

**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

We have been asked to supplement our Final Report (the "Final Report") which was presented to the Standing Committee on Legal Education and Training ("SCLET") on 26 April 2018 in the light of the document (the "Response") dated 8 May, which was submitted to SCLET as a Response of the Law Society of Hong Kong ("the Law Society") to our Interim Report. Our Interim Report had been submitted in October 2017.

1. General Observations

- 1.1. Following the submission of our Interim Report, we had wished to meet with representatives of the Law Society when all the consultants were in Hong Kong in January 2018. That had been arranged whilst the Law Society was still providing secretarial services to SCLET. The intention had been to meet those interested in offering further submissions in the light of our Interim Report. However, in the week before our overseas members travelled to Hong Kong, the Law Society informed us that they were not ready to meet us. Since then, we have offered to have a meeting via video link, but that offer has also not been taken up. A meeting, even by video link might have helped to clarify a number of matters, particularly those which emerge from the Response, and which remain obscure.
- 1.2. In short, it appears that the Law Society's primary concerns are, firstly, that there should be more places available for the vocational courses leading to qualification as a solicitor in Hong Kong and secondly, that the Law Society should have more direct control, at least in name if not in practice, of the entry to the profession as part of the autonomy of the legal profession.
- 1.3. We consider the first point below. The autonomy of the legal professions in Hong Kong is undoubted and respected. Nevertheless, because the administration of the law is of vital interest to everybody and to the public good, there is a public interest in the training of lawyers which in part is recognised by the fact that the vocational courses are provided, to a great extent at public expense, by the universities. The function of SCLET is, at least in part, to oversee the conduct of legal education in the public interest. We note that the Society makes no comment regarding our concerns (in Section 6 of our Reports) over its interpretation of its regulatory responsibilities.

2. Numbers of Available Places on the PCLL Courses

- 2.1. As is acknowledged in paragraph 5 of the Response, the number of solicitors is a matter for the market to determine. An increase in PCLL graduands will not create more jobs. Paragraph 6 of the Response is based on the premise that there is an "absence of sufficient PCLL places offered by the three universities...". We question this assertion. In paragraph 5.2 of the Final Report the question of numbers of available places is considered and it is pointed out that, based on approximate figures for 2014 and 2015, there is a likely training employment rate of between 80% to 90%. We have not seen any statistics or other information which would enable us to have a better assessment than was made in the Final Report.
- 2.2. We would point out that while some over-supply to the training market is necessary for competition, the Society's proposal involves a virtual doubling of places. This was not supported by any other stakeholder group that expressed an opinion on the matter during our consultations. It is undesirable in a context where students are admitted to courses and courses are provided, often at public expense, and it is clear that there will be insufficient training contracts or positions in the legal professions. An over supply of those completing legal vocational courses is also likely to have an adverse effect on the quality and quantity of entrants to the Bar.

3. Further training providers

- 3.1. In paragraph 6 of the Response the Law Society expresses the view that it welcomes other "qualified institutions" willing to offer suitable vocational training leading to professional qualification. This is probably a reference to paragraph 32 of the Response where it is stated that the Law Society is currently in discussion with at least two institutions that have expressed interest in providing an alternative vocational training course, rather than an expansion of PCLL providers. It is impossible to comment on that without knowing which are the two qualified institutions and what is meant by "qualified".

Attention can be drawn to paragraph 32 e. where it is stated that their qualifications have yet to be assessed.

- 3.2. In the Final Report it was recommended that further work be undertaken to explore the feasibility of having amongst other things an additional PCLL provider. Nevertheless, it must be pointed out that there would have to be an amendment to the Legal Practitioners Ordinance in order for there to be any additional provider.
- 3.3. Paragraph 15 of the Response asserts that the Law Society has a duty to act as a gatekeeper of standards and skills of entrants to the solicitors' profession. There can be no doubt that is part of the autonomy of the profession and its consequent responsibility with regard to qualification of solicitors. It is then said that the 3 universities should not have the "privilege" of controlling entry standards. After asserting, in paragraph 16, that the entry test to the solicitors' profession should be the domain of the Law Society, it is then said in paragraph 17 that the Law Society need not conduct the "test" itself but can "contract" the unified law school to administer the "test" under the Law Society's supervision and control.
- 3.4. These statements raise a number of questions. In so far as it is referring to the entry to the PCLL course itself the Law Society sets the baseline standard for entry to the PCLL courses, and the law schools, de jure, have to operate under delegation. Having set the standards it is a matter of practicality that the law schools have to determine admissions on an individual basis.
- 3.5. In so far as the statements relate to the conduct of the courses and the ultimate outcome, it is not apparent as to why the Law Society's involvement in supervision and control of the vocational course is likely to be, or potentially could be, any different with a unified law school or with the "qualified institutions" than it is or could be at present. In paragraph 5.4 of Final Report it was recommended that the professional bodies should work with the law schools to construct a proper, uniform, statement of outcomes and written standards for the PCLL.

