* as members of the bar. Pupillage, for which there is considerable competition, is normally in the chambers of self-employed barristers, but may be in the Government Legal Service or a small number of organisations (including some solicitors' firms) authorised by the BSB to provide pupillage. Pupillage involves a "first six" during which the pupil shadow and observe their pupil supervisor, draft documents and carry out research and a second six during which they may take on work of their own but remain supervised. Advocacy training courses and practice management courses are completed during pupillage and further training is completed during the early years of practice.. Following recommendations made by the Wood Review (BSB, 2008a) training of pupil supervisors has been enhanced and measures put in place to seek to regulate the quality of performance and range of activity undertaken during pupillage.

31. Following completion of the LPC graduates must complete a two-year[45] training (SRA, 2008) of employment in a solicitors' firm or another authorised organisation (eg the GLS, a local authority, or another organisation which has been authorised by the SRA to take trainees). The range of exposure during the training contract must be to at least three distinct different areas of work and to both contentious and non-contentious work. The title of "solicitor, which entitles the individual to obtain a practising certificate not conferred until the training contract has been completed. Solicitors are not normally permitted to practise alone until a further 3 years have elapsed since qualification.[46] Again, whilst less marked than for the bar, there is considerable competition for vacancies, as well as, in some sectors, challenges in meeting the threshold requirements for the breadth of experience and a number of

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[44] Normally – there may be some reduction for relevant prior experience.

[45] Again, there may be some reduction for relevant prior experience. There are also variations in the intersection between the end of the LPC and the beginning of the training contract, particularly where either or both are pursued on a part-time basis.

[46] The somewhat contentious "Management Course Stage 1", mandatory during the first three years is, presumably, placed at that point with a view to being preparation for sole practice once the first three years are complete.

innovations are or have been explored to address them. [47] Although a group of "day one outcomes" intended to represent the competences of solicitors at the point of qualification,[48] and a set of "work-based learning outcomes", intended to represent the competences to be achieved during and at the end of the training contract[49] have been developed, the training contract remains at the time of writing governed by the "practice skills standards" (SRA, 2008) setting out what is to be achieved. These appear to range from the highly advanced[50] to the rather passive.[51]

32. A Professional Skills Course (including some advocacy, business and finance and some optional study) is completed during the training contract.

33. Much more complex are the criteria for entry to training contract and pupillage, and we shall discuss aspects of these in the following sections.

The development of entry standards by regulation

34. It is difficult to contrast the current position with entry standards in previous years, for the reasons given above, and because of the paucity of data on regulation of prior regimes, both at undergraduate and vocational stages of legal education.[52] There is certainly little in the literature that makes reasonable and coherent comparison as to the effect of regulation on entry standards. There is evidence from a study on occupational regulation that the effects of regulation 'can be expected to be stronger when the entry requirements are either higher [than occupations such as childcare workers] or are more extensively applied' (Forth *et al*, 2011, p. 16).

35. As Huxley-Binns points out, 'to date the impact of legislative and regulatory changes has been negligible on the QLD' (Huxley-Binns, 2011, p. 295). Like many other commentators, though, she points out that the changes to be brought about by the Legal Services Act 2007 will impact on admission:

> 'Fewer QLD graduates of the future may choose to proceed to the LPC or BPTC without a guaranteed training contract or pupillage. Rather than law firms, they are likely to work for businesses specializing in legal services, working alongside accountants, financial advisers, estate agents, taxation consultants, conveyancers, trade mark attorneys, work based learning students, risk assessors, insurers and underwriters (p. 296)

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[47] Secondments (modular training contracts) or exchanges between organisations; the replacement of the contentious requirement by a classroom simulation and/or pro bono work; consortium traineeships and their development into the Accutrainee model, for example. A more substantial experiment, in which paralegals without training contracts were externally supported to achieve the same results, is the paralegal section of the SRA's work-based learning pilot (IWBL, 2010; BMG Research, 2012).

[48] These are, however, tested in the Qualifying Lawyer Transfer Scheme assessments for Scottish, Northern Irish and foreign and other qualified lawyers wishing to transfer into the profession.

[49] These were tested on both current trainees and on paralegals in the SRA's work-based learning pilot. They were also required to produce evidence of having satisfactorily achieved the stated competences. (IWBL, 2010; BMG Research, 2012).

[50] "On completing the training contract, trainee solicitors should be competent to exercise the rights of audience available to solicitors on admission", i.e.. to conduct a trial in the county court or magistrates' court.

[51] "Trainees should understand the processes involved in contentious and non-contentious negotiations [and] appreciate the importance to the client of reaching agreement or resolving a dispute."

[52] As indicated above, European regulation clearly has an impact on the entry standards for the patent attorney profession. Clearly there is the potential for useful comparative data emerging from the change from BVC to BPTC.

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and training review

She argues for mandated knowledge specialisms outlined in the Joint Academic Stage Board Statement to be replace by 'skills aligned to knowledge' (p. 298). This is a reasonable viewpoint, one expressed by a number of commentators on legal education at least since Biggs' concept of alignment became generally accepted in higher education as a standard curriculum device (Biggs, 1999) and one we have explored in our empirical investigations..

36. As with all undergraduate law provision, there is a "benchmark" for law programmes provided by the QAA (QAA, 2007). For professional purposes, however, where the QLD and GDL are more significant, the Joint Academic Stage Board Statement (JASB, 2011) is of greater significance.. While accepted as a broad practice statement, the Statement has been criticized for mandating some specialisms at the expense of others, and doing so without any clear rationales (Birks, 1995) and for encouraging shallow cramming of legal subjects (Boon and Whyte, 2007). Whilst considerable innovation is seen in the field, the prescription of the foundation subjects and the proportion of the curriculum, which they are required to occupy, inevitably, constrains providers in the design of legal curricula, particularly for the GDL – this has been the subject of extensive comment in the last decade.

37. It could be argued that the generality of the Statement – one strategic reason why it has lasted as long as it has – together with, in the early days at least, a relative lack of procedural guidance surrounding it, has given rise to problems. In a Submission by CHULS to JASB, for example, on the subject of a JASB paper that criticized providers' collaborative arrangements with non-QLD providers, CHULS responded by criticizing issues of interpretation and procedure on the application of the Statement. CHULS also pointed out that areas of quality assurance subject to QAA and dealt with by internal quality processes within institutions need not be governed twice, in effect, by JASB (CHULS, 2007, p. 2). Procedures were extensively revised, no doubt as a result of this and similar exchanges and are now more sophisticated. The content of the statement may need revision – in an age of internetworked technologies, any minimum statement of skills should include digital information literacy in its widest sense.

38. The JASB *Handbook* currently deals with the detail of issues arising from the Statement, and is the official reference document for QLD and CPE/GDL programmes, which must be followed by all providers of professional postgraduate training (since 2009-10). There will also be problems with the assessment which, currently under Appendix G, is split 60/40% between examination and coursework on the QLD, and 70/30% on the CPE/GDL which, it could be argued, set unnecessarily binding constraints on forms of assessment.

Other issues in determining academic and professional entry

LNAT, LSAT and BCAT

39. A number of law schools use the National Admissions Test for Law (LNAT).[53] Maharg (2007) traced one of its origins to E.L. Thorndyke's educational experiments at

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[53] For more information on specialist admissions assessments such as LNAT, see the website of SPA (Supporting Professionalism in Admissions) at: http://www.spa.ac.uk/admission-tests/index.html, and in particular the report on that page entitled: 'SPA Report on Admissions Tests Used by Higher Education Institutions' (June 2007) and

Columbia University Law Faculty in the 1920s. The method, now extensively used in US law schools, involves testing candidates in order to obtain a score on critical reasoning aptitude.[54] According to the LNAT website[55] eight UK and two non-UK universities currently use the assessment to enable them to obtain such data. The Law National Admissions Test (LNAT) Consortium was formed in 2003 by the universities of Birmingham, Bristol, Cambridge, Durham, Nottingham, UEA (East Anglia) Oxford, and University College London. It consists of a two-hour test in two parts: a multiple-choice element (80 minutes) and an essay element (40 minutes). Law schools are advised by LNAT to use the results of the assessment in conjunction with other evidence, e.g. A-level results, interviews, etc. The assessment is administered for profit by Pearson VUE, a business of Pearson plc., the global educational and information corporation. There has been some fluidity in the group of universities participating in LNAT. Most recently, the University of Cambridge has withdrawn from LNAT and most colleges use the "Cambridge Law Test", taken on paper whilst the candidate attends interview. This test may employ any of essay, problem and comprehension questions.

40. To date there has been little in the way of serious study of LNAT as a gatekeeping device. In a 2008 study funded and conducted by LNAT the authors concluded that LNAT did lead to a fall in applications to LNAT universities, but cited 'wider contextual processes' as, in part, the cause of this (Hoare, Syrpis and Crockett, 2008, p. 30). On the more serious issue of the assessment's differential effect on widening participation (WP – which they defined as including students from low socio-economic background as well as BME students) they claim the effect has been 'negligible' (Hoare, Syrpis and Crockett, 2008, p. 31). The performance of WP against non-WP candidates was not considered. The Consortium claims on its website that school background does not influence performance in the LNAT ([No author], 2007). The Chair of the Consortium also claims that 'by focusing purely on aptitude, those sitting the LNAT cannot be coached to succeed, the result is not swayed by presentation skills or a lack of them, it can't be crammed for and is almost impossible for someone to plagiarise or cheat' (Lazarus, 2011).

41. Her claim that the LNAT cannot be coached is arguably open to doubt, nor does it prevent attempts to do so (see Hutton, Hutton and Sampson, 2011; Petrova and Reid, 2011). Skills and aptitude are never performed in a vacuum and it is self-evident that content, its absence or plenitude, cognitively ill-organized or well-structured, affects structure. Moreover, as the research literature for over three decades has been telling us, the full picture of a writer's representation

> will have to include not just topic and discourse knowledge, pre-text, and textual choices, but the network of plans, goals, criteria, the associations and emotions, the evaluations and suggestions of collaborators, and so on – the activated network that makes up what a writer means. (Flower, 1994, pp.97-8)

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the statistics showing a slight increase in (transparent) use of admissions tests for 2013 entry (SPA, 2012). Other similar UK tests include the uniTEST (critical reasoning, developed by Cambridge Assessment with ACER, Australian Council for Educational Research), UKCAT (Clinical Aptitude Test for Medicine and Dentistry (HEI consortium of around 26 HEIs with Pearson VUE), and GAMSAT (Graduate Australian Medical School Admissions Test – a selection test developed by ACER for medical schools offering graduate-entry programmes). A GMAT is available for entry to MBA programmes: http://www.mba.com/the-gmat.aspx

[54] Significantly, the concept of 'critical reasoning' is not defined. The term normally used to describe what LNAT assesses is 'aptitude' – again, this term is not defined. The glossary to the Schwartz Report defines an 'aptitude test' as 'designed to measure intellectual capabilities for thinking and reasoning, particularly logical and analytical reasoning abilities' (Schwartz, 2004, p. 79), but this definition raises as many questions as it answers.

[55] (http://www.lnat.ac.uk/lnat-exam/admissions-law.aspx)

42. Kaye (Chair of the LNAT Consortium until 2005) stated in an article in *The Law Teacher* that 'the format of the LNAT has been deliberately designed to avoid giving an advantage to those student willing to pay large sums of money to "test preparation" organizations' (Kaye, 2005, p. 196), though this has not stopped Kaplan from publishing guides to the assessment (Kaplan, 2006). Moreover the research on student literacy in HE in the last few decades reveal the importance that practice of specific forms of writing has in familiarizing us with rhetorical structure, in helping us to routinize many of the lower cognitive processes of writing so that we can plan and structure higher-level ideas (Creme, 1999; Creme and Lea, 1997). Many of the essay flaws Kaye focuses on in his article arguably could be the result of the contextless activity of the assessment, and the lack of a familiar situated practice:

> Spelling, grammar and punctuation were dreadful, and there was often little evidence of reasoning skills. Many students simply recited list of facts instead of constructing an argument. Others apparently tried to follow a "blueprint" of how to write an essay, which had the effect that they spent most of their time defining or "unpacking" the question rather than answering it. (p. 197)

43. Two further points ought to be considered. Admissions in the LNAT is built around critical reasoning, but it is significant that 'critical reasoning' nowhere appears in the JASB *Handbook* or the Statement or indeed in the QAA subject benchmark for law. There are synonyms at various points, [56] but this key aptitude, upon the evidence of which students can be barred entry to law school, does not seem to be the focus of development once students have been accepted or rejected. Second, admission on the basis of predictive results in the LNAT is no prediction at all of a student's ability to perform as a lawyer in the vocational stage of learning; or indeed of a student's success in most of the undergraduate benchmark and transferable skills of the JASB Statement. This has been proven in other professions. A US study evaluated the use of an aptitude selection assessment in a dental school's admissions process and found that the scores had no predictive value for clinical achievement at the end of the programme (Gray, Deem and Straja, 2002) – a result corroborated by similar results in McManus *et al* (2003) and other longitudinal studies.

44. In US law schools the literature is much more ambivalent about the effects of the equivalent assessment, the LSAT. [57] There, at least one study has shown that LSATs are only predictive of JD first year success, [58] not third year; while the author concluded that the 'common practice in law school admissions of attributing special weight to the LSAT score as a predictor of law school academic performance is without merit or validity' (Thomas, 2003, p. 1021). The history of the LSAT in American law schools is a contested one – there have been many and unresolved debates over the influence of law school rankings, weighting of LSAT scores alongside grade point or other averages, 'whole-person' approaches, the real predictive value of the test, the effect on the entry of students of colour, the role of the LSAT in affirmative action programmes, and over-reliance on the LSAT

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[56] "Critical judgement" appears, for example, in the QAA subject benchmark under "general transferable intellectual skills" QAA, 2007, p. 3).

[57] According to LSAC , the LSAT is 'designed to measure skills considered essential for success in law school' – Law School Admission Council (2005) LSAT AND LSDAS Information Book. The JD programme is of course postgraduate: while practices vary, most law schools combine the LSAT with an undergraduate grade point average, which result is then combined into an Index Score.

[58] And possibly only 30% of that (Soares, 2012).

(Weinstein, 2001; Henderson, 2004; Kidder, 2001; Delgado 2001; Edwards, 2006, Randall, 2006).[59]

45. Following a period of consultation (BSB, 2012) the BSB is about to implement, for the 2013 BPTC entry, an aptitude test called the Bar Course Aptitude Test (BCAT). In a comprehensive consultation document (which also measures the aptitude test against Better Regulation principles) the BSB set out the work done to ensure that the test met the criteria for its implementation. The aim of the test is not, as with the LNAT, to select the best candidates from a body of candidates, but to identify 'those unsuitable to do the [BPTC], at a threshold level, and whose presence on the course adversely impacts on the learning experience of other students' (p. 138). According to the BSB the key criterion of its success will be

> the improvement of standards on entry, and therefore exit of the BPTC. By using a test universally we will be able systematically to identify students who are likely to fail the course and they will be prevented from undertaking it, thus saving them wasting their own time and money.

The pilots, particularly the second, were detailed and useful. The LSB also commissioned an academic, Chris Dewberry, to comment on aptitude tests generally and the conduct and results of the pilots (Dewberry, 2006). His detailed and comprehensive report (commented upon in an appendix to the BCAT consultation), points out that the purpose of the test should be clarified (p. 132); but he noted the very strong correlation between test scores and examination results, which were stronger than the median correlations for the US LSAT test and first year university results (p. 134). He noted that (as with the LSAT), a full predictive test could only be carried out once the BCAT was in operation. He did note, as the BCAT consultation paper observes, that 'both Degree class and university attended significantly predicted course outcome', though the test had incremental validity beyond students' prior educational qualifications, i.e. the 'best prediction (highest validity) is achieved by taking all these factors into account together' (p. 134).

Culture

46. Education is analogous to legal practice in that, while it can be reduced to work flows, matrices, procedures and patterns or templates, it is concerned primarily with social process and relationship (Trow 2006; Maharg and Maughan, 2011). Educational processes are therefore powerfully affected by culture in every respect – the national, racial, social, class, gender and family cultures that students bring to their studies, the cultures of the institution and its processes (classes, forms of teaching and assessment, physical locale, its history and the situated history of the law school or its equivalent within the wider institution), the culture that is embedded in procedures of critical points such as entry and exit points.

47. While much of this may not seem to be a regulatory issue, it does impact upon regulatory obligations. The educational literature has for some time now dwelt upon the cultural aspects of learning in higher education, professional learning and the formation of identity within undergraduate and postgraduate study and in training placements, traineeships and pupillages. West, for instance, in his study of

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[59] Statistical data is increasingly available: see Marcus, Sweeney and Reese, 2011, Lauth, Sweeney and Reese, 2012.

adult learners in Medway towns, noted how the culture of institutional learning encountered by adult learners affected them not just in their studies but in their changing view of themselves and their communities: 'The problem … is that certain conversations, thoughts and actions are favoured rather than others in a manner which can frustrate the struggle for more integrated learning, selves and stories' (West, 1996, p. 188). Given higher education's transitional status in the lives of all students, he noted the importance of identity to study, and identities based upon interpretations of past and future thought and action: 'reclaiming a past – emotionally, biographically, intellectually and culturally – is essential to claiming a future, built more on one's own terms than upon those of others' (p. 211).[60] He also drew attention to how educational structure in institutions, and social expectations, shape identity: 'when adults give reasons for educational participation, their vocational explanations partly reflect the powerful normalising gaze of such ideas within society' (p. 206).

48. We can see this given voice in some of the work on the admissions of specific groups of students to higher education and the professions. Shiner (2000; 2002), writing about BME students, takes up some of these perspectives to give a portrait of BME student engagement. Francis and McDonald, writing about part-time law students, noted the 'multiple disadvantages, largely unrecognized by universities', the marginalization of part-time students and, as a result, the formation of a 'collective habitus which may structure what is "thinkable" for their futures'. The result is a 'fundamentally paradoxical experience' where institutions 'offer broader access to legal practice for non-traditional entrants, while continuing to inhibit their chances of success by entrenching their difference in the eyes of the profession' (Francis and McDonald, 2009, p. 220). Such work may seem to have more to say about the experience of learning while on the course rather than the experience of being admitted to a course; but it could be argued that this research should be taken into account when providing induction courses for part-time students; and that regulators might wish to consider research literature that points, as does Francis and McDonald's to the effects that arise where '*formal* equality can mask substantive differences between groups [of students]' (p. 226, their italics).

49. Sommerlad has shown how cultural biases affect crucial entry points, and in particular how theories of symbolic, linguistic and cultural capital come into play at all entry points, including where the profession controls entry, at training contract. She describes (quoting the work of Halpern, Shiner and Newburn) how there is a 'significant bias against new university students, especially on the part of large commercial firms' (pp. 204-5).

50. In their empirical study Zimdars, Sullivan and Heath have questioned the extent to which Bourdieu's theory of cultural capital, which Sommerlad relies on amongst other theoretical constructs, explains the link between social background and gaining an offer to study at the University of Oxford. It did not, for example, explain the gender gap in admission, and only part of the disadvantage encountered by South-Asian applicants to Oxford (p. 648). They argue the case for constructing measures of cultural knowledge, and observe that 'what matters is a relationship of familiarity with culture, rather than just participation in culture' (p. 661). It could be argued that such measures would be useful to regulators, giving as they would a

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[60] A point also made about the relationship between conditions of employment and identity, in his study of GPs responding to change in the NHS (West, 2001).

finer-grained analysis of the issues of diversity and access to higher education and the professions. Many of the examples cited in Sommerlad's empirical research bear this out: the importance to applicants of not just A Level achievements and university attended, but for men, playing and talking about specific sports, and for men and women, ways of talking, dressing and presenting socially (pp. 203-07).[61] This is true of the maintenance of elites generally in higher education, and the literature of this in education is extensive – in the case of linguistic markers, for example, going back at least to Bernstein's seminal work on hegemonic discourse and social class (1971). As Zimdars (2009, p. 3) points out with regard to admissions to Oxford,

> net of attainment, the professional middle class, white, male and state school applicants fare particularly well in securing offers for undergraduate study at Oxford. With the exception of the state school effect, the admissions privilege advantages already privileged strata of society.

Different professions: different knowledge, different skills?

51. As Huxley-Binns (2011), Flood (2010) and many others point out, the LSA 2007 will have significant effects on admissions: to law schools, to professional programmes, to the profession itself. Admissions and gatekeeping functions, as Abel (2003) pointed out, are crucial not just for students and educational providers but for regulators too; and when the shape and function of the profession is under such change as will be brought about by LSA, then admissions will change significantly. It is clear from the literature and self-evident facts that the two main professions are fragmenting into smaller bodies of professionals, most regulated by their own regulators, though there are some areas of unregulated practice.

52. Each of these bodies will have their own standards (IPS is a good example), and these standards will inevitably form part of the admissions process. On the transition from school to further or higher education, clearly school qualifications will be taken into account, but there may be further tests, such as the LNAT, should pressure of numbers and other pressures force regulators to seek other forms of filtering.

53. There is a possible argument for admission processes that take account of more than formal academic records and self-reports by applicants. In her work on the quality of solicitors' work, for instance, Sommerlad noted that her research findings could inform teaching and learning in a variety of ways (Sommerlad, 2000, p. 512). This is entirely justified in our view: research into matters such as lawyer-client relationship should be part of the resources that educationalists consider when drawing up, validating and updating outcomes, standards and the like. Sommerlad, however, takes a 'whole-office' approach:

> These issues … should also inform training for paralegals, since it appears that tight resources may result in the increasing delegation of legal aid work. This, in turn, raises the issue of in-house training, not only for all practitioners (including paralegals, legal executives, and clerks), but also for all support staff. Such training should form part of a coordinated strategy to generate a client-centred culture, embedding standards into practice which will foster a reflective practice rooted in such culture.

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[61] And of course this is the subject of parody and ironic comment in the law student press and blogs. See, e.g., http://www.lawcareers.net/Information/Blog/InTheEighthCircle/

54. There are of course quite different cultures that exist between hierarchies of employed staff in all areas of legal work – between barristers and their clerks (Flood, 1983), and within solicitors' offices – secretaries, partners, paralegals, associates, PSLs, etc. Many of the areas of knowledge required for transactional work, for instance, overlap between employment roles, as do the requisite skills; but there is also demarcation of both knowledge and skills through role, relationship and management. In a solicitor's office for instance the subject of her research, namely client-care and the client relationship is of central importance; but it is important in different ways to different employment segments within the office.

55. This simultaneous identity and diversity raises the question as to whether separate regulators should draw up separate standards, or whether there should be a degree of homogeneity between the different (and differently regulated) areas of legal practice regulation. This is not a question to be answered in our project, but it does affect the educational issues of standards and development of admission criteria, for ideally outcomes and standard-setting will need to reflect this; and educational admissions procedures and standards will similarly need to be designed to accommodate it. Francis (2002, p. 22) described some of the issues perceptively, well before LSA (2007):

> If occupational boundaries continue to blur, if there is increasing convergence between legal workers, the momentum towards a fused profession, to homogenize education, training, representation and regulation may prove irresistible.

56. It makes sense for such research to be used by regulators for the creation of assessment criteria for entry at the professional stage; but there is also an argument that it could be used at the undergraduate stage as well. If the skills statements in the JASB Statement are to be taken seriously, then perhaps at least some more of them of them (and certainly beyond the aptitude of critical reasoning) could be taken into account when students are admitted to law programmes.

57. Some of this was investigated and reported on in the SRA Work-Based Learning Scheme (IWBL, 2010; BMG Research, 2012), which, *inter alia*, explored an alternative to formal education and current training contract arrangements. While not strictly the subject of this section, the report nevertheless gives valuable insight into current admissions issues. On the subject of whether the pilot WBL would reduce barriers to access, the IWBL report stated that:
    - most candidates were convinced that such a scheme would help address the specific perceived barrier to entry into the profession of socio/educational background but only relating directly to paralegals and those in legal related employment
    - professionals were not convinced that by itself the WBL scheme could address barriers to entry but rather barriers to entry needed to be addressed earlier in the education and training process, for example at the training contract application stage
    - due to the economic climate, professionals in law firms believed that the level of degree and type of university would still need to be one of the criteria of initial selection for processing to interview stage
    - professionals were not convinced that having a WBL portfolio would offer any particular advantage to the individual in seeking a newly qualified

solicitor job in a legal firm. It could assist in securing an interview. (IWBL, p. 16)

58. Since one of the primary aims of the research was to test a route to qualification that did not depend on a training contract, the work would be especially of interest to groups such as paralegals, who were unable to obtain training contracts, though they may have completed the first two stages of the route to becoming a solicitor. On that issue, the IWBL researchers reported that the WBL route was 'a fairer system' (p. 7), but over the course of the pilot they raised the following issues:

- shifting economic climate and the potential professionalization of other legal roles influenced a modification in respondent views from 'supportive in principle' to 'perhaps not feasible'
- all professionals did believe it was 'fair' to have this route but were concerned that reduced availability of training contracts would make entry into the profession even more competitive, and selection criteria would be even more refined, making a change to the degree level requirement unlikely
- concerns over whether being employed as a paralegal could give full exposure to the areas of law without the paralegal becoming a full time trainee
- the process of replacing a paralegal would also incur more costs for the employer
- during the course of the scheme concerns arose, which were not evident in the first year, that giving access to paralegals to enter the profession through the WBL scheme may create a two-tier system because paralegals would never be able to have the same experience as trainees unless they were employed solely as trainees.[62]
- the impact of Alternative Business Structures as well as the emergence of a professional body for paralegals was mentioned in this context but not elaborated upon
- the possibility of firms becoming more specialized and traditional paralegal work going abroad meant that firms would be looking for individuals to enter the profession who had the highest knowledge and skills levels to bring in and maintain business. It was believed by some that this approach was a meritocratic approach, decided by the market, that would remove barriers to entry that were based on other factors such as age, ethnicity and gender.
(IWBL, p. 54)

Many of these issues are discussed earlier. It is interesting to note the argument in the final point above, namely that the action of the market, in encouraging formation of niche practices and outsourcing, would remove barriers to entry. It may do the opposite, in the case of niche practices restricting entry to those with highly specialist qualifications in specific areas of law, and in the case of outsourcing, removing at a stroke the promising early rungs of the paralegal ladder described briefly at p.2 of this chapter.

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[62] Some of these concerns may be circular: paralegals clearly *can* have the same exposure to different areas of law as trainees do (and would not have been able to complete the pilot without it). Similarly, if training contracts are as variable as is reported, some trainees may not have the same quality of experience as the paralegals in the pilot.

58   Subsequent investigation (BMG, 2012) of the second cohort of part-time participants, raised similar points but in particular in this context:

- Part-time candidates were at no specific disadvantage in terms of the WBL training process. They simply faced the pressures that apply to people who seek to study for a qualification whilst holding down a job.
- Differences in delivery mode between part-time and full-time candidates do not result in different standards of training and learning. Numbers of WBL trainees are still small but it appears that a WBL approach is robust and allows flexible delivery without dilution of standards.

[…]

- The pilot appears to show that it has made a contribution to lowering barriers to access to the legal profession for those candidates who took part. However, if the pilot was to be delivered in a similar way in the future there may be some concern that, in cases where paralegals become qualified but do not move up into a fully-qualified status position as a solicitor, the programme's impact is a little muted.
- At the present time, the sector is likely to see the WBL approach not as a competitor to, or replacement of, the traditional approach to the training of solicitors but as a variation, which has specific value in specific circumstances and should be developed and promoted as such.

59. Clearly a WBL route would necessitate a wide-ranging review of standards and entry criteria across the range of regulators in the legal domain; and the IWBL report's key recommendations signalled the significant work that would need to be done to achieve the aims of WBL:

- Undertake further work to set out the skills and attributes for qualifying as a solicitor;
- Develop progressive steps of achievement linking the LPC, the vocational stage and Day 1 competences;
- Set out the learning outcomes necessary to demonstrate competence;[63]
- Consider a credit system to assess incremental learning and to open the door to more flexible routes to qualification and transfer between professions;
- Retain and develop the use of the portfolio as a learning journal;
- Train key professionals in coaching and assessing within a WBL framework;[64]
- Continue the bold moves in widening participation through exploring an accredited learning scheme for prior learning;
- Address barriers to entry at secondary school level when choices of university, courses and future careers are still in the formative stage. (IWBL, 18)

60. Working on its own pilot in 2012, IPS has produced a scheme that will, from 2013, apply to all applicants for Chartered Legal Executive Status. In the final iteration, there are eight competencies: practical application of the law and legal practice, communication skills, client relations, management of workload, business

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[63] BMG suggested, of the tested WBL outcomes, "A wider roll-out of the pilot may benefit if the number of outcomes is streamlined with more emphasis placed on achieving against the eight broad outcomes in order to reduce the overall workload for candidates and employers." (p. 7).
[64] The BMG report endorsed the idea that there was scope for further work on support and information for supervisors.

awareness, professional conduct, self awareness and development and working with others, divided into twenty-seven outcomes (IPS, n.d.) Guidance for each outcome and other supporting documents are provided and assessment is by portfolio and supporting documents against assessment criteria. Initial summative assessment is by the employer. A moderation process then involves review by IPS officers and reference to the IPS Admission and Licensing Committee (IPS, n.d.).

Other qualifications

Barristers clerks

61. A degree is not necessary for entry, and entrants are expected to have a minimum of four GCSE pass grades at A-C or A Levels.[65] Membership of the Institute for Barristers' Clerks (IBC) is open to all clerks.[66] It offers a one-year BTEC Advanced Award in Chambers Administration for Barristers' Clerks. The course (largely online) is aimed at clerks with up to five years of experience, and certifies competence as a junior clerk.

Immigration advisers

62. It is in the nature of community-based immigration advisers that they might have limited formal prior qualifications. The application for regulation (OISC, n.d.) therefore combines assessment of character with requirements for prior informal immigration advice experience within an online assessment of the applicant's knowledge of the OISC codes and rules.

Legal Finance and Management

63. The Institute of Legal Finance and Management offers a diploma and several associate courses to its membership, which may include members of existing professions (such as accountants, CILEx or solicitors) as well, potentially, as those employed as "cashiers" (ILFM, n.d.). There are no specific entry qualifications.

Legal Secretaries and PAs

64. Aside from generic secretarial qualifications, CILEx offers a level 2 and a level 3 qualification for legal secretaries in association with City and Guilds. In addition, the Institute of Legal Secretaries and PAs offers its own Legal Secretaries Diploma (ILSPA, n.d.) to those who already have "administrative skills with a good typing speed, computer literacy, a knowledge of word processing programs and a good standard of English".

Wills, trusts and estates

65. The Institute of Professional Willwriters offers a number of short training courses outside its CPD scheme for full, affiliate and sponsored members on technicalities of will writing and taking will instructions. Entrance to full membership is by "a 1½ hour written paper and a role play taking Will instructions and a Will drafting exercise" (with a 70% pass mark) or for those with 5 years relevant experience, four written assignments based on the applicant's actual files, intended to demonstrate competence. There is a sequence of exemptions for other qualifications and experience (IPW, n.d., a, b)

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[65] See http://www.prospects.ac.uk/barristers_clerk_entry_requirements.htm
[66] See http://www.ibc.org.uk/

66. The Society of Trust and Estate Practitioners offers a number of certificates and diplomas as well as a qualified practitioner programme route (at level 7, supported by a reflective log) for those with significant prior experience.[67] It also, via the University of Manchester, allows diploma graduates to top up to a BSc in Management and Trust Estates. There are no formal entry requirements for the certificates and completion of the certificate is normally a precursor to entry to the diplomas. (STEP, n.d.)

67. The Society of Will Writers and Estate Planning Practitioners offers a variety of classroom, distance learning and online modular courses and examinations, through its College of Will-writing. There is no minimum standard of academic qualification for entry.

Paralegals

68. A number of paralegal qualifications are available in the higher education sector, as, for example the Postgraduate Diploma in Paralegal Practice offered by Leeds Metropolitan University. Clearly to varying explicit extents the CILEx qualifications, especially those at level 3 and the LLB, BPTC and LPC operate as qualifications for paralegal practice. There are, however, two organisations offering other distinctly "paralegal" frameworks.

69. The Institute of Paralegals recognizes a four-stage career path (IoP, n.d.), outlined below:
    - *Affiliate member.* This stage is open access to all, and designed for those currently not doing legal work but aspiring to become a paralegal, e.g. studying a law course. Membership does not confer any professional designation; there is no obligatory training and no CPD requirement.
    - *Associate Paralegal.* This is the apprenticeship stage, open to those practising law, but with less than four years' experience, less than two years' experience if they have completed an approved course or less than one year's legal work experience if they have completed the Legal Practice Course. This is a recognized professional designation; there is no obligatory training requirement, and there is a CPD obligation of 12 hours per annum.
    - *Certified Paralegal*. This is an award aimed at more experienced practitioners, normally a minimum of four years; or two years experience and completion of an approved course, or one year's experience and completion of the LPC/BPTC. This is a recognized professional designation and confers full membership of the Institute. There is no obligatory training requirement, and there is a CPD obligation of 12 hours per annum.
    - *Qualified Paralegal.* This stage is for qualified lawyers (solicitors or barristers), or people doing legal work who are eligible to become a Certified Paralegal and who have passed the mandatory course. This is a recognized professional designation and confers full membership of the Institute, and there is a CPD obligation of 12 hours per annum.[68]

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[67] Entry to this route is contingent on one of a) professional qualification and two years PQE in trust and estate practice; or b) a vocational degree and 5 years similar experience or c) 10 years similar experience.
[68] Information available at the Institute of Paralegals website: http://www.theiop.org/careers/become-a-qualified-paralegal/career-path.html

70. The admissions process is designed to move from practice situations into more formal educational structures; but it is significant that the Institute has chosen to incorporate other levels of legal education within its structure, particularly at stages 3 and 4.

71. The National Association of Licensed Paralegals (NALP, n.d.) offers a number of courses (sometimes through FE and HE institutions) (recognised by OfQual):
    - Paralegal apprenticeship at level 2 and 3;
    - A level 4 diploma, for which the normal entry requirements are two A Levels; A Level Law; BTEC National Diploma (NVQ/GNVQ Level 3 or above); CILEX Level 3 Qualifications; or ILSPAs Legal Secretary Diploma;
    - A level 7 diploma, for which the normal entry requirements are LL.B. (Hons); BA LAW or CPE/GDL.

Themes arising from debates

Control of entry points

72. From a regulatory point of view, admissions policies are crucial entry points and control of the checkpoint has been viewed as essential. But that control is necessarily a shared one for legal regulators because the stakes are so high and the issues so important to a range of stakeholders, from students themselves to government and society generally. Entry to undergraduate programmes is shaped by a complex mix of market forces, government caps on undergraduate numbers, as these are interpreted by local institutions, governed by QA guidelines and much else. Entry to professional programmes is more controlled, as might be expected, by regulators. The key issue for regulators is how to design entry processes that are fair, promote equality and diversity, and ensure quality of candidates in a highly competitive market.

73. It is clear that the Abel thesis identified over a decade ago – namely that the profession has been overly concerned with both the imperative and the impossibility of controlling supply into the profession – is one complicating factor in an otherwise complicated enough situation (Abel, 2003, p. 114). Paradoxically, control of admissions may not be the way forward, any more than top-down, highly detailed and prescriptive curriculum control was the way forward for regulators in the design of teaching and learning on professional programmes. Quality – of regulation, outcome and access – is critical. It is significant that the BSB's consultation document on a proposed aptitude test notes that the test 'is not designed specifically to cap numbers but to ensure the legitimate aim that only suitable candidates with a reasonable prospect of passing undertake the course' (pp. 137-8) – though of course the test will operate as a cap, but based this time on criteria of quality and access. In the report, social class was not taken into account as a category that may be affected by the test; but as Professor Carol Costley noted in her contribution to the SRA WBL report, socioeconomic status is crucial (WBL, 2010, p. 129). As Zimdars points out in her survey of Bar pupils in the period 2004-08, 'participation by those from working class backgrounds is lower among pupils than the university population' (Zimdars, 2010, p. 117). She also concluded that degree class, university attended and performance on the BVC were the strongest predictors of young barristers' earnings and employment status. If the aptitude test

is implemented it will be interesting to see what effect, if any, it has on opening access to the BPTC for individuals regardless of their social origin. The Neuberger Report (2007, p. 8) did advocate much more liaison between the Bar and schools and universities in this respect; but much more will be needed to change prevailing attitudes.

74. In the long-term future, given the wide variety of employment options made available by deregulation, and given other changes that will be brought about by the Legal Services Act, attempts to control numbers alone will be increasingly unsuccessful. There may be attempts to limit access to limited types of employment, and regulators should be aware of them. Given the complexities of entity- *versus* activity-based regulation, and particularly the issues of diversity (see chapter seven of the literature review), it is clear that the whole issue of gatekeeping by regulation at every stage of legal education requires general revision.[69]

Joint Academic Stage Board Statement

75. We would suggest that the literature points to the need for the Joint Statement, for long the concordat between academy and legal professions, to be redrafted in the light of the changes being brought about by the Legal Services Act 2007. The statement of transferable skills, for instance, requires alignment with the recent changes to professional standards, and probably also in the light of the changing standards in other academic disciplines. It may be that the skills standards need to be specified in more detail. It is interesting that the skill set analysed in the LNAT is not specifically detailed in the Statement; and indeed given the LNAT's role as gatekeeper, the part that critical reasoning plays in both undergraduate degrees and in the professional sector of legal education should be re-assessed. Given the increasing potential for divergence between the law of England and that of Wales, that is reflected in a separate legal jurisdiction, we suggest also that attention is paid in the Statement to creating at least an awareness of the potential for divergence in the QLD.

Alternatives to standardized admissions tests

76. For admissions officers struggling to discriminate between students who all have three As in A Levels, the simplest alternative might have been to raise the ceiling of the A Level upward, to A+, A++, as suggested in the Tomlinson Report (2004), but not implemented. However there is a strong argument, particularly on grounds of diversity, for cost-effective alternatives to A Levels. One reason for the LNAT's success is that it seems to provide that alternative. However LNATs are not a complete solution. There are alternatives to LNAT, and they should be explored by

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[69] The BSB consulted, in 2012, on a draft regulatory framework with draft rules and options, and this is clearly a response to the LSA 2007 along the lines of regulating advocacy-focused ABSs, LDPs and Barrister-Only entities. It was proposed that the BSB Handbook be adjusted to allow barrister-only practices; legal disciplinary practices and to permit barristers to conduct litigation, and that the BSB become a licensing authority for ABSs (BSB, 2012a). However, there is a clear statement that the BSB perceives itself to be a field-specific regulator: 'The BSB is seeking to become a niche specialist regulator focusing on advocacy and ancillary services and to regulate beyond this more widely would be outside the scope of the BSB's remit and could lead to regulatory failure.' (*ibid*, p. 4).

regulators, educational providers and educational researchers. Some of them, unlike the LNAT, take the well-researched concept that all texts are symbolic representations that writers use to think and work with, and have a social history replete with social and affective reality that is an integral part of the attention that writers and readers give to professional texts.

77. Some also take account of the professional *habitus* that lawyers inhabit, and draw performance predictors from that domain. One example of this is the work of Marjorie Shultz and Sheldon Zedeck, Professors of Psychology at UC Berkeley, who in 2008 released their final report on a performance prediction project entitled 'Identification, Development, and Validation of Predictors for Successful Lawyering' (Shultz and Zedeck, 2008). To predict effective lawyering, Shultz and Zedeck needed to define the concept, which they did over the course of well over a hundred interviews with lawyers, faculty, students, judges and clients, and identified 26 factors of lawyer effectiveness and behavioural examples of each.[70] They validated the new predictors and tested them using a sample of 1,148 alumni from two law schools, graduating 1973 – 2006. Their conclusions were that the new test instruments they devised, used in conjunction with current tests such as the LSAT, could 'extend admission consideration beyond prediction of grades to include predictions of professional effectiveness in law and law-related jobs' (Shultz and Zedeck, 2011, p. 661). In their view,

> Inclusion of tests to predict lawyer performance would … be justified by the actual role and mandate of law schools as professional schools and by the profession's mandate in society (e.g. serving clients, guiding behaviour, aiding in resolution of disputes and contributing to justice). (p. 661)

78. Shultz and Zedeck's work is of course a good fit for professional training and education. The extent to which it could be used at undergraduate admissions is another matter; but we would suggest that the sophistication and rigour of their work is a good model for the development of further work in this area. The work of the BSB on the BCAT is useful in this respect. The consultation document reveals that the BSB has attempted to align the assessment criteria of the aptitude test from the work of practitioners and tried to create a test that can, with convincing predictive power, identify poor candidates before they enter the BPTC. A key issue is of course the cut score, which will minimize the impact on BME applicants (which the consultation document acknowledged was affected by the test); and that has still to be determined.[71]

79. In other disciplines there is research and good practice that can be used in law school and professional programme admissions. Sedlacek (2004) challenged the dominance of the SAT in the US, and gave a wide variety of non-cognitive assessment instruments that could be used in conjunction with it, or in place of it.

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[70] The 26 factors were: Analysis and Reasoning; Creativity/Innovation; Problem Solving; Practical Judgment; Researching the Law; Fact Finding; Questioning and Interviewing; Influencing and Advocating; Writing; Speaking; Listening; Strategic Planning; Organizing and Managing One's Own Work; Organizing and Managing Others (Staff/Colleagues); Negotiation Skills; Ability to See the World Through the Eyes of Others; Networking and Business Development; Providing Advice & Counsel & Building Relationships with Clients; Developing Relationships within the Legal Profession; Evaluation, Development, and Mentoring; Passion and Engagement; Diligence; Integrity/Honesty; Stress Management; Community Involvement and Service; Self-Development.
[71] As the report points out, 'the largest [adverse] impact was for ethnic groups with students from minority groups being somewhat less successful than the white group overall' (p. 141), thought the report goes on to point out the rather puzzling result that 'some BME categories actually perform better on the Test than on the course' (p. 140).

In a review of admissions practices in medical schools McManus *et al* (2005) concurred with this approach, stating that 'an argument exists for … developing and validating tests of non-cognitive variables in selection, including interpersonal communication skills, motivation, and probity' (p. 555).

Principles of fair admissions

80. In any admissions system there should be a principled basis that underpins the process by which admission is conducted. Such a basis was outlined in the Schwartz Report (2004), whose principles of fair admissions processes stated that they should:
    - Be transparent
    - Enable institutions to select students who are able to complete the course as judged by their achievements and their potential
    - Strive to use assessment methods that are reliable and valid
    - Seek to minimise barriers for applicants
    - Be professional in every respect and underpinned by appropriate institutional structures and processes. (Schwartz, 2004, pp. 7-8)

81. The Schwartz Report recommendations and principles were considered by the then Department for Innovation, Universities and Skills (DIUS), which commissioned a further report in 2008, as recommended in the Schwartz Report, to gauge the sector's response to the Schwartz principles. That report, brief title *Schwartz Report Review*, and its associated initiative, Supporting Professionalism in Admissions Programme (SPA), provides much information in the way of good practice in admissions standards, processes and procedures. It also gives a valuable portrait of changes to admissions that reflect larger pressures higher education institutions by government and QAA. The Schwartz Review Report found that a number of the Schwartz principles had been successfully adopted by the higher education sector. With regard to factors other than formal academic qualifications being taken into account in admissions decision-making, though, it was clear that 'the majority of institutions' practice had not changed as a result of the Schwartz Report' (McCaig *et al,* 2008, p. 7).

82. There have been initiatives that attempt to widen participation in law programmes. The Sutton Trust and the College of Law, for example, established a Pathways to Law programme in England (http://www.pathwaystolaw.org/#). Originally established at Edinburgh University, the initiative encourages widening participation, and argues (along with earlier widening participation initiatives such as Glasgow University Education Department's *The University and Its Ways*) embedding processes beyond the point of admission and within the broader culture of the institution.[72] The sociological and the educational point is clear: widening participation at admissions counts for little if retention of students later in the programme becomes a problematic issue.

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[72] See Edinburgh's website at http://www.law.ed.ac.uk/wideningparticipation/. See LSE's website at: http://www.law.ed.ac.uk/wideningparticipation/http://www2.lse.ac.uk/study/undergraduate/informationForTeachersAndSchools/wideningParticipation/pathwayToLaw.aspx

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Appendix 1

Applicants/Acceptances by Tariff UCAS Data UK 2010

JACS2 Subject Group	Group M Law					

	Values					
Row Labels	Sum of Applicants	Sum of Deg Accepts	Sum of Found Deg Accepts	Sum of HND Accepts	Sum of Other Accepts	Sum of Accepts - All
0	4514	4080	115	34	3	4232
M1 - Law by Area	3238	2775	11	5	3	2794
M2 - Law by Topic	156	362	59	8	0	429
M9 - Others in Law	755	853	31	21	0	905
MM - Combinations within Law	40	90	14	0	0	104
Z No preferred subject line	325	0	0	0	0	0
001-079	607	487	17	7	2	513
M1 - Law by Area	340	243	1	0	1	245
M2 - Law by Topic	24	62	7	4	0	73
M9 - Others in Law	183	166	6	3	0	175
MM - Combinations within Law	5	16	3	0	1	20
Z No preferred subject line	55	0	0	0	0	0
080-119	350	171	19	3	1	194
M1 - Law by Area	213	109	3	1	0	113
M2 - Law by Topic	12	13	6	1	1	21
M9 - Others in Law	90	45	4	1	0	50
MM - Combinations within Law	4	4	6	0	0	10
Z No preferred subject line	31	0	0	0	0	0
120-179	887	464	32	12	2	510
M1 - Law by Area	559	283	3	3	0	289
M2 - Law by Topic	28	35	15	2	1	53
M9 - Others in Law	227	124	7	7	0	138
MM - Combinations within Law	5	22	7	0	1	30
Z No preferred subject line	68	0	0	0	0	0
180-239	1748	1227	25	7	0	1259
M1 - Law by Area	1120	727	8	1	0	736
M2 - Law by Topic	23	92	8	1	0	101
M9 - Others in Law	466	366	6	5	0	377
MM - Combinations within Law	9	42	3	0	0	45
Z No preferred subject line	130	0	0	0	0	0
240-299	2540	2204	6	3	0	2213
M1 - Law by Area	1796	1420	2	1	0	1423
M2 - Law by Topic	39	167	1	1	0	169
M9 - Others in Law	530	561	2	1	0	564
MM - Combinations within Law	12	56	1	0	0	57
Z No preferred subject line	163	0	0	0	0	0
300-359	2631	2514	1	0	0	2515

Applicants/Acceptances by Tariff UCAS Data UK 2010

M1 - Law by Area	2088	1881	0	0	0	1881
M2 - Law by Topic	36	156	1	0	0	157
M9 - Others in Law	361	402	0	0	0	402
MM - Combinations within Law	7	75	0	0	0	75
Z No preferred subject line	139	0	0	0	0	0
360-419	2455	2302	1	1	0	2304
M1 - Law by Area	2133	1907	0	1	0	1908
M2 - Law by Topic	13	86	1	0	0	87
M9 - Others in Law	197	247	0	0	0	247
MM - Combinations within Law	14	62	0	0	0	62
Z No preferred subject line	98	0	0	0	0	0
420-479	1845	1678	2	0	0	1680
M1 - Law by Area	1680	1511	1	0	0	1512
M2 - Law by Topic	8	47	0	0	0	47
M9 - Others in Law	87	86	0	0	0	86
MM - Combinations within Law	6	34	1	0	0	35
Z No preferred subject line	64	0	0	0	0	0
480-539	1209	1159	0	0	0	1159
M1 - Law by Area	1155	1076	0	0	0	1076
M2 - Law by Topic	3	22	0	0	0	22
M9 - Others in Law	29	48	0	0	0	48
MM - Combinations within Law	1	13	0	0	0	13
Z No preferred subject line	21	0	0	0	0	0
540 plus	1537	1429	0	0	0	1429
M1 - Law by Area	1503	1397	0	0	0	1397
M2 - Law by Topic	3	10	0	0	0	10
M9 - Others in Law	10	12	0	0	0	12
MM - Combinations within Law	3	10	0	0	0	10
Z No preferred subject line	18	0	0	0	0	0
Grand Total	20323	17715	218	67	8	18008

Appendix 2

Accepted applicants

Tariff	2006	2007	2008	2009	2010	2011
None/not known	98,300	117,449	142,769	145,694	141,640	141,315
001-079	10,169	15,598	18,266	21,455	21,184	17,982
080-119	6,601	6,514	6,870	6,648	6,442	6,657
120-179	18,336	15,582	16,423	16,158	14,728	14,604
180-239	31,596	28,305	29,859	30,904	28,618	28,217
240-299	42,353	39,649	42,448	44,751	45,458	46,849
300-359	45,101	43,343	46,224	49,094	49,624	51,912
360-419	39,171	39,383	41,484	43,861	42,861	45,521
420-479	26,214	27,359	28,178	30,134	31,087	32,734
480-539	15,795	16,995	17,574	18,754	19,723	21,033
540 plus	11,928	14,367	14,929	17,610	23,269	24,411
Total	**345,564**	**364,544**	**405,024**	**425,063**	**424,634**	**431,235**

Applicants - expressed as percentages

Tariff	2006	2007	2008	2009	2010	2011
None/not known	32.3%	35.5%	38.8%	38.8%	39.4%	39.2%
001-079	3.3%	4.7%	4.8%	5.2%	5.1%	4.4%
080-119	2.2%	2.1%	1.9%	1.8%	1.8%	1.9%
120-179	5.7%	4.7%	4.3%	4.2%	4.1%	4.2%
180-239	9.1%	7.8%	7.2%	7.2%	7.0%	7.0%
240-299	11.6%	10.3%	9.9%	9.8%	9.8%	9.9%
300-359	11.9%	10.9%	10.5%	10.4%	10.1%	10.2%
360-419	10.1%	9.7%	9.2%	9.1%	8.4%	8.7%
420-479	6.6%	6.7%	6.2%	6.2%	6.0%	6.1%
480-539	4.0%	4.1%	3.8%	3.8%	3.8%	3.9%
540 plus	3.0%	3.4%	3.2%	3.5%	4.4%	4.5%
Total	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**

Appendix 3

Accepted applicants - average Tariff scores by subject

Subject	2006	2007	2008	2009	2010	2011
Group A Medicine & Dentistry	377.9	378.79	379.24	384.66	401.38	399.26
A1 - Pre-clinical Medicine	375.27	381.84	382.32	387.46	405.91	406.48
A2 - Pre-clinical Dentistry	396.24	362.07	365.77	371.28	377.41	361.23
A9 - Others in Medicine and Dentistry	368.1	263.81	194.83	277.95	236.50	266.00
Group B Subjects allied to Medicine	188.69	184.25	127.44	123.38	133.67	147.41
B1 - Anatomy,Physiology and Pathology	265.58	265	259.87	254.59	279.35	284.80
B2 - Pharmacology,Toxicology and Pharmacy	283.24	288.28	282.79	298.12	305.81	322.99
B3 - Complementary Medicine	61.41	57.4	67.81	66.42	69.75	79.62
B4 - Nutrition	171.58	181.35	158.21	168.50	166.43	172.84
B5 - Ophthalmics	308.42	298.25	304.99	310.44	321.37	318.09
B6 - Aural and Oral Sciences	248.21	237.76	255.27	229.89	247.64	252.93
B7 - Nursing	132.24	120.83	60.94	57.82	71.89	79.14
B8 - Medical Technology	152.89	151.6	149.96	144.76	160.42	169.78
B9 - Others in Subjects allied to Medicine	169.35	167.1	170.83	167.52	179.59	189.82
BB - Combinations within Subjects allied to Medicine	153.56	149.73	125.59	132.45	129.49	140.54
Group C Biological Sciences	235.41	228.51	223.02	228.04	238.69	240.35
C0 - Biological Sciences: any area of study	475	347.79	390.60	382.92	486.25	473.43
C1 - Biology	287.43	286.61	292.09	307.29	317.87	319.33
C2 - Botany	224.39	217.35	315.90	287.79	348.21	335.65
C3 - Zoology	261.45	259.37	251.87	253.84	279.99	283.95
C4 - Genetics	312.82	317.63	317.92	333.73	346.17	359.09
C5 - Microbiology	292.3	279.33	271.18	293.96	320.55	320.07
C6 - Sports Science	148.82	141.02	133.24	129.90	129.58	127.19
C7 - Molecular Biology,Biophysics & Biochem	319.18	325.32	319.65	347.74	352.48	345.50
C8 - Psychology	263.5	256.62	249.44	255.62	269.25	269.27
C9 - Others in Biological Sciences	218.19	198.7	170.69	203.29	226.45	251.50
CC - Combinations within Biological Sciences	251.42	242.02	242.57	252.64	257.07	256.55
Group D Vet Sci, Ag & related	170.39	170.3	159.12	157.19	160.95	166.37
D0 - Vet Sci, Ag & related: any area of study	166	81.5	-	-	-	-
D1 - Pre-clinical Veterinary Medicine	380.13	379.34	384.57	389.05	407.21	403.95
D2 - Clinical Veterinary Medicine & Dentistry	137	148.83	-	-	-	-
D3 - Animal Science	117.78	125.79	120.11	132.49	123.15	130.17
D4 - Agriculture	98.25	99.45	96.82	104.01	112.33	122.26

Rise in average tariff score

Chapter five
Continuing professional development (CPD)

Introduction

> The first problem for any regulator becoming involved in CPD is being clear about what it is trying to regulate and why … Just as there is no single, right way of doing CPD, so there is no single right way of regulating it.
> CPD Review Working Group (2011, pp. 5 and 12)

> There is still confusion in the minds of professional members as to what CPD is, what it is for, how it should be assessed and supported and to what degree compliance with CPD programmes should be compulsory.
> Friedman (2001, p. 6)

1   Continuing professional development ("CPD") for legal practitioners (in some jurisdictions: continuing legal education ("CLE")) is to be examined within the context of a broader educational and professional context from which some terminology and concepts can usefully be drawn.

