



## THE COUNCIL OF THE INNS OF COURT

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### **Increasing Flexibility in Legal Education and Training**

#### **Consultation Response**

##### **Introductory Comments**

The Council of the Inns of Court (COIC) would welcome a flexible legal education and training regime and sets out within this response ideas as to how this might be achieved. Such education and training should be rigorous and set to a high standard so as to promote the interests of the public.

The Inns, through COIC, welcome the opportunity to respond to this consultation. The Inns each have significant and well-staffed Education Departments and devote large resources to advocacy training throughout the year. The Inns draw upon the goodwill of a significant number of their members who give freely of their time to conduct training courses during the evenings and at weekends. The Inns conduct numerous student, pupil and new practitioner courses throughout the year, attendance at which is often compulsory. The Inns work increasingly with the Advocacy Training Council (which they fund) and the Circuits in providing advocacy training to students, pupils and new practitioners. The Advocacy Training Council is the only body able to accredit advocacy trainers. The Inns play a crucial role in the provision of advocacy training to the profession and the maintenance of standards of advocacy training.

COIC is concerned that many of the questions in the consultation are posed in such a way so as to make it difficult to do anything other than agree. Answers to the questions should, therefore, be read in light of these introductory comments.

**Excellence:** It is in the interests of society, the rule of law and the individual consumer of legal services that legal education and training should drive standards and promote excellence. There is a very real risk that if the training and education system focuses on minimum standards of competence, then mediocrity is rewarded. It is hard to understand how such a system will motivate lawyers to be the very best that they can be. This can neither inspire the confidence of the public nor serve the interests of the consumer.

**Cost:** The cost of education and training (particularly the cost of the BPTC) is of grave concern to the Inns. All four Inns have extensive experience and expertise in this area and are rightly considered leaders in the field of education and training of the profession. They provide millions of pounds in scholarships annually to student members. Over the years the Inns have made a number of important changes to their education programmes and continue to make changes which will result in a more cost effective and flexible way to deliver education and training. The Inns consider that there is an urgent need for detailed discussion about cost of education because, first, cost has a

negative effect upon quantity and quality of entrants into the profession; and secondly it affects the Inns' use of their valuable scholarship funds. In this respect, the Inns will support (and wish to be consulted on) consideration being given to proposals that will reduce cost. It should be recognised that one important reason for the Inns' cost-effective training programmes is that they have been able to rely annually on experienced practitioners and Judges who give their time for free in providing advocacy and ethics training to members of the Inns.

Training lawyers to provide 'advocacy training services' to a very high standard will be an expensive endeavour – and will not be satisfactory unless those lawyers are advocates who appear regularly in courts and tribunals. COIC is concerned that the effectiveness of education should not be based on advocacy training programmes delivered in the fastest and cheapest way by trainers who do not, in fact, practise advocacy. To go down that route will degrade the quality of advocates in our courts and tribunals.

Ethics: Finally, these proposals make no specific reference to professional ethics. Outcome i. should contain explicit reference to training in ethical judgements and decisions because the experience of the Inns is that such training provides the foundation to all aspects of the services provided by the profession. Education and training requirements must focus on an individual's ethical standards of behaviour and decision making at the point of authorisation, and all subsequent stages of training and beyond. The importance of ethics cannot be overemphasised in the wake of these substantial proposed changes to education of the profession.

### **Proposed Outcomes**

#### **Q.1 Do you agree that these outcomes are the right ones?**

Yes, however COIC's agreement with outcome i (requirements and authorisation) should be read in light of the answer to question 5.

#### **Q.2 Do you think that all of the outcomes should have equal priority?**

Yes.

### **Outcome Focus**

#### **Q.3 Do you agree with our guidance that a risk based approach to education and training should focus more on what an individual must know, understand and be able to do at the point of authorisation?**

Yes, save that there should also be mention that an individual must have the right attitudes and ethical grounding.

