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“What we did over the summer”: updates on proposed reforms to legal education and training in England and Wales and in the Republic of Ireland.

Elaine Hall, John Hodgson, Caroline Strevens and Jessica Guth

Introduction

How was your summer? Maybe you were living the law teacher summer fantasy: enjoying the outdoors, friends, food, culture and sleep; reconnecting with non-academic pursuits whilst simultaneously catching up on all of the tasks postponed from term time; becoming more relaxed and also more focused....

Meanwhile, the ongoing debates about legal education and training continued. You may have missed the reports from the SRA about the pilot round of the SQE1, since they released those reports on the 30th July. You may also have missed the short consultations relating to the SQE 2 assessment specification to be used in the upcoming pilot in December 2019, which came out at the beginning of September and has already closed. In Ireland, the current period of consultation on the future of legal education and training is coming to an end. We are juxtaposing our responses to all of these to draw out issues of process and also what seem to us to be fundamental gaps in the discussion about what legal education can and should be.

The Legal Services Regulation Authority Consultation

In Ireland, the LSRA have a statutory duty to report to the Minister for Justice and Equality under s34(1)(a) of the Legal Services Regulation Act, 2015 on the Review of the Education and Training of Legal Practitioners¹. In August 2018 Hook Tangaza published their commissioned Review of Legal Practitioner Education and Training², drawing on written consultation submissions (n=41) from universities, societies and legal professionals as well as surveys of trainees and the public conducted specifically for the report.

The Hook Tangaza report recommends significant structural change. The empirical section is broadly sound in methodological terms, with what appear to be appropriate instruments used in the surveys³. However, there are some significant problems with the framing of this exercise which limit the validity of the analysis.

“The report by the Hook Tangaza external review team begins by outlining the requirements of the Act, the premise of the review of legal education and the significance of the education and training of legal practitioners to the wider legal services sector

¹ hereafter LSRA s34 Report 2018. <http://www.lsr.ie/en/LSRA/Pages/WP18000006>

² hereafter Hook Tangaza Report

<http://www.lsr.ie/en/LSRA/20180928%20Review%20of%20Legal%20Practitioner%20Education%20and%20Training%20-Final%20version.pdf/Files/20180928%20Review%20of%20Legal%20Practitioner%20Education%20and%20Training%20-Final%20version.pdf>

³ unlike the SRA consultation process, there is no evidence of poor research practice or mis-reporting of the data. Hall, E. (2017) Notes on the SRA report of the consultation on the SQE: Comment is free, but facts are sacred *The Law Teacher*, 41, 1, 364-72

The second section looks at the appropriate standards required for a ‘fit for purpose’ system of legal practitioner training. The third section then reviews the existing arrangements for the education and training of legal practitioners in the State”⁴

In other words, there is a guiding structure for the whole exercise:

“a framework that the Review Team has used both to consider the feedback obtained from stakeholders and to make proposals for change. This framework is **commended** to the Authority as a useful mechanism to enable it to draw its own conclusions.... It is important to note that the framework set out below consists of principles that **should** be reflected in the design of an education and training system.”⁵.

That is a lot of weight for a theoretical framework to bear. In order for it to have both predictive, analytic and veridical qualities as claimed: it would need to be a framework that has been developed and tested in the crucible of practice, using detailed empirical analysis of systems and processes in education, relating these to first principles and calling all preconceptions into question before arriving at a framework that both represents reality and presents an ideal state.

The authors consider that

“There are two questions that will underpin any judgment on a system’s fitness for purpose: Firstly, is it effective (i.e. does it meet the objectives set for it) and secondly, does it operate efficiently? (i.e. are the outcomes it produces proportionate to the resources it consumes in terms of time and money).”⁶

In fact, there are **at least** five definitions of quality⁷ which are in competition at any moment, as detailed in Table 1 below. On the face of it, the framework looks set to ignore considerations of exception, perfection and transformation and to operate in a reductive and mechanistic way within a closed set of assumptions and a limited cost/benefit analysis.

