

## “I INTEND TO DO VERY WELL IN IT”: THE ROAD(S) TO COMPETENCE

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I am pleased to inform you that I am out of my articles at Kenge and Carboy's and admitted to the roll of attorneys in my own right and I have taken a 'ouse in the locality of Walcot Square in Lambeth. In short, I am setting up on my own in the legal profession and I intend to do very well in it.<sup>1</sup>

### INTRODUCTION

Those who have heard me talk about the training contract and its proposed successor, the period of work-based learning for intended solicitors in England and Wales, will have experienced my fondness for Mr Guppy, Dickens' forensically gifted (if under-occupied at the office) articled clerk, whose major failing, in which he is hardly unique, is in pursuing a girl who is out of his league. He is pragmatic and disparaging of the vocational examinations required of him: “an examination that's enough to badger a man blue, touching a pack of nonsense that he don't want to know”,<sup>2</sup> but determined to succeed. As an individual he is recognisable amongst our younger colleagues: what interests me is the extent to which his experience during his articles fits him for “setting up on [his] own in the legal profession” and his professional life thereafter. Accusations of “dumbing down” are rife at all stages of the educational process and are not exclusive to law and, given that a modern Mr Guppy would not be let out to set up on his own without a further three years of supervised practice,<sup>3</sup> it is already possible to suggest that something has changed, arguably for the worse, in the fit between the training contract and the competence of the individual at the point of

qualification – let alone the degree of maintained or improved competence thereafter - which is ripe for remedy. The point is no longer confined to the pre-qualification stage: the Solicitors Regulation Authority (“SRA”) has, as part of its continuing agenda in this direction (“Agenda for Quality”), now consulted on a “professional standards framework” which would apply *after* qualification.<sup>4</sup>

This paper seeks to contextualise the notion of competence frameworks which informs both the Agenda for Quality and the current proposal to replace the training contract and to explore some issues which may emerge around and in the piloting of the latter. Prior to doing so, some background is useful.

## THE SHAPE OF LEGAL EDUCATION

Saunders<sup>5</sup> lists a series of reports of formal committees on legal education from 1971 onwards, the first of which (chaired by Ormrod J) established a three tier format:

- i) academic;
- ii) professional (currently the vocational stage represented by the Legal Practice Course (“LPC”) and the training contract) and
- iii) continuing education (*ie* CPD).

He also points out that it was not until 1979 that a university degree in law (as opposed to the “articles of clerkship” of up to five years combined with Law Society examinations familiar to Mr Guppy) was treated by the profession as anything more than an exemption from Part I of its own examinations; Part II representing roughly what is now covered by the LPC. The JASB recognition of some but not all law degree programmes and the route to qualification for Fellows of the Institute of Legal Executives (who need not be graduates) demonstrate the persistence of this approach. In 1979 Part II was replaced by a national “Law Society Finals”

(“LSF”) course with centrally-set examinations covering the seven “heads” of: Business Organisations and Insolvency; Consumer Protection and Employment; Conveyancing; Wills, Probate and Administration; Family; Litigation (Civil and Criminal); and Accounts.

Criticisms of that model, according to Saunders, resulted in two further reviews (the Marre Committee on the Future of the Legal Profession in 1988 and a solicitor-specific Law Society Review of Legal Education in 1988 and 1989) and work by the Training Committee of the Law Society then resulted in the current academic stage plus LPC plus two year training contract sequence. This has its own limitations, which are not unique to law:

[Initial Professional Education] syllabi are notoriously overcrowded because they attempt to include all the knowledge required for a lifetime in the profession<sup>6</sup> ... There is little sign as yet of IPE being conceived in a context of lifelong professional learning, in spite of increasing evidence that the frontloading of theory is extremely inefficient. Many IPE courses exacerbate this situation by frontloading theory within the IPE stage itself, thus maximising the separation between theory and practice.<sup>7</sup>

Solicitors’ education follows this frontloaded model such that the “theory” is concentrated at the academic stage and the “professional practice” hived off to the separate LPC or “vocational stage”.<sup>8</sup> The peculiarity of the law degree in not being exclusively regarded as preparation for professional practice<sup>9</sup> may, pragmatically, justify this approach: some, possibly even a majority of, students being interested in the theory alone in a way that will not be true for, for example, degrees in medicine or nursing. On the other hand, expectations of “law” as an activity involving substantial intellectual challenge inculcated perhaps without a clear practice-based context at the academic stage may have substantial implications for the satisfaction (or otherwise) of those subsequently entering the profession.<sup>10</sup> For those who

intend to and do qualify, Boon and Whyte<sup>11</sup> found a desire for increased integration of the three stages and, in particular, a greater focus on practicality at an earlier stage.

Drawing on vocational courses then being developed particularly in Canada,<sup>12</sup> the LPC – additionally distinct from the LSF in being developed independently by different institutions (“providers”) within a common curriculum (the “written standards”<sup>13</sup>) – was intended both to incorporate skills but also to allow for a level of optional study better reflecting the differences between legal practice in the high street and the City.<sup>14</sup> Workshop, simulation and role-play as well as individual and small group work were explicitly to be used and assessed.