#### **Q.4 What are the specific obstacles that need to be removed to facilitate movement across the different branches of the profession?**

Better, consistent competency descriptors that are assessed at the right level and are assessed rigorously will facilitate movement and reduce risk. The competencies in the different branches of the profession can be very different; to attain competency in a particular area will require extensive training or additional experience.

### **Q.5 Do you agree that regulators should move away from 'time served' models?**

COIC believes that time served deliberately and productively is the best basis for the rigorous training of advocates. Nevertheless COIC's answer to this question is yes and no, depending on whether knowledge, embedded skills, practical ethics or real time skills are being assessed. Dealing with each (though not in that order):

#### Knowledge

COIC agrees that time served models are not always appropriate for the acquisition of knowledge. Regulators should focus the appropriateness of assessment instruments in areas such as civil procedure; they should not be concerned with how a person acquires that knowledge. This will allow for different learning styles as well as innovation and flexibility in education provision. It should be a matter for an individual whether they teach themselves from a book, learn online or attend a course.

#### Real Time Skills

COIC does not agree that time served models are inappropriate for the acquisition of skills that are exercised in real time, such as advocacy and conferences/interviews with clients. At the vocational stage of training, COIC believes that it is very important for the protection of the consumer that such skills are practised for prescribed minimum times, in a prescribed variety of circumstances and under prescribed conditions prior to outcome assessment. The reason for this is that the advocate or advisor has to be able to react immediately, with little or no time for reflection or consultation, to the myriad challenges faced in either the courtroom or conference room. The ability to be able to react in such a way can only be learned to the point that it is intuitive through repetition and reflection facilitated by a trained trainer.

Assessments are summative and not formative processes and as such cannot alone develop the advocate so as to ensure that they are ready for the vicissitudes of the tribunal process, however sophisticated the assessments are.

Turning to the supervised practice period, when a new advocate represents a client in court for the first time, the advocate is taking responsibility for their advocacy and their supervisor will not be able to intervene. For that reason, it is very important that there is rigorous training, prior to that moment and on an ongoing basis. COIC believes that in this context it is vital that time is served by way of a minimum period of observing other practitioners and a minimum period of supervised practice. This allows the trainee to reflect on the advocacy of others and their own advocacy and thereby embed the skills introduced at earlier stages. A new practitioner should also return to the advocacy classroom during their early practice, as this is an excellent time for a trainer to help the advocate improve their newly acquired skills.

#### Ethics

There are two aspects to acquiring the right attitudes/ ethic. Firstly, an individual should have a working knowledge of the relevant ethical positions and the professional codes or rules. This can be learned in the same way as any knowledge subject. Secondly, a person must learn the skill of exercising ethical judgement in practical situations. This is a real time skill and should be taught and assessed as such.

## Skills

Those skills that are not exercised in real time such as writing advices and the drafting of documents are also worthy of mention. Whilst COIC agrees that a time served model is not necessary for these skills, COIC thinks that an individual should undertake and receive feedback on a prescribed minimum number and variety of exercises. Taking statements of case as an example, it is important that a person drafts and receives feedback on particulars of claim, defences, counter claims and so on. It is also important that the process should culminate in a person undertaking an assessment in controlled circumstances so as to remove the risk of the assessed work not being the individual's. This protects the public. Moving away from a time served model for non-real time skills could introduce flexibility and innovation. For example, instead of drafting being learned by attending a course, it could be undertaken through distance learning.

### **Q.6 Do you agree that the regulation of students in particular needs to be reviewed in the light of best practice in particular areas?**

Yes, clearly it would be useful to explore the developments regarding which have been made in other professions.