Table 1: Summary of the Forms of Quality from Wittek and Kvernbekk (2011, pp673-4)

| Quality as | Description | Paradoxical qualities |
|---------------------|---|---|
| exception | <i>Distinctiveness</i> [possessors, e.g. Oxford or Harvard] <i>simply embody quality and thus have no need to prove themselves</i> | Self-evident and holistic/ unattainable, inimitable |
| perfection | Based on <i>specifications for how quality is to be strived for in every part of a process</i> , emphasizing the responsibility of individual actors for their contribution | Processual and atomized/ reliant upon perfect knowledge of system |
| fitness for purpose | <i>Functional</i> meeting the needs of an external ‘client’ e.g. <i>the education received by students should match the requirements of work life</i> | Who is the client? Imagining the future/ Concrete or simple outcome measures |
| value for money | Similar to fitness but the emphasis is on <i>profit... accountability to the funders (tax payers) and the consumers (the students)</i> | Is there a good enough overlap between efficiency and effectiveness? |
| transformation | <i>Cognitive and personal growth... enhancing the student and empowering the students</i> | Phenomenological and individualistic/ are all |

⁴ LSRA s.34 Report, p2, my emphasis

⁵ Hook Tangaza report, p41, my emphasis

⁶ Hook Tangaza, p41

⁷ Wittek, L. & Kvernbekk, T. (2011) On the Problems of Asking for a Definition of Quality in Education, *Scandinavian Journal of Educational Research*, 55:6, 671-684

| | | |
|--|--|------------------------|
| | | transformations equal? |
|--|--|------------------------|

The framework is set out over twenty-five paragraphs. It is well-written and structured so as to draw the reader into agreement with all the elements. There is an apparently logical flow. It is minimally footnoted (six citations), none of which are empirical or theoretical studies of legal education. The authors use European directives on proportionality of competencies and restriction of entry into the professions and two cases to support their arguments against restrictions to entry and then make a passing reference to the Bologna process, though its relevance to their point about governance is not clear. The single academic reference is to McKee and Eraut's excellent edited collection⁸. The authors use this citation to support the use of competencies as a gold standard. Now, there is an argument to be had about the pre-eminence of competencies and some authors do come down in favour but this book does not do that. The quote used by Hook Tangaza is – ironically enough - part of a paragraph in which the lack of conceptual clarity and over-simplistic use of 'competence' is discussed. This is what McKee and Eraut actually say is the premise for their book:

- there are *at least* 54 types of knowledge used by early career professionals;
- the use of knowledge is mediated by both competence (which is socially and contextually judged rather than objective)
- and capability (the broader characteristics of the individual: cognitive, affective and self-regulatory), thus
- it is reasonable to consider professionals' '*learning trajectory*' within an overall '*performance*'

"It is unusual for a performance to use knowledge from only one trajectory, and the seamless integration of personal knowledge from several trajectories may itself be an important learning challenge that goes beyond progress in several separate trajectories. The holistic nature of any complex performance should never be neglected... [t]here is no one best way for describing complex knowledge in use."⁹

So it would appear that the Hook Tangaza framework is one that has been developed without the contamination of scholarship, using an 'if.. then' stepwise logical structure. In order to be a good enough one of those, each of the premises needs to be set against the possibility of a null hypothesis¹⁰ before being presented as axiomatic. In this respect the first paragraph does well:

"A fully effective and efficient legal education and training system **might** be expected to have the following characteristics"¹¹.

However, after that, this reserve drops away, with repeated use of the language of certainty: 'should' (used 27 times in 25 paragraphs), 'must' (4 times), 'will' (9 times). I will pull out particular elements of the argument to unpick the logical lacunae. For example, the guiding principle is incoherently vague and generic:

⁸ Anne McKee and Michael Eraut (Eds.), *Learning Trajectories, Innovation and Identity for Professional Development* (Springer, 2012)

⁹ *Ibid.*, p5

¹⁰ The null hypothesis in statistics is the idea that the relationship or impact the researcher is seeking does **not** exist and it is a fundamental principle of all research that it must be possible for the null hypothesis to be found. If your idea cannot be disproved, it cannot be tested.

¹¹ Hook Tangaza report, p41, our emphasis

“It should aim to meet Society’s qualitative and quantitative needs for legal practitioners and should also be sufficiently flexible to accommodate changes in these needs.”¹²

It is hard to disagree that Society needs a sufficient number of lawyers and that they need sufficiently good at their jobs. However, there is a huge literature that debates how many lawyers are needed and another that looks at how lawyers fail society (through the lens of being imprisoned, sanctioned and/or excluded from their professional bodies). It might be reasonable, therefore, when constructing this principle, from which all else flows, to be somewhat more specific about how this might be gauged or benchmarked. I do not think that is the purpose of paragraph 2, however: I think that it functions as a rhetorical device to get the reader to swallow paragraph three uncritically and whole, despite that fact that it is full of assumptions and contradictions (highlighted in the text and unpacked below).