2   Firstly, a distinction may need to be made between "formal" or "accredited" CPD activity, sanctioned by the regulator within the context of a defined scheme, and a more diffuse on-going process of learning in the workplace (Houle, 1980) taking place irrespective of the functions of the CPD scheme. Such informal learning, about which there is a considerable literature, is outside the scope of this discussion, but it is important to recognise that regulated CPD is not the only, or even the most extensive or individually important, context of learning for legal professionals[73] and some professions, as will be seen in this chapter, do count such learning for CPD purposes. It is perhaps notable that although prior discussions cited by ACLEC in its *Second Report* (1997) envisaged no more than a mechanism for technical updating (ACLEC, p. 13) or refresher courses for the "older members of the profession"; ACLEC itself preferred an approach closer to what is now often referred to as a commitment to this broader "lifelong learning".

3   A second useful concept serves to distinguish between types of CPD schemes: those whose focus is on compliance ("the sanctions model": Madden &Mitchell, 1993) and those whose focus is on personal development ("the benefits model"). A related distinction can be seen between regulatory schemes which record and regulate inputs (hourages, participation in mandatory elements) and those which seek to achieve the much more difficult task of measuring and recording outputs (learning, impact on personal practice). Evaluation, where it occurs, may be limited to a questionnaire focussing on quality of delivery rather than impact on practice (and if such impact is assessed in the questionnaire it will only, by definition, be immediate impact, see Muijs & Lindsay, 2008, p. 196). In the latter study, (p. 201) which tested a possible model for more in-depth evaluation of CPD activity, evaluation questionnaires used in assessment of teachers' CPD were found always

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[73] So, for example, in a study of young lawyers in New South Wales, (Nelson, 1993), "in-house staff development" was placed third after "ask someone else" and "look it up yourself", with "non participatory" lectures in fourth place.

to ask about "participant satisfaction" in 35.2% of cases, but about participants' use of new knowledge and skills in only 6.2%:

> [O]nly those coordinators who operate at the highest level of evaluation evaluate use of new knowledge and skills. Conversely, this is therefore the type of evaluation least likely to be encountered in schools.
> (Muijs & Lindsay, 2008, p.204)

Further discussion of measurement of impact, from a Professional Associations Research Network ("PARN") study, appears in Friedman (2005, pp.73, 95).

4   Bodies adopting a pure sanctions model have been criticised as treating the desired competence and regulatory compliance as coterminous:

> The effectiveness of CPD practice and provision is measured in terms of compliance with CPD requirements, since the desired outcome is compliance.
> (Madden & Mitchell, 1993, p. 27)

Alternatively, the existence of a mandatory scheme may be seen as an appropriate regulatory defence:

> [t]he argument is that in every profession there is a residuum – preferably a small one – of members whose practice fails to come up to standard. It is largely for their sake that defensive measures have to be taken. Thus 'formal courses don't really meet the needs of lively members of the profession, but they help to ensure minimum standards'.
> (Becher 1996, p.53)

Insofar as CPD schemes for legal practitioners are directed at maintenance of (measurable, sanctionable) "competence" to practise,[74] regulators are adopting this approach. Different stakeholders in the process may well hold differing concepts:

> Professionals mostly believed in self-assessment as part of professional self-reflection. If CPD is to be assessed by others, it should be through formative assessment, i.e. it should aim to help professionals improve. …
> However the majority from professional bodies as well as employers view assessment as summative, that is, as a way of evaluating professionals and of accounting for CPD activities. Those representing professional bodies mostly viewed assessment as an important way of demonstrating the maintenance of competence. Employers valued assessment for judging if CPD activities met organisational needs.
> Friedman, 2005, p.8)

Nevertheless, an assumption, without more, that recording of attendance at formal CPD activities is, by definition, a recording of learning – leading to maintained or improved competence - obtained from such activities, is flawed. On the other hand, learning resulting from CPD activity need not be confined to (mere) competence or negligence-avoidance:

> there is a potential role for the professional body in encouraging solicitors to aspire to levels of professionalism that significantly *exceed* those set by the statutory regulator.
> (Hunt, 2009, p.88, our italics).

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[74] For the avoidance of doubt, specialist accreditations, such as those for rights of audience, or as pupil supervisor, have been excluded from this discussion.

5   It will be apparent that much of the literature discussed in this section, both inside and outside the legal professions, is very recent. For the legal professions, the immediate driver is the Legal Services Act 2007; for medicine, the advent of compulsory revalidation of doctors.   Although it might be possible to infer that this constant review of CPD frameworks betrays a widespread dissatisfaction with process, if not content, major current themes for the professional sector as a whole identified in the Institute of Continuing Professional Development multi-disciplinary research of 23 professions, which included the then Bar Council and Law Society systems, (2006, p.4) were:

   a) A need for professional bodies to be "seen to be responding appropriately to the public perception that they oversee the competencies of their members", a consumerist approach readily apparent in current approaches to legal services regulation (see DCA, 2005, Legal Services Consumer Panel, 2011, Legal Services Board, 2012);
   b) A response by the professions of continual review and modernisation of their CPD systems, "imposing greater requirements and obligations to comply … in the belief that this will increase competency";
   c) That monitoring and policing compliance "presents a major challenge for the professions. Modernisation of CPD requirements has emphasised the enormous variety in professionals' educational needs, and professions are therefore increasingly requiring their members to set their own curriculum" (an approach visible in the medical and accountancy professions described below)
   d) "Substantially increasing the monitoring and compliance obligations presents major problems in terms of the professions' relations with members".

   This research therefore advocated the considerable challenge for professions and regulators of instituting "a system of incentive that enables both effective monitoring of CPD activity and engages, rather than alienates, members of professional bodies. Encouraging and rewarding voluntary CPD activity, over and above any necessary and existing level of compulsion, is the most effective means of propagating good practice" (p.4).

6   Boud and Hager (2012) have more recently argued more generally for a concept of CPD that is more clearly located in practice than in decontextualized classroom activity which has historically been the focus for the legal professions. They acknowledge, however, that

>   … it is clear that some forms of practice are likely to be so circumscribed and limited that continuing engagement in them alone will inhibit the broader development of the professional. This implies that CPD requires far greater opportunities to engage in practices that extend the repertoire of practitioners and that the focus needs to move from an analysis of individual knowledge skills and competencies to an analysis of environments and what the practices in them generate in terms of extending practice scope. …Professional bodies would need to be more nuanced in their recognition of members … and accredit specialisations and particular scopes of practice rather than taking a one-size-its-all stance.
>   (p. 27)

Current standards and practices in professions regulated under the Legal Services Act 2007

7   In this section we set out the existing standards and practices of the regulated legal professions and, where relevant and available, outline current debates and reviews for each profession and some degree of comparison with approaches taken in other jurisdictions.[75] The multiplicity of schemes in current operation also suggests that it is useful to look at broader, cross-border and cross-profession approaches designed for consistency and mutual recognition between schemes.

Literature on the pedagogic aspects of CPD (or CLE) in the legal profession or professions specifically is comparatively rare. As long ago as 1997, Roper recommended the construction of a "conceptual framework" for CPD for lawyers, as a distinct task:

> There is considerable development of theory in a number of areas related to CPD, such as skills, the nature of professions, how professionals work, adult learning, lifelong learning and management. What is lacking, so far as CPD for lawyers is concerned, is the bringing together of these various elements in some cohesive and useful way to provide a conceptual framework.
> (Roper, 1997, p.172)

8   Shortly before the extension of the solicitors' CPD scheme to all practitioners, the Law Society conducted a study (Hales, Stratford & Sherr, 1998) of 568 solicitors of 15+ years post-qualification experience. The results of this study cast some light on possible patterns of CPD activity in the absence of a regulatory mandate. Of the senior solicitors in the sample, only 14% (mostly sole practitioners or in smaller firms) had not participated in any form of CPD at all; there was notably a higher degree of voluntary compliance for those working in larger firms and even greater compliance in the public and in-house sector. In total (p. 32) "the median was about 150 hours over the last three years and only 5% reported less than 50 hours". Whilst most individuals focused on substantive law, a third of respondents (p. 2) also covered aspects of professional skills and 99% (p. 30) said that they used reading as a learning method. Only 16% of the non-attenders (p. 29) responded that they "knew enough already" (and 73% agreed that solicitors over a certain age should not be exempted from compliance, p. 43). Participants were also asked (p. 39) to identify areas which might be compulsory in any CPD scheme for senior solicitors, of which the top five were running a firm or practice; own specialism; professional conduct; client care and avoiding negligence claims.

9   Slightly earlier, two studies in New South Wales (Nelson, 1993; Roper, 1993) investigated the CPD participation of junior (3 years post qualification, an equivalent to 1 year PQE in England and Wales) and very senior (20 years + post qualification experience) solicitors within the context of a mandatory scheme requiring 10 points annually. The junior lawyers, as might be expected, reported a great deal of learning activity, as, in the week prior to the administration of the questionnaire, "slightly more than half had spent up to 4 hours in learning activities; two fifths between 5 and 9 hours and about 7% ten or more hours" (Nelson, 1993, p.171). Of the older

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[75] I has not been possible to examine all existing schemes, in federal states particularly. Summaries of all USA schemes can be found at http://www.digilearnonline.com/stateRegs.asp on a state-by-state basis and for Canada at http://www.canadian-universities.net/Law-Schools/Legal_Education.html. Summaries for Europe are at http://www.ccbe.eu/index.php?id=276&L=0.

lawyers (Roper, 1993), at the point of interview, 22% had already attained 10-15 hours of CPD (within this example, sole practitioners and partners were more likely to have attended 10+ hours), of which the most common area covered was "new developments" (which 45% had covered for up to 10 hours: pp. 92-93). In a contrast to the findings of the English study, 86% had not attended any course dealing with anything other than substantive law and 84% had not attended any practice management courses (p. 94). Nevertheless, the top responses to reasons behind participation were to improve provision of legal services, improve proficiency and productivity, with the fact the scheme was mandatory rated only in sixth place.

10   A further survey of 150 solicitors' firms in the Republic of Ireland (McGuire, Garavan, O'Donnell & Murphy, 2001) identified a number of issues arising from the broader CPD literature, including problems of professionalization, ownership and responsibility for CPD as well as barriers to CPD (a tension between dictates of survival of the business and longer term benefits); financial and other costs of CPD versus investment; diversity of learning strategies found in CPD schemes and the need for organisational structures which can support CPD (p. 25).[76] Their empirical findings suggest issues of time and expense as a barrier to more effective CPD activity in smaller firms; but that there was a strong "traditional" approach in use of courses and reading, as opposed to coaching and mentoring and, at the time of this research, online delivery. Perhaps most significantly, as the issue of mandatory topics of CPD coverage, including mandatory coverage of aspects of COBR, will form a theme in this chapter:

> CPD is conceptualised in terms of core management and personal skills rather than specific legal knowledge and/or skills. Management skills were prioritised as the most important CPD area, with only one specific legal expertise area[77] ranked in the top five priorities.
> (McGuire *et al,* 2001, p. 38)

11   More recent work by the BSB, SRA and IPReg in this jurisdiction is reported separately below in the discussion of the individual regulated professions.

12   Another theme – as outlined in paragraph 2 above - will recognise that not all learning, in fact perhaps the minority of learning, takes place in a formal CPD context. Some of the CPD schemes discussed below allow for experiential learning in practice, particularly where there is an emphasis on reflective learning. A related issue (Phillips, 2006) is the contribution to CPD of evidence and evidence-based practice. The significance of such activity for lawyers is addressed by Gold, Thorpe, Woodall & Sadler-Smith:

- How might professional associations learn to appreciate the importance of practice-based learning and how can they provide the necessary credit for their CPD schemes?
- Could and should CPD be better conceived as a collective and distributed process affecting different subjects working within diverse but overlapping contexts?
- How can collective and distributed learning be studied, given the constraints and difficulties involved in researching professional practice?

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[76] Some of the peculiarities of the structure of law firms in particular are discussed in this context by Watson & Harmel-Law (2010). Further discussion of the different foci of organisational HRD and individual CPE appear in Bierema & Eraut (2004).
[77] Legal research.

(Gold *et al*, 2007, p. 248)

Cross-border and model approaches to CPD

13   It should be noted that, whilst the Council of Bars and Law Societies of Europe has made recommendations about continuing education, particularly in the light of desires for mutual recognition across the European Union, those proposals were explicitly "not intended to impose a solution or obligation, but to encourage the adoption of continuing training regimes and to confirm a culture of quality and training for lawyers, in the public interest" (Council of the Bars and Law Societies of the European Union ("CCBE"), 2003, p.2). Additionally the Federation des Barreaux d'Europe adopted in a resolution of 2001 the "urgent short term measure" that "[c]ontinuing education equivalent to a minimum of 10 hours each year shall become obligatory throughout the European Union" (FBE, 2001).

14   Further investigation of CPD in Europe, across a number of different disciplines, appears in CEPLIS (2010). It is notable that some professions (as, for example, the accountants and construction professionals described below) are subject to regulation at an international level.

15   Further, the CCBE recommendations included a wide range of potentially sanctioned activities. Perhaps rather oddly, "evaluation", treated in this chapter as involving an analysis of the effectiveness of what has been learned from CPD activity, was proposed to be "done with a weighted allotment of hours/credit points being given for the various methods and duration of training" (CCBE, 2003, p.3), that is, by measurement of inputs, rather than outputs. A non-binding and largely input-focussed model for Continuing Professional Training, promulgated by the CCBE in 2006, (CCBE, 2006) however, contains the following aspects of interest for the current discussion:
     1. A suggestion that participation should be accredited (only) where there is proof of participation and of successful assessment;
     2. Recommendations for mutual accreditation and recognition of activities, including cross-border recognition with in the EU;
     3. Recognition of viable CPD activity in teaching, writing articles, peer review, self-study;
     4. A minimum number of hours to be prescribed annually (pro rata where relevant);
     5. The possibility of mandatory content in, for example, ethics, EU law and professional rules;
     6. Provision for exemption and carry over of excess credits into a following year;
     7. Provision for record-keeping.

16   A model proposed for the legal professions in Australia (National CPD Task Force, 2007) bears some similarities in assuming a mandatory, minimum hourage system, with reporting and disciplinary implications, a minimum annual component in ethics,[78] professional skills and practice management and business skills and excluding by omission inclusion of informal experiential learning. The Australian model, on the other hand, includes committee work as a legitimate CPD activity and excludes self-study (other than listening to or viewing study materials). Quality

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[78] See also a discussion of mandatory ethics CPD in the wider Asia and South Pacific region, O'Brien, 2012.

assurance is assumed as a principle (as is cost efficiency and ease of access) but is to be ensured by the quality of those delivering the courses, rather than by imposing a requirement for accreditation of courses or providers. This aspect, of regulators imposing a form of COBR on education providers, is a theme of varied importance for different schemes and professions discussed in this chapter.

17   In the USA, a summit sponsored by the American Law Institute/American Bar Association and the Association for Continuing Legal Education (ALI/ABA/ACLEA, 2009) generated the following final recommendations for continuing legal education, which is worth quoting in full:

> …law schools, the bar, and the bench should partner in the career-long development of lawyer competencies;
> Law schools, the bar, and the bench should develop and encourage transitional training programs (defined as ones that teach or improve practice skills) to begin in law school and to continue through at least the first two years of practice;[79]
> CLE providers, MCLE[80] regulators, the practicing bar, and the bench should create communication frameworks for mandatory CLE rules to ensure that all parties share an understanding of the content of the rules, their needed evolution, and their effects;
> MCLE regulators, in collaboration with CLE providers and the practicing bar, should develop appropriate accreditation standards for all varieties of distance learning CLE programs while also updating and improving accreditation standards for in-person CLE programs.
> MCLE regulators should accredit training in the content or skills necessary to effectively practice law, even if such content or skills are not directly related to substantive law.
> MCLE regulators and CLE providers should work together to develop and implement means of measuring the effectiveness of CLE offerings
> Recognising that law firms and other legal employers are significant and regular providers of CLE, MCLE regulators should provide them with the same opportunities to gain accreditation of their programs as those afforded to external CLE providers.
> Law schools, law firms, and CLE providers should train their instructors in: teaching skills, effective uses of technology to enhance learning, inter-generational communication issues, the communication of professional values and identity, and the design of effective clinical experiences.
> Acknowledging our professional responsibility, the legal community should continue to develop programs that will prepare and encourage law students and all lawyers to serve the underserved.

18   We have suggested that the regulators explore the possibility of a common scheme for legal practitioners in England and Wales (and, indeed, neighbouring jurisdictions),[81] perhaps drawing on the approaches of the Engineering Council (2010); the Health and Care Professions Council (2011) or on the clearinghouse for accreditation operated by the European Accreditation Council for Continuing Medical Education. At the very least, we invite the regulators to consider increased mutual recognition between schemes (an approach employed within the accountancy

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[79] Explicit reference is made here to possible introduction of "[p]ost-admission supervised apprenticeships (similar to paid articling in Commonwealth countries)".

[80] Mandatory Continuing Legal Education.

[81] Reference to neighbouring jurisdictions in this chapter is to Northern Ireland, Scotland and the Republic of Ireland. Investigation has not been undertaken into the bars and law societies of the Isle of Man or the Channel Islands.

professions)[82] or the creation of a body to co-ordinate CPD activity for the legal professions (as the Continuing Legal Education Association of Australasia and the Association for Continuing Legal Education and Continuing Legal Education Regulators Association in the USA). A domestic example of such a clearing house, albeit outside law is the CPD Certification Service.[83]

Regulated professions under the Legal Services Act 2007

Accountants

19   ICAS and ACCA are approved regulators under the Legal Services Act 2007 for the purposes of reserved probate business only.

20   The Association of Chartered Certified Accountants (ACCA) had 75,305 members in the UK and Republic of Ireland in 2011 (FRC Professional Oversight Board, 2012, p.8). Its CPD system (ACCA, n.d.), consistent with the standards of the International Federation of Accountants (IAESB, *International Education Standard 7: Continuing Professional Development*, 2012[84]), comprises three routes:

1.   The unit route. An individual must complete at least 40 "units" (hours) of CPD each year of which 21 units must be "verifiable" (relevant to the individual's career; susceptible of application in the workplace and evidenced). An excess of verifiable units in one year, to a maximum of 21, can be carried into the subsequent year. Individual records of both verifiable and non-verifiable activity are logged online. Part-time and semi-retired members (with some constraints, as, for example, this pro-rata route is not available to members with audit responsibility) are required to complete 19 units of non-verifiable activity and to set their own threshold for verifiable activity. Other forms of waiver may be available in exceptional circumstances (such as illness, maternity/paternity leave etc.). Activity provided by ACCA Registered CPD Providers is treated as verifiable.[85]
2.   The approved employer route. An alternative to the unit route, for those employed by ACCA Approved Employers, is to follow the employer's own employee development programme which is, in effect, accredited as satisfying the entirety of the CPD requirements.

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[82] In smaller jurisdictions at least, there are examples of joint CPD schemes covering different legal professions. Such is the case, for example, in Mauritius, where a single scheme covers barristers, attorneys (solicitors) and notaries.

[83] http://www.cpduk.co.uk/index.html

[84] This supra-national framework for member association of the International Federation of Accountants allows for each of an inputs based, outputs based or combination approach. If input-based, the minimum annual hourage is 20.

[85] Friedman & Woodhead (2008) cited elsewhere in this paper, concluded, in relation to the model current for ACCA in 2008, that accommodates its international membership, that ACCA implements a primarily input-based CPD scheme, but has moved away from a mere points-gathering exercise by insisting that CPD be relevant to a member's role. Despite the input-based nature of this scheme, output is certainly addressed, and ACCA has implemented a "professional development matrix," an online planning tool that assists members in analysing their job roles and prioritizing learning needs. They also self-assess their results by comparing them with the development plan. Although a CPD cycle is not explicitly followed, details of the cycle are provided in guidance for members. CPD records are audited to ensure that development activities are relevant to a member's role." (2008, p.39). As the current model refers to a "cycle" rather than a matrix, some subsequent development would appear to have taken place.

3. The IFAC route. If a member follows the CPD scheme of another professional accountancy body of which he or she is a member, provided that CPD scheme is IFAC approved and consistent with IES 7, doing so is treated as satisfying the ACCA requirements. This theme of inter-profession mutual recognition of CPD activity emerges in other circumstances, including healthcare and engineering, where there are a number of related professions in a single sector and where individuals may be, or entities may employ, members of more than one. Where dual qualification and transfer between professions is, or becomes possible in the legal sector (e.g. the solicitor who is also a notary, or the barrister who is also a trade mark attorney), and in multi-disciplinary ABSs, mutual recognition may come to have greater significance.

21 Review of compliance is by sample taken from members' annual CPD declarations (the CPD declaration includes an ethical declaration) and review may include questionnaires and seeking of access to individuals' online records. Refusal to co-operate with a review may be sanctioned by withdrawal of membership.

22 The Institute of Chartered Accountants of Scotland (ICAS) had 16,666 members in the UK and Republic of Ireland in 2011 (FRC Professional Oversight Board, 2012, p.8). The ICAS Professional Development Process is consciously cyclical, utilising a four-step process (ICAS, n.d.):
   1. definition of current and future role(s)
   2. decide on training and development needs
   3. develop or undertake a professional development programme, and
   4.   record any CPD activities undertaken

23 As with ACCA, the scheme provides for an Accredited CPD Employer status (ICAS, n.d.). Individuals must keep records (including records of planning and of learning) for three years and are similarly subject to an annual declaration of compliance and monitoring by sample. Activities referred to as legitimate CPD activity (ICAS, n.d.) include the informal and experiential "work-based learning, undertaking new projects at work, on-line reading, researching a particular issue relating to a client or a role, and focused discussions with colleagues or other professional advisers" not generally included in CPD recognition. The overriding principle is that "consideration is given to the requirements of the position and that learning addresses this".

Barristers

24 Discussion of the CPD scheme for the Bar is assisted enormously by the substantial internal review and consultation exercise conducted for the Bar Standards Board in 2011 . The results of that consultation have not, at the time of writing, been published. Current provision (BSB, 2011a, d) is, therefore, to be contrasted with the proposed new system (BSB, 2011b, c) set out in a consultation paper which includes both a draft CPD handbook envisaged to be implemented in 2013 and the report of the working group which conducted the Review (including empirical work amongst the profession and comparison with other legal professions and professional bodies outside law).[86] Given the nature and ethos of the profession, it is not surprising that

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[86] Page references are, therefore, to the composite document.

there is a considerable focus on individual professional responsibility, not only in the BSB scheme, but also in other schemes for barristers as a separate profession.

25 The strategy derived from the Review to be implemented in the proposed new scheme is stated (BSB, 2011b, p.5) as one which:
1. increases the range of approved CPD activities;
2. correspondingly increases the number of CPD hours, which established practitioners must undertake each year;
3. raises the standard of record-keeping;
4. simplifies the system of reporting; and
5. simplifies enforcement of the CPD Regulations.

26 The draft handbook, consequently acknowledged (BSB, 2011b, p. 121) what elsewhere in this chapter we have referred to as a cyclical approach, emphasising not only the input of participation in activities, but also the prior planning and the subsequent implementation of what has been learned. This was reflected in the template for a portfolio which was to be susceptible to being called in for inspection and which demands a record of "Reasons for attending or undertaking the event/activity and relevance for practice, and reflection on own learning" (i.e., the output) (p. 140). Monitoring in the first instance was proposed essentially to be by self-certification and to be attached to the issue of a practising certificate. Thereafter, a 10% sample was proposed (p. 132). Sanctions – ranging from fine to disbarment – were proposed for non-compliance (although first offenders might be supported and warned) and all CPD records to be produced where the BSB conducts a Chambers Monitoring exercise (p. 132).

27 A distinct new practitioners' programme was to be retained, as is the early career Forensic Accounting Course. Thereafter, practitioners will be required to complete 24 hours annually, of which at least 12 hours must be "verifiable" (p. 125). Verifiable activity (p. 126) included face-to-face and online course (including courses in personal and practice management skills), judicial training, work shadowing teaching and legal writing. Non-verifiable activity included private study (hitherto excluded), research and writing for a textbook or article published in the subsequent year and viewing or listening to relevant broadcast material. Networking and marketing activities have been specifically excluded. Although outside the early career programmes, nothing was to be compulsory, reference has been made (p. 128) to the important areas of "Advanced Advocacy Training"; "Further Ethics Training"; "Equality and Diversity Training"[87] and "Costs". The BSB proposed no longer to accredit course providers (on the basis of the "impossibility of quality assuring the large number of commercially provided courses", p. 131), consequently, courses, whether accredited by another CPD scheme or otherwise, would count provided "the content and objectives fit within the BSB specifications of verifiable CPD" (p. 131). Following consultation (BSB, 2011c) the more flexible definition of CPD has been retained although the proposed increase in hours and range of acceptable activities is to be reviewed. There are still to be no waivers from compliance but there are provisions intended to assist those who are, for example, on parental leave. Initial inclusion of prompts for reflection and self-evaluation in the template portfolio record have been removed.

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[87] A suggestion that this might be mandatory was positively rejected (p. 54).

28   By way of comparison amongst neighbouring legal professions, in Northern Ireland, the Bar Council requires (Bar Council, 2004) 12 hours annually with a mandatory requirement for those within their first 12 months of a Northern Ireland Bar Advocacy Training Course and a Northern Ireland Bar Ethics course.

29   In Scotland, the Faculty of Advocates maintains a list of 60 accredited providers (Faculty of Advocates, n.d.) and requires a minimum of 10 hours annually for practising members "by attendance at courses, conferences, symposia and similar events organised by training providers accredited for the purpose by the Director of Training & Education" (Faculty of Advocates, 2010, p.2) although a member may, in advance seek ad hoc accreditation of their attendance on an otherwise unaccredited course. Although the regulations define CPD in terms of such accredited courses only, subject to the Faculty Council extending the range of legitimate activities, the Faculty website refers also to "individual undertakings, such as writing books or articles, tutoring and preparing responses" (Faculty of Advocates, n.d.) Records are maintained centrally and sent to members annually for checking and certification. Waiver or extension of time is permitted (subject to a £125 administration fee). Non-compliance is reported to the Dean of Faculty.

30   The Bar Council of Ireland scheme requires 10 points annually obtained during the course of at least two separate activities (and up to a further 5 obtained during August or September can be carried forwards to the following year). As with the domestic scheme, there is a specific programme for first year barristers. Whilst the default position is 1 point per hour, some activities are weighted. Private study is included as are teaching, examining and committee work but, as with the domestic scheme, pure experiential learning is not. The Bar Council does not accredit training providers but legitimate CPD activity, which is self-certified, must be:

- Of significant intellectual or practical content and must deal primarily with matters related to the practice of law;
- Conducted by persons or bodies that have suitable qualifications;
- Relevant to a practitioner's immediate or long term needs in relation to the practitioner's professional development.
  Bar Council of Ireland, (n.d.)

31   Further afield, distinct approaches for barristers appear in some jurisdictions outside Europe (European approaches are discussed below). In Australia, for example, the New South Wales Bar Association demands 10 points a year, of which a minimum of 1 point of activity must be accrued in each of "Ethics and Regulation of the Profession"; "Management" "Substantive law, Practice and Procedure and Evidence; and "Advocacy, Mediation and other Barristers' Skills" (New South Wales Bar Association, 2012). Private study (to a maximum of 6 points) and small study groups are encouraged and legitimate activity includes mentoring and being mentored as well as teaching and examining. Compliance is self-certified in accordance with an "honour scheme".

32   In Queensland, similarly, (Bar Association of Queensland, 2004) 10 points of annual activity are required, which may be acquired by attendance at a single major regional, national or international conference (such as the IBA Annual Conference). No mandatory content is prescribed (although the Bar Association of Queensland reserves the right to do so). However, only attendance at accredited events will count for CPD purposes. As in the Faculty of Advocates scheme (the two are very similar) ad hoc accreditation may be obtained in

advance. Failure to comply results in the non-issue of a practising certificate and potential disciplinary proceedings.

33   Where legal professions are fused, it is more difficult to detect CPD provision directed at advocacy and courtroom skills in particular. Of the USA schemes, for example, only Georgia imposes a particular requirement of 3 hours (from a total of 12) of advocacy related CLE annually on each "active member who appears as sole or lead counsel in Superior or State Court of Georgia in any contested civil or criminal case", defined as involving "evidence, civil practice and procedure, criminal practice and procedure, ethics and professionalism in litigation, or trial advocacy" (State Bar of Georgia, 2011, p. H147).

Chartered Legal Executives

34   The current CPD scheme of the Chartered Institute of Legal Executives is consciously conceived of as being related to the regulator's obligations to ensure individual "fitness to practise". CPD is defined as:

> The systematic maintenance, improvement and extension of the professional and legal skills, and personal qualities, necessary for the execution of professional and legal duties, and compliance with the standards required by IPS of CILEx members throughout their working life.
> (CILEX, 2013, p.3)

35   Compliance with the scheme is compulsory for all Fellows, Legal Accounts members, Graduate Members, Associate Members and Associate Prosecutor members, consequently including those who are simultaneously studying for the substantive CILEx qualifications. There are varying hours requirements for each category (from 12 hours for Fellows and Associate Prosecutors to 6 hours for Associates in 2013[88]). Chartered Legal Executive Advocates must complete 12 hours in 2013 of which at least 5 must be devoted to advocacy skills (p. 12). There is no provision for carry over of surplus hours to the following year. At least half of each member's CPD time must be recorded as relevant to their specialist area of practice and the remainder in areas "which [members] consider would be of benefit to them in their daily role. This may include non-legal work such as management training, or the development of communication skills or information technology skills" (p. 3). The scheme is essentially input-focussed although the output of some activities (such as coaching, mentoring and shadowing activities, formal qualifications obtained and the results of tests attached to the ITC updates described below) are recorded. The logbook template does not, of itself, record outputs.

36   Individuals are now required to submit their CPD logbooks online and provision is made for the extent of evidence of each activity of input/participation that must be provided (p. 12).   Failure to submit results in suspension of the practising certificate. Such submission is treated as a declaration of compliance and false declaration is a disciplinary matter. Recognised activities include coaching and mentoring in some circumstances, work shadowing and committee work in specialist areas as well as research and writing on a legal topic (provided it is in the individual's specialist area). There is some weighting of activities generally by reference to whether it is, or is not, within the member's specialist area (so, for example, work shadowing within the specialist area may count for 100% of the CPD requirement,

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[88] The CPD year for 2013 has been shortened and hours requirements reduced as a result.

but outside it may count for no more than 50%). A maximum of 75% of an individual's CPD can be obtained by reading relevant articles and using updates provided specifically for that purpose by ILEX Tutorial College. These updates, at a cost of £17 each, are distance learning study materials, provided with a multiple-choice or short answer assessment and are set at or above NQF level 6 (p.5); that is, they are intended as updates to existing knowledge rather than as introductions to new areas of practice.

37   Provision is made that "[a]ny course taken with a training provider accredited by the Law Society or any other professional body may be used as CILEx CPD, provided the requirements of the CILEx scheme are satisfied" (p.6). In-house training by employers, provided it is signed off by a training manager or equivalent is accredited automatically.   "In-house training providers are automatically approved for training their own staff, and are not required to undergo a formal listing process" (p.6). CILEx does not guarantee the performance of external training providers.

38   Self-employed members are required to comply with the scheme even if not providing legal services. Members working outside legal services also remain obliged to comply although they need not designate a specialist area. Retired members are exempt but there is explicitly no provision for part-time staff to comply on a pro-rata basis (p. 12) although there are dispensations for illness and related issues. There is specific and detailed provision for compliance with the scheme for overseas members and for double-counting of CPD for members who are also subject to another CPD scheme (p. 12). Failure to comply constitutes misconduct and may result in reprimand, warning or in more extreme cases, suspension from membership (p. 14).

39   IPS has, however, recently completed a consultation exercise (IPS, 2012a, b) on a more unusual, cyclical scheme that is considerably more unusual in the legal sector, but similar to that of the General Pharmaceutical Council. It is proposed (IPS, 2012a, b) that a cycle (reflection, planning, action, evaluation) will be used, but that, as an element of "input", 9 entries on the CPD record will be required annually. Critical incident analysis and examples f informal learning in the workplace will be permissible as the basis for entries. At least 3 of the entries must represent "planned" activity and planning is by reference to a competency framework. The associated PDP is required to include at least one entry on ethics, and CILEx advocates must include at least 2 entries relating to advocacy. It is proposed that there should be no exemption for part-time working.

40   By way of comparison, the Irish Institute of Legal Executives' CPD scheme under the aegis of the Solicitors (Continuing Professional Development) Regulations 2009, appears to be in the course of review" (IILEX, 2012.). The New Zealand Institute of Legal Executives does not appear to offer a distinct CPD scheme for its members, but contains within its code of ethics a requirement that: "Members should endeavour to maintain the highest level of legal knowledge within their chosen field and to that end gain an understanding of changes in the law or legal practice" (n.d.) and it hosts educational and update events. The scheme of the Institute of Legal Executives (Victoria) requires 10 points to be achieved annually, with provision for pro-rata-ing, double-counting, self-certification of compliance and random auditing. Since the scheme is points-based rather than hours-based, activities are weighted so that, for example, committee work rates ½ point, attendance at the AGM 1 point, pro-bono work 1 point per hour but

completion of a law -based module of a designated formal qualification accrues 10 points (IILEX, n.d.).

Costs Lawyers

41   The CPD regulations effective from 1 January 2013 for costs lawyers are held by the Costs Lawyers Standards Board (CLSB, 2013). A costs lawyer (of whom there are c 600 in England and Wales) must complete 12 hours of CPD in a year, make a declaration of compliance (on which the practising certificate may be contingent) and keep records, which must be produced on demand from the regulator. The CLSB has power to approve CPD providers and to require CPD activity as a remedial disciplinary sanction. There is a reference, in its scheme, to a reciprocal arrangement with the Association of Costs Lawyers ("ACL"), Law Society, SRA and ILEX for mutual cross-recognition of CPD activities. A minimum of 6 of the annual 12 points must be acquired from one or more of the following activities:

> 1(a) Attending ACL National Conference
> 1(b) Attending ACL training course
> 1(c) Attending CPD approved costs conference or training (in-house or external) on costs related subject matter
> 1(d) Attending CPD approved training (in-house or external) on subject matter of relevance e.g. advocacy, area of law in which bills are drafted
> 1(e) Attending training by a CLSB Accredited Costs Lawyer
> 1(f) Delivery of training on costs by a CLSB Accredited Costs Lawyer
> 1(g) Completing CPD approved webinars
>   (CLSB, 2013, p.1)

Other approved activities may be taken from the following:

> 2(a) Marking of Costs Lawyer examination papers & assignments
> 2(b) Attending non CPD accredited in-house training by employer on any legal subject matter
> 2(c) Writing articles relating to costs law for the Costs Lawyer Journal or other legal publications
> 2(d) Coaching & mentoring of Trainee Costs Lawyers
> 2(e) Reading and completing ACL tutorial updates
> 2(f) Reading all Costs Lawyer Journals throughout the CPD Year

This level of detailed prescription is unusual, even in the comparatively highly regulated legal profession CPD schemes as a class.

Licensed Conveyancers

42   The reviewed *Continuing Professional Development Code* (CLC, 2011a) for the just over 1,000 licensed conveyancers in England and Wales marks the organisation's movement towards outcomes-focussed regulation and reflects its ambitions in respect of rights to conduct litigation and advocacy. It therefore makes specific reference to principles relating to standard of work; the best interests of clients; ethics; equality and obligations to keep one's skills and knowledge up to date; to act only within one's competence and to ensure the competence of all employees of any regulated entity. Specific CPD requirements are

> 8 In each year in which you hold a *licence* you complete *Continuing Professional Development* in such courses, lectures, seminars or other programmes or other activities approved by the *CLC*.

9. You are able to demonstrate that the subject matter of the course or activity is relevant to your professional development or area of practice and to help you deliver positive *Outcomes* to your *Client*s.

10. Each year you inform the *CLC* - in such form as the *CLC* may from time to time prescribe - whether or not you have complied with the *CLC*'s requirements for *continuing professional development* as they apply to you.

11. You keep an up-to-date *training record*. You provide the *CLC* with this record upon its request.

12. You attend, and pay to attend, a specific course that the *CLC* has directed you to attend (as an alternative to disciplinary action).

(CLC, 2011a, p. 2).

43   The CLC's framework for CPD (CLC, 2011b), which provides for conditions being placed on the licence to practise as a sanction for failure to comply with those requirements, makes a distinction between managers and practitioners, with minima for "recognised courses" stated as:

…for a licensed conveyancer manager in each year in which a licence is held:

- 12 hours if they hold only a conveyancing licence
- 16 hours if they hold a probate, litigation and/or advocacy licence in addition to a conveyancing licence ;

for a licensed conveyancer, other than a manager, in each year in which a licence is held:

- 6 hours if they hold only a conveyancing licence
- 8 hours if they hold a probate, litigation and/or advocacy licence in addition to a conveyancing licence.

(CLC, 2011b, p. 6)

44   Recognised courses are those provided by CLC-approved CPD providers or by the CLC itself. Monitoring is by way of self-certification and monitoring (presumably by way of sample). Reading, mentoring and coaching; informal experiential learning and reciprocal arrangements are, therefore, subject to variation of its rules by the CLC, excluded.

Notaries Public

45   Under the Notaries (Continuing Professional Education) Regulations 2010, issued by the Master of the Faculties, CPE for the c 900 notaries other than ecclesiastical notaries, is defined as "participation in such programmes, courses or seminars accredited by the Master as may be necessary to acquire the number of credit points determined by the Master". Six credit points in notarial practice must be achieved in each year, of which 3 must be in accredited activity. There are additional requirements for notaries practising in conveyancing and probate (6 credit points in each field of practice of which at least half are to be in accredited activity). Individual records are submitted with each request for a practising certificate and may be demanded (the registrar may also demand evidence demonstrating the accuracy of the record). To achieve accreditation, providers' courses must have "written learning objectives" and some form of written assessment designed to demonstrate achievement of those objectives. The latter may, however, be a self-evaluation questionnaire. Non-accredited activity is legitimate only if it involves:

- Lectures and seminars;
- Coaching and mentoring sessions (including supervision of trainees) face to face or at a distance;
- Writing on law or practice
- Research on law or practice leading to such outputs as forms, surveys, precedents;
- Watching and listening
- Work shadowing;
- Specialist committees and working parties;
- Studying for professional qualifications;
- Setting, marking and moderating professional examinations

Patent Attorneys and registered Trade Mark Attorneys

46   The institution of a joint regulator (IPReg) for the c 600 registered trade mark attorneys and c1700 patent attorneys in the UK has resulted in a unified CPD system (which, in this context, extends beyond England and Wales). The IPReg system (IPReg, 2013) provides for members who are dual qualified as both patent attorneys and registered trade mark attorneys (the system is cumulative, not consecutive) and there are additional requirements for authorised litigators.[89]

47   A survey of CPD (IPReg, 2012c) produced, inter alia, a 77% response that the 16 hours requirement was "about right". IPReg (2012a) proposes training in the professional code specifically for those moving from in-house to private practice.

48   By way of comparison, in Australia, the minimum is 10 hours a year, with a minimum of 15 hours for those qualified as both patent and trade mark attorneys (Professional Standards Board for Patent and Trade Marks Attorneys, 2012.) and a minimum 1 hour on ethics annually. In the domestic system, there is at present no prescription for any further required content although IPReg retains power to do so. "Personal Study" tendered for CPD must be susceptible of evidence. There is no provision for carry over of surplus credit. Reporting is by annual declaration of compliance and an undertaking to submit details of activity if required to do so. Monitoring is by sampling and non-compliance may result in striking-off but there is provision for waiver, exemption for the non-practising, and extension of time for compliance. There is additional provision for those with litigation or advocacy rights (IPReg, 2013).

Solicitors

49   The current context for the CPD scheme for solicitors is derived from aspects of the SRA's outcomes-focussed approach to regulation, although the scheme, and in particular what was seen as the small number of hours prescribed, has been on the regulator's agenda since 2007 (SRA, 2007). Under the SRA Authorisation Rules 2011, reg. 8.2(a) "An *authorised body* must at all times have suitable arrangements in place to ensure that […] the body and its *managers* and

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[89] Changes to provision for rights to conduct litigation and advocacy rights in both professions have now been implemented (IPReg, 2012b, d, 2013). Under the 2013 CPD scheme, higher court advocates (which includes those with rights to conduct litigation) must undertake a minimum of 5 hours higher court advocacy CPD in each of the first five years following acquisition of that status (IPReg, 2013, p.2).

employees, who are *authorised persons*, maintain the *professional principles*",[90] an obligation defined in the accompanying practice note as including the provision of "appropriate systems for supporting the development and training of staff" (SRA, 2012b, our italics). The SRA Training Regulations 2011, Part 3 (SRA, 2012a), then, define CPD as a regulatory obligation,[91] imposed on all solicitors and Registered European Lawyers ("RELs"). The basic requirement is 16 hours a year, reduced pro-rata for part-time staff.[92] A SWOT analysis framework for CPD planning and a template record of participation are provided. Carry over is excluded and additional requirements (5 hours of advocacy CPD) are imposed, in a similar way as for legal executives, on solicitor-advocates for the first 5 years after attaining that qualification. There are also specific requirements for those in their first three years of practice (the SRA Management Course, stage 1), for RELS and those who have transferred into the profession via the Qualified Lawyers Transfer Scheme (which includes foreign lawyers and members of the bar). Responsibility for CPD completion is placed on the individual solicitor rather than his or her employer, as is responsibility for competence ("*you* maintain competence through relevant ongoing training") which is shared with the employer in the current regulatory structure. At least 25% of the requirement must be through full (not partial) attendance at accredited courses, that is: "a structured training session, delivered face-to-face or by distance learning, of one hour or more which has written aims and objectives, and is approved specifically for the purpose of compliance with *our CPD* requirements" (SRA, 2011). Structured coaching and mentoring sessions, teaching (including work on assessing and verifying NVQs) , writing on law or practice, work shadowing, research resulting in a practice note, precedent or the like, writing of a dissertation, developing specialist areas by participating in committees and working groups, work towards professional qualifications[93] and NVQs "in any business-related area " are all legitimate CPD activities. Private study per se appears to be excluded. Additional support is provided by the Law Society (Law Society, 2011). A number of requirements, including details of aims and learning outcomes, relevance, appropriate level and with appropriate methods of delivery, are set out for accreditation of course providers (SRA, 2010).

50   Monitoring is by self-certification on application for issue of a practising certificate although a record of activities must be retained for at least 6 years and is to be produced on demand. Those not working in legal practice, retired or working fewer than 2 hours a week are exempted from the requirement. There are explicit waivers from the monitoring requirements:
   a.   *firms* and organisations with Lexcel/Investors in People accreditation have a waiver from the routine monitoring of in-house *CPD* courses and the requirements to submit details of courses, course tutors and/or discussion group leaders;
   b.   *solicitors*/*RELs* in *firms* and organisations with Lexcel/Investors in People accreditation have a waiver from routine monitoring of *CPD training records*, and the requirement to satisfy a minimum of 25 per cent of the *CPD* requirement by *participation* in accredited courses;

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[90] Which include "provide a proper standard of service to your *clients". Some professional bodies include a commitment to self-development in such lists of core principles.*

[91] " CPD means continuing professional development, namely, the training requirement(s) set by *us* to ensure *solicitors* and *RELs* maintain competence;" (SRA, 2011). For some comparison of the (then) definitions of CPD in the legal sector, see Ching (2010). Some other professions adopt a more consciously developmental definition

[92] It is to be noted that specialist groups, such as the Association of Personal Injury Lawyers, may impose additional CPD requirements on their members.

[93] This is not defined.

    c.   *solicitors/RELs* in *firms* holding a Legal Aid franchise have a waiver from routine monitoring of *CPD training records*;

    d.   *solicitors/RELs* in *firms* and organisations holding ISO 9000 accreditation have a waiver from routine monitoring of *CPD training records*;

    e.   *solicitors/RELs* in *firms* and organisations which are authorised in-house *CPD* providers or part of a *training contract consortium* authorised as in-house *CPD* providers may have a waiver from the requirement to satisfy 25 per cent of their *CPD* requirement by *participation* in accredited courses, if *you* develop a training plan which is acceptable to the *firm* or *training contract consortium*.

51   More recently, the SRA commissioned a detailed review, including collection of data, survey, interview and focus group data of the CPD system (Henderson et al, 2012). The objectives of the review were to identify models of good practice; address challenges to effective CPD; and to examine the role of CPD as a regulatory tool designed to maintain and enhance competence, performance and ethical conduct. Its recommendations are that the SRA should:

- Authorise independent schemes operated by employers, law societies or affinity groups;
- Reconsider the purpose of accreditation (including the possibility of dispensing with the requirement of a proportion of accredited activity)
- Require CPD providers to provide more detailed pre-booking information;
- Require providers of public CPD to publish online ratings/feedback
- Require providers to report annually to the SRA
- Reconsider the provision that employers are not required to pay for CPD or to release time
- Retain a minimum hours requirement, but of no more than 16 hours
- Require documentation of a learning cycle
- Require individuals to log all their CPD activity, not just the minimum to satisfy regulation
- Implement an auditing process of individuals' records
- Implement a progressive enforcement and sanctions system
- Review the Management course stage 1 for relevance
- Consult the profession more widely on the need for any compulsory CPD components (eg ethics).

52   In neighbouring jurisdictions, the Law Society of Northern Ireland applies the Solicitors Training (Continuing Professional Development) Regulations 2004. Its scheme, consciously applying the approach that "Solicitors will be expected to exercise their own judgment on what training is relevant to their practice requirements and the quality of that training" (Law Society of Northern Ireland, 2012, p. 2) demands 15 hours in each year, of which, for those practising in Northern Ireland, a minimum of 10 hours must be in group study[94] (of which 3 hours must be on client care and practice management). Up to 5 hours can be private study.[95] Those practising outside Northern Ireland may comply with the CPD scheme operating in the jurisdiction in which they are working. There is a detailed pro-rata system for part-time and locum work, illness, sabbatical and the like. The Law

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[94] Defined as "study in a group of 3 or more people which lasts for a minimum of one hour on each occasion on which it is undertaken. Group study must be in a form which can be verified … Group study may take place in or outside of Northern Ireland and is not required to be in groups comprised solely of solicitors" (p. 3).

[95] Which includes computer or audio-visual courses and writing.

Society does not accredit providers. Monitoring is by return of a record card showing inputs, which is checked and may be actively verified by the Law Society.

53   In Scotland, a new, cyclical CPD scheme was implemented for solicitors in November 2011, (LSS, 2011b) involving self-certification, recording of planning, activities and what has been learned, an increase of minimum hours to 20 and an increase in the range of permitted activities.   In contrast to those professions which encourage group work, a previous requirement to complete a minimum of 15 hours group study has been relaxed: a minimum of 15 hours must be verifiable (although online and distance learning courses no longer need be accredited) and a maximum of 5 hours may be private study. It is no longer a requirement to undertake a mandatory management element. Carry-over of points and pro-rata-ing [96] are excluded.

54   In the Republic of Ireland, the 2011 CPD scheme involves "12 hours, (to include a minimum of three hours management and professional development skills and a minimum of one hour regulatory matters)" (Law Society of Ireland, n.d.).

Allied professions

Paralegals

55   Some paralegals will, of course, fall under the CILEx scheme if they hold degrees of CILEx membership below that of the Chartered Legal Executive. Otherwise, the National Association of Licensed Paralegals (NALP, n.d.), demands 10 hours CPD annually for licence-holders but permits carry over in to the subsequent year. NALP permits research carried out on a file, for a client, to be counted as CPD provided it generates some kind of practice note or precedent. Beyond this, acceptable activity for NALP is a conventional list of courses and writing with specific reference to "personal or inter-personal development" activity. Post-licentiate educational activity leading to NALP fellowship also accumulates CPD credit.

56   The Institute of Paralegals CPD scheme, introduced in 2005, is a condition of membership for practising members and demands 12 hours (with a minimum increment of 30 minutes) each year (reduced pro-rata in relevant cases; no carry-over). Recording is required and the Institute reserves the right to inspect records. There is unusually a specific reference to level as part of the exclusionary discretion:

> Because we take your completion of your CPD obligations seriously, we reserve the right to refuse to recognise for CPD purposes any activities that breach the spirit of Paralegal CPD™ - e.g. attending a course significantly below your level of expertise (as you would have learnt little or nothing from it).
> (IoP, n.d.)

Some writing, research leading to precedents/notes and teaching is approved for the purposes of CPD, otherwise, CPD is by attendance at courses. The Institute accredits

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[96] "The view of the Society is that solicitors in these situations have to be as competent as a solicitor working full-time." (Law Society of Scotland, 2011, p. 7). A similar rationale is provided for imposing the CPD obligation on Scottish solicitors working outside Scotland.

courses but will also recognise courses accredited by the Law Societies of England and Wales or of Scotland; the Bar Council; the Institute of Chartered Secretaries & Administrators "or equivalent for international members or members overseas".

