

CREATING A GOLD STANDARD FOR PRACTICAL LEGAL TRAINING IN COMMON LAW COUNTRIES

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Abstract: Some form of discrete, mandatory, pre-admission, practical legal training (PLT) delivered by educational providers has been an essential element in a number of common law countries including England and Wales, Hong Kong and NSW in Australia, for around the last 40–50 years. However, it is almost certain that from September 2020, completion of a PLT component will no longer be compulsory in order to become a solicitor in England and Wales, and it will be replaced by a requirement to pass a centralised exam testing various legal skills. Based on the experience of the United States, this seismic change from established practice should be viewed by other common law jurisdictions such as Hong Kong (which is contemplating reform in this area) with caution.

Keywords: *professional legal training; summative and formative assessment; legal profession; disruptions to legal practice; recent changes to practical legal training in the United States; proposals to change professional legal training in England and Wales; proposals to change professional legal training in Hong Kong; lessons for practical legal training in other common law jurisdictions*

I. Introduction

Reform of practical legal training (PLT)/the vocational stage¹ involving experiential learning for those wishing to practice as traditional lawyers is travelling in polar directions in England and Wales, compared to the United States. In the former, it is likely those wishing to enter the solicitors' branch of the legal profession will no longer be compelled to undertake any vocational training from as soon as September 2020. Rather, entrants seeking admission in England and Wales will be required to pass a centralised exam testing various skills and competencies. The main stated purposes of these changes are to improve the assessment standards operating at the vocational stage, enhance access into the vocational stage and improve the flexibility of the delivery of it and to increase the diversity of the profession.² Similar

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1 The terms “vocational stage” and “vocational training” will generally be used when commenting on the use of PLT for solicitors and barristers in England and Wales, as these are usual terms employed in that jurisdiction to cover this type of training.

2 Solicitors Regulation Authority, “A New Route to Qualification: The Solicitors Qualifying Examination (SQE) Summary of Responses and Our Decision on Next Steps” (April 2017) pp.2–3, available at <https://www.sra.org.uk/documents/SRA/consultations/sqe-summary-responses.pdf> (visited 20 May 2018).

goals have been espoused for barristers' vocational training in England and Wales, but the changes, which contemplate a greater variety in vocational training pathways, have not extended so far as to remove the need for any form of the vocational stage.³ In August 2014, the American Bar Association (ABA) mandated that US students graduating in Spring 2019 from ABA-approved law schools are required to have completed a designated period of experiential skills-based learning within their law degree.⁴ In Hong Kong, the Standing Committee on Legal Education and Training has recently released both a Draft Report (the Draft Report)⁵ and a Final Report (the Final Report)⁶ as a part of a comprehensive review of legal education and training, a major part of which is dedicated to the future of its PLT.⁷ This article analyses the current diverging directions taken between England and Wales and the United States relating to PLT, and the position taken in the Draft Report and Final Report. These reports are likely to be influential in shaping regulatory policy in Hong Kong, which may in turn further influence the development of regulatory policy and/or curriculum development of PLT in other common law jurisdictions. This article concludes that the steps taken in England and Wales concerning the solicitors' arm of the legal profession constitute an unwise model for Hong Kong and other common law countries to adopt, as evidenced by legal educational theory and the experience of the legal profession in the United States, as well as by the need to strengthen PLT based on the challenges and opportunities arising in an increasingly complex, worldwide legal practice environment.

II. Vocational Training in England and Wales for Solicitors and Barristers

Following on from the Ormrod Report,⁸ entry into the traditional professions of solicitors and barristers in England and Wales has normally been predicated on completion of three separate and consecutive stages, being the academic, vocational

3 Bar Standards Board, "BSB Policy Statement on Bar Training" (23 March 2017), available at https://www.barstandardsboard.org.uk/media/1825162/032317_fbt_-_policy_statement_version_for_publication.pdf (visited 20 May 2018).

4 American Bar Association, Section of Legal Education and Admissions to the Bar, "Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools" (13 August 2014), available at https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_august_transition_and_implementation_of_new_aba_standards_and_rules.authcheckdam.pdf (visited 20 May 2018).

5 Standing Committee on Legal Education and Training, "Comprehensive Review of Legal Education and Training in Hong Kong. Draft Report of the Consultants" (October 2017) (the Draft Report), available at <http://www.sclet.gov.hk/eng/pdf/Draft2017.pdf> (visited 20 May 2018).

6 Standing Committee on Legal Education and Training, "Comprehensive Review of Legal Education and Training in Hong Kong. Final Report of the Consultants" (April 2018) (the Final Report), available at <http://www.sclet.gov.hk/eng/pdf/final2018.pdf> (visited 27 May 2018).

7 *Ibid.*, Chapters 5 and 6.

8 The Report of the Committee on Legal Education (CMND No 4595, 1971), but usually cited as the "Ormrod Report" after its Chairman, Sir Roger Ormrod.

and work-based training requirements, although provision exists for suitably qualified exceptions.⁹ The vocational stage places an emphasis on acquiring skills rather than substantive law, a shift in teaching which took place in the 1980s and 1990s in the then Bar Vocational Course (now called the Bar Professional Training Course (BPTC)) and the Legal Practice Course (LPC) in that order.¹⁰

While that system remained basically intact, there were some significant modifications to it in ensuing years promoting flexibility, foremost among which were:

- (1) The entitlement to offer LPCs with an online component.¹¹
- (2) Provision of tailor-made LPCs.¹²
- (3) Permission to take the LPC and the academic stage jointly.¹³
- (4) Some centralisation of assessment in the BPTC.¹⁴
- (5) A requirement that applicants to the BPTC successfully complete an aptitude test.¹⁵

A distinguishing feature of training and education in England was the creation of a regulatory objective in the Legal Services Act 2007 to encourage a “diverse” legal profession.¹⁶ The overall regulator of training and education of the legal profession, the Legal Services Board (LSB), issued statutory guidance on this area, requiring that legal education and training concentrate on outcomes rather than processes and that it should be flexible, balanced both in relation to the expectation of standards at authorisation and concerning obligations between entities and individuals and devoid of unnecessary restrictions to entry.¹⁷ This has had a significant impact on the findings of consultations and reports in this area which have appeared in recent years and are discussed below.

9 In relation to solicitors and barristers, respectively, see The Law Society, “Becoming a Solicitor”, available at <http://www.lawsociety.org.uk/law-careers/becoming-a-solicitor> (visited 5 April 2018); Bar Standards Board, “Qualifying as a Barrister”, available at <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/> (visited 5 April 2018).

10 Andrew Boon and Julian Webb, “Legal Education and Training in England and Wales: Back to the Future” (2008) 58(1) *Journal of Legal Education* 79, 90–93.

11 Solicitors Regulation Authority, “Legal Practice Course Information Pack” (25 July 2017) pp.19 and 22, available at <https://www.sra.org.uk/students/resources/legal-practice-course-information-pack.page> (visited 5 April 2018).

12 *Ibid.*, pp.14–16.

13 *Ibid.*, pp.17–18.

14 Bar Standards Board, Regulating Barristers, Central Examinations Board, “Chair’s Report August 2016: First Sit 2015/6”, p.2, available at https://www.barstandardsboard.org.uk/media/1777378/2015-16_first_sit_chair_s_report.pdf (visited 20 May 2018).

15 Bar Standards Board, “Bar Course Aptitude Test”, available at <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/current-requirements/bar-professional-training-course/bar-course-aptitude-test/> (visited 20 May 2018).

16 Legal Services Act 2007 s.1(f).

17 Legal Services Board, “Statutory Guidance on Legal Education and Training” (4 March 2014) p.1, available at http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2014/20140304_LSB_Issues_Statutory_Guidance_On_Legal_Education_And_Training.pdf (visited 20 May 2018).

A major report was issued in June 2013 (the LETR Report)¹⁸ which followed on from a research project into the system of legal education and training in England and Wales and its regulation called the Legal Education and Training Review (LETR) in England and Wales.¹⁹ The LETR was commissioned by various branches of the legal profession, including those with responsibility for the regulation of professional education and training for solicitors and barristers, being, respectively, the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB).²⁰

In general, the LETR Report accepted that the current regulated system of legal education and training in England and Wales worked relatively well. More particularly, it was of the view that “There is no evidence that the system, or any one professional regimen, is fundamentally ‘broken’”.²¹ It did note a contrary view, being that around 30 per cent of solicitors and barristers considered that the BPTC and the LPC were not fit for purpose.²² On the other hand, it stated that “Concerns about consistency of standards were raised primarily with respect to the solicitors’ profession.”²³

A number of criticisms were levelled in the LETR Report at the LPC including that:

- (1) Its broadly generalist curriculum lacked utility in an increasingly specialised legal profession.²⁴
- (2) There was inconsistency of standards of assessment among LPC providers.²⁵
- (3) There was a lack of flexibility in its delivery.²⁶
- (4) The cost of the LPC was high which hindered access to it.²⁷

The LETR Report warned about overreaction to the criticism of the BPTC mentioned above that it was not fit for purpose, as this might have related to dissatisfaction with the earlier incarnation of training barristers (the Bar Vocational Course) which had less active engagement with the Bar.²⁸ It also noted that respondents were generally of the view that the BPTC was successful in its role in advocacy training.²⁹ More negative perceptions of the BPTC, were deficiencies in the provision of

18 Legal Education and Training Review (LETR), “Setting Standards. The Future of Legal Services Education and Training Regulation in England and Wales” (June 2013) para.1.3, available at <http://www.lettr.org.uk/wp-content/uploads/LETR-Report.pdf> (visited 20 May 2018).

19 *Ibid.*, para.1.1.

20 *Ibid.*

21 *Ibid.*, para.2.175.

22 *Ibid.*, para.2.59.

23 *Ibid.*, para.7.29.

24 *Ibid.*, para.2.60.

25 *Ibid.*, para.2.119.

26 *Ibid.*, para.7.69.

27 *Ibid.*, para.7.39.

28 *Ibid.*, para.2.61.

29 *Ibid.*, para.2.89.

the centralised examination system in the BPTC,³⁰ shortages of pupillages for many BPTC graduates,³¹ the potential impact of its aptitude testing in restricting diversity in the BPTC³² and the prohibitive costs of the BPTC and access to it.³³

While the LETR Report did not advocate abandoning the current system of formalised vocational training for solicitors and barristers, it did seek reform in a number of areas. For instance, in relation to the training of solicitors, it advocated the development of greater flexibility in the delivery of existing systems to promote greater specialisation,³⁴ as well as allowing alternative pathways reducing costs, including consideration of a system of legal apprenticeships as direct entry points into that arm of the profession.³⁵

The LETR Report also expressed the view that access and cost improvements for the vocational component for both barristers and solicitors could be obtained through greater integration between the workplace and vocational learning, provision of joint academic and vocational degrees and consideration of “price, scholarships and financial assistance” as a factor in licencing.³⁶

In order to ensure consistency of standards, the LETR Report also saw it as essential that thorough learning outcomes were prescribed and performance standards were utilised to accurately determine that those joining the profession had acquired all necessary skills.³⁷ Following on from this, the LETR Report considered that centralised assessment could ensure standardisation of assessment. The exact parameters of this type of assessment were not canvassed, but the LETR Report’s discussion of it was directed more towards it being used in the LPC, where there was no centralised assessment. In considering the value of introducing centralised assessment, the LETR Report was of the view that this type of model could provide assurance of standardisation and integrity but might lack validity in relation to assessment of practice skills and also might break the connection between training and assessment.³⁸

A. *Training of solicitors in England and Wales*

After the release of the LETR, the SRA issued a self-described “radical” Policy Statement on pathways to becoming a solicitor.³⁹ It suggested that a model of legal education and training might be instituted that contained no specific training strictures on qualifying as a solicitor; doing away with these barriers would achieve

30 *Ibid.*, para.2.123.