“The system should also be built to be efficient. In other words, **the costs to society should be proportionate to the benefit it derives** from well-trained legal practitioners. Lawyers who are **inadequately trained can increase costs to society** by causing delays in the administration of justice, making mistakes which are time-consuming and costly to rectify or recompense, and otherwise failing to play their critical role in facilitating the conduct of business and management of risk. On the other hand, **lawyers who are over-trained will have incurred significant costs in training which are frequently passed on in higher costs to clients.** ‘Over-trained’ could mean, **subject to unnecessarily high standards in terms of the content or duration of training, given the activities to be undertaken or training which duplicates** prior learning. Training which is unduly onerous, lengthy, or repetitious **will also have a deterrent effect on new entrants.**”¹³

- i) How are we defining ‘costs/benefits to society’? Even within a narrowly economic framework this is a complex business, requiring an understanding of opportunity cost and short, medium and long term projections within a specific social and economic context. Developing a model for this would be incredibly time-consuming and costly in itself; which is not an argument against trying, just an argument against trying to pass this off as common sense and straight-forward.
- ii) This is an argument the SRA used to justify the introduction of the SQE, that public safety and the rule of law were under threat from poorly trained solicitors.¹⁴ They have yet to produce the detailed analysis of the data (which they alone hold) which proves the correlation (let alone the causation) link between training and failures in practice. It is a reasonable supposition that *some* kinds of mistakes made *could* be traced back to training lacunae. However, it is also possible that mistakes could arise *despite* adequate training. Moreover, adequate training does not and arguably cannot¹⁵ claim that it either develops moral character (to avoid failures grounded in ethical breaches) or provides ongoing protection against workplace and life stress (to avoid failures grounded in burn-out). The logical corollary is that more would be better (hence the SRA’s ‘super-exam’ rhetoric) but if you don’t know which lacunae (if any) are causing the problem then you would have to include everything and test everything – just in case.

¹² Ibid. p42

¹³ Ibid, p42

¹⁴ Interestingly, they have had to issue statements on their website assuring the public that the current crop of solicitors are, in fact, perfectly safe. <https://www.sra.org.uk/sra/policy/sqe/employ-persona/>

¹⁵ McKeown, P. and Hall, E (2018) If we could instil social justice values through clinical education, should we? Journal of International and Comparative Law Special Issue, 5, 1, 143-179

- iii) Here we run smash into the opposing view, that lawyers are ‘over-trained’: there is a bare minimum that they need to do a specific job and everything else is just window-dressing. This relies on the initial entirely unsupported assumption that students of the law a) know what kind of lawyer they want to be and b) that these roles are so static and predictable that streamlined routes can be designed. A very reductive and technicist view that does not map well on to the complexity of the profession.¹⁶
- iv) What is the mechanism by which lawyers’ training costs are passed on to clients? Are lawyers using oligopolistic pricing strategies? If they are, why would they stop just because training was cheaper?
- v) So, how much is too much? If I have one lecture about something and it comes up on an exam is that ‘enough’? Are there some concepts¹⁷ in law that require multiple experiences to develop a nuanced understanding? There is no direct evidence at all about this: the closest would be the reflections of practising lawyers about which aspects of their training they do not rely on in practice. However, these post-hoc accounts ignore the synthesis of competence, capability and learning trajectories and are bounded by the norms of their present performance. Again, this is a reductive model which is not about excellence or transformation.
- vi) The nature of the training puts some potential lawyers off. Maybe, though I’d like to see really good evidence of this from students who drop out of the training process and those who decide not even to apply. The more significant problem is that focusing on the training as the main or most significant barrier ignores structural realities: there are many more law undergraduates than there are lawyer jobs¹⁸. This is a reflection of several factors: the utility of the law degree as currency for a wide range of graduate employment, the effectiveness of undergraduate law in putting students off the profession and arguably most critically, awareness of the limited number of jobs and the social capital needed to get one of them. If, as paragraph 1 stated, society has quantitative needs for lawyers then the operation of the free market suggests that these are finite.