In Boon and Whyte’s survey of solicitors who had been part of the first LPC cohort in 1993, the interactive, group-work approach of the LPC produced mixed responses and indications of difficulty in adjusting from the academic stage:

I was used to lectures and being, you know, talked at really. And then all of a sudden there you were being asked if you had an opinion on things, and you think wow ... it was nice. But the first few weeks I thought “no, I don’t want to have to express an opinion, I’m used to hiding at the back of a lecture hall and sleeping”, you know, not having to say anything.<sup>15</sup>

including difficulties with simulation arising from this “frontloading of theory”<sup>16</sup> and consequent lack of previous exposure of students to practice.

Subsequently, Fancourt, for the UK Centre for Legal Education, conducted a further interview study of 14 organisations seeking views on the adequacy of the LPC as preparation for the training contract, identifying—whatever might have been the intentions of those designing and running the course—a lack of perceived coherence in the other direction; between the LPC and the training contract, which Mr Guppy would have recognised:

[m]any of the trainees interviewed did say the LPC did not prepare them for practice, but that was with the benefit of hindsight, and many of them also admitted they had seen the LPC as a series of assessment hurdles, and had not really engaged with the process.<sup>17</sup>

and uncovering a remarkable degree of lack of interest by employers in the content of the LPC (together with tension between the needs of a particular practice for knowledge or skills not covered on the LPC, or taught in a way different from the employer's "house-style"). Boon and Whyte<sup>18</sup> carried out interviews in 2001-2002 of 22 recently qualified individuals and found some positive approval of the course as preparation but, consistently with Fancourt, uncovered complaints about the extent and quantity of assessment and considerable potential for a mismatch between what was covered on the LPC and the needs of the subsequently employing firm. Even quite well-established firms<sup>19</sup> and from my own experience, sometimes express a lack of knowledge of what is covered in the LPC to an alarming degree, suggesting in my view that some firms may not perceive it as relevant preparation for or having any real connection with the training contract at all. Outside the realm of the bespoke LPCs which can be commanded by City firms with substantial resources, specialised topics which may be highly relevant to an individual in a particular practice will not appear in the LPC curriculum and there may be difficulty in transferring other knowledge and skills from it into the workplace context, particularly, I suggest, if the employing firm is not fully aware of the benchmark set by the LPC.

## THE TRAINING CONTRACT

Following successful completion of the vocational stage, the student currently seeks employment as a “trainee solicitor” (previously, as for Mr Guppy, “articled clerk”). The trainee is, at present, an employee of an individual firm; local authority; the Government Legal Service or in-house legal department authorised by the SRA to take trainees.

Following the Legal Services Act 2007, this may begin to include “Alternative Business Structures” not confined to the conventional law firm model and including non-lawyers as owners of the business. The purpose of the “training contract” over what is normally two years is expressed as being to “give trainees supervised experience in legal practice through which they can refine and develop their professional skills”,<sup>20</sup> placements in different departments within the overall contract generally being described as “seats”. The experience of a trainee in a large corporate practice in the City will, however, be very different to that of a trainee in a general practice in Nottingham, or in a niche practice specialising in clinical negligence litigation.<sup>21</sup>

Whilst a trainee solicitor is required to keep a record or log of activities undertaken during the training contract, this is at present, at its minimum, a means of tracking that the individual has been exposed to particular experiences (“it is used to record the experience that the trainee is getting and the skills that the trainee is developing”<sup>22</sup>) although of course much more developed versions are available. Although “practice skills standards”<sup>23</sup> are provided, they are comparatively passive in comparison with the outcomes proposed for the replacement period of work-based learning, frequently phrased in as “understand the importance of” or “understand the need to” rather than requiring or assessing actual performance. There is, nevertheless, an expressed aspiration that trainees will use the record as “an opportunity to reflect on what they have learnt and where there may be gaps in their experience and skills”.<sup>24</sup>

<i>Practice standards</i> <sup>25</sup>	<i>Work based learning outcomes</i> <sup>26</sup>
<p><b>Interviewing and advising</b></p> <p>Trainees should understand the importance of identifying the client's goals along with the need to take accurate instructions. They should be given opportunities to observe and to conduct interviews with clients, experts, witnesses and others.</p> <p>They should be given work that helps them <i>understand the need to</i></p>	<p>By the end of the period of Work-Based Learning, a successful candidate should <i>be able to</i></p> <p>1.3 exercise effectively, both separately and in combination, relevant skills in areas of practice including areas of practice including ...</p>
<ul style="list-style-type: none"> <li>• prepare for an interview</li> <li>• allow clients or professional advisers to explain their concerns</li> <li>• identify the client's goals and priorities</li> </ul>	<p>1.3.3 interviewing and advising, 3.2 identify clients' needs, objectives and priorities with clarity, and take accurate instructions which reflect those needs, objectives and priorities</p>
<ul style="list-style-type: none"> <li>• use appropriate questioning techniques</li> <li>• determine what further information is required</li> </ul>	<p>2.4 elicit relevant information through effective questioning</p>
<ul style="list-style-type: none"> <li>• identify possible courses of action and their consequences</li> <li>• help the client decide the best course of action</li> <li>• agree the action to be taken</li> </ul>	<p>3.3 exercise effective judgement in evaluating alternative courses of action or possible solutions in the light of clients' needs, objectives and priorities</p>