31 *Ibid.*, para.2.137.

32 *Ibid.*, para.7.53.

33 *Ibid.*, para.7.39.

34 *Ibid.*, para.5.126.

35 *Ibid.*, para.7.40.

36 *Ibid.*

37 *Ibid.*, paras.7.29, 7.32 and 7.83.

38 *Ibid.*, paras.4.127–4.129.

39 Solicitors Regulation Authority, “Policy Statement: Training for Tomorrow. Ensuring the Lawyers of Today Have the Skills for Tomorrow” (16 October 2013) p.1, available at <https://www.sra.org.uk/sra/policy/training-for-tomorrow/resources/policy-statement.page> (visited 5 April 2018).

greater diversity within the solicitors' branch of the profession by removing impediments to entry into it.⁴⁰ The SRA asserted that standards would be upheld by creating an outcomes-based learning paradigm and strict and exacting assessment practices (that could be centralised), in conjunction with a greater emphasis on employment of competency-based standards.⁴¹

On 20 October 2014, the SRA sought views in a consultation process about the proposed adoption of an archetype of legal education and training that would move away from a system of "processes" to one that would define "standards".⁴² Key planks of such a reform would be the identification of necessary competencies (set out in an accompanying Draft Competence Statement),⁴³ listing of standards which must be met (set out in an accompanying Draft Threshold Standard),⁴⁴ and cataloguing of basic underpinning knowledge (set out in an accompanying Statement of Underpinning Legal Knowledge, the discussion of which is outside the scope of this article).⁴⁵ The Draft Competence Statement and Draft Threshold Standard are not wildly controversial documents; there has reportedly been broad acceptance of their content, in so far as they provide a basic list of things that lawyers should be able to do reasonably well.⁴⁶

What is more significant is the overall rationale underlying the SRA's move away from designating the manner in which standards should be maintained:

"We have adopted an activity-based approach to formulating the Competence Statement. We have described the activities that all solicitors need to be able to do competently, rather than describing the attributes that solicitors require in order to be competent (i.e. the knowledge, skills and attitudes). We have chosen this approach because, as regulator, we are not concerned with the precise balance of skill, knowledge, behaviours or attitudes through which the outcomes are delivered. Our focus, instead, is on the activities which must be delivered competently."⁴⁷

While, as noted above, the LETR Report indicated that there was room for improvement in the delivery of the LPC, such a move by the SRA rejects the value of well-constructed PLT as an experiential learning paradigm that positions a "student within a construct that perpetuates realization of and constant thought

40 *Ibid.*, pp.8–10.

41 *Ibid.*, pp.5–8.

42 Solicitors Regulation Authority, "Training for Tomorrow. A Competence Statement for Solicitors" (20 October 2014) p.1, available at <http://www.sra.org.uk/documents/SRA/consultations/competence-statement-consultation.pdf> (visited 20 May 2018).

43 *Ibid.*, Annex A.

44 *Ibid.*, Annex B.

45 *Ibid.*, Annex C.

46 Solicitors Regulation Authority, "Closed Consultations. A Competence Statement for Solicitors. SRA Response to the Consultation" (March 2015) paras.19–42, available at <https://www.sra.org.uk/sra/consultations/competence-statement.page> (visited 9 April 2018).

47 See Solicitors Regulation Authority, "Training for Tomorrow. A Competence Statement for Solicitors" (n.42) para.14.

about professional skills and values” and so operates as a means of fostering not only short-term competency but also long-term professional success.⁴⁸

In any event, while guaranteeing that standards would not be compromised, and to meet the aim of more flexible pathways, the SRA broached the idea of allowing “any training pathway proposed by a training provider which enables a candidate to demonstrate they can perform the activities set out in the Competence Statement to the standard stipulated in the Threshold Standard”.⁴⁹ This might be conducted in combination with a centralised assessment “regardless of the training which they have followed”.⁵⁰ Arguably, this type of pedagogical view runs contrary to fundamental notions of tertiary education, where assessment operates as a way of testing what has been learnt and not as a complete end in itself as far as validation of standards is concerned.⁵¹

B. Solicitor apprenticeships in England and Wales

In line with the recommendations of the LETR Report, solicitor apprenticeships were introduced into England in 2016 (the English Apprenticeship Scheme). Depending on whether exemptions are granted, the length of a legal apprenticeship will be five to six years.⁵² Apprentices are not required to obtain a degree in order to complete their apprenticeship⁵³ nor are they required to undertake the LPC or any vocational course.⁵⁴ Instead, in order to qualify, apprentices will need to pass the two components of a centralised assessment entitled the Solicitors Qualifying Examination (SQE).⁵⁵ The SQE comprises:

- (1) The Functional Legal Knowledge Assessment in Part 1 of the SQE (SQE 1) (encompassing knowledge of certain doctrinal law courses).
- (2) The Practical Legal Skills Assessment in Part 2 of the SQE (SQE 2), which must be undertaken within the final six months of the apprenticeship.⁵⁶

48 Daniel M Schaffzin, “So Why Not an Experiential Law School ... Starting with Reflection in the First Year?” (2014) 7(1) *Elon Law Review* 383, 391.

49 See Solicitors Regulation Authority, “Training for Tomorrow. A Competence Statement for Solicitors” (n.42) para.33(b).

50 *Ibid.*, para.33(c).

51 John Biggs, *Teaching for Quality Learning at University* (Buckingham: Society for Research into Higher Education and Open University Press, 1999) p.213. See also, Roy Stuckey, “Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses” (2007) 13 *Clinical Law Review* 807.

52 Skills Funding Agency, “Apprenticeship Standard for a Solicitor” (Undated but 2015), available at <http://dera.ioe.ac.uk/24240/> (visited 20 May 2018).

53 The Law Society, “Apprenticeships”, available at <https://www.lawsociety.org.uk/Law-careers/Becoming-a-solicitor/Qualifying-as-a-solicitor/apprenticeships/> (visited 9 April 2018).

54 Solicitors Regulation Authority, “Trailblazer Solicitor Apprenticeship: Questions and Answers”, Questions 5, 6 and 7, available at <https://sra.org.uk/students/resources/solicitor-apprenticeship-qa.page> (visited 9 April 2018).

55 *Ibid.*, Question 8.

56 Solicitors Regulation Authority, “Solicitors Qualifying Examination: Draft Assessment Specification” (June 2017) p.7, available at <https://www.sra.org.uk/documents/SRA/news/sqe-draft-assessment-specification.pdf> (visited 20 May 2018).

Focussing on SQE 2,⁵⁷ this (as currently described) would cover vocational assessments which are listed as follows:

- (1) Client Interviewing;
- (2) Advocacy/Persuasive Oral Communication;
- (3) Case and Matter Analysis;
- (4) Legal Research and Written Advice; and
- (5) Legal Drafting.

In order to sit SQE 2, the SRA stated that apprentices will need to satisfactorily complete a work-based assessment by having reached a level of competence as set out in the Threshold Standard. This will occur on an annual basis. The form of any such assessment is entirely at the discretion of the employer or any training provider.⁵⁸

At this early stage, it is difficult to fully assess the merits of the English Apprenticeship Scheme. Apprentices with sufficient aptitude, who combine doctrinal and vocational study and are apprenticed in firms that provide effective on-programme assessment, are likely to be highly skilled and sought after in the job market after completion of their apprenticeship, because they have acquired both practical and theoretical knowledge and training during this period. Fletcher expressed the view that the English Apprenticeship Scheme is not underpinned by any educational regime that has been demonstrated to coherently blend teaching, learning and cognitive development. Furthermore, he warned against assuming that the job experience gained in these apprenticeships will comprehensively satisfy apprentices' education and training needs as there is an absence of a sufficiently detailed pedagogical structure or learning outcomes to impart these.⁵⁹

While it is not altogether clear from the various publically stated positions on the matter, the apprenticeship scheme to become a solicitor in Wales (the Welsh Apprenticeship Scheme) seems to be somewhat different from the English Apprenticeship Scheme, as far as its assessment and training pathways are concerned.⁶⁰ In addition to the need to pass the SQE, Welsh apprentices also appear to be required to complete a law degree and an LPC,⁶¹ and so the programme is both

⁵⁷ *Ibid.*, p.6.

⁵⁸ Anon, "Apprenticeship Standard Leading to Qualification as a Solicitor Assessment Plan" (undated but 2015) paras.3.1–3.2, available at http://dera.ioe.ac.uk/24240/2/Solicitor_Apprenticeship_Assessment_Plan.pdf (visited 20 May 2018).

⁵⁹ Roland Fletcher, "Legal Education and Proposed Regulation of the Legal Profession in England and Wales: A Transformation or a Tragedy?" (2016) 50(3) *The Law Teacher* 371, 380–382.

⁶⁰ Grania Langdon-Down, "How to: Prepare for Apprenticeships" *The Law Society Gazette* (7 March 2016), available at <https://www.lawgazette.co.uk/features/how-to-prepare-for-apprenticeships/5053956.article> (visited 20 May 2018).

⁶¹ Skills for Justice (Justice, Community Safety and Legal Services), "Legal Practice (Wales)" (23 March 2015) pp.18–20, available at <http://afo.sscalliance.org/frameworkslibrary/downloader.cfm?FRID=FR03202> (visited 20 May 2018).

prima facie robust in maintaining educational standards and worthwhile in giving the participants work experience.

C. *October 2016 Consultation of the SRA*

Following on from a consultation dated December 2015,⁶² the SRA published a further consultation paper in October 2016 (the October 2016 Consultation Paper).⁶³ The central recommendation of the October 2016 Consultation Paper was to broaden the reach of the SQE beyond apprentices to all those intending to become solicitors.⁶⁴

Students then would no longer have to complete any vocational training (whether it be the LPC or any form of vocational training) before either undertaking SQE 2 or admission.⁶⁵ The SRA considered that students would obtain adequate preparation for SQE 2 by undertaking any mandatory work component prior to taking it, albeit they were not required to do so.⁶⁶ The main elements in its reasoning for such a major reform again revolved around the need to establish increased consistency and flexibility and to decrease the costs of vocational training providers.⁶⁷

As far as the argument that work-related experience is sufficient preparation for SQE 2 is concerned, this presupposes that the work experience that the examinees receive aligns with what is examined, which might not always be the case. Furthermore, if the examinees do not undertake any vocational training (and lack any foundation in legal skills), then presumably many employers will be either reluctant to hire them or unwilling to entrust them with tasks that are sufficiently challenging to empower them with enough experience to deal with the tasks required in SQE 2. Many students who feel the need to undertake vocational training would then be financially worse off because of the still undisclosed extra costs of SQE 2.⁶⁸ Alternatively, students might prepare for the exam by cramming-style courses, thereby diluting the value of their learning experience.⁶⁹ Ironically, perhaps, the

62 Solicitors Regulation Authority, “Closed Consultations. Training for Tomorrow: Assessing Competence” (7 December 2015), available at <https://www.sra.org.uk/sra/consultations/t4t-assessing-competence.page> (visited 5 April 2018).