57   The Law Society of Scotland CPD scheme for registered paralegals (and trainee-registered paralegals)[97] involves a minimum of 10 hours a year in a model which requires "planning, recording and justifying" of activity. Recording is online. Legitimate activity includes not only courses but also "structured coaching, online training, distance learning and private study" (Law Society of Scotland, 2011a, p. 2). There are exemptions on application, for long-term illness and for maternity/adoption leave but no reduction for part-time working. A maximum of 5 hours of the total may be private study and a minimum of 5 hours must be "verifiable", that is:

>   (i) Have educational aims and objectives relevant to your development;
>   (ii) Have clearly anticipated outcomes (e.g. what do you expect to learn from attending the course)
>   (iii) Have quality controls (e.g. you should be given the opportunity to give feedback or ask questions).
>   (iv) Be verifiable (e.g. able to be evidenced).
>   (Law Society of Scotland, 2011a, p. 6)

58   The Scottish Paralegal Association requires 10 hours a year, of which a maximum of 4 hours can be private study. It is broad enough to encompass "[a]ny area designed to improve the individual's ability to operate properly and effectively as a paralegal" (SPA, n.d.). The SPA will not accredit or recommend courses; there is no carry over and pro rata reduction of up to 5 hours reduction is on a case-by-case basis. Sanction for non-compliance is set out carefully:

>   If a member has not complied with the requirement and is not entitled to exemption, further time will be given as a first sanction and independent evidence of group study will be required to be produced to show that compliance has been achieved. Continued failure may be referred to the Committee who shall deal with the matter in such a way as they may deem fit. The Committee shall have the power to revoke the membership of the paralegal in question but only after giving the member an opportunity of being heard.
>   (SPA, n. d.)

59   The Society of Specialist Paralegals (for alumni of specialist paralegal programmes at Strathclyde and UWE) recommends 10 hours a year (5 for associate members) including face to face courses, home study of legal or management material and in-house training provided by employers (SSP, n.d.).

60   As an emerging profession, whose parameters and identity are still to a large extent in the course of formation in this country, the paralegal groups may necessarily have a strong focus on competence and CPD as a means of demonstrating competence. Madden et al (1993,) identified that emerging professions, with a status to secure, were more likely to adopt benefits models, measuring output, than the sanctions models more characteristic of the established professions. Here, however, we would suggest that, outside the CILEx umbrella, the paralegal professions, at least in England and Wales, are seeking to establish their position, should they still need to, by adopting recognisable and conventionally "legal" CPD models, with their familiar

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[97] Who are registered to train and practise in one or more distinct legal domains only.

overriding focus on input and attendance at face to face courses.[98]   In pursuit of the emerging theme of joint and multi-disciplinary frameworks, and perhaps as the logical corollary of this trend, it is worth noting that the Law Society of Upper Canada has a CPD scheme in identical terms and with identical requirements, covering both lawyers and "paralegals who provide legal services (those … paralegals in the 100% fee paying category)" (Law Society of Upper Canada, 2010, p.4)**.**

Administrative staff

61   The Institute of Legal Finance and Management (of which solicitors, barristers and accountants, non-lawyer partners and managers as well as legal cashiers may be members) qualification programmes are accredited for CPD by the Law Society (ILFM, n.d.). CPD is at least encouraged.

62   Members of the Institute of Legal Secretaries and PAs may apply for a CPD Certificate recognising achievement of at least 12 annual hours of CPD including courses, writing, reading and "Personal or inter-personal development training such as human relations, leadership, stress management or motivational skills" (ILSPA, n.d.).

63   The Institute of Barristers' Clerks Code of Conduct (Institute of Barristers' Clerks, n.d.) imposes a number of obligations on clerks as to the effective operation of chambers' business but does not include a CPD requirement. Nevertheless, the Institute offers events and seminars as well as a BTEC award for junior clerks.

Related professions

Institute of Chartered Secretaries and Administrators

64   The Institute of Chartered Secretaries and Administrators (37,000 members) CPD mandatory scheme from 2011 demands 20 hours a year, of which a minimum of 5 hours must be "formal" (ICSA, n.d.).

Ministry of Justice regulated claims managers

65   Claims managers regulated by the Ministry of Justice are not required to participate in a formal CPD scheme although, if it gives advice, "A Trade Union should ensure that regular training is made available to employees, or workplace representatives who offer advice to members on pursuing a claim" (DCA, 2006, p.4). Other claims managers are required to ensure the training and competence of their staff and "comply with any rules made by the Regulator in respect of training and competence. (There are currently no additional rules.)" (Ministry of Justice, 2007, p. 4).

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[98] "As we are working towards our profession being widely recognised and respected, Paralegal CPD is a necessity" (Institute of Paralegals, n.d.).

OISC regulated advisors

66   OISC regulated advisers (including CILEx members but excluding CAB level 1 advisers, government ministers and members of designated professions holding a practising certificate) are subject to a CPD scheme over and above the incremental gradings of competence: CPD compliance does not of itself produce a change in grade and there is no carry -over. There is an emphasis on planning and selection of relevant content:

> We would expect advisers at the beginning of each year to review their skills and knowledge with regards to their work and business plans. They should then produce a Training and Development Plan for their CPD focusing on what they need to learn and how they might do this, for example, by attending classroom training courses, e-learning courses or even attending a conference. A Training and Development Plan form is available to download from the OISC website. We do not expect advisers to stick to this plan rigidly as long as they complete the requisite hours of CPD and courses undertaken are relevant to their business. Although advisers can choose how they undertake their CPD, the OISC may recommend specific areas they feel should be improved upon, for example, areas identified through competence assessment or a complaint investigation. Compliance with the scheme will be monitored by the CPD Co-ordinator
> (OISC, 2012., p. 3)

67   Level 1 advisers are required to complete 6 hours CPD in core knowledge and 2 in non-core knowledge annually; rising to 9 and 3 for level 2 and 12 and 4 for level 3. Core knowledge is defined as UK and EEA immigration and asylum law. Non-core may include "professional development, management skills and personal skills (such as computer skills, administration, communication). Also immigration and asylum law of other nations and other speciality knowledge required by your organisation (such as welfare benefits)" (p. 5). There is a strong policing element apparent thereafter in the OISC scheme, where non-compliance is emphasised more than once as "a breach of Code 23 of the Commissioner's Code of Standards [which] will affect your continued regulation with the Commissioner" (p. 6, their emphasis). In some organisations the entire organisation will be deregulated if any of its advisors is found to be non-compliant. Reinstatement within 12 months after deregulation requires submission of a competence statement, making up the deficit and completing, in advance, the entire CPD requirement for the forthcoming year. Reinstatement after 12 months requires a fresh competence assessment as well as completion of the annual diet of CPD in advance. Qualifying CPD courses are accredited only if provided by OISC, through a designated Open University course, by a professional training organisation (and if core knowledge, only if accredited by the Law Society, CILEx, Bar Council and their Scottish and Northern Irish equivalents). Writing, study leave, mentoring and coaching are explicitly excluded. OISC retains the right to access individuals' on-line CPR records for monitoring purposes. The only explicit reference to outputs appears in relation to online OISC programmes and the Open University courses, which only count for CPD if at least 70% is attained in the course quiz.

Society of Trust and Estate Practitioners

68   The CPD Scheme of the Society of Trust and Estate Practitioners is tied to a professional obligation to provide a competent service and designed:

1.4.1 To be relevant to the needs of Members in their professional lives and to fit within the scope of each individual member's on-going professional development programme.
1.4.2 To be flexible enough to cater for particular circumstances (e.g. a career break).
1.4.3 To be straightforward to manage and complete.
(STEP, 2007, p.1)

The minimum requirement is 35 hours a year, of which 15 must be structured. Records must be kept for 6 years. Monitoring is by way of annual self-certification and random sampling. There are detailed exemptions for those not involved full-time in trusts and estate work, non-earners, the retired and part-time workers. Whilst it is assumed that the content of CPD activity will be related to trust and estate work, "It is nevertheless appreciated that Members must often keep up to date on the related topics of law, accounting, banking and financial services. Such study can count for up to 50 per cent of the CPD requirements" (p. 3). It is acknowledged that members may also be required to participate in the CPD schemes of other organisations or firms and, although there is no express mutual recognition, provision is made for a single event to count for more than one CPD scheme. Responsibility for determining the appropriate level of complexity of an activity is placed on members. Failure to comply is met in the first instance by a requirement to make up the difference in the following year. It is expressly stated that any complaint against a member will automatically involve a review of the member's CPD records.

Will writers

69   The Institute of Professional Willwriters and Institute of Scottish Professional Willwriters' CPD joint scheme:

> meets the following requirements:-
> · It is relevant to the needs of Members in their field of work;
> · It is flexible to cater for particular circumstances of Members;
> · It does not create onerous demands on time;
> · It is not administratively burdensome;
> · It is not unreasonably costly.
> (Institute of Professional Willwriters, 2011, p.4)

Hourages vary according to professional status with an unusual commitment to a required minimum of unstructured study; from 6 hours (4 must be structured and 2 must be unstructured or private study) for associates to 20 for full and affiliate members (12 hours must be structured and 8 hours must be unstructured or private study) (p.4). Members employed by another member may complete all their requirement by approved online provision; others can complete up to half their requirement through approved online provision. Members may devote no more than 25% of their activity to aspects of law and financial services outside the scope of wills, powers of attorney and estate administration. If a member participates in another CPD scheme, activity relevant to willwriting may be double-counted. Records and evidence are subject to inspection. Non-compliance not made up in the following year will result in suspension until the entrance criteria for the organisation are met.

70   The Society of Will Writers and Estate Planning Practitioners CPD scheme (n.d.)
        involves 16 mandatory structured hours a year (additional unstructured learning –
        reading, research, private study - is encouraged). Up to 50% of the hourage may be
        composed of material relating to topics of "law, accounting and financial services"
        not directly related to will writing or trust and estate planning.   Compliance is self-
        certified and there is exemption for the retired, the non-earning and those
        "temporarily engaged in other full-time work". Legitimate structured activity is
        defined as:

> 4.1 Attendance at conferences, seminars, workshops, regional group
> meetings or similar events involving active contributions.
> 4.2 Preparation of lectures or other forms of presentation.
> 4.3 Writing books, articles or reviews.
> 4.4 All learning media, provided they involve interaction with other
> individuals or completion of interactive printed material by an authorised
> provider, whether or not in conjunction with video support (including
> group research; listening to audio tapes, viewing tax videos and tax
> specific television programmes; using video discs and computer-based
> training packages).
> 4.5 Completion of online CPD quiz.

Compliance with another CPD scheme or in-house activity, provided it relates to will
writing or trust and estate planning is permissible. Monitoring is by random
checking.

Lawyers in Europe

71   A brief discussion of CPD schemes available to lawyers in Europe is assisted by a
        recent survey by the Council of the Bars and Law Societies of the European Union
        (CCBE, 2011) of the shape of legal CPD across its member countries. Of the 31
        countries considered, 18 had a mandatory scheme (for at least one legal profession)
        of which in more than half measurement was in annual hours; in 5 a weighted points
        system was used and in 4 a similar weighted credits system. In two countries
        measurement was by lessons or events. The average minimum mandated obligation
        was 14 hours/13-14 points annually.[99] Some countries mandated a minimum level
        of compulsory content (such as non-legal matters, management, ethics etc.). Carry
        over of surplus credit, sometimes to a maximum extent, was allowed in most
        countries and reduction (for example, maternity leave) and exemption (for example,
        at a certain age) were available in some. Courses were recognised for CPD in all
        countries, and teaching, writing and language courses were recognised in some.
        Research, pro-bono activity, postgraduate study were recognised in most countries.
        In most of the countries attendance at foreign events (sometimes to a maximum)
        was counted. Monitoring was in the majority of countries by annual submission of
        individual records and in some by random sampling. Sanctions for non-compliance
        "vary from warning to disbarment" (p. 7). By way of example we explore a few of
        the more unusual or more interesting approaches from jurisdictions not
        neighbouring England and Wales briefly here.

72   Two systems operate in Belgium, one for French- and German-speaking lawyers
        (Ordre des Barreaux francophones et germanphones, "OBFG", 2011, corrected 2012)
        and one for the Flemish-speaking (Orde van Vlaamse Bailes, "OVB", 2004). The

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[99] In Sweden, for example, there is an annual minimum of 18 hours of structured activity. Up to a further 12
hours of structured activity can be carried over into the following year (Sveriges Advokatsamfund, 2008).

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OBFG scheme demands 20 points a year, calculated over a three year period of which 2/3 must be on "matières juridiques" whilst the remainder may be on relevant but non-legal topics. Publication may account for 1-4 points, dependent on the importance of the article. As with many of the systems of mainland Europe, teaching is double weighted. Courses must be accredited and failure to comply is treated as breach of professional ethics. The OVM scheme requires 16 points annually with a maximum of 10 points to be gained from teaching. One point is credited for writing a legal article of up to 1,000 words with a further point for each additional 1,000 words. Recognition may be given to courses provided by OBFG or other bars that are members of CCBE. Unusual provisions include 32 points allocated for completion of postgraduate diplomas and the provision that in-house courses can only be counted if made available to lawyers who are not members of that firm. A distinct recognition commission is responsible for accreditation of courses.

73   In France, where the minimum requirement is 20 hours annually, courses must be for a minimum of 2 hours (Conseil National des Barreaux, 2011). Providers for other than in-house courses must be previously accredited with a considerable amount of detail provided. Unusually 1 hour of teaching attracts 4 hours of CPD and writing of an article or articles on a subject connected to law, ethics or professional practice comprising 10,000 characters attracts 3 hours. Within chambers, a designated "correspondent formation" is responsible for collating and forwarding CPD records of in-house CPD activity. An anonymous evaluation questionnaire is required for each course, considering the quality of the delivery and the materials.

74   In Germany, both the Bundesrechtsanwaltskammer (n.d.) and Deutscher Anwaltsverein (n.d.) issue certificates of CPD participation endorsed with the organisation's logo which can be displayed in the lawyers' office as a form of quality mark.

75   In Norway, non-compliance may be met with a fine (CCBE, 2011) and those who lack more than 64 CPD hours (out of a mandatory 80- over a 5 year period) or do not pay the fine may be disbarred.

76   Spain is one of the few countries without a mandatory CPD scheme for its lawyers. Events and an online service are, however, available (Abogacia Espanol, 2012).

Lawyers outside Europe

77   CPD schemes, whilst well-established in North American and Australasia, continue to be developed in the rest of the legal world. The Malaysian Bar, for example, adopted in 2012 a mandatory scheme for advocates, solicitors and pupils of 16 points per year (and 8 points during pupillage) (Malaysian Bar, 2012). Smaller jurisdictions, where there are perhaps fewer regulators and distinct professional bodies, may find it easier to develop joint schemes for a number of professions. Larger, and federal states, may have developed national minimum standards, clearing houses or umbrella organisations for transparency and to facilitate internal transfer. We comment here on only two models from outside Europe, both of which demonstrate the trend towards a more cyclical approach in which compliance is not measured exclusively by input.

78   The Law Society of Alberta, very unusually, has adopted an extremely broad
        definition of CPD in its professional code of conduct:
> 67.1(1)… any learning activity that is:
> (a) relevant to the professional needs of a lawyer;
> (b) pertinent to long-term career interests as a lawyer;
> (c) in the interests of the employer of a lawyer or
> (d) related to the professional ethics and responsibilities of lawyers.
> (2) Continuing professional development must contain significant
> substantive, technical, practical or intellectual content.
> (3) It is each lawyer's responsibility to determine whether a learning
> activity meets these criteria and therefore qualifies as continuing
> professional development
> (Law Society of Alberta, n.d.)

79   Regulatory monitoring, then, is confined to making an annual CPD plan (which at
        least in the online version, includes tracking progress in accordance with the plan)
        and registering this with the professional body. Review and development of this
        scheme is part of an ongoing project based around the concept of lawyer
        competence (Glass, 2011). In the 2011 cycle, a 99.5% compliance rate was achieved
        (Billington, 2011). In 2012, with a 100% compliance rate, evaluation (Brower &
        Woodman, 2012)[100] indicated a strong degree of engagement: 91% following
        through on their plans and 90% spending more than 15 hours on CPD activity.
        Concerns and recommendations related to accountability[101] and more widely on
        linking the scheme more explicitly to public confidence and to a possible
        competency profile.

80   The New Zealand Law Society conducted a review of CPD (New Zealand Law
        Society 2012a) which, in October 2012, has led to draft Lawyers and
        Conveyancers Act (Lawyers: Ongoing Legal Education) Rules [2013] (New
        Zealand Law Society, 2012b) in consultation until mid-December 2012. The
        draft rules provide for a cyclical approach, involving recording of "a reflection on
        each activity" which identify what has been learned from the activity whilst
        retaining for lawyers in practice a minimum hourage of 10 hours a year (an
        excess of up to 5 can be carried forward into the following year). Organisations
        may apply, in what is in effect an "approved employer" model for "self-review
        status" under the supervision of an internally appointed continuing professional
        development officer. A wide range of activities is permissible and, although
        "private study" is excluded (as are attending meetings, committee work and pro
        bono activity), all lawyers are also "encouraged to complete a minimum of 50
        hours of self-study each CPD year and to include them in their CPD plan as such".

81   The International Union of Latin Notaries does not itself prescribe a CPD
        scheme but an umbrella regulation that "Notaries must particularly ensure that
        they keep up-to-date with professional matters, taking a personal interest in
        the initiatives proposed by their professional bodies" (UINL, 2004).

Standards and practices in other professions

82   Reference has already been made to the multi-disciplinary research carried out by
        the Institute of Continuing Professional Development. The Professional Associations

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[100] We are grateful to Paul Wood QC for kindly updating us on developments in Alberta.
[101] Some respondents to this survey, consistency with the SRA's findings (Henderson et al, 2012) preferring a minimum hours standard for this reason.

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Research Network has, similarly, conducted research comparing approaches across a variety of professions, often including some of the legal professions (see PARN, 1998-2000, 2001; Friedman et al 2001, 2004, 2005, 2009). Themes emerging from these studies are concisely set out in Friedman et al (2009, p. 34) as:

a)   Whether CPD should be voluntary or compulsory (the majority being compulsory) and whether a compulsory requirement detracts from individuals' personal responsibility;

> There is a strong set of opinions in the field that CPD should be either voluntary or obligatory. That making it compulsory will lead to a rule following or tick box approach. Certainly this has been a problem with using input measures: people scrambling to fulfil their CPD requirements by taking whatever courses or attending whatever events are available and convenient rather than activities that will genuinely support their competence and development.
> (Friedman *et al,* 2009, p.40)

b)   Level of activity expected: hourages, activities valued as higher (usually structured) or lower credit; measurement of outputs (outputs possibly arising from one or more of: responsibility shown in planning activity; evaluation of activity and reflection[102] on activity):

> While we generally regard output measures to be superior to input, at PARN we regard points systems or a weighting system towards hours to be preferable to merely counting hours. Some hours spent on CPD are clearly more valuable than others and if the regulator is judging which hours count at all, it is better also to judge which hours should count for more than others.
> Output measures can involve (in increasing levels of objectivity but also increasing cost) self assessment, self assessment with audits, third party assessment such as by examination and peer assessment in practice situations.
> (Friedman *et al*, 2009, p.35)[103]

83   Friedman et al report, in work commissioned for the Financial Services Authority, on a survey of 54 organisations undertaken in 2008 (2009, p.:36) producing the following numerical results:

Inputs	hours	46%
	points	17%
Outputs	matching to competencies set by professional body	13%
	matching to competencies set by another body	4%
	matching to competencies set by members themselves	31%
	evidence of reflecting on practice	41%

84   It will be noticeable from earlier discussion that legal profession schemes, throughout the jurisdictions considered, have, at least until comparatively recently, tended towards the input-oriented. A general trend, however, for professions as a group (reinforced by the Institute of Continuing Professional Development findings) was found by the PARN research to be a move towards output measurement:

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[102] Reflective learning, as a concept, is not unknown in legal education in the classroom and outside it, including work with practitioners. It also appears as a desired competence for the point of qualification in the SRA's draft and in IPS' work-based learning outcomes.

[103] See also Boud and Hager (2012, p. 28) to the effect that inputs measures "foster an orientation towards compliance with procedures that direct attention away form the nature of development itself. A false notion of continuing professional learning is embodied in the practices of those very organisations that seek to promote it".

> Regulators have in the past generally preferred input measures because they are perceived to be more straightforward to assess. However it is possible to develop standardised output forms through the use of planning frameworks and reflection templates (see Friedman & Woodhead, 2008).
> (Friedman *et al,* 2009, p.40)

85   Particularly interesting approaches by the Nursing and Midwifery Council, and by some of the accountancy professions are discussed below. Interesting aspects include:

a)   accreditation of activities and providers;

b)   the range of positive support for CPD made available including guidelines, help with recording and advertising of CPD opportunities;

c)   CPD specifically designed – and apparent in a number of professional schemes - to support the organisation's ethical code:

> …there are several ways to support an ethical code, two fundamental aspects of which are making it accessible to the profession and making it accessible to the public. For the profession there are a wide range of strategies that can be pursued: supplying cases of ethical dilemmas, offering training on the details of the ethical code and how it is being interpreted, making the code readily available, even having new recruits sign up to it or take an oath. For the public the key elements are transparent and easily understood phrasing, making it available on the professional body's website homepage or no more than one or two clicks away from the homepage, and making leaflets available to member's clients and the general public.
> (Friedman *et al,* 2009, p.37)

d)   the challenge and potential for discrepancy arising from modern separation between representative and regulatory bodies.

86   A similar example of multi-disciplinary work including professions in Europe, North America, Africa and Asia, appears in an earlier PARN report (Friedman & Woodhead, 2008) and synthesises three profiles of CPD schemes by reference to the elements of the learning cycle which they emphasise:

a)   A reflective practitioner approach, with "A strong emphasis on the reflection and planning phases of the cycle, with less accuracy measuring at the outcome phase" (p.60);

b)   A planning for professional development value approach, where outputs are tied to competence frameworks and there is "[e]mphasis on planning with various levels at reflection and outcomes phases, generally measuring action phase by input" (p. 62). These are described as follows:

> Planning tools and competency frameworks are tools that can easily be understood by individual professionals and communicated to important stakeholders. They also can easily be adapted to different professions. It is perhaps for this reason that the planning phase of the CPD cycle is particularly well developed in terms of levels of PDV compared with reflection in particular which is regarded by some as a woolly concept. This is likely to change if new well-specified techniques or tools to support reflection are developed.
> (Friedman & Woodhead, 2008, p. 71)

c)   An approach found in the medical sector in particular, with a deep outcomes-focus: "[f]ocus on measurement at the outcome phase of the cycle, minimal or no

measurement of action, and varying degrees of measurement at the planning and reflection phases" (p. 65):

> Many of the disadvantages of output based systems are not inherent in such systems, but are rather a reflection of the early state of development of such systems. Costs of output measurement systems are likely to fall with further developments in online software, costs of auditing are also likely to fall as standards expected become better established and more experience is gained with training of auditors. Most significantly we believe that techniques of practice appraisal are likely to improve ...
>
> Along with improvements in the supply of output measurement techniques, we believe the demand for such systems will grow significantly as pressures on professional bodies towards providing evidence for continuing competence and maintaining professionalism grows both from professionals themselves and from other stakeholders.

(Friedman & Woodhead, 2008, p. 89)

87   PARN has developed the concept of a CPD scheme's "Professional Development Value" (PDV), described as follows:

> If a CPD circuit (one progression through the cycle) has a large impact on the individual's professionalism, it can be said to have a high PDV. Ideally, a measurement technique will be capable of detecting the correct PDV of a CPD circuit and of particular phases of the CPD cycle. Output measures have the capability of identifying PDV, … We must emphasise that individuals may derive high professional development value - may achieve the purposes of CPD to a high degree – without it being detected by an output measurement system. They may even achieve the purposes of CPD without following any formal CPD programme at all. However, we do regard the output measurement system as potentially leading to PDV in itself.

(Friedman & Woodhead, 2008, p. 17).

88   Although some of the schemes described in this chapter can easily be identified (and in some cases were identified by Friedman & Woodhead as fitting into one of these models), some equally demonstrate aspects of more than one. A simpler pragmatic taxonomy might define schemes as input-oriented; output oriented, or, where there is focus on a learning cycle of some kind as part of the learning process, cyclical. A cyclical approach could, however, be weighted towards any part of the cycle (as, for example, the planning stage or the output/impact stage).

89   Additional multi-disciplinary work can be found in Goodall, *et al*, 2005 and Muijs & Lindsay, 2008. The question of evaluation of CPD activity has, potentially two aspects: the quality of relevance and delivery of structured formal activity and, where output is relevant, the individual's assessment of what he or she has learned (the impact of CPD). Considering the impact of CPD, Goodall et al make a useful distinction, in an empirical study of schoolteachers, between meaningful evaluation of what has been learned, and the kind of dissemination of material familiar to those who have passed on the notes to colleagues in a law firm:

> …while many feel that the evaluation of the impact of CPD is important, this evaluation often does not happen due to constraints of time (on CPD leaders as well as other members of staff), and lack of resources (in terms of joint time, structures for peer observation, etc.). While time is often

made for *dissemination* of learning through CPD, the process often stops
there, with no further investigation as to the effect of that learning.
(Goodall *et al,* 2005, p.124)

An innovative approach to measurement of output is demonstrated in the RIBA
scheme, described below. Fundamentally, however, it is because the legal CPD
schemes, taken as a group and across a variety of jurisdictions, tend towards a very
similar model, that some discussion of the variety of differing approaches taken by
other professions is useful.

Medicine

**90   All discussion of CPD in the medical sector must now take into account the
regulatory move towards a periodic revalidation process perceived as a more in
depth assessment of professional competence than CPD alone (Department of
Health 2007, 2008a and b; 2011; Health Professions Council 2008) as a condition of
continuing licensure to practise. An overview of progress is provided by the
Council for Healthcare Regulatory Excellence[104] (CHRE, 2012) and another view is
found in an early multi-disciplinary conclusion:**

> A CPD record dependant on accumulating hours or points based on
> course attendance, does not meet the basic requirements of
> revalidation
> (UK Interprofessional Group,[105] n.d., p. 2)

General Dental Council

91   Dentists and dental care professionals are governed by the General Dental Council,
which provides separate CPD schemes for each. Dentists (GDC, n.d.) are required to
complete at least 250 hours over a five year period, of which a minimum of 75 must
be "verifiable" (with concise educational aims and objectives, clear anticipated
outcomes, quality controls and documentary proof [of participation, not of output]).
Activity carried out in another country under the aegis of another dental regulator
may be counted. It is suggested, but not required, that in each cycle, the individual
keeps up to date on legal and ethical issues and on dealing with complaints and
devotes 10 hours to medical emergencies; 5 to disinfection and decontamination
and 5 to radiography and radiation protection).

92   The equivalent scheme for ancillary staff (GDC, n.d.) follows the same model,
including the same suggestion about the number of hours in each cycle to be
devoted to core subjects. The overall requirement is, however, reduced to 150
hours over the five year cycle, of which 50 must be verifiable.

93   Reporting is annual, either on a form or through an online log. At the end of a cycle
an individual may be asked to submit proof of the verifiable activity and a log of
hours. Presumably the length of the cycle reduces the strain of the audit process for

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[104] To become the Professional Standards Authority for Health and Social Care by the end of 2012.
[105] The Law Society/SRA is listed as a member of this group. In other sectors there is some evidence of
"revalidation" being used as a synonym for declaration of CPD activity (see, for example, NRCPD, n.d.)

the monitoring regulator. It also automatically provides, as many CPD programmes do not, for carry over from year to year

94   As with other medical sectors, the General Dental Council is reviewing its CPD requirements in the context of an overall move towards a revalidation process (Eaton et al, 2011; Pinto and Robinson, 2012; GDC, 2012a, b, c, d). A CPD discussion document comments that "dentists are more likely to undertake CPD based on reflection on their skills and abilities than other registrant groups" and explores a move towards a more outputs focussed approach (GDC, 2012c). The GDC is, at the time of writing, consulting on a cyclical approach which would, nevertheless, maintain a minimum hourage (100 hours for dentists) which consciously includes reflection and which will be incorporated into the 5 yearly revalidation cycle. The revalidation exercise (from 2014) will include assessment around four topics: clinical, communication, professionalism and management and leadership (GDC, 2010). At least once in each cycle, an individual's evidence must be checked by an approved external verifier. The stages of review will include:

Stage 1 – compliance check, which will apply to all dentists
Stage 2 – remediation phase, which will provide an opportunity to dentists who do not pass Stage 1 to remedy deficiencies
Stage 3 – in-depth assessment, which will apply to dentists who fail to demonstrate their compliance at the end of the remediation phase

General Medical Council

95   The GMC has recently altered its CPD approach following a review of the regulation of medical education and training (the "Patel Report": GMC, 2010) and subsequent examination of CPD in particular (Schostak, *et al* 2010; Murgatroyd, 2011; CPD Review Working Group, 2011; GMC 2010, 2011, 2012 a, b, c). Medical CPD is now a component part of the periodic revalidation of the licence to practise in the context of a profession with "both a culture of CPD participation and an infrastructure to support it" (CPD Review Working Group, 2011, p. 9).

96   Significant features of the outputs focussed scheme[106] are:
   - A positive refusal to prescribe input hourages or mandatory activities/content outside the broad topics of the revalidation framework ;[107]
      > This guidance does not tell you what CPD, or how much CPD, is right for you. You will need to judge how best to apply the principles of this guidance to your own practice and professional development.
      > (GMC, 2012a, p. 5)

   - A definition of CPD which permits informal experiential learning in the workplace – "any learning outside of undergraduate education or postgraduate training that helps you maintain and improve your performance" - to "count" for CPD purposes (ibid, p.7);[108]

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[106] That said, the European Accreditation Council for Continuing Medical Education has a mandate to act as a clearinghouse for recognition of credits in continuing medical education across Europe.
[107] Although CPD schemes of individual royal colleges or faculties may prescribe hourages. A discussion of the role of private study in medical practice appears in Asbjørn Holm, 2000.
[108] "…for most doctors the most effective CPD is the sort of experiential learning that occurs naturally in the workplace, almost as a by-product of practice, rather than through activities formally designated as CPD.

- Requirements that practitioners take responsibility for a cycle involving individual identification of needs and CPD planning but also demanding that practitioners

  > reflect on what you have learnt from your CPD activities and record whether your CPD has had any impact (or is expected to have any impact) on your performance and practice. This will help you assess whether your learning is adding value to the care of your patients and improving the services in which you work
  > (ibid, p.11);[109]

- A recording system including PDPs. .The revalidation process (GMS, 2012b), then, explores through evidence and appraisal, four domain with their sub-attributes:

Domain	Attributes
Knowledge, skills and performance	Maintain your professional performance Apply knowledge and experience to practice Ensure that all documentation (including clinical records) formally recording your work is clear, accurate and legible
Safety and Quality	Contribute to and comply with systems to protect patients Respond to risks to safety Protect patients and colleagues from any risk posed by your health
Communication, partnership and teamwork	Communicate effectively Work constructively with colleagues and delegate effectively Establish and maintain partnerships with patients
Maintaining trust	Show respect for patients Treat patients and colleagues fairly and without discrimination Act with honesty and integrity

General Pharmaceutical Council

97   The approach of the General Pharmaceutical Council pursuant to The General Pharmaceutical Council (Continuing Professional Development and Consequential Amendments) Rules Order of Council 2011 (SI 2001/1367) has a strong basis in reflection (see Friedman & Woodhead's first model described above, 2008). Pharmacists and pharmacy technicians must make a minimum of 9 CPD entries each year, in a prescribed format showing the cycle of reflection, planning, action and evaluation (GPC, 2010 and 2011).[110] As with the ICAEW scheme below, "reflect" is used to describe initial identification of learning needs

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Inevitably this 'informal' CPD activity is hard to measure and resistant to providing the sort of assurances a regulator might seek" CPD Review Working Group, 2011, p..13

[109] Indeed, the Academy of Medical Royal Colleges has agreed a template for recording reflection (AoMRC, n.d.).

[110] The latter is unusual, many of the organisations requiring evidence of a cyclical approach do not prescribe the format. Here, however, the template forces individuals to address the cycle in full and at least three out of the required nine entries must start at "reflection".

rather than impact on practice or improved competence). Monitoring is by initial self-certification but an individual can expect to have to submit his or her record every 5 years or more frequently if remedial action has been prescribed (e.g. by the Fitness to Practise Committee) or there is concern about compliance. On review, records dating back for 5 years are examined.

98   The General Pharmaceutical Council's approach to revalidation is, at the time of writing, in discussion with a view to implementation in 2015, although draft principles and a draft definition ("The process by which assurance of continuing fitness to practise of registrants is provided and in a way which is aimed primarily at supporting and enhancing professional practice") have been established (GPC, 2012).

Health and Care Professions Council

99   The work of what is now the Health and Care Professions Council (previously the Health Professions Council) provides a helpful example of the thought process involved in work seeking to establish a single CPD system for a wide range of professions (16 professions, now including social workers as a result of the Health and Social Care Act 2012). Brook (2005) reports on a substantial consultation exercise carried out in 2004 throughout the UK as a precursor to the Council's establishment of the CPD scheme required by art 19 of the Health Professions Order 2001 (SI 2002/254).[111] A particular challenge in this exercise was the creation of a scheme flexible enough to suit a wide variety of professions and to accommodate individuals' compliance with existing local or national CPD schemes. Consequently, perhaps, a very wide range of activity is included beyond formal courses, as for example: "work-based learning, for example, reflective practice, clinical audit, significant event analysis, user feedback, membership of a committee, journal club; professional activity, for example, member of specialist interest group, mentoring, teaching, expert witness,[112] presentation at conferences; […] public service" (Brook, 2005, p. 9). It is fair to say that some respondents suggested that some of these activities were inherently difficult to define or were subjective and that some, such as membership of a specialist group, inherently passive. A rating system, weighting some activities more highly than others, was rejected: "[t]he variation of CPD activities reflects differences between the professions and the work of individual registrants. Introducing a rating system would wipe out this important benefit and need CPD standards to be set for each profession, and for individual circumstances within each profession" (p. 10). Equally, the prescription of a minimum number of hours was rejected in favour of an output-focussed approach intended to recognise on-going learning and development.[113]

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[111] The legislation prevents the Council organising or approving CPD activity itself. Its current statement (Health and Care Professions Council, 2011a, p.10) goes further: "We are not going to 'approve' certain CPD activities because we believe that you are in the best position to decide what type of CPD activity is most relevant to you. If we approve only certain CPD activities, you might not be able to complete other activities which could benefit your work and service users more".

[112] It is apparent from the scheme as currently operating that being an expert witness remains a valid CPD activity (Health Professions Council, 2011a, p.9).

[113] A group of health care professions, including many of those now serviced by the Health and Care Professions Council nevertheless subscribe to a Joint Statement on CPD (Royal College of Nursing *et al*, 2007, p. 3) which, apparently targeted at employers, sets out an expectation of "Six days (45 hours) per year protected CPD time [including documentation of outcomes] should be the minimum time granted to support health and social care practitioners' CPD, above existing statutory and mandatory training and formal study leave arrangements. This is a realistic amount of time, and is in keeping with existing regulatory and professional body requirements".

100   Monitoring by sample was proposed, and advice was taken as to the extent of a statistically valid sample (samples from each of the professions, 5% in the first year and 2.5% thereafter: p. 16).[114] The current CPD scheme (Health Professions Council, 2011a, 2012) now representing 16 professions explicitly (but somewhat confusingly, as experiential learning in the workplace has already been defined as CPD activity), dissociates CPD compliance from fitness to practice:

> There is no automatic link between your CPD and your competence. This is because it would be possible (although unlikely) for a competent professional not to undertake any CPD and yet still meet our standards for their skills and knowledge. Equally, it would be possible for a registrant who was not competent to complete a lot of CPD activities but still not be fit to practise.
> We have a separate process (our fitness to practise procedures) for dealing with lack of competence, and this is not linked to our powers to make sure registrants undertake CPD. …
> However, for individual professionals, there is likely to be a link between competence and CPD. When considering your CPD, and planning your CPD activities, you may consider your on-going competence as important for your CPD. But you can be sure that we do not assess your competence, or make assumptions about your fitness to practise, based on your CPD activities.
> (Health Professions Council, 2011a pp. 4-5)

101   Maintaining the position that a minimum number of hours is not prescribed, this CPD scheme takes an alternative approach based on a series of standards (an example of Friedman & Woodhead's planning focussed model):

> A registrant must:
> 1. maintain a continuous, up-to-date and accurate record of their CPD activities;
> 2. demonstrate that their CPD activities are a mixture of learning activities relevant to current or future practice;
> 3. seek to ensure that their CPD has contributed to the quality of their practice and service delivery;
> 4. seek to ensure that their CPD benefits the service user; and
> 5. upon request, present a written profile (which must be their own work and
> supported by evidence) explaining how they have met the standards for CPD.
> (Health Professions Council, 2011a p. 6)

102   Audit remains an important part of the scheme, and is carried out each time one of the regulated professions renews its registration. However only those of more than 2 years registration can be selected for audit: "We have made this decision because, although we believe that all registrants should undertake CPD throughout their careers, we also believe that registrants should be allowed at least two years on the Register to build up evidence of their CPD activities before they are audited." (p. 13). This audit, necessarily, given the nature of the scheme, provides assessment criteria against the standards with instructions for completion of the CPD profile and involves trained CPD assessors as well as detailed provisions for further and better particulars, deferral of audit (for e.g. parental leave) appeal and application for

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[114] Few organisations stipulate so precisely. The Institute of Risk Management 9a, b, however, audits 15% of its membership annually.

reinstatement. The Council is in the process of detailed investigations (including into the level of risk posed by the practice of its registrants and the utility for this purpose of its existing systems) (Health and Care Professions Council, 2011b, 2012a; Burford *et al,* 2012).

Nursing and Midwifery Council

103   The strategy of the Nursing and Midwifery Council was expressed to a PARN study (Friedman *et al* 2009, p. 35) as:

> There is a misunderstanding with nurses and midwives in that they expect their employers to provide funding for CPD and they think they have to go on courses, and we deliberately set out not to do that because you can go on a course but you might not learn anything from it, or put the learning into practice. What we want people to do is to learn from good practice, introduce it and evaluate… we wanted people to examine their specific area of practice.

Consequently the post-registration education and practice ("PREP") standards for registered nurses and midwives require members to:

- undertake at least 35 hours of learning activity relevant to your practice during the three years prior to your renewal of registration;
- maintain a personal professional profile of your learning activity;
- comply with any request from the NMC to audit how you have met these requirements.
  (NMC, 2011, p.8)

A template for the required profile documenting both activity and outcomes is provided under the following headings (p. 9):

> A list and a description of your work place or organisation and role for the last three years;
> The nature of the learning activity – what did you do?
> Description of the learning activity – what did it consist of?
> Outcome of the learning activity – how did the learning relate to your work?

Monitoring is by way of self-certification of compliance on renewal of registration (every three years) and through audit by sample.

104   The NMC approach to revalidation will involve replacing the current PREP standard by 2015. Although consultation was anticipated by late 2012 it does not appear to have been initiated at the time of writing.

Royal College of Psychiatrists

105   This professional body was described as unique amongst those studied by Friedman & Woodhead (2008) in having a CPD scheme driven by peer assessment (for a survey of psychiatrists' CPD activity, see Bamrah *et al*, 2011). A minimum number of hours (50) is also prescribed (supplemented by a suggested 100 additional hours of reading) and activity is divided into Clinical, Academic and Professional (Royal College of Psychiatrists, 2010). The Royal College has the responsibility of setting the standards for revalidation of psychiatrists and has recommended that the format of the appraisals be "a

minimum of ten case-based discussions be undertaken over a 5-year period (two discussions per year)." (Royal College of Psychiatrists, 2012: 11).

Accountancy

> Undertaking CPD does not, by itself, guarantee that all professional accountants will provide high quality professional service at all times. The latter requires ethical behaviour, professional judgment, an objective attitude, and an appropriate level of supervision. Further, not every professional accountant who participates in a CPD program will obtain the full benefits of that program. This will depend on the professional accountant's commitment and capacity to learn. However, CPD plays an important part in enabling professional accountants to develop and maintain professional competence that is relevant to their role. Therefore, despite some inherent limitations, CPD is an important element in maintaining public confidence and trust.
> (International Education Accountancy Standards Board, 2012, p. 7).

106   At an international level, accountancy professional bodies which are members of the International Federation of Accountants, are, since 2006, required to have a CPD scheme consistent with IFAC's International Education Standard for Professional Accountants 7 *Continuing Professional Development: A Program of Lifelong Learning and Continuing Development of Professional Competence* (IES 7). It should be noted that the research carried out by Friedman & Woodhead (2008) cited above was commissioned by the International Accounting Education Standards Board.

107   IES 7 has recently been redrafted or clarity in drafting and consistency with overall educational standard. The reviewed IES 7I will become effective in January 2014 (International Accounting Education Standards Board, 2012, p. 3). Professional bodies are, however, permitted to implement an output based, input-based or a combination CPD scheme.[115] Output-based models must require demonstration of maintenance or development of competence with "sufficient and reliable evidence that has been objectively verified by a competent source, and measured using a valid competence assessment method" (p. 9). Input schemes must require at least 120 hours (or its equivalent) in a three year period, of which at least 20 hours must be completed annually and of which 60 hours must be verifiable. Monitoring must be systematic and provide for sanctions for failure to "report on or to develop and maintain competence" (p. 10). As will be seen, the trend amongst domestic accountancy bodies at present is for a self-directed output model. No doubt discussion will be needed to establish whether existing models, many of which are at least cyclical and to some extent output-oriented, are able to comply with the standard and burden of proof demanded. Friedman & Woodhead, for instance, refer to a strongly output-focussed German professional organisation of accountants (2008, p. 44) where, at the time of their research, "the organisation carries out practice audits, which involve checking on the extent that CPD requirements are met.

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[115] "For example, member bodies may choose to:
   a. use the principles of both input- and output-based systems, whereby input-based learning units contribute to the output competences being measured for a portion of the knowledge areas in a predominantly output-based system;
   b. allow professional accountants who may not meet the input-based learning units requirement to provide verification that competence has been developed and maintained; or
   c. specify a certain number of learning units as an indication of likely effort required to achieve competence, and monitor this together with verifying the competence achieved as a result of the learning activities."
   (p. 12)

During these audits, CPD records are not checked, but the quality of work at the practice is. If a deficiency is found, there is further investigation, which involves interviewing practitioners to gauge their professional knowledge and looking through invoices and attendance sheets."

Institute and Faculty of Actuaries

109   The actuarial profession (the Institute for England and Wales and Faculty for Scotland) identified as one of its priorities for 2011/2012, "developing proposals for an outcomes-based CPD scheme to succeed the current inputs-based system" (Institute and Faculty of Actuaries, 2011, p.13). Nevertheless, the scheme for 2012/2013 (Institute and Faculty of Actuaries, 2012) prescribed hourages (distinguishing between members with practising certificates and those without). For those with practising certificates, annual requirements are 30 hours of verifiable activity, of which a minimum of 20 (of which 10 must be by attendance at external events) must relate to technical aspects and a minimum of 6 to professionalism. Up to 15 hours may be claimed for "service to the profession" (volunteering for the benefit of the profession is a distinct part of the profession's ethos). Those with practising certificates may also be required to attend designated "professionalism events".

110   Only those without practising certificates, whose hourages are lower, are permitted to count private study (and must identify the learning outcomes from such study). Members working overseas may comply with the CPD scheme operated by the professional body for that country. Failure to comply on time is met by an extension and an administration fee of £50. Failure to comply by the expiry of the deadline incurs, at the election of the defaulting member, either a fine of £750 and public identification as a non-complier or referral as a disciplinary matter. Failure to comply more than once in a 10-year period is automatically a disciplinary matter.

Association of Accounting Technicians

111   Licensed and registered members are explicitly required to assess their CPD needs in practice management and, if a registered member in practice to submit evidence of practical experience and/or CPD in this are as a condition of applying for a licence and on renewal of registration (AAT, n.d.). Members in practice are required to go through a CPD cycle, rather than to record hours, at least twice in a 12 month period and to retain records which are subject to monitoring (AAT, n.d.).

Association of International Accountants

112   The 1647 UK and Republic of Ireland members (FRC, 2011, p. 8) of this body with a distinct international focus, are subject to a CPD scheme which, as with others in this sector, is designed to be consistent with the over-arching CPD requirements of the IAESB International Education Standard 7s for Professional Accountants. 120 units are required in each rolling 3 year period, of which 20 units of verifiable activity must be completed in each year.

Chartered Institute of Internal Auditors

113   The professional commitment of the IIA is consciously aspirational, setting a level beyond maintenance of a minimum level of negligence-avoiding competence with the objective of *raising* standards of practice:

All members of the IIA, as signatories to the Code of Ethics and the
International Standards for the Professional Practice of Internal Auditing,
are expected to "continually improve" and to "enhance their knowledge,
skills and other competencies through continuing professional
development".
(IIA, 2011, p.2)

Responsibility for CPD is explicitly placed on the individual and the principles of the
scheme include the following:

2.6 As wide and diverse a range of activities as possible shall be recognised
as contributing to CPD provided they are relevant, measurable and, where
possible, verifiable
2.7 There shall be minimal administrative requirements placed on
members in meeting the expectations of the Institute's CPD policy
2.8 There shall be no unnecessary duplication of effort where existing and
alternative processes satisfy the same requirements for CPD
2.9 The Institute shall provide clear guidance on CPD, actively promote
professional development and facilitate it through the provision of
meaningful activity
2.10 The means of determining that members are engaging in the
appropriate level and volume of activity to support their CPD shall be
focused on the impact that it has on their performance and effectiveness
rather than the number of hours or credits accumulated.
(p.3).

114   Individuals must identify needs, "define a minimum of one target for the desired
outcome of professional development in terms of improvements to personal
performance" (p. 4), create a plan, engage in suitable activity, monitor progress
against the plan and review the impact of activity on personal performance. Self-
certification is annual and records must be kept for 3 years. Monitoring is by random
sample. Exemptions are available and compliance with the CPD scheme of another
professional body (provided that it involves the same cyclical approach, recording
output) is permitted as an alternative. Those who fail to comply "will be positively
supported and encouraged but ultimately may be referred to the disciplinary
committee for review" (p. 6).

Chartered Institute of Management Accountants

115   The 69, 038 (FRC, 2011, p. 8) UK and Republic of Ireland members are required
to comply with the CPD policy described in an earlier iteration by Friedman &
Woodhead as output based (2008,p. 26) as a condition of registration. No
minimum hours or points are required and work-based (experiential) learning is
included: "Members are responsible for assessing their development goals,
selecting activities, and designing their CPD programmes"" (CIMA, n.d). Records
must be kept for 3 years and monitoring is by annual random sample. An
accredited employer scheme is available. Members are expected to be able to
demonstrate all aspects of a learning cycle:

Step 1: Define what is expected of you in your role, and future goals. Draw up
brief descriptions of these roles and expectations.
Step 2: Assess your development needs and outcomes. Compare what is
expected of you in your current, or a future role, against your current
capabilities.
Step 3: Design your programme around activities you believe are relevant to
your role. Document these activities.

Step 4: Act. Undertake the development activities planned in Step 3.
Step 5: Reflect on your development activities, consider what you learned,
how you can apply your learning and changes you would make next time.
Step 6: Evaluate your actual development against your development needs
and outcomes. Any outstanding development can be carried over into the next
cycle.
(CIMA, n.d)[116]

CIMA provides a substantial range of events and written materials and endorses a range of formal activity, including MSc and MBA programmes.

Chartered Institute of Public Finance and Accountancy

116   The CPD scheme for the 13,159 UK and Republic of Ireland members (FRC, 2011, p. 8) is "designed to be as flexible as possible and takes into account the various sectors CIPFA members work in particularly as nowadays many members work outside of mainstream accountancy and audit roles. It is especially important, in this time precious era, that all development should be relevant to your job role now and for your possible future career" (CIPFA, 2010, p.:1). Minimum participation is 120 hours in a three year period, of which at least 20 hours in each year must be "verifiable".

117   Unusually, there are two levels of participation, and individuals may switch between the two. Level 1 is targeted at meeting the regulator's minimum requirements and demands a log of activity together with a portfolio of evidence (evidence may range from simple proof of attendance to results of an assessment or appraisal). Level 2, however, is described as "the best practice scheme" (p. 2) and demands the full cycle of "planning, recording and reflecting on development". Participants at level 2 are asked to add to their portfolio of evidence their "reflective comments about the usefulness of the activity, what you have learned, how you will use the acquired knowledge or skill in the future and how far it has met your objectives".

118   All participants are invited to participate in "technical development" activity as well as leadership and management development.   Structured activities include mentoring and being mentored, secondment, project work and "developing new systems or processes" in addition to the conventional course attendance. Unstructured activity includes, unusually, the application into practice of learning derived from a course as well as work shadowing, reading, on the job learning (i.e. experiential learning) and "visiting other departments or organisations" (p.5). There is provision for exemption for those who are retired or on leave (although special consideration is given to returners as requiring particular support in refreshing themselves on return to work) and monitoring is by annual declaration and random sampling. Employer staff development schemes may be accredited.

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[116] This emphasis may be as a result of Friedman & Woodhead's evaluation (2008, p.27), where the planning and reflection phases were assigned a professional development value of 4, but the results phase only 2-3 as "Results are considered during reflection, but there is no formal recording, structure, or assessment system specifically for this phase".

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Chartered Institute of Taxation/ Association of Taxation Technicians

119   Unusually in the accountancy sector, the joint CPD scheme of these two organisations prescribes a minimum number of hours for those "working in taxation"; and at a high level. CIOT members must complete "a minimum of 90 hours of CPD per calendar year of which not more than 70 hours each year should be reading" and ATT members 45 hours, of which not more than 30 may be reading (ATT/CIOT, 2011, p.3). Totals can be averaged out over a 3-year period so there is some element of carry over and "[t]raining in law, accounting and financial services, practice management and administration, staff development and IT may be included up to a maximum of one quarter of the total annual CPD requirement" (p.3). As for some of the other accountancy professions, temporary suspension for leave is treated not only as an exemption but also as a trigger for refreshment on return: "the overriding requirement to ensure that their tax knowledge is up to date on returning to work" (p.4). Records must be kept for 3 years and monitoring is by random checking. Checking of CPD records is a mandatory aspect of any disciplinary proceedings.

Institute of Chartered Accountants of England and Wales

120   No minimum hourage or points system is imposed (ICAEW, n.d. a, b) for the UK and Republic of Ireland members of the Institute (FRC, 2011, p. 8) although an annual declaration of compliance is required.[117] The rationale for movement towards this model is justified as:

> You are the best judge of how much CPD you need to do and which activities will be most beneficial in meeting your learning and development needs. CPD should be proportionate and relevant to your role; there is no need to keep up to date with areas of accountancy which are not directly relevant to your role. … There is no requirement to achieve a certain number of hours or points, and the notion of structured and unstructured activities no longer exists. There is no requirement to attend a certain number of courses or seminars. There may be periods when, having reflected, you quite reasonably conclude that you already have all the current skills and knowledge necessary for your work and that you do not need to undertake any further CPD activity at that moment.
> (ICAEW n.d., a)

Monitoring is by random sample requesting evidence of CPD reflecting three stages of a cycle: "reflect, act, impact" where "reflect" represents the planning stage and "impact" the assessment of "the effectiveness of [the] activities (how the learning has made you more competent and effective, what you can do now which you couldn't do before) and consider whether your learning and development objectives have been met".