<ul style="list-style-type: none"> <li>accurately record the interview, confirming the instructions and the action that needs to be taken</li> </ul>	<p>5.7 record accurately his or her work to a level of detail appropriate to the work and the organisation.</p>
<ul style="list-style-type: none"> <li>establish a professional relationship with the client, and deal with any ethical problems that may arise</li> </ul>	<p>3.1 promote clients' confidence and trust through an organised, focussed and professional approach to the relationship with clients</p> <p>8.1 interpret any situation in the light of solicitors' core duties and any other relevant professional conduct requirements, and act accordingly</p> <p>8.2 exercise effective judgement in relation to ethical dilemmas and professional conduct requirements.</p>

*Fig 1: A comparison of some existing training contract practice standards against proposed work-based learning outcomes [my italics]*

Although many employers will expend considerable care on providing a structured and supportive environment for the training contract experience so as to build on the academic and vocational stages and to permit the trainee to socialise into the profession and also to consolidate skills in a “real” context within the practice standards,<sup>27</sup> Boon and Whyte suggest that “from the views expressed to us, it appears that some employers expect trainees on day one to be consummate solicitors”.<sup>28</sup> The impact of the proposal to replace the training contract with a period of work-based learning<sup>29</sup> which will not only require exposure to certain experiences but also assessment of skills represented by profession-wide competences acquired through or demonstrated in those experiences is, therefore, a major paradigm shift



for the profession, but one which has its genesis in a major investigation into legal education for the profession as a whole, seeking to embed the training contract period as a distinct learning period with both input and measurable output.

## THE TRAINING FRAMEWORK REVIEW

A principal internal driver of the Law Society's Training Framework Review from 2001 (a project inherited by the Solicitors Regulation Authority) has been that of promoting equality of access to the profession, particularly by under-represented groups<sup>30</sup> and compliance with the Disability Discrimination Act 1995 and Race Relations (Amendment) Act 2000.

In 2001, a consultation paper was issued by the Law Society's Training Framework Review Group suggesting the development of:

a framework or grid of competencies around which it will be possible to identify what should be required of the training process at every stage of a solicitor's career ... once the framework has been established the next stage will be to consider the standards and outcomes of individual parts of the process both pre- and post-qualification ...<sup>31</sup>

I discuss the post-qualification phase, particularly in the context of Agenda for Quality, separately. A particular difficulty even for the pre-qualification phase, however, remained the problem of the wide diversity of practice:

... the nature of practice is so diverse that some newly admitted solicitors might be expected to conduct a whole case, ... while others, such as those engaged in large commercial transactions, would only ever be responsible

for part of the whole. Thus, there are difficulties in specifying a common level of outcome that could be expected from all solicitors in areas such as communication skills.<sup>32</sup>

Following consultation, a report was commissioned<sup>33</sup> reviewing the wider educational literature as well as competency frameworks for lawyers in, for example, Australasia (the APLEC outcomes<sup>34</sup>). A second consultation paper<sup>35</sup> raised a number of possible pathways to qualification including most controversially, a “continuous pathway integrating academic, vocational and work-based learning”,<sup>36</sup> and a series of individual reports was then commissioned on aspects of the proposals.<sup>37</sup>

In parallel with this internal review a number of concerns were being expressed externally about competence in the profession,<sup>38</sup> particularly in client care and client communication; complaints and complaint management<sup>39</sup> followed by an independent review of the regulatory system of solicitors in particular<sup>40</sup> which resulted in the removal of self-regulation (through the creation of the SRA in 2006) and the Legal Services Act 2007. The regulatory provisions of the Act, together with its widening of the legal services market, create demands in respect of demonstration and maintenance of quality and competence which, I suggest, inform much of the current approach of the profession (see, for example, the SRA’s proposals in respect of post-qualification CPD) which I discuss further below.<sup>41</sup> In addition, the ruling by the European Court of Justice in 2003 in *Morgenbesser v Consiglio dell’Ordine degli Avvocati di Genova*,<sup>42</sup> that EU professionals wishing to work in other member states could not be required to attend a specific course (such as the LPC) as a condition of doing so created confusion and potential for additional routes to entitlement to practise in this jurisdiction. The impact of both internal and external factors can be seen in a further consultation paper about qualification,<sup>43</sup> maintaining the focus on diversity of access to the profession (including that of recognition of EU qualifications) but demonstrating the

principal concern of the Law Society Regulation Board (precursor of the SRA), to be precisely those matters of demonstrable standard and quality, when:

... at the end of the current training contract period, individuals can be signed off by their training principal regardless of the standard of their performance in practice. As the gatekeeper to the profession, the LSRB has a responsibility to ensure that those entering the profession are competent to do so. With no formal assessment of trainees' performance in practice, the LSRB cannot currently be confident that trainees completing the current two year training contract have reached an appropriate standard.<sup>44</sup>