63 Solicitors Regulation Authority, “A New Route to Qualification: The New Solicitor’s Qualifying Examination (SQE)” (October 2016), available at <https://www.sra.org.uk/documents/SRA/consultations/solicitors-qualifying-examination-2-consultation.pdf> (visited 4 June 2018).

64 *Ibid.*, para.20.

65 *Ibid.*, para.120.

66 *Ibid.*, para.111.

67 *Ibid.*, paras.26–33.

68 Solicitors Regulation Authority, Consultation Responses. A New Route to Qualification: The Solicitors Qualification Examination (April 2017), “Response by Birmingham Law Society to Consultation Question 7: Do You Forsee Any Positive or Negative EDI Impacts Arising From Our Proposals?” (January 2017) pp.13–14, available at <https://www.sra.org.uk/documents/SRA/consultations/sqe2-consultation-responses-list.pdf> (visited 3 June 2018).

69 *Ibid.*, SRA — Solicitors Qualifying Examination — Consultation Response for the LEAPS (Legal Education and Professional Skills Research Group, Northumbria University Law School), Response

costs and time associated with passing SQE 2 may constitute an unhelpful barrier to entry and perhaps particularly so for those who are financially disadvantaged.

A prosaic, but critical, matter concerning SQE 2 is whether a skills-based assessment of a substantial magnitude can be effectively administered.⁷⁰ In this regard, some sense of the likely number of examinees can be gauged from the fact that there were 5,728 new traineeships registered with the SRA in the year ending 31 July 2016.⁷¹ Even the relatively simple logistical challenges of the BSB knowledge-based centralised exams still do not always continue to run smoothly and illustrate that centralisation of the LPC is not necessarily a guarantee of improvement over the existing system.⁷² While the exams testing written skills like drafting should be possible to arrange logistically (but establishing consistency in marking over 5,000 or so papers may not be so easy), it is difficult to fathom how oral assessments can be organised for such a large number of students within a time frame that does not either advantage or disadvantage different examinees. This may be to some extent reflected in the rather limited modes of the assessment. For example, the advocacy assessments will be exclusively conducted on an *ex parte* basis,⁷³ which is axiomatically not a comprehensive test of advocacy skills.

In any event, in a document published on 25 April 2017 (the April 2017 Document) the SRA announced that it intended to implement a number of key planks of its new regulatory regime governing vocational training;⁷⁴ namely, abolition of the requirement to undergo the LPC or any vocational training⁷⁵ and the introduction of SQE 2 in September 2020.⁷⁶ Once again it expressed the importance of allowing flexible vocational learning alternatives, while at the same time achieving consistency of standards.⁷⁷ It can then be seen that the SRA has moved from its earlier “radical” proposal to take ‘a hands-off’ attitude to regulating providers to one that dispenses with the need for any type of mandatory vocational training.

to “Q4 To What Extent Do You Agree or Disagree that Our Proposed Model is a Suitable Test of the Requirements Needed to Become a Solicitor?”, p.5.

70 AlphaPlus, “A Technical Evaluation of a New Approach to the Assessment of Competence of Intending Solicitors. Final Report for the Solicitors Regulation Authority” (October 2015) p.37, available at <https://www.sra.org.uk/documents/SRA/research/Alphaplus.pdf> (visited 5 April 2018).

71 The Law Society, “Entry Trends: Undergraduates and Graduates in Law”, available at <https://www.lawsociety.org.uk/Law-careers/Becoming-a-solicitor/Entry-trends/> (visited 5 April 2018).

72 See Bar Standards Board, Regulating Barristers, Central Examinations Board, “Chair’s Report August 2016: First Sit 2015/16” (n.14), para.17.3. Problems ranged from scripts being lost before either any marking or only after first marking had taken place as well as instances of under-marking or over-marking requiring subsequent correction, paras.17.3–17.4.

73 See Solicitors Regulation Authority, “Solicitors Qualifying Examination: Draft Assessment Specification” (n.56) p.64.

74 See Solicitors Regulation Authority, “A New Route to Qualification: The Solicitors Qualifying Examination (SQE) Summary of Responses and Our Decision on Next Steps” (n.2).

75 *Ibid.*, p.10.

76 *Ibid.*, p.2.

77 *Ibid.*, p.5.

There is no comprehensive educational evidence in the April 2017 Document for removing the current vocational training requirements, as opposed to instituting more rigorous quality control measures to deal with any perceived deficiencies in the existing model. Instead, it largely relies on an argument that publication of data by the SRA on success rates of providers will guarantee that future training providers will be of the necessary standard.⁷⁸ The April 2017 document also does not provide any details about how the prospective costs and administrative problems associated with SQE 2 will be addressed.⁷⁹ Again, in November 2017,⁸⁰ the SRA did not set out these details when it confirmed that it would not be changing the elements of draft legislation (which it had publically circulated as part of another public consultation in May 2017)⁸¹ that replaced compulsory vocational training with a centralised exam.

Strikingly, another document that the SRA published at or around the same time as the April 2017 document, the SQE Equality, Diversity and Inclusion Risk Assessment (the Risk Assessment Document), accepts that there may be perceptions about the quality of some providers in the new system, with consequential negative effects on the employability of those from disadvantaged backgrounds who undertake non-traditional vocational programmes.⁸² There is also no guarantee in the Risk Assessment Document that the new system will be less expensive than the current one.⁸³ So, rather counterintuitively, there is a real possibility that the new process may actually hinder access, diversity and standards, especially taking into account the pedagogical, logistical, costs-based and administrative problems which have arisen in the more limited form of centralised system of assessment run by the BSB.⁸⁴

Based on these types of concerns, the City of London Law Society (which represents about 17,000 solicitors in London and which would have a key role in training those seeking admission) wrote to the LSB opposing the SRA's application for approval of SQE 2.⁸⁵ Nevertheless, the LSB stated on 27 March 2018 that it

78 *Ibid.*, p.10.

79 *Ibid.*, pp.12–14.

80 Solicitors Regulation Authority, “Closed Consultations. A New Route to Qualification: New Regulations. Consultation Response” (November 2017) pp.3–7, available at <https://www.sra.org.uk/documents/SRA/consultations/sqe3-response-regulations.pdf> (visited 21 May 2018).

81 Solicitors Regulation Authority, “Consultation. A New Route to Qualification: New Regulations” (May 2017), available at <https://www.sra.org.uk/documents/SRA/consultations/sqe3-consultation.pdf> (visited 21 May 2018).

82 Solicitors Regulation Authority, “Solicitors Qualifying Examination (SQE) Equality, Diversity and Inclusion Risk Assessment” (April 2017) pp.4–5, available at www.sra.org.uk/documents/sra/consultations/sqe-edi-risk-assessment.doc (visited 21 May 2018).

83 *Ibid.*, p.4.

84 Bar Standards Board, “Future Bar Training. Consultation on the Future of Training for the Bar: Academic, Vocational and Professional Stages of Training” (July 2015) p.33, available at https://www.barstandardsboard.org.uk/media/1676754/fbt_triple_consultation_9_july_2015.pdf (visited 21 May 2018).

85 The City of London Law Society, “CLLS Submission to the Legal Services Board on the SRA's Application for the Approval of Amendments to Its Regulatory Arrangements in Respect of the Introduction of the Solicitors Qualifying Examination” (28 February 2018) pp.3–5, available at <http://www.citysolicitors.org.uk>

had approved the SRA's application to amend its regulatory arrangements for qualification as a solicitor, including the SQE.⁸⁶ However, it added that this was an interim approval process as the LSB still would need to approve any changes to any rules to give effect to these changes. This will evidently occur in 2019.⁸⁷ In doing so, the LSB stated that it would "expect to see more detail from the SRA - particularly on how the SQE will operate, what it will cost and the likely diversity impacts".⁸⁸ Quite how the details concerning the precise delivery of SQE 2 unfold from here is somewhat uncertain, but the overall position of the LSB appears to be that it has accepted in principle that SQE 2 can replace mandatory PLT.⁸⁹

This leads onto a consideration of the deficiencies of summative assessment (or a test without feedback) as opposed to formative assessment. Formative assessment/training is a term used when multiple measures are used in making qualitative determinations about student performance.⁹⁰ Feedback is the defining characteristic of formative assessment, insofar as what it seeks to achieve is a developmental outcome - so that a student learns how to do something better, ie, rather than simply categorising their answer as "right" or "wrong".⁹¹

The premise of formative assessment is that students, to be able to improve their performance at a particular task or skill, must develop the capacity to monitor the quality of their own work during its actual production. This presupposes that they are able to recognise relevant benchmarks based on good practice for assessing the quality of their work and evaluate how best to progress to that level.⁹² Sadler has argued that these skills can be developed by the provision of a "direct authentic evaluative experience for students".⁹³ The argument against wholly summative assessment systems is that they fail to provide such an experience.⁹⁴

Niedwiecki has characterised this type of evaluative process as the development of metacognitive skills, or put very simply, creating a teaching system to enable students how to learn from their previous mistakes, so as to improve their performances in future activities, which may be similar, but are not always

org.uk/attachments/article/104/CLLS%20Submission%20to%20the%20LSB%20-%20SQE%20-%2028%2002%2018.pdf (visited 21 May 2018).

86 Legal Services Board, "LSB Approves Framework for SRA's New Admission Requirements for Solicitors" (27 March 2018) p.1, available at http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2018/20180327LSB_Approves_SRA_SQE_Application.html (visited 21 May 2018).

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*, p.2; Solicitors Regulation Authority, "LSB Gives Go-Ahead to the First Stage of Reforms to How Solicitors Qualify" (27 March 2018), available at <http://www.sra.org.uk/sra/news/press/lb-gives-first-stage-sqe-approval.page> (visited 21 May 2018).

90 DR Sadler, "Formative Assessment and the Design of Instructional Systems" (1989) 18(2) *Instructional Science* 119, 124-125.

91 *Ibid.*, p.120.

92 *Ibid.*, p.130.

93 *Ibid.*, p.135.

94 *Ibid.*, p.142.

completely identical, to the ones which were taught.⁹⁵ This is particularly relevant to the teaching of legal skills as it is not possible to teach every type of legal skill to law students and the nature of legal practice will change over time.⁹⁶ Formative assessments, which can provide meaningful feedback on the deficiencies of the learning processes which the student undertook, enable students to become better self-directed learners.⁹⁷ Self-evidently, this type of learning attribute will be absent in the upcoming vocational training regime in England and Wales. As will be seen further below, this view runs contrary to recent developments in the United States.

D. Education of barristers in England

Following on from the publication of the LETR, the BSB has also been reviewing the vocational stage of training of barristers in England. Moving forward to March 2017, the BSB published a policy statement on Bar Training (the BSB 2017 Policy Statement).⁹⁸ The BSB 2017 Policy Statement adopted a relatively measured approach to reform of the existing policy of education and training as compared to the SRA, in that there is no suggestion in this document that vocational training would be optional or that it will introduce a summative assessment of the scope matching SQE 2. In general, and in contrast to the SRA's position, the BSB has taken the view that removal of any quality controls on the training of barristers would have a substantive negative effect in that it could "cause confusion for prospective barristers and training providers, damage diversity and increase regulatory cost".⁹⁹

The BSB 2017 Policy Statement envisaged instead that there would be greater variety in the vocational routes that those seeking to join the Bar could take. The proposed vocational routes were listed as follows:

- (1) The existing BPTC (at least for a transitional period) with some strengthening of teaching and assessment of legal ethics.¹⁰⁰
- (2) A two-part vocational course where students would be required to pass an assessment for the knowledge-based areas (Part 1) before entering Part 2 which would focus on skills and ethics.¹⁰¹
- (3) A combined academic/vocational model such as the Northumbria MLaw.¹⁰²
- (4) A modular or apprenticeship-based model.¹⁰³

95 Anthony Niedwiecki, "Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students through More Effective Formative Assessment Techniques" (2012) 40 *Capital University Law Review* 149, 155–159.