Other approaches

121   A selection of other professional bodies have been identified as having particular insight into aspects of CPD, or as taking unusual or innovative approaches.

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[117] Total number of members at time of writing: 117,475. The size of the profession will be of interest to those involved with the largest legal professions.

Chartered Institute of Personnel and Development

122 The Chartered Institute of Personnel and Development has adopted an output-oriented model (CIPD, 2012 with a strong emphasis on reflective learning.[118] The recommended planning stage involves review of learning over the previous 12 months and setting objectives for the forthcoming year. Presentation of learning is fluid and would accommodate a narrative, learning journal approach:

> We don't provide rigid templates or lay down restrictive rules, either for planning or recording your development activity. So as long as you clearly identify the professional value of the things you've learned, you can do whatever suits you. We also don't believe that you can measure personal development by counting training hours or the number of courses attended.
>
> **What counts towards CPD?**
> Some people find it helpful to write things down in detail, while others record 'insights and learning points' in their diaries as they go along. The thing to remember is that records and logs are only tools for planning and reflection. CPD is what you experience, learn and then apply.
>   Anything that helps you to meet your development objectives could count as CPD – as long as you can demonstrate real value to you in your work. So, if you do something at the weekend that changes your perspective on teamwork or teaches you something about interpersonal communication, you can use it in your CPD record. Similarly, if there are personal learning experiences you don't want to share, leave them out. You decide what goes in and what stays out.
> (CIPD 2012, p.3)

Chartered Institute of Public Relations

123 This scheme, which, as with the actuarial profession, has a strong emphasis on volunteering and pro bono work, has an annual requirement of 60 hours where it is mandatory. Members can attain "accredited practitioner" status after accumulating 2 years of CPD activity and retain that status as long as CPD is continued.

124 There are two streams of activity: "Developing your communication skills and knowledge" (the number of required points varies by status but the maximum is 40), and "Voluntary work, research and supporting others". This latter category includes networking, teaching and supporting others, unstructured and self-directed learning (including work shadowing and specific projects), and contribution to the development of the profession, including committee work and pro-bono activity (CIPR, n.d.).

Construction Industry Council

125 Friedman & Woodhead (2008) comment that the CIC is obliged to manage, carefully, a certain degree of resistance to anything other than an input-based CPD scheme. The domestic scheme falls within the framework of the European Project for the Use

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[118] "Within a very short time, reflection becomes a routine part of working life that is more or less instinctive. If you see learning as an intrinsic part of your job, you dong as an intrinsic part of your to do it. People who routinely plan, record and reflect on their learning tend to see more opportunities for personal development. The fact is the world becomes a richer, more stimulating place when you embrace reflective learning, because you switch on a kind of intuitive radar that's tuned to pick up useful opportunities"(CIPD, 2012, p 4.).

of Standards of Competence in CPD for Construction Industry Practitioners, which reinforces the cyclical nature and outputs based of the scheme:

> a CPD system should allow individuals to:
> • review and explore their professional and personal careers/competences;
> • discover and set down their individual strengths and weaknesses;
> • make and use a development plan; and
> • record their intentions and provide verification that they have conformed to their plans and achieved their targets.
> (CIC, n.d., p. 14).

126   The domestic CIC "User's Guide Application", whilst consistent with this model, provides considerably more detailed operational instruction about the underlying learning cycle than many others: clarify aims; identify professional CPD requirements; find sources of help, select appropriate Occupational Standard; appraise your personal situation; identify competence needs and goals; plan CPD; implement CPD, record CPD, monitor and review (p. 18).

An alternate version (p. 19) operates by way of self-appraisal but maintains a cyclical structure: clarify personal aims; manage the appraisal; review personal experience; assess your own competences; assess what helps and hinders your development; review self-appraisal process. It is suggested that, given the nature of the industry, the construction project itself might be used as a vehicle for CPD and development of competence:

> This might provide a number of benefits:
> • ensuring better structured training for new entrants;
> • helping with recruitment and retention;
> • demonstrating the importance of training in improving business performance;
> • encouraging a 'learning and feedback' culture in the industry;
> • encouraging cross disciplinary learning and development of team working skills;
> • potential for CPD and or competence to be a requirement in procurement processes and contracts; and
> • aiding identification of where competence needs improving through CPD.
> (p. 26)

Engineering Council

127   The Engineering Council code is an example of an approach designed to accommodate a variety of professions (see also the Health and Care Professions Council, International Accounting Education Standards Board and Construction Industry Council). Rather than prescribe in detail the parameters of acceptable CPD schemes,[119] however, the approach is to prescribe a range of standards of professional development that should be attained by use of the relevant discipline's discrete CPD scheme and a professional code for individuals. There are three pillars to these standards: "Demonstrate commitment to maintaining professional competence through self managed PD"; "Take responsibility for and manage PD" and

[119] Guidance for the professional engineering institutions includes, however, the cyclical "PD should be guided by a development action plan and recorded in a professional development record. There is an obligation placed through the PD code on individuals to plan and record their PD, to produce evidence of PD achievement and to support the learning of others." (Engineering Council, 2010).

"Support the learning and development of others" (Engineering Council, 2010a, b). No hourages are prescribed.

Royal Institution of British Architects

128   As do many regulators or professional bodies with a regulatory role, the Architects' Regulation Board demands, in its Architects' Code, that architects "are expected to keep your knowledge and skills relevant to your professional work up to date and be aware of the content of any guidelines issued by the Board from time to time" (2010). In implementing this requirement, the RIBA scheme seeks to combine both input and individual measurement of output without necessarily prescribing a cycle. RIBA does not accredit or assess learning itself although there is an approved network of CPD providers and a specific selection of courses for more senior practitioners. Individuals must:

- Do at least 35 hours of CPD each year
- Of these, 20 hours must be gained from our RIBA CPD Core Curriculum syllabus
- You can get the other 15 hours from relevant subjects of your choice
- You must give at least 100 learning points to the CPD you carry out
- You must gain at least half your CPD from structured learning, where possible
- You must record your CPD online using the CPD recording manager
- You must plan your CPD as much as possible.
    (RIBA, 2011.)

129   The core curriculum involves 10 topics, on each of which at least two hours should be spent each year. In addition to the measurement of hours spent, the "learning points" system requires individuals to allocate up to 4 points to each activity, as follows:

    One point – you learned little.
    Two points – your knowledge has increased in a general way.
    Three points – you have increased your knowledge of a subject in a detailed way.
    Four points – the activity significantly benefited you in terms of knowledge and skills and you are expert in the subject.
    (RIBA n.d).[120]

    There is no pro-rata provision for part-time working. Monitoring is by random sample and failure to provide CPR records on request leads to suspension.

Equality and Diversity issues

130   No substantive investigation into equality and diversity in CPD as a concept has been located to date. Many of the schemes do, however, contain a commitment to equality of treatment and access to CPD and mandatory equality and diversity training as an aspect of CPD has at least been considered (BSB, 2011b). Indeed, the proposed new BSB scheme was subjected to an equality and diversity impact assessment (BSB, 2011b, p. 159) in which possible negative impacts were identified as: exclusion of waivers for the non-practising; additional cost inherent in a doubling of the number of mandatory hours (which might affect sole practitioners, "who are

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[120] This approach would not, then, allow for the result sometimes seen with senior practitioners attending a technical update: I learned nothing new, therefore I have confirmed that I am in fact up to date.

often, but not exclusively of BME origin" p. 160). Increased flexibility in the way in which hourages could be made up was, however, considered to counteract this, particularly for the disabled and those with caring responsibilities (p. 160). An earlier investigation into senior solicitors (Hales et al, 1998, p.4) identified barriers as including "the cost of external courses and the difficulty of access to them by solicitors working outside the main population centres", a problem, also appearing in the Australian studies (Nelson, 1993, p.152) possibly now ameliorated by the availability of CPD on the internet. Of the non-participants in that study (p. 29) 67% identified cost, 65% time and 64% issues of travel as barriers to involvement in external courses. The more recent SRA Review (Henderson *et al*, 2012) also identified barriers of cost (81% of survey respondents), time, relevance/level and location (62%)[121] and examples o f employers refusing to release time or imposing irrelevant (cheap or free) activity on employees purely to make up the hours. Solutions explored were in good quality online delivery (possibly for limited purposes such as legal updates), encouraging employer proactivity and bespoke and tailored CPD provision. IPReg (2012) with a much smaller and more specialist constituency, also explored constraints as to location (55%), cost (51%) and time (52%). 69%, however, responded that obtaining release of time from the employer was *not* a constraint.

131   Some of these themes appear elsewhere in the literature. Where there is a wide availability of online provision, or where experiential learning (see CPD Review Working Group 2011, p.17) in the workplace is legitimate CPD activity, such a problem may be ameliorated to a considerable extent. This might also assist with compliance for those who live and work using, for example, Welsh, Gaelic or British Sign Language. Both IPReg and the Law Society of Upper Canada considered economic and access issues for small and provincial firms in particular in their reviews of CPD.   The Faculty of Advocates (n.d.) acknowledges for the self-employed bar in Scotland that "members may be on a restricted income in their first few years of practice and it is making every effort to ensure that there are sufficient courses available free of charge and at reasonable rates. Many of the special interest groups offer discounted fees for new members and some external providers may also give discounts on request".

132   In terms of effectiveness and output, however, a smaller organisation may be at least as well able to encourage learning as a substantial one. So, for example, in Goodall *et al* (2005, p.2):
> The research found that there was no correlation between phase, size or sector of schools which were rated as "high" in terms of the evaluation of impact of CPD. Some small schools were able to evaluate the impact of their CPD experiences at least as effectively as much larger schools: this leads to the conclusion that effective evaluation of CPD is not a factor of the size, phase or sector of the school but rather of the culture in which that CPD takes place and the processes by which it is evaluated.

133   The issue of equality of treatment also arises for part-time, non-working and retired members. Some of the input-oriented CPD schemes described above allow for pro-rata compliance. Others see it as axiomatic that CPD activity is at the same threshold for everyone. This is a positive strategy discussed at some length in the BSB review and in the equality impact assessment of its proposed new scheme.   In medicine, similarly, the CPD Review Working Group determined that in respect of

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121 It was perceived that opportunities to undertake CPD course were concentrated in London.

part-timers and returners "patients and the public have a right to expect that all licensed doctors remain up to date in all areas of their work, regardless of the circumstances of their practice" (2011, p.17).

134   A positive aspect of an input-oriented hourage scheme is, of course, that it is easier to persuade or mandate employers to release individuals for a finite pre-determined amount of external or structured activity, a point endorsed by the SRA commissioned review.   In other cases, as demanded by the Royal College of Nursing and many other healthcare professions (2007, p. 4; a similar issue arising in teaching, see above): "Employers provide equal access to CPD, regardless of individual working patterns, to ensure that equality policies are implemented." In the legal services, sector, however, the CILEx scheme (2011, p. 12) states:

> The responsibility to undertake CPD lies with the individual member. A member's employer is not obliged to provide them with time off from work to complete the CPD, nor is the employer obliged to fund the cost incurred by the member for undertaking CPD. Members who find themselves in such circumstances may wish to consider low cost CPD activities.

135   There is, in some professions such as nursing and teaching, a political dimension in encouraging return to the profession or retention of the experienced and expert, both as practitioners and as mentors or teachers (see Lammintakanen and Kivinen, 2012; Drey, Gould & Allan, 2009), to supply a deficit. Although returners may of course be male or female, it is not surprising to find the issue current in professions with a strong female workforce.[122] In accountancy, it is notable that rather than being treated as a rationale (solely) for exemption from the CPD scheme, a break from or return to practice is seen as a distinct trigger for positive refreshing activity. There may not at present be a market deficit for lawyers, but given the gender profile and statistics relating to those, usually women, who leave mid-career, this issue may come to be of greater significance for the legal professions that it perhaps occupies at present.

Themes arising from debates

136   A number of issues appear in the discussion above and, in this section, are shown as a series of questions for discussion. Clearly the trend in professional CPD schemes as a sector is towards cyclical and more outputs focussed approaches, with a greater emphasis on professional standards and on learning in environments other than the classroom.

Structural issues

a)   What form of recording is appropriate? Should this be of input, cycle or output? Is the objective compliance, assessment of competence or professional commitment to learning?
b)   Should recording/certification be annual or over a longer period? Should carry over be permissible?
c)   Should those not working full time be entitled to pro-rata their CPD requirement? If the scheme extends to those registered but not practising (e.g. a BPTC tutor), should the system allow such a person to comply with his or her CPD requirement

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[122] The views of a largely (but not exclusively) female survey population appear in Gould *et al*, 2006.

by carrying out activities relevant to their actual work (in this example, in teaching)?

d) Should different levels (greater or lower) of CPD activity be expected of more senior practitioners?

e) Given that, "[t]he legal professions take a relatively strict view with regards [to] non-compliance with CPD obligations" (Institute of CPD, 2006, p.14), what sanctions for non-compliance should be imposed? Should they be rehabilitative or retributive? Should different sanctions be applied to more or less senior members? Who owns or has responsibility for CPD: the individual, the employer or the regulator?

> In some sectors, for example medical and legal, keeping skills and knowledge up-to-date is vital to the protection of the public the members serve, making compliance with CPD a fundamental issue linked with a professional's continued licence to operate …In these sectors CPD requirements, compliance mechanisms and the approach to monitoring are different from sectors where the driver behind engaging in CPD relates more to maintaining professional expertise in order to maintain reputation and reliability.
> (Institute of Continuing Professional Development, 2006, p.7)

> Finding sufficient resources to provide a service the members are demanding is likely to be less onerous than continuing to find resources to support a monitoring and compliance system that ultimately works against the best interests of the profession. It is this element of CPD strategy that is most urgently in need of review by the professions if they are to create a transparent, effective CPD system that is easy to monitor, has few compliance issues, encourages good practice and is generally viewed by the membership as adding value.
> (Institute of Continuing Professional Development, 2006, p.17)

f) What equality and diversity issues arise? How can they be managed? To what extent can a CPD system promote flexibility and mobility between the professions/work sectors?

Inputs v outputs

a) What activities should "count" for CPD purposes? Should experiential learning count?[123] Should the approach be inclusionary or exclusionary? Should aspirational or speculatively relevant activity be counted (see, e.g. the CIPFA approach) if it promotes mobility? Should peer, collaborative or small group study be encouraged?

b) To the extent that inputs are required (if at all), should they be hourage alone or weighted? As it will have been noted that the legal sector hourages are sometimes considerably lower than those of other professions, what should any minimum hourage be?

> Those professions where CPD is particularly critical retain some level of inputs monitoring to ease the burden of ensuring CPD requirements are being complied with. This reluctance to transfer completely away from inputs reflects in part the inherent difficulty attached to monitoring and ensuring compliance within a fully outputs based system.

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[123] An extension of experiential learning is to treat it as a legitimate form of action research. See Webb, 1995; Hardy & Rönnerman, 2011).

(Institute of Continuing Professional Development 2006, p.15).

c) To the extent that outputs are required, how should they be measured? Should they be linked to COBR and professional standards of competence? Is evidence of performance of a cycle helpful in its own right or as a half-way house between measuring only the input and the challenge of seeking to measure output? To what extent can individuals be persuaded of the merits of CPD for its own sake?

> Different professional bodies will place different emphases on the various purposes of CPD, and this will, … have consequences on which CPD output measurement system is appropriate. If the purpose of CPD is mainly personal and professional development, then it may be that a system skewed towards planning and reflection is all that is required. Resources should not be expended on outcome measurement if this is the case. If the purpose of CPD is mainly maintaining competence and ensuring, or reassuring, that competence is being maintained, then output measurements on outcomes, particularly practice outcomes, are paramount. Going far along the PDV measurement dimension for planning and reflection will be less important here.
>
> On the other hand it may be argued that encouraging professionals to reflect and plan their CPD is important even if the emphasis is strongly on outcomes. Similarly outcomes are important even if the emphasis is on individual professionals taking responsibility for their CPD. The CPD cycle is intended as an integrated process and outputs measured by planning, outcomes and reflection may be said to complement each other in the overall achievement of PDV.
> (Friedman & Woodhead, 2008, p.90)

d) To what extent do specialist accreditations and higher degrees fit into the CPD system. Should lawyers be encouraged to study for relevant higher degrees?[124] Should specific roles require specific CPD activity (an extension to, say, management or regulation of, for example, the common domestic requirement for higher court advocates to undertake an annual diet of advocacy-related CPD)?

Accreditation and mandatory content

a) Should there be any mandatory content? Should the profession's own COBR be part of any mandatory content? Should there be special provision for new practitioners? [125] Or older practitioners?

b) Should deliberately promoting good citizenship – pro bono, teaching, examining, committee work, sustaining the organisation's own publications – be included?

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[124] It is notable that in an Australian study of junior lawyers 'most of the respondents were either uninterested in further formal study or inclined to value a higher degree purely as a qualification to further their careers' (Nelson, 1993: 171). A different response might be obtained, one imagines, from those later in their careers.

[125] By way of examples not previously mentioned, the Law Society of Hong Kong has a mandatory Risk Management Education programme for all practitioners, including foreign lawyers practising in Hong Kong (Law Society of Hong Kong, 2003). In Canada, the Law Society of the Northwest Territories requires 2 hours annually to be focussed on Legal Ethics an Practice (Law Society of the Northwest Territories, n.d).; in Ontario, management minimum of 3mandatory accredited "professionalism hours" are required annually from a total overall requirement of 12 (Law Society of Upper Canada, 2012); and in Saskatchewan, 6 hours in each three year period must be devoted to professional responsibility, ethics, practice standards, the Code of Professional Conduct, conflict of interest, Rules of the Law Society; client care and relations; and practice management. (Law Society of Saskatchewan, 201, p. 2)

Should there be specific encouragement to induce individuals to supply deficits in legal services provision by accrediting pro bono activity?

c) Should approved employer schemes be accredited? Could these be extended to specialist or geographical groups?

d) Should regulators or professional bodies formally accredit any provision or providers? If so, what should be their minimum COBR standards (e.g. quality of tutors, existence of learning outcomes (to be distinguished from objectives) , pre-booking information, means of assessment, satisfaction feedback)?

Mutual recognition, CPD carried out elsewhere

a) Should CPD activity carried out in another country or jurisdiction, in learning EU law or under the auspices of another CPD scheme[126] count?

b) Should there be formal automatic mutual recognition of activity across the whole legal services sector?

c) Is there scope for a supra-disciplinary body bringing together or providing an umbrella for all legal services sector CPD schemes or accreditation of CPD activity?

d) Should there be a single basic CPD framework for the legal services sector as a whole?

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[126] The number of legal schemes which do not yet appear to have acknowledged the existence of the SRA, BSB and IPS will have been noted.

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Chapter six
Requirements made of approved providers of legal education and training

Introduction

1   This chapter of the literature review is intended to compare and contrast the requirements made of approved providers of pre-qualification legal education and training across three key jurisdictions. Comparative analysis of the manner in which these requirements are framed, and how they are assessed adds to an understanding of current trends in the regulation of legal education providers. This chapter also aims to explore the way in which other professions set requirements for their pre-qualification education and training providers and, building on the work already carried out by the Legal Services Board (Sullivan, 2011a and b), provides insight into the emergent patterns of expressed requirements, the focus of these requirements and the manner in which the requirements are assessed.

2   For completeness, and bearing in mind that a number of professions do not accredit providers of CPD activity, we also set out the requirements made of CPD providers insofar as this is relevant.

The Qualifying Law Degree and GDL/CPE (the 'academic stage' for solicitors and barristers)

3   Requirements made of providers of Legal Education and Training at the academic stage for solicitors and barristers are set by the Joint Academic Stage Board ("JASB"), which is the regulator responsible for the validation of Qualifying Law Degrees, the Graduate Diploma in Law and the Common Professional Examination (JASB, 2012).

4   Under the Courts and Legal Services Act 1990 (as amended), the Law Society and the Bar Council were responsible for setting qualification regulations in respect of those seeking to qualify as solicitors or barristers (JASB Handbook, 2011, p. 6). In 2006 these regulatory functions were taken over by the Bar Standards Board and the Solicitors Regulation Authority, who drew up a formal agreement between them to define the status of the JASB.

5   The document detailing the conditions that must be met in relation to the provision of the undergraduate degree courses that are regarded as satisfying the academic stage of training, is the Joint Statement, which was first issued in 1999 by the Law Society and the General Council of the Bar. It includes a supplement covering the CPE/GDL and Senior Status degrees. Guidance notes on its interpretation supplement the Joint Statement. However, in the case of any contradiction or confusion the

provisions of the Joint Statement prevail (JASB Handbook, 2011, p. 6). In September 2011 the JASB compiled a handbook which contains all of the rules and guidance that have evolved since the issuing of the Joint Statement, with the stated aim of providing a 'common reference point' (JASB Handbook 2011, p. 6) and to improve clarity and transparency regarding the existing rules.

6   Additionally, higher educational institutions must comply with the infrastructure and content requirements of the Quality Assurance Agency (QAA, 2007). Additional requirements may be made for institutions in Wales (as, for example, facilitating study in the Welsh language).

7   The provisions contained within the Joint Statement relate to a number of areas that are summarised below at Figure 1..

Figure 1: Requirements of approved providers for the academic stage

Statutory	Content			Duration of course	Achievement standards	Resources
	Academic	Knowledge	Skills			
The provider must have been granted degree awarding powers by the Privy Council, which are conferred either by Royal Charter (for Universities inaugurated prior to 1992) or the Further and Higher Education Act 1992 (for Universities founded after 1992)	Course must include the study of legal subjects referred to in the professional bodies qualifying regulations as the Foundations of Legal Knowledge[127] ("Foundation Subjects') Legal subjects: "the study of law broadly interpreted" (JASB Handbook, 2011: Appendix B, 2) CPE/GDL providers are expected to provide an equivalent to the Foundation Subjects within 1 year. There are strict restrictions on course of study, mode of study, and assessment procedures.	An understanding of the fundamental doctrines and principles which underpin the law of England and Wales A basic knowledge of the sources of that law, and how it is made and developed and of the institutions within which that law is administered and the personnel who practice law. The ability to demonstrate knowledge and understanding of a wide range of legal concepts, values, principles and rules of English law and to explain the relationship between	To apply knowledge to complex situations To recognise potential alternative conclusions for particular situations, and provide supporting reasons for them; To select key relevant issues for research and to formulate them with clarity; To use standard paper and electronic resources to provide up to date information. To make a personal and reasoned judgement based on an informed	Legal subjects must be studied for the equivalent of not less than two years out of a three or four year course of study, i.e. a student must not gain less than 240 credits in the study of legal subjects in a 360 or 480 credit degree programme. Within those two years, a minimum of one year and a half should be spent studying the Foundation Subjects (180 credits) with the remaining 60 credits gained from studying "Legal Subjects" For senior status degrees (undergraduate and	Standards of achievement must be set at or above the minimum level of performance as set out in the QAA Benchmark Standards for Law Degrees in England, Wales and Northern Ireland.[128] Transcripts should record all pass marks and also attempts at assessment. Disciplinary matters should be recorded similarly.	Sufficient appropriately qualified members of teaching staff to deliver the programme. Adequate library and information technology provision Sufficient physical accommodation to enable students to achieve the outcomes of recognised law programmes. Able to meet the standards set out in the

[127] i) Public Law, including Constitutional Law, Administrative Law and Human Rights, ii) Law of the European Union, iii) Criminal Law, iv) Obligations including Contract, Tort and Restitution, v) Property Law, vi) Equity and the Law of Trusts. In addition students are expected to receive training in legal research.
[128] Students wishing to read for the Bar must achieve at least a lower second-class honours degree.

		them in a number of particular areas. The intellectual and practical skills needed to research and analyse the law from primary resources on specific matters and to apply the findings of such work to the solution of legal problems and the ability to communicate these, both orally and in writing appropriately to the needs of a variety of audiences.	understanding of standard arguments in the area of law in question; To use the English language and legal terminology with care and accuracy; To conduct efficient searchers of websites to locate relevant information; to exchange documents by email and manage information exchanges by email; To produce word-processed text and present it in an appropriate form.	graduate degrees taken by individuals who already have a degree in another subject) the number of credits falls to 220 credits from legal subjects and the satisfaction of knowledge requirements. Minimum duration for the CPE/GDL course is 36 weeks if studied full time and 72 weeks if studied part time.		QAA code of practice with respect to Student Support in such areas as course information, careers advice, academic support, quality assurance and student complaints procedure.

The 'vocational stage' for solicitors and barristers

Solicitors: Legal Practice Course

8   The SRA is the body that regulates the providers of education and training for solicitors in England and Wales. Requirements for the Legal Practice Course (and the LPC element of any exempting degree which incorporates it) are set out in *Information for Providers of Legal Practice Courses* (SRA, 2012b).

Barristers: Bar Professional Training Course

9   The Bar Standards Board prescribes requirements for providers of both the BPTC and pupillage. The *BPTC Course Specification and Requirements* provides a detailed specification of the curriculum content, delivery and assessment framework, including the relative weightings of various elements. This document contextualises requirements made of providers in terms of the aims, objectives and ethos of the Bar Professional Training Course (2011a, p.10) but is more prescriptive than the SRA equivalent.

10   The summary table below at Figure 2 compares the requirements made for the vocational stage for solicitors and barristers in England and Wales.

Figure 2: Requirements of approved providers for LPC and BPTC

Course	Content		Duration of course	Achievement standards	Resources
	Knowledge	**Skills**			
LPC	Stage 1: Core practice areas of: Business Law and Practice, Property Law and Practice and Litigation plus Professional Conduct and Regulation, Taxation and Wills & Administration of Estates Stage 2: three vocational electives	Stage 1: Practical Legal Research; Writing; Drafting; Interviewing and Advising; Advocacy	All assessments must be passed in a 5-year period. Stages 1 and 2 may be separated. Stage 1 represents 1100 notional learning hours and stage 2, 300. 60% of stage 1 must be spent on the core practice areas. There is a minimum face-to-face requirement.	As set out in the LPC Outcomes with some prescription as to modes and duration of assessments. Pass mark of 50% . Whilst students are expected to be able to reflect on their learning and identify their learning needs, this is not explicitly assessed.	A number of requirements on authorisation of a provider : its structure core business and governance, equality and diversity approaches, academic good practice. There are separate requirements for validation of individual courses by an authorised provider. Students may be co-taught with other programmes provided there is clarity for non-LPC students.
BPTC	Professional ethics and conduct Knowledge areas of civil litigation, evidence and remedies; criminal litigation, evidence and sentencing, Resolution of disputes out of court and professional ethics. Optional subjects.	Advocacy; Opinion Writing, Drafting, Conferencing;	120 credits over a minimum of one academic year. Detailed requirements for each element.	A series of standards, level descriptors and competences. Pass mark of 60%. Minimum assessment requirements and percentages of total course prescribed for each element.	A number of principles of accreditation including e.g. involvement of practitioners, staffing, pro-bono opportunities, library holdings, equality and diversity and academic good practice. Students must not be co-taught with those on other programmes. Tutors are required to pass an advocacy assessment.

Periods of 'supervised practice' for solicitors and barristers

Solicitors: training contract

11   The Training Provider Regulations2011 (2012a) that replaced The Solicitors Training Regulations 2009 (see also SRA, 2008) are organised according to outcomes. For the purposes of the regulation of training providers, the SRA consider that providers should educate to 'the required level and quality of training, and deliver that training effectively'.

12   Beneath this outcome heading, the SRA sets out a number of regulations that providers must abide by if they wish to train solicitors. The regulations detail the steps that prospective providers must take if they wish to be authorised to provide training. These consist of procedural-based standards (for example, details that must be provided by firms wanting to be authorised as training providers) together with substantive standards (for example, evincing a commitment to operating in accordance with chapter 2 of the SRA Code of Conduct) that must be met. They also specify the qualities required of any trainer in charge of trainees.

Barristers: pupillage

13   Requirements for pupillage are set out in the BSB *Pupillage Handbook* (2012) and under the Bar Training Regulations 2011 (BSB, 2011b). Pupillage must be undertaken both in an Approved Training Organisation and under the supervision of a registered pupil supervisor. Detailed criteria are provided for both and there is specific training for pupil-supervisors.

14   Additionally the Inns of Court and regional circuits have a role in supporting pupils by, for example, providing compulsory in-pupillage courses, by providing other resources and activities and by monitoring the overall standard of pupillage. Formal assessment at various stages throughout pupillage is encouraged.

15   The summary table below at Figure 3 compares the requirements made for the periods of supervised practice for solicitors and barristers in England and Wales.

Figure 3: Comparative requirements set for providers of training contracts and pupillage for solicitors and barristers in England and Wales

	Duration of Training specified?	Curriculum specified?	Mode of delivery of training specified?	Standards set in relation to supervisors of trainees/pupils?	Discretion to amend training period?	Required to submit to inspection?	Minimum standards for salary of trainee/pupil?
Solicitors	Yes, 2 years of training contract	Yes, Trainees must be provided with opportunities for: i.) Practical experience in at least three distinct areas of English law[129] ii.) Development of skills in both contentious and non-contentious work iii.) Development of skills needed in practice (Practice Skills Standards[130] iv.) Guiding and tutoring in professional conduct, ethics and client care v.) Gradual increase in level and complexity of work. vi.) Proper supervision	No, firms able to exercise discretion providing curriculum requirements met and training contract record kept by trainee. Possible supervisor to trainee ratio of 1:2. Compulsory Professional Skills Course must be completed by the end of the training contract.	Yes, supervisors;[131] i.) Must be qualified solicitors (with a practising certificate for the last five years) , experienced legal executives or barristers ii.) Must ensure that the amount and type of work given to the trainee over the period adequately covers each skill within the Practice Skills Set. iii.) Must ensure that the work given is of an appropriate level and complexity for the trainee iv.) Must regularly review and appraise the performance of the trainee and include feedback on his or her performance against the Practice Skills Standards.	Yes, in recognition of trainee's previous experience (limited APL available from LPC)	Yes, if SRA are not satisfied that appropriate standards are being met during training contract	Yes (statutory minimum wage)

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[129] Compare, however, the republic of Ireland, where the training contract must encompass: conveyancing, landlord and tenant and litigation and two of wills, probate and administration/commercial, corporate, insolvency/other specialisations including criminal or family law

[130]Although note the passivity of what is stated.

[131] Requirements are also set for "training principals" with a higher-level responsibility than supervisors.

	Duration of Training specified?	Curriculum specified?	Mode of delivery of training specified?	Standards set in relation to supervisors of trainees/pupils?	Discretion to amend training period?	Required to submit to inspection?	Minimum standards for salary of trainee/pupil?
Barristers	Yes; 12 months of pupillage	Yes, Pupils must achieve a stated minimum level of competence, with specific reference to advocacy. Core: • Conduct and etiquette • Advocacy • Conferences and Negotiations • Drafting, paperwork and Legal Research Specialist work is likely to form a fifth element.	Yes, some compulsory in-pupillage courses and a pupil to supervisor ratio of 1:1. Checklists tracking experience and progress must be submitted.	Pupillage supervisors must be registered with the Bar Standards Board, hold a current practising certificate, have practised for six out of the last eight years, and have regularly practised as a barrister over the past two years and been entitled to exercise a right of audience before every court in England and Wales in relation to all proceedings. There is training for supervisors through the Inns of Court and circuits.	Yes, in recognition of previous experience	Yes BSB monitors pupillage and makes sample and triggered visits to ATOs.	Yes

CILEx

16   The Lawyer, Paralegal and Legal Secretary qualifications of the Chartered
      Institute of Legal Executives are offered in approximately 72 colleges across
      England and Wales. Distance learning options are also available through the
      ILEX Tutorial College, Cardiff College Online and Worcester College of
      Technology, making CILEx qualifications (CILEX, n.d. a,b) some of the most
      flexible and accessible on offer. They have also been embedded in a number
      of degrees and there are fast-track entry routes for LLB and LPC graduates.
      Because the period of supervised practice and the period of study operate in
      parallel more than is the case for solicitors and barristers, we deal with both
      aspects together.

17   CILEx is the body responsible for accrediting those centres that offer its
      qualifications. CILEx has revised its centre accreditation process in order to
      comply with Ofqual's General Conditions of Recognition, which were
      launched in May 2011 (Ofqual, 2012). Under the new conditions all
      accredited centres will be required to sign and comply with terms that
      represent a written enforceable agreement. These conditions build on the
      previous CILEx quality assurance standards for centres to more clearly define
      the requirements that an accredited centre must meet. They include explicit
      reference to examinations, Professional Skills, malpractice, centre withdrawal
      and the CILEx sanctions policy. One of the key changes introduced by the new
      terms and conditions for centre accreditation is an increase in accreditation
      period for centres from three to five years. The conditions which must be
      satisfied by centres wishing to deliver CILEx qualifications (CILEx, 2012b) are
      set out at Figure 4 below.

Figure 4: Requirements made of accredited centres

Condition in relation to	Guidance
(1) CILEx policies and procedures	Ensure centre staff are familiar with and adhere to a number of CILEx policy documents and guidance
(2) CILEx programmes of learning	Ensure CILEx programmes follow the syllabus as detailed in the relevant CILEx Unit Specification, are adequately resourced and adhere to the following: • Structured into delivery sessions that cover relevant topics and subject matter, incorporate time for lost lectures and revision and the assessment of students' progress. • Comply with assessment requirements in accordance with the CILEx qualification(s) requirements. • Are reviewed at least annually.
(3) Learner registration	Ensure adequate assessments of students' existing skills, knowledge and understanding is made prior to registration on CILEx programmes. Work towards the full implementation of all the requirements associated with qualifications accredited to the Qualifications and Credit Framework (QCF). This includes arrangements for the acquisition of Unique Learner Numbers (ULNs) for students, and the development of systems and processes necessary to ensure that students' QCF achievements and their associated credit are both tracked and maximized.

(4) Learner information and support	Provide students with accurate and up to date information and guidance, including a Learner Handbook or similar information pack, at the start of a CILEx programme
	Ensure students are familiar with a number of CILEx policy and guidance documents
	Gain feedback from students regarding the centre's CILEx programmes through satisfaction questionnaires and student representative groups.
(5) Centre staff	Retain a workforce of appropriate size and competence to undertake the management and delivery of the qualification.
	Ensure CILEx tutors hold a recognized qualification in law, such as CILEx Fellow/Graduate, or a law degree and have obtained or are working towards an accredited teaching qualification.
	Provide CILEx tutors with appropriate inductions and continuing professional development, including attending CILEx training events, to ensure that they can maintain their expertise and competence to deliver the CILEx qualifications.
(6) Centre resources	Have adequate systems and resources in place, including staff, sufficient managerial resources, finances, equipment, materials and software, to support the delivery of the CILEx qualifications.
	Ensure all equipment and accommodation used for the purpose of qualification delivery and assessment complies with the requirements of Health and Safety regulations and current Equalities Law and any successor legislation. Required resource facilities include:
	• Lecture room(s)
	• Private study room(s)
	• Learning resources and IT facilities are relevant and current
	• Refreshment facilities
	• Examinations venue (with appropriate provision for invigilation and security)
	• Facilities to protect the security and confidentiality of assessment materials and records, including examination question papers, examination scripts and Professional Skills assessments before, during and after the assessment has taken place.
(7) Sub-contractors/satellite sites	Have an appropriate and effective system for the management of all sub-contracted services and that all policies and requirements referred to within the CILEx Accredited Centre Handbook will apply to all satellites affiliated to the centre, for example, remote assessment sites or delivery points.
	Have appropriate arrangements and agreements in place with any third parties or suppliers who provide goods or services to the centre that contributes to the delivery and/or assessment of the qualification.
(8) Retention of records	Keep complete and accurate records for at least three years from the end of the year to which they relate, for all CILEx qualifications and make these available to CILEx upon request. These include (but are not limited to):
	• Learner attendance
	• Learner performance
	• Learner assessments and related feedback
	• Learner feedback
	Have appropriate measures to ensure students' personal data is held in accordance with current Data Protection legislation.
(9) Examinations	Encourage students to register for their examinations in line with CILEx procedures and the Key Deadlines and Dates as published by CILEx.
	Provide suitable facilities for CILEx students to sit all examinations for all units

	taught at the centre. This includes suitable accommodation, desks and chairs.
	Ensure that the delivery of CILEx examinations conforms to the following documents: • *CILEx Examination Regulations* • *CILEx Instructions to Examination Centres and Invigilators*.
	Maintain the security and integrity of CILEx examinations.
	Make arrangements to put in place (as far as is reasonably practicable) CILEx approved reasonable adjustments for students as detailed in *Guidance for Candidates: Reasonable Adjustment and Special Consideration*.
	Confirm examination venue details on an annual basis and inform CILEx immediately of any changes to examination venues.
(10) Professional Skills Units	Encourage students to register to have their Professional Skills assessments submitted in line with CILEx procedures and the *Key Deadlines and Dates* as published by CILEx.
	Tutors adhere to the requirements relating to the delivery, registration and submission of the Professional Skills units as detailed in: • Qualifications Handbooks • Professional Skills Units: Tutor Guidance and Candidate Materials • Professional Skills Unit Specifications • Professional Skills Regulations
	Ensure internal quality assurance (internal verification) procedures are in place which quality assure and standardize assessment decisions across the centre before work is dispatched to CILEx for external moderation.
	Conduct the assessments for the Professional Skills Units in accordance with the CILEx *Professional Skills Regulations*.
	Report any incidence of potential Professional Skills malpractice by students and/or centre staff immediately to CILEx.
	Maintain the security and integrity of the Professional Skills Units and materials in accordance with the *Professional Skills Units: Tutor Guidance and Candidate Materials*.
	Make arrangements to put in place (as far as is reasonably practicable) CILEx approved reasonable adjustments for Learners as detailed in *Guidance for Candidates: Reasonable Adjustment and Special Consideration.*
(11) Equality and diversity	Undertake the delivery of the qualification in accordance with current Equalities Law and CILEx's reasonable adjustment policy.
	Ensure that there are no unnecessary barriers in the access to learning and that the special needs of individual students are met in relation to learning and assessment
(12) Malpractice and maladministration	Have in place robust procedures for preventing and investigating incidents of malpractice or maladministration.
	Take all reasonable steps to prevent incidents of malpractice or maladministration occurring including implementing actions or measures directed by CILEx after completion of a malpractice or maladministration investigation.
	Promptly notify CILEx of any incidents of malpractice or maladministration in line with the requirements of CILEx's policy and procedures.
	Provide access to documents, records, data, staff, third parties, students, satellite centres or any other resources required by CILEx during an

	investigation of malpractice or maladministration.
(13) Regulatory and legal obligations	Take all reasonable steps to ensure that CILEx is able to comply with the General Conditions of Recognition.
	Comply with all relevant law, regulatory criteria and codes of practice as updated and amended from time to time, including the General Conditions of Recognition.
	Provide CILEx and the regulatory authorities, on reasonable notice, with access to premises, people, information, documentation and records as required, and to fully cooperate with CILEx's monitoring activities, including but not limited to providing access to any premises used (including satellite sites).
(14) CILEx monitoring activities	Assist CILEx in carrying out any reasonable monitoring activities as part of the centre's on-going CILEx Accredited Centre status and comply with CILEx's risk monitoring procedures as detailed in the *CILEx Accredited Centre Handbook* and sanctions as set out in the *CILEx Centre Withdrawal Policy*.
	Contact CILEx immediately in the event of any risks identified relating to the delivery of the centre's CILEx programmes of learning.
(15) Withdrawal of approval and interests of learners	Cooperate fully with CILEx in cases where either the centre or CILEx decides it needs to withdraw the centre from its role in delivering the qualification irrespective of whether the withdrawal is voluntary or not.
	Take all reasonable steps to protect the interests of students in any withdrawal of the centre (whether voluntary or not) from its role in delivering a CILEx qualification in line with the CILEx Centre Withdrawal Policy.
(16) CILEx centre accreditation fees	Make payment of all valid invoices presented by CILEx within the stated terms and conditions

18   In order to achieve chartered status, students must complete, as 'supervised practice', 5 years qualifying employment (CILEx, n.d.,c), to be reduced from 2013 to 3 years IPS, n.d.a). This must be work of a legal, as distinct from an administrative nature. Three of the five years at present and two of the three years in future may be concurrent with study. Employment has recently been redefined as employment by:
- an authorised person in private practice;
- an organisation where the employment is subject to supervision by an authorised person employed in duties of a legal nature by that firm, corporation, undertaking, department or office

provided that involvement in work that is 'wholly of a legal nature' is undertaken for at least 20 hours each week.

From 2013, following consultation and a pilot (IPS, 2011), the period of qualifying employment will be assessed by reference to a series of work-based learning competencies, evidenced by portfolio (IPS, n.d.b)

Other legal professions, allied and related professions

19   It is a feature of the smaller professions that, by definition, their size may mean that they deliver their own qualifications, or have them delivered by a single institution. In the latter case, accreditation of the institution may have been a question of individual negotiation, rather than against

publicly available criteria.   We set out in Figure 5 such criteria as appear to be available, for both formal courses and qualification and for periods of supervised practice, in tabular format.

Figure 5: Requirements made of accredited centres and for periods of supervised practice

	Courses and qualifications	Periods of supervised practice required as a precursor to qualification[132]
Legal services apprenticeships (Skills for Justice, n.d.; CILEx and others, 2012)	Formal education and activity and supervised practice are blended in accordance with the relevant apprenticeship framework.	
Licensed conveyancers (CLC, n.d.)	Centralised assessments. CLC literature suggests that Bradford College, the Manchester College and the Manchester College of Higher Education and Media Technology are currently accredited to provide at least some of the CLC courses.	"As well as completing the CLC examinations, students are also required to complete at least 1200 chargeable hours based on 25 supervised hours a week for 48 weeks, e.g.. one year, current practical training before obtaining their first licence. Students in qualifying employment are required, in order to comply with the CLC Student Training Framework, to send practical training certificates to the CLC every year from their date of registration and continue to do so until the completion of all the CLC assignments and examinations. "Practical Training" means full or part-time employment assisting in the provision of conveyancing services, supervised by "qualified person" i.e., a licensed conveyancer, a solicitor or a FILEX who in either case is entitled to offer Conveyancing services directly to the public. For each period of training the trainee will be required to submit a statement to the Council, signed by the supervisor giving an account of the training received. If the supervisor is not "qualified" as above, the statement must be countersigned by a "qualified" person. Only after all the examinations have been successfully completed or been exempted and practical training certificates have been submitted to the CLC can a first licence is applied for."(CLC, n.d.) A practical training checklist sets out a number of tasks to be performed during the period.
Costs lawyers (CLSB, 2013)	3-year modular programme delivered by (at present) ACL Training Ltd authorised by the CLSB. Other providers may be authorised. Modules cover General & civil costs; Solicitors and client costs, specialist courts and tribunals; Public	"In addition to successfully passing the modular course and final examination 3 years relevant work experience in costs law and practice are required before a Trainee Costs Lawyer can apply to become a Costs Lawyer. The 3 years can be acquired before, during or after the period of study and need not be continuous.

[132] Clearly many of the programmes assume that the individual is working in the relevant area, even if this is not a formal contributor to the qualification itself.

	funding/legal aid. Following completion of the modules (65% pass mark) there is a final examination.	ACL/CLSB may audit alleged relevant experience to ensure it was achieved and was indeed relevant."

	Courses and qualifications	Periods of supervised practice required as a precursor to qualification[133]
Notaries (Master of the Faculties, 1998)	**"8. Practical Qualifications** 8.1 Any person wishing to be admitted as a general notary under rule 5 shall have followed and attained a satisfactory standard in a course or courses of studies covering all of the subjects listed in schedule 2. 8.2 Whether a particular course of studies satisfies the requirements of these rules and whether a person has obtained a satisfactory standard in that course shall be determined by the Master after seeking the advice of the Board. 8.3 The Master after seeking the advice of the Board may by order direct that the award of a particular qualification meets the requirements of these rules as to some or all of the subjects listed in schedule 2. 8.4 The Master may as a condition of making a direction under rule 8.3 require the body by which the qualification is awarded to issue those pursuing a course of studies leading to that qualification with such information about the notarial profession, these rules and other rules made by the Master and the Company as the Master may specify. 8.5 The Master may by Order add any subjects to the list in schedule 2 or remove any subjects from that list or alter any of the provisions of that schedule but before doing so he shall consult the Board." The UCL Notarial Practice course is, currently, accredited for this purpose.	There is a post-qualification period of supervised practice normally of two years under the supervision of a notary with at least 5 years experience. Notaries carrying out probate or conveyancing may have supervision from solicitors or licensed conveyancers with experience in the fields. Supervision involves visits and inspection of work and mandatory course attendance. The supervision then indicates whether the notary is fit to practise (Master of the Faculties, 2009) Scrivener notaries are required to undertake 2 years training with a scrivener notary involving inspection of work and the possibility of final assessment by viva (Society of Scriveners of the City of London, 1998).

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[133] Clearly many of the programmes assume that the individual is working in the relevant area, even if this is not a formal contributor to the qualification itself.

	Courses and qualifications	Periods of supervised practice required as a precursor to qualification[134]

Patent Attorneys	The European Qualifying Examination is "organised and conducted by a Supervisory Board, an Examination Board, Examination Committees and an Examination Secretariat" (EPO, n.d.) of the European Patent Office. There is no required preliminary training but courses are offered by CEIPI and EPI and reference is made to HEI and other pre-existing courses in European patent law. The assessment itself is closely prescribed by an EPO regulation (EPO, 2011).	"Candidates must have trained under the supervision of a professional representative or as an employee dealing with patent matters in an industrial company established in one of the contracting states[for at least 3 years].
		
		   The mandatory practical training is very important, since a great deal of the knowledge required by a European patent attorney is gained during this period. During this period the candidates must take part in a wide range of activities pertaining to patent applications or patents.
		
		   Only periods of professional activity completed after the required qualifications were obtained are taken into account. The training period must be completed at the date of the examination." (EPO, n.d.)

	Domestic qualifications at foundation and final level are organised and assessed by the Joint Examination Board of CIPA and ITMA. The universities of Bournemouth, Brunel, Queen Mary and Manchester are accredited examination agencies for foundation level activity in the relevant regulations. (IPReg, 2009, 2011)	" …not less than two years' full-time practice in the field of intellectual property, including substantial experience of patent attorney work, under the supervision of: • a registered patent attorney, or • a barrister, solicitor or advocate who is engaged in or has substantial experience of patent attorney work in the United Kingdom, or else has satisfactorily completed not less than four years' full-time practice in the field of intellectual property, including substantial experience of patent attorney work in the United Kingdom" (IPReg, 2009). Evidence of this experience (eg in a training diary) may be required on application for registration.
Patent administrators (CIPA, 2012)	CIPA Certificate in Patent Administration delivered and administered by professional body	N/A

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	Courses and qualifications	Periods of supervised practice required as a precursor to qualification[135]
Registered trade mark attorneys (new model) (IPReg, 2009, 2011)	The universities of Bournemouth, Brunel, Queen Mary, and Manchester are accredited examination agencies for foundation level activity in the relevant regulations. Nottingham Trent University is an examination agency at both foundation and final level. In practice, the diet of courses is through the Queen Mary Certificate in Trade Mark Law and Practice followed by the NTU Professional Certificate in Trade Mark Law and Practice.	" ...not less than two years' full-time practice in the field of intellectual property, including substantial experience of trade mark attorney work, under the supervision of: • a registered trade mark attorney, or • a barrister, solicitor or advocate who is engaged in or has substantial experience of trade mark attorney work in the United Kingdom, or else has satisfactorily completed not less than four years' full-time practice in the field of intellectual property, including substantial experience of trade mark attorney work in the United Kingdom" (IPReg, 2009). Evidence of this experience (e.g. in a training diary) may be required on application for registration.
Trade mark administrators (ITMA, 2012)	ITMA Trade Mark Administrators Course delivered and administered by professional body	N/A
Immigration advisors (OISC, n.d.)	Assessments are administered by OISC.	OISC audits of immigration advisor practice subsequently include an assessment of competence.
Legal finance and management (ILFM, n.d.)	Diploma and associate courses delivered and administered by professional body	N/A
Legal se (ILSPA, n.d.)	CILEx level 2 and level 3 courses delivered in conjunction with City and Guilds and QCA accredited. ILSPA Legal Secretaries Diploma delivered and administered by professional body.	N/A
Institute of Professional Willwriters (IPW, n.d.)	Delivered and administered by professional body	The qualified practitioner route is based on assessment of four examples of practice occurring during the minimum 5 years previous practice period.
Society of Trust and Estate Practitioners (STEP, n.d.)	Delivered and administered by professional body	The qualified practitioner route requires relevant experience as a condition of entry and then spaces three papers over a 4-year practice period accompanied by a reflective log. Graduates of a STEP diploma may become full members after completion of 2 years experience "at a specialist level" in the relevant field. Evidence by CV is required on application.

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	Courses and qualifications	Periods of supervised practice required as a precursor to qualification[136]
Society of Will Writers and Estate Planning Practitioners (SWW, n.d.)	Delivered and administered by professional body through the College of Will-writing.	N/A
Institute of Paralegals (IoP, n.d.,a, b)	"The questions we ask are (a) will it help paralegals? and (b) will we be happy to have our name associated with it? We will want to know basic information like what level it will be pitched at (introductory, certificate, undergraduate, etc.); duration, content, how assessed (if it is), who will be teaching it, how it will be delivered etc." Six available levels of accreditation: • CPD recognition on a course by course basis • Non CPD recognition • Accreditation (where the IoP makes an award on successful completion) • Approved course status linked to fast track progression into certified paralegal status. • Mandatory course status conferring qualified paralegal status • Assistance with obtaining accreditation by a national awarding body.	Higher membership grades are contingent on legal practice experience. This is defined in terms of activity rather than through regulatory requirements imposed on the employer: "By "legal work" we mean advising or assisting with the law. This can be done as part of paid employment (e.g. trades mark manager or debt recovery officer for a company), full-time or part-time, or as a significant element of a non-legal job (e.g. HR consultant), or on a voluntary basis (e.g. Citizens Advice Bureau volunteer)." (IoP, n.d., b)
National Association of Licensed Paralegals (NALP, 2011)	Recognition of centres is through a number of criteria including: • Single point of contact for NALP • Staff roles for invigilators and examination officers • Resources and systems to support assessment • Recognition of APL • Fair and equal access to assessment • A number of maters of infrastructure relating to student records and ability to track progress. There is then a process of monitoring that includes visits. NALP Centres are currently NALP Training together with Anglia Ruskin University, Stratford College, the London College UCK, University of East London, University of Sunderland, University of West London, Leeds City College and Newcastle College.	N/A

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[136] Clearly many of the programmes assume that the individual is working in the relevant area, even if this is not a formal contributor to the qualification itself.

Other jurisdictions

Scotland

19   In 2010 the Law Society of Scotland published its accreditation guidelines for the Foundation Programme, which is the Scottish equivalent of the English Qualifying Law Degree (LSS, 2010). It is structured around a set of compulsory outcomes dealing with knowledge, skills, values and attitudes and is designed to link with the Professional Education and Training stage, which is divided into two parts, referred to as PEAT 1 (a programme of professional study and performance (LSS, 2009)) and PEAT 2 a 24 month period of in-office training carried out under the supervision of a Scottish Solicitor (LSS, 2010, p.6; LSS, n.d.). Successful completion of PEAT 1 is required before individuals can progress to the PEAT 2 stage.

20   The new programmes, introduced in 2011, place obligations on providers in relation to course content, staff qualifications, staffing levels and load, resources and mode of delivery (see Figure 6 below). Unlike the English system, the Scottish system goes beyond prescription of content to offer detailed guidance on modes of study. There are also objectives in place regarding the integration of technology-enhanced learning into broader learning practices, as well as provisions regarding diversity.