Despite its controversially liberal beginnings, which caused the head of one LPC provider—ironically echoing Twining<sup>45</sup>—to compare proposals for qualification as a solicitor unfavourably with the qualification requirements of plumbers,<sup>46</sup> the Training Framework Review finally concluded that:

...most students would wish, and would need, to complete a structured programme of vocational training in order to achieve the full range of outcomes required.<sup>47</sup>

This is true of the LPC, where, although the written standards have been replaced by learning outcomes, the prescription as to content (in particular as to the proportion of time allocated to different subjects) and as to delivery (as to the number of required classroom contact hours and the possibility of studying the core subjects in one tranche of activity with the electives studied later perhaps even at a different institution) has been relaxed from 2009.<sup>48</sup>

## THE POST QUALIFICATION POSITION

From 1 November 2001, all solicitors and registered European lawyers practising in England and Wales have been required to undertake 16 hours of CPD in a year, *pro rata* for part-time staff. This is at the lower end of the time commitment spectrum, Madden and Mitchell finding, in their survey of 20 professional organisations (of the 65% who prescribed a number of hours) a median of 30 and modes of 20 and 30.<sup>49</sup> At least 25% must be satisfied by attending accredited courses. The type of CPD offered is market-led and the archetype is the talk and chalk model of the updating lecture on a technical area identified by Cruickshank:

[t]he primary method for delivering continuing legal education is still the “talking head”. From a panel, experts speak to their written papers in sequence. Audiences of up to 200 have little input except for a handful of questions at the conclusion of each panel. In some courses, this goes on for two days, seven hours each day ... Nevertheless, lawyers attend these courses in large numbers, give them good evaluations ... and are satisfied with one or two practical insights that can be applied on the job. But the course format may be what lawyers are used to, not necessarily what they want or need.<sup>50</sup>

The remainder may include writing books or articles, coaching and mentoring (this is not uncommon),<sup>51</sup> reading journals or viewing videotapes.<sup>52</sup> The CPD scheme now falls within the overall quality assurance remit of the SRA, the relevant part of whose strategy, articulated prior to Agenda for Quality, is to “set standards for ... continuing professional development so as to maintain and enhance the competence, performance and ethical conduct of solicitors and uphold the rule of law”.<sup>53</sup> The SRA has recently identified, as one of a number of matters to be addressed “the small number of CPD hours required each year”.<sup>54</sup>

Provided the individual complies with the minimum participation requirement, it is for the solicitor him- or herself to decide in which CPD activities to participate, although a short “Management Course Part 1” is mandatory during the first three years. More recently, any member of the profession with supervisory responsibilities is required to undertake a minimum period of appropriate learning activity (at present self-determined by the individual and with no obligation to demonstrate any particular competence as a result): Solicitors’ Code of Conduct 2007, rule 5. The suggestion of “solicitors’ practice diplomas” amounting to 25% of a masters’ degree for those wishing to pursue specialisms<sup>55</sup> has not been implemented to date, although additional single level accreditations for membership of specialist panels do exist.<sup>56</sup> Despite the SRA’s objective in Agenda for Quality to demonstrate and improve the operational standards of the profession (an “output” of CPD activity), the profession’s definition of CPD remains at present one of input alone:

“continuing professional development” means a course, lecture, seminar or other programme or method of study (whether requiring attendance or not) that is relevant to the needs and professional standards of solicitors and complies with guidance issued from time to time by the Society.<sup>57</sup>

After qualification, then, there is no need at present (and therefore no necessary impetus or expectation of funding) for the individual to achieve any further qualifications or—except as required by his or her employer—to demonstrate any higher competences beyond what might soon be represented by the day one outcomes.

Roper points out the quantitative importance of the CPD context in comparison with the pre-qualification period on which most discussion is focussed but recognises a lack of coherent theoretical underpinning:

[but, after [qualification] ... there are another 40 years or so of working life awaiting the new lawyer ... So we can contrast the framework which supports the first 20 years or so [of life] with that supporting the remaining 40 years...

There is considerable development of theory in a number of areas related to CPD, ... What is lacking, so far as CPD for lawyers is concerned, is the bringing together of these various elements in some cohesive and useful way to provide a conceptual framework.<sup>58</sup>

The SRA's attitude<sup>59</sup> pursued in Agenda for Quality, gives greater importance than hitherto articulated to the output, particularly in what I will describe below as the "bottom-line" sense of maintaining "standards of service". Nevertheless, in the proposals for work based learning and in the new LPC with its focus on "learning outcomes" rather than "written standards", and, implicitly in Agenda for Quality, the phenomenon of "competence" in an educational sense, arises.