A similar analysis of the next 23 paragraphs could be done: the whole framework suffers from the same sort of logical and evidential limitations. We’ll limit ourselves to highlighting a couple more areas where we consider that there is a strong possibility that other considerations have influenced the inclusion of criteria, starting with paragraph 9:

“Overall, therefore, the costs and time involved in professional training leading to qualification should be proportionate to the need to develop the defined competences for practice. **The need for proportionality further reflects the trend in regulatory requirements at a European level**”¹⁹

It should not cost too much or too little (though as we have yet to establish benchmarks for under and over-trained, this may prove difficult to gauge) seems like a reasonable general proposition, sitting as

¹⁶ Luke Mason (2018) SQEzing the jurisprudence out of the SRA’s super exam: the SQE’s Bleak Legal Realism and the rejection of law’s multimodal truth, *The Law Teacher*, 52:4, 409-424

¹⁷ See, for example, Weresh, M. H. (2014) Stargate: Malleability as a Threshold Concept in Legal Education. *Journal of Legal Education*. 63, 689-728

¹⁸ Anthony Bradney (2018) The success of university law schools in England and Wales: or how to fail, *The Law Teacher*, 52:4, 490-498 reports that applications to law degrees in England and Wales rose from 95,340 in 2009 to 127,640 in 2018 (134% increase). Practising certificate holders in 2009 numbered 119,000 and in 2018 147,000 as reported in the SRA’s 2017/18 Annual review (124% increase). Rates of growth may be comparable but still, an awful lot of practitioners would have to retire to make room for all the new graduates. In fact, transition to the solicitors arm of the profession remains relatively stable, at around 36%.

¹⁹ Hook Taganza report, p45, our emphasis

it does in a section on openness and accessibility for all. However, it assumes that burden of cost devolves entirely upon the individual and this neo-liberal positioning of responsibility upon the individual to bear all the risk coupled with the implied responsibility of not exceeding minimal standards on the regulator so as not to be discriminatory is one that ignores the social benefits of well-trained professionals from all backgrounds. Again, the European Directive cited by Hook Taganza in support of this assertion actually unpacks into something much more complex:

It is also necessary to clarify **that the following are among the overriding reasons in the public interest, recognised by the Court of Justice**: preserving the financial equilibrium of the social security system; the protection of consumers, of recipients of services, including by guaranteeing the quality of craft work, and of workers; **the safeguarding of the proper administration of justice**; ensuring the fairness of trade transactions; the combating of fraud and the prevention of tax evasion and avoidance, and the safeguarding of the effectiveness of fiscal supervision; transport safety; the protection of the environment and the urban environment; the health of animals; intellectual property; the safeguarding and conservation of the national historic and artistic heritage; social policy objectives; and cultural policy objectives. According to settled case-law, **purely economic reasons, namely promoting the national economy to the detriment of the fundamental freedoms, as well as purely administrative reasons, such as carrying out controls or gathering statistics, cannot constitute an overriding reason in the public interest.**²⁰

I am particularly concerned about how this connects with paragraph 10 which again ignores the structure of the profession and employment prospects:

“Openness and accessibility are not just attributes of the system that are needed for new entrants to the profession. **The possibility for new providers to enter the system should also be recognised, since this will make it more likely that there are no capacity limits in the system and that diversity is also reflected in training offered.**”²¹

Getting more students through a training process does not in itself create more opportunities, it merely ‘kicks the can’ further down the road. A lot more qualified lawyers in the market could have a number of effects, including lower wages and more precarious employment and it is vanishingly unlikely that any such savings to legal businesses will be passed on to the public. Moreover, new players in the training market would have a number of key strategic decisions to make: are they in direct competition and offering the same (or better) than the existing brand? How does this disrupt the current system and lead to greater openness and choice? Are they going to position themselves as quicker, cheaper or more flexible? That might play well with students but would it impact the currency of the qualification with employers? Moreover, new players in the market will be primarily concerned with the financial viability of their business, a concern that may not always align with the societal goals of legal education and training.

The LSRA wisely consider that:

²⁰ DIRECTIVE (EU) 2018/958 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 June 2018 on a proportionality test before adoption of new regulation of profession, para 17 <https://eur-lex.europa.eu/eli/dir/2018/958/oj> , our emphasis

²¹ Hook Taganza report, p45, our emphasis

“The Authority is of the view that such significant change should only be made, following careful consideration and informed debate on both proposals for change and their proposed implementation and impact.”²²

We would advise the LRSA to consider a re-analysis of the consultation data which does not start with a pre-existing framework. Such an inductive approach would be a much more valid way to explore the data and would reveal the relationship between the respondents’ context and perspectives and their views of the system. It is clear that respondents see areas for improvement in Irish legal education and it does them a disservice to attach their thoughts and experience to a framework that is so very flimsy.