96 *Ibid.*, p.153.

97 *Ibid.*, pp.176–184.

98 See Bar Standards Board, "BSB Policy Statement on Bar Training" (n.3).

99 *Ibid.*, para.32.

100 *Ibid.*, paras.21–22.

101 *Ibid.*, para.23.

102 *Ibid.*, paras.29–30.

103 *Ibid.*, para.31.

The BSB has already outlined what it perceives as the primary benefit of the combined academic/vocational model, namely, that it is much more affordable for students. Other benefits could (indirectly) include furtherance of opportunities to conduct research into ways of improving vocational training,¹⁰⁴ a greater variety of teaching methodologies to increase students' interest, and if effectively implemented, a contextualisation of theory and practice that will promote a deeper understanding of both.¹⁰⁵

The BSB did not provide any detail on the most significant of these changes, being the modular or apprenticeship model, but it was looking forward to receiving concrete proposals on this by intended participating stakeholders.¹⁰⁶ A challenge then for the BSB will be how to ascertain the quality of the pedagogical standards of these essentially untested routes before they are launched.¹⁰⁷

In October 2017, the BSB published a draft document entitled an "Authorisation Framework for the Approval of Education and Training Organisations" (the October 2017 Document).¹⁰⁸ The October 2017 Document is directed at setting standards for organisations, including those currently providing vocational training which will be called Authorised Education and Training Organisations.¹⁰⁹ It states that vocational requirements will be retained,¹¹⁰ consistent with the four types of training routes outlined above.¹¹¹ In order to achieve future accreditation, all these routes must incorporate four principles in their training standards: "Flexibility, Accessibility, Affordability and High Standards".¹¹² In some cases, the guidance as to what these concepts entail is fairly straightforward. For instance, flexibility could involve e-learning¹¹³ and affordability might mean provision of scholarships and fee waivers.¹¹⁴ Provision of high standards relates to competence at the point of authorisation.¹¹⁵ The October 2017 Document measures competence as compliance

104 Kristoffer Greaves, "Re-imagining Practical Training Legal Training Practitioners — Soldiers for 'Vocationalism', or 'Double Agents'" (2014) 7(1/2) *Journal of the Australasian Law Teachers Association* 7, 101–118, available at scholar.google.com/citations?user=TV1kJdwAAAAJ&hl=zh-TW (visited 8 April 2018).

105 Jonny Hall and Kevin Kerrigan, "Clinic and the Wider Law Curriculum" (2011) 11 *International Journal of Legal Education* 25, 29–33.

106 See Bar Standards Board, "BSB Policy Statement on Bar Training" (n.3) para.31.

107 James Welsh, "BPTC Futures" *Counsel* (December 2016), available at <https://www.counselmagazine.co.uk/articles/bptc-futures> (visited 21 May 2018).

108 Bar Standards Board, Closed Consultations, "Authorisation Framework for the Approval of Education and Training Organisations" (3 October 2017), available at https://www.barstandardsboard.org.uk/media/1852744/authorisation_20framework_20draft_209.3_203_20october_202017_20final_20version_20for_20publication.pdf (visited 21 May 2018).

109 *Ibid.*, p.2.

110 *Ibid.*, pp.5–6.

111 See Bar Standards Board, "BSB Policy Statement on Bar Training" (n.3) paras.21–23, 29–31.

112 See Bar Standards Board, Closed Consultations "Authorisation Framework for the Approval of Education and Training Organisations" (n.108) p.2.

113 *Ibid.*, p.10.

114 *Ibid.*, p.12.

115 *Ibid.*, p.13.

with the Professional Statement for Barristers.¹¹⁶ The concept of accessibility, eg, removal of entry barriers to those who are regarded as insufficiently represented at the bar,¹¹⁷ could be the most difficult of these principles, at this stage, to pin down with certainty.

Broadly speaking, the BSB's policy on education and training, through its retention of a place for vocational training, appears to be a rational and proportionate approach as far as the preservation of standards is concerned. As to whether its vocational training requirements will prove to be the optimum mix of flexibility, accessibility, affordability and high-quality training, this will be somewhat dependent on the validity of the qualitative and quantitative data the BSB uses to inform its decision-making processes and the decisions it makes after analysing such data. A qualitative study commissioned by the BSB examining these factors was published (on the BSB website) in December 2017.¹¹⁸ While the qualitative study only had self-acknowledged relatively small sample sizes,¹¹⁹ it did provide some evidence that improvements needed to be made to the overall quality of teaching on the BPTC, the currency of its curriculum, its flexibility and the manageability of its workload.¹²⁰ A more challenging question will be how to improve some of the more nuanced of its teaching dynamics that (allegedly) militate against success by disadvantaged groups, such as a perceived absence of collegiality and inclusiveness between different demographic cohorts during its peer-learning activities.¹²¹

Interestingly, here, a quantitative study carried out by the BSB¹²² (also published on the BSB website in December 2017)¹²³ concluded that "Black Minority Ethnic (BME) students", and to a lesser extent those from socio-economically disadvantaged backgrounds, underperform on the BPTC, as compared to their respective counterparts: students from the so-called white groups and more affluent socioeconomic backgrounds.¹²⁴ As these two studies were conducted by different researchers and

116 Bar Standards Board, "Future Bar Training. Professional Statement for Barristers. Incorporating the Threshold Standard and Competences" (September 2016), available at https://www.barstandardsboard.org.uk/media/1787559/bsb_professional_statement_and_competences_2016.pdf (visited 21 May 2018).

117 See Bar Standards Board, "Authorisation Framework for the Approval of Education and Training Organisations" (n.108) p.11.

118 Mehul Kotecha, Sandy Chidley, Ruth Hudson and Fatima Husain, NatCen, "Barriers to Training for the Bar: A Qualitative Study" (June 2017), available at http://www.barstandardsboard.org.uk/media/1910425/barriers_to_training_for_the_bar_research.pdf (visited 21 May 2018).

119 *Ibid.*, p.10.

120 *Ibid.*, pp.18–23.

121 *Ibid.*, pp.23–25 and p.61.

122 BSB Research Team, "Exploring Differential Attainment at BPTC and Pupillage. A Quantitative Study" (November 2017), available at http://www.barstandardsboard.org.uk/media/1910429/differential_attainment_at_bptc_and_pupillage_analysis.pdf (visited 4 June 2018).

123 Bar Standards Board Website, "New Research Published to Help Inform Future Bar Training Decisions" (11 December 2018), available at <https://www.barstandardsboard.org.uk/> (visited 15 April 2018).

124 See BSB Research Team, "Exploring Differential Attainment at BPTC and Pupillage. A Quantitative Study" (n.122) pp.4–5.

over different time periods, evidentially their combined results probably operate as the starting point for further research,¹²⁵ but a worthwhile area for further study should be how to improve potentially valuable learning methods (such as peer-learning), so that they work in the most effective manner for all BPTC students.¹²⁶

On 30 May 2018, the BSB released a further statement (the May 2018 Statement) that included a more definitive policy on the vocational stage of barristers' training.¹²⁷ The May 2018 Statement makes some changes to rationalise the existing vocational training curriculum, and to provide some further flexibility in relation to its delivery and assessment.¹²⁸ In relation to the topical nature of centralised assessment, the BSB has not made any revolutionary changes to this part of the validation process. Perhaps, the most noteworthy change is to split the assessment of Professional Ethics into two parts. The first part will be conducted by the vocational provider. The second part will be a centralised exam that will occur during work-based learning or pupillage. This seems to be quite a potentially worthy reform by providing, presumably alongside structured tuition on professional ethics in the BPTC, some added contextual experience for the examinees before they sit their second assessment in this subject.¹²⁹ Without going into much detail, the May 2018 Statement provides a strong degree of confirmation that vocational training via the BPTC will continue to be part of barristers' training but that different qualifying vocational avenues could be introduced in September 2019.¹³⁰

III. United States of America

Until recently, and in general, graduates in the United States have not had to undergo a PLT programme, or certainly anything substantial of that nature, prior to admission. Pre-admission educational and training requirements were satisfied (in the main) through completion of a law degree (ordinarily an ABA-approved

125 This point was made (albeit from a slightly different perspective) by the BSB about the quantitative study in that it identified problems rather than solutions: Bar Standards Board, "Future Bar Training — Publication of Research Findings. Quantitative Analysis: Differential Attainment at the Bar Professional Training Course (BPTC) and Pupillage Stages (BSB Research Team)" (November 2017) p.5, available at https://www.barstandardsboard.org.uk/media/1910475/research_summary.pdf (visited 15 April 2018).

126 Peer learning is generally regarded as a valuable learning tool in higher education, but it can be difficult to implement effectively among a diverse student population. However, adoption of an appropriate leadership structure can improve its efficacy: Jane Skalicky and Dr Natalie Brown, "Peer Learning Framework: A Community of Practice Model" (October 2009), available at http://www.utas.edu.au/_data/assets/pdf_file/0017/334106/Peer-Learning-Framework_UTAS.pdf (visited 21 May 2018).

127 The Bar Standard Board, "Future Bar Training: BSB Policy Statement on Pupillage and Other Forms of Work-based Learning, the Authorisation Framework, and the Curriculum Strategy" (30 May 2018) (the May 2018 statement), available at https://www.barstandardsboard.org.uk/media/1935316/ftb_pupillage_af_and_car_policy_statement_-_may18.pdf (visited 4 June 2018).

128 *Ibid.*, paras.18–19.

129 *Ibid.*, para.19.

130 *Ibid.*, footnote 19 of the May 2018 statement.

Juris Doctor) and then by passing a written bar exam that was limited to testing knowledge of doctrinal courses such as contract and tort and an examination in Professional Conduct.¹³¹

Both the MacCrate Report and the Stuckey Report concluded that, because US state bar exams fail to test skills such as interviewing and advising and negotiation and because these were also not taught adequately in the law school curriculum, those entering practice lacked sufficient practical skills and the attendant professionalism to meet their clients' needs.¹³² Accordingly, both these reports argued the case for changing the focus of the education which US law students received from its academic slant to a greater emphasis on practical subjects.¹³³ Consistent with its emphasis on the importance of quality formative assessment,¹³⁴ the Stuckey Report further suggested that PLT is a necessary vehicle for skills-based learning, as an experiential setting allows for an opportunity to repeat skills as needed in a framework that provides necessary feedback, an essential concomitant to the ability to move beyond a mechanistic ability to copy certain techniques to a more informed understanding of any applicable norms and values.¹³⁵ Quoting from the Stuckey Report, "One cannot become skilled simply by reading about skills or watching others perform lawyerly tasks. One must perform the skills repeatedly, preferably receiving expert feedback."¹³⁶ The Carnegie Report, published shortly after the Stuckey Report, saw value in the ability of a law school to use formative feedback to expressly interweave ethical issues into the learning process to better develop students' sense of professional responsibility.¹³⁷

Spurred on by these views, the rising costs of attending law school, and a belief that despite students' increasing debt burden they were not being properly equipped for practice (and hence were also less employable), the call for greater transmission of skills into the law school curriculum reached a crescendo through a series of

131 American Bar Association Task Force on the Future of Legal Education, "Draft Report and Recommendations. American Bar Association Task Force on the Future of Legal Education" (20 September 2013) pp.2–3 and 25, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/task_force_on_lealeducation_draft_report_september2013.authcheckdam.pdf (visited 21 May 2018).