## COMPETENCE

The concept of "competence" pervades much of the discussion surrounding the pre-qualification development of solicitors as well as forming a principal component of the ongoing debate about overall quality of service by the profession as a whole. Possible alternative meanings of the term "competent" include:

- a) Properly qualified<sup>60</sup> – a *normative and political* meaning;
- b) Mid-way on a scale from novice to expert<sup>61</sup> – an *aspirational* meaning;

- c) As a more pejorative version of b), “only [just] competent”; “not negligent – the *bottom line* meaning (to be distinguished from the aspirational meaning in its suggestion that there is no need or expectation to move beyond it);
- d) That of a “meta-outcome” linking all the stages of, in this context, pre-qualification legal education<sup>62</sup> – the *holistic* meaning (neutral as to its aspirational sense):

One potential difficulty is that the meaning which initially seems to have preoccupied the profession, particularly given the Legal Services Act 2007 and criticisms which led to it, was a combination of a) and c). More recently, however, both the SRA, as regulator, in Agenda for Quality<sup>63</sup> and, for the Law Society as representative body, Lord Hunt of Wirral<sup>64</sup> have explored a more holistic or aspirational meaning:

...there is a potential role for the professional body in encouraging solicitors to aspire to levels of professionalism that significantly exceed those set by the statutory regulator.<sup>65</sup>

Competence as an over-arching concept in educational terms also exhibits two further facets: that of the *range* of activities in which an individual is competent, and the *level* of their performance in such activities, or, as Eraut succinctly puts it, “two dimensions, scope and quality”.<sup>66</sup> Quality occupies a spectrum from incompetent to expert and it is, of course, the incompetent to which Agenda for Quality is addressed. So Eraut—supporting an aspirational argument that competence as a bottom line description cannot by definition apply to a beginner—indicates that:

[a] competent professional is no longer a novice or a beginner and can be trusted with a degree of responsibility in those areas within the range of his

or her competence, but has not yet become proficient or expert. This contrasts with those definitions of competence adopted by most competency-based systems of training and education, which assume a binary scale by confining assessment decisions to judging whether a candidate is competent or not yet competent. ... binary scales [are] inappropriate for assessing most areas of professional knowledge and ... [are] incompatible with the notion of lifelong learning.<sup>67</sup>

However, within the range of activities in which lawyers engage, there may be some (“form filling”, for example) in which there is an absolute standard—right or wrong—whilst in other tasks the quality of a beginner’s work is expected to be less (less innovative, less effective, considering less of the “big picture”, less speedy or cost-effective) than that of the expert, whilst maintaining a “bottom line” of competence, that is, non-negligence. One might, for example, compare the standards required to obtain rights of audience in the higher courts<sup>68</sup> against the competence framework for QCs<sup>69</sup> as indicating increments in both scope (range, complexity) of work and in its quality (the level assessed). In criminal cases, indeed, the Legal Services Commission has suggested four levels of advocacy competence, of which level 1, as it involves some Crown Court work, includes but exceeds the rights of audience acquired by a solicitor on qualification. Level 4, in the same framework, encompasses QC-level performance.<sup>70</sup>

A competence framework, particularly if, as is not the case with the advocacy examples described above, there is only a single level of articulation,<sup>71</sup> does not of itself encourage development beyond the benchmark set whether as to scope or as to quality; the “lifelong learning” to which Eraut refers. Indeed, insofar as the purpose for adoption of any such framework is that of public confidence in the profession, the priority might be perceived to be to ensure standards of performance at the static level of existing activity (quality), rather than



to encourage practitioners to extend the scope of their activity into new fields in which they stand at greater risk of making mistakes. The more recent explicit recognition in Agenda for Quality of the need not only to secure the bottom-line benchmark but also to embed an expectation of aspiration to improve and extend beyond it—here by means including an enhanced and output-focussed CPD system—is, therefore, to be applauded:

We could explore an approach which links inputs and outputs by requiring solicitors to use the professional standards framework to plan and undertake CPD to reflect the level at which they were working, or to which they aspire, and to identify any aspects of their performance that could be enhanced. The current (or modified/enhanced) CPD input requirements could be retained, as a simple to understand and monitor “safety net”.<sup>72</sup>

### *Competences*

The difficulty of setting out and working with a competency framework, in the professional context, lies in the diffuse nature of professional activity where tasks and performance are often cerebral or verbal and the underlying attitudes and personal qualities impossible to detach or to assess summatively where, as with the work-based learning outcomes, such assessment is required. Although the Training Framework Review first introduced the idea of an enforceable competence framework applied across the board to the profession in England and Wales, competence frameworks for lawyers are by no means new.<sup>73</sup> In a meta-survey of several jurisdictions, Gasteen concludes that:

... although the research indicates very similar skills and knowledge are required of practising lawyers, the way in which these skills and knowledge are described and categorised are very different. Many of the differences in

the definitions of competence are attributable to semantics or categorisation.

While the majority of researchers seem to agree on a comprehensive or “thick” description they differ on how this description is divided and categorised.<sup>74</sup>

Proponents of competence frameworks, particularly in the professional sphere, suggest that they promote:

- a) public confidence in the profession;<sup>75</sup>
- b) homogeneity and normatisation within the profession;<sup>76</sup>
- c) clarity and transparency;<sup>77</sup>

and that the individual competences are susceptible of both identification and categorisation as well as being objectively measurable.<sup>78</sup> A contrary and more political view of point b) is that a “competence” approach, in restricting entry to and practice within the profession, may be “derived from the perceived need of a relevant group to occupy and defend for its exclusive use a particular area of competence territory”<sup>79</sup> or even that such an approach permits state control:<sup>80</sup> painful in the context of the Legal Services Act 2007 and the state’s dilution of the profession’s self-regulation. Others, however, recognise that individuals develop skills and attributes at different stages.<sup>81</sup>

