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## Measuring Competence in Legal Education: A View from the Bridge

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Following the Legal Education Training Review<sup>1</sup> (LETR) the professional bodies' response has been to devise a more comprehensive and informed set of draft competencies for day 1 solicitors<sup>2</sup> focussing on the activity of legal practice. The impact of the competency statement on legal education is not yet clear, but one option is that it opens up a route to qualification where competency is achieved in the work place or other non-academic settings and assessed outside of the normal educational establishments.

This article argues that in the light of these possible changes a new approach to assessment will be required to deliver the SRA's aim to "produce "lawyers with the highest ethical standards, and necessary competence to deliver safe, ethical, good quality legal services".

This article considers how to assess competency in legal education both in an educational and work based setting. It charts the development of an outcomes orthodoxy in legal education in England and Wales and in other jurisdictions and draws on research in medical education to identify key principles in the design of an assessment methodology for professional education. The article reviews a range of assessment methods already in use in legal education and in other professions such as accountancy, medicine and conservator restorers. It argues that a move to a complex competency orientated training system will require a different approach to both the method of assessment and its programming.

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<sup>1</sup> J.Webb, J.Ching, P.Maharg, and A.Sherr, *Setting Standards: the Future of Legal Services Education and Training Regulation in England and Wales* (London: Legal Education and Training Review, (2013) (LETR Report). Available at: <http://letr.org.uk/the-report/index.html>.

<sup>2</sup> Solicitors Regulation Authority, *Training for Tomorrow: A Competence Statement for Solicitors*. 20.10.14

### **The emergence of the ‘outcomes orthodoxy’<sup>3</sup>**

There is nothing new about an outcomes or competency based approach in higher education, in 1997 the Dearing Report recommended that “achievement and expectations, at the threshold and at the highest end of the spectrum for different programme types, should be identified...”<sup>4</sup> This marked a move away from defining course content in terms of inputs to a focus on what students should be able to ‘do’ on completion of their degrees. The then newly formed Quality Assurance Agency for Higher Education began to develop subject benchmarks resulting in the current 2007 Law Subject Benchmark which specifies subject specific knowledge and skills, general transferable intellectual skills and key skills to provide a “basis for institutions to devise their learning outcomes compatible with the benchmark standards”.<sup>5</sup> An “outcomes orthodoxy”<sup>6</sup> for law was born and is now a familiar element of programme and module specifications across undergraduate programmes in law.

Unsurprisingly the outcomes based approach had its origins in vocational education. In 1986 the newly established National Council for Vocational Qualifications (NCVQ) was tasked with developing employer-led ‘standards of occupational competence’ initially for use in level four vocational qualifications. In recent years the new apprenticeship schemes have extended vocational training to professional education and in 2013 the Department of Business Innovation and Skills published The Specification of Apprenticeship Standards for England (SASE) opening the way for the development of competency and knowledge frameworks for legal practice. The SASE guidance, in common with many vocational qualifications, uses the terminology of ‘technical knowledge’ and ‘occupational competence’ (the former being typically gained outside of the workplace through appropriate courses of study and the latter being developed in the workplace).

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<sup>3</sup> C. Maughan, M. Maughan and J. Webb, “Sharpening the Mind or Narrowing it? The limitations of outcome and performance measures in legal education” (1995) 29(3) *The Law Teacher* 255-278.

<sup>4</sup> *Higher Education in the Learning Society, Main Report*, 1997 The National Committee of Inquiry into Higher Education, Para 10.66.

<sup>5</sup> The Quality Assurance Agency for Higher Education 2007, Law Benchmark, Section 2 available from [www.qaa.ac.uk](http://www.qaa.ac.uk)

<sup>6</sup> C. Maughan, M. Maughan, J. Webb, *supra* n.2

The professional bodies in law adopted an outcomes based approach in the professional training courses in the early 1990s with the introduction of revised Bar and Legal Practice courses which embedded specified skills in the professional courses. These standards were reviewed in 2007 and 2008 when new day one outcomes were prescribed for both the LPC course and the training contract. In respect of the academic stage of qualification the Joint Statement<sup>7</sup> prescribed content in terms of knowledge both of core subject areas and of legal concepts and principles. It also specified in broad terms general transferable skills and intellectual and practical skills. Whilst not couched in the language of competence used in the apprenticeship models, the specified outcomes for each stage of legal education and training cover a wide range of competencies and are an attempt to articulate some of the key academic and intellectual skills required by lawyers as well as some of the more established legal skills areas<sup>8</sup>.