132 ABA, Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development — An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) (the MacCrate Report) (Chicago: American Bar Association 1992) pp.266–278, available at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf (visited 21 May 2018); Roy Stuckey et al, Best Practices for Legal Education. A Vision and Road Map (the Stuckey Report) (United States: Clinical Legal Education Association, 2007) pp.8–9, available at www.cleaweb.org/Resources/Documents/best_practices-full.pdf (visited 17 April 2018).

133 *Ibid.*, the MacCrate Report, pp.330–334; the Stuckey Report, p.209.

134 *Ibid.*, the Stuckey Report, pp.191–192.

135 *Ibid.*, p.125.

136 *Ibid.*

137 William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers. Preparation for the Profession of Law* (the Carnegie Report) (San Francisco: Jossey-Bass, 2007) p.115.

reports commissioned by a number of major bar associations between 2012 and 2014.¹³⁸ ABA policy embraced a degree of mandatory PLT-style training (if not quite a mandatory stand-alone programme) in August 2014.¹³⁹ A major part of these changes are contained in Standard 303(a)(3) of the ABA Standards and Rules of Procedure for Approval of Law Schools 2017–2018 (the ABA standards) which requires law schools to provide to students an experiential learning requirement in professional skills amounting to six credit hours.¹⁴⁰ Six credit hours, per Standard 311(a), roughly comprises about one-tenth of the face-to-face-type requirements for successful completion of a law school course.¹⁴¹

Pursuant to Standard 303(a)(3), an experiential course must be a simulation course, a law clinic or a field placement.¹⁴² The field placement, as defined in Standard 304(c),¹⁴³ contains a number of very robust mechanisms to better guarantee a comprehensive and quality educational experience that should address the deficiencies that have been raised concerning work experience as the totality of vocational training.¹⁴⁴ These include supervision and feedback of the student by a faculty member or a site supervisor.¹⁴⁵

138 MBA Task Force on the Law, Economy and Unemployment, “Report of the Task Force on Law, the Economy and Underemployment. Beginning the Conversation” (Massachusetts Bar Association, 17 May 2012) pp.5–11, available at <https://www.massbar.org/docs/default-source/mba-reports/massbar-beginning-the-conversation-2012-may-17.pdf?sfvrsn=2> (visited 21 May 2018); Illinois State Bar Association, “Final Report, Findings and Recommendations on the Impact of Law School Debt on the Delivery of Legal Services” (22 June 2013) p.45, available at <https://www.isba.org/sites/default/files/committees/Law%20School%20Debt%20Report%20-%203-8-13.pdf> (visited 21 May 2018); American Bar Association Task Force on the Future of Legal Education, “Draft Report and Recommendations. American Bar Association Task Force on the Future of Legal Education” (n.131); American Bar Association Task Force on the Future of Legal Education, “Report and Recommendations. American Bar Association Task Force on the Future of Legal Education” (24 January 2014), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf (visited 21 May 2018).

139 See American Bar Association, Section of Legal Education and Admissions to the Bar, “Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools” (n.4); American Bar Association, Section of Legal Education and Admission to the Bar, “ABA Standards and Rules of Procedure for Approval of Law Schools 2014-2015”, Chapter 3, available at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf (visited 21 May 2018).

140 American Bar Association, Section of Legal Education and Admissions to the Bar, “ABA Standards and Rules of Procedure for Approval of Law Schools 2017-2018” p.16, available at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017_2018ABASStandardsforApprovalofLawSchools/2017_2018_aba_standards_rules_approval_law_schools_final.authcheckdam.pdf (visited 21 May 2018).

141 *Ibid.*, p.21.

142 *Ibid.*, p.16.

143 *Ibid.*, pp.17–18.

144 See Stuckey, “Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses” (n.51) p.835.

145 See American Bar Association, Section of Legal Education and Admission to the Bar, “ABA Standards and Rules of Procedure for Approval of Law Schools 2017-2018” (n.140) Standard 304(c)(i)-(ii).

Standard 302 also requires law schools to create “learning outcomes” that would include “competency” in a number of areas including professional conduct and professional skills.¹⁴⁶ The menu of particular skills which must be taught was left open, but there is a broad range of suggested options in an interpretation section of Standard 302.¹⁴⁷ Standard 315 requires law schools to monitor assessment, content and learning outcomes, and after using this evaluation to measure the extent of students’ “attainment of competency in the learning outcomes”, take any necessary remedial steps to correct any deficiencies in the curriculum.¹⁴⁸ Interpretation 315-1 provides useful and valid measurements to ensure that these outcomes are met, including by making it incumbent on the Deans of law schools to survey the various branches of the profession about this and involving them in assessment.¹⁴⁹ With the right goodwill, this reform will hopefully bring about fruitful partnerships between the profession and law schools so that they can engage in a more collaborative role to better inform and shape education and training.

Matters such as diversity are recognised as important in the ABA standards.¹⁵⁰ There is no suggestion, though, to achieve these goals through adjustments to models of delivery of legal education and training. Instead, it encouraged the adoption of more traditional methods of assistance to disadvantaged groups, such as affirmative action admissions procedures and financial and academic support.¹⁵¹

Standard 314 orders the application of formative and summative assessment to the whole curriculum in a way that “provides meaningful feedback”. This should help foster, for the reasons described above in relation to the general discussion on the benefits of formative feedback, a greater depth of learning among students in these areas.¹⁵²

Therefore, following on from a longstanding and profound dissatisfaction on the part of lawyers’ professional organisations in the United States over the performance of many law schools in providing sufficient skills-based training to their students, and a subsequent lack of confidence in the practice readiness of law school graduates, there has been a pattern of transformative reform deeply rooted in sound educational theory. While Stuckey has suggested that the amount of PLT should be increased to 15 hours in US law school curriculums to provide a more

146 *Ibid.*, p.15; Standard 302(c) and 302(d), respectively.

147 *Ibid.*, p.16; Interpretation 302-1 states:

“For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.”

148 *Ibid.*, p.23; Standard 315.

149 *Ibid.*, p.24; Interpretation 315-1.

150 *Ibid.*, p.12; Standard 206.

151 *Ibid.*, pp.12–13; Standard 206 and Interpretation 206-2.

152 *Ibid.*, p.23; Standard 314.

significant impact on the skills-based learning needs of law students,¹⁵³ the overall effect of these changes, at this stage, is to provide an opportunity to develop a more relevant curriculum to address the PLT learning needs of those entering practice as lawyers in the United States.¹⁵⁴

IV. Disruptions to Legal Practice

In formulating legal educational curriculums, it will be necessary to factor in the forces of disruption, eg, digital modes, competition by non-traditional legal service providers or otherwise, and the probable/possible effects that these will have upon legal practice in the 21st century.¹⁵⁵ While views may differ as to the nature and extent of what “disruption” may amount to in the future of legal practice,¹⁵⁶ what is clear is that legal practice, throughout the world in general, is facing special challenges such as the availability of technology which transforms the way in which legal tasks are carried out, disruptions to lawyers’ monopolies by non-traditional law models and the globalisation of legal services.¹⁵⁷ In particular, these trends are creating competitive pressures to produce highly-skilled and expert freshly-minted lawyers who can generate excellent legal work at economical rates, with a minimum of mentoring and supervision.¹⁵⁸ According to a report by Deloitte, the way that legal practitioners will work will be fundamentally transformed by technology as early as 2020.¹⁵⁹ The challenge then for PLT providers will be to devise programmes which adequately and accurately identify and address (and assess) the skills needed to meet the challenges of 21st century lawyering.¹⁶⁰ In determining how this could take shape, guidance can be obtained from the types of innovative courses being taught in some US law schools such as e-discovery, improvement of processes,

153 Roy Stuckey, “The American Bar Association’s New Mandates for Teaching Professional Skills and Values: Impact, Human Resources, New Roles for Clinical Teachers, and Virtual Worlds” (2016) 2 *Wake Forest Law Review* 259, 260.

154 Denitsa R Mavrova Heinrich, “Teaching and Assessing Professional Communication Skills in Law School” (2015) *North Dakota Law Review* 99.

155 Carolyn Evans, “Digital Disruption and the Law — Balancing Tradition with Innovation in a Fast-Changing Industry is a Challenge for Legal Educators” (University of Melbourne Website, 2017), available at pursuit.unimelb.edu.au/articles/digital-disruption-and-the-law (visited 9 April 2018).

156 *Ibid.*, p.2.

157 Carole Silver, “What We Know and Need to Know About Global Lawyer Regulation” (2016) 67 *South Carolina Law Review* 461, 461–471.

158 Andrew Godwin and Richard Wai-sang Wu, “Legal Education, Practice Skills, and Pathways to Admission: A Comparative Analysis of Singapore, Hong Kong, and Australia” (2017) 66(2) *Journal of Legal Education* 212, 214–215.

159 Deloitte, “Developing Legal Talent. Stepping into the Future Law Firm” (February 2016) pp.2–8, available at www.legalfutures.co.uk/wp-content/uploads/developing-legal-talent-2016.pdf (visited 9 April 2018).

160 See Evans, “Digital Disruption and the Law — Balancing Tradition with Innovation in a Fast-Changing Industry is a Challenge for Legal Educators” (n.155) p.2.

automation of documentation and legal project management.¹⁶¹ Assessment of these types of challenging, innovative, complex and evolving skills is unlikely to be adequately met by a stand-alone summative assessment.

A. *Domino effect?*

Based on the perceived need to provide a consistently high-quality system of mandatory pre-admission training, PLT has spread throughout England and the Commonwealth, eventually gaining root in jurisdictions such as Hong Kong, NSW in Australia, New Zealand, Fiji, Papua New Guinea and British Columbia in Canada.¹⁶² The coming abandonment of this approach for the training of solicitors in England and Wales, one of the pioneers in PLT, is likely to be influential in any debate surrounding the future of PLT in these common law jurisdictions, as will any major decisions taken in regard to PLT in Hong Kong.

V. Current Situation Concerning Legal Training in Hong Kong

The conventional route for those seeking admission as either solicitors or barristers in Hong Kong is to undertake the Postgraduate Certificate in Laws course (PCLL) after completion of a law course and before completion of a training contract or pupillage, respectively.¹⁶³ The PCLL provides training in PLT in a simulated learning environment.¹⁶⁴ This provision for substantial skills-based learning in the PCLL has occurred as a result of a recommendation in the Roper Redmond Report.¹⁶⁵

There has been a debate in Hong Kong since 2012 about the direction that PLT in that jurisdiction should take.¹⁶⁶ Two main concerns have been voiced at various

161 Commission on the Future of Legal Services, American Bar Association, “Report on the Future of the Legal Services in the United States” (2016) p.25, available at https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf (visited 21 May 2018).