Criticism of the competence movement within a professional context can be grouped into three arguments:

- a) That prescription of defined competences inhibits, rather than promotes, innovation, aspirational and metacognitive development (the *inhibiting* criticism); the very notion of a defined series of indicators – consistently with a bottom-line concept of overall competence - suggesting exclusion of others:

...outcomes and competence approaches are inadequate for the epistemological task ... They can lead us to focus on low-level procedures and attributes that are easy to define, at the expense of developing and assessing the higher skills of critical thinking, judgment and evaluation ... They encourage us to focus too much on the behavioural outcomes of learning, ... Both [outcomes and competence] approaches tend towards assessing understanding by looking at observable competences and outcomes ..... competence approaches in particular can dehumanise learning ...<sup>82</sup>

b) That competences, in prescribing a minimum and bottom-line standard, create the inference, as I have indicated above, that improvement beyond the bottom line is not required or perhaps even positively not to be encouraged (the *mechanistic* criticism);

... the pejorative epithet of “the 3 Rs” – Reductionist, Restrictive and Ritualistic.<sup>83</sup>

Where Agenda for Quality focuses on the definition of competences for specific roles undertaken after qualification<sup>84</sup> there is, therefore, a risk of its overall aspirations being dislodged by inhibiting constraints and mechanistic definition of competence.

c) That – an argument raised, as we have seen, in the context of the Training Framework Review - the diversity of professional work makes it impracticable to define meaningful competences (and/or to assess them) in any event (the *impracticability* criticism). It is apparent from Agenda for Quality that even defining the overall objective of “a good service” as a starting point is not without considerable difficulties.<sup>85</sup>

This is not to say that proponents of competence frameworks are entirely utilitarian in their approach. Hager, *et al* suggest that professional competence frameworks adopted in Australia<sup>86</sup> succeed in dealing with the “atomistic” (closely defined task analysis-based competencies) and the “holistic” (competences), the *impracticability* criticism:

...these professional competency standards strike a balance between the misguided extremes of fragmenting the occupation to such a degree that its character is destroyed by the analysis or adhering to a rigid, monistic holism that rules out all analysis. ... these professional competency standards are quite consistent with one practitioner having, say, a strong commitment to social justice, while another is just as strongly committed to excellence of practice.<sup>87</sup>

As an alternative to competence approaches, the concept of capability is advocated by some to promote the reflection, innovation and creativity thought to be absent from what may be a relatively static competence model.<sup>88</sup> This approach deals most effectively with the *inhibiting* criticism by embedding aspiration as to scope and enhancement of quality as essential components:

... capability can be said to provide a basis for developing future competence, including the possession of the knowledge and skills deemed necessary for future professional work.<sup>89</sup>

The way in which this is approached in the proposed work-based learning outcomes in discussion is by way of inclusion of what I will call a “competence for development”.

*Competences for development*

<i>Practice standards</i> <sup>90</sup>	<i>Work based learning outcome</i> <sup>91</sup>	<i>Day one outcome</i> <sup>92</sup>
<p>You must ensure that you</p> <p>...</p> <ul style="list-style-type: none"> <li>take responsibility for your own self-development (completing and reviewing your training record, and reflecting on your experiences and what you have learnt are important aspects of this)</li> </ul>	<p><b>1 Application of Legal Expertise</b></p> <p>1.4 Keep up-to-date with changes in law and practice relevant to his or her work.</p> <p><b>7 Self Awareness &amp; Development</b></p> <p>7.1 evaluate accurately the strengths and weaknesses of his or her professional skills and knowledge</p>	<p><b>E Personal development and work management skills</b></p> <p>The ability to: ....</p> <ul style="list-style-type: none"> <li>Recognise personal and professional strengths and weaknesses;</li> </ul>
	<p>7.2 identify situations where the limits of his or her abilities are reached, and the next steps in such cases, in clients' best interests</p>	<ul style="list-style-type: none"> <li>Identify the limits of personal knowledge and skills;</li> </ul>
	<p>7.3 reflect on experiences and mistakes so as to improve future performance</p>	<ul style="list-style-type: none"> <li>Develop strategies to enhance professional performance</li> </ul>

	7.4 identify areas where skills and knowledge can be improved, and plan and effect those improvements	<ul style="list-style-type: none"> <li>• Recognise personal and professional strengths and weaknesses;</li> <li>• Identify the limits of personal knowledge and skills;</li> <li>• Develop strategies to enhance professional performance</li> </ul>
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*Fig 2: A comparison of the proposed work-based learning outcomes in respect of personal development with the equivalent “day one outcomes” proposed for the point of qualification*

A professional obligation only to take on work in which one is “competent” (in the bottom-line sense of “not negligent”) appears in the domestic Solicitors Code of Conduct 2007, para 1.05<sup>93</sup> glossed in the notes as “[y]ou must provide a good standard of client care and of work, including the exercise of competence, skill and diligence” and in para 2.01, “you must refuse to act or cease acting for a client ...where you .... lack the competence to deal with the matter” and may have informed work-based learning outcome 7.2.