It is hard to dispute the merits of a system that makes explicit for students and stakeholders alike what a person achieving a qualification will be able to do and not surprising that the approach has been widely adopted. However, whilst the rhetoric of outcomes has been widely adopted since the mid 1990's their actual impact on programme design and delivery is less apparent, particularly in higher education. Biggs and Tang observe that "Today most UK universities describe course and programme outcomes in terms of the outcomes students are intended to attain, although how far these filter through to fully blown outcomes-based teaching and learning varies between institutions."<sup>9</sup> The issue of competence has been largely assumed by virtue of the fact that programmes can be mapped against the requisite outcomes.

Legal Education in other jurisdictions has also been moving towards the outcomes approach. In Australia the knowledge element of legal education is enshrined in the Priestly Eleven.<sup>10</sup> However

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<sup>7</sup> Joint statement on the academic stage of training, Law Society and the General Council of the Bar 2002

<sup>8</sup> Prior to 2007 required by LPC standards were known as the DRAIN skills: Drafting, research, advocacy, interviewing and negotiation

<sup>9</sup> John Biggs and Catherine Tang, *Teaching for Quality Learning at University*, 4<sup>th</sup> Edition, Society for Research into Higher Education and Open University Press, 2011, p9

<sup>10</sup> Law Admissions Consultative Committee Report 1992

in 2010 the Learning and Teaching Academic Standards project in law devised six Threshold Learning Outcomes (TLOs) for the Bachelor of Laws degree which were “to represent what a graduate is expected to know, understand and be able to do as a result of learning”,<sup>11</sup> two years later these were extended to cover the masters level Juris Doctor. The introduction of the TLOs led to a process of curriculum review in many Australian Law Schools with some evidence of wholesale change to align the learning outcomes with course delivery.<sup>12</sup>

In the US, the entrenched approach to post graduate legal education in Law Schools<sup>13</sup> came under fire in the Carnegie Report of 2007 which referred to the cognitive, practical and formative elements of professional legal practice as the “three apprenticeships of Professional Education”. The report challenged Law Schools to “align the practices of teaching and learning within the professional school so that they introduce students to the full range of the domain of professional practice while also forming habits of mind and character that support the student’s lifelong growth into mature knowledge and skill”.<sup>14</sup> In the same year Roy Stuckey recommended an outcomes based approach for use in US Law Schools<sup>15</sup>, a proposal which was ultimately accepted by the ABA in 2008.<sup>16</sup> Carnegie referred to students being ‘socialised’ into the profession reflecting a general concern for ethical standards in the profession and an economic reality that in a highly competitive work place students needed to be equipped with more than academic knowledge of the law.

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<sup>11</sup> Learning and Teaching Academic Standards Project, Bachelor of Laws, Learning and Teaching Academic Standards Statement December 2010, Australian Learning and Teaching Council.

<sup>12</sup> Skead, Murray, Carruthers, Taking up the challenge: embedding , mapping and maintaining threshold learning outcomes in the transition to the JD- the UWA experience, (2013), 47 *The Law Teacher* 130

<sup>13</sup> In the US students study law as a postgraduate qualification and there is no required period of training in the work place before qualification.

<sup>14</sup> Sullivan, Colby, Wegner, Bond and Shulman, *Educating Lawyers, Preparation for the Profession of Law*, The Carnegie Foundation for the Advancement of Teaching, Jossey- Bass, 2007,p45

<sup>15</sup> Stuckey et al, *Best Practices for Legal Education, A Vision and a Road Map*, Clinical Legal Education Association, 2007

<sup>16</sup> American Bar Association Section of Legal Education and Admissions to the Bar, *Report of the Outcome Measures Committee* 2008 p1. The report recommended that the existing ABA accreditation standards were reframed ‘to reduce their reliance on input measures and instead adopt a greater more overt reliance on outcome measures’