4. Should Recommendation 5.1 or 5.4 of the Final Report be revised?

- 4.1. In the circumstances we see no reason to change Recommendation 5.1 in the Final Report where we state that we welcome the providers' agreement to facilitate another moderate increase in PCLL capacity in the short term and encourage providers to consider what additional steps should be taken to increase access to the PCLL.
- 4.2. Similarly, if the opportunities at present available to the professions to work with the universities are availed and recommendation 5.4 is followed, it has not been made clear as to how or why a unified law school or the engagement of other "qualified institutions" should be an improvement on the present system.

5. Unified law school

- 5.1. In paragraph 13 of the Response it is stated that the Law Society welcomes and is supportive of the concept behind establishing a unified law school. The matter of a unified law school was considered in paragraphs 2.14 to 2.16 of the Final Report but, in the light of responses to the interim Report, no recommendations were made as to its establishment. It should be noted that there is a distinction between what might be termed a "unified" law school and a "single" law school.
- 5.2. A single law school would be one which is self-contained outside the purview of the universities. That in itself would cause problems in Hong Kong because it would not, on the face of it, come within the purview of the University Grants Committee, which would thus not be required to subsidise it. Hong Kong is quite exceptional in the common law world in having a vocational course that still receives public subsidy, this is a matter of some import, not least in terms of maintaining the socio-economic diversity of the profession. There would also be problems of finding and securing a suitable location, not to speak of financing necessary construction.
- 5.3. A "unified" law school might be one where the constituent parts were still part of the universities but the vocational part

of the law schools would be under the umbrella of a single 'institution'. Whilst the unified model is less resource intensive than the establishment of a fully independent professional school, following discussions with stakeholders in the wake of the Interim Report, we were persuaded that there is a sufficient willingness in the law schools to work together on admissions and consistency issues, to make the considerable logistical and constitutional challenges of this model unnecessary.

5.4. The future course in this respect is something which clearly can be considered by SCLET as one of a suite of options. We do not consider that the Law Society's response provides grounds to override our recommendation for a moratorium on vocational training reform (whether of a PCLL-embedded CEE or 'LSE') in order that a properly constituted cross-stakeholder working party can be established. We consider it unlikely that a single or unified provider could be established in the timeframe proposed by the Society, because it would require very careful consideration and implementation.

6. The Law Society Examination (the "LSE") paragraph 29 of the Response

6.1. The proposed LSE referred to in paragraph 29 of the Report appears to be significantly different from previous proposals by the Law Society. It is not a CEE as part of the PCLL but an alternative pathway. Footnote 13 of the Response is indicative that the proposal in the Response has yet to be given full consideration by the Society.

6.2. What is apparent is that the concept of the LSE is an altCEE of the kind discussed in the Interim and Final Reports. A number of significant concerns about such an arrangement were raised in the Interim and Final Reports: see section 6.8. Some of those concerns are addressed in paragraph 32 of the Response but not the most critical. Important considerations include risks that it may be perceived by employers and students as a 'second class' pathway for those who cannot get onto the PCLL; risks as to standards, notably insofar as pass rates may become a proxy for provider quality leading to a "race to the bottom" of grade inflation. The move to an LSE would also

require very careful maintenance of assessment of comparability and standards in such a mixed system, and it is not clear that the profession has the additional resources for such a task. Certainly, the LSE or altCEE would not address any concerns about variability of standards of the vocational courses; on the contrary it would add to them.

- 6.3. Concerns about resources, monitoring and oversight, would likely be exacerbated, particularly if the suggestion in paragraph 32 of the Response, that part or all of the course work were undertaken overseas, was implemented.