In a review of similar professional requirements in the USA, Sabis and Webert identify the dilemma as “[w]ith little or no experience, is there any case a new lawyer can accept and believe that she [*sic*] is competent?”<sup>94</sup> The bottom-line concept of competence, however, requires only that the individual identify him- or herself as *not* competent for a particular

task; imposing no necessary obligation to aspire to become competent at it. One can nevertheless, as does Nelson, see an aspirational obligation as implicit in the avoidance of negligence:

...competence is an elusive notion and, when definitions are attempted, they tend to be expressed as generalisations ... What is clear is that, as Bushman (1979:55) points out, professional incompetence can be the result of several factors:

- part of the knowledge, skills and attitudes professionals acquired during their academic education or in practice has been forgotten or declined;
- some of the knowledge and skills have become useless through obsolescence;
- some services they are asked to perform require knowledge, skills and attributes they never owned;
- new information, skills and attributes have emerged and have become part of the profession's current standards of competence.

Of these four factors, the one which is most likely to influence the levels of competence of the beginning solicitors who are the subject of this study is the third. It is clear that their pre-admission preparation cannot hope to cover the full spectrum of what they will be called upon to perform in the workplace, especially if they engage in specialised areas of practice.<sup>95</sup>

An ability to take deliberate responsibility for one's own learning, or, in Eraut's terminology, to be "professional learners' in order to become more effective 'learning professionals'"<sup>96</sup> might however be seen as inherent in a philosophical concept of professionalism. Whilst the work-based learning outcomes and day one outcomes are consistent with a bottom line

concept of competence, both extend further into this aspirational sense than the APLEC standards appear to do, embedding a “metacompetence” promoting capacity to move beyond and above the basic framework and involving a degree of metacognition: an ability to transfer, to understand one’s own learning.

Just as Cheetham and Chivers<sup>97</sup> combine the reflective practitioner with the competence model; Winter<sup>98</sup> in his “general theory of professional competences” goes further, showing categories (usually identified as competences to be achieved in their own right) essentially in their relationship to development of practice and expertise such that the task-based competences inform and are aspects of an overall commitment to development. Lester,<sup>99</sup> similarly, develops a constructivist framework that seeks to smooth out “the distinction between learning processes and process of practice” by inculcating “engagement with practice” and use of reflective techniques from the outset; retaining only by way of guidance some form of “minimum standards” as a benchmark:

[t]he broad map structure is not a syllabus to cover or set of standards to achieve, but one way of representing a territory of which exploration is encouraged until sufficient experience and confidence are gained to redraw the map or extend its boundaries.<sup>100</sup>

This (meta)competence for development straddles the boundary of the normative and political meaning of competence and the aspirational meaning. The competence for development in the solicitors’ context, however, is open-ended. The day one outcomes seek to determine the benchmark *from* which one is to aspire, but no specific guidance is given as to what one is to aspire *towards*. Analysed cynically, when one takes into account the prohibition on individual practice prior to the three-year post-qualification point, it is possible to conclude that a solicitor is not regarded as “fully” qualified in the real normative and



political sense until those three years have passed and the individual is permitted to take on (largely) whatever work he or she chooses and to conduct it with no supervision.

Eraut suggests that objective and external models of professional development – such as competence frameworks – should:

... take into account during the period before and soon after qualification the following kinds of progress:

- extending competence over a wider range of situations and contexts;
- becoming more independent of support and advice;
- routinization of certain tasks;
- coping with a heavier workload and getting more done;
- becoming competent in further roles and activities;
- extending professional capability; and
- improving the quality of some aspects of one's work.<sup>101</sup>

Put more emotively, the distinction is between survival and competence at a single level which merely avoids negligence in comparatively straightforward tasks and the ability (or metacompetence) to develop to a new level involving more complex tasks and more reliable quality of performance and ultimately into the “swampy” problems which demand creativity in their solution.<sup>102</sup> Post qualification, whilst not explicitly re-defining CPD, the SRA has set out<sup>103</sup> a series of expectations for the post-qualification period which bears comparison with the competence for development derived from the work-based learning and day one outcomes but betrays an assumption that there will be (measurable) output, at least in terms of bottom-line competence. Agenda for Quality, however, with a more consciously bottom-line approach, envisages “standards frameworks” for specific roles that an individual might take on,<sup>104</sup> treating CPD as only one of a number of factors which promote quality of service, the

others being effective office management and supervision.<sup>105</sup> As shown above at Fig 2, it is at the stage of the day one and work-based learning outcomes that it is initially and explicitly sought to embed such a “competence for development” as a responsibility of the individual solicitor.

## THE DAY ONE AND WORK-BASED LEARNING OUTCOMES

Three groups of outcomes or competences emerged from the Training Framework Review: new learning outcomes for the LPC; proposed outcomes for the period of work-based learning to replace the training contract and an umbrella set of outcomes intended to represent all the skills that a solicitor will possess on their first day after qualification (the “day one outcomes”).<sup>106</sup> The latter, therefore, draw on the academic stage and vocational stage as well as the training contract/period of work-based learning.