Definitions of professional competence vary. The LETR referred to Epstein and Hundert's research which defined professional competence as "the ability to manage ambiguous problems, tolerate uncertainty, and make decisions with limited information"<sup>17</sup>. Yorke's overview identifies as common requirements the ability to apply certain professional attributes and values and the ability to integrate and apply skills and knowledge and make judgements in varied circumstances.<sup>18</sup> Whether in spite of or because of the developing role of outcomes in higher education it is clear that professional education in many fields is now required to train students to meet these complex outcomes. In legal education it is widely acknowledged that the existing professional body competencies do not reflect the complexity of professional practice and in 2012 the LETR referred to "the reliance on relatively shallow, vague or narrow conceptions of competence"<sup>19</sup> as a challenge for any new system of legal education and training and drew on medical education as an example of a training system which had adopted a "richer conception of competency" . In October 2014 the SRA published its Draft Competence Statement<sup>20</sup> for solicitors for consultation. The draft statement adopts a broader definition of competence it focuses on "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"<sup>21</sup>. It sets out four domains of solicitors' competence; a) ethics, professionalism and judgement, b) technical legal practice, c) managing themselves and their own work, d) working with other people. The wording of the statement appears to move away from lists of 'tasks' to be completed by students to a more descriptive approach which acknowledges the context of legal practice and in some cases, the limitations of the legal professional.<sup>22</sup> The competencies have been drafted with little reference to assessment methodology although the document acknowledges that

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<sup>17</sup> Epstein and Hundert ,Defining and assessing professional competence, (2002) Journal of the American Medical Association, 287 (2), p226 as stated in LETR *supra* n1

<sup>18</sup> M Yorke, *Issues in the assessment of practice -based professional learning*, 2005, a report prepared for the project based professional learning CETL at the Open University, p15

<sup>19</sup> LETR *supra* n1, p 152

<sup>20</sup> Solicitors Regulation Authority, Training for Tomorrow: A Competence Statement for Solicitors. 20.10.14

<sup>21</sup> *Ibid.*, p5

<sup>22</sup> *Ibid.*, p15, For example in category A4, which deals with effective practice, a solicitor is required to spot "relevant issues that are outside their expertise and take appropriate action, using both awareness of a broad base of legal knowledge and detailed knowledge of their practice area".

a wide range of assessment methods could be used. The precise nature and extent of the assessment regime is due to be consulted on at the end of 2015.

### **The need for change in assessment practice**

Eraut<sup>23</sup> characterised the current system of professional legal education and training as a 'dual qualification approach' where theory is separated from practice by delivering propositional knowledge through an accredited degree and with a further period of work based professional practice (the training contract) prior to qualification. The focus is on the acquisition of propositional knowledge and limited process knowledge at the academic and LPC stages whilst the training contract process delivers the higher level practice competencies. This has broadly allowed the providers of the legal education to continue delivering propositional knowledge in time honoured lecture/ seminar / workshop mode, assessing by way of traditional exam or coursework format. Skills and LPC outcomes tend to be delivered and assessed through the use of extended case studies and simulated skills scenarios. Legal skills are normally assessed discreetly and any interaction with actual legal practice (in contrast to medicine) is typically restricted to placements and clinical legal education.<sup>24</sup> In 2014 the LawWorks Law School Pro Bono and Clinic Report reported that somewhere in the region of 70% of Law Schools in the England and Wales engage in pro bono and/or clinical activity an increase of 5% from 2010. However, only 25% of those providing a clinical experience assess it as part of the curriculum. As Newble observed the emphasis for assessment in the academy is to measure the student's ability by subject matter or skills area rather than their reliability as competent practitioners<sup>25</sup>.

At the training contract stage students are required to demonstrate when they meet the Practice Skills Standards and the Principles by maintaining a training record and reflecting on their

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<sup>23</sup> M Eraut, *Developing Professional Knowledge and Competence*, 1994, Falmer Press, p101

<sup>24</sup> D. Carney, F. Dignan, R. Grimes, G. Kelly and R. Parker, *The LawWorks Law School Pro Bono and Clinic Report 2014* Law Works supported by the Law Society available at [www.lawworks.org.uk](http://www.lawworks.org.uk). Out of 80 responding Law Schools, 56 confirmed that they offered clinical legal education in some form and 41 offered placements.