7. Implementation of the LSE or altCEE

- 7.1. Any move to the establishment of an LSE or altCEE must be fully scrutinised by SCLET before it is put before the Chief Justice for approval. Section 73(1)(d) of the Legal Practitioners Ordinance Cap.159 of the Laws of Hong Kong cannot be read in isolation. Attention must be paid to Section 73(2).
- 7.2. The note by Professor Johannes Chan SC, included in the volume of evidence submitted with our Report, sets out the history and intent behind the legislation and subsidiary legislation. Furthermore, the empowering section for the Trainee Solicitors Rules is itself expressed to be Section 73. It is difficult to contemplate that the provisions of those Rules could be read as permitting examinations to be set or approved without reference to the duty of the Chief Justice under Section 73(2). If the Trainee Solicitors Rules were to be read in that way it would call into question the validity of the Rules since it would mean that the Chief Justice had abdicated the statutory responsibility for the function imposed under Section 73(2).

8. Continuing Professional Development (CPD)

- 8.1. CPD was outwith our core remit, so we are grateful to the Law Society for considering our suggestions on this area (in para 34 of their response). We very much welcome the Society's consideration of our proposal to develop an online CPD record (34(e)), and its commitment to explore the feasibility of enhancing guidance on skills (34(f)).

- 8.2. We agree that the framing of CPD obligations in terms of minimum hours is straightforward, administratively convenient and still common across many systems. In itself it is not objectionable, and (subject to our observations below) can be combined with the kind of ‘benefits’ model of CPD that we discuss in our Report - though the variation in prescribed hours across jurisdictions does suggest that the actual specification of hours is somewhat arbitrary.
- 8.3. We recognise too, that many practitioners take their CPD obligations entirely seriously, but this rather misses the point; regulation is not for the virtuous. Evidence from Canada, New Zealand and the UK points to a persistent ‘rump’ of practitioners who treat CPD as primarily an inconvenient regulatory burden, rather than as a useful developmental and risk-reduction tool. Hong Kong may be different, but that seems somewhat unlikely. The Society’s observations in paras 34(a)-(d) understate the extent to which our reform would alter the style, and, we would argue, *overall* effectiveness of CPD in contributing to the continuing competence of the profession.
- 8.4. There may be some increase in administrative costs, though the SRA and Alberta models seem to indicate that the additional ongoing costs on the regulator are not necessarily substantial. Costs may also be offset (certainly relative to accreditation-based models – such as British Columbia) by a reduction in or abolition of activity accreditation, and by automation of reporting requirements. For the majority of practitioners, and particularly those in firms that already have modern appraisal and development schemes, we do not see that there is necessarily a significant increase in compliance costs – indeed, there may be a significant cost transfer effect if the regulatory onus shifts from *reporting* hours/activities to *planning and recording* activities. In this context, retaining CPD hours and requiring a ‘learning plan’ represents, in cost terms, the worst of all worlds.¹ The costs on smaller firms and sole practitioners may be proportionately higher, if such firms

¹ This may well be why the addition of a ‘learning plan’ was rejected by the Law Society of British Columbia, since the Society seemed committed to retaining an accreditation-based approach. See Law Society of British Columbia, ‘Final CPD Review Report of the Lawyer Education Advisory Committee’ (8 December, 2017), available at https://s3.amazonaws.com/tld-documents.llnassets.com/0006000/6352/lawyered-cpd_2017.pdf

do not have the kinds of internal tools and procedures discussed. However, in risk-reduction terms (since complaints and discipline data internationally identify smaller firms as posing, statistically-speaking, the greater risk to the profession and to consumers), that imposition might be considered justifiable.

9. The OLQE

9.1. There is no disagreement that the Law Society's role in relation to the OLQE is to assure competence. The disagreement relates only to the extent of the competences to which that role applies. In both our Interim and Final reports we expressed the view that the course does not assure competence with regard to the usual range of practical skills (practical legal research, interviewing, negotiation, advocacy), that go beyond the problem-solving capacities and (limited) drafting skills tested by the current written examinations. These other skills are, we suggest, self-evidently material to competent practice, as the PCLL Benchmark attest, and as more sophisticated transfer schemes like the English QLTS, acknowledge.