Australia

21   There exists a considerable literature on the standards required of legal education and training providers in Australia, not least because of the division of the country into different jurisdictions (see, e.g. LCA, n.d.a, b, c) and an on-going project on reform of the legal professions (Attorney-General, 2011). The Australian Government is currently developing a new Higher Education Quality and Regulatory Framework that includes the establishment of the Tertiary Education Quality and Standards Agency (TEQSA). TEQSA, as regulator, is tasked with monitoring the quality of tertiary education against agreed standards currently under review by the Higher Education Standards Panel. The Learning and Teaching Academic Standards Law Project published a statement in 2010 (Kift et al, 2011) that begins to address some of the issues relating to the standards required of providers of legal education and training, and some aspects of the literature that are relevant to legal education are dealt with in chapter 8 of this review.

United States of America

22   The American Bar Association sets the standards for approval of Law Schools in the USA. These are set out in the document *2012-2013 ABA Standards and Rules of Procedure for Approval of Law School*s (ABA, 2012;

see also ABA, n.d.). There are fifty-seven standards divided into eight thematic chapters. In contrast to the Scottish system, which is outcome-oriented, the ABA sets out rule-based standards and offers alternative interpretations of these, interpretations that are, in themselves quite narrowly prescriptive. Figure 7 below is intended to illustrate the nature and extent of requirements made of providers of legal education in the USA.

Figure 6: Requirements for Scottish Providers of legal education

	Curriculum	Resources	Trainers	Research Activity	Diversity
Foundation Programme (LSS, 2010)	Core and Mandatory outcomes for learning.	Providers assessed on the quality of learning materials they provide, including ICT and library materials.\n\nStudents should also be given access to careers advice.	Standards set with regard to level of qualification of teaching staff. Maximum ratio of 30:1 staff to student; but dependent on mode of study.\n\nEvidence of staff development programmes including in pedagogical techniques and student support.	Providers offering the degree should be research active, and able to demonstrate this.	Teaching accommodation should be made accessible.\n\nInstitutions should be able to provide information on their policies to improve diversity within the student body; and evidence that demonstrates pervasive tuition of issues relating to diversity across the curriculum.
PEAT 1 (LSS, 2009)	Core and Mandatory outcomes for learning are set; courses must provide a balance between these and elective subjects.	Must follow guidelines for good practice in relation to e learning, open learning and distance learning.\n\nAssessed on quality of accommodation, library and ICT facilities.	Tuition must take place primarily in small group tutorials, practical and simulated learning.	-	-
PEAT 2 (LSS, n.d.)	Core and Mandatory outcomes are set. Specialist "Training CPD" learning must take place in addition to office commitments with a view to such learning assisting the achievement of PEAT2 outcomes.	Requirements to offer additional training that allows trainees the opportunity to gain practical experience and apply the law in real life situations.	The trainer must be a solicitor and be willing to provide informal feedback and supervision in addition to supervision of the trainee's Quarterly Performance Reviews.	-	-

Figure 7: ABA standards (2012-2013) for approval of law schools, requirements by thematic area

Organisation and Administration	Program of Legal Education	The Faculty	Admissions and Student Services	Library and Information Resources	Facilities
Resources for program	Objectives	Qualifications	Admissions policy	General Provision	General Requirements
Self Study	Curriculum	Size of Full-Time Faculty	Educational Requirements	Administration	Law Library
Strategic Planning and Assessment	Academic Standards and Achievement	Instructional Role of Faculty	Admission Test	Director of the Law Library	Research and Study Space
Governing Board of an Independent Law School	Course of Study and Academic Calendar	Responsibilities of Full Time Faculty	Character and Fitness	Personnel	Technological Capacities
Governing Board and Law School Authority	Study Outside the Classroom	Professional Environment	Previously Disqualified Applicant	Services	
Dean	Distance Education		Applicants from Law Schools not Approved by the ABA	Collection	
Allocation of Authority between Dean and Faculty	Participation in Studies or Activities in a Foreign Country		Applicants from Foreign Law Schools		
Involvement of Alumni, Students and Others	Degree Programs in Addition to JD		Enrolment of Non-Degree Candidates		
Non-University Affiliated Law Schools			Consumer Information		
Law School-University Relationship			Student Loan Programs		
Non-discrimination and Equality of Opportunity			Student Support Services		
Equal Opportunity and Diversity			Student complaints implicating compliance with the Standards		
Reasonable Accommodation for Qualified Individuals with Disabilities					

Other Professions

Medicine

23 The General Medical Council is in charge of setting requirements for undergraduate medical education in the UK. It is in charge of deciding which bodies or combinations of bodies are entitled to award primary medical qualifications. *Tomorrow's Doctors* (2009) maps the outcomes and standards for undergraduate medical education, and is supplemented by the *GMC Medical Education Strategy, 2011-2013* (GMC, 2011; see also GMC, n.d.).

24 The approach taken is one of outcome assessment, with graduates being expected to meet outcomes as a scholar and scientist, as a practitioner and as a professional. The GMC sets standards for the delivery of teaching, learning and assessment across nine domains:
    i)   Patient Safety
    ii)   Quality assurance, review and evaluation
    iii)   Equality, diversity and opportunity
    iv)   Student selection
    v)   Design and delivery of the curriculum, including assessment
    vi)   Support and development of students, teachers and the local faculty
    vii)   Management of teaching, learning and assessment
    viii)   Educational resources and capacity
    ix)   Outcomes

25 Under each domain there are listed:
    • outcomes that doctors are required to meet
    • standards that must be upheld by medical schools in assessing these outcomes
    • criteria that the medical school must meet in helping students to achieve these standards
    • evidence that the medical school must provide in order to demonstrate that they meet their obligations.

    Linking outcomes, standards, and requirements in this manner is an effective way of relating the requirements made of providers of medical education to quality assurance within the profession. Further discussion of the literature relating to medical education is included in chapter 8 of this review.

Accountancy

26 Unlike Medicine and the Law, the accounting profession does not have a single domestic regulator for those entities who provide professional education. Whilst the Financial Reporting Council is the overall regulator for accounting and auditing standards, its remit does not currently extend to regulating providers of education and training. The International Accounting Education Standards Board, however, provides minimum standards and learning outcomes at international level for organisations

which are members of IFAC (IFAC, n.d.) and audit is super-regulated by the Professional Oversight Board of the Financial Reporting Council (FRC, n.d.).

27   Some of the representative bodies for accountants in the UK are summarised at Figure 8 below. These were previously coordinated through the Consultative Committee of Accountancy Bodies (CCAB). The CCAB acted as an umbrella organisation with a role as a "forum in which matters affecting the profession as a whole can be discussed and co-ordinated" (Stokdyk, 2011). With each of the representative bodies as members the CCAB held considerable prestige as the umbrella organisation for those with chartered status, however, in 2011 CIMA, chose to withdraw from CCAB citing the organisation's focus on audit at the expense of accountancy as a reason for doing so (Stokdyk, 2011).

Figure 8: Representative bodies and mode of education

Representative Body	For	Mode of education
Association of Accounting Technicians (AAT, n.d.)	Accounting Technicians (member or fellow)	Professional examinations at levels 2, 3 and 4 assessed online and studied flexibly.
Association of Chartered Certified Accountants (regulated under the LSA) (ACCA, n.d.)	Certified Chartered Accountants	Training for the Certified Accountancy Qualification is provided through employers
Association of International Accountants (ACIA, 2012)	International accountants	A range of certificates and diplomas (levels 5-7) studied flexibly, plus 3 years qualifying employment.
Association Of Taxation Technicians (ATT, n.d.)	Taxation technicians	Professional examinations, study may be through an accredited college.
Chartered Institute Of Internal Auditors (CIIA, n.d.)	Chartered Internal Auditors	Study accredited by the Open University together with qualifying employment.
Chartered Institute of Management Accountants (CIMA, 2010)	Chartered Management Accountants	Through a number of providers via an employer.
Chartered Institute of Public Finance and Accountancy (CIPFA, n.d.)	Chartered Public Finance Accountants	Training through employers
Chartered Institute Of Taxation (CIT, n.d.)	Chartered Tax Advisers	Professional examinations, study may be through an accredited college.
Institute of Chartered Accountants in England and Wales (ICAEW, n.d.)	Chartered Accountants	Professional examination provided through employers
Institute of Chartered Accountants of Scotland (regulated under the LSA; ICAS, n.d.))	Chartered Accountants in Scotland	Through a number of providers via an employer
Institute and Faculty of Actuaries (The Actuarial Profession, n.d.)	Actuaries	Professional examinations supported through employers

		together with work-based learning assessment (3 years)

28   Unlike law and medicine, accountancy does not seem to be moving toward developing a single domestic regulator model for the setting and maintaining of requirements for education providers. This may be as a result of the internal divisions within the profession over the separate status of accountants from auditors, or because of the existence of an international standards-setter.

Continuing professional development

29   As we set out in Chapter 5, not all legal professions accredit providers of CPD activity. Where a largely output focussed, personal approach is taken to CPD, granting a higher status to a particular kind of activity may be contrary to the ethos of the scheme as a whole. Whilst accreditation may allow for quality control, evidence of participation and evidence of learning having taken place, it need not do so and learning may be verified and evidenced by other means.   The BSB has rejected accreditation on the pragmatic ground that it is impossible to quality-assure the vast range of activities on offer; whilst the SRA maintains a requirement of a minimum 25% participation in accredited activities and detailed criteria for accreditation.   For completeness, however, the table below sets out the position for the regulated legal professions.

Figure 9: Accreditation of CPD providers

Profession	Accreditation of providers?
Barristers (BSB, 2011c, d, e, f, 2013)	No (in proposed new scheme)
CILEx (2013)	Yes (current scheme). In-house providers automatically accredited. The new scheme from 2014 will not involved accreditation of providers.
Costs Lawyers (CLSB, 2013)	Yes, power to approve.
Licensed conveyancers (CLC, 2011b)	Yes
Notaries (Master of the Faculties, 2010)	Yes. Approval requires • Written learning objectives • Assessment to evaluate achievement of objectives
Patent attorneys and registered trade mark attorneys (IPReg, 2013)	Power to specify "the amount, nature, content and format of courses and other activities which may be undertaken". There are additional requirements (IPReg, 2012, sched 1) to course providers of litigation and advocacy courses.
Solicitors (SRA, 2010a, b)	Separate approval criteria for in-house and external providers (SRA, 2010) which require details of: • Aims and learning outcomes • Content • Presentation • Materials • Speakers • Venue and accommodation • Administration • Assessment (where relevant) • Evaluation

	Separate arrangements are made for, for example, PSC, Management Stage 1 and higher rights courses.

Themes arising from material assimilated

The rise of the single regulator and outcomes focussed regulation of providers

30   One theme that emerges from an analysis of requirements made of education providers across jurisdictions and disciplines is the move towards a single regulator with responsibility for the setting and maintaining of these requirements. The compilation of the JASB Handbook and approach taken to reform of legal education in Scotland seem emblematic of this approach. Furthermore, the predominance of "outcomes focussed" requirements setting as a model for regulating providers of education is apparent, reflecting wider trends in regulation as a whole.

Technology

31   All of the requirements of educators listed above now include regulations relating to adequate provision of technology as a learning resource. This perhaps reflects wider trends in higher education regarding future models of delivery, and is encouraging for proponents of web-based educational platforms. This also arguably augers well for those concerned with widening access to legal education, for technologies such as the internet can, given good educational design and infrastructure, improve the ability of providers to deliver courses facilitate distance learning.

Periods of supervised practice.

32   One of the widest areas of difference between professions is in the regulation of experience in the workplace as a precursor to qualification (although much the same could be said for treatment of learning in the workplace by way of CPD). For some professions, such experience is a precursor to entry, or entry at a particular grade and may be largely self-certified. For others, it is a requirement, but with limited constraint – witness the willingness of some legal professions to accredit experience under the supervision of a member of another legal profession. For a third group, the period of supervised practice is highly formalised and constrained to a limited range of environments.

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Chapter seven
Current equality, diversity and social mobility issues

Introduction

1. Equality, diversity and social mobility are an overarching and underpinning concern of this Review. They constitute an important part of both the socio-economic and regulatory contexts. Advancing equality of opportunity is widely seen as a significant function of public goods such as higher education. Higher education has long been regarded as an important mechanism for improving social mobility and thereby unlocking 'the talents' in society (Kelsall 1957; Department of Constitutional Affairs 2004, 3). To not address social mobility arguably undermines its emancipatory and democratic functions and values (Rhoads and Torres 2006).

2. Ensuring equality of opportunity is also an important legal and regulatory objective for both further and higher education institutions and legal service providers. One of the regulatory objectives of the Legal Services Act 2007 is to encourage an independent, strong, diverse and effective legal profession (s.1(1)(f) - our emphasis). The Legal Services Board, in its Business Plan for 2010/11 observed:

   > 81. Systems of education and training provide the lynchpin for delivering success in any workforce development strategy. Fair access to education and training, and flexibility in the way it can be accessed, may help to unlock the opportunities that will allow the widest pool of talent to enter and progress within the legal sector.

3. In this paper we explore the ways in which existing education and training practices constitute initial and continuing barriers to access, and are hence a potential constraint on diversity and social mobility. This initial literature review should also help identify the risks and consequences for equality and diversity of any regulatory or structural changes that may be proposed by the Legal Education and Training Review.

Definitions

4. Equality, diversity and social mobility are related but distinct concepts, and reflect different strategic approaches to equality and diversity issues in education and the workplace.

5. *Equality* focuses on the legal obligation to comply with anti-discrimination and equal opportunity standards, currently as framed in the legal requirements of the single *Equality Act 2010* which replaces earlier anti-discrimination legislation. Equality protects people from being discriminated against on the basis of nine protected characteristics, i.e. sex, race, disability, sexual orientation, marital or civil partnership status, pregnancy and maternity, religion, belief, or age.

6. *Diversity* definitions vary widely (Ashley 2011). Nevertheless diversity can be broadly understood as an approach that compliments equality approaches, by focusing on cultural rather than behavioural change. Diversity policies are designed to recognise, value and reward human difference – in all its forms –

whether social, cultural, ethnic, gendered, etc. It thus encompasses a wider range of conditions and characteristics than equality.

7. *Social mobility* 'refers to the ability of individuals from disadvantaged backgrounds to move up in the world, akin to the notion of equality of opportunity' (Crawford et al. 2011, 6). John Goldthorpe, in one of the classic texts of mobility studies similarly, though rather more broadly asserts that mobility is associated with:

    a tendency towards greater equality of chances of access, for individuals of all social origins, to positions differently located within the social division of labour. (Goldthorpe 1987, p. 27)

8. Social mobility policies are thus directed towards reducing disadvantage, which is usually defined by reference to some concept of socio-economic status (SES) or social class. Rather like diversity, therefore, social mobility is not restricted to the characteristics protected by equality legislation, and recognises that specific interventions may be required to support those disadvantaged by social class rather than by legally protected characteristics. Mobility may be characterised as either *horizontal,* that is, movement from one position to another within the same social level - for example, by changing jobs or geographical location without altering occupation or SES - or, more commonly, *vertical mobility,* that is, the extent to which an individual or group may improve or worsen their position in the social hierarchy. This paper is primarily concerned with vertical mobility.

9. Social mobility has become a significant political and social policy issue (Milburn 2009; HM Government 2011). The UK has one of the lowest rates of social mobility in Europe, and falls below average rates of social mobility in international comparisons; moreover the rate of mobility within the UK has declined since the 'baby boomer' years (HM Government 2011, 16-17).[137] Continuing failure to address such structural inequalities may not only undermine equal opportunities, but also limit economic growth (OECD 2010).

10. Current government policy emphasises two things. First, it focuses primarily on relative rather than absolute social mobility (Crawford et al 2011, 6; HM Government 2011, 15). This has important policy implications. To put it simply, social mobility is difficult to target directly, so policies focus on strategies for increasing access to particular goods that are the drivers of social mobility – education, skilled jobs, etc. This has two related consequences: (i) if those policies are effective, then obviously the targeted groups should gain proportionately more access to those goods (ie upwards towards equality), and (ii) as a result, in the context of a finite supply, other groups that have historically enjoyed a disproportionate share of those goods may see their share reduce downwards towards equality, but hence experience some (relative) downward social mobility. We will return to this point later. Secondly, the emphasis on relative mobility also means that the government's approach remains meritocratic. Its emphasis is on increasing 'fair access' to opportunity: 'making life chances more equal at the critical moments for social mobility' (HM Government 2011, 6) – the early years of childhood, readiness for primary school, GCSE attainment, choices at 16+, entry into training and apprenticeships, and access to higher education and professional work.

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[137] The 2009 Milburn Report demonstrates evidence of this in the context of the legal profession. Comparing the backgrounds of individuals at the top of the legal profession today with their counterparts ten or twenty years ago, it shows an increase in the proportion of individuals from independent schools from 68-73% in the case of barristers, 70-74% in the case of judges and 55-68% in the case of solicitors (Milburn 2009, 6).

There may be arguments about the strengths and weaknesses of that approach, but for present purposes at least we follow the style of 'lifecycle' analysis that this employs.

11. Before we leave definitions behind, there is another concept relevant to this subject, namely 'intersectionality', which can be used as an analytic tool to understand and respond to the ways in which factors such as gender, race and class intersect , or 'stack-up' and interact. Intersectionality can uncover the qualitatively different experiences of discrimination and disadvantage felt by those at the intersections. At the same time, it also highlights the difficulty of separating out the root causes of social disadvantage, and perhaps challenges, to a degree, the utility of equality approaches that require the isolation of discrimination as a cause.

Education to age 18

12. 'Ability' is shaped and moulded by opportunity. In this section we examine how influences and experiences in the early years and on through compulsory and post-compulsory schooling do much to shape access to legal education and training.

Childhood and schooling

13. Early years education is, of course, well outside the remit of this review, but it needs to be borne in mind that the legal education system is, in part, an inheritor of existing inequality and disadvantage. These problems require greater structural intervention at an earlier stage, and early disadvantages can limit or reduce the scope and efficacy of later engagement. (This is not to assume that later interventions lack value and impact.)

14. The impact of social disadvantage emerges extremely early in childhood and tends to be reinforced throughout the early years and schooling. For a socially disadvantaged child, large socio-economic gaps in cognitive skills are already evident by three years of age (Crawford et al. 2011, 11). By age 11, educational attainment is already a significant predictor of later life chances (Chowdry et al. 2010, 14–15).

15. It is widely recognised that social class is itself a key predictor of educational achievement, though low educational attainment in turn is a significant, and to some degree independent, factor in building and maintaining an intergenerational cycle of disadvantage (Egerton 1997; Lampard 2007; Perry and B. Francis 2010; Schoon 2008). For example, by the age of 16, 79% of children born in 1989/90 to degree educated parents achieved at least five GCSE passes at grades A-C, compared with only 33% of those whose parents did not have GCSEs/O-levels (Ermisch and Del Bono 2010, 13). Such effects are exacerbated by structural, systemic, inertia within the education system itself. Quantitative data indicate that, historically, the expansion of state schooling, and successive changes to the state school system have had relatively little long-term impact on patterns of social mobility in the UK (Heath and Clifford 1990; Shavit and Blossfeld 1993).[138] The school system as a

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[138] The significance of the much vaunted grammar school effect appears, statistically, to be overstated on the evidence of these studies.

whole remains heavily stratified in class terms.

16. Secondary school attainment and the decisions made at 14-16 are also important in shaping HE participation – possibly even more significant than those made in sixth form (Crawford et al 2011, 25). A range of research demonstrates consistently that at age 16 pupils with Black Caribbean heritage, other Black heritage or Pakistani ethnicity achieve considerably lower average scores than white pupils, whereas students with Indian or Chinese ethnicity tend to score higher than their white peers. Moreover, research also tends to show that, while ethnicity has some independent effects, the majority of the difference in performance between BME and white pupils seems to be accounted for by social background. In terms of value added, between ages 11 and 16 ethnic groups either catch up or in fact surpass the performance of their white counterparts (Bhattacharyya, Ison, and Blair 2003; Wilson, Burgess, and Briggs 2006).

17. The importance of this stage is not just about getting the grades to progress, however. The decisions a pupil makes in Year 10 in terms of pathways through the 14-16 curriculum,[139] and choices between traditional academic GCSEs and applied subjects will shape her future options at A level and beyond, particularly as regards the status of HE institution to which she is likely to be admitted. A growing body of literature emphasises the importance of career support and mentoring at this stage.

Post-compulsory education

18. Overall a greater proportion of BME than white people stay on in post-16 education, with a correspondingly smaller proportion of the BME population in work, or on the job training at16/17 (Bhattacharyya et al. 2003). Since the mid-2000s, the number of young people staying on in post-16 education has steadily risen in the face of a declining youth employment rate. However, while the gap in post-16 participation has narrowed between rich and poor, inequality of access to higher education has continued to widen (Blanden, Gregg and Machin 2005, 2-3). In large part this reflects the extent to which HE expansion has disproportionately benefitted the wealthier in society – a phenomenon defined by some analysts as 'maximally maintained inequality' (MMI) (Raftery and Hout 1993), ie, a process whereby the already advantaged are able to leverage their economic and cultural capital to benefit from social policy changes . As Brennan and Osborne observe:

> The diversity of students in terms of social and educational origins within UK HE as a whole does not appear to match the policy rhetoric. The most advantaged 20% of young people are up to six times more likely to enter HE than the most disadvantaged 20%. These differences are further skewed in the most selective disciplines. (Brennan and Osborne 2008, 180)

19. In short, socially disadvantaged students who do stay on, are still more likely to end up studying vocational courses in FE colleges, and they are more likely to be studying for basic and lower level qualifications than at level 3 (Crawford et al 2011, 18-19).

Access to higher education

20. Prior educational attainment is the key predictor for entry into higher education and, statistically, this accounts for most of the gendered and ethnic differences observed in HE participation rates (Broecke and Hamid 2008; Chowdry et al 2010

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[139] Only English, maths, science, physical education, religion and citizenship are statutorily prescribed.

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).[140] It is also a dominant factor in studies of disability. By age 16, disabled people tend to have lower GCSE attainment than those without disabilities; they are also less likely to be studying for Level 3 qualifications (including A Levels), and less likely than average to have achieved such qualifications by age 18 or 19 (DIUS 2009). Moreover, advantage and disadvantage is about much more than just the grades. The admissions process is skewed in three particular ways.

21. First, the dominance of A level entry is an important means by which inequality is embedded in the admissions system, particularly in controlling access to high demand subjects (like law) at elite universities.[141] Since the uptake of A levels reflects GCSE performance, it is itself skewed in terms of class and ethnicity. It has been argued that this systematically disadvantages ethnic minority students and as such is a form of indirect discrimination (Modood and Shiner 1994).

22. Secondly, other things being equal, the admissions system strongly favours privately educated applicants, particularly in accessing elite universities. According to the Independent Schools Council, the independent sector educates around 6.5% of the total number of schoolchildren in the UK (some 7% of the total number in England) and over 18% of pupils at 16+. However, it accounts for over 48% of the entrants to the UK's 30 most selective universities (The Sutton Trust 2010, 5–6). Even when judged within a cohort of academically successful young people, those who attend private schools are still more likely to progress to elite universities and to study more traditional subjects than there state educated peers (Power et al. 2003; The Sutton Trust 2004, 2011). Results of recent research at Oxford (Zimdars 2007), demonstrating that, after controlling for A level grades, the privately educated tend to be out-performed in final degree classification by state- educated students, adds to the evidence of a lack of meritocratic justification for this trend.

23. Thirdly, there is also evidence that disadvantaged young people tend to self-select away from the elite and apply, instead, to less demanding pre-92s, and, overwhelmingly, to the post-1992 universities. A lack of confidence and lack of quality information are widely cited as key causes for this. The level and quality of advice, support and encouragement a pupil gets from parents, teachers and career advisers, etc, may be critical in determining their next steps, and this can vary widely.[142] For many schools, including some that send significant numbers into higher education, the elite, and particularly Oxbridge are still not 'on the radar'. The extent to which schools, colleges and universities perform what Burton Clark calls a 'cooling-out' function (Clark 1960) at this stage, by managing and possibly limiting student expectations seems under-researched. More directly relevant to the work of the review is the extent to which there is an expanded role for the universities and professions in supporting and mentoring potential applicants at this stage (cf Milburn 2009, recommendations 4, 6, 9; Milburn 2012a, 2012b). As the Sutton Trust (2011, 18) concludes, the considerable outreach activity by the elite universities still

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[140] They conclude (2008, 19-20) that, by the late 1990s gender has no clear independent effect once we control for prior attainment at GCSE.

[141] Coffield and Vignoles (1997) noted that in 1992, the pre-1992 universities admitted 16% of students without A levels, whilst post-1992 universities admitted 41%.

[142] A recent poll conducted for City & Guilds showed that a quarter of young people in a representative sample claimed to have received no formal careers advice, increasing to 28% of those following vocational as opposed to general qualifications (Batterham and Levesley 2011, 19–20). The survey also found that parents were the most widely relied upon source of careers advice and support, and that less educated parents were generally less confident in giving advice.

has some way to go in a range of schools. Moreover, as the most recent Milburn Report (2012a: 35) has observed

> Overall, it is unclear what impact the significant expenditure on outreach has had and some research has suggested that much of the progress of recent years in broadening the social intake of higher education has been driven by improving GCSE results rather than the efforts of universities

Access and admission to law

24. Demand to study law has been consistently strong over many years. In 2009 there were 29,211 applicants to study first-degree courses in law in England and Wales, of whom 19,882 (68.1%) were accepted (Fletcher and Muratova 2010). Competition for places can be fierce, particularly amongst the most popular universities, with ratios of applicants to admissions easily exceeding 10:1.[143]

25. A level entry requirements remain correspondingly high. Within the Sutton 13, standard offers[144] range from A*AA to AAB, with the majority expecting AAA. The two private universities (University of Buckingham and BPP University College) both publish standard offers of 300 tariff points – equivalent to three Bs at A Level.[145] Published requirements amongst the recruiting universities represent, as one would expect, a broader range of achievement than the pre-92s, roughly from ABB through to BCC and possibly below. Harris and Beinart (2005, 325) found that the gap in median[146] standard offers between pre- and post-92 universities was 100 tariff points (equivalent to one extra B grade): 340 tariff points (AAB) at pre-92s, as compared with 240 points (BCD equivalent) at the new universities surveyed. In sum, then, there remains a significant entry qualification gap between old and new universities that does much to explain the class and ethnic stratification of the sector (discussed below).

26. Reliance on 'traditional' entry criteria and admissions practices may well disadvantage non-traditional applicants. Requiring high grades at A level and GCSE, looking for evidence of a high stock of cultural knowledge, and/or for relevant unpaid work experience are all likely to narrow the pool of suitable applicants. There has been very little empirical research into the law admissions process and its outcomes, and what there has been is now dated – in many cases seriously so (Lee 1984; Bermingham, Hall, and Webb 1996; Halpern 1994), though some of this data can be supplemented with information from later, more general, studies of law schools and their students (Bone 2009; Harris and Beinart 2005; Harris and Jones

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[143] Harris and Beinart (2005, 318) reported an overall ratio of applications to places of 9.7:1 in 2002-03, as compared to 12.8:1 in 1994-95 (Harris and M. Jones 1997, 60). Both surveys reported wide institutional variations in the ratio, with the range in 2002 being from 1.3:1 to 24.6:1. Both surveys also noted that the application to place ratio tends to be higher in pre-92 universities, but that some of the highest ratios actually occur in the post-92 sector.

[144] The standard offer represents the normal attainment expected by that university. It should, however, be understood as no more than indicative of the actual level of achievement within a cohort. The mean tariff points across a cohort may, in some cases, vary markedly from the standard offer, for a variety of reasons. Standard offers may not just reflect relative demand or existing status, we believe they may also be used strategically in an attempt to raise standards in and/or enhance the reputation of a law school.

[145] A level grades attract 'tariff points' as follows: Grade A = 120 points, Grade B = 100, Grade C = 80, Grade D = 60, and Grade E = 40. AS levels attract half the tariff points of the equivalent A level grade.

[146] The median refers to the mid-point on a range of items as opposed to its arithmetic mean or average. The median is usually used as an indication of relative distribution. Eg, whether the median is above or below the mean of a set of numbers gives us an indication of whether and in what way that distribution is skewed.

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1997). Not surprisingly, it paints a mixed picture, emphasising that recruitment decisions are essentially qualitative judgments, based upon a relatively wide range of evidence.

27. Survey responses to both Harris and Jones (1997, 62) and Harris and Beinart (2005, 326-30) stressed the importance of A level grades in assessing standard entrants, and, particularly in some of the pre-92 universities, even non-traditional entrants. Such data as are available support the view that A levels remain the predominant entry qualification for law. 82.7% of the 754 students surveyed by Bermingham, Hall and Webb in 1995 had completed A levels; the Law Society Cohort Study similarly found that 81% of students in 1994-95 were admitted on the basis of A levels (Shiner and Newburn 1995). More recently, 71.5% of Bone's (2009) survey of over 1000 students (based on two pre-92 and seven post-92 universities) were studying for A levels in the preceding year. As noted above, research generally suggests that reliance on A levels reinforces existing patterns of social mobility and stratification, and this certainly appears to have been the case in law. Thus, Shiner and Newburn (1995) found 'significantly fewer' black than Asian or white students being admitted on the basis of A levels. Bermingham, Hall and Webb (1996, 23-24), in their analysis of UCAS application and acceptance data for law in 1994, similarly noted that Black African and Black Caribbean students in particular performed less well than the average, and also identified a clear linear relationship between average A level attainment and social class.

28. The quality of references and the applicant's own personal statement, both required as part of the UCAS application, are also highly important. These may provide evidence of potential ability, possibly written language skills (in the case of the written personal statement) and motivation, all of which have been identified as important factors in the admissions process. These may have acquired even greater weight as fewer institutions interview prospective applicants than historically: 56% of institutions surveyed by Harris and Beinart did not use interviews at all for standard entrants, though interviews of non-standard and part-time students remained important for the majority of providers. Whether interviews are necessarily a fair and effective recruitment measure is, of course, itself questionable, since they may also privilege the acquisition of certain kinds of cultural capital (Zimdars, A. Sullivan, and Heath 2009, 659–60). Interestingly, there is little evidence that institutions put much weight on previous legal work experience, except perhaps when recruiting part-time students, where it may be used as a proxy for interest and aptitude.

29. These data in our view tend to indicate that different weightings are applied to similar criteria in respect of standard and non-standard entrants, rather than more substantially different criteria. It has been suggested that the use of additional criteria, including a stronger focus on factors such as motivation, capacity for independent working, and organisational skills, the use of standardised aptitude tests, and additional contextual information would benefit non-standard applicants (see, eg, Bibbings 2006, 82). This is perhaps contestable. As regards aptitude tests, evidence from research conducted in the US context points to their controversial history and has been said to demonstrate 'conclusively' that such tests favour white students over those from ethnic minority backgrounds (Dewberry 2011, 32; Cannon 1989) – see also chapter 4 of this literature review. There is, however, relatively little reliable evidence from the literature of the extent to which these methods are

currently used by UK law schools, and with what impact.[147]

30. One other factor that has the potential to impact the diversity of law school admissions has been the introduction of student fees. So far there is no strong empirical evidence that the introduction of fees has reduced the relative HE participation rate of poorer students (Chowdry et al 2010, 5). Whether the significant increase in fees planned for 2012 entry will have a stronger disincentive effect in the long-term future is moot.[148]

31. The Education White Paper proposes increasing grants and maintenance loans available to low-income students, including a proposed new National Scholarship Programme. These will continue to be supplemented by institutional bursaries and scholarships that are set out in individual access agreements with the Office for Fair Access (OFFA). There is some evidence that bursary levels at elite institutions have tended to be more generous, though research commissioned by OFFA has found absolutely no statistical evidence that disadvantaged applicants are incentivised thereby to apply to those institutions (Corver 2010).

The university experience

32. In this section we focus on three key aspects of the law school[149] experience: firstly we look at the demographic profile of the student body; we then consider finance and debt, and access to work experience as potentially important variables in shaping progression to professional training and practice.

Demographic profile

33. In 2009-10, over 58,000 students were studying for first degrees in law, a 3% increase over the previous year, [150] and an increase of over 13,000 students on 2002-03 figures (see Harris and Beinart 2005, 320). There were also 14,000 students studying the subject part-time in 2009. The number of LLB graduates has more than doubled since 1989.

34. Data on the demographic profile of law students suggest that it broadly conforms to the patterns identified across higher education more generally, though, as we shall see, the law school population is more ethnically diverse than the norm. Published HESA statistics confirm the continuing trend of the last twenty to thirty years, whereby the law student population today is increasingly female, with men accounting for just 40% of that population. HESA does not publish data on age, ethnicity, disability or social class at the discipline level. Consequently, in terms of a

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[147] The exception is the LNAT test that is currently used by eight UK and two overseas institutions. Among original members, the University of East Anglia withdrew from the scheme in 2007, apparently on the basis that it did not support their WP objectives. Exeter withdrew in 2009, and Cambridge in 2010, the latter on the basis that LNAT scores did not correlate well to final degree classifications. Cambridge has now created its own admissions test. On the other hand, Manchester University joined LNAT in 2011, and other schools are apparently in discussions with LNAT.

[148] There is, as yet (April 2013), little substantive literature to report on the likely impact of the new fee regime in England. We discuss the issue in greater depth in LETR Discussion Paper 02/2011, updated in chapter 9, para 38 of this Literature Review.

[149] We use 'law school' in the sense commonly used in UK legal education to refer to university law schools and departments, not to exclusively vocational course providers.

[150] With a full-time (f/t) undergraduate population of over 1.3M, f/t law students thus account for 4.36% of the total. Note that a 3% increase in student numbers was below the 5% increase recorded for the sector as a whole.

review of available literature and data sets, we are obliged to fall back on other resources that are (even) less complete and often dated. It follows that the findings discussed below need to be regarded with some caution.

35. Turning to the issue of social class, data show some increase in mobility decade by decade. In the 1950s, 84% of law undergraduates were drawn from the top two social classes (Department of Constitutional Affairs 2004, 7). By the early 1980s, research suggested that around 70% of law students still came from professional and executive/managerial backgrounds (McDonald 1982; Webb 1986). Studies in the mid-90s continued to find that there was a marked bias in recruitment. Bermingham et al found that almost 60% of students were still from the top two social classes I and II,[151] and only 8.6% from semi-skilled and unskilled manual backgrounds (see Bermingham, Hall and Webb 1996, 20), while Shiner and Newburn (1995) reported a marked skew in law schools towards the children of professional and graduate parents. So far as we are aware, there have been no significant published studies addressing the social class of law students in England and Wales since. Analysis of UCAS data from Scotland, though not wholly comparable, demonstrates little change in social class composition within that jurisdiction between the mid-1990s and 2000 (Anderson, Murray, and Maharg 2003). Although higher education participation rates have undoubtedly increased in the last decade, as we have noted above, most general studies cast some doubt on the extent to which this has meaningfully reduced the social inequalities embedded in the HE system.

36. As regards ethnicity, Cole et al (2009, 29) report that, in total, BME students accounted for 32.1% of students starting a first degree in law in 2008. This is significantly above their population representation, and above average BME participation in HE. In 2008-09, BME students comprised 19.5% of the total undergraduate population (ECU 2010, 87). Double the proportion of BME as compared to white students read law (at 6.3% as compared with 3.1% - ECU 2010, 90). This emphasises the extent to which law stands out as a preferred subject for BME applicants – it is in fact the fifth most popular subject area after business studies, subjects allied to medicine, social studies, and biological sciences (ECU 2010, 91). Within this total, female acceptances (32.6%) were slightly more likely than males (31%) to be drawn from ethnic minorities.

37. This headline trend does not, however, preclude some marked variations between ethnic group participation. The low participation rate of African Caribbean students in law has been particularly marked (Carr and Tunnah 2004, 9). Educational and ethnic differences apparent in students' own backgrounds clearly helps shape patterns of participation. Shiner and Newburn (1995) reported that, while 60% of white respondents had at least one parent with a degree or professional qualification, this applied to only 47% of African Caribbean; 40% of Indian and 20% of Pakistani or Bangladeshi students. As Sullivan notes, data from the Law Society's Cohort Study in the 1990s also confirmed that:

> Those from less privileged backgrounds are concentrated in new universities, with well over half (56%) of those who attended a comprehensive school attending a new university, as had 59% of those whose parents did not have a degree or professional qualification. This was in comparison to 33% who had been to an

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[151] This study followed UCAS in using the then Registrar General's Classification of Occupations as the determinant of social class based on father's or head of household's occupation. This divides the population into six broad occupational sets I - higher professional; II - managerial; IIINM - clerical and skilled non-manual; IIIM - skilled manual, IV – semi-skilled manual; V – unskilled workers.

independent school and 34% of those who had a graduate parent.... Ethnic minority law graduates are significantly more likely than their white equivalents to have studied at a new university with 87% of African Caribbean having done so. (R. Sullivan 2010, 5, 6)

38. The 'choice' of university, of course acts in itself as an important filter mechanism and indicator of class (Sommerlad, 2008b). Attendance at a new university still creates, if not barriers, then at least hurdles to progression, which first-generation students may well be unaware of. As one of Sommerlad's respondents observed: 'you're at a disadvantage because you didn't sort of go to a .. not a proper university .. I never really thought it would make any difference where you did [the law degree] … but it does'.

39. Getting a broader social mix into university is only the first step. Keeping them there, and enabling them to perform to a level that supports them to progress into the profession also matters. UK retention data compiled by the NAO indicate that about 78% of UK students in the period 2000-05 completed their degrees, with a continuation rate (from first to second year of full-time study) of around 90-91%. These figures place the UK in the world top five for retention (National Audit Office 2007). From that data set, continuation rates for law are comfortably within the 'top 10' by subject area, with about 92% of first years progressing to their second year, which may suggest that there is fairly limited room – or necessity - for greater intervention, though we should be cautious in reaching that conclusion. The risks of non-completion are not evenly distributed. Being a full-time as opposed to part-time student is the single largest determinant of completion, but the next most significant tends to be level of pre-entry qualifications (Arulampalam, Naylor, and Smith 2004; Smith and Naylor 2001; National Audit Office 2007). This does much to explain the higher completion rates generally found in elite as compared to at least some post-92 institutions.

40. The proportion of good degrees (2:i or First) awarded has been increasing across the board, from around 38-40% of graduates in the late 1970s, to about 60% by the middle of this decade (Richardson 2008, 4). Figures for law are broadly in line with this trend, though consistently slightly below the average. Thus, over half of law graduates (56.6%) in the summer of 2009 achieved firsts or 2:i classifications. While this means the 'good degree' has become less significant as a filtering mechanism over the last twenty to thirty years, the increase is neither gender nor ethnically neutral. More women now graduate with firsts and upper seconds than men: 58.0% as opposed to 54.2%. (Fletcher and Muratova 2010, 6). There are no figures showing the class of law degree awarded to different ethnic groups. However, studies reporting on various other datasets from the mid 90s to the mid 2000s have consistently shown that white students are more likely to graduate with a good degree than students from any other ethnic group (see Richardson 2008,10-11; ECU 2010, 9). The attainment gap remains largest between white and black students, at about 29% (ECU 2010, 92). There is also some evidence to show that the percentage increase in first and upper-second class degrees has been more marked in pre-1992 than in post-1992 universities (Harris and Beinart 2005, 332), which might also account for some of this apparent ethnic difference.

Finance and debt

41. Patterns of debt vary by social class, gender, ethnicity, disability and type of institution attended. Whether debt in and of itself is a significant cause of withdrawal is less certain, though it may often be one of a range of factors (Bennett 2003; Christie, Munro, and Fisher 2004; Pennell and West 2005; Purcell and Elias 2010). Not surprisingly, there is evidence that financial constraints and levels of indebtedness impact the ability of students to take on unpaid work placements (Shiner and Newburn 1995, 39), pro bono, and other activities used by legal sector recruiters in selecting interns, trainees and pupils (Francis and Sommerlad 2009). Whether these effects are exacerbated by the new fees regime is obviously a concern for the future.

Access to work experience

42. Obtaining formal work experience during university is a critical step in securing a training contract or pupillage. Shiner's work on the Cohort Study demonstrated that 63% of those who gained work experience with a solicitors' firm were offered a training contract, with a virtually identical proportion of those taking mini-pupillages being subsequently offered a full pupillage (Shiner 1997). Work experience itself, however, is not equitably distributed. Shiner and Newburn (1995) thus found that students who gained work experience with solicitors and barristers were disproportionately from private schools and Oxbridge, and that ethnic minority students (with the exception of Indian students) were less likely to obtain work experience. Recent research by Andrew Francis and Hilary Sommerlad has added a useful qualitative gloss to this (A. Francis and Sommerlad 2009, 2011). Their research emphasises how access to formal work experience is shaped by a mix of credentials and ascriptive criteria, which they describe as a combination of social capital, UCAS tariff scores of 360+, attendance at a pre-1992 university and prior informal work experience. Their study also points to the extent to which opportunities to undertake informal work experience, often in years 11 and 12 of school are themselves 'classed' and shaped by social capital, in terms of personal and family connections with the profession. In particular they highlight the practice, acknowledged in interviews, of commercial firms awarding informal work experience to the children of clients as part of their business development activities.

'HE in FE'

43. Before leaving this section of the chapter we need to say something briefly about the role of 'HE in FE' – that is HE provision in further education colleges. This is being advanced by Government policy as part of the widening participation agenda. Aside from the work FE colleges may take-on in enabling participation in HE, there is growing crossover and partnership between the FE and HE sectors in a number of areas of provision. Foundation degrees are a particular example of this. Foundation degrees were launched in 2001 to provide a new range of vocationally-focused intermediate level (ie level 4) higher education qualifications, they are thus recognised qualifications in their own right, but also provide an alternative entry route into traditional HE awards. Entry criteria are significantly below those needed for a traditional degree, ranging from 40-120 tariff points in the examples we identified. Some foundation degrees may carry exemption from the CILEx level 3

Diploma, and students who do well in a foundation degree may be admitted to the second year of an LLB programme. Foundation degrees thus could have a potential role in widening participation in legal education. Harris and Beinart (2005), however, noted very little HE interest in law foundation degrees in their early days. It is questionable whether this situation has much changed. Our own research so far indicates that only eight such awards are offered by FE colleges in England and one in Wales, suggesting that, so far, their impact on law is clearly not on a grand scale, but there has not been any formal research or evaluation of that impact so far as we are aware.

44. There is also little evidence about whether, and if so how, professional bodies generally have taken the development of foundation degrees into account. A survey examining professional bodies' engagement with foundation degrees by PARN in 2010 garnered an 18% response rate (44 out of 238 bodies), only 7% of which agreed that foundation degrees had changed the way they thought about routes to entry (Williams and Hanson 2010).

Vocational Training: the LPC/BPTC

45. Despite the economic downturn, numbers on LPC and BPTC currently exceed the number of training contracts and pupillages available annually. There is a risk that this disparity, and the intensity of competition that it produces, may increase pressures on diversity and social mobility.

46. Detailed enrolment data for the BVC/BPTC are published on the BSB website. The latest published data are as follows:[152]

BVC Year	03/04	04/05	05/06	06/07	07/08	08/09	09/10
Applicants	2570	2883	2917	2870	2864	2540	2657
Enrolments	1449	1665	1745	1932	1837	1749	1793
Successful[153]	1251	1392	1480	1560	1720	1330	1432[154]

Table 7.1: BVC/BPTC enrolments

47. It can be seen that numbers have remained relatively constant (with the exception of the peak in 2006-07), with an annualised percentage growth rate for the last five years of 0.6% (Sauboorah 2011a, 25). However, this must nevertheless be contrasted with a training market consisting of, on average, 500-550 pupillages at the independent Bar and a far smaller number at the employed Bar. Note also that the data published by the BSB refer only to applications and enrolments, not to

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[152] http://www.barstandardsboard.org.uk/news/statistics/

[153] The figures here represent those students who successfully completed the BVC in the year in which they enrolled. It does not take into account those students who deferred their place or who were referred and took resits after the September examination board.

[154] 1432 is a provisional figure.

target or validated numbers at BVC/BPTC providers, so trends in recruitment to target numbers cannot be extrapolated from that data.

48. The average pass rate for the BVC over the last five years has been 83.1%, but there have been significant variations – from a high of 94% in 2007/08 to a low of 76% the following year (Sauboorah 2011, 25). Detailed data on gender and ethnicity show, interestingly, an almost equal split between male and female students, and, until 2009-10 when it jumped to 44%, consistently over 30% BME participation.[155]

49. Headline data for the LPC are published in the Law Society Annual Statistical Reports.[156] Available data for the last five years appear below in Table 7.2. This records available places, not enrolments, but we do know that enrolments are running markedly below capacity, [157] and this is reflected in the level of passes. Thus, in 2008/09 there were 5824 first-time passes (Dixon 2011) as against some 13,000 places. Even allowing for failures, this suggests courses collectively may have been running at little more than 60% capacity.

| 10.	11. **LPC places**	12. **Training contracts (TCs) registered**	13. **%age year-on change in TCs**
14. **2006-07**	15. **10,325 FT** 16. **2,498 PT**	17. **6,012**	18. **+4.5**
19. **2007-08**	20. **10,675 FT** 21. **3,064 PT**	22. **6,303**	23. **+4.8**
24. **2008-09**	25. **10,803 FT** 26. **3,152 PT**	27. **5,809**	28. **-7.8**
29. **2009-10**	30. **11,370 FT** 31. **3,112 PT**	32. **4,874**	33. **-16.1**
34. **2010-11**	35. **12,142 FT** 36. **3,112 PT**	37. **-**	38. **-**

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[155] It should be noted both that there is a high (12%+ since 2005-06) and seemingly increasing non-response rate to this item, and that the statistics do not distinguish home from non-EU students. The latter may comprise 20-30% of a cohort, and it is possible that this latest increase/spike may reflect a significant increase in overseas recruitment. This could be readily confirmed by qualitative research.

[156] Available online at http://www.lawsociety.org.uk/aboutlawsociety/whatwedo/researchandtrends/archive.law

[157] It was reported last year that, of the available LPC places nationally, only 9,337 were actually filled – see http://www.guardian.co.uk/law/2010/jul/13/legal-training-law-students.

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Table 7.2: Available places on LPC courses and available training contracts
Extracted from *Trends in the Solicitors' Profession 2007, 2008, 2009, 2010.*

50. Annual pass rates are similar to the BVC/BPTC, averaging around 80%. David Dixon's (2011) study of the correlation of LPC passes to available training contracts shows some interesting trends, summarised in the following graph.[158]
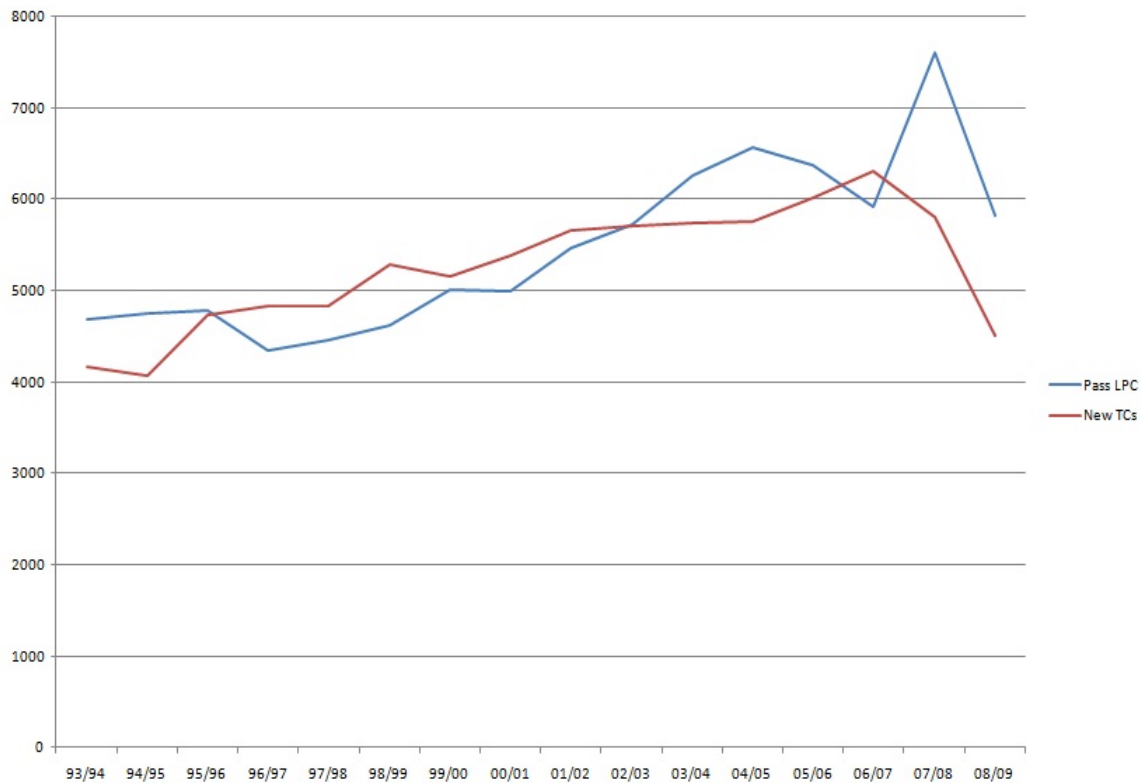
51. Overall the figures indicate that the mismatch between student numbers and training contracts, has, at least until the late 2000s been much less than often assumed. Indeed, for extended periods since the introduction of the LPC, there have been fewer LPC students graduating than there were training contracts. However, these figures do not include the additional graduates coming into the marketplace following re-takes, which could add significantly to the total number of applicants, nor can this analysis gage the cumulative effect of successive years of over-supply, so it is reasonable to assume that the disparity between applicants and training places is underestimated by this analysis.

52. Research from the 1990s identified both the LPC and BVC as barriers to greater social mobility within the legal profession. As Sullivan (2010, 8) notes the Law Society Cohort Study indicated that:
     a. 42% of individuals who did not apply for the LPC cited financial reasons for their failure to do so (*Shiner and Newburn, 1995*). This financial barrier is more prevalent for those from lower socioeconomic backgrounds, with 38% of students found to fund their LPC with money from their parents. Students from less privileged backgrounds, defined as those who had attended a comprehensive school or those whose parents did not have professional qualifications, were less

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[158] Data for this graph were extracted by Richard Moorhead and published in his 'Lawyer Watch' blog at http://lawyerwatch.wordpress.com/2010/11/09/a-history-of-lpc-numbers/

likely than their more privileged peers to have received professional sponsorship or parental contributions, but were more likely to have used a commercial loan (*Shiner and Newburn, 1995*). Those who do not receive professional sponsorship during their LPC are also more likely to carry out paid employment, a possible detriment to their performance (*Vignaendra, 2001*).

   b. The university attended influences the source of finance for the LPC, with 74% of Oxbridge graduates receiving professional sponsorship, in comparison to just 27% of old university graduates and 14% of new university graduates

53. Similarly, the BVC was also criticised in this period for a distinct Oxbridge bias (Shiner 1997). Shiner's work also raised another important issue, which was the continuing effect of academic performance on BVC and LPC recruitment. Using multivariate analysis, Shiner showed that prior academic performance was the dominant factor in gaining an LPC or BVC place.[159] Indeed, the Oxbridge bias in BVC recruitment virtually disappeared once one controlled for prior academic attainment. This study also showed that students who had completed the CPE (GDL) had a clear advantage over law graduates in obtaining places.