<sup>25</sup> Newbie D et al, *The certification and recertification of doctors : issues in the assessment of clinical competence* (1994) Cambridge University Press as stated by Mantz *supra* n 16

performance. The record is not intended as a portfolio of evidence supporting the claim to competence and whilst it can be called upon by the SRA, it is not normally scrutinised. Eraut refers to this as 'a prevailing assumption that the professionals who run the system know what competence is and do not need to spell it out'<sup>26</sup>. The staged approach to legal education and training has resulted in a conservative approach to assessment methods and a dearth of experience in assessing complex professional competency in law.

The rationale that the acquisition of propositional knowledge is a necessary precursor to development of process knowledge is increasingly being called into question with the development of such methodologies as problem based learning and clinical legal education as well as a growing acknowledgement that a range of work based experiences can provide an integrated or concurrent approach to acquiring both legal knowledge and professional competency. Against the back drop of a challenging employment market in legal practice and the economic reality that a very expensive and protracted legal education process no longer guarantees employment, the SRA's initial response to the LETR was to consider extending the outcomes approach to its logical conclusion and provide 'the possibility for those working in various roles in legal services to demonstrate that they have the knowledge, skills and attributes to qualify as a solicitor without going through the current tightly structured process'.<sup>27</sup> The publication of the draft competencies in October 2014 was the first step in this process.<sup>28</sup>

The SRA is yet to specify the pathways and assessment of these overarching outcomes but it has made it clear that one of the options facilitated by the introduction of threshold outcomes is a move away from an emphasis on staged routes to qualification to a final gateway assessment to practice. By necessity, this will require an assessment process that is capable of ensuring both propositional and professional knowledge with all its richer competencies is reliably in place before

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<sup>26</sup> Eraut *supra* n18,

<sup>27</sup> Solicitors Regulation Authority, Policy Statement: Training for Tomorrow, 16.10.13

<sup>28</sup> *Supra* n19



the candidate is licensed to practice. Students approaching this gateway assessment may have reached competency through an unstructured combination of practice and more formal training. In addition the SRA has made it clear that one of the options under consideration is to detach the assessment process from the educational and training programmes and the institutions delivering them and assess through centralised assessments. In these circumstances it emphasises the importance of assessing competency with all its complexity prior to full qualification is essential to “to ensure a system of legal training which produces lawyers with the highest ethical standards, and necessary competence to deliver safe, ethical, good quality legal services”.<sup>29</sup>

### **Designing an assessment process**

The LETR was critical of current assessment practices in legal education which ‘possess conformity rather than practice validity’<sup>30</sup> and drew on medical education as a profession which has developed a wide range of assessment methods. Whilst in law assessment methods have remained fairly static, albeit with increasing attention to the use of simulation and unstructured case studies, in medicine unstandardised approaches are numerous and nuanced and have been developing over a long period of time.

In 1990 Miller<sup>31</sup> identified a simple pyramid classification for professional knowledge in medical education with four levels; knowing, knows how, shows how and does, rising from base layer to apex. Whilst ‘knowing and knowing how’ are typically and extensively assessed using standardised approaches such as examination, multiple choice questions and coursework the higher level competencies required an ‘unstandardised approach’. Miller identified that a range of assessment methods, both standardised and unstandardised, were required to test the different aspects of competency. In legal education assessing the ‘shows how and does’ elements of the

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<sup>29</sup> SRA *supra* n22, p13

<sup>30</sup> LETR *supra* n1, p152

<sup>31</sup> GE Miller, The Assessment of Clinical Skills/Competence/ Performance, 1990, Acad Med, 65(9), p63

triangle is limited, for example the Legal Practice Course skills of drafting, practical legal research, legal writing, interviewing and advocacy are typically assessed in isolation on a competent / non-competent basis. The foundation skills such as problem solving and analysis tend to be assessed implicitly through knowledge orientated standardised assessments. The problem with this approach is that as Biggs and Tang state “Students will underestimate requirements if assessment tasks let them, so they get by with low level, surface learning strategies. ....Assessment is the senior partner in learning and teaching. Get it wrong and the rest collapses.”<sup>32</sup>