9.2. We note:

- that there are significant differences in skills training between different jurisdictions (eg the US system still tends to be criticised for its lack of formal skills training requirements, and there is wide variation in the extent of professional skills training across civil law systems), and
- complaints and discipline data in other jurisdictions point to the impact of shortcomings in lawyers skills, not just substantive law, on the delivery of legal services, and the public perceptions of lawyers.²

² In particular, data across a number of jurisdictions have consistently highlighted communication and case-handling problems, including failures to keep clients informed, properly to advise, or to follow instructions, and delay as amongst the most common causes of complaint. See, eg, E.H. Steele and R.T. Nimmer, 'Lawyers, Clients, and Professional Regulation' (1976) 1 *Law & Social Inquiry* 917-1019; T. Sklar et al, 'Characteristics of Lawyers Who Are Subject to Complaints and Misconduct Findings' (January 30, 2018). Available at SSRN: <https://ssrn.com/abstract=2988411>; Legal Services Ombudsman (England and Wales) 'Complaints data 2016-17' at <http://www.legalombudsman.org.uk/raising-standards/data-and-decisions/#complaints-data>. If these data were taken seriously, they might indicate a need to ensure that incoming practitioners not only had

- 9.3. Consequently, we are not clear that the Society’s response at paras 45-46 adequately demonstrates that they have identified or addressed the risks to continuing competence that the OLQE is supposed to guard against. While we accept that a majority of jurisdictions still do not assess skills at this stage (para 41), we question whether this can now be seen as best practice. Moreover, we observe that this trend may in part also reflect (i) the limitations of the competency models adopted by those jurisdictions’ domestic training systems, and/or (ii) unavoidable resource constraints in jurisdictions that have a small inflow of lawyer transfers.
- 9.4. We acknowledge the Law Society’s concern that it wishes to ‘assess’ rather than ‘train’ overseas practitioners. However, it seems to us that any setting of an assessment outcome, whether of knowledge or skills, implies some obligation *on the candidate* (only) to undertake some ‘training’, whether self-directed or via a course provider. We do not see that a skills requirement of itself adds any training burden to the Law Society. We therefore continue to encourage the Law Society to keep skills in mind as part of future development of the OLQE.
- 9.5. We note also the Law Society’s concerns regarding possible loss of control over the OLQE. We reiterate our acceptance of the principle of professional autonomy. If a unified law school were to be involved in OLQE design and delivery, it would, in our view, be an administrative arrangement, supporting design delivery of the assessment to the Society’s specification. This is no different to the system which the Society appears to be contemplating in the context of its proposed LSE. It thus presents no greater threat to the Society’s regulatory authority than any other such arrangement.
- 9.6. With regard to SCLET ‘oversight’, while both our Interim and Final Reports, in Section 8.2, indicate some general reservations regarding SCLETs (limited) advisory role, we do not ultimately recommend that SCLET be given direct *regulatory* control over any vocational or post-vocational stage

appropriate communication skills, but basic case management and client relationship management skills as well.

of training or admission. The Law Society in its response seems to overlook the fact that the only oversight powers we propose for SCLET are to receive reports and to make *non-binding* recommendations. We respectfully suggest that this is hardly the revolution that the Society indicates. We present these changes as an opportunity, not a threat. Change would, in our view, improve capacities for quality assurance and quality enhancement at an overall system-level. It would better enable the range of stakeholders engaged in professional legal education and training in Hong Kong to plan for the future of the system as a (coherent) whole, from across as well as within their existing professional and institutional ‘silos’.

10. Trainee solicitors’ training

- 10.1. While we are sure that the Law Society, as a responsible regulator, will wish to keep its training regime ‘under review’, we are somewhat concerned by the tenor of para. 47. We note that the Society offers no substantive reasons as to why or how a move to standardised outcomes would place ‘undue pressure’ on firms. While the Society must, of course, ensure that changes to training regulation are proportionate and do not unduly burden its regulatees, the pressure on firms must also be balanced against the public interest in maintaining proper standards of training. If a firm does not have the resources properly to provide and monitor training, there may be a legitimate question over whether it is an appropriate training organisation.
- 10.2. Paragraph 47 essentially highlights the problem: the existing checklist is non-mandatory, and there is a “substantial diversity in the training provided”. Diversity in fields of law and consequent diversity in experience are not (necessarily) a problem; diversity in *quality* may be, and hence some baseline standard is surely necessary, not merely optional.
- 10.3. It may be that the Society is tending to think of competence here in narrower, more substantive, terms than we intended. The whole point of the Scottish PEAT2 outcomes is that they are generic and focussed on core competences that apply to all practitioners, regardless of field of practice, namely competences that develop the individual’s

- professionalism
- professional communication skills
- professional standards and ethics
- commercial, financial and practice awareness³

10.4. These we suggest are fundamental to the sustainability of the *professional* legal services industry in any jurisdiction.

³ See Law Society of Scotland, 'PEAT2 Outcomes' at <https://www.lawscot.org.uk/qualifying-and-education/qualifying-as-a-scottish-solicitor/the-traineeship/information-for-trainees-and-traineeship-providers/peat-2-outcomes/>