The SRA pilot reports and SQE Pilot Preparation²³

The SRA conducted a pilot of the first element of its intended new qualifying exam, the Solicitors Qualifying Examination, or SQE 1, earlier this year. It has now published reports on the performance of the pilot by its appointed contractors Kaplan, and by a designated independent reviewer²⁴, together with its own response to these reports. The timing of the release of these documents, in the middle of the university long vacation, might suggest a desire to avoid immediate scrutiny from the academic community²⁵.

What is most significant about these reports is that neither of them actually disclose important parts of the evidence on which they are based, which are fundamental to any critique or comment. For example, the Kaplan report states that:

Candidates were selected who were broadly representative of those who would sit Stage 1 of the SQE both as to prior education and demographic characteristics. 555 candidates were invited to take part in the pilot. 419 accepted their place. 58 of them cancelled in the run up to the examinations and there were 43 no-shows on the day, leaving 318 active participants with 316 sitting all 3 days. 18 candidates requested and were granted reasonable adjustments.²⁶

Even if the original selection was broadly representative (and in the absence of any information this has to be taken on trust) we are concerned about the ‘representativeness’ of this cohort. In a best-case scenario (from the students’ point of view), someone sitting SQE1 would have some kind of preparation, some idea of the nature of the assessment, some opportunities for practice. As no questions examples or guidance were (or are) available, the participants were without any of these supports. What the data from this pilot *might* show is what happens if a candidate goes into the assessment blind.

The high attrition rate raises significant questions as to how representative the 318 really were. In the absence of detailed data, we cannot assume that the 42.7% of the original sample who did not take

²² LSRA s34 report, p4

²³ A version of this section, compiled by the Association of Law Teachers was first published in the Law Society Gazette <https://www.lawgazette.co.uk/news/depressing-super-exam-reports-fail-the-test-say-law-teachers/5101151.article>; <https://www.lawgazette.co.uk/practice-points/failing-the-test/5101153.article>

²⁴ Kaplan Report on SQE Stage One Pilot 30th July 2019 and Geoff Coombe (Independent Reviewer) SQE Stage 1 Pilot Findings June 2019. Both available at <https://www.sra.org.uk/sra/policy/sqe/pilot/sra-response-sqe1-pilot.page>

²⁵ This was not entirely successful – see for example Richard Moorhead’s blog:

<https://lawyerwatch.blog/2019/08/01/sqe-tests-show-openness-reliability-and-fairness-concerns/>

²⁶ Kaplan report, p3

part were evenly distributed across gender, ethnicity, social class, prior education experience or any other relevant demographic factor.

The piloted version of SQE 1 comprised three Computer Mediated Assessment (CMA) sessions each involving 120 questions which are described as single best answer but were in fact right answer only. Between them they are said to have covered the Functional Legal Knowledge based on the SRA Statement of Underpinning Legal Knowledge. It should be noted that the SRA confirmed the contents of that Statement despite significant criticisms from the Association and others that it did not cover all the areas which solicitors might be expected to know, such as Family Law and Employment Law. However, there is no information given as to how many questions addressed each of the required areas, and there is no comprehensible evidence as to how each question performed.

No individual questions have been published, although it is understood that 176 of the 360 (49%) were newly designed and the remaining 51% have previously been used in the Multiple Choice Question (MCQ) element of the Qualified Lawyers Transfer Scheme (QLTS). The Kaplan report and, to a greater extent the independent reviewer's report, do suggest that the questions were appropriately drafted, tested and stood up well in the pilot. The latter report includes a comment in section 2.1 : "re-using items from QLTS which are used in very similar, but not identical context had the advantage of knowing prior candidate performance on these items" This too raises questions about reliability of test results. The QLTS test is taken by lawyers who hold qualification elsewhere and who probably have a law degree and a period of practitioner experience. This raises further questions about the suitability of the instrument. Kaplan claim an 'extensive stakeholder consultation'²⁷, which does not yet seem to include the future plans reported by the Independent reviewer: "Kaplan have committed to future items also being sent to practitioners, not involved in writing or editing, for them to comment on their relevance to practice, which will provide an added safeguard to ensure validity"²⁸. It is made clear that external review of 10% of the questions (not specified whether new or recycled) was carried out by someone in the US who "has also worked with Kaplan on QLTS for several years"²⁹. It is therefore not surprising that the recommendations call **for public transparency** in the processes, a move away from the **over-reliance on a small team** of Kaplan staff and the **need for independent experts** to review test analyses.³⁰