If a range of assessment methods are required to assess the full spectrum of professional expertise it is important that assessors understand the attributes of each type of assessment. In its Draft Competency statement of October 2014 the SRA acknowledge that the key principles are that assessment must be valid, reliable and relevant<sup>33</sup>. However, it does not give any indication of how these principles might be utilised within an assessment regime to adequately assess competence. Some key trade offs may have to be made when designing a programme of assessment, for example, when deciding whether reliability or validity is paramount in assessing a particular learning outcome. In medical education the classification of assessment methods detailing the process, setting and level of standardisation is well advanced.<sup>34</sup> The PMETB recommends plotting the assessment methods against the outcomes (or domains) to provide a visual check to ensure “all domains of GMP<sup>35</sup> have been appropriately addressed within the assessment system”.

## **Validity**

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<sup>32</sup> Biggs and Tang *supra* n7, P 221

<sup>33</sup> *Supra* n19 p9

<sup>34</sup> Developing and maintaining an assessment system – a PMTEB guide to good practice, 2007 Postgraduate Medical Education and Training Board Guidance

<sup>35</sup> General Medical Council, Good Medical Practice (2013) specifies four domains; i) Knowledge skills and performance, ii) safety and quality, iii) communication partnership and teamwork, iv) maintaining trust.

The concept of validity is described by Van Der Vleuten as “whether an instrument actually does measure what it is purported to “. <sup>36</sup> Validity is the measure of the extent to which the assessment assesses the outcomes it is being used to test. The range of standard and non-standardised assessments aimed at assessing behavioural capability is probably most developed in medical education which uses a wide range of assessment methods both pre-qualification as a doctor and in postgraduate training years. The OSCE<sup>37</sup> was developed in medicine specifically to address the ‘shows how’ element of Miller’s triangle. Although there are now a number of variations to OSCEs they cannot truly assess professional performance because the very fact they rely on standardised components undermines validity. Rethans et al distinguish between assessments for performance i.e. OSCEs and assessments for competence i.e. live performance<sup>38</sup>. In early years medical practice the direct observation by the expert of real life practice is, unsurprisingly, still an important element of assessment. In law, the SRA has made it clear that the draft competencies relate to the ‘activities’ of the solicitor conducting legal cases within a practice setting. They refer to the interaction between client and solicitor and the ongoing conduct of cases. Whilst it is possible to simulate practice situations, it is difficult to see how these competencies, even at a threshold level, can be satisfactorily assessed without reference to real life practice.<sup>39</sup>

## **Reliability**

Reliability refers to the consistency and reproducibility of the outcomes or scores from an assessment. The question being whether the same student taking the same type of assessment on the same subject area with an equal amount of preparedness achieves the same score in a

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<sup>36</sup> Cees Van Der Vleuten, L W T Schuwirth, Assessing professional competence: from methods to programmes 2005, Medical Education 39 p309

<sup>37</sup> The Objective Structured Clinical Examination was developed by Harden in 1975 and has been widely used in medical education since 2002

<sup>38</sup> J Rethans, J Norcini, M Baron-Maldonado et al, The relationship between competence and performance: implications for assessing practice performance, 2002, Med Educ 36 (10) p901

<sup>39</sup> Supra n26, para D1. For example the competency relating to communication skills requires solicitors to a) ensure that the communication achieves its intended objective, b) responds to and addresses individual characteristics effectively and sensitively, c) uses the most appropriate method and style of communication for the situation and the recipient etc

reproduced assessment. Downing compares this with scientific method and the need for reproducibility in data arising from scientific experiments “If a researcher cannot reproduce the results of an experiment, more or less, any conclusions drawn from the original experiment are suspect and generalisations limited”.<sup>40</sup> Reliability can be affected by a number of factors including for live performance assessments the risk of assessor variations or a variation between cases used.