54. Both of these trends may constitute barriers to entry for those BME or lower SES students, who are more likely to have weaker A levels and lower degree attainment. Moreover, Shiner and Halpern's work in 1995 had also pointed to the fact that BME and lower SES students were less likely to take the CPE than a law degree, so that the CPE of itself also could contribute to narrowing the social class composition of the profession, particularly as some larger legal recruiters are known to take 40-50% of non-law graduate trainees.

55. We can also provisionally identify four other diversity issues around the vocational courses, though the formal evidence for these is sparse. First, where you complete your LPC, and possibly BPTC, may be another way in which class and opportunity are inscribed in students' training decisions (see also Sommerlad 2008b). Certainly as regards the LPC, there is some recognition of an informal divide between 'national' and 'local' training providers and a 'pecking order' that is influenced in large part by ties to the big corporate law firms.

56. Secondly, the awards may have limited market value outside the sphere of legal professional training. Anecdotally this appears to be a bigger problem for the LPC than BVC/BPTC, but it does amplify the risks of failing to attract a training contract or pupillage, as it is not clear that the qualifications have significant value in the graduate marketplace more generally, other than enabling work as a paralegal. Given the social and educational barriers attending the acquisition of pupillage and training contracts, the disincentive effects of this risk may be greater for some BME and non traditional students.

57. Thirdly, we know very little about the numbers, demographic characteristics, employment basis and career progression of those who complete vocational training and move into paralegal, knowledge management or outsourcing roles within the sector. Anecdotally this is thought to be a not insubstantial segment of the workforce, and one that will potentially grow as technology and new business practices routinize and disassemble a greater range of transactional work.

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[159] Whether its influence is so great on the LPC when there is excess capacity may be a pertinent question.

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58. Lastly, there is a significant gap between the published 'on paper' requirements for obtaining a place on the BVC/BPTC (both of which accept 2:ii students), and what the market most often requires to progress into practice. There may thus be a concern that the formal requirements give a false impression of the opportunities/relative ease of access, particularly for students who do not have a strong cultural understanding of the profession and its recruitment market. On the other hand, of course, raising entry requirements is unlikely to be easy. It may be seen as anti-competitive, by raising an artificial restriction on entry. It is notable in this context that the recommendation of the Wood Report to raise the entry standard to the BVC has not been acted upon. Given the evidence that ethnic minority students are less likely to graduate with a good degree, an increase in entry standards could negatively impact diversity.

59. It should also be noted that the Bar has introduced its aptitude test (discussed in chapter 4), and the Law Society has also been showing some support for this idea. The comments we make about aptitude tests elsewhere in this chapter are relevant to these initiatives.

Recruitment and entry to practice

60. As a starting point it must be acknowledged that the legal profession has become increasingly diverse. Women now make up over 45% of solicitors on the Roll and 60% of admissions (Sommerlad et al. 2010, 6). They constituted over 34% of barristers and 44% of new tenants in 2010 (Sauboorah 2011a, 13, 20 There has also been a substantial increase in the proportion of BME lawyers. In 2008-9 they made up 13% of solicitors on the Roll, 24% of admissions to the Roll and 16% of barristers. The numbers of BME solicitors with a practising certificate rose by 243.7 % between 1996 and 2006 (Sommerlad, Webley, et al. 2010, 6). At the same time, there are some interesting and perhaps significant differences.

61. In assessing how the solicitors' profession and the Bar perform in terms of ethnic diversity, the question of comparator is crucial. As against the general population, the professions could both be considered to be performing well, on the basis that BME persons constitute about 7.9% of the total population (2001 Census) and around 13% of the working age population. The professions do slightly less well when measured against the 15% of the general university population (Zimdars 2010, 123-4). But the contrast becomes least favourable when we compare this with the figures of (about) 32% of undergraduate law 'starters', or 31% of Law Society student members, and 25.8% of pupillage applicants (Carney 2011). By these standards there appears, prima facie, to be appreciable ethnic under-recruitment. Of course this does not prove that there is necessarily direct discrimination in recruitment processes, but it does beg the question whether, and if so to what extent, existing 'meritocratic' and ascriptive recruitment criteria impact BME applicants unequally. It is also notable that the proportion of women entering practice at the Bar is markedly less than the equivalent populations of both women law graduates and women trainee solicitors, and below the university population comparator (Zimdars 2010, 124).

62. The Bar Council and Bar Standards Board have published a useful range of data on pupils' social and academic background. Data in the Wood Report on pupillage (BSB 2010) demonstrates that those who successfully obtain pupillage are drawn heavily

from professional and managerial backgrounds. Nearly one-third have attended fee-paying schools, and the population has consistently been skewed towards the academic elite, with a far higher proportion of Oxbridge graduates and students with First Class honours than would be predicted from population norms. Drawing on recent cross-sectional data, the academic bias, relative to pupil applicants, is also striking (Table 7.3):

39. **2009-10**	40. **Pupillage applicant (Carney 2011)**	41. **New pupils (Sauboorah 2011b)**
42. **Oxbridge**	43. **12.6%**	44. **23%**
45. **First class degree**	46. **14.9%**	47. **23.5%**

Table 7.3: Elite academic backgrounds of pupil barristers

63. This would appear to be consistent with the Wood Report's conclusion that 'the principal qualification for obtaining pupillage appears to be 'high educational achievement'. The extent to which this perpetuates or actually accentuates earlier ethnic and class effects is moot. The Wood Report also concludes that, without further information on the characteristics of those who are rejected, it is not possible to make a proper judgment of the fairness of recruitment processes, and notes that research to compare successful and unsuccessful applicants is underway. Such research is to be welcomed, though as Zimdars (2010, 131) asserts, even on the data we have 'there still seems scope to expand the intake of new barristers from lower social-class origins and to recruit from a larger number of universities.'

64. Comparable data have not been published for trainee solicitors. Looking at the profession as a whole data suggests that solicitors are drawn from a wider demographic. Data on socio-economic background for the profession in 2009 shows that 73% came from professional/managerial backgrounds, and 27% had attended an independent school. Only seven per cent of solicitors had graduated from Oxbridge, and 30% had attended a 'Redbrick' university. As we would expect, solicitors from non-professional backgrounds were more likely to have attended a college, polytechnic or post-92 university than those from a professional background (44% as compared with 33%) (Law Society of England and Wales 2011, 4, 12).

65. However, what recent research there has been indicates a continuing and strong Oxbridge/pre-1992 university bias in recruitment. This is often seen as a particular consequence of the recruitment practices of the larger corporate and elite law firms. These constitute a significant share of the recruitment market, and have tended to target a relatively narrow range of universities, though there is evidence from the firms themselves and from 'trade press' sources that this practice is changing. Nevertheless, Oxbridge applicants who had gained a lower second or below were, on balance, more likely to be offered a training contract than those from other 'old' universities or post 1992 institutions who achieved better; 79% of those who gained a first or upper second from an old university were offered a training contract in comparison to 60% of those who had achieved the same from a new university.

66. As a number of studies highlight, these recruitment practices are not anti-diversity as such. Rather they can be seen primarily as a means by which recruits are brought into the firm who have the kinds of cultural capital that will facilitate their entry into

the firm's social (and training) milieu, and ensure their (perceived) acceptability to clients. It can thus be seen as part of a process that involves elements of professional closure (by restricting access) (Bolton and D. Muzio 2007; Sommerlad 2007), 'upmarket branding' (Ashley 2010, 721) and 'identity regulation' of those within the organisation (Cook and Faulconbridge n.d.). This leads, albeit perhaps unintentionally, or at least incidentally, to the reproduction of a relatively homogenous profession in terms of educational background.

Barristers and solicitors: career progression/retention

67. A wide range of research has demonstrated correlations between ethnic origin, gender and social class, and progression and retention. Concerns have been expressed that BME and (younger) women lawyers are disproportionately likely to leave the profession, creating a loss of talent and waste of training resources. Studies show that key career 'choices' as regards areas of practice, or the decision to move in-house, pursue partnership or apply to take silk are shaped differently by diversity characteristics. Market risks, regulatory risks and burdens, and training needs are not the same across all sectors, and the extent to which sub-sectors of the market (eg high street and legal aid practice) are differently raced and gendered will mean that these risks, etc, are also borne differently by these groups. In the present volatile and uncertain climate structural changes to the profession, caused, for example, by legal aid cuts, deprofessionalisation, structural changes in the tournament for partnership, and the move to ABSs may have quite disproportionate consequences for at least some diversity groups.[160]

68. The primary issue for this Review, however, is whether the current training regimes actively contribute to, or at least do not ameliorate negative effects of professional culture and structures on career progression and retention.[161] At the same time, the issue of training cannot be wholly separated from wider issues about the business models that dominate the sector. These are seen as the major barrier to developing good – and fair - management and working practices. Solicitors firms, for example, are thus criticised for perpetuating a male work paradigm characterised by a long hours culture, 'presenteeism' and a resistance to flexible working (Duff and Webley 2004; Insights Oxford 2010; Sommerlad et al 2010).[162]

Training Needs

69. Specific training gaps that have been identified thus far include:

Management skills, structures and cultures

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[160] Though not all are necessarily negative. ABSs, for example, could provide new openings and opportunities, particularly for private client work, and introduce new organisational structures that lack some of the negative economic and cultural practices that may be associated with the traditional law firm/chambers models.

[161] Again, although such criticism is widespread, it should also be understood in the context of underlying high levels of work satisfaction and commitment – see, eg, Duff and Webley (2004) and Janet Walsh's unpublished (2009) research on women solicitors – reported in the *Law Society Gazette,* 25 March 2010, and available at http://www.lawgazette.co.uk/news/women-solicitors-believe-flexible-working-damages-career.

[162] Challenges are also likely to exist for the chambers model – which has been discussed far less in the literature – partly because it does not employ its members, but also because it may operate through a looser organisational structure than most other forms of business organisation.

70. The lack of good management training and management skills is highlighted, particularly by qualitative research, as an underlying problem in a range of diversity studies. In some, perhaps many, firms employees feel that management is not regarded as a critical activity. Indeed a common view seems to be that 'time spent on management is time lost on billable hours' (Insights Oxford 2010, 13). Smaller firms in particular are often seen as 'making it up as they go along' (Law Society of England and Wales 2010, 7). Poor management is thus seen to perpetuate informal and often unfair working practices and cultures, for example:

    a.   Equity partnership itself is seen as a vehicle for perpetuating an 'old boys club', a tendency that may be exacerbated by the use of salaried partnerships as an intermediate rung (Insight Oxford 2010, 16; Sommerlad et al 2010, 32)

    b.   lack of clarity over promotion criteria used by firms (Insight Oxford Ltd 2010; Law Society of England and Wales 2010)

    c.   Absence of clear pay structures and published pay scales (Law Society of England and Wales 2010)

    d.   Absence of support structures, particularly coaching and mentoring, and support for diversity networks. These are important to redress the balance of informal support and mentoring which 'was reported as characterising most respondents' workplaces, and the fact that in practice this meant that powerful senior figures (generally white men) tended to foster the careers of young white men.' (Sommerlad et al 2010, 7)

    e.   In similar vein, firms' attitudes to women returners constitute the main deterrent to returning (Siem 2004, 105).

71. It will be obvious that many of these are not purely diversity issues; they are poor practices by any modern management standards, but ones that also appear to have a disproportionate impact on employees with protected characteristics.

Training for transition

72. The complexities of modern legal practice create a range of critical transition points in individuals' careers where training may produce significant benefits. Studies thus emphasise the difficulty of changing specialisation (Duff and Webley 2004); the need for 'up-skilling' following a career break (Siems 2004, 105–6), and the pressures of setting up one's own practice. Some of these have been a matter of concern in studies dating back to the mid- 1990s (eg, re-training for women returners) and it is at least a matter of note that these issues are still arising.

73. In the context of setting up a new practice, it is notable that disproportionate numbers of BME solicitors are setting up their own practices. This was seen in a number of studies as a direct consequence of the foreclosure of other career routes (Law Society of England and Wales 2010). We also know from the Ouseley Report that smaller firms are more likely to get into business and disciplinary difficulties, and have evidence of a disproportionate number of complaints being brought against BME solicitors (SRA 2008). Taken together, these raise a more general equality question for the Review: whether such disproportionality exists among other (LSA) regulated professions (the interim PK report for the SRA in 2009 found little available evidence), and whether there are specific gaps in the support available to lawyers in training and at critical later transition points which, if

addressed, might reduce that disproportionality.

Diversity training

74. The need for diversity training has been noted in a number of studies, and particular gaps, such as developing managers' awareness of LGB issues, have been highlighted (Interlaw Diversity Forum 2010, 24). Sommerlad et al (2010) recommend that diversity training should take place at several career points including the LLB, LPC and BPTC stages and for qualified lawyers (as CPD). They suggest consideration should also be given to the regulators requiring training of current senior partners/ line managers.

75. While there is no doubt that diversity training appears the 'right thing to do', is mandation the best way forward? Its effects and effectiveness are open to question. It might be argued that it is not the job of the regulators to advance social justice in this way, or that much of the diversity debate is currently framed in ways that undermines the dignity and self-respect of its intended beneficiaries, or that care needs to be taken to limit the backlash from those who regard it as tokenism on one side and mere 'political correctness' on the other. Equally, it is the job of the approved regulators to ensure compliance with the equality and diversity principles and outcomes contained in their own codes and handbooks. The arguments are many and nuanced, more nuanced than the space in this review allows (Ashley 2011; Braithwaite 2010b; Nicolson 2005).

76. A more practical concern may be its limited efficacy. Ashley (2010, 720-21) thus argues that, even in firms where policies are in place, including a culture of diversity training, diversity still tends to operate within parameters of risk that are set by assumed cultural (and particularly perceived client) expectations of what a lawyer needs to be, a finding supported by other research which points to the role of diversity staff in negotiating and compromising the impact of diversity policies (Braithwaite 2010a). To step outside of those cultural parameters is thus to risk diminishing the perceived value of the firm's services, and this, for the firms involved, overrides other considerations. This points, perhaps, to a larger root problem: how should the system not just of education and training, but of regulation more generally, respond? How far should one go in setting, monitoring, and enforcing formal diversity standards, particularly in a context where the underlying structural and cultural inequalities are largely beyond the reach of legal services regulation?

The costs of CPD

77. CPD as a topic is considered more fully in chapter 5 of this review. We have already noted there that there is very little existing literature, and that is doubly true in respect of equality, diversity and social mobility within the legal profession.

78. The cost of CPD may be a particular issue for the smaller professions and paralegal bodies, and, given the make-up of those groups, the creation or increase in CPD requirements may have diversity implications.[163]

79. Turning to the larger professions, barristers in independent practice stand out as they are, of course, individually responsible for their CPD. The Bar Council, in its

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[163] For example, the cost of CPD has already been highlighted in our research as an existing challenge by the Institute of Professional Willwriters.

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evidence to ACLEC, raised concerns about the impact of CPD cost, particularly on new practitioners who would already be managing significant debt. This contrasted with the earlier views of the Bar Council's Potter/Southwell Working Party in 1991 (ACLEC 1997, 40-41) which concluded that competition and the resources and support of the Inns would be sufficient to keep costs manageable. Whilst these reports did not address CPD specifically as a diversity issue, it was briefly addressed in the later Neuberger Report as a potential barrier to progression, but was not made the subject of specific recommendations.

80. So far there appears to be little or no published evidence of the costs of CPD acting as a barrier in the solicitors' profession. Most CPD is met by firms as part of the costs of regulation, and much may be provided in-house. In addition, many of the registered providers (e.g. BPP) provide discounts for sole practitioners, arguably reducing the risk of CPD acting as a barrier there. As noted above, for groups like women returners, who wish to update their skills *before* re-entering practice, access to low cost CPD could make a difference.

81. It is difficult to draw parallels with other professions (such as medicine or teaching), where there is a more developed literature, as the CPD undertaken by clinicians and teachers is funded by the state (Brown et al, 2002:652) as opposed to individuals or firms.

Diversity initiatives

82. Diversity initiatives exist at many different points and perform a multiplicity of functions within legal education and the professions.

83. Many diversity initiatives are geared to widening access to legal education and the profession, such as Pathways to Law, the PRIME initiative, and a variety of initiatives supported independently by the Bar and Inns of Court. The amount of such outreach activity is considerable and has been commended (Milburn 2012a). A recent paper published by the LSB usefully identifies a range of such activities, though it offers little meaningful evaluation (LSB 2010). We do not intend to repeat those large amounts of descriptive information here, but this work does highlight both the extent of activity being undertaken by a wide range of professional bodies and groups, often working in conjunction with charitable institutions, HEIs, community groups and others. That study also does not highlight other access and outreach work by schools, HEIs and others that is geared more generally to widening participation in HE. This also cannot be discounted. When we start to look at the volume of organisations and activities involved, this highlights the fragmentary and complex nature of provision. These initiatives undoubtedly make a difference at the level of the individuals supported, but collectively, it is rather less clear what scale and reach such initiatives have.

84. The underlying point is that there is relatively little published (or indeed, so far as we can tell unpublished) research and evaluation, identifying and assessing the impact or effectiveness of such interventions. This seems to be a pressing concern, and one that has also been highlighted by the Legal Services Board in both its Diversity Forum

of Professional Regulators, and its recent consultation on diversity,[164] and by the Milburn Report (2012a: 40). Are such initiatives an effective means of bringing about systemic, intergenerational, change or do they primarily ameliorate some instances of individual disadvantage? What is or would be the most effective uses of scarce resources in this area? These are questions to which we need answers.

85. Diversity initiatives may also be developed, primarily by representative bodies and individual organisations, as part of a policy of developing and retaining a well-qualified and diverse workforce. Examples here include the Law Society's Diversity and Inclusion Charter, which was launched with the support of over 80 firms in 2009, as well as law firm and Bar Council participation in the government's Business Compact initiative. The Charter initiative is particularly interesting insofar as it requires member firms to self-assess against the Law Society's Equality and Diversity Standards. In other words it adopts through a voluntary scheme a methodology akin to the self-assessment of ethical infrastructure adopted by the regulator in New South Wales (Parker, Gordon, and Mark 2010). This fits well with outcomes-focussed approaches to standards and regulation.

86. The use of such schemes to develop, among other things, leadership in promoting equality and diversity objectives, assurance mechanisms for fair employment practices, diversity work placement and student mentoring schemes; formal in-house mentoring of new professionals and the establishment of diversity networks are seen in policy terms as important steps forward. However, it has also been argued that many such initiatives are largely confined to large corporate law firms, and the in-house sector, and are in general likely to reach only a limited number of individuals, and hence unlikely to produce significant or rapid changes to the overall culture of the profession (Sommerlad et al 2010).

Other legal service providers

87. The size of the total legal services sector in England and Wales is uncertain. One recent estimate suggests it may be in the region of 300,000 persons.[165] Around half of this number are employed in regulated occupations, that is, either as persons authorised to deliver reserved legal activities under the Legal Services Act 2007, s.18, or as regulated immigration advisors. Within the legal services sector in 2010 there were 136,556 authorised persons, and a further 4150 regulated immigration advisers, making a total of 140,706 directly[166] regulated individuals.[167] Solicitors and barristers comprise the largest of these regulated groups, together accounting for approximately 89% of the total regulated workforce.

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http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/diversity_consultation_publish.pdf

[165] International Financial Services London puts the UK wide figure at about 320,000 in 2010;

[166] These figures thus exclude paralegal and support workers in the sector who are employed by regulated entities but are not themselves authorised to deliver reserved legal or immigration services. A high proportion of members of other regulated professions are employed in solicitors' practices. Unpublished SRA data thus indicate that 40% of the fee earners employed by solicitors' firms are not solicitors. It is not clear from these data what proportion of them are authorised persons. Such individuals are *indirectly* regulated by virtue of their employment in regulated entities. The data also exclude those – eg willwriters - who deliver unreserved legal services through unregulated entities or on their own account.

[167] Claims management companies are regulated by the Ministry of Justice as entities, not individuals, and so are also excluded from this analysis.

88. There is very little literature relating to other professional and occupational groups within the legal services sector. This includes an absence of demographic data in the public domain. The LSB's requirement of more extensive monitoring of protected characteristics across the workforce will help in analysing future trends, but that will be too late in the context of this review. The reporting requirement does not extend to entities regulated by OISC or the Ministry of Justice, neither of which currently publish individual level diversity data on their regulated communities.

89. What we have been able to ascertain so far by research from public information and unpublished sources is considered more fully in LETR Discussion Paper 02/2011. In sum it shows a range of entry patterns and demographics. It emphasises the extent to which at least some of the groups are very highly, or at least increasingly, feminised (eg willwriters, CILEx), or appear to have a large BME composition (OISC-registered immigration advisers), but there is no overarching pattern apparent at this stage.

90. The one group for whom there is a developing literature is CILEx. CILEx has moved in recent years from the position of a 'subordinate' to an independent profession, distinct, at least in regulatory terms, from the both the solicitor and paralegal workforces. Demographically Chartered legal executives are drawn from a far wider social background than solicitors: 85% of them come from families where neither parent went to university; three out of four are women.

91. How far the feminisation of the profession, in the present cultural setting, reinforces or re-inscribes legal executives' subordinate status, is moot. Whilst the profession collectively has pursued a strategy of achieving 'classical professionalism', Francis notes that legal executives in practice seem to tread a fine line between those who are treated as equal fee-earners, and enjoy similar levels of autonomy to their solicitor colleagues and those who negotiate the more difficult terrain of being seen as either a failed solicitor or glorified legal secretary/paralegal (Francis 2006, 2011). Francis's work also highlights that these distinctions are potentially gendered: that male legal executives, particularly in larger firms, may more readily wield autonomy, or else 'more naturally' choose to 'get out quick' and cross-qualify as solicitors (Francis 2011, 76, 78-9). These inequalities have also been reflected in pay differentials between men and women legal executives (Sidaway and Punt 1997, 26).

92. At present relatively few CILEX lawyers actually exercise their option to qualify as solicitors by completing the LPC. In 2008/09 the number of CILEx lawyers admitted to the role was 147, or 1.7% of all admissions (Dixon 2011, 8). To that extent, the impact of the CILEx route on the potential diversity of the solicitors' profession is, numerically at least, relatively limited.

93. CILEx has latterly been giving greater prominence to its graduate entry route. Whilst this is an obvious strategic response to the current market, Francis (2011, 81) asserts that it also thereby risks undermining the status of its traditional membership, and exposing its claims to providing a diverse and open route into the sector to charges of political expediency. It may also reflect and (arguably) help reinforce existing status distinctions between elite and non-elite university graduates, as the CILEx route is potentially most attractive to post-92 providers.

International Comparisons

94. In this section we consider developments in two other Common Law jurisdictions: the USA and Australia. In both jurisdictions there is an extensive literature on gender equality in the legal profession. In the US there is also a great deal of work on the experiences of black and hispanic lawyers in law school and in the profession. In this section, however, we intend to focus primarily on issues that bear perhaps more usefully on some of the regulatory and other gaps identified elsewhere in this paper.

USA

95. The distinction between the US and UK strategies for addressing issues of equality and diversity within the legal profession may be best understood within the wider context of differing regulatory paradigms. The US method, as expressed in the American Bar Association (ABA) mission statement is outcomes focussed, and as such sets a quantifiable goal against which the success or failure of any initiative aimed at improving diversity may be measured. In contrast to the approach taken by the regulators in England and Wales, who have tended not to commit themselves to an outcomes based definition of a diverse legal profession, the ABA considers the goal of its equality and diversity initiatives to be a legal profession that proportionately reflects the ethnic composition of the population of the United States (Commission on Racial and Ethnic Diversity in the Profession 2010, 3).

96. The ABA first introduced a commitment to supporting the participation of minorities in the legal profession in 1986. As such, its mission statement was amended to demonstrate an organisational commitment to: '…promote the full and equal participation in the legal profession by minorities' (Commission on Racial and Ethnic Diversity in the Profession 2010, 1). At this time the ABA established the Commission on Racial and Ethnic Diversity in the Profession to both drive and monitor progress towards achieving this aim. In 2008 the ABA House of Delegates undertook to reform the goals and mission of the ABA, reducing the organisation's mission statement to four key goals. The third of these Goals is to: 'Eliminate Bias and Enhance Diversity', and its attendant objectives are stated as firstly ' to promote full and equal participation in the association, our profession and the justice system by all persons' (Commission on Racial and Ethnic Diversity in the Profession,2010: 1) and secondly to: 'eliminate bias in the legal profession and the justice system' (Commission on Racial and Ethnic Diversity in the Profession 2010, 1)

97. These goals are advanced through the work of three entities within the ABA, coordinated by the Centre for Racial and Ethnic Diversity (established in 2001): the Commission, whose role is to provide services for racially and ethnically diverse legal professionals, the Presidential Advisory Counsel on Diversity in the Profession - which provides programs and services to improve access and diversity in the education system that prepares individuals for careers in the legal profession and the Council on Racial and Ethnic Justice, which works to address issues related to racial and ethnic bias in the judicial system. (Commission on Racial and Ethnic Diversity in the Profession 2010, 1). The Commission is committed to annual measurement and analysis of progress towards its goal of eliminating bias and enhancing diversity, in addition to its roles in motivating and inspiring ABA leaders to promote the organisation's equality and diversity objective and inspiring the profession to maintain its commitment to diversity (Commission on Racial and

Ethnic Diversity in the Profession, 2010: 1). To this end, the Commission conducts an annual survey of the ABA's members, which is published in its Goal III report, available from the ABA website.

98. The 2010 Goal III report compares the percentage of lawyers and judges from racial and ethnic minority backgrounds with the percentage of individuals from racial and ethnic minority backgrounds within the general population (see Table 7.4 below). It uses these figures as a metric for expressing progress towards its stated ambition to create a more diverse legal profession.

48. 2000	49. US Census Minority Demographics/Percentages 50.		
51.	52. General Population	53. Lawyers	54. Lawyers and Judges
55. African American	56. 12.90%	57. 3.9%	58. 4.20%
59. Asian American	60. 4.20%	61. 2.3%	62. 2.29%
63. Hispanic	64. 12.50%	65. 3.3%	66. 3.70%
67. Native American	68. 1.50%	69. 0.2%	70. 0.24%
71. Total	72. 31.1%	73. 9.7%	74. 10.43%

Table 7.4: Number of lawyers and judges from racial and ethnic minority backgrounds compared with general population (Commission on Racial and Ethnic Diversity in the Profession, 2010, 3)

99. The significantly higher ethnic population figures and low participation rates appear in stark contrast to the UK experience. The report also analyses data on the ethnic and racial composition of the ABA's membership. ABA members are asked to self report their racial and ethnic background, these indicate that that the proportion of ABA members from African American, Asian American and Hispanic racial and ethnic backgrounds has increased year on year since 2000. The proportion of Asian American members of the ABA is the closest to reflecting the proportion of Asian Americans in the general population (not accounting for increases in percentage members of general population from Asian American backgrounds since the 2000 census). Conversely, the percentage of ABA members from Native American backgrounds has fallen slightly since 2000.

100. Whilst numbers of ABA members who choose not to report their ethnic and racial background has fallen since 2001, the number of ABA members in 2010 who chose not to supply this information constituted 69.2% of the total membership. Again, relative to UK non-response levels, this is striking, and arguably calls into question the validity of the conclusions drawn from the data, whilst exposing a crucial flaw with attempting to measure the success of diversity initiatives in this way. The Commission acknowledges that race is a 'sensitive' issue (Commission on Racial and Ethnic Diversity in the Profession 2010, 2) and cites this as a reason for individuals choosing not to contribute this data.

Affirmative Action

101. No comprehensive study of equality and diversity in the US legal profession can be undertaken without reference to the debates surrounding affirmative action initiatives. However, as many commentators have asserted, 'affirmative action' is a concept that defies rigorous definition (White, 2004:2117). Historically, affirmative action referred to a group of remedies designed and administered informally to combat the structural inequalities created by Jim Crow (White 2004, 2120) before his judicial repudiation in *Brown v. Board of Education* 347 US. 483 (1954). The subsequent anti- discrimination ethic, which has been defined as 'the general principle of disfavouring classifications and other decisions and practices that depend on the race or ethnic origin of the parties affected' (Brest 1976, I) dominated civil rights movement generated policies in the US from the 1970s (White 2004, 2121). It has been argued that affirmative action was out of step with these initiatives as it focussed on remedying structural inequality, rather than tackling individual acts of discrimination (White 2004, 2121). The mid 1970s and early 1980s may be characterised as a period of consternation regarding the extent and nature of affirmative action programmes. During the 1990s and early 2000s the debate shifted to a discussion as to whether affirmative action ought to be subsumed by the anti-discrimination ethic, with the decisions in *Grutter v. Bollinger* 123 S Ct. 2325 (2003) and *Gratz v. Bollinger* 123 S Ct. 2411 (2003) seemingly refuting that this should be the case.

102. In the context of law school admissions, affirmative action policies may be understood to refer to those policies that use racial preferences in college and graduate school admissions with the aim of: (i) improving diversity within higher education, (ii) widening access to higher education for people from minority ethnic and racial backgrounds, (iii) correcting historic inequalities in the representation of minorities within the legal profession and (iv) 'giving non-whites in America…entrée to the national elite' (Sander 2004, 368). Advocates of these policies assert that they are effective in redressing structural barriers to entry to higher education that disproportionately affect individuals from black and ethnic minority backgrounds. However, critics argue that the impact of these policies can be pernicious, and indeed detrimental to the success of the individuals they are trying to support. Criticisms levelled at affirmative action admissions procedures range from those relating to the less tangible impact such policies have in increasing levels of stigma and stereotyping of individuals from black and racial minority backgrounds in the legal profession (Sander 2004, 368) to concerns that affirmative action in admissions procedures can actually result in lowering the performance of, and higher attrition rates amongst those individuals who benefit from preferential admissions (Sander 2004, 369). Sander, whose systematic analysis of the impact of affirmative action policies in law schools on individuals from black minority backgrounds, points to a 'growing body of evidence… that students who attend schools where they are at a significant academic disadvantage suffer a variety of ill effects, from the erosion of aspirations to a simple failure to learn as much as they do in an environment where their credentials match those of their peers' (373). He goes on to assert that grades, rather than attendance at an elite school are a far better predictor of future performance at the bar exam (373) and argues that:

> since racial preferences have the effect of boosting black's school quality but sharply lowering their average grades, blacks have much higher failure rates on the bar than do whites with similar LSAT scores and undergraduate GPA's (Sander 2004, 373).

103. Further criticisms of the affirmative action policies of elite universities focus on their inability to target those most harmed by racism (Nadel 2006, 326) and argue that instead affirmative action should target those communities most affected by racism at an earlier stage in their education. A compromise position, put forward by Nadel argues for a system where 'an individual's race and ethnicity would only be considered for the purposes of providing context to a candidates achievements and experiences, i.e. to confirm the significance of obstacles faced or uncommon backgrounds' (Nadel 2006, 328). It thus argues that using contextual knowledge in this way, rather than simply focusing on race or ethnicity per se, could eliminate some of the more troubling unintended consequences of current affirmative action initiatives.

Admissions tests and equality

104. Much of the literature relating to structural barriers to entry to US law schools now focuses on the role of the Law School Admissions Test ('LSAT') in perpetuating discrimination, particularly against individuals from black or latino ethnic minority backgrounds. (Jones 2006, 20). According to Kidder (2001), law school applicants with essentially equivalent college grades are apt to receive discrepant LSAT scores depending on their race or ethnicity. Research has demonstrated that the mean LSAT scores of blacks are persistently lower than those of whites (Jones 2006,18). It has been argued that as law schools increasingly set higher minimum LSAT requirements (Jones, 2006:18) than are consistently achieved by the majority black students, then 'many students who are disqualified in this way actually have significantly higher [college] grades than their white counterparts' (Jones 2006, 19). This, combined with an overreliance on LSAT scores in the admissions process (an overreliance borne of the need for expedient mechanisms of deciding between applicants, it is argued) not only expressly goes against the LSAT Council's guidance notes, but actively contributes to the systemic decline in minority enrolment in law schools (Jones 2006, 21). Critics also question the evidence base for the LSAT as a legitimate and reliable indicator of an individual's likely academic performance (Connor, 1989; Jones, 2006:20). These criticisms are worth bearing in mind in any analysis of the future role of aptitude tests in influencing admissions procedures in UK legal education.

Australia

105. In contrast to the wealth of literature that exists on equality and diversity within the legal profession in the USA, at this stage, there appears to be a limited amount of literature relating to the Australian experience. Much of what is published related to affirmative action in the context of improving the representation of women within the Australian legal profession (Sheridan 1998), and the gender equality debates on the whole tend to mirror many of those in the UK. In a meta-review of the literature of the preceding decade, Hutchinson notes that writers almost universally assert that the rate of change is (barely) incremental and exceedingly slow (Hutchinson 2005).

106. A 2010 report by the Law Admissions Consultative Committee makes no mention of equality and diversity in its review of admission requirements. The Law Council of Australia's website also makes no mention of diversity or equality within the profession. Whilst the Law Council of Australia has an established Indigenous Legal Issues Committee, the remit of this organisation was, until 2010 restricted to addressing substantive legal and constitutional issues facing indigenous people. It

has only recently begun to address the structural issues affecting the participation of indigenous Australians within the legal profession, seeking to overcome these primarily through the provision of financial aid to students from indigenous backgrounds (LCA 2010, 23). It will be interesting to examine the impact of these initiatives as they evolve.

Themes arising from the debate

An overview of themes/conclusions

107. From the literature reviewed here we can draw a number of broad conclusions which provide an important context for the discussion that follows.

108. Undoubted progress has been made over the last twenty to thirty years in increasing equality and diversity in legal education and training. Law may be generally 'ahead of the curve' in relation to many professions, but success remains qualified.

109. The complexity of disadvantage is such that, whilst prior educational attainment is perhaps the most significant factor in explaining existing patterns of disadvantage, there is no single or predominant barrier to access, and there are unlikely to be 'quick fixes' to a problem that is, in many respects, shaped by culturally ingrained and intergenerational patterns of disadvantage. As Sullivan (2010:2) concludes:

> Research focused on barriers to entry and progression in the legal market tends to be at one stage, for example gaining the training contract. We believe that the lack of diversity in the legal market arises from a combination of factors that make pursuing a career in legal services difficult for those outside of the traditional norm for a lawyer. In the legal market such cumulative problems: failing to gain the right A-levels; not getting work experience in law firms while at school; attending the wrong university; training at the wrong firm all add up to insurmountable barriers that permanently effect the careers of lawyers and segregate the market.

110. Data clearly indicate that, structurally, the key barriers to access remain the training contract and pupillage. Over-provision of capacity at LPC and BPTC stages indicates that these are not significant (numerical) barriers, though they may act as a limited socio-economic filter based on attainment and ascriptive characteristics.

111. Looking at recruitment trends, the traditional legal professions are performing well relative to broad population trends in gender and ethnicity. However, they are still under-recruiting relative to ethnic minority participation in the earlier stages of legal education. There may be a case for taking university participation figures more into account in assessing the performance of the sector.

112. Whilst gender and ethnicity are, of course, significant, we should not overlook social class (Nicolson 2005; Sommerlad 2008). Indeed, further analysis should be undertaken to assess whether progress on gender and ethnicity may both contribute to the narrowing of social mobility, particularly among the professional elite (The Sutton Trust 2009; Milburn 2009). This would be consistent with trends noted in other jurisdictions and settings (Abel 1992), whereby the effects of pressure to introduce 'outsiders' are mediated, at least to a degree, by apparently neutral and meritocratic recruitment and progression criteria that ensure favoured new (minority) entrants share much of the cultural capital of 'insiders' – cultural capital that is largely reflective of a particular socio-economic status.

113. Increasing participation of currently under-represented groups at elite universities would likely be the single most significant way of increasing social mobility in the legal profession in the short term, but such gains are likely to remain limited without greater adjustment of ascriptive criteria at the recruitment stage, and leave underlying structural inequalities relatively untouched.

114. Global trends tend to disguise the extent to which the legal services sector remains segmented in terms of gender and ethnicity. Examples include the tendency for ethnic minority solicitors to work in smaller high street and legal aid firms, or as sole practitioners; the male bias of the commercial Bar, and the feminisation of the legal executives' profession. Such segmentation matters. It may place barriers in the way of workforce development and career progression, on mobility between parts of the sector, and on opportunities to participate in the power and authority networks and structures that shape the future of the sector.

115. There is greater scope to consider ways in which education and training can contribute to the retention and progression of lawyers with protected characteristics. However, there is evidence of a relative lack of leadership and commitment among both service providers and in some representative bodies (cf Duff and Webley 2004) to meeting such training needs.

116. Most of these observations focus primarily on two equality characteristics: gender, and race/ethnicity. This in itself highlights a very real and significant gap in terms of both baseline information and research on the other protected characteristics. Disability, age, sexual orientation, religion, and pregnancy/maternity status have been far less widely discussed and researched than gender, race and ethnicity, though there is a growing secondary literature in relation to some them.

117. This reflects in part the fact that there has been no historic requirement on HEIs or legal service providers to maintain equality data for factors other than gender, ethnicity and disability, or at all. Under the Equality Act 2010, universities will now be obliged to gather data on all protected characteristics, so as to comply with the public sector equality duty. As noted above, the LSB has also introduced a reporting duty for regulated entities. These changes may make a significant difference to institutions' ability to target resources and interventions in areas of unmet, or possibly previously unidentified, need.[168]

118. Beyond this, the relative lack of recent longitudinal, quantitative, research on diversity trends across legal education and training is a more general concern. This is not a gap that LETR itself can close.

Problematizing meritocracy

119. Policies to enhance social mobility are sometimes seen as interfering in the meritocratic basis of selection, and as a threat to standards. Much of the research discussed here has the potential to turns this challenge around and ask whether it is not the perception of 'meritocracy' itself that is the problem? Legal education and training can be said to be only weakly meritocratic because it relies on too narrow and subjective a conception of merit (see, eg, Zimdars, 2010).

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[168] For example the Equality Challenge Unit research has found that one in five LGBT (lesbian, gay, bisexual and trans) students has had to take time out of their studies to deal with issues related to their sexual orientation, including dealing with cases of harassment and discrimination (Valentine, Wood, and Plummer 2009).

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120. The case may be stated even more strongly: disadvantage is actually reinforced by institutional and cultural barriers created by a 'meritocratic' system that actually rewards the most socially advantaged. In terms of access to the profession, the effect of successive barriers to entry is significantly to reduce the opportunities for those from disadvantaged backgrounds. Expansion of HE numbers, identified by BIS as a key to increasing social mobility, will not necessarily increase access to the professions, but, as Sullivan (2010), and others note, only increase competition for entry to the professions. Moreover a continuing focus on expanding graduate entry may not in any event best meet the diverse workforce needs of the sector. Might some resources be better spent in re-directing potential students to paralegal careers, higher apprenticeships and other ways of accessing (other) legal careers?

121. Questioning the relationship between diversity and standards is intended to problematize, not devalue debates about quality and standards. Currently, not all pathways to the profession are treated the same: all degrees may be nominally equal, but some are clearly more equal than others. The fact that movement into the legal services market is not closely regulated by undergraduate subjects studied and qualifications obtained at university, when combined with highly socially stratified HEIs, has already given us a system in which the importance of *where* one studies can often outweigh *what* one studies (Brennan 2008). Similar issues arise with later stages of training: not all LPCs or BPTCs may carry the same value in the marketplace, and a work-based learning portfolio completed with a variety of training bodies may not carry the same weight as a traditional training contract. This latter point highlights the challenge of one of the main themes of the Review, how do we increase flexibility of training routes, whilst improving or (at the very least) not undermining existing levels of diversity? As we saw in the debates around the Law Society's Training Framework Review, there is a fear that flexibility may also generate new forms of discrimination. At the very least, increasing flexibility in terms of entry routes, admissions criteria, modes of study etc, may also be a double-edged sword. The MMI phenomenon (Raftery and Hout 1993) means that 'middle class' students may initially be better placed to exploit diversity-led changes, with consequently slower or more hidden trickle down effects to the policy's real target audience. The short-term consequences of this need to be borne in mind.

122. Unlike the USA, there has been relatively little enthusiasm for affirmative action approaches in the UK, though arguably this criticism is directed more at 'hard' - such as formal quotas and tie-break preferences in recruitment and progression decisions - rather than 'soft' forms of affirmative action (Nicolson 2005, 221), such as introducing contextual data, or alternative recruitment criteria (Milburn, 2012b). Both hard and soft measures could potentially involve ways of expanding and diversifying the conception of merit in use, and could lawfully facilitate widening participation (Bibbings, 2006).

123. In conclusion, how do we insure that the legal education and training system can discriminate without discriminating? Accommodate and value difference without imposing arbitrary distinctions and hierarchies? How do we address discrimination by the market, within a system that increasingly looks to the market for regulation? These seem to be important challenges for the Review.

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Chapter eight
Key regulatory issues: International comparisons of professions and jurisdictions

Introduction

1. In this chapter we shall examine a number of key regulatory issues through the prisms of international jurisdictional practice, and the practice of other professions. We shall consider first a number of methods of learning and teaching, or heuristics, and the relationship between them and regulation. Next we shall analyse the place of legal ethics within educational regulatory structures. We shall then consider the relationship of legal education, regulation and democracy. The role of technology in legal education is then considered, followed by a summary of some of the literature on change processes in HE and professional education.

Legal educational heuristics and regulation

2. In this section we shall explore a number of approaches to how legal educational practice can best be regulated. One of the core practices in other professions, particularly in medical education, is the generation of research and the encouragement by regulators of the production of that research.[169] It is a central feature of the literature considered in this section (and arises in other chapters of the literature review as well) that the generation, dissemination and implementation of research into educational and related matters is vital to the ongoing health and vitality of legal education in all sectors of the academy and the profession.[170] As we have seen in chapter 2, prior reports into legal education tended either to miss or dismiss this point. We believe that the evidence base provided here shows that legal educational research is critically important to the formation of regulatory policy and practice.

3. As examples we shall consider the research into problem-based learning, as well as the place of quality assurance in legal education. QA is not strictly speaking a heuristic, but the practice and influence of QA regimes do of course affect the structure and content of learning.

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[169] The lack of research data constrains our understanding of how regulation can best be framed. A recent report by the LSB on quality in other regulated professions, for instance, concluded, *inter alia*, that the 'lack of assessment of the quality assurance methods across the professions means that we cannot consider lessons-learned from these professions' (Sullivan, 2011, p. 28).

[170] In medical education it has long been recognized that one of the drivers for high-volume, high-quality research into educational issues has been the focus in medical schools, since at least the late eighties, on evidence-based medical practice. As Trinder and Reynolds put it, evidence-based practice is a significant move away from traditional guides to professional behaviour, namely 'knowledge gained during primary training, prejudice and opinion, outcomes of previous cases, fads and fashions, and advice of senior and not so senior colleagues' (Trinder and Reynolds, 2000, pp. 3-4).

Quality Assurance in Scottish HE

4. Scottish HE approaches to quality assurance are significantly different to those of England and Wales. Law schools in Scottish universities have been affected by the same shaping pressures as have universities elsewhere in the UK: by government funding (or the lack of it), funding council policies, globalisation, information technology, and much else. The quality assurance process and benchmarking have left their mark on law curricula and teaching practices throughout the UK. Initially the concept of quality as accountability (as embodied in the Government White Paper of 1991 and the Further and Higher Education Act, 1992) was much criticised for its lack of focus on improvement or enhancement of educational provision (Yorke, 1994). The MacFarlane Report (1993) clearly pointed out the need for such enhancement. Nevertheless, even here there are differences – Scotland has adopted a quality enhancement regime aimed less at evaluation of quality and more at the enhancement of it. The strategy developed by QAA Scotland (which is based in the Scottish Credit and Qualifications Framework, SCQF, and has been certified against the European Qualifications Framework) has five strands, as outlined on the QAA website:
    a. *A comprehensive programme of institution-led reviews* carried out by HE institutions with guidance from the Scottish Funding Council (SFC)
    b. *Enhancement-led institutional review* – external reviews that involve all Scottish HE institutions over a four-year cycle
    c. *Improved forms of public information about quality*, based on the different needs of the stakeholders involved in HE
    d. *Greater voice for student representation* in institutional quality systems, supported by a national development service, SPARQS (student participation in quality Scotland).
    e. *A national programme of Enhancement Themes*, managed by QAA Scotland, which encourage academic and support staff and students to share current good practice and collectively generate ideas and models for innovation in learning and teaching. Each theme lasts for around two years (the current theme deals with integration of earlier themes around graduate attributes, and the idea of what it means to be a twenty-first century graduate[171]), and is supported through symposia, conferences and other events.[172]

5. Key to the Scottish approach is the process of Enhancement-Led Institutional Review (ELIR). The process reviews
    *   an institution's approach to improving students' learning experiences
    *   its strategy to ensure the academic standards of its awards
    *   its management of the quality of the learning opportunities it offers students who take its programmes.[173]

6. Student experiences are much more to the fore in the ELIR process, as is the concept of partnership – not just between stakeholders in an institution (students, academics, administration), but between national bodies (National Union of Students Scotland, Scottish Funding Council, the Scottish Government and Universities Scotland for instance) and between institutions themselves (QAA Scotland, 2008a). The partnership approach extends to the review process itself, and the means by which standards are maintained. QAA Scotland developed a

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[171] Final reports can be viewed at http://www.enhancementthemes.ac.uk/enhancement-themes/completed-enhancement-themes/graduates-for-the-21st-century

[172] http://www.qaa.ac.uk/Scotland/AboutUs/Pages/Quality-enhancement-framework-in-Scotland.aspx

[173] http://www.qaa.ac.uk/InstitutionReports/types-of-review/Pages/ELIR.aspx)

protocol for this in which the key features are, first, that the response by QAA to a request to investigate risk 'should be phased and proportionate. Second, Scottish HE adopted an 'informal protocol for sharing information often referred to as "no surprises"' (QAA Scotland, 2008b, p. 1).

7. As a regulatory response to the problems of quality assurance, Quality Enhancement is an interesting example where the regulator engages closely not just with the institution, but puts students at the forefront of the processes.

Problem-based learning

8. Where traditional medical education was content-focused and often organised by organ systems, in much the same way that legal education is organised by type of law and legal transaction, more recent approaches take an outcomes approach, with what might be termed clinical scenarios where basic knowledge benchmarks are achieved, alongside increased communication skills, values and attitudinal education and significantly more emphasis on professionalism (Stern, 2005). Medical education regulators have taken a key role in re-aligning medical education in this direction in different countries (Phillips, 2008).[174]

9. Few now doubt that educational theory is important to teaching in HE.[175] This is true of other disciplines too. As an approach to learning, problem-based learning (PBL) is generally taken as being a significant force for good in medical education, but this has not stopped the flow of research literature in medical education analysing why, under what conditions and to what extent it is good for the education of doctors, nurses, dentists and many others to be problem-based. This is in part a recognition that while general guidelines to PBL exist, its implementation can differ quite significantly from one medical faculty to the next; and that a number of different models exist, from pure PBL to hybrid models.[176] It is also a recognition that as a heuristic, PBL has the power to change how doctors practise, and in particular, to change *what* they know (domain knowledge) and how they solve problems.

10. PBL, it is generally agreed, began at McMaster Medical School in the 1960s, where a learning environment was introduced that combined small group, co-operative and self-directive learning methods. As Barrows & Kelson point out, it is both a method of learning medical science and a complete curriculum method. It has developed in many ways over the past half-century, adapted to local curricula and disciplines beyond medicine, including engineering and law, and has been extensively researched and regulated.

11. According to some of the literature, students on a PBL course show no decrease in science domain knowledge compared to their traditional course counterparts (Albanese, 1993, pp. 52-81). They are more likely to use that knowledge in problem-solving activities than students on more traditional courses, and to perceive that they have developed more effective problem-solving and communication skills, and a greater sense of personal responsibility than did students who received lectures

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[174] The following analysis of PBL is derived from Maharg (2007), with permission.
[175] See for instance Cownie (2000).
[176] For a general introduction to PBL, see Schmidt (1983).

(Bransford *et al,* 1989). These differences extend down to the detail of personal methods of study (Newble & Clarke, 1986; Nolte *et al,* 1988).

12. Other researchers found that PBL students could be weaker on basic sciences (Vernon & Blake, 1993). Colliver reported no overall and convincing evidence that PBL could significantly improve knowledge base and clinical performance, to the extent justified by the resources that were required for the task of implementing PBL (Colliver, 2000). It has to be said, though, that many other studies contradict these findings.[177] Norman & Schmidt (2000) for instance observed that a number of studies reported positively on PBL learners' abilities to recall information, in part because remembered information helps learners to construct explanations; in part because elaborations of remembered information enables the integration of new information; and also because the contextual learning activities of PBL enabled information to be recalled more easily at a later point. In a two-year comparison study of a traditional curriculum against a PBL curriculum, Eisenstadt found that PBL students tested lower on test scores at the end of the study than traditional students, but retained much more after re-testing a year later (Eisenstaedt, 1990).

13. If the studies are contradictory, what the great majority of them agree upon is that PBL is a sufficiently powerful heuristic to have changed the way that many medical teachers now organise their teaching of problem-identification and problem-solving. The studies carried out by Patel *et al* confirm this. In their comparison of an admittedly small sample, they discovered that PBL curriculum students tended to solve problems by reasoning from the data of the problem to explanations. This they termed 'backward reasoning', and contrasted it with the 'forward reasoning', of experts, which proceeded by comparing data against previous experience of data types, to achieve a congruence between the two. Backward reasoning, they held, generated multiple explanations, some of them erroneous, while forward reasoning gave rise to fewer clinical errors. Perhaps most controversially, they identified forward reasoning in the practice of students undertaking traditional curricula, and identified its source as domain knowledge, not problem-solving heuristics. In other words, according to their results, PBL appeared to be teaching students ineffective reasoning methods. In response to these research findings, some researchers have advocated better methods of presenting domain knowledge, in place of a move to full-scale PBL (Claessen & Boshuizen, 1985).

14. It seems to be a persuasive point. But whether or not backward reasoning – or 'hypothetico-deductive reasoning', to give it its proper title – is ineffective is debatable. Forward reasoning may be useful for the diagnosis of relatively straightforward clinical problems, but even experts use backward reasoning when presented with uncertain or ill-structured problems, or when they move from a domain they are confident in to one in which they have less domain knowledge (Bergus *et al,* 1995). Moreover, accurate diagnosis relies on what some researchers have identified as an accurate and well-remembered network or semantic structure that is a form of schema (Bordage & Lemieux, 1991).

15. What the literature proves is that the experimental cognitive psychology research on this point of problem-solving is contradictory. Why is it, then, one might ask, that PBL has become so popular in the health sciences, and not least with regulators? One answer is that it has many other benefits that traditional approaches to health

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[177] See for example Vernon *et al* (1993) and Hmelo *et al* (1997).

education do not offer. For instance, students enjoy problem-identification and problem-solving, and engage more readily in active learning (Amos & White, 1998; Barr & Tagg, 1995; Duffy & Cunningham, 1996). They make greater use of background reading, have more positive attitudes to the instructional milieu, and they take greater personal responsibility for their work.[178]

16. But if we step back for a moment from the detail of the research itself, we can see what is happening as regards PBL interdisciplinary research strategies. Medical practitioners and medical educators have liaised with cognitive scientists, or learned about cognitive educational research themselves, in order to understand more about the processes of learning involved.[179] Cognitive psychologists themselves report on these processes and results. What we have, then, is a community of disciplinary practitioners in medicine co-operating with another disciplinary community in cognitive science. As a result, the standards and approaches of one community – experimental cognitive psychology – is brought to bear upon medical education, which becomes subject to forms of discourse, measurement and judgement appropriate to this disciplinary community. In turn, the medical community evolved its own special forms of educational expertise – PBL itself, and statistical and psychometric approaches to assessment, such as standardisation of patients. It has to be said, of course, that the statistical bases of cognitive science and medical science mean that *au fond* there are many overlaps between the two disciplines. [180] As one study puts it:

> systematic reviews of controlled studies that focus on outcomes resonate with a community which has seen the success of randomised, controlled trials in biomedical science. The complexities of educational interventions may indicate that this is not the most appropriate tool for research in this area and may have contributed to the difficulties that the authors had in coming to a definitive answer (Farrow & Norman, 2003, p. 1132).