The justifications for the current approach to question setting include reference to the use of Angoff method, 'as done in medicine'. Details are very hard to come by. One assumes that this was a modified Angoff, using the restricted eight choices, though this detail is not revealed³¹. The process took one day and consisted of a panel of nine solicitors drawn from practice³² (only seven of whom

²⁷ Kaplan report p3

²⁸ Independent report p3

²⁹ Independent report, p3

³⁰ Independent report p3-4

³¹ In modified Angoff, the panel of experts assess each item on the basis of how likely it is that a minimally competent respondent would answer the question correctly, using eight options (0.2, 0.4, 0.5, 0.6, 0.75, 0.90, 0.95, unknown). Panellists rate questions individually and then scores are shared and the variance discussed, with the opportunity to revise estimates. This is done for individual items for a sub-set of the whole to calibrate the panel, then serially for blocks of items, with significant discrepancies (typically 20%) of scoring for items within the blocks brought back for full panel discussion. It is time consuming and labour intensive.

³² "The panel of judges in an Angoff procedure should be familiar with the performance level of the students who take the test and it should consist of credible experts in all topics being tested. Usually, these expert judges are teachers. It is assumed that they are able to conceptualize the borderline test-taker and predict their performance on each individual test item" Verhoeven, BH, et al Panel expertise for an Angoff standard setting procedure in progress testing, *Med Educ.* 2002;36(9):860–867

completed the day)³³, during which they covered the 176 new items and 24 of the QLTS. There is no detail given of how or whether these solicitors were trained in Angoff method or of how they managed to cover 200 items in a single day (assuming an 8 hour day with no breaks, each item would be allotted 2.4 minutes), suggesting that this was not a full discussion version of Angoff with the consequent threat to reliability and credibility. Without the review protocol and the scoring data, it is impossible to judge, so once that data is public and can be independently reviewed we can assess whether this **potentially very modified** 'Angoff' can be used to support the claims of Kaplan and the SRA in this way.

Nevertheless, it is asserted that none had to be discounted, although it is stated that some will be retired and others will be modified. In the absence of both examples of questions and statistical information it is impossible to form a view as to exactly how robust the batteries of questions were.

The Kaplan report in particular asserts that, while there was evidence that BAME candidates performed less well, this can be accounted for by other variables, such as whether they had undertaken the GDL or a law degree at a Russell Group university³⁴. Given that the original purpose of the SQE reform was to widen access and participation this is a very depressing finding that suggests the reproduction of privilege. Again, it is impossible to assess the validity of these statements in the absence of access to the underlying data. A gender analysis apparently indicates no significant differences, and the same applies to an analysis based on disability, although it is acknowledged that the numbers involved are so small that conclusions are statistically unreliable.

The original design of SQE 1 provided for these three batteries of CMA questions together with a skills exercise designed to test research and drafting. In the pilot candidates were required to undertake two of these exercises each comprising three components. It is our assumption that these exercises were designed to be of equivalent standard. The Kaplan report candidly admits that performance on one exercise was significantly better than on the other. Furthermore there was a clear disparity in the performance of BAME students (although not male/female or students with disabilities). BAME students perform significantly less well than others across the crucial central 60% of the achievement range. The independent reviewer has confirmed these outcomes. The response of the SRA is to acknowledge that the skills assessment as currently designed and piloted is not fit for purpose although additional recent comments suggest that the problem with these elements was more about the validity of the exercise than performance of BAME which was described as a separate issue and not the reason the SRA are not considering not including a skills element in the QE 1 examination. The level of discrepancy between the two assessments and the differential performance of BAME students are both unacceptable.