The issue of reliability is of utmost concern in high stakes assessments particularly those regulating entry to the profession both for reasons of fairness and so we can be sure that the successful applicant, acting in a practice situation, will reproduce those levels of competency. The very nature of competency is that it is a sustained level of performance. Typically reliability has been associated with objectivity and standardisation. However, in medical education Van Der Vleuten analysed a range of studies on assessment methods from MCQs to OSCEs. He found that all assessment methods increased in reliability in relation to the time spent<sup>41</sup>. In other words whatever method is used, a truly reliable result is only achieved by assessing over a period of time and a short incident of assessment cannot truly reflect whether a student has achieved competence.

The emerging principles from Van Der Vleuten’s work establishes that both the variety and period of time over which the student is assessed are both central to establishing professional competence. He argues that “in assessment we tend to persist in our inclination to break down the competency that we wish to assess into smaller units, which we then assess separately in the conviction that masters of the parts will automatically lead to competent performance of the integrated whole”. He makes a “strong plea... for a shift away from individual assessment methods for separate parts of competencies towards assessment as a component that is inextricably woven together with all the other aspects of a training programme.”<sup>42</sup> He refers to this as programmatic assessment. Whilst the SRA has not yet proposed an assessment regime or pathways to qualification, initial indications are that it is considering assessment in terms of assessing units of competency rather than as an

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<sup>40</sup> S Downing, Reliability: on the reproducibility of assessment data, 2004, Med Educ 38, p1006

<sup>41</sup> C Van der Vleuten, L Schuwirth, E Driessen, J Dijkstra, D Tigelaar, L Baartman, J Van Tartwijk, A model for programmatic assessment fit for purpose, 2012, Medical Teacher, 34 p205

<sup>42</sup> C Van de Vleuten *supra* n29

integrated component of instructional design when it states that “all elements of the Competence Statement are capable of being assessed through one or more of these mechanisms”<sup>43</sup>. In reality a single gatekeeping assessment of competence would be in conflict with the need to embed assessment within the training process itself.

Medical education is very different to legal education. Those embarking on a medical education intend to practice, and acceptance into medical school requires students to demonstrate their commitment to this. This is not the case with the academic stage of legal education. In addition the long tradition of medical education is that whether in the medical school, the GP practice or on the wards, the professional supervisor is part of the training process and is paid to deliver that role and to ensure that doctors are trained to meet rigorous standards no matter how or where they practise. There is an acceptance that doctors have to train through engaging with real clients under the supervision of practitioners. In law, training is provided within the educational establishments with a varying degree of practice orientation and then in the legal practices. Law firms will have their own training agendas and priorities. Legal education lacks the continuity of medical education and the Van Der Vleuten approach, when spread between a range of providers and employers, may simply translate into more assessment for what is generally acknowledged as being an already over assessed training programme .

**Learning from experience:**

Probably the closest the SRA has come to assessing professional competency at the point of qualification was as a consequence of the work based learning pilot set up in 2008 to test a range of routes to qualification for those based wholly or partially in a work environment . The pilot identified eight learning competencies to be achieved within three distinct areas of work and participants were required to use a portfolio to provide evidence in the form of specified ‘outcomes’ within each competency . Final assessment of the portfolio was undertaken by a mix of employers and academic providers depending on which of the three pilot routes was undertaken. The SRA undertook two

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<sup>43</sup> Supra n19 p10

reviews of the pilots. The first conducted by Professor Carol Costley of Middlesex University in 2010<sup>44</sup> and the second in 2012 prepared by BMG Research<sup>45</sup>. Overall the pilot concluded that Work Based Learning (WBL) could provide a valuable alternative to traditional routes to qualification.

The 2010 report focused on the use of WBL “to develop an approach to ensuring the competence of qualifying solicitors that is quality assured, consistent and reliable”.

However it concluded that “on its own, the portfolio was not convincing as a summative assessment tool at the end of the two years”.<sup>46</sup> The conclusion was based on a number of concerns about the limitations of portfolios which included its ability to demonstrate soft skills and also to show incremental development of skills through WBL. It was not clear from the portfolios the extent to which students had been dependent on supervisors. A number of participants considered the process of evidencing the specific outcomes in the portfolio as too time consuming and were concerned that the process demonstrated the students’ skill at collecting and exhibiting evidence and not necessarily competence. Yorke recognised that the place of the portfolio may be in formative assessment “Taken in conjunction with personal development planning, the portfolio offers the opportunity for the students to self-assess and to reflect on progression in their learning and professionalism”.<sup>47</sup>

Since June 2013 the portfolio approach has been adopted by CILEX. Applicants completing their period of qualifying employment for fellowship are now required to produce specific evidence of eight competencies broken down into 27 learning outcomes.<sup>48</sup> Candidates are required to produce a portfolio containing a log book and specific authentic supporting documentary evidence. On the face of it, the same criticisms of the portfolio approach identified in the SRA work based pilot can be levelled at this system.