## Flexibility

### **Q.7 Do you agree that regulators should allow more flexibility in the way that education and training requirements are delivered by no longer prescribing particular routes?**

Yes - provided it is understood that standards must never be compromised. The maintenance of high standards of advocacy in our courts and tribunals is vital to the public interest. The danger of introducing too much 'flexibility' in the routes of education and training is that it leads to an increasingly disparate cohort of applicants and calibrating common qualifying standards becomes more difficult, if not impossible. It also leads to an insidious demand for the watering down of qualifying standards and 'special pleading' by those who have chosen soft or sub-optimal routes to qualifying. There is a natural tension between 'open' access to a profession and qualifying standards. The former must never govern the latter.

Outcome 2c is ambiguous – 'no one route becoming 'gold standard''. COIC agrees with this statement if it is meant to imply that no route should be preferred as of right. COIC is concerned, however, that this may be read to mean that excellent routes should not be allowed to develop. COIC believes that allowing for flexibility should allow for innovation and for best practice to emerge, thereby encouraging the raising of standards.

COIC believes that ordinarily those exercising rights of audience should have a law degree or equivalent qualification(s) so as to ensure a sound grounding in the principles of law. Further, the ability to understand and develop legal concepts as required in a particular case is akin to academic work, and if a student is able to obtain a degree, s/he has demonstrated that ability. This promotes the interests of the client by ensuring that the advocate not only has an understanding of the law but also the ability to apply the law to practical problems.

**Q.8 Do you think such change will impact positively on equality and diversity?**

Positively, if all training regimes are rigorous. For example, in the revised model of the BPTC as set out in the answer to question 16, students would be able to complete Part 1 of the BPTC without having to commit to the cost of a whole BPTC. Students could choose how they study for the Part 1 assessments, be that by self-study or by enrolling on a course and they could manage cost accordingly. Part 2 of the BPTC, being shorter, should be cheaper. It is hoped that such a model would reduce the cost to be met by an aspirant barrister and thereby encourage those from less financially advantaged backgrounds to enter the profession.

The only note of caution is that multiple routes often perpetuate more confusion around entry to the profession and reward those students with the knowledge-base and connections to navigate those routes best.

**Q.9 Do you agree that regulators should review their approach to quality assurance in the light of developments in sector specific regulation of education providers?**

COIC does not have any comments on this.

**Entry/Ongoing Requirements**

**Q.10 Do you agree that entry requirements set by regulators should focus on competence?**

Yes, in so far as the level of competence should be set sufficiently high and tested sufficiently thoroughly so as to protect and promote the rule of law and thereby protect the interests of the consumer. COIC is concerned that testing to a 'minimum level of competence' could be, or could be perceived to be, a recipe for promoting mediocrity rather than excellence.

Whilst COIC agrees that the regulators should be particularly focused on competence, any new regime should be sufficiently flexible as to allow for grades or marks above the competence threshold, should an educational provider or assessment organisation choose to award them. This will motivate individuals to learn to the very best of their ability rather than simply pass the assessment and therefore will be of benefit to the consumer. It will also assist equality and diversity, as those from a less advantaged educational background will have the opportunity to distinguish themselves.

**Q.11 Do you agree with our proposal that there may be areas where broad based knowledge is not essential for authorisation? Can you provide further examples of where this may happen already?**

No. COIC believes that, in practice, a broad based knowledge is essential. For example, it is important that a person intending to become a 'civil' advocate has a broad based understanding of the whole of the civil procedure rules, principles of drafting, rules of evidence and principles of good advocacy. All of the elements are interrelated and interdependent and a gap in learning in any one area will compromise a client's case. Further, COIC believes that at authorisation a person should understand and commit to memory a broad knowledge of the whole of the civil procedure rules and be tested on the same. This should be done near the start of the learning process so as to make sense of and facilitate the remainder of the learning process. Whilst it is of course true that a practitioner can look things up, in court they will not have the time to do so and will not know the

full range of procedural possibilities if they have not first learned them. Further, COIC believes the client's interests are best promoted if a civil practitioner has a good understanding of criminal procedure and evidence and vice versa. It is a fallacy to believe that the two areas are unconnected. Civil practitioners need to know how to examine to a criminal standard and according to criminal rules of evidence and technique because at certain points this will be the best way to advance a client's case, even in a civil context. Similarly criminal practitioners need to know civil principles because they are increasingly presenting cases in a tribunal or regulatory context. Practitioners should have a sound understanding of the law in general as legal problems do not occur in watertight compartments.