17. Recently, other discourses have entered the field, notably situated learning, constructivist learning and teamwork learning. Regarding the last, Bleakely has noted that despite the emphasis in health care upon interprofessional teamwork,

> [i]ndividualistic models of learning continue to be privileged within medical education … Where clinical skills are collaborative, such as resuscitation team activity, we need learning theories with explanatory and predictive power for such contexts. This is a health-care imperative, where the majority of medical errors are systems-based and quality of teamwork is linked with improving patient outcomes. (Bleakley, 2006, p. 152).

Bleakely compares research based on acquisition metaphors to research based on metaphors of participation where collective work is 'more than the sum of any recollections individual team members might bring to the work situation' (p.153); and he goes on to explore aspects of theories of identity-formation, narration, the rhetorical strategies of practitioners, models of ethical awareness, the role of activity theory, distributed cognition and dynamicist learning in complex adaptive systems.[181]

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[178] See, respectively, Blumberg & Michael (1992); de Vries *et al* (1989); Lieux (1996).

[179] See for instance the interesting early history of the Standardized Patient movement, as recounted by Wallace (1997). See also Schmidt (1993), p. 432.

[180] Including the use of meta-analyses of research – see for example Newman (2001).

[181] Bleakley is also interested in the aesthetic dimensions of looking and judging – see the project involving three medical practitioners and three visual artists into processes of clinical and aesthetic judgements in the visual domain, in Bleakley *et al* (2003).

18. Tracking the research base in this very brief overview of some of the literature, we can see how important it is for regulators and accreditors to have access to a body of evidence that may persuade new medical schools to commit to the PBL approach who otherwise might be reluctant to enter the field. It is also evidence of effectiveness that works to give security to regulators and to the representative bodies of professionals, eg the British Medical Association. The literature also acts as a filter to new approaches. PBL, as Davis & Harden point out (1999) is not a strictly-defined heuristic: they define it variously as 'an approach to learning and to curriculum design with a number of specified features', 'a range of approaches – a genus with different species', and 'an umbrella term that involves any learning experiences in which problems are solved' (Davis & Harden, 1999, p. 131). The categories are not closed, and new approaches to PBL are constantly developed. What is important for regulators in this ecology is that they are developed, and then implemented, researched and written up. It is also important that the literature is peer-reviewed, and is set within a searchable context, with tools such as critical reviews, meta-reviews and the like. These give some clarity to the research results being obtained, and enable regulators to ascertain the quality of different approaches, and then to set their own guidelines based upon evidence arising from the field.

Ethics and educational regulatory structures

Ethics and undergraduate study: The Australian Learning and Teaching Academic Standards project

19. In England and Wales there is a complex debate about the place of ethics in undergraduate studies. The arguments for and against mandatory ethics and professional responsibility teaching is set out in Economides & Rogers (2009). Their report advocates strongly for the inclusion of ethics at the undergraduate stage. Their first recommendation states:

> We recommend TLS take a lead and encourage the SRA to initiate a review to consider the pros and cons of revisiting the content of the Joint Announcement in order to see whether any consensus exists, or could be constructed, to make awareness of and commitment to legal values, and the moral context of law, mandatory in undergraduate law degrees, as originally proposed in the ACLEC Report (1996, p. 24).

They also recommended that:

> the professional bodies should together consider what support might be offered to law schools to assist them to comply with this flexible guidance, as currently is the case with library provision, and in reviewing the process of validating law degrees.

20. Since the publication of the Economides & Rogers report, Australia has taken interesting steps in this direction that could inform the development of ethics at undergraduate stages in England and Wales. The Learning and Teaching Academic Standards (LTAS) project in Law has developed a set of what it terms six Threshold Learning Outcomes (TLOs) for the LLB.[182] The drafting process, carried out in 2010, was an iterative consultation process involving 'judiciary, admitting authorities, legal

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[182] Note that the TLOs do not address the JD, NSW's Legal Profession Admission Board's Diploma in Law, the honours component of the LLB, the practical legal training (PLT) requirements for admission to the Australian legal profession, and other levels of qualification such as Masters programmes. These will be the subject of separate standards statements (4).

profession, regulators, academics, students and recent graduates'. The TLOs were endorsed by the Council of Australian Law Deans (CALD) in November 2010; and this was achieved in no small measure thanks to the 'genuine collaboration between the academy and peak professional, accrediting and student organisations' (Kift, Israel & Field, 2011, p. 1).

21. The six TLOs are not equally weighted across the curriculum (p. 9), but they are regarded within the Australian Qualifications Framework as the 'minimum standards of performance, achievement or attainment at the bachelor qualification level' (p. 9). The authors imply that this is not an attempt to create a national curriculum: they state that programme diversity is 'valued', and providers of bachelor degree programmes are expected to meet or exceed the standards.

22. TLO 2 is the statement on 'Ethics and professional responsibility':
    Graduates of the Bachelor of Laws will demonstrate:
    - an understanding of approaches to ethical decision-making,
    - an ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts,
    - an ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community, and
    - a developing ability to exercise professional judgement. (Kift, Israel & Field, 2011, p. 14)

23. The Notes give background to the phraseology and conceptual freight of the Statement. For example the Notes make clear that the phrase 'approaches to ethical decision-making' is 'not intended to limit law schools and their curriculum to the theoretical bases of ethical decision-making' (15). What is interesting about the Statement is how closely it is sited to professional work. The authors cite Economides & Rogers on the need to extend development of ethical awareness from undergraduate through to professional education, and cite Parker & Evans, (2007) on the process by which ethical awareness of practice issues is part of ethical reasoning. Indeed it is possible to see that the movement from a. through to d. is actually a circle – or perhaps more accurately, a developmental spiral. Point a. is really, as Kift, Israel & Field put it, 'an early, emergent standard of ability' (p. 15) where the student develops ethical awareness in the communities of self, social circles, academic circles. This, it is postulated, is further developed as a deepening awareness of legal ethics as students move through the higher reaches of the bachelor degree and professional qualifications. The 'promotion of justice' and 'service to the community' (point c.) clearly go beyond point a. (and the authors recognise this, citing US authors and the MacCrate Report in particular). 'Justice', the authors observe in their notes, is to be interpreted widely to 'provide opportunities for diverse curricular responses by different law schools' (p. 16). Point d., which focuses on 'professional judgement', returns to the individual, but the individual within a new and more sophisticated professional context, within which judgement is developed so that it can be practised more particularly within a professional legal context.

Pro bono, ethics and legal education

24. No one disputes that ethical awareness is essential in professional education and training, both at primary stages such as the BPTC and LPC, and in CPD. How regulators might ensure that such education and training takes place and how, is a

much more complex issue. At CPD stage it is fairly clear that mandatory ethics initiatives, to date, have had little effect. A good example of this in the USA was the proposal of an ABA Commission on Evaluation of Professional Standards that there be a mandatory 40 hours annually given over to pro bono activities (Armstrong, 1982). The proposed rule provided for annual reports by lawyers concerning mandatory pro bono efforts to 'appropriate regulatory authorities'. The proposal caused considerable concern at the draft discussion stage, and was dropped from the final report (Slonim, 1981a).[183] Discussing the whole process by which the ABA had developed its Model Rules for Professional Conduct, Schneyer argued against earlier critical theories about the provenance and significance of professional ethics codes, and for a view of the Model Rules as an instance of *de facto* law-making by a private group. He constructed what he termed 'professionalism-in-fact' – a matrix of common themes by which lawyers thought about the field of legal ethics – and sited this in the diversity and pluralism of lawyers' practices, arguing that the roots of lawyers' ethical preoccupations could be found in the circumstances of their particular practices.

25. The development of pro bono as an institutionalised practice is examined extensively in the US literature. Cummings (2004), for example, has analysed the move in the US from *ad hoc* and individualised pro bono to a centralise and streamlined system that is distributed institutionally (eg through local Bars, federal legal services and the non-profit sector as well as large law firms) by lawyers acting primarily out of a sense of professional duty. He reveals the consequences of the delivery of legal services in this structure, contrasting the benefits of leveraged law firm resources against what is often a set of circumstances where limitations on pro bono activity is imposed by the dependence on lawyers whose dominant professional and commercial concern is the interest of their commercial clients. The advantages are well recognised – 'decentralised structure, collaborative relationships, pragmatic alliances' – but Cummings also points to the 'systemic challenges' that pro bono poses – the refusal of pro bono to 'take on corporate practice and its dilettantish approach to advancing the interests of marginalised groups' and its tendency to privilege 'professional interests over concerns of social justice – promoting the image of equal access without the reality' (2004, pp. 148-9).

26. Rhode (1999) takes a more proactive approach to the issue of regulation, arguing that few lawyers in the US 'come close to the American Bar Association's Model Rules' on the subject (p. 2415) in spite of public need; and noting that 'many of the nation's landmark public-interest cases have grown out of lawyers' voluntary contributions' (pp. 2415-6). She also makes the case for creating a culture where pro bono is more accepted as part of the cultural *habitus* of lawyers' working environment, and argues for much more pro bono at law schools, noting that while there are obvious educational benefits to pro bono service, particularly in the development of legal skills and client-centred values, 'positive experience with pro bono work as a student will at least increase the likelihood of similar work later in life (p. 2435 – she notes that the evidence for this is 'thin but consistent' -- p. 2434).

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[183] The strength of feeling on both sides is striking. Arguments against included analogies with the McCarthy era proposal that teachers take oaths of loyalty, as well as the view that the Commission was destroying '"a form of recreation [pro bono] by changing its moral character" from something donated to something required'. Arguments for included appeals to professionalism, one Panel member declaring: "I cannot agree that reporting is demeaning". The obligation of a professional, he said, is different from that of a citizen. If lawyers overlook that, '"we step back to being a trade. If we do that, we might as well let the legislature regulate us"' (Slonim, 1981b, 652).

She notes, too, that pro bono activities can provide valuable contacts for students, and for all participating students, such activities

> break down the rigid distinctions that prevail in many law schools between students who are preparing for public-interest careers and those who are not. These "on-the-boat or off-the-boat" dichotomies send the wrong message about integrating private practice and public service. (p. 2435)

27. The activities of UK law schools, summarised in the database at the Student Pro Bono website (www.studentprobono.net), while LawWorks, the Law Society's initiative (www.lawworks.org.uk) maps out the law firm and law school context as well as providing useful resources. The state of US law schools is summarised at the Pro Bono Institute (www.probonoinst.org/). The statistics show how numbers of participating law schools have increased on both sides of the Atlantic since Deborah Rhode's article in 1999. More of course could be done; and regulators have a part to play. Mandatory pro bono regulation is probably countercultural to pro bono's activities and values in terms of student initiative and altruistic commitment (Granfield 2007), but regulators could be more involved in the creation of a hub for the dissemination of information, commission research, eg met-reviews, collate research results, disseminate briefing papers and act as an intermediary between policy, the profession and educators. They also have a part to play in encouraging co-operative regional efforts and institutions to ensure that every law student has a place on a pro bono programme. They could also provide guidelines for integrating pro bono work into the mainstream of law school educational activities, at both undergraduate and postgraduate stages. As Rhode points out, support for the pro bono enterprise is critical to ethical lawyering: it is 'a central challenge of modern legal education' (p. 2446) and should have a higher curricular priority. It is unlikely to be a shaping force for good in the law school unless it is supported by regulation and by links with and to the profession and its own pro bono activities.

Legal education, regulation and democracy

28. In a number of jurisdictions and professions the relationship of regulation, education and democracy has come under scrutiny. The reasons for this are many, and include the realisation that professionalism as a construct requires re-definition. In this section we shall analyse briefly the approach of one jurisdiction, Scotland, to the problem of professionalism across the whole range of primary legal education, from undergraduate to qualification.

29. We can approach this by noting an early survey of Scots professional legal education. Wilson and Marsh's *Second Survey* gives interesting data on the introduction of the Diploma in Legal Practice (DLP) in Scotland. (Wilson & Marsh 1981). The DLP was introduced in October 1980. Then, around 70% of all law graduates sought entry to the profession – approximately 45 students from each of the five law schools in the first year of operation. According to Wilson & Marsh, citing the Law Society of Scotland,

> [t]he objective of the Diploma course is to provide in an institutional setting, simulated experience of the everyday legal transactions which a young solicitor can expect to encounter in his first few years of practice. Thus, students will be engaged in taking instructions, preparing and drafting documents, preparing court pleadings, and generally becoming familiar with the styles and materials which they will require in practice' (Wilson & Marsh 1981, p. 42).

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30. Under the direction of the Central Liaison Committee, which consisted of representatives from the five university law schools and the two professional bodies, syllabi were drawn up and teaching resources were prepared. While no guidelines as to pedagogic approaches or methods were mentioned, Wilson & Marsh point out that on the subject of assessment, the Society 'envisaged that more emphasis will be attached to continuous assessment throughout the course than to formal examinations at the end' (p. 43).

31. Interestingly, Wilson & Marsh point out that the DLP was 'an attempt to provide the "organised vocational training in an institutional setting" advocated by the Ormrod Report' (p. 43). Its ambitions are clear, and it is certainly the case that the Ormrod Report influenced the designers of the programme; however there is no indication in the literature produced by the designers or in Wilson & Marsh's text of the tensions inherent in the Ormrod description. As a final point, it might be useful to note that in Scotland the regulations regarding the traineeship period of 24 months that proceeded the DLP were much laxer than those set out later by the Law Society of England and Wales. Traineeships, for example, could be either general or specific, since the point of the DLP was to give general training – for example restricted practising certificates were available to those trainees in their second year who wished to practise, under certain conditions, in the courts.

32. The DLP predated the LPC in its design; but from early on there were problems in the curricular design that were mitigated but not resolved by amendments to it throughout the eighties and nineties. These included:
    1. No meta-planning for curriculum review over a span of time. All was left in the hands of a Committee that became increasingly drawn into the annual administration of the DLP.
    2. No provision for ongoing review projects to identify the fit of the programme with the changing nature of legal services and professional work patterns.
    3. No provision for ongoing quality checks, or to check the matter of curriculum drift, over a span of time, from Law Society objectives.
    4. No requirement that any members of the DLP Committee should have educational training or background, though almost all were academics or drawn from the profession.
    5. The Ormrod description was followed without analysing the duality of the description: vocational training within academic institutions. At a time when it was recognised that law schools throughout the UK were moving away from vocational training, the tension between these poles would grow stronger.
    6. Institutions would interpret vocational training to suit their own image of the profession, and their own timetables and practices.
    7. The body of practitioner-tutors required initial and ongoing training
    8. The designers and materials authors appointed by the Law Society required training.
    9. The DLP was a watershed programme, in that both branches of the profession were required to take it. However there was no programme of training for those who wished to go to the Bar (later remedied by the Faculty of Advocates).[184]

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[184] See http://www.advocates.org.uk/training/index.html

10. There was no stated ground to the standards of professionalism that students were expected to attain in the DLP (Maharg, 2004).

33. Focusing on point 10, it was clear that there was little agreed understanding of the ground of values and standards for professional education. Following a key conference on the Diploma in 2004 it was agreed that part of the work of the Diploma Working Group was to form those values and standards (Appendix 1). Simultaneously a Law Society Committee was working towards a statement of standards for the legal profession in Scotland, and the work of the Diploma Working Group tracked the standards as defined by that Committee.

34. An example of regulator awareness of the meta-issues of professionalism, and used in the development of values, is the MacCrate Report, published by the ABA, which gives not just a substantial set of outcomes but a statement of the values that gives moral definition to the skills.[185] At the heart of the 414-page Task Force report is the Statement of Fundamental Lawyering Skills and Professional Values. The report groups essential skills under the following headings: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counselling, negotiation, litigation and alternative dispute resolution procedures, organisation and management of legal work, and recognising and resolving ethical dilemmas. Fundamental values are grouped under the headings: provision of competent representation, striving to promote justice, fairness, and morality, striving to improve the profession, and professional self-development.

35. In more detail, here is the statement of values:

Value 1:
As a member of a profession dedicated to the service of clients, a lawyer should be committed to the values of:
- attaining a level of competence in one's own field of practice
- maintaining a level of competence in one's own field of practice
- representing clients in a competent manner.

Value 2:
As a member of a profession that bears special responsibilities for the quality of justice, a lawyer should be committed to the values of:
- promoting justice, fairness, and morality in one's own daily practice
- contributing to the profession's fulfilment of its responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them
- contributing to the profession's fulfilment of its responsibility to enhance the capacity of law and legal institutions to do justice.

Value 3:
As a member of a self-governing profession, a lawyer should be committed to the values of:
- participating in activities designed to improve the profession;
- assisting in the training and preparation of new lawyers;
- striving to rid the profession of bias based on race, religion, ethnic origin, gender, sexual orientation, or disability, and to rectify the effects of these biases.
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[185] MacCrate, R. (1992), Legal Education and Professional Development -- An Educational Continuum. Report of The Task Force on Law Schools and the Profession: Narrowing the Gap, American Bar Association, Section of Legal Education and Admissions to the Bar. Excerpts are available on the web at:
http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html

> **Value 4:**
> As a member of a learned profession, a lawyer should be committed to the values of:
> * seeking out and taking advantage of opportunities to increase his or her knowledge and improve his or her skills;
> * selecting and maintaining employment that will allow the lawyer to develop as a professional and to pursue his or her professional and personal goals.

36. It is significant that this statement of values goes beyond the specifics of professional conduct codes and guidelines. In effect, it is a statement of moral values relevant to the profession within the wider context of society, and profoundly democratic. It recognizes that whatever values are espoused by the profession, it is essential that the relationship between statement of skills and statement of values is explicitly drawn, for all stakeholders in the educational process. The MacCrate Report makes this relationship quite clear:

> As Value §1 explains, the specific skills examined in Skill §§ 1-10, together with the more general skill of self-appraisal (which is discussed in the text and Commentary of Skill §1) are essential means by which a lawyer fulfils his or her responsibilities to a client and simultaneously realises the ideal of competent representation. The process of preparing to represent clients competently is a matter both of accepting certain professional values and of acquiring the skills necessary to promote these values.[186]

37. The approach of the MacCrate Report was influential to the development of an approach to professional practice in Scotland. As we point out above, the early iterations of the DLP in Scotland had little stated concept of professionalism underpinning it. This was addressed in the latest iteration of the DLP by the regulator, the Law Society of Scotland, now called the PEAT 1 – Professional Education and Training, Stage 1. PEAT 1 was significantly different from the DLP not just in its core/elective structure, its detailed outcome statements and its guiding documentation on curriculum design for providers. The Society recognised the bridging nature of the programme by consulting not just on PEAT 1 proposals but also on the undergraduate LLB programme (termed the 'Foundation') and on traineeship (re-named PEAT 2) and CPD. For the first time in the history of the Society, legal education was thus envisaged as a holistic process. In this it went beyond the remit of the Training Framework Review. Indeed for the first time there was a requirement on Scottish law schools to embed ethics within their undergraduate curricula. Implicit in this first step to give ethical learning a much higher profile in the LLB was an acknowledgement that the curriculum was less of a uni-directional entity; and much more spiral in its structure and effects, and the spiral curriculum became a key element in the design of the new programme (Harden & Stamper, 1999).

38. But if PEAT 1 were really to be a 'bridge' course, then the foundations of that bridge to professionalism were the core outcomes described in Professionalism and Professional Communications. The outcomes were designed to declare to students and others that ethics and professionalism conjoined were regarded as critical to professional practice by the Society, and that effective communication was a critical part of the ethical dimension of professionalism. Other professions recognise this –

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[186] Part II, Chapter five, A. at
http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html#Fundamental%20Values%20of%20the%20Profession

see for example the work of Hickson and others in medical education and ethics.[187] In that discipline there has been a renewed focus on the concept of medical professionalism. Reports have been published by the Royal College of Physicians and Surgeons of Canada, the American Medical Association and the Royal College of Physicians of London that seek to map out the constituent elements of the concept. While there is difference, there is also a convergence upon certain qualities and values among them. In the UK, medical professionalism is defined in a General Medical Council publication called *Good Medical Practice* that includes a general definition, entitled *The Duties of a Doctor*. What is interesting about such documents is that they are used quite closely to map the lineaments of the outcomes of any educational programme for professionalism in medicine. This was precisely the approach of the Law Society of Scotland, who regarded it as part of their strategy that professionalism was a key educational quality – and again, there is good evidence that other professions have the same perspective.[188]

39. The Working Party drew up a core of professional values, therefore, which became the core of the professional programme. Visualised as series of concentric circles, around this core was the next ring of professional behaviour, namely communications, comprising professional relationships, interviewing, negotiation, writing and drafting, transactional research, use of technology and advocacy. The third ring comprised what is normally understood as ethical conduct rules: regulatory framework and professional standards, duties to Court and to Profession, the client-solicitor relationship, conflict of interest and confidentiality.

40. At the core of the statement of professionalism, in the centre of the circles, was the first statement: 'Throughout the programme a student should demonstrate a commitment to the interests of justice and democracy in society'. Positive indicators for this included: '[d]isplays an interest in the workings of justice in society; has an ethical awareness of legal practice, and a developing sense of the regulatory framework of professional ethics. Shows awareness of his or her responsibility to improve the capacity of legal institutions and process'.

41. The first clause in these positive indications goes beyond the social contractual nature of professionalism as it is normally understood, to something approaching a moral understanding of the role of justice in society. It thus goes beyond the network of values normally associated with lawyering, and which find their statements in lists of value in nearly all common law jurisdictions – the MacCrate values listed above are good examples. Part of the problem of many such statements may be that they are too close to professional work to encompass all stakeholders. Being statements of technical professionalism they could be regarded as statements made deliberately with an eye to the wider public, in that they improve the status and value of the profession and those serving in it, but do little for wider society (in the Scottish example, arguable ring 2, and certainly ring 3). The problem with opening up to wider society, however is what Webb & Nicolson (2005, 170) noted as the problem of commensurability.

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[187] See Hickson *et al*. (1992). The medical educational literature on the subject is considerable. See also Frank *et al* (2000), who point out, 'patients who feel ignored, deserted, or who suspect that there is a `cover up' by the medical profession, may be more inclined to sue. Failure to understand the patient and family's perspective and devaluing their point of view have also been identified as common triggers for lawsuits.'
[188] See for instance in medical education, Brownell & Côté (2001), Bronwell (2001), Ginsburg & Stern (2004), Ginsburg *et al* (2000), Papadakis, Loeser & Healy (2004, Papadakis *et al* (2004). See also Breger, Calabrese, & Hughes (2004).

42. The first value statement in the Scottish list is an attempt to find a common ground to what is otherwise incommensurable in the values of democratic commitment (Maharg 2013). Just what that commitment might entail on the PEAT 1 programme is set out in the positive indicators; and could be detailed for various future educational stages. It is not defined: the debate is left for the profession to engage in, and in the open porous nature of the statement lies both its strength and its weakness. In that debate, however, is the attempt to escape a self-referential professionalism, the values of which are 'mostly unremarkable and unobjectionable, not least because they coincide with the commitments and objectives of lawyers' traditional professionalization project' (Webb & Nicolson, 2005, p. 168). Instead, a commitment to democracy reaches out to the fundamental values of our society and one that, in its recognition of the tension in those values, rejects 'the possibility of the conventional monistic approach capturing the complexity of ethical life' (Webb & Nicolson, 2005, p. 169).

43. The Law Society of Scotland's new programme began in 2011, and it will require some time before it can be claimed that the new approach to professionalism is making a difference to the quality of education and the quality of ethical professionalism in trainees and newly-qualified lawyers. In truth, much remains to be done to change the context of legal practice in this regard. The Society's initiative however gives an alternative and sophisticated approach to the complex problems of grounding ethics and practice in educational curricula, and the redefinition of professionalism in that regard.

Technology and legal education

44. That technology has a profound effect upon society cannot be doubted (Nardi, 1996, Slevin, 2000). That it is socially constituted, and mediated by culturally embedded practices is also widely accepted (Suchmann, 1987; Castells, 2000); and this is as true of legal education as it is of legal professional or indeed any other professional practice. At a time when the general trend with regard to educational technology is to converge discussion of technology as much as possible with its constituent sector (pedagogy, administration, technical infrastructure, etc) it may seem odd to extract and discuss it in this literature review in a chapter section separate from other educational issues. However technology presents regulation with unique opportunities and problems that require separate analysis.

45. The use of technology in one form or another has generally been recognised as significant by various regulatory reports. The SPTL Working Party on Law Publishing (1977), for instance, advocated the use of 'computer setting' for 'speedy updating' of textbooks and reference books (paras 71-73, p. 33). Pre-internet, it advocated micro-publishing (ie microfilm or microfiche). More interesting (and more relevant to contemporary legal education) the Working Party advocated 'on-demand publishing', which it describes as follows:

    'it is possible to install a machine on the lines of a superior photocopier which makes a complete copy of a book or manuscript, collates and binds it. An experiment in the "publication" of low-demand works by this method is to be carried out by the British Library Lending Division. (para 68, p. 33)

There is no further reference of this BL pilot, but the idea is obviously still relevant – even more so in the internet age of digital texts, where it has been revived as print on-demand (POD), or podbook publishing (Haugland, 2006).

46. More interesting than the identification of possible technologies is the ways in which teaching habits and conventions might be changed. Two paragraphs illustrate this in the SPTL report. 'Personal source books' (para 61, pp. 30-31) refers not as we might expect in our age of personalisation to student materials, but to lecturers' materials, ie to the practice of lecturers personalising their materials for their courses. The Working Party advocate against this on two grounds: first that too much of a lecturer's time would be taken up by the endeavour, and second 'the student's reading [would be] too fully structured by his teacher (but is it any less so by the standard text-book?)'. The question in parenthesis is a valid one (not least in an age of personalised textbooks or podbooks); but it is interesting that the idea that personalisation may apply more aptly to students than to staff does not arise in the report.

47. Second, the Working Party advocate 'greater inter-institutional co-operation and initiative' (paras 6467, pp.31-35), and explore the issues in some detail. The case is unarguable; the detail of co-operation one of the key difficulties. The Working Party recommended the approach to the SPTL Publishing Committee. The Working Party does however go further than advocating local co-operation: '[t]he real need for individual and co-operative production of materials within the academic world is for a good information system' (para 67, p. 32). The Working Party advocates for the creation and maintenance of a bibliographical service for legal education which it proposed that SPTL and ALT might join in producing. (This was not accepted, apparently, by the SPTL Committee – para 67, p. 32).

48. Even at this early, pre-internet stage of technology use we can see a number of themes arising. One is the way that curriculum structure encourages or constrains innovation. In the examples above, interesting proposals arise from members of the Working Party; but these ground-up proposals require consents from a parent body (acting as a form of regulator in this instance) to be taken forward. Note that actual regulators take no part in this transaction.

49. The second theme is the integration of technology and information. In these proposals we can see changes being proposed that would create a networked information environment. These changes are deep, structural and, since the steeply falling price of computation, communications and storage as well as the exponential increase in the access speeds of all three, have wrought massive changes in our society (Benkler, 2006). These changes go to the core of a number of regulatory issues, not least because they are rarely foreseeable. Two examples: the choice of digital hardware that we use grows more various over time, not less; and the wireless environments that we now almost take for granted were scarcely imaginable 15 years ago – only recently was it announced that London is currently setting up the largest free wi-fi zone in Europe http://www.bbc.co.uk/news/technology-16440911. We shall examine the issues for regulators, especially with regard to the attempts by the ABA to regulate use of technology in accredited JD programmes of study.

50. A definitive history of technology and legal education in England and Wales has yet to be written, but the work of Paliwala is the closest we have to that goal. In a series of articles he outlined many of the key influences and drivers for change (2002; 2004; 2007). He points to the effect of the European Union's e-Government and e-Communication initiatives on legal education, and the need therefore for interactive group e-learning that transcends the traditional institutional and national boundaries of legal education (Paliwala, 2005). He analyzed the impact of globalization on legal education and the associated processes of IT convergence (of learning technologies and theories) and divergence (law schools themselves have diversified nationally and globally – Paliwala, 2004). He drew attention to the growing commodification of legal education and the role that technological learning spaces played in bringing this about, together with the decline of domestic institutions, and differentiation of institutions and regions (Paliwala, 2002). He also drew attention to the shifts from standalone to networked pedagogies (Paliwala 2007). The history of the IOLIS project is a good example that stands for many other smaller initiatives in this regard. Funded initially by the Funding Council's Teaching and Learning Technologies Project grant in the early 1990s, it provided an innovative, well-used and sophisticated resource for undergraduate student learning. A theme throughout Paliwala's work with IOLIS and with other applications is the call for a renewed attention to educational theory at all levels of technology. Others such as Maharg (2007) have made the same appeal. He argues that as a discipline we need to develop technologies that are specifically developed for the requirements of our discipline, our curricula and our profession, where we give learners much more control over the learning environment, and where technology is used to enhance educational approaches such as transactional learning (Maharg 2007).

51. The scope of technological use in law schools and other institutions cannot be summarized in this literature review – it is too extensive. Goldmann (2008) provides a useful summary of the literature. Technology is fundamental to the operation of universities and educational institutions. It is used as part of the administrative infrastructure, as well as for finance and other applications. As such, institutional systems rapidly become institutional silos, and often the advent of new technologies, for example cloud computing, is difficult to implement because old technologies thwart newer technologies. Conventionally physical campuses find it difficult to move to cloud computing or cloud apps such as Google Apps, because their culture and practices are based upon the institution having a physical being in a particular place. Such issues should be at the centre of regulators' concerns with regard to accreditation and monitoring of quality. At the very least they should be aware of the powerful indirect effect that institutional systems have upon the systemic context of learning.

52. The same is true of technical services delivered for the purposes of teaching and learning; and it is here that regulatory issues begin to arise directly. University learning systems, for example Virtual Learning Environments (VLEs) such as Moodle or Blackboard, are designed more for internal than for external collaboration; and as such, the local area networks do not integrate well with services that could be delivered over the public internet. Public access may thus be denied. In some respects (eg student and staff privacy) this is a good thing; but in other respects it is not – it can constrain the ability of academics to open up programmes to a wider range of stakeholders – the general public, for example. It often encourages staff to

use digital technologies as if they were analogue platforms – as Jos Boys points out, technology is thus used to mimic traditional forms of university administration, teaching, learning and assessment (Boys, 2002).[189] It can also constrain the production, sharing and re-use of Open Education Resources (OER), and the development of Open Education Practices (OEP).[190] Using both approaches, and engaging in educational design processes such as 'participatory design', organizations can cut the costs generating structure and content in educational resources, and can improve the quality of the resource much more quickly than they might otherwise be able to do. Both these initiatives are therefore important for regulators to recognize, support and facilitate.

53. A number of institutions and organizations set out the future of technology in learning and teaching as they see it. One of the most reliable is Educause, whose Horizon Report 2013 describes the following six areas of emerging technology that will have significant impact on higher education over the next one to five years. Starting at a baseline of 2013 the areas are as follows:

    Time to adoption: One Year or Less
    - Massively Open Online Courses
    - Tablet computing

    Time to adoption: Two to Three Years
    - Games and gamification
    - Learning analytics

    Time to adoption: Four to Five Years
    - 3D printing
    - Wearable technology
      (Johnson *et al,* 2013)

54. It could be argued that the use of many of these technologies should be encouraged by regulators. Granted that they are statements of technology uptake in the future, it is nevertheless remarkable that, to date, very few of them are used in law schools.[191] The gathering importance of learning analytics in particular cannot be underestimated. As the Report describes it,

    > Whereas analysts in business use consumer-related data to target potential customers and thus personalize advertising, learning analytics leverages student-related data to build better pedagogies, target at-risk student populations, and to assess whether programs designed to improve retention have been effective and should be sustained — important outcomes for administrators, policy makers, and legislators. (Johnson *et al,* 2013, p.24)

    While it has been used to date on campuses for admissions and other marketing-related initiatives, the approach has the capacity to personalise learning for students and enable much more specific feedback upon performance.

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[189] What have always been regarded as separate systems of learning services – registry services, archival services, library functions, learning interfaces – still largely remain so in the VLE, and the key opportunity for change, organizationally and technically, is lost. Indeed, Boys argues that 'the portal approach is taking hold precisely *because it enables institutions to avoid difficult questions about how they organize themselves*' (their italics: Boys, 2002, quoted in Maharg & Muntjewerff, 2002, 310–11).

[190] For examples see http://www.oercommons.org/ and http://www.heacademy.ac.uk/oer. JISC has an extensive programme to develop OER – see http://www.jisc.ac.uk/whatwedo/programmes/ukoer3.aspx. For examples of legal educational OER, see http://simplecommunity.org (open-source software and associated documentation) and http://www.simshare.org.uk (multidisciplinary simulation resources).

[191] The exception is the work of the academics and technologists around the SIMPLE (http://simplecommunity.org) simulation application, and Simshare, the OER website that hosts simulations, both conventional paper-based simulations and virtual sims.

55. Technologies, though, need to be fused with curriculum design if they are to be used successfully in a programme of study. There are many examples of failure, where technology is viewed as a form of cargo cult object – a magical object that will of itself transform learning, without the need to alter teaching, assessment, presence, and much else in the programme. One example where a professional curriculum was radically altered to enhance learning with technology was the transactional learning initiative at the Glasgow Graduate School of Law, Strathclyde Law School. There, technology in the form of web-based simulation environments, enabled students on the Diploma in Legal Practice (the Scottish equivalent of the LPC) to play the role of trainees and newly-qualified lawyers, while staff (who were tutor practitioners from local firms of solicitors) role-played supervisors, and trained mentors played the parts of virtual characters in a virtual town on the web (Barton, McKellar and Maharg, 2007; Maharg, 2007; Gould *et al,* 2008; de Freitas and Maharg, 2011).

56. For regulators, concerned with quality in online education, a key question is: can the web encourage deep learning amongst students? One early piece of research, in the discipline of History, answers this concern. It is a substantial and long-term analysis of the use of the web made by students in a history course entitled 'Western Civilization: A Course Portfolio'. The study was part of the American Historical Association Teaching Portfolio Project, funded in part by the Carnegie Foundation. Professor Kelly taught two sections of the course in each semester. The students in one section acquired all their materials from online sources while students in the other section received them in printed form only. Kelly designed the online course so that he could make as much use as possible of the communicational potential of the web; he tracked student performance throughout the project, and performed careful pre- and post-test analyses on assessment pieces submitted by students.[192]

57. The results were surprising. First, it was clear that students who used the online resources displayed a higher level of recursive reading. They used historical sources that were posted on the class site much than students did who were using printed versions. The main reason for this was the ease with which students could access the resources – 'just a click away', as one of them reported. However they engaged in this recursion only when it was clear to them that their assignment grade would improve if they did so. Good syllabus assessment design, in other words, was essential as a complement to ease of resource access. This was true of wider access to the web. Students performed little in the way of web searching, in part because they did not perceive that it was necessary for the assessment task. When they did so, it was because the concept of affordance affected them – ie they needed information that was lacking from the class site, or came to a point in the resources where there was a vagueness that left them wanting to know more. As Kelly points out, the web thus encouraged independent learning, but perhaps not as much as he would have liked. His conclusion for history teachers was that the web course signalled the end of what he called the 'coverage model introductory history survey course', ie 'from Plato to NATO in just 28 weeks'… Instead, the web seemed to encourage careful consideration of topics and deep understanding of historical issues and episodes. As a result, he argued, historians needed to re-think the design

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[192] See American Historical Association at http://www.theaha.org/teaching/aahe/aahecover.html and in particular T. Mills Kelly, Western Civilization: A Course Portfolio at http://www.theaha.org/teaching/aahe/Kelly/Pew/Portfolio/welcome.htm

of such courses, and needed to consider teaching web literacy, including examination of web sites as proper sites of historical documentation.

58. But there may be other forces at work here, too. The effect of what Barthes (1970) called the 'referential illusion' of textbooks, ie the illusion that ideas can be narrated in only one polished stream of discourse, was mitigated in the set of resources with which Kelly presented his students. Both printed and online resources consisted of primary sources as well as a textbook. There was of course a difference for the online section between the online sources and the textbook that significantly set aside their work online from the text. For the printed text readers, however, there was no such divide. In other words the form of the resources affected the ways in which Kelly's students used the resources. The digital revolution, avalanching all around us, and radically transforming the form of resources, should give legal regulators good enough reason to raise fundamental questions about use of the internet for teaching and learning (Maharg 2007).

59. If the results of Kelly's research seem clear, and relevant to other textual disciplines such as Law, other studies, particularly meta-reviews, are more complex in their conclusions. For instance, a meta-analysis of student use of multimedia by Liao (1998), based on 35 studies, concluded that multimedia-based instruction was superior to more traditional forms of instruction.[193] However a meta-analysis by Dillon and Gabbard in the same year concluded that there was little evidence that multimedia could improve user comprehension. A year later a further and more detailed meta-analysis by Liao (1999), this time of 46 studies, confirmed his earlier conclusion but cautioned that the form of multimedia and the form of traditional instruction being compared is critical to any evaluation of learning gain.

60. Part of the problem is methodological. The multimedia applications being compared were different in content, aims and method, and probably in quality as well. The instructional strategies they were compared with were different, too. But part of the problem is also conceptual: such conflicting findings take us back to the classic debates and complex issues surrounding the influence that media has on learning and knowledge structure within a discipline – a debate that goes right back to the thirteenth century (Maharg, 2007). One way out of this endlessly unfolding debate is to step aside in a distinctively pragmatic way, and consider how, for any particular situation of teacher and learner, given a certain forms of assessment and many other local variables, the quality of learning is improved with technology. How, in other words, can regulators ensure that extensive multimedia and internetworked applications will enhance the quality of student learning? The issue is a microcosm of the larger dilemma faced by regulators: how can they be sure that a wholly online programme, for example, is not simply a cheap, poor-quality version of a face-to-face, campus-based programme?

61. It is useful for regulators in answering this question to bear in mind Christensen's concepts of sustaining and disruptive technology. Within the context of corporate production, he identified two sorts of technological change. The first *sustained* the industry leaders' rates of improvement in product performance, while the second *disrupted* or redefined performance trajectories, and according to Christensen, 'consistently resulted in the failure of the industry's leading firms'.[194] To apply this

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[193] In Liao's study, however, it should be noted that 10 of the studies showed the opposite.
[194] See http://www.businessweek.com/chapter/christensen.htm

analogy to education, we can point to improvements in face-to-face lecturing as sustaining the relatively settled body of conventions within a law school that constitute lecture-programmes. Contrast this with digital and multimedia learning environments, which often disrupt such settled patterns for students and staff. We would argue that such intrusion is often typical of the movement from one technology of learning to another, and if it contributes to the quality of learning and teaching, then it is justified. If law schools and other institutions are to act responsibly, they need to consider and respond to many of the pressures they operate under today - pressure of student debt, student numbers, fewer resources, a complex curriculum, regulatory pressures and much else. Under such conditions the learning of knowledge, skills, values and attitudes is quite a different process and experience than it was for the generality of students at the time of the Ormrod Report. Technology, and specifically internetworked technologies enable local and targeted responses to such pressures. Indeed it might be said that if legal education developers and curriculum designers do not consider the use of technology in their work, then in the words of Christensen, they will be 'held captive' by students and staff to traditional patterns of working and studying – patterns that, under the pressures mentioned above are already crumbling.

Regulation issues

62. What are the key issues for regulators in all of this? We can appreciate them if we track the debate currently ongoing in the ABA Standards Regulation Committee on provisions for the regulation of distance learning. It is likely that the Standard that deals with Distance Learning (now proposed Standard 311, current Standard 306) will be considered and discussed by the SRC in April 2012 and voted on during the July 2012 meeting. The issues go to the heart of the future of technology in legal education.

63. Standard 306 restricted US law schools that wished to offer online subjects in the JD because it permitted only 12 credits' worth of classes in total, restricted these 12 credits to four credits per session maximum and barred any online credits to be offered in the first year of the JD. The restrictions, quite apart from seriously curtailing curriculum design, were drafted in order to prevent online law schools from winning ABA accreditation. As it stood, Standard 306 was actually an improvement on the previous regime, which allowed no distance education credits to be part of a law degree. However the restriction has been heavily criticized in the literature (Rakes, 2007; Bynum, 1998).[195] The pattern is one where the regulator, for any number of reasons, is conservative in its regulation of curriculum structure and content.[196]

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[195] Rakes (2007, 2) put it well:

> While distance education can be analogized to classroom time, it would seem that a better approach is to think about what we want the education to accomplish – knowledge of subjects needed to be a lawyer, inculcation of skills and values necessary to be a good lawyer, and some experiential component – then set out how any program proves that it does so. The proof may be through bar results, employer surveys, student surveys, observations by site visitors, and review of curriculum.

[196] Technology is not the only curriculum area where this occurs. As Morton (1993) points out with regard to regulations on field placements, the then current regulations 'place unnecessary restrictions on their programs, show insensitivity toward program goals of self-learning, and are an ill-disguised attempt to fit field placement programs into the more traditional models of in-house and simulation clinics' (Morton, 1993, 20).

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64. By 2006, when Standard 306 was formed, there were already online law schools in the US (Concord School of Law graduated its first students in 2002 – Salzer, 2004, 102). For a decade, the Standard prevented dynamic change in law school development. As Martin (2006, 514) pointed out:

> the longer it is that accreditation standards are used to protect conventional classroom-based instruction from online competitors, the less likely it will be that schools practicing only traditional modes of education will be able to respond to the challenge of online instruction when that barrier is finally lowered.

For Martin, and for many other commentators, Standard 306 acted against the direction of increasing networked connectivity. It did not ensure quality in face-to-face classes any more than it did in online or distance learning classes, nor did it encourage innovation. On the contrary it acted as a stop against innovation, not just within modules, but strategic innovation across the curriculum, urged by the Carnegie review on US legal education (Sullivan *et al* 2007).

65. Standard 306 is currently in the process of being redrafted as Standard 311, but while the number of credits is increased, little else has altered. Part of the problem is the definition of distance learning by the ABA:

Standard 311. DISTANCE LEARNING

a. Distance education is an educational process in which more than one-third of the instruction of the course is characterised by: (1) the separation in time or place, or both, between instructor and student; and (2) the use of technology to deliver instruction.

Distance learning is defined as delivery – the underlying metaphor is that of learning not as experience but as something transmitted wirelessly, as if the educative intent and the educational experience have themselves become technologized. The definition is defined arithmetically in later subsections, but it breaks down when one examines what exactly it means for students. Is a videoconference distance-learning in the same way that study packs of printed materials delivered across the internet are often considered so? It also does not account of technology's protean, ever-changing nature. Online maps and GIS, for instance, may not seem to be technologies amenable to legal learning, but this is changing (Pacheco & Velez, 2009; Barton, Garvey & Maharg, 2012). Moreover, learning, as opposed to teaching, can take place anywhere, and does not necessarily take place in face-to-face sessions with teachers. The description of technology as used to 'deliver instruction' is curiously beside the point. Technology is paradoxical: at once endlessly new, and actually nothing new in itself: books are technology, as are yellow pads, quill pens, gel ballpoints, iPads, clay tablets, webpages, TV, vellum pages, telex, voicemail, codices, GIS – all of which could, conceivably, be used to 'deliver' legal instruction with better or worse results for student learning.

66. Currently there are proposals that arose out of the series of FutureEd conferences held at New York Law School and Harvard Law School, to develop a new Model Law School Distance Learning Policy; but it could be argued that what is require is a substantial change of strategy by the regulator, based upon a reading of the literature (which, incidentally, was summarised by an extensive critical review – Torres & Sterling, 1999).

67. Other regulators have taken different approaches. In April 2010 the General Medical Council assumed statutory responsibility for all stages of medical education and now oversees every stage of doctors' training and professional development. Part of its educational remit is to ensure that the standards it sets provide a

framework for excellence. It is currently undertaking a consultation to do so. *Tomorrow's Doctors* (2009) currently sets out the standards for use of technology. There, discussion of technology is not an issue separated out from other educational issues but an integral part of them, eg para 100: 'Medical schools should take advantage of new technologies, including simulation, to deliver teaching'.[197] This overview statement is of course evidenced by many ancillary reports, including meta-reviews, updates of research, research reports on innovations, all of which are commissioned or written by medical educationalists. There is, in other words, a constant and rich exchange between regulator and those working in the field, and the sophisticated infrastructure – comprising, eg, the National Institute for Health and Clinical Excellence, the Royal Colleges, Scottish Deans' Medical Education Group, Medical Schools Council and many more – is itself a mode of regulation for the quality of research and implementation.[198]

Change processes in legal education

68. Change processes are affected by many factors, cultural, regulatory, professional work routines, concepts of professionalism and knowledge, and economic. For instance the decline in funding and the rise in fees (not only in England and Wales but in all jurisdictions) and the practical limit of many personal and household incomes to cope with this has driven much change in recently in Higher Education. On the staff and institutional side, culture and funding are intimately related. One of the key features is the relative importance of the balance of research-allocated funding to an institution, over against the teaching-allocated funding. The source of funding, together with perceived benefits of following that funding (whether in terms of increased student numbers on programmes, or research positioning and status) shapes the financial and knowledge strategy of HE institutions. It is one of the key influences upon institutional ability of universities generally and law schools in particular to engage in change processes. Others include leaders' positions in institutional hierarchy (vice-dean, dean, etc), regulatory accreditation ratings, and league table rankings in research and teaching and learning, as they are represented in the media commentary. These factors affect not just aspirational motivations but conforming motivations as well.

69. On the student side there is pressure to reduce the amount of unpaid time spent in the qualification process. In the US for example students bear a heavy burden of debt from the years of undergraduate college studies, followed by three years of a JD in law school, and further time spent in preparation for a state Bar Examination. A number of universities are seeking innovative ways to reduce the amount of time spent in the qualification process. One option is to embed an exemption to the Bar Exam within the JD. This has been implemented by the University of New Hampshire Law School, whose Daniel Webster Honors Scholars Program has been

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[197] Standards and processes for postgraduate medical education are similarly set out in the document entitled *The Trainee Doctor*, and again, the use of technology is seen simply as one educational approach amongst others (http://www.gmc-uk.org/Trainee_Doctor.pdf_39274940.pdf).

[198] *Tomorrow's Doctors* currently has four supplementary advice documents, containing advice for medical schools on a range of issues (http://www.gmc-uk.org/education/undergraduate/8837.asp). They contain snapshot examples of local practice from UK medical schools. The areas are:
- Clinical placements for medical students
- Assessment in undergraduate medical education
- Patient and public involvement in undergraduate medical education
- Developing teachers and trainers in undergraduate medical education

mandated by the Supreme Court of New Hampshire to be a exemption programme for the state Bar Exam. The programme runs as an elective stream within years two and three of the JD and was designed 'to offer program participants practice courses that would be small, emphasise the MacCrate skills and values, and be taught in the context of real life' (Garvey & Zinkin, 2009, 117). The capstone programme was formed, initially as a project that grew out of the MacCrate Report publication when representatives from the high courts of Maine, New Hampshire and Vermont met with the deans of local law schools, together with the Bar presidents in the three states. A Task Force was convened consisting of law school deans, members of the judiciary, bar presidents and community leaders. The broader initiative ran into budgetary and other difficulties, but out of this grew the New Hampshire programme, which initially was designed as a three-year pilot for the aims of the larger initiative and which, after two years of consultation and preparation, was implemented (Dalianis & Sparrow, 2005).

70. The literature on change in Higher Education points to a number of key issues that regulators will face in implementing change such as the New Hampshire programme, some of them summarised below.

Bi-lingualism

71. Research into attempts to change cultures and attitudes in schools discovered that an unexpected by-product of the change initiative was a bi-lingualism, in which multiple sets of cultures and attitudes compete with each other, and are drawn upon where the context seems appropriate (Gewirtz *et al*, 1995)

72. A good example of this is the result of change to the qualification process undertaken in Germany. Legal education is regulated by each of the sixteen states that enacts its own legislation (*Justizausbildungsgesetz*), as well as by a federal statute, the *Richtergesetz* or statute of judges (Wolff 2008). Prior to recent reform, academic education was almost wholly lecture-based (involving as many as 1200 students at a time) with a high staff-student ratio (Leith (1995) cited 34 permanent full-time teaching staff to a student body of around 5,000 in the University of Munich Law Faculty), the curriculum was rigid with little elective choice, and the student body heterogeneous, in that first-year students could study subjects alongside third-year students. Evaluation was by written and oral exams, but in addition the assessment system was based on a *Staatsexamen*, an examination set by regional Ministries of Justice, which had a high failure rate (almost 50% - Schafer 2001, 308). With little support for student learning, the system encouraged students to adopt their own systems, but also encouraged the growth of 'commercial "repetitors", or cramming schools' (Schafer 2001, 309) that provided rich resources and seminars, at extra cost to students. The rigidity of the formal educational system thus encouraged a sub-culture to flourish in the eco-system.

73. This was reformed a decade ago. In 2002 reforms were implemented that emphasised legal skills (by adding to the four-year academic stage a two-year *Referendarzeit* or apprenticeship), and enabled a more flexible curriculum by making elective components more important (Korioth 2008). Some small-group discussion has been introduced, but the system is still dominated by what is now a two-stage *staatsexamen* the form of which encourages cramming and rote memorisation because of the breadth of the subjects (effectively all German law) open to assessment in the examinations. Currently in Germany therefore there is what

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might be called an uneasy dual system of *staatsexamen* and modified LLB, where much of the theoretical knowledge is still understood and memorised at the academic stage, and where practical skills are separated from this body of knowledge not just by the two-stage process, but by the nature of the double *staatsexamen*. As a result, and as Korioth points out, the reforms have had little effect:

> legal education has remained unamended, despite social and economic changes. It is likely, however, that the process of European integration and globalisation will initiate a radical change in the near future. (Korioth 2008, 86)

74. The 'bi-lingualism' of the German system is indicative of a system that has only partially adopted change because the reforms themselves did not reach to the core of the issues that required reform. The Bologna process, as Korioth acknowledges (2008, 107) will force change, though he was sceptical if it would change for the better:

> Especially on the European level, there is no profound concept of reforming legal education, only the well-known and extra-legal demands that it should be faster and less expensive. This could end with a specialized legal craftsmanship, neglecting all the questions that have to be answered before designing legal education. (2008, 107)

Bi-lingualism, therefore, is a complex state, to some extent unavoidable in the process of change, but which in the medium- to long-term slows down change and can render it ineffective, unless regulators take steps to enable culture to change as well as regulation.