162 See, respectively, Luke Marsh and Michael Ramsden, “Developments in Hong Kong Legal Education” (2015) 3(2) *Asia Journal of Legal Education* 144, 149; Jeff Giddings and Michael McNamara, “Preparing Future Generations of Lawyers for Legal Practice: What’s Supervision Got to Do with It?” (2014) 37(3) *University of New South Wales Law Journal* 1226, 1229–1230; Cheryl Green, “Law Schools: Evolution and Law’s Role” (2016) 9(1) *Journal of Australasian Law Teachers* 57; Website of the University of Fiji, “Graduate Diploma of Legal Practice”, available at <https://www.unifiji.ac.fj/graduate-diploma-in-legal-practice-2/> (visited 7 April 2018); JBK Kaburise, “Access to Legal Education in Papua New Guinea” (1987) 3 *QIT Law Journal* 163, 165, available at www5.austlii.edu.au/au/journals/QITLawJl/1987/13.html (visited 7 April 2018); “Website of the Professional Legal Training Course. The Law Society of British Columbia”, available at <https://www.lawsociety.bc.ca/becoming-a-lawyer-in-bc/admission-program/professional-legal-training-course/> (visited 21 May 2018).

163 Wilson WS Chow and Firew Tiba, “Professional Legal Education Reviews: Too Many ‘What’s, Too Few How’s” (2013) 4(1) *European Journal of Law and Technology* 4.

164 *Ibid.*, pp.3–7.

165 Jack Burke, “An Impediment to Accord or a Springboard for Change? The Proposal to Introduce a Common Qualifying Exam in Hong Kong” (2015) 23(1) *Asia Pacific Law Review* 123, 133–134.

166 A Joint Submission from the Faculty of Law, The University of Hong Kong, the Faculty of Law, Chinese University of Hong Kong, and the School of Law, City University of Hong Kong to the Panel

stages about the existing model. First, both the Law Society of Hong Kong (the Law Society) and potential PCLL entrants have argued that there are insufficient places available in the PCLL.¹⁶⁷ Second, the Law Society has queried whether the assessments offered by the PCLL providers lacked consistency.¹⁶⁸ Although the Law Society commissioned a consultation paper into whether a Common Entrance Examination (CEE) should be introduced in Hong Kong as long ago as December 2013,¹⁶⁹ it is yet to release this report. Nevertheless, it announced on 6 January 2016 that the CEE would be introduced in Hong Kong in 2021 after completion of the PCLL.¹⁷⁰ It identified three main reasons in this press release as to why the CEE should be introduced:

- (1) Safeguarding the standards of those who will become solicitors.
- (2) Providing access to capable entrants.
- (3) Acting consistently with its duty as a regulator to preserve the profession's standards as well as to look after the interests of the public.¹⁷¹

It later added that the CEE, in line with recent changes in the last decade, would ensure consistency of standards of assessment to take into account the increase in the number of PCLL providers, the increased diversity among the feeder universities that educate students entering the PCLL, the greater scope of services offered by solicitors and the increase in the number of foreign lawyers practicing.¹⁷² However, by way of counter-argument, the increase in PCLL providers over this period was negligible (from two to three);¹⁷³ the PCLL Conversion Exams (which assess students on their knowledge as required in Hong Kong doctrinal law)¹⁷⁴ already

on Administration of Justice and Legal Services, the Legislative Council" (LC Paper No CB(4)234/13-14(01)) (the Joint Submission) (September 2013), available at <https://www.legco.gov.hk/yr13-14/english/panels/ajls/papers/aj1216cb4-234-1-e.pdf> (visited 21 May 2018).

167 Respectively, The Panel on Administration of Justice and Legal Services, Report of the Panel on Administration of Justice and Legal Services for Submission to the Legislative Council (LC Paper No CB(4)1162/14-15, 24 June 2015) para.21, available at <http://www.legco.gov.hk/yr14-15/english/panels/ajls/reports/ajls20150624cb4-1162-e.pdf> (visited 21 May 2018); *Ibid.*, para.15.

168 See the Joint Submission (n.166) para.15.

169 The Law Society of Hong Kong, "Consultation on the Feasibility of Implementing a Common Entrance Examination in Hong Kong" (December 2013), referenced in Submissions of the Law Society of Hong Kong on the Common Entrance Examination (LC Paper No CB(4)225/13-14(03)) Annex 1, available at <https://www.legco.gov.hk/yr13-14/english/panels/ajls/papers/aj1216cb4-225-3-e.pdf> (visited 28 May 2018).

170 The Law Society of Hong Kong, "Press Releases: Common Entrance Examination" (6 January 2016) paras.3-4, available at http://www.hklawsoc.org.hk/pub_e/news/press/20160106.asp (visited 28 May 2018).

171 *Ibid.*, para.5.

172 Panel on Administration of Justice and Legal Services, Background Brief Prepared by the Legislative Council Secretariat for the Meeting on 26 June 2017 (LC Paper No CB(4)1255/16-17(04), 20 June 2017) para.13, available at <http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170626cb4-1255-4-e.pdf> (visited 21 May 2018).

173 See Marsh and Ramsden, "Developments in Hong Kong Legal Education" (n.162) p.155.

174 PCLL Conversion Examination Website, available at www.pcea.com.hk/ (visited 5 April 2018).

address the concern about the variety of feeder universities; and it is difficult to identify how a CEE relates to the remaining issues.

More fundamentally, the Law Society's definitive announcement that there would be a CEE predated a wide-ranging enquiry by the Standing Committee on Legal Education and Training (SCLET)¹⁷⁵ on legal education and training in Hong Kong,¹⁷⁶ including into the PCLL,¹⁷⁷ and thus attracted criticism that it was premature in arriving at this decision.¹⁷⁸ The Law Society's most recent pronouncement on the CEE is somewhat complex; its position operates as a response to the Draft Report and it contemplates a few different scenarios as to how any new regime relating to PLT or a centralised exam might function.¹⁷⁹ As a result, it will be more convenient to discuss these new proposals by the Law Society after consideration of the Draft Report and the Final Report.

As noted, the SCLET has released both a Draft Report and a Final Report relating to its Comprehensive Review of Legal Education and Training in Hong Kong which examine among other things, if the PCLL is in need of reform.¹⁸⁰

As far as a broad-based evaluation of the PCLL is concerned, the authors of the Draft Report (the Consultants) noted that there is no trenchant criticism of the quality of teaching on the PCLL programmes and the mode of their design and delivery. The starting point for the Draft Report's discussion about the way forward for the PCLL is improvement rather than replacement.¹⁸¹

Focusing on some of the more key aspects of the Draft Report,¹⁸² in this respect, the Draft Report was critical of the existing system of sparsely outlined benchmarks used by the Law Society, and the currency of the Bar Benchmarks. Therefore, it suggested adopting a competence based-system that relies on a set of

175 The SCLET maintains a review function of legal education and training in Hong Kong.

176 Standing Committee on Legal Education and Training, "Consultation Paper, Comprehensive Review of Legal Education and Training in Hong Kong" (October 2015), available at <http://www.sclet.gov.hk/eng/pdf/cone.pdf> (visited 29 May 2018).

177 *Ibid.*, paras.10(a)–10(c) and 12.

178 The Bar Association of Hong Kong, "Statement of the Hong Kong Bar Association on the Law Society's Decision to Implement a Common Entrance Examination for Qualifying Entries into the Solicitors' Profession" (8 January 2018) paras.5 and 6, available at <http://www.hkba.org/sites/default/files/20160108%20-%20Public%20Statement%20of%20the%20Bar%20on%20CEE%20%28e%29.pdf> (visited 4 June 2018).

179 The Law Society of Hong Kong, "Response to Standing Committee on Legal Education and Training ("SCLET") Consultants Regarding Unified Law School and the Common Entrance Exam ("CEE") and other Recommendations" (the Law Society Response), available at http://www.sclet.gov.hk/eng/pdf/lawsociety_20180508.pdf (visited 28 May 2018).

180 The Draft Report (n.5) and The Final Report (n.6), respectively.

181 *Ibid.*, The Draft Report, pp.76–77.

182 Although the publication of the Final Report follows fairly closely in time from that of the Draft Report, it is worth devoting some attention to the findings of the Draft Report as the Law Society has only responded to the Draft Report to date (but with some fairly "game changing" proposals) and the Consultants have significantly moved away in the Final Report from one of their recommendations in the Draft Report relating to amalgamation of the three PCLL providers into a unified entity; The Draft Report (n.5) p.30.

stated outcomes that would be further buttressed by written standards (collectively referred to as benchmarks) as a means of prescribing quality assurance standards for the PCLL programmes.¹⁸³ Quoting from the Draft Report, these outcomes can be described as “a range of knowledge, skilled behaviours and attitudes (reflecting underlying personal and professional values)”.¹⁸⁴ The written standards would, at least, encompass matters such as the essential knowledge elements, teaching and learning methods (such as the time devoted to small group teaching and student-to-staff ratios within these small groups along with the overall workload) consistent assessment indicators and mechanisms. Although there is little to suggest that the necessary personal and professional attributes for legal practitioners are not already being intuitively taught and assessed relatively well by the PCLL providers, it is self-evident that there is value in identifying and developing these in the optimum manner, and monitoring if there is compliance with them, to best ensure that students who finish the PCLL are ready to enter practice as competent trainees or pupil barristers.

In relation to the existing curriculum, some important areas for improvement were removal of duplication of knowledge-based learning across the PCLL and the law degrees¹⁸⁵ and updating the curriculum e.g. getting PCLL students more “up to speed” with IT practice-related skills.¹⁸⁶

The Draft Report also suggested increasing the number of entrants into the PCLL, perhaps through greater utilisation of online learning, and introducing greater transparency and consistency into the PCLL admissions process.¹⁸⁷ This to some extent leads onto one of the more controversial issues which the Draft Report addressed, being the question of whether a CEE should be introduced in Hong Kong. The Draft Report took note of the criticism that the overall passing rate of the PCLL after resits was fairly high but it did not conclude that this was indicative of low standards. It is also probably fair to add that this might well be a consequence of restrictive standards of entry and/or even the generally accepted high standards of delivery and teaching in the PCLL. The Draft Report counselled against complacency in monitoring standards by keeping pass rates under review as part of a wider process of identifying what should constitute suitable competencies¹⁸⁸ and provided some sound suggestions for improvement through standardisation of assessment processes.¹⁸⁹ Also, as recommended in the Draft Report, additional confidence in this aspect of the PCLL could be achieved as a part of the implementation of a comprehensive triennial accreditation process governing overall quality of the

183 The Draft Report (n.5) pp.46, 77 and 88.

184 *Ibid.*, p.46.

185 *Ibid.*, p.63.

186 *Ibid.*, pp.85–86.

187 *Ibid.*, p.70.

188 *Ibid.*, p.81.

189 *Ibid.*, p.83.

programmes.¹⁹⁰ This is consistent with the Draft Report's belief in the importance of quality assurance and could be carried out as a part of a widening of the role of the SCLET or any similar body to take a stronger role in governance issues.¹⁹¹

Ultimately, the Draft Report saw no clear evidence of a lack of consistency in marking standards among the PCLL providers that would justify the need for the introduction of a CEE, leaving aside the fact that it was currently uncostered or that its logistics had not been fully revealed.¹⁹² It also did not see any merit in any argument by the Law Society of a conflict of interest between the providers in their roles as educators and assessors, especially in so far as it had hinted that it was in the providers' interests to pass poorly performing students.¹⁹³ Instead, the Draft Report believed that the types of quality assurance measures which it advocated should ensure greater confidence in PCLL assessment standards.¹⁹⁴ Furthermore, as the proposed CEE would operate post-PCLL, it did not see that it would likely assist in alleviating access restrictions into the programmes.¹⁹⁵ It envisaged fewer problems with a more modest-style CEE that assessed students across the providers on core areas that could be tested in written exams,¹⁹⁶ and rejected the notion of what it labelled as an "altCEE", being an alternative pathway to admission solely reliant on passing an exam, for a number of the same reasons as those discussed above in relation to the SQE, eg, it would become a second-class route to practice.¹⁹⁷ In view of (what it saw as) the apparent lack of a strong case for any type of CEE, the need for further work to sort out the specifics of it (should it be imposed) and the desirability of creating a School of Professional Legal Studies (which is discussed in the paragraph below), the Draft Report proposed the imposition of a moratorium on the implementation of any CEE until an agreed set of benchmarking assessment standards were implemented reflecting the attainment of suitable competencies, or a decision was made to create a School of Professional Legal Studies (the Unified School) or consensus was reached between the PCLL providers, the Bar and the Law Society about implementing a CEE.¹⁹⁸

Probably, the most unexpected suggestion for change in the Draft Report is its Recommendation 2.1, namely that thought be given to the establishment of the Unified School which would be the sole provider of PLT in Hong Kong.¹⁹⁹ However, in order to make attendance at the Unified School less costly for students (by preserving existing University Grants Council funding for the PCLL), the Draft Report recommended that the Unified School should be affiliated with

190 *Ibid.*, pp.83–84.