**Q.12 Do you agree that reaccreditation requirements should be introduced in areas where risks are highest?**

Reaccreditation should be used where proportionate, effective and in the public interest.

**Entities / Individuals**

**Q.13 Do you agree that in most circumstances an entity is better placed than a regulator to take responsibility for education and training?**

No, COIC does not agree with the question as posed. Education and training is a complex and specialist process. The majority of law firms and chambers are not large enough or sufficiently well resourced to take such responsibility alone. It is true, of course, that entities can purchase education and training from external suppliers. However, the entity would still need to exercise great care, resource and skill to ensure that the external suppliers are delivering the education to the required standards. This is something that most entities would be poorly placed to do alone; it may not be the best use of resources for each entity to develop the appropriate expertise so as to ensure uniform standards are applied. That is not to say that entities should take no responsibility for education and training, far from it. It is better to say that entities and the regulator should share responsibility for education and training. Further, handing over responsibility for education and training wholly to entities will create a conflict of interest within the entity because education and training can be expensive, and it is foreseeable that the commercial pressures will prevail.

**Q.14 Can you think of any circumstances where this may not be possible?**

Yes, see answer to question 13.

**Restrictions on Numbers**

**Q.15 Do you agree that it is not the role of the regulator to place restrictions on the number of people entering the profession?**

Yes. That said, it is important that regulators provide detailed information to those considering entering the profession about routes to qualification, pass rates, success rates and so on. Further, it is vital that the training and assessment of the profession be set at a sufficiently high standard so as to ensure a skilled cohort of professionals.

**Q.16 Can you provide any examples for review where the current arrangements impose restrictions and may be unnecessary?**

COIC believes the content of the BPTC to be very valuable and necessary for the promotion of the consumer's interests. However, COIC believes that the regulatory requirements around the delivery of the BPTC are overly prescriptive and inflexible so as to make qualifying for the Bar unduly inflexible, expensive and risk laden, thereby inhibiting access to qualification. This is to the disadvantage of the ultimate consumer whose choice of legal representative may be restricted to those who can afford to undertake the training rather than those who are most able. This is also to the disadvantage of the aspirant barrister as a consumer who must either choose not to attempt to qualify or must take on huge cost and risk in order to qualify.

COIC would encourage the Bar Standards Board to review the regulation regarding delivery of the BPTC. Whilst COIC appreciates such distinctions are crude, COIC believes that different regulatory principles should apply with regard to knowledge, skills, ethics, and real time skills. These should be thought of as being on a continuum. At the one end, the acquisition of knowledge (e.g. procedural rules) should be totally deregulated with the focus being only on outcome assessment. At the other end of the scale, the acquisition of real time skills (e.g. advocacy) should be highly regulated both as to process and outcome assessment.

Such a regime might operate by splitting the present vocational stage in to two parts. Part 1 would be three centralised assessments in Civil Litigation and Evidence, Criminal Litigation and Evidence and the Code of Conduct. These could be sat at any time (whilst an undergraduate for example). The individual would learn in whatever way they chose. Part 1 would have to be passed before commencing, or bearing the cost of, part 2. Part 2 would be the experiential element of the course, with a focus on the skills, ethics in practice, and real time skills. This would be a highly regulated course but much shorter, or 'thinner', or fragmented, than the present BPTC.

COIC believes that such a process would be more flexible, cheaper and rigorous. It would allow more individuals to enter the process and to manage cost and risk. It would allow more institutions to provide elements (but not necessarily all) of the training, including universities, commercial providers and charities.