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<sup>44</sup> Institute for work based learning Middlesex University, *SRA Final Report Evaluation Work Based Learning Scheme Pilot Cohort 1 2008 – 2010*, 2010 available on SRA website

<sup>45</sup> J Wiseman, P Roe and E Davies, BMG Research, *SRA Final evaluation of the work based learning Scheme pilot*, 2012 available on SRA website

<sup>46</sup> Institute for work based learning, *supra* n34, para 3.6

<sup>47</sup> M Yorke *supra* n16

<sup>48</sup> The Chartered Institute of Legal Executives. Application for Fellowship Rules

In 2012 the Qualified Lawyers Transfer Scheme broke new ground by assessing competence in the SRA's day one outcomes by introducing Objective Structured Clinical Examinations to test interviewing, advocacy, research, writing and drafting in three practice areas. Other knowledge based outcomes are assessed through MCQs. This goes some way to addressing the validity requirement for assessments using a standardised approach required for high stakes assessment. However, much work has been done on the reliability of OSCEs in medical education and Downing comments that for OSCEs to be reliable they should consist of a number of different stations each assessed by a different assessor<sup>49</sup>. Nevertheless the development illustrates the scope for looking at the wide range of assessment methods available in other disciplines to see if they can be effective in legal education.

#### **Learning from others:**

The LETR also considered the assessment process adopted by other professions. One of the most interesting, is accountancy which adopts a concurrent approach to professional education. The majority of students entering the profession have studied a different discipline and achieve their accountancy qualifications in a work based setting. In the UK there are four professional accountancy bodies each with their own regime which will usually require completion of exams and a period of practice with an accredited employer. So for example for the ACCA<sup>50</sup> qualification students have to complete anywhere between 5 to 14 exams, a professional ethics module and 36 months experience in a relevant role.

In Scotland ICAS<sup>51</sup> adopt a three tier staged approach to qualification; a test of competence in year 1, a test of professional skills in year 2 and a test of professional expertise in year 3. A traditional exam approach is typically used for each stage combined with assessed work based practice with an accredited training organisation. In 1999 following a review, ICAS adopted a

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<sup>49</sup> Ibid n28

<sup>50</sup> Association of Chartered Certified Accountants

<sup>51</sup> Institute of Chartered Accountants Scotland

competency approach to work based experience and introduced an achievement log which required students to tick off each competency when they felt it had been achieved giving a date and reference number to enable review. The achievement log was criticised by training providers because of its lack of descriptive or reflective content and its binary (tick box) approach which was felt to encourage students to assume that once ticked off, the competence had been completed and did not need to be sustained. In addition, there were concerns that not all training providers adopted a consistent approach as to when a competency could be ticked off, probably a reflection of the diversity of work experience amongst training providers. Measures were introduced to address these concerns including the requirement for a reflective statement. However, Gammie highlights the importance of the role of professional bodies in a profession where practice is so varied that there may be no agreed common core of professional experience between training providers. In these circumstances Gammie concludes that it is the role of the professional bodies to provide the relevant support and infrastructure and to “set work experience requirements and then put in place mechanisms for ensuring these are met and properly assessed.”<sup>52</sup>.