191 *Ibid.*, pp.144–145.

192 *Ibid.*, pp.97–98.

193 *Ibid.*, pp.100–101.

194 *Ibid.*, p.105.

195 *Ibid.*, p.99.

196 *Ibid.*, p.104.

197 *Ibid.*, pp.106–107.

198 *Ibid.*, p.108.

199 *Ibid.*, p.30.

the existing university structure.²⁰⁰ Important perceived advantages of the Unified School are that it could ensure greater consistency of delivery and it would enjoy greater economies of scale and so would be able to provide more places.²⁰¹ Obvious perceived disadvantages of the Unified School would be that it would operate as a monopoly²⁰² with all the well-known problems of inertia that flow from that model.

The Final Report, dated April 2018, reaffirmed a number of recommendations which were made in the Draft Report. In particular, it made representations in very strong terms about the importance of providing as much publically available material as possible about the PCLL admissions criteria as well as taking steps to assure the consistency of this admissions process. Taking into account the critical nature of this outcome for students, the relatively low percentage of number of applicants who are admitted into the PCLL (around 50 per cent) and the lack of absolute confidence in some quarters about the accuracy of judgments made in this admissions process, this is likely to be a relatively non-contentious reform.²⁰³

Following on consultations with various parties, the Final Report moved away from the recommendation in the Draft Report about creating the Unified School in place of the existing PCLL providers as this (uncosted, relatively undetailed and rather theoretical proposal)²⁰⁴ was unlikely to “get off the ground”.²⁰⁵ This seems wise, as it might be better to focus on a number of the more easily achievable reforms (as initially set out above in the Draft Report and endorsed again in the Final Report) such as removing unnecessary teaching of knowledge-based material in the PCLL, enhancement of quality control measures in the PCLL around the use of outcomes and the adoption of written standards, employment of comprehensive procedures to ensure better programme monitoring and improvement of it (but on a quinquennial basis) and payment of closer attention to the robustness of assessment standards in it.²⁰⁶ In a further noteworthy step to ensure standards, the Final Report recommended the institution of procedures to accredit, and if necessary, to discredit PCLL providers.²⁰⁷ On a more micro-level, the Final Report, among other things, also considered that it was vital to ensure that ethical values were effectively taught in the PCLL, that the curriculum should be updated to allow students to upskill on technology, and social and business awareness and that there should be a greater emphasis in the PCLL on the development of reflective learning habits and greater proficiency in legal Putonghua.²⁰⁸

200 *Ibid.*, p.29.

201 *Ibid.*, p.28.

202 *Ibid.*, p.29.

203 The Final Report (n.6) pp.84–88.

204 The Draft Report (n.5) pp.28–29.

205 The Final Report (n.6) p.29.

206 *Ibid.*, pp.96–99.

207 *Ibid.*, p.103.

208 *Ibid.*, pp.100–102.

As with the Draft Report, the Final Report also stated that there should be a moratorium on the implementation of a CEE. In doing so, it stated that it has three major concerns about the need for a CEE. First, that there is no compelling evidence to prove that there is a problem with the PCLL assessment standards or if there is, that the CEE will correct these.²⁰⁹ Second, insufficient detail has been provided about the nature of the CEE to allow key decision-makers to be able to come to any consensus on it.²¹⁰ Third, the general model of the CEE (whatever its specifics), contemplated by the Law Society, provides a say not just in determining standards but also over “the market mechanism governing access to the profession”²¹¹ and excludes the other legitimate stakeholders, especially the Bar, from having adequate input into PLT in Hong Kong.²¹²

In a document dated 8 May 2018, the Law Society responded to the Draft Report (the Law Society Response).²¹³ The Law Society Response began by outlining what it believed to be the three primary principles relating to the “implementation” of a CEE.²¹⁴ First, as a regulator, the Law Society has a responsibility to maintain “the quality” of solicitors.²¹⁵ Second, it has to ensure that those becoming trainee solicitors have reached a uniform standard.²¹⁶ Third, to ensure “more” qualified candidates are able to undertake the PCLL.²¹⁷

Probably, its most significant reaction to the Draft Report is to agree with the recommendation in that report to adopt the Unified School and to accept a moratorium on the CEE in lieu of that happening by March 2021.²¹⁸ Problematically, of course, the Final Report has subsequently derogated from that position.²¹⁹ In any event, the Law Society Response has in place a holding position which would take force until the creation of the Unified School or the availability of enough places on the PCLL to “fairly and appropriately accommodate at least the current level of PCLL applications”.²²⁰ Namely, that possibly as soon as 2019/2020, students will need to undertake a Law Society Examination (LSE)²²¹ if they have “completed a qualifying vocational training programme approved by the Law Society”.²²² At this stage, the Law Society envisages that students’ completion of a course equivalent to the PCLL (which will not necessarily have to be operated

209 *Ibid.*, p.122.

210 *Ibid.*

211 *Ibid.*

212 *Ibid.*, pp.122–123.

213 The Law Society Response (n.179).

214 *Ibid.*, para.2.

215 *Ibid.*, para.2(a).

216 *Ibid.*, para.2(b).

217 *Ibid.*, para.2(c).

218 *Ibid.*, paras.11–18.

219 See footnotes 199–202.

220 The Law Society Response (n.179) para.28.

221 *Ibid.*, para.29.

222 *Ibid.*, para.30.

in Hong Kong), staffed by Hong Kong solicitors or those with sufficient expertise, and which will be “determined and supervised” by the Law Society, will constitute completion of such a qualifying vocational training programme.²²³ As best as can be gathered, these new qualifying vocational training programmes will operate in conjunction with existing PCLL providers, although the Law Society has not explicitly confirmed this.²²⁴ Certainly, if the Law Society is going to institute a system establishing PLT providers as an alternative to the university-based PCLL providers, it would not rationally follow that it would also permit a pathway that bypassed the need to undertake any PLT training through simply passing an LSE. On the other hand, the Law Society does not seem to have completely ruled this option out.²²⁵

This suggestion to consider the creation of another non-university provider(s), in addition to, rather than in substitution for the existing ones, could ease the perennial shortage of places for PCLL students. Of course, this would displace the “bottleneck” of places from the PCLL to the market place and might lead to some students spending money on a vocational course that does not lead to a place in the profession.²²⁶ This is backed up by overseas experience which has shown that there is a limit to the ability of developed economies to satisfy unfettered demand for law graduates.²²⁷ A case could be made though that this is a decision that a mature, intelligent and well-informed student should be able to make and is really not fundamentally different as a financial risk-taking exercise from the one he undertook when deciding to undertake law in the first place.

If the Law Society insists on introducing an LSE (and it has the resources and legislative power to do so), perhaps, a more worthwhile change that should be administratively easy to implement, and which would lessen any existing perception it has about inconsistencies in assessment standards, might be for the PCLL providers and any LSE provider(s) to set the same exams in courses like Professional Conduct and Civil Litigation Practice and Conveyancing (where there should not be any significant differences in their curriculums).²²⁸

223 *Ibid.*, para.32.

224 *Ibid.*, para.30.

225 The Law Society Response (n.179) para.27 states that:

“The Law Society ... has reached the conclusion that there should be no apparent need for the altCEE if the 3 universities are able to substantially increase PCLL intake immediately to completely remove the bottleneck or when the unified law school is able to maintain standards despite it being a form of monopoly.”

226 The Final Report (n.6) paras.80–81.

227 Kyle P McEntee, Patrick J Lynch and Derek M Tokaz, “The Crisis in Legal Education: Dabbling in Disaster Planning” (2012) 46(1) University of Michigan Journal of Law Reform 225, 225–227.

228 Submission of the Faculty of Law, The University of Hong Kong, Panel on Administration of Justice and Legal Services of the Legislative Council (LC Paper No CB(4)884/15-16(03), 25 April 2016) para.2.9 and Appendix C, available at www.legco.gov.hk/yr15-16/english/panels/ajls/papers/ajls20160425cb4-884-3-e.pdf (visited 9 April 2018).

The Law Society Response led to a speedy reply by the Consultants (the Consultants' Reply).²²⁹ The Consultants' Reply addressed the vexed issue of increasing PCLL places to all qualified applicants and made the point that this could affect the quality of those entering the Bar,²³⁰ presumably because those PCLL graduates who do not get trainee contracts will try to obtain pupillage seats, but this to some extent presupposes that there will be a sufficient increase in pupillage seats to accommodate this surplus.

The Consultants' Reply reasonably identifies the importance of ensuring that any LSE is of the same quality as that currently provided by the PCLL providers.²³¹ Undoubtedly, it is critical that the Law Society provides further detail as soon as possible about the LSE, if only from a self-interested perspective of ensuring that all trainee solicitors entering the legal profession are of a sufficiently high standard and to remove any underlying scepticism about the LSE which might damage its reputational product.²³²

Further, in this regard, the Consultants' Reply expressed the view that, by virtue of s.73(2) of the Legal Practitioners Ordinance (Cap.159) (LPO), any change to the Trainee Solicitors Rules (Cap.159J) (the Trainee Solicitors Rules) must be approved by the Chief Justice.²³³ Accordingly, the Consultants were of the view that this requirement would extend to s.73(1)(d) of the LPO²³⁴ which is the underlying legislation supporting the Trainee Solicitors Rules, the legislation which the Law Society would be relying on to empower it to institute the LSE.²³⁵

On the basis that this relatively plausible interpretation is correct, and in the absence of any stated criteria (other than perhaps the current general PCLL framework) as to what might form an acceptable alternative to the PCLL, self-evidently the Law Society will probably need to consider if it would be circumspect

229 Standing Committee on Legal Education and Training Comprehensive Review of Legal Education and Training in Hong Kong, "Observations by the SCLET Consultants on the Response of the Hong Kong Law Society to Their Interim Report (October 2017)" (May 2018) (the Consultants' Reply), available at http://www.sclet.gov.hk/eng/pdf/consultant_20180529.pdf (visited 31 May 2018).

230 *Ibid.*, para.2.2.

231 *Ibid.*, para.6.2.

232 Alvin Lum, "Solicitors' Group in Hong Kong pushes for a New Qualifying Exam for Lawyers" *South China Morning Post* (25 May 2018), available at <http://www.scmp.com/news/hong-kong/hong-kong-law-and-crime/article/2147686/solicitors-group-hong-kong-pushes-new> (visited 4 June 2018).