75. One way of changing legal culture is to transplant educational ideas and forms from other professions and jurisdictions. The reform of legal education in Japan is an example of this. Japanese legal education had changed little since the substantial reforms after WWII. Law degrees were largely knowledge-based courses taken by students who entered a wide variety of professions and occupations (Maxeiner & Yamamaka 2004). Entry to the profession was governed by examination, but the numbers were severely limited (in 2002, 'only 1183 out of a total of 41,459 applicants were admitted to [the final stage of] training' – Maxeiner & Yamanaka 2004, 308-09), which led to the growth of preparatory schools. In addition, much training was focused on the learning of abstract bodies of knowledge, and lecture-modes of teaching – The national Legal Training and Research Institute, an agency of the Supreme Court, is responsible for legal education. In its Reform Report (Shihōseido kaikaku shingikai, 2001) it reduced the time taken from five or more years to a three-year degree structure (two years, if students already have a degree). Over 60 new law schools were created, and the Report anticipated that around 70% of applicants to the Institute would be admitted. In practice the number was around 25%, and decreased thereafter (Maxeiner & Yamanaka 2004, 312).[199] In addition, the model for the new law schools, that of the American law schools did not, according to Saito (2007, 202-04) address the problems of Japanese legal education – for instance, there was a universally-recognised need for practical training in the Japanese system; but the US system has been criticised for the lack of such training, apart from clinical education initiatives, which do not play a key role in the JD core curriculum. Such initiatives would, in any case, need to be adapted to suit Japanese educational stages, institutions, aims and culture.

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[199] Saito (2007, 197-8) confirms this, citing a lower figure for 2005 than 2004, and observing that this will lead to the closure of some of the new law schools. He points out: 'The real victims, however, are not the law schools but their students.'

Change by facilitation and innovation

76. It has been pointed out, and by academics themselves, that the university, while the loci of much social change in the last millennium, is a highly traditional organisation (Clark, 1983), and one that, in the pre-1992 sector at least, resists managerialist strategies that seeks to impose change. Change needs managing, but it has been argued that top-down change imposed by management or indeed by regulation alone is problematic and not necessarily successful (Trow 1993). Some key reports, however (the Dearing Report (National Committee of Inquiry into Higher Education, 1997), for instance), took a managerialist view of university structures, assuming large-scale compliance, national frameworks for academic degrees and standards and the closer grading of student achievement and staff research outputs (Trow 1997, 26, cited Deem 2004).

77. One direction of change literature emphasises the need to take into account identity and its horizons – the bounded space in which agents work and have their being (Taylor, 1989, 28). These spaces are fluid, and are derived from personal and institutional histories, values, practices and objects; and identity is often distributed in this environment. Thus HE academics, and indeed anyone working in education, will bring their understandings of their horizon, personal, disciplinary and institutional, and will adopt and adapt schemas or scripts by which they enact those understandings. Geertz (1983) saw disciplines as ways of thinking and living in the world; and these and similar ideas were taken forward by Becher (1987; 1989) whose work revealed the important links between the epistemological structures of disciplines and the social dimensions of academic tribes or disciplines. Clark, by contrast, emphasised the tension between discipline and institution; and it is only another step to see a triangle of tensions, similar to Clark's own classic triangle of co-ordinating influences, with the third corner belonging to the regulator. Other studies point out that the key element is how 'a culture shapes an institution's change processes or strategies' (Kezar & Eckel, 2002, 438; Petersen & Spencer, 1991); and if change is to be brought about successfully it is probably the case that a regulator would need to engage with institutions on this level.[200]

78. Elton (2003) points to how this may be resolved. He describes, for instance, how dissemination of innovation can best be done, in three stages:
    a. From the innovator to the converted or readily convertible, usually best through a workshop;
    b. From the converted, back at base, to the convertible ones in the same discipline in the home institution, as well as in other institutions;
    c. From the converted discipline to other disciplines within each of the institutions. (2003, 4)
    Elton acknowledge that processes such as this require to take place within a further process where there are least five stages, reaching from initial awareness of the existence of proposed changes to final adoption. Elton cites examples of successful change from other disciplines, eg in nursing (Francke, Garssen & Saad, 1995). In

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[200] Other international research results from the educational literature pointed in similar directions. Resnick & Nolan (1995) described the New Standards Project, in which educational standards in countries other than the US are described using an ethnographic approach to data collection (eg curricula, texts, examinations, tasks students undertake and professional views). Louis & Versloot (1996), commenting on their work, argue for a more detailed understanding, taking the example of mathematics curricula and assessment in the Netherlands, and pointing out that there, much is due to the balance between legal autonomy that schools have, and the national consensus around high standards for student learning.

more detail he shows how project work was adopted by the disciplines of physical sciences because it was, conceptually and practically, close to the practical research base of the discipline, and therefore tracked the professional patterns of research work carried out by physicists in industry and academia.

79. Another success Elton quotes is the adoption of problem-based learning (PBL) by medical educationalists, observing that the widespread adoption of the heuristic was due to specific conditions in disciplines. He points out, as do a number of other commentators, that the extensive literature on PBL demonstrates how it was not, as in the example from physics, the research pattern that brought about acceptance of the new heuristic, but 'the practice of the most prestigious members of the profession' (Elton 2003). This is undoubtedly true but there are other reasons why this change process succeeded so well. PBL has many other benefits that traditional approaches to health education did not offer. For instance, students enjoy problem-identification and problem-solving, and engage more readily in active learning (Amos & White, 1998; Barr & Tagg, 1995; Duffy & Cunningham, 1996). They make greater use of background reading, have more positive attitudes to the instructional milieu, and they take greater personal responsibility for their work.[201]

80. But if we step back for a moment from the detail of the student engagement we can see what is happening in the change process as regards PBL interdisciplinary research strategies. Medical practitioners and medical educators have liaised with cognitive scientists, or learned about cognitive educational research themselves, in order to understand more about the processes of learning involved.[202] Cognitive psychologists themselves report on these processes and results. What we have, then, is a community of disciplinary practitioners in medicine co-operating with another disciplinary community in cognitive science. As a result, the standards and approaches of one community – experimental cognitive psychology – is brought to bear upon medical education, which becomes subject to forms of discourse, measurement and judgement appropriate to this disciplinary community. In turn, the medical community evolved its own special forms of educational expertise – PBL itself, and statistical and psychometric approaches to assessment, such as standardisation of patients. It has to be said, of course, that the statistical bases of cognitive science and medical science mean that *au fond* there are many overlaps between the two disciplines (Maharg 2007). [203]

81. Elton questioned whether initiatives such as PBL can be transplanted into other disciplines, noting that it will be 'very different' once there (2003, 5). That it need not be substantially different is proved by the curriculum at York Law School (Fitzpatrick & Hunter 2011), the development of which involved designers from the York-Hull Medical Education Unit, and which is a model of good interdisciplinary design work in that respect.

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[201] See, respectively, Blumberg & Michael (1992); de Vries *et al* (1989); Lieux (1996).

[202] See for instance the interesting early history of the Standardized Patient movement, as recounted by Wallace (1997). See also Schmidt (1993), p. 432.

[203] Including the use of meta-analyses of research – see for example Newman (2001).

Themes arising from debates

Development of ethics programmes

82. What the literature on the two examples above on mandatory ethics and the development of Threshold Learning Outcomes (TLOs) in Australia point to is the necessity for ongoing and genuine collaboration. Out of that collaboration the authors of the Statement envisage that the Standards 'would be fleshed out over time through the development and inclusion of a Commentary' (11). In the Statement itself the Notes on the TLOs provide 'non-prescriptive guidance on how to interpret the TLOs' (11), and it is clear that they regard these helpful notes as the seed of further Commentary. The authors do, however, make the valuable point that continuing development should be the responsibility of the academic community – 'it is not the role of the LTAS project to tell law schools how they should go about the learning, teaching or assessment of their students' (11).

83. The same might be said for development of standards in England and Wales – indeed it is a striking element of the Australian approach that the method of constructing the Standards embodies many of the ethical practices that are in the Standards.

Professionalism and programme design

84. The debates on professionalism outlined above go to heart of regulatory activity; and in many respects shape the legal curriculum and are shaped by them (one reason why the Law Society of Scotland provided commentary on curricular method, while leaving curricular design open to diversity of approaches from educational providers). In Scotland the primary professional educational programme is not divided as it is in England and Wales into LPC and BPTC. If they wish to practise at the Bar, entrants are require to undergo specialist education and training within the Faculty of Advocates as part of their training as 'devils'. The educational process has been designed as part of what the devils do as their everyday activities at the Bar. It benefits from close proximity to the courts, both inferior and superior, in Edinburgh – professional and workplace culture is a powerful transmitter of values and attitudes. This means that the Diploma in Legal Practice, now PEAT 1, is a watershed programme through which virtually all graduates pass. It contains within it basic knowledge and skills for both solicitor and advocate branches of the profession, and therefore the concept of professionalism that is part of the programme is taught to and learned by all students and trainees entering the same legal profession in the same programme, though practising in different domains of law. This is one structural strategy by which the law profession in Scotland hopes to counter the regulatory problems of atomisation and fragmentation that all legal professions face. The other, discussed above, is the embedding of a sense of professionalism with the fundamental values of democratic responsibility. The spiral curriculum that is embedded in the Australian TLOs on ethics and professional responsibility is there, too, in the example of the Scottish professionalism curriculum.

Technology, legal learning and regulation

85. Contrary to what some early web enthusiasts asserted, the internet is not an inherently democratic network. In fact there is a body of literature that shows that the web and its applications are not in themselves more democratic than other

institutions and networks (eg Hawisher & Selfe, 2000; Zembylas, Vrasidas & McIsaac, 2002). The web is a remarkable communications network, one among many. It has profound implications for our lives, and therefore regulators, as well as educational providers, need to think closely about how it is used, and how we allow it to be used by others.

86. One theme discussed above has been the ways in which the technologies used by lawyers can be used by law students to enhance their learning. Another is to harness the use of technology as consumer and leisure practices – in casual reading, games, virtual environments, etc. For example – consumer attitudes to e-reading are changing. According to the Book Industry Study Group the number of e-books sold last year grew by 43%, accounting for around 20% of all book sales reported by publishers.[204] In addition, web technologies are gradually becoming more focused on educational structure and content, and providing radical solutions – see the new revamped iTunes U, from where, rather than presenting brochure sites for universities, staff can produce their own textbooks, and students can produce textbooks too, with iBooks Author -- http://www.apple.com/apps/itunes-u/. A lot remains to be done to make this venture and similar actually useful within an educational environment (there are serious issues to do with open educational resources that are not restricted to proprietary hardware and software systems, such as Apple's; and many more interactive tools need to be embedded within text to enable deep learning to take place, as opposed to browsing).

87. But if, as in the example of Apple's technology, we can easily be constrained to the private agendas of corporate capitalism, technology can also liberate. The Swedish Free School Organisation, Vittra, http://vittra.se/, has built a unique pedagogical space that takes up many of the innovations of progressive schools in the 1960s in England. Classrooms have been abolished, and in their place are themed learning environments, neither work nor place spaces, where digital media is the key pedagogical tool. Much more requires to be done in the way of meta-reviews of research if we are to understand the full implications of what works and under what conditions for law students at every level in legal education (Song and Herman, 2010).

88. And if, as we say, the international and multi-professional literature point to how important it is to engage with the research evidence, how that evidence is used, and how technology mediates that evidence, is just as important. The literature points to the necessity to engage teachers in the development of their own expertise with regard to both research and practice. In US high schools, for example, the development of the Common Core State Standards was followed in some states by the development of lessons taught by expert teachers, and shown *via* online videos. Anderson & Herr (2011) argued that that the use of such externally developed, research-based, and standards-aligned videos violated the principles of authentic inquiry that underlie professional learning communities. They also cautioned that a profit-seeking education industry was increasingly behind the promotion of such evidence-based products. Their work has implications for the ways that regulators may want to think about how technology and educational standards may be best integrated so that both educational diversity and educational quality is enhanced.

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[204] See http://www.bisg.org/news-2-841-e-book-sales-are-up-43-but-thats-still-a-slowdown.php. Reported 16 May 2013.

Change and regulatory focus

89. What is interesting about the change process that brought about the Daniel Webster capstone programme at the University of New Hampshire law school is the context and the focus. Arising initially from the impetus of a new legal educational report, the more ambitious project involving three states failed. The much smaller and agile project within a single state and law school succeeded. It could be argued that it was relatively easy for the project to succeed in New Hampshire that has, to date, only one law school and a homogeneous legal culture in what is one of the smallest states in the US. Nevertheless the significant change would not have come about had there not been regulatory personnel and law school staff who were willing to rethink regulatory processes and the content of legal education, and undertake to commit to a relatively small-scale pilot in order to bring about improvement. The scale of the project also allowed for fairly detailed planning and liaison between Bar regulators and law school that took account of assessment culture, risk, learning and teaching, economic considerations and many other aspects of the needs of both sides. This contrasts strongly with the implementation of change by Japanese regulators, where the culture of the US law school model actually created more difficulties in the teaching of the civil law structure of Japanese law, and the 'unique nature' of Japanese legal practice (Saito, 2007, 206).

90. The same point arises with regard to instances of innovation and change. In each country where PBL was adopted by medical schools, for example, regulators were involved not only in the regulation of the changed curriculum processes, but often in learning about and developing good practice with medical schools, as well as ensuring good practice was sustained and disseminated.

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Appendix: PEAT 1 Professionalism Outcomes (Law Society of Scotland)

The full set of learning outcomes for PEAT 1 is available at
http://www.lawscot.org.uk/media/39767/peat_1_guidelines_-_final.pdf.

Major domain	1. Professionalism		
Minor domain	**Throughout the programme a student should demonstrate a commitment to:**	**Positive indicators**	**Appropriate forms of assessment**
1.	The interests of justice and democracy in society	Displays an interest in the workings of justice in society; has an ethical awareness of legal practice, and a developing sense of the regulatory framework of professional ethics. Shows awareness of his or her responsibility to improve the capacity of legal institutions and process.	Best assessed longitudinally throughout the programme, by more than one assessor, and in more than one assessment, so that a variety of views are obtained under different conditions. Providers should be under an obligation to inform the Society of students who obtain problematic scores in any of the minor domains.
2.	Effective and competent legal services on behalf of a client	Updates and expands knowledge of the law, knowledge of legal practice, client-centred practice and management of client service. Pays careful attention to standard of detail in legal work; evaluates own client care; appraises new forms of client care and adopts improvements; acts quickly to protect clients and the public from risk.	Forms of assessment could include: 1. Client-based long case 2. Case file review of simulated client file 3. Portfolio – self-assessment
3.	Continuing professional education and personal development	Is aware of own strengths and weaknesses and forms plans to develop character, values, knowledge and skills throughout the course.	4. Log book/activity log/confidential file 5. Critical incident review
4.	Diversity and public service	Shows an awareness of the importance of equality of access to and participation in legal services regardless of culture, race, religion, gender, disability; assists in the training of new lawyers through peer learning and training of undergraduate students or other groups in society.	6. Peer-review 7. Transactional assessment 8. Tutor reports
5.	Personal integrity and civility towards colleagues, clients and the courts	Is honest with all others on the course; relates to colleagues on the programme with civility; treats tutors, administrative staff and others with respect.	

Chapter nine
Recent HE reforms and their impact on legal education and training

Introduction

1. A significant proportion of the Ormrod Report (1971) is given to a consideration of the financial arrangements of the Committee's proposals (eg pp. 144-152). Commenting on the reforms to costs and student grants, the Committee observed that it had 'no reason to think that the University Grants Committee will not be as co-operative and helpful as possible. Moreover, the position in regard to student grants is likely to be more advantageous.' (p. 152). The Committee's optimism is a sign of how much things have changed in the interim. Today there is much more uncertainty and outright division on the way forward for Higher Education (HE).

2. Our remit in this chapter is to outline the possible impacts of the proposed 2012/13 reforms in the higher education sector on legal education and training and in particular the increases in undergraduate tuition fees. Before we examine some of the literature on recent HE reforms in England and Wales it may be useful to outline what the reforms actually entail. Given that our focus in this literature review is the regulation of professional legal education, we shall pay less attention to the effects of the reforms on university research capacity and on postgraduate research programmes (critical though these subjects are to the funding and culture of HE, and serious though the effects of the new regime have been to both). Instead we shall focus more on the general effect of the financial reforms on institutions and on law schools, as well as subsidiary issues such as the situation with devolved HE systems in the UK. We shall focus only on the period since the Browne Report (2010). It should be said at the outset that the literature is relatively scattered and immature, given the timeframe and the relative paucity of reliable data. Nevertheless, it may be possible to discern some emerging themes.

Recent funding reform

3. The problem of funding UK HE is not recent. It is as old as state funding itself which, in the form of maintenance awards and payment of course fees for full-time undergraduate students, was introduced in 1962 on the recommendations of the Anderson Committee in 1960.[205] The system remained unchanged for over 25 years but as the HE system moved, under political pressure, from elite to mass education, funding failed to match the increase in student numbers. In the early 1960s there were around 140,000 full-time degree-level students; by 2002, 1.5 million. As a result the real value of the student awards fell, as did the funding received by the universities from the state. In 1988 the Conservative government proposed an alternative system of top-up loans (DES, 1988), effectively moving from a grant

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[205] Implemented by the Education Act (1962), s.1. Note that while we focus on England in the period *post*-2010, the issue of student finance was generally comparable across the jurisdictions of the UK from the early sixties until the late 1990s, when its devolved status within the new devolutionary settlements began to create significant policy and cultural differences, particularly in Scotland and latterly in Wales (Øivind, 2011). These are discussed below.

system to a loan system of funding that was further developed by successive administrations.[206]

4. If the direction of recent funding reform has not changed, the pace and intensity of reform has, and this acceleration has brought with it significant trends towards marketization. Prior to the Browne Report (Browne 2010), student fees were capped (eg £3,224 for 2009/10). There were loans for tuition and maintenance with grant support for households with an income level of £50,778. The loans were repayable when graduates reached a £15,000 income threshold. In 2009 the Labour government set up an independent review committee with Lord Browne as its chairman, which reported in 2010. Its aim was to identify a sustainable future for HE in England. It did so by proposing a system of funding that moved the costs of HE from government to students, on the principle that those benefitting from the privileges of HE should pay for them.

5. Brown (2011, p. 3) noted that the Browne Report was in effect one further step in a process of marketization of HE that 'began with the introduction of full cost fees for overseas students in 1980'. While this is arguable (in that the progressive decrease in student funding and in government support for HE began at least a decade earlier), Brown's point is essentially correct, and borne out by other commentators, as we shall see. He points to the main elements of the Browne Report approach:
   - 'Lowering of market entry barriers' for new providers
   - 'Separation of teaching and research funding'
   - HE institutions receiving a 'tuition fee' that is effectively 'a voucher system'.
   - Institutions compete on 'level of fee as well as on course quality and availability'
   - Students to receive more information in order to make their choice of institutions and courses
   - A 'strong regulatory regime'
   - 'Research is funded selectively' (Brown, 2011, p. 3)

6. The Browne Report was received by the Coalition Government, and its approach was largely followed by the Government's Comprehensive Spending Review proposals, in which the proposed 25% reduction in the Dept for Business, Innovation and Skills' resource budget would predominantly fall on HE budgets, again following the Browne Report. In effect, government withdrew from funding most undergraduate courses, but subsidised the STEM subjects (science, technology, engineering and mathematics) to a reduced level. In its place, universities would receive income from tuition fees capped at a maximum of £9,000, with universities given the freedom to choose their fee levels (many though not all adopted the maximum). The fees were repayable by students on reaching an income level when in employment, and at rates that were government-subsidised. This represented a cut in funding of 40% in the HE budget that, according to BIS will be reduced to £4.2 billion by 2014/15 (BIS, 2010).

7. The position was set out in the Government's White Paper, subtitled *Students at the Heart of the System*, which was voted through Parliament in December 2010, and implemented for the 2012/13 cohort of undergraduates. As summarised in a report by the million+ think-tank, the key changes included the following:

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[206] For a history of the last half-century of HE funding in England, see Hillman (2013).

- Removal of teaching funding provided by HEFCE for 'predominantly classroom taught subjects'
- A cap on chargeable fees at £9,000, subject to access agreements with the Office for Fair Access (OFFA)
- Increase in the scale of tuition fee loans
- Increase in maintenance loans and grants available to eligible full-time undergraduates
- Tuition fee loans available to eligible part-time undergraduates
- Higher tuition fee loans made available for students attending private institutions
- Tuition fee and maintenance loan conditions that are subject to:
    - Variable real interest rate on loans, dependent on graduate earnings
    - Extension of the repayment period before debt write-off
    - Increase in the nominal earnings threshold before loan repayment begins
- Introduction of a National Scholarship Programme with matching funding from the HE sector (million+ 2013, p. 2)

Views on the Coalition Government's proposals

8. A number of commentators noted the risk involved in the scale of the cuts to HE, summed up in a response by the million + group, commenting on the position of England vis-à-vis other countries:

    a. None of Britain's key competitor countries are withdrawing public investment from higher education in this way; nor are they seeking to fund university teaching almost entirely on the basis of students taking out loans which they repay as graduates. If the reduction in teaching funding is of the order proposed by Browne and assumed in the Spending Review, the UK's funding of university teaching will stand in sharp contrast to Germany, China, France, Sweden and Finland. Even in the highly differentiated higher education market in the US (currently the subject of much criticism within the US itself), state universities receive state funding. (million +, 2010, p. 3)[207]

9. The extent to which the radical innovation of the system can be controlled by risk-based regulation, as the White Paper (BIS, 2011a) proposes, has been subject to analysis. In a consultation paper the Government describes a system with HEFCE as the lead regulator, with QAA, OFFA (the Office for Fair Access), and the Office of the Independent Adjudicator (OIA) – see BIS (2011b). The key change was a move from quality assurance that applied to all institutions to a risk-based regime that, as King puts it, 'modulates levels of institutional audit on the basis of regulatory judgments concerning the variable risks posed by institutions to the sector and to the regulator' (King, 2011, 1). By taking this approach, risk-based regulation seeks to become 'proportionate, targeted, and explicit' (1).

10. As King observes, the approach is part of a general move to risk-based regulation in the last decade, and has been strongly encouraged by the Treasury, the Cabinet Office and the National Audit Office. However the challenges for this approach in the HE domain are considerable, and not least in an environment where institutions are encouraged to engage in entrepreneurial activities, both in the domestic market

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[207] Note that the Briefing Paper comments should deal not with Britain or the UK but with England only. HE is a devolved matter in Scotland, Wales and Northern Ireland. As we shall see below, the political ideology and fiscal infrastructure of HE in Wales and especially Scotland is significantly different to that of England.

created for home students, and in the much less regulated international markets, where institutions may seek profit or simply to recover lost revenue from home students. King notes two principal problems:

- That 'there will be failures as a result of institutions and activities that have slipped through the risk-based approach'
- The 'reforms of the White Paper actually increase the risks that will be faced by a large number perhaps the majority of institutions'. As a result, King argues, 'the regulatory burden will increase – logically it certainly should increase – for these institutions as a result of a risk-based approach' (King, 2011, p. 11).[208]

11. Others have critiqued the detail of the Coalition's fiscal plans for HE. In a press release for the Institute of Fiscal Studies, Chowdry *et al* pointed out of the National Scholarship Programme mentioned above that because the programme is ' being administered separately, and differently, by each university and for students entering a majority of universities they cannot be sure in advance what level of support they will receive. The effectiveness of this financial support in encouraging participation of students from poorer backgrounds is likely to be undermined by these levels of complexity and uncertainty' (Chowdry *et al* 2012). Ironically, it could be argued that this situation returns students to the 1950s, pre-Anderson Report, where Local Education Authority awards to students varied considerably across the country (Hillman, 2011, p. 5).

12. Yet others have argued against the ideologies underpinning the new regime. In his analysis of whether the proposals would work and whether they would protect quality and diversity Brown considered the quantum of funding and other issues such as equity, diversity, regulation, quality and what he called 'the balance between private and public goods'.[209] Summarising earlier research, he notes that the provenance of the public goods deriving from HE (and he quotes McMahon's (2009) estimate of that to be 52% of the total benefits of HE) 'is the principal justification for the direct subsidy of teaching'. Following the Browne Report, the Government has confined 'these public goods to a few, mostly scientific, subjects', with the result that '[i]nstead of being seen as a public good, higher education is seen as a private investment'. He maps out the possible consequences of this:

    > This is reductionism on the grand scale, and it will lead over time to a diminution of the public benefits of higher education beginning, probably, with the detriments of a much narrower curriculum. It is this – as much as the increase in the fee and the reduction in teaching funding – which has fuelled the near total rejection of the package within the sector. (Brown, 2011, p. 6)

13. Brown concludes his analysis by looking to the future and attempting to discern the lineaments of our university system by mid-decade. He lists the following characteristics:

- Much greater 'resourcing and status differentials between institutions'
- The student population 'is unlikely to be any more representative of the general population than is currently the case'.

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[208] This is discussed in the general context of COBR in chapter 3, paras 57-59.

[209] In the literature analyzing HE and its contribution to society there is a generally accepted distinction between private goods and public goods. Private goods include market goods such as higher wages, and non-market goods such as health advantages. Public goods include greater contribution to the Treasury through increased tax revenues, more consumption, decreased reliance on welfare and NHS, workforce productivity and flexibility, increased charitable donation, reduced crime and recidivism and a general increase in the quality of public civic life (McMahon 2009).

- A 'greater proportion of the university curriculum will be "vocational" or concerned with "employability"', with non-vocational subjects, particularly the arts, humanities and social sciences 'confined to a small number of elite institutions catering for wealthier students, together with poorer students on scholarships – a return to something akin to the situation in the 1950s.
- Research concentration in a 'small number of institutions', with concomitant greater variation in staff salaries, terms and conditions (and a 'much bigger proportion of the teaching force will be on part-time and/or temporary contracts').
- 'Students will be even more clearly consumers (rather than producers)', with institutions giving much greater resource to 'marketing, advertising, branding and recruitment' as well as 'student care and complaints' and 'conspicuous expenditure'.
- Tighter regulatory regimes 'because of the inability of markets to police quality in any serious way, and the unwillingness of governments to accept this' (Brown, 2011, pp. 8-9).

His final point, should he be right, has serious consequences for regulatory oversight of the undergraduate LLB. While it is beyond the remit of LETR to explore this in detail, it should be noted.

14. Brown's analysis of the changing culture in HE brought about by increased marketization has been taken further by many others. Representative of the literature is a collection of essays on the subject (Molesworth, Scullion & Nixon, 2011). In their chapter in this volume Nixon, Scullion and Molesworth noted how in the discussions of consumer and scholarly identities, choice in HE could encourage conservative learners (p. 207). They note in their conclusion how university brands make stakeholders act 'off-brand' (p. 229). The marketwise systems that support institutional activity in the market, too, will have unintended and deleterious consequences, for institutions and for students.

15. For students, they argue, the market 'offers the appearance of endless opportunity to express one's agency but that means choice is always contained and constrained within the market'. And yet, the environment of a market is a powerful force shaping student expectations of institutions. Adapting Fromm (1976) they point to how students have 'adopted a "marketing personality"', in which 'the emphasis is on having the personal attributes that successfully position the individual in a capitalist system' (p. 233). Thus in this discourse *having* a degree is privileged over *being* learners; in place of *transformation* through critical study, there is an emphasis on *confirmation* of the student as consumer.

16. In the same volume Barnett argues for more nuance in our definition of markets and their effects: they can be, he states, both virtuous and also pernicious. He explores ways in which the pernicious effects can be ameliorated by 'countervailing measures'. While accepting that market presence can 'distort the pedagogical relationship', it can herald a shift from social knowledge to market knowledge. For him, nevertheless, 'at the heart of the emergence of the student-as-customer lies the pedagogical relationship' (Barnett 2011, 49). Our care for this relationship, he holds, 'is perhaps the crucial pedagogical challenge of our times' (Barnett, 2011, p. 50).

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17. The social rejection of the Coalition Government's direction for HE has taken the form of demonstrations, protests, petitions and a counter-literature. Almost 400 academic campaigners signed up to an 'alternative white paper' entitled In Defence of Public Higher Education. The first sentence of the defence sums up the approach of the campaigners:

> Public higher education is not state-controlled higher education, but publicly-funded higher education that respects these principles and secures other public benefits appropriate to a democratic society. These principles and benefits are put at risk by a market in higher education and the entry of for-profit providers. (Campaign for the Public University 2011, p. 1)

The rest of the defence sets out in detail why the campaigners reject the fundamental principles underlying the Browne Report and the White Paper.

18. Other academics have examined the conceptual bases of Browne, the CSR and the White Paper. Stefan Collini has contested the view that universities must be judged on their contribution to economic growth, arguing that this mistakes the inherent worth of intellectual activity. For him, the concept of 'accountability' as defined by the Browne Report and White Paper is fundamentally in error. In place of a consumerist view of HE, where students choose in a market and universities are accountable to them, he describes a wider concept of accountability: '[i]n reality, universities are already, and necessarily, 'accountable' to society, including students, in all kinds of ways: it is cheap and empty rhetoric to suggest they exist purely to 'serve students', especially when this is really code for "respond to the expressed wishes of the consumer in the way other businesses have to do"' (Collini, 2011, p. 14, col 1).

19. Collini and others see basic misunderstandings in the White Paper regarding the fundamental purposes of universities. Comparing the Robbins Report and the White Paper, he observes that 'what the White Paper so lamentably lacks is a considered understanding of the character of intellectual inquiry and of the conditions needed to sustain it successfully across a wide range of subjects and across many generations' (Collini, 2011, p. 14, col 3). In his broad perspective across the history of universities and his analysis of the present policy direction of the Browne Report and White Paper Collini argues not just that the Government has misunderstood HE and its role in society, but is attempting to redefine higher education: '[the Browne Report] displays no real interest in universities as places of education; they are conceived of simply as engines of economic prosperity and as agencies for equipping future employees to earn higher salaries' (Collini, 2012, p. 187).

20. The long-term costings for the new regime have been analysed. Thompson and Bekhradnia have analysed the projected costs of the HE White Paper in detail, as these are represented in models of public deficit and debt. They focused on the Resource Accounting and Budgeting (RAB) cost, ie the 'long-run real-term cost to the Government of the loans that it makes' (Thompson & Bekhradnia, 2012, para. 11). Following their consistent critique that 'the cost of the policy is likely to be higher than [the government] admitted' (para. 15), the results of their analysis is that the true RAB cost to government (and therefore to taxpayer) will be considerably more than forecast. Noting discrepancies in government figures (eg between the RAB cost for full-time over against part-time students – para. 14), they also pointed out the doubtful assumptions that were made of career growth and earnings (that they would replicate the last 30 years over the next 30 years – para. 22.a) and that the distribution of earnings will remain as it has been historically (when in fact there is

evidence that 'shows the difference between high and low graduate earners is increasing' – para. 22.b). By their figures there will be an increased cost base of over £1 billion per year. As a result they conclude that public expenditure will not be reduced; indeed, at a 'slightly higher RAB cost or a slightly greater inflationary effect […] would mean that the present policy is actually more expensive than the one it has replaced' (para. 47).

21. These figures have been updated by the university think-tank million+ in association with London Economics. According to a report on the costings of the new regime, the Treasury will 'contribute £1.166 billion *less* to the funding of the smaller 2012/13 cohort of students overall compared to the 2010/11 cohort of students' (report's emphasis). However according to the report's calculations the short-term benefits are considerably outweighed by the longer terms costs to the Treasury. They put it in stark terms: '**the combined costs of increasing higher education fees is estimated to be almost 6½ times as great as the potential Treasury expenditure savings** (million+ 2013, p. 20, report's emphasis).

Widening participation in HE

22. As Williams pointed out, 'it has long been recognised by serious higher education researchers that the public subsidy of higher education has in practice been largely a transfer of resources towards people who are, and who will be, relatively wealthy' (Williams, 2011, p. 2). One of the government's stated aims is to widen the scope of participation in and access to HE. Whether this will be achieved is disputed in the research literature. Roberts, examining the implications of the expansion of HE for social class formation in the UK, argues that widening participation in HE is 'unlikely seriously to dilute the overwhelmingly middle-class complexion of UK higher education', and 'a further expansion will strengthen the role of higher education as a distinctive and normal middle-class life stage' (Roberts, 2010). Others point out that despite much political argument about the nature of participation in HE, there are serious inequalities in social class with HE institutions. The role of HE, however, should be viewed in a wider context on this issue. Williams observes, adducing the research of Galindo-Rueda and Vignoles (2004, 2005), that 'a large part of the differences in social class participation in higher education can be attributed to differential performance in secondary education. The most effective way of widening higher education participation is to reduce inequalities in nursery, primary and secondary education' (Williams 2011, p. 2).

23. This was verified by research carried out for the Institute of Fiscal Studies. Focusing on the determinants of participation in HE among participants from lower socioeconomic backgrounds the researchers discovered that 'poor achievement in secondary schools is more important in explaining lower HE participation rates among pupils from low socio-economic backgrounds than barriers arising at the point of entry to HE'; and that these factors are 'consistent with the need for earlier policy intervention to raise HE participation rates among pupils from low socio-economic backgrounds' (Chowdry *et al* 2012, p. 431).

24. Recent research produced by the Institute for Fiscal Studies and supported by the Nuffield Foundation analyzed the financial implications of the White Paper reforms for a wide array of stakeholders – students, graduates, taxpayers and universities. It concluded that the Government's proposals eventually saves the taxpayer around £1800 per graduate, achieved largely by the cut in direct public funding to

universities. For universities, they argue, 'this cut is more than offset by almost £15,000 in additional fee income per graduate - a 140 per cent rise over the old system. Thus the total amount spent - from both private and public sources - on higher education is expected to *increase* as a result of these reforms. On average, universities will be better off financially as a consequence' (Chowdry *et al* 2012, 211).

25. This finding should of course be viewed in context: universities now operate in a fee-based, market-structured financial system where the total amount spent derives from the market, and the amount available to an institution also depends crucially on market placing. As McGettigan (2013) points out with regard to the issue of universities raising bonds, for instance, market placing is crucial. His discussion of the recent bonds issued in 2012 by Cambridge (for £350M) and De Montfort (for £90M) reveals how Cambridge's dominant position in the university market strengthens its ability to raise funding in the financial market; while the position of less established institutions such as De Montfort in the university market renders their position in the financial market much more uncertain:

    While Cambridge strengthens its place, De Montfort and similarly positioned institutions must consider whether business as usual is an option, and whether being in the squeezed middle is a bigger risk than large borrowings. Something seems to have gone wrong if these are the questions facing colleges and universities.

26. Chowdry *et al* claim that on social mobility 'the new funding regime is actually more progressive than its predecessor: the poorest 29 per cent of graduates will be better off under the new system, while other graduates will be worse off.' However, they acknowledge that this requires a 'lack of debt aversion amongst students from poorer backgrounds' (a point also made by Thompson & Bekhradnia, 2010, para 37). As we shall see from the research of Callender and others, though, the problem is more complex than explaining the consequences of financial figures to prospective students. There are many affective and cultural issues bound up with choosing prospective careers in Law to do with identity, resilience, social capital, perceptions of projected futures, perceptions of current and future communities and their networks and value systems, and much else (Francis & Sommerlad, 2011; Anderson, Murray & Maharg, 2003).

27. The literature on fair admissions has acknowledged much of this body of research (eg Schwartz 2004), and the Government has encouraged institutions to consider the use of contextual information in admissions processes (eg OFFA's guidance on Access Agreements). Whether or not this will have any effect, given the nature of the issues at stake for disadvantaged students, remains to be seen. Again, the literature lacks reliable data: by the end of the decade we should be in a much better position to clarify the position. As we reported in chapter four of the this literature review, however, the recommendations of the Schwartz Report had not changed the practices of the majority of institutions (McCaig *et al*).

28. On the issue of whether the Government's new regime is progressive or regressive Brown makes the valuable point that the regulatory attitude to institutions will probably have an impact on the institutions that are perceived as weaker or in danger of failing. It is the institutions that currently accept the majority of students from disadvantaged backgrounds that 'are amongst those most at risk from the new regime' (Brown 2011, 4).

HE and UK devolutionary settlements

29. One often unregarded aspect of HE and its funding in England is the extent to which devolutionary settlement in Wales and Scotland has changed HE in the UK nations. Following referenda, Parliament passed three devolutionary Acts – the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998 (later superseded by the 2006 Government of Wales Act). The Acts established devolved legislatures and defined their powers.[210]

30. Broadly speaking, HE is a devolved matter in Northern Ireland and Scotland, while in Wales it is the responsibility of the Welsh Executive.[211] The Welsh Government's twin priorities for HE were stated as being 'supporting a buoyant economy and delivering social justice' (HEW, 2013, p. 3). The Government introduced grants for poorer students. It gave home domiciled students better financial support, as did Northern Ireland. This created the problem of balancing significant inward and outward flows of students from and to England (Bruce, 2012, 98). Wales also has 'a less selective approach to research funding'. It tends to encourage the merging of HEIs. There is concern that there is a funding gap between England and Wales (Trench, 2011, p. 7).

31. These are encouraging signs of devolutionary activity. In 2002 Rees and Istance questioned whether a national system of HE was emerging in Wales. They earlier had commented upon the patterns of participation, observing:

    > Currently, Wales exhibits a pattern of participation which is unique amongst the home countries, whereby the Welsh higher education institutions serve very substantial numbers of students from England (and to a much lesser extent elsewhere), whilst a large proportion of Welsh students register at institutions in England. This indicates that there is now a significant disjuncture between an increasingly distinct pattern of governance of Welsh higher education and a pattern of participation which is massively integrated in the 'England and Wales' system. (Rees & Istance, 1997, p. 49)

    Nine years later, Rees and Taylor observed that the price differentials in student finance arrangements between England and Wales had had little effect on patterns of participation to date, but that 'from 2007–2008, there will be a significant price differential for Welsh-domiciled students studying in Wales and those who wish to go elsewhere' (Rees & Taylor, 2006, p. 370).[212]

32. HE policies in England have not been replicated in Scotland where, under devolved government, a significantly different approach has been taken to HE. In one sense this is the resumption of a fundamentally different approach to tertiary education in Scotland that existed in the Enlightenment and nineteenth centuries. In the nineteenth century, as historians of universities have pointed out, Scottish HE was very different from English university education (Withrington, 2008) in its culture, openness, organization of curricula, the flexibility of the curricula for students, outreach classes and the more democratic participative rates of attendance. As Keating points out (2006), the convergence of the systems of HE in Scotland and England that characterised much of twentieth century UK HE policy was in a number

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[210] For a comprehensive list of the legislation, strategy reviews and reports affecting the four nations of the devolved UK, see Bruce 2012, Annex 2.

[211] In general financial terms though certainly not in all aspects the system of HE in N. Ireland is based upon the English system.

[212] The differential was effectively a non-repayable fees grant that covered half the costs of the course, and which was also not means-tested.

of important respects halted after devolution. Where English HE was based on 'differentiation and competition', Scotland favoured 'integration and more egalitarianism' (2006, p. 23).[213]

33. The issue of higher variable HE fees is a classic example of the divergence, but by no means the only one. In 2000/01 the Scottish Government abolished up-front tuition fees for Scottish and EU domiciled students studying in Scotland, and the newly-elected SNP administration abolished the system of Graduate Endowment in 2008. For College students there are Bursaries, Maintenance Allowances and Extra Allowances for some students, depending on circumstances, Child Care Assistance and Additional Support Needs for Learning, for disabled students, and other assistance with costs, eg travel. Most Scottish HE students do not pay fees for a first degree or equivalent. Living costs are met via a student loan based on household income, and in addition there is a Young Student Bursary for students under the age of 25. There are also other bursaries and additional loans are available (Scottish Government, 2013). Newall lists some of the achievements of this approach:

> Scotland outperforms the rest of the UK in widening access and in research. It produces a higher proportion of graduates than any other European nation. And the universities have a profound impact on the national community. (Newall, 2003, p. 150)

Newall's praise should be tempered by the recent figures on socioeconomic diversity, which have given rise to calls in the press for legislation to raise the figure of students from poorer backgrounds attending Scottish universities (Denholm, 2013).

34. While the Scottish Government's approach has been praised in many quarters, it has also been criticised for not providing a sustainable model of financial support for Scottish universities (Royal Society of Edinburgh, 2011). Trench states that '[i]f Scotland and Wales maintain their policies on fees their spending on higher education will be disadvantaged' (Trench, 2008, p. 8). Trench also observes that devolutionary progress is hampered by UK governmental approaches to policy:

> The UK Government's policymaking process often considers devolved concerns late, or not at all, and liaison remains undeveloped. Greater clarity in the UK Government about devolved and non-devolved matters is needed, with more systematic liaison and recognition of the impact of the financial systems and the anomalies they can create. (Trench, 2008, 8)

Watson made the same point, stating that 'national policy confusion' is 'exacerbated by devolution' (Watson 2012). This point was also made, independently, by Higher Education Wales in their response to the Commission on Devolution in Wales:

> Universities need a policy framework at a Wales and UK level that facilitates the development of appropriate national policy, and not inhibit it. (HEW, 2013, p. 5)

As Bruce points out, though, there are policy differences that signal the significant difference between the market-based reforms adopted in England and the social democratic governments of the devolved nations. He summarised the themes well, and it is useful to quote him in full, given that these are alternatives to the English position:

> There are a number of consistent themes in the policy statements of the devolved countries as they respond to common pressures. These include an emphasis on lifelong learning, more coherent pathways for learners from schools and colleges to university,

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[213] As Keating points out, these differences are consistent with 'overall patterns of divergence in public services after devolution', eg health care.

the need for the rationalisation of provision, and enhanced research performance. Higher education is seen primarily as serving economic and social objectives and this focus is shaping how the devolved governments secure the changes in the sector that they are seeking. While acknowledging the importance of autonomous institutions, the devolved governments wish to see them contributing optimally to their ambitions and are increasingly interventionist in their approach. (Bruce, 2012, p. 99)

35. The funding dilemma, however, remains for Scotland. The Scottish Government published a Green Paper on the Future of Higher Education in Scotland. The Royal Society of Edinburgh's (RSE) Education Committee responded to the Paper in its own Advice Paper, warning that 'as a consequence of the funding cuts for 2011/12 of £130 million per annum […] will create a cumulative shortfall by then of £640 million' (RSE, 2011, para 5). The RSE proposed a number of alternatives to the shortfall: flat funding, virement from other parts of the Scottish Government budget, structural change to the Scottish university system, and student contributions. It is significant that on the subject of fees, the Advice Paper did not expressly state its preference for a fees solution such as that operating in England; in fact quite the opposite. The Paper points to a lesson for Scotland 'in the current confusion about university funding policy in England' (para 21).

Effects on legal education

36. The literature on this is not well developed, as one might expect. On the subject of funding, at least one study indicates that the effect of the new funding regime will be small. Walker and Zhu estimated the impact of HE on the earnings of graduates in the UK by subject studied, and incidentally used the data of the £9,000 fee structure in their simulations. They note that relatively little research has been carried out on the economic effect of the 'college major'. Unsurprisingly, 'the studies that do exist report large differentials by major of study' (Walker & Zhu, 2011, p. 1177). They state 'the strong message … is that even a large rise in tuition fees makes relatively little difference to the quality of the investment [by students] – those subjects that offer high returns ([defined as Law, Economics, Management] for men, and all subjects for women) will continue to do so'. They conclude that 'this policy would have only modest detrimental effects on the soundness of an investment in higher education – but large cross subject differences will remain' (Walker & Zhu, 2011, p. 1186).

37. As an economic analysis of graduate earnings and funding, Walker and Zhu's study may work on the macroscale of funding analysis. On the microscale of legal education, there are many issues that affect graduate earnings – perception of the relative worth of institutional degrees, costs of LPC and BPTC and their relative worth, availability and uptake of traineeships, the relations between social class and ethnic profiles and traineeship, and much else. There is also the perception of debt and how that debt will be managed which, when they are at the point of considering legal education, is a factor in dissuading students from lower socio-economic categories.

38. In their study of the issue, Callender and Jackson derived data from just under 2,000 prospective students and showed clearly that 'those from low social classes are more debt averse than those from other social classes, and are far more likely to be deterred from going to university because of their fear of debt'. As they point out, student funding policies predicated on the accumulation of debt 'are in danger of

deterring the very students at the heart of their widening participation policies' (2005, p. 509). Their findings, though not specific to Law, can surely be applied to Law as a discipline. They are replicated in other jurisdictions – see for example the Report of the Illinois State Bar Association (2013). In other words, funding may affect who enters HE in the first place, as well as who has the funds to exit with a good enough degree to proceed through professional training such as the LPC and training contract to employment. Research by the National Union of Students, cited in HEFCE (2013, p. 14) also found that financial considerations were significant, but variable, affecting two categories of students in particular – those who were parents and younger prospective students (eg in school, Years 10-13).

39. Reports in the press in 2012 suggested a serious downturn in the numbers of applicants to English universities, with figures quoted ranging from 15,000 up to 50,000. Thompson and Bekhradnia analysed the phenomenon, using figures from UCAS and the Sutton Trust. In their conclusion they noted that it was too early to make long-term predictions as to whether the reforms had discouraged students in general and disadvantaged students in particular. They made a distinction between 'the impact of the changes in 2012, as distinct from the temporary impact from introducing the change'. They stated that the 'estimate of 15,000 less than expected 18 year old applicants should be viewed as an upper bound', and that 'it is far more likely that demand, as measured by application rates, has not been reduced by the increase in fees to any material extent (Thompson and Bekhradnia, 2012, para 52). Since 2012/13 was the first year of the new funding regime for students, it is clearly too early to draw strong conclusions.

40. It is significant, perhaps, that mature application rates for groups of 24-29 and 30-39 age in England dropped steeply in 2012 (falling only slightly, by comparison, in Scotland). All sources are agreed that there has been a steep drop in undergraduate applications and acceptances from mature students – much more significant than for young students. The recent HEFCE Report (2013) cites caring responsibilities and other factors, but does not mention the issue of debt-perception. The consideration of debt taken on later in life is much more significant for a mature, rather than a young, debtor. HEFCE also points out that data from HESA and ILR show that 'in 2011, young students from the most disadvantaged backgrounds were twice as likely as the most advantaged young students to choose to study part-time rather than full-time' (HEFCE, 2013, p. 21). HEFCE acknowledges the need to 'develop a deeper understanding of the risks of large and swift declines in part-time numbers as well as the opportunities of broadening learning in flexible and innovative provision' (2013, p. 15). Unless reversed these declines will clearly affect the profile of the student populations in law schools, and will affect the revenues of those institutions that have much larger numbers of part-time and mature students. Here, as in many areas of this chapter, more data is required before a fuller understanding of the issues can emerge.

41. Brown points out that one effect of the fees regime may be the shift of students from disciplines such as the arts, humanities and social sciences to what are perceived as professional programmes, including Law. He notes that commentators expect that 'subjects like history or sociology will in future be the preserve of the wealthier middle classes' (Brown, 2011, p. 4). If that is the case then undergraduate programmes in Law may not be as affected as some other disciplines by the reforms. Since the market pressures will increase on law schools within their stratum of the

sector, though, we may see a move by some institutions to capitalise on the vocationalisation of the curriculum by adding placements, professionally-related modules in the undergraduate curriculum and such like – and these may not be only post-1992 institutions but those who wish to make strong links with professional groupings in the locality of the institution. Some institutions may well target specific sectors of the market, similar to the way that private legal education providers have targeted City law firms. This is one effect of what will probably be a larger form of marketization, namely significant movement away from 'not for profit' programmes to 'for profit' programmes which will serve to reduce student choice on curricula (Brown, 2011, p. 8). Recent HEFCE data would seem to confirm this pattern. There has been an increase in the applications for Law programmes, though how many of the applications will translate into enrolments is another matter (HEFCE, 2013, 30).

42. The concept of a free market brings with it the increased likelihood of institutional weakness (given the frail capital resources of most institutions) and potential failure, with resulting movement between institutions. While law school admission figures may be better than those of other disciplines it may be difficult for some law schools to sustain their historical levels of admission within the legal educational market. Summing up views on this Brown observed 'most commentators are assuming that there will be a good deal of institutional restructuring in the form of takeovers, mergers, strategic alliances and the like, and indeed this is the preferred scenario in the Browne Report' (Brown, 2011, p. 8).

43. The HEFCE Report is muted on whether the reforms have encouraged innovation: it is clear that they have not, though HEFCE asserts it will 'look to identify specific examples of emerging innovative higher education in future reports' (2013, 44). It could be said that financial uncertainty and anxiety, for institutions as for students, is an environment unlikely to produce sound and innovative practices or risk-taking. Clearly this applies to the curricular practices of law schools as other disciplines, though there was as yet little clear evidence in the literature (as opposed to anecdotal evidence and hearsay) of law schools responding innovatively to the challenges presented by the new funding regime.

44. HEFCE acknowledges that 'there is wide variation in the financial performance and health of different institutions within the sector, and some institutions will face difficulties if they experience repeated falls in student recruitment' (48). Their statement bears out King's cautionary statements on risk-based regulation, cited above (King 2011). HEFCE goes on to warn that if the Government makes good on the indications in the Autumn 2012 Statement that public sector funding will come under further pressure, then 'it could prompt a significant change in the sector's financial position' (2013, 49).

Themes arising from debates

From grant funding to loan systems: HE financial provision and widening participation

45. The shift of UK HE funding from a system of grant funding to loan systems has accelerated and intensified in the last five years, with the proposals of the Browne Report and the Coalition Government White Paper. The effects of the withdrawal of the state from funding large sectors of HE are sharply debated in the recent

literature. Some have argued that the proposals to withdraw public investment in this way go too far, in contrast to HE funding regimes of England's competitors and partners in HE in Europe, US and Asia. Others point out that the reforms of the White Paper increase the risks of failure and decline faced by institutions that will result, for those institutions at least, in increased regulatory burdens. The conceptual bases have been critiqued in depth, and particularly the concept of universities as engines of potential wealth, rather than as sites of education and personal growth.

46. The longer term costings have been challenged, with one paper outlining a potential increased cost base of over £1B per year; while a university think-tank estimates the combined costs of increasing HE fees as 6½ times as great as potential Treasury expenditure savings. The Coalition Government's fiscal plans have also been criticised as likely to engender complexity and uncertainty, and thus deter students from poorer backgrounds. Widening participation in HE, one of the Government's aims, is strongly disputed. While some commentators argue that other educational factors such as poor achievement in secondary education matter more than barriers at the HE stage, and that the poorest students may be better off under the new system than the previous one, others point to the problems created by the fee system in increasing debt aversion amongst poor students. For those commentators, debt aversion will deter those students to whom widening participation policies are constructed in the first place. It is too early to conclude from application figures that the reforms had discouraged students in general and disadvantaged students in particular from applying to university. Nevertheless it is clear that mature application rates, particularly for part-time students, in age groups 24-29 and 30-39 have declined significantly. HEFCE has called for a 'deeper understanding of the risks of large and swift declines in part-time numbers'.

Devolutionary alternatives

47. Political devolution has brought about differentiation in HE policies in Wales and particularly Scotland. The devolved countries tend to emphasize lifelong learning, coherent pathways into education, and the role of universities in serving social as well as economic aims. Their route to funding universities is much less marketized than that of England, but they still face significant problems in funding Higher Education.

HE reforms and institutional restructuring

48. It is likely that as a result of the reforms, some institutions will become more fragile. Institutional restructuring will be probably increase in the form of takeovers, mergers, etc. The climate of anxiety and uncertainty may lead institutions to become less innovative and entrepreneurial than they otherwise might have been. The evidence for this, however, is slight – as indeed could be said for much of the situation in HE at present.

HE reforms and legal education

49. There is little literature on how this affects legal education in particular. It has been argued that since Law is a subject that offers relatively high career rewards, the large rise in fees will have little detrimental effect on entry figures. Others point out that the reforms will increase pressure on many degree programmes to

vocationalize their content and method – for instance placements, professionally-related modules and the like.

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