Similar to accountancy in that it requires no prior academic study in the discipline and a true example of a gateway assessment to professional accreditation is the small, very specialist profession of Conservator Restorers. This is an interesting example of the development of a system of accreditation which sets out to produce a work based scheme “to provide a measure of confidence in the proficiency and judgement of accredited members.”<sup>53</sup> The system worked around a framework developed in consultation with the professional bodies. Applicants for accreditation make a detailed application addressing the framework supported by sponsors. This is followed by a lengthy visit by expert assessors to the studio to discuss current and past work, examine existing projects and discussions with managers (with the candidate’s consent). The assessors reported back

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<sup>52</sup> Ibid p 459

<sup>53</sup> S Lester, The professional accreditation of Conservator – restorer: developing a competence based professional assessment system (2000) *Assessment and Evaluation in Higher Education* 25:4, p407



to a panel which made a decision on accreditation. This has obvious cost and efficiency issues for use in law but it does acknowledge the importance of direct, expert opinion as an element of high stakes assessment. The external expert assessor of practical work is also used in surveying and engineering. In these professions development records or log books which map progress against a set of specified skills or competencies are used and accreditation is preceded by a professional review interview which involves an element of peer review.

Lester's research into trends in professional education looked at 23 professions. He found that professions were generally speaking moving to a greater flexibility in entry routes with a move towards "clearer and more robust exit criteria" and "requirements that are more directly concerned with the ability to practice proficiently and capably rather than with the route taken." He observes that " In some areas these developments will present challenges to university departments and to academics, who may need to become facilitators, advisers and expert resources more than teachers".<sup>54</sup>

The use of authentic evidence generated in the work place and considered by experts in context is both possible and necessary if we are to assess the 'does' level of the pyramid in legal education. Unsurprisingly (and perhaps reassuringly) medicine makes full use of observations (both in situ and of videoed encounters) by experts to assess student's competency when treating patients or managing a work environment. It also draws on a range of different observations from different key professionals to assess behaviour over time. The discussion of clinical materials such as case notes and simulated exercises are also used to test a wide range of competencies. Whilst acknowledging the importance of confidentiality and other ethical considerations, many of these methods translate easily into law, for example client interviews can be observed or recorded, the discussion of clinical materials translates directly into the sorts of discussion trainees will conduct regularly on how to progress cases. In combination with a number of more standardised assessments such as OSCEs using standardised clients, unstructured cases studies using simulated

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<sup>54</sup> S Lester, Routes to qualified status: practices and trends among UK professional bodies, 2009, Studies in Higher Education 34:2, p223

documentation, drafting exercises and knowledge based tests that can be done in a more controlled way, we can get closer to reaching a true judgement of competence.

There is no doubt that a move to a gateway assessment in law must place as its first priority the need to protect the public and to preserve professional standards but it is also important to acknowledge the universal truth that “assessment rather than teaching, has major influence on student’s learning. It directs attention to what is important. It acts as an incentive for study. And it has a powerful effect on what students do and how they do it. Assessment also communicates to them what they can and what they cannot succeed in doing”.<sup>55</sup> Any assessment regime sends a message to aspiring legal professionals about what the profession values.

## **Conclusion**

Whilst the future of legal education remains uncertain it is important that any changes are informed by the experiences of other professional education systems. A wide range of assessment tools have been tried and tested in other fields and legal education would benefit from a broad ‘view from the bridge’ approach when considering the options for legal education.

With reference to existing authority it is possible to identify some overriding priorities for a fit for purpose, professional competency assessment regime. At the outset any assessment regime must identify which outcomes are to be assessed and devise an assessment programme or framework around this. The assessment process must be equipped to assess complex competencies and not divide competencies into smaller units or ‘snap shots’ of competent behaviour.

The research in medical education confirms that there is no magic bullet for assessment in terms of reliability and validity and whilst exams and traditional methods serve a purpose there is still a need to draw on professional expertise and assessment in situ. There is scope for exploring more imaginative approaches to assessment and to consider the extent to which employers and educators should participate in this process.

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<sup>55</sup> Boud and Falchikov 2007. Assessment for the long term. Rethinking assessment in higher education: Learning for the longer term 14-26 London Routledge. As quoted by J McNamara in The challenges of assessing professional competence in work integrated learning, Assessment and Evaluation in Higher Education 2013 38:2, 183-197

Legal practice has at its disposal a wide range of authentic materials and these could be drawn on to develop a wider range of assessment formats.

Finally the evidence suggests that multiple assessment points need to be embedded within the training process. The one off assessment, no matter how objective or standardised, does not ensure reliability. These principles will require a more holistic approach to assessment which is hard to reconcile with any move towards a single gatekeeping assessment for legal practice.