233 See the Consultants' Reply (n.229) para. 7.1. Section 73(2) of LPO states: "Every rule made by the Council under this section shall be subject to the prior approval of the Chief Justice."

234 *Ibid.*, paras.7.1–7.2. The salient part of s.73(1)(d) states:

"The Council may make rules regulating the employment of trainee solicitors and examinations, and in particular, without prejudice to the generality of the foregoing, providing for — (i) the manner in which any person shall qualify for admission under section 4(1)(a) including, in particular, the period of employment, if any, of a trainee solicitor in any particular case, the examination or examinations to be passed, the courses to be completed and notices and forms to be used in connection therewith."

235 See the Consultants' Reply (n.229) para.7.2. For a deeper analysis of this issue, see Johannes Chan, "The Law Society's Power to Introduce a Common Entrance Exam" (2018) 48(1) HKLJ 1.

to provide a detailed and compelling outline of any proposed LSE, which has been already fully evaluated by the SCLET, to the Chief Justice to gain the relevant approval.²³⁶

VI. Moving Forward for Hong Kong's Stakeholders in the PCLL

Hong Kong's legal industry has been in a special position to grow and prosper for a number of years as a result of its access to legal work in China.²³⁷ This development is only likely to continue to grow following Hong Kong's potentially major roles in a number of transformative economic initiatives. First, Hong Kong is set to occupy a key role, by virtue of its fortunate geographical gateway position, in the "One Belt, One Road" initiative, that seeks to create major infrastructure projects throughout Asia, Europe and Africa, with the chance of resultant legal work in the areas of financing, mergers and acquisitions and mediation and arbitration.²³⁸ Second, Hong Kong will play a pivotal part in the Guangdong–Hong Kong–Macau Greater Bay Area Plan which aims to bring about greater cooperation in the economic development of these regions with an attendant surge in financing-related work.²³⁹ In particular, substantial work relating to the Greater Bay Area Plan may flow from a pilot programme allowing Hong Kong law firms to operate in a form of partnership with Chinese firms in Guangdong.²⁴⁰ Third, Hong Kong is poised to strengthen its position as a major financial centre with the establishment of the Bond Connect Scheme which will afford an entrée into China's interbank bond market.²⁴¹

The Hong Kong Bar Association, cognisant of disruptive competition to its share of the market from globalised legal entities, is expanding its reach into direct access work. For instance, Hong Kong barristers are now permitted to compete with solicitors for direct access to certain types of advisory work from Chinese law firms.²⁴² The Bar Association is also taking steps to more actively promote

236 *Ibid.*, paras.7.1 and 7.2.

237 Legislative Council Panel on Administration of Justice and Legal Services, Future Development of the Legal Profession Under the Trend of Globalization, Its Impacts on the Legal Profession and Legal Services to the Public in Hong Kong (LC Paper No CB(4)762-18(03)), available at <https://www.legco.gov.hk/yr17-18/english/panels/ajls/papers/ajls20180326cb4-762-3-e.pdf> (visited 9 April 2018).

238 Rimsky Yuen, "Opportunities and Challenges for Lawyers under the Mainland's 'Belt and Road Initiative'" (Keynote Speech, ALB Hong Kong In-House Legal Summit 2015) (22 September 2015), available at www.doj.gov.hk/eng/public/pdf/2015/sj20150922e.pdf (visited 5 April 2018).

239 Li Qiaoyi and Yang Sheng, "HK Explores Integration Plan" *Global Times* (20 April 2017), available at www.pressreader.com/usa/global-times-us-edition/20170420/281487866226537 (visited 3 June 2018).

240 See Submission of the Faculty of Law, The University of Hong Kong, Panel on Administration of Justice and Legal Services of the Legislative Council (n.228) para.15.

241 Karen Yeung, "Bond Market Opens Up" *South China Morning Post* A6 (1 July 2017).

242 Winnie Tam SC, "Speech of the Chairman of the Hong Kong Bar Association, Winnie Tam SC, at the Opening of the Legal Year" (11 January 2016) para.32, available at <http://www.hkba.org/sites/default/files/20160111%20-%20Oly%20Jan%202016%20Speech%20%28Eng%29.pdf> (visited 21 May 2018).

awareness among those who can currently provide direct instructions to barristers such as corporate counsel, accountants, engineers and foreign lawyers.²⁴³ A persuasive case can be made then that the ability of both arms of the profession to work effectively with PCLL providers (whether they be in the university sector or otherwise) to inculcate the sophisticated attitudes and legal skills required to prosper in a dynamically changing legal environment, will help safeguard the legal profession's future profitability and success.²⁴⁴

The SRA's recently enacted policy that makes vocational training optional, in conjunction with the mandatory SQE 2, should be rejected by the Law Society in forming its policy on vocational training in Hong Kong, no matter what circumstances unfold in its further relations with the Bar and the current PCLL providers. There is no overriding legislative policy, similar to that existing in England and Wales, which tilts reform away from improving the standards of legal education and training on the basis of perceived indirect discrimination, and issues of diversity are not ones which have been raised concerning entry into the PCLL. The issue of access has been raised only in so far as it relates to the number of places on the PCLL which are available.²⁴⁵ Students who are unable to gain admission into practice because of the lack of places on the PCLL will naturally find the notion of an altCEE pathway (that can operate in lieu of training) attractive, and such ideas are gaining traction in Hong Kong.²⁴⁶ If the effect of that change would be to dilute the rigour of PLT though, such a move would be self-defeating for the solicitors' branch of the profession in Hong Kong and detrimental to the quality of the delivery of legal services.

Furthermore, a key difference between the situation in Hong Kong and that in England and Wales is that there are 3 PCLL providers in Hong Kong but around 30 institutions that have been authorised to provide the LPC in England and Wales.²⁴⁷ This obviously makes the difficulty of ensuring uniformity of standards between the different PLT providers more acute in the latter.

England and Wales does offer greater flexibility in its current mandatory vocational models of legal training for solicitors, and this flexibility will also be offered in the near future to barristers. On the other hand, substantial flexibility

243 Winnie Tam SC, "Chairman's Report for 2016" (10 January 2017) paras.26–27, available at <http://www.hkba.org/sites/default/files/Chairman%27s%20Report%20%202016%20%28E%29.pdf> (visited 1 April 2018).

244 James E Moliterno, "The Trouble with Lawyer Regulation" (2013) 62 *Emory Law Journal* 102, 113.

245 Department of Justice, *Legal Education and Training in Hong Kong* (LC Paper No CB(4)1255/16-17(03), 26 June 2017), available at <https://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170626cb4-1255-3-e.pdf> (visited 17 May 2018).

246 Council Business Division 4, Legislative Council Secretariat, *Background Brief Prepared by the Legislative Council Secretariat for the Meeting on 26 June 2017, Legal Education and Training in Hong Kong* (LC Paper No CB(4)1255/16-17(04), 20 June 2017) para.18, <http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170626cb4-1255-4-e.pdf> (visited 21 May 2018).

247 Solicitors Regulation Authority, "Legal Practice Course (LPC) Providers", available at www.sra.org.uk/students/courses/lpc-course-providers.page (visited 8 April 2018).

goes hand in hand with greater difficulty in standardising quality controls, and if there is one constant in the history of regulatory control of the PCLL in Hong Kong, it has been that both branches of the profession retain an eagle eye on all key aspects of the delivery of the PLT.²⁴⁸

The most straightforward response to help students, as the Final Report has advocated, would be to open up more places for PCLL students.²⁴⁹ This is happening now in Hong Kong²⁵⁰ and the shortfall between available places and those applying could be further reduced if the Law Society is able to bring additional PLT providers into the market-place. In lieu of that, a well-designed apprenticeship model that combines work experience with part-time study in a doctrinal law degree and the PCLL could provide a more affordable career path into the legal profession, as well as one that is likely to offer a chance of gainful employment. It could also dovetail well into a stream now being offered by a number of PCLL providers, or being contemplated as such, which awards places onto the PCLL for students with substantial work experience.²⁵¹

The notion of an LSE floated by the Law Society is a more complex issue less easily definitively resolved in view of the paucity of information provided by the Law Society on it. Nevertheless, and despite the challenges involved in constructively bringing about a change of this magnitude, all interested parties should keep an open mind in relation to it. Provision of further detail by the Law Society here should hopefully drive the debate on this issue in a more fruitful manner.

Moving forward, the latest changes to the ABA standards accept the logic of the discourse that has emanated since the publication of the MacCrate Report about the necessity of a comprehensive training regime to instil a measure of the necessary knowledge, skills and attitudes into law students before they commence practice. They also presuppose a willingness by the various arms of the legal profession in the United States, including the judiciary, to work together to reach a consensus about how best to achieve these aims. This line of reasoning seems to be wise and accordingly it would be beneficial for this type of engagement to come to fruition in Hong Kong.

Currently, reform of the PCLL is in something of a flux as its major stakeholders are not only in disagreement but also often talking at cross-purposes. Those involved in delivering and regulating the PCLL have a historical opportunity to collaborate

248 See Submission of the Faculty of Law, The University of Hong Kong, Panel on Administration of Justice and Legal Services of the Legislative Council (n.228) paras.7.6–7.8.

249 The Final Report (n.6) p.82.

250 See Submission of the Faculty of Law, The University of Hong Kong, Panel on Administration of Justice and Legal Services of the Legislative Council (n.228) para.6.7(b).

251 Legco, Panel on Administration of Justice and Legal Services, Background Brief Prepared by the Legislative Council Secretariat for the Meeting on 26 June 2017 (LC Paper No CB(4)1255/16-17(04), 20 June 2017) paras.30–33, available at www.legco.gov.hk/yr16-17/english/panels/ajls/.../ajls20170626.htm (visited 5 April 2018).

in identifying the changes that need to be made to it, so that it is able to best meet the rapidly changing demands of modern practice. One way of achieving this goal is to identify the necessary competencies which lawyers entering practice must have. However, this should not be the end of the fact-finding exercise, but rather should act as one stage in the continuum that will identify the types of training and assessment (both formative and summative measures) that will produce the types of lawyers who will succeed financially and act ethically. A major part of the dialogue between relevant stakeholders in Hong Kong and the PCLL providers should be directed towards these ends.

VII. Lessons for PLT in Hong Kong and Other Common Law Countries

The practice of law is becoming increasingly globalised and interconnected. A lawyer's success in navigating these boundaries will often correlate with the quality of the legal education that he receives.²⁵² In addition, and even more importantly, the role of a lawyer involves a public service, and it is vital that lawyers throughout the common law world are imbued with the necessary values to ethically serve their clients and the wider society in both the domestic and international contexts.²⁵³ The lessons and experiences derived from the United States about the need for PLT, and the value of keeping its teaching and learning activities relevant, are such fundamental pedagogical ones that they are applicable to Hong Kong and common law countries worldwide. As a result, those involved in shaping PLT in Hong Kong would be wise to not only continue to retain the delivery of the PCLL or equivalent means of training but also should embrace the chance to establish a programme that will train and educate its students to meet the current and upcoming opportunities and challenges of legal practice. In doing so, it may well provide a template or gold standard for all common law jurisdictions to emulate.

252 John Flood, "Institutional Bridging: How Large Firms Engage in Globalization" (2013) 54(1) Boston College Law Review 1087, 1093–1094.

253 Charles Sampford and Hugh Breakey, "Building an Ethical Profession in a Globalizing World" in Charles Sampford and Hugh Breakey (eds.), *Law, Lawyering and Legal Education* (London: Routledge, 2017) pp.327–331.