The Kaplan report states that statistical analysis of the performance of the FLK assessments indicate that they do not meet the "gold standard" required for high-stakes professional examinations³⁵. There is no indication of the extent of the shortfall or any real explanation of the reasons for it. This is concerning. It should be noted that this is simply a statistical assessment of the assessment in its own terms. Neither report attempts to address the question of whether the assessment is actually fit for purpose. The solution proposed is that rather than having three batteries of 120 questions there

³³ "an acceptable precision of 1% on the scoring scale would require a panel of 39 item writers judging 200 test items... If the discussions were omitted and individual estimates used, the number of judges needed to obtain a reliable passing score would increase to 77" Verhoeven et al ibid

³⁴ Kaplan report p.7

³⁵ Kaplan report, p5.

should be two batteries of 180 questions with the required topics being reallocated according³⁶. The SRA has confirmed that this does not mean that some candidates did sit such exams but rather that the data has been modelled for such a scenario. Detailed reporting of this modelling process would be need to reassure readers that this does not constitute manipulation.

Anecdotal evidence from students who participated in the pilot indicates that the questions were presented in a random order and questions on cognate topics were not grouped together. This appears to indicate that there are no groupings of questions based on a common fact pattern or other common material. Given that what is being assessed is the ability of the students to apply legal knowledge, including knowledge as to court and other procedures, it appears that there has been no attempt to assess students on the basis of their ability to progress a particular scenario. This would appear to be a significant lacuna and removes one significant area where CMA can be used in a relatively sophisticated way to assess responses to an evolving scenario.

The Kaplan report proposes removing skills assessment from SQE 1 altogether. The SRA have not accepted this, and propose to consult further, but it is certainly possible that the SQE 1 will only comprise the two 180 question batteries of FLK topics. One issue that has not been addressed is whether candidates will be able to maintain their levels of concentration for these longer batteries of questions, and whether the use of CMA exclusively will have a differential impact on certain categories of student. The SRA has indicated that there will be adequate breaks between the two papers which will make up each of the two assessments. The Association of Law Teachers has always acknowledged that the SRA is entitled to specify its own assessment of the vocational and professional stage of legal education for solicitors. We have expressed our concern that the SRA appears to be adopting what amounts to a “one club policy” in relation to SQE 1 by focusing on CMA to the exclusion of other forms of assessment. We continue to be sceptical as to whether a CMA assessment, however well-designed, can assess skills such as research and communication, and if the batteries of questions are, as we understand, randomised, so that there can be no grouping of questions, we are also extremely sceptical as to whether these assessments can capture anything other than relatively superficial knowledge and understanding. Without the ability to set a series of questions based on a single scenario we cannot see how it is possible to assess the ability to advise a client and devise appropriate responses in the context both of litigation and dispute resolution and transactions such as property sales and purchases.

All in all, the two reports and the SRA response raise many more questions than they actually answer. We accordingly request that the SRA to publish forthwith a representative sample of the questions and the statistical data. Only then will it be possible to provide a detailed critique as to whether or not the SQE 1 as currently proposed by the SRA can be regarded as fit for purpose. Our concerns extend to SQE 2 and the pilot as it is set out to run in December 2019. The pilot assessment specification raises a number of questions for us which suggest that the concerns we have in relation to SQE 1 have not been addressed and will be repeated for SQE 2.

For the pilot, candidates will be required to take assessments across the common core as well as in a specialist subject area. Only two of the specialisations will be available for the pilot but it is not clear why they have been chosen and what can be generalised from them. Equally it is not clear who will take the pilot and what we can learn from that in terms of how the SQE 2 will work for candidates in the future who may or may not have a period of work experience or other training under their belt. The assessment specification also suggests that legal knowledge will be assessed quite heavily, the consultation asking for whether respondents agree that the marks should be split 50/50 between

³⁶ “Scores based on two exams each provided better statistics”, Kaplan report p.5.

knowledge and skills. It is however not clear what knowledge exactly is to be assessed and how this relates to SQE1. We call on the SRA to be a lot more transparent in their preparations for and evaluation of their pilot for the SQE 2 and to take into account our concerns about the overall suitability of the SQE to achieve its regulatory aim.

Next steps

We will continue to carefully watch developments both in England & Wales, The Republic of Ireland and further afield. In Ireland, the LSRA is asking open questions and conducting a wide-ranging discussion which is not predicated on specific goal, rather they are focused on the broader outcome of a high quality, accessible and sustainable legal profession.

In England and Wales, there appears to be a grim determination to press on and get it done, which may be attributable to the zeitgeist, but perhaps not optimal for the profession. We will also continue to ask for further information so as to be able to fully evaluate the developments and proposals. We hope that those seeking to reform legal education and training as/or access to the profession will start engaging more positively and constructively with questions raised. In relation to the SRA, we await the report on SQE 2 early in the new year and then an application to the Legal Services Board is likely to follow shortly after that.