Initial plans for the period of work-based learning involved the gathering of a portfolio of evidence of those of the day one outcomes best “developed and demonstrated in the workplace”<sup>107</sup> with a limited (500-1000 word) reflective element, all centrally assessed. A further external assessment, possibly online, would cover ethics, client care and similar issues now covered by the PSC. By 2007, further consultation had taken place<sup>108</sup> and the day one outcomes refined. The proposed outcomes for the period of work-based learning were also redrafted in 2008 and it is this iteration which is in the course of piloting at the time of writing.

Despite the difficulties of some firms in supplying sufficient contentious seats, a requirement to cover both contentious and non-contentious practice is retained although assessment may be either by the employer or by external assessment organisations (allowing

individuals unable to obtain a conventional “training contract” to contract externally for their mentoring and assessment with the consent of their employers).<sup>109</sup> The author and colleagues at Nottingham Law School are contracted to the SRA to test this aspect of the proposals with a number of candidates working in legal firms; in local government and other contexts including in-house legal activity. Whether this latter permission is able to deal satisfactorily with the question of increased access to the profession remains to be seen.

### *Scope and Quality*

A notable distinction between the day one and work-based learning outcomes (I now refer to their 2008 iteration<sup>110</sup>), as competences, is that the former are, likely the majority of their Australasian counterparts, related to identifiable tasks to be performed in particular fields of activity (litigation, business transactions and so on). The latter, however, are consciously generic and, with the possible exception of an outcome relating to the exercise of skills in advocacy, could be acquired and exercised in any field of legal practice and (as many relate to activities such as communication skills and workload management) in work outside legal practice. There are, in fact, 37 proposed work-based learning outcomes (although in the author’s view several overlap) grouped into eight sections:

- 1 “application of legal expertise” (relating to identification and application of the law to client’s problems and the exercise of the LPC skills of writing and drafting, interviewing and advising, research and advocacy as well as a developmental commitment to keeping up to date)
- 2 Communication
- 3 Client relations
- 4 Business awareness
- 5 Workload management

- 6 Working with others
- 7 Self-awareness and development (the “competence for development” I have referred to above)
- 8 Professional conduct.

Neither set of outcomes contains a statement of an explicit level to be achieved although in its 2007 iteration, the work-based learning outcomes were to be achieved in “straightforward/typical work” and the SRA’s material for the pilot of the work-based learning outcomes refers to a decreasing need for supervision as the end of the period is approached.<sup>111</sup> Some outcomes refer to the candidate’s being able to “exercise effective judgment” whilst some others only require “awareness”. Even so, a particularly good example might be found in outcomes 8.1 and 8.2 which require the individual to identify, exercise effective judgment and act on “ethical dilemmas and professional conduct issues” where, whatever one conceives an “ethical dilemma” to be, a consensus may be emerging from discussion with those involved in the pilot that exercising judgment and acting appropriately in the circumstances may well, at this level, require the candidate only to pass the problem on to someone more senior.<sup>112</sup> By implication, however, the level of advocacy should be at or approaching that which would allow the individual to exercise the rights of audience automatically acquired at the point of qualification: sufficient to conduct a county court trial.

One approach to level would be to employ an existing framework such as those used in the educational and skills sector. There is already, of course, a set of National Occupation Standards for Legal Advice, albeit targeted perhaps more at the advice centre than the law firm.<sup>113</sup> Johnson and Bone, however, suggest that NVQ level 7 is too high in terms of skills to be expected of a newly-qualified solicitor (or at least one without prior experience in a workplace):

... as at day one the solicitor appears to stride two levels – he or she has the graduate level (and on occasion master’s level) of knowledge and understanding but his or her skills are not yet high enough to warrant the label of “manager” for which the NQF level 7 is primarily designed.<sup>114</sup>

Nevertheless, the work based learning outcomes in particular, because they relate more obviously to interaction between lawyer and client and to efficiency of service, than to specified legal tasks, operate perhaps more clearly than the day one or LPC outcomes as a set of desiderata representing what the profession would like its members to be seen to be in the context of the current “Agenda for Quality”.<sup>115</sup> Even so, the pilot will no doubt help to illuminate whether or the extent to which it may be difficult for some individuals to demonstrate the achievement of some of the work-based learning outcomes in any meaningful way within their work.

## THE WORK-BASED LEARNING PILOT PROJECT

The Work-Based Learning pilot project is currently approximately half-way through, involving a number of law firms and two educational institutions: Nottingham Law School (“NLS”) and Oxford Institute of Legal Practice. The law firms, and a group of law firms working in conjunction with Oxford Institute of Legal Practice, are working with individuals employed under training contracts, testing achievement, monitoring and assessment of the 37 outcomes. All participants have to demonstrate that they are having experience, at a trainee-equivalent level, of three distinct areas of work (in some cases in the NLS part of the pilot, this is being achieved by secondment within or outside their organisation, whilst for other

participants it requires delineation of their existing workload into differing work-types). All have to demonstrate experience of both contentious and non-contentious work. Those involved in the NLS part of the pilot are, however, emphatically not employed under “training contracts”: they may have been employed in the first instance as paralegals, or as legal officers or are working in-house or in organisations that might someday become Alternative Business Structures but carrying out distinctly legal tasks even if as unreserved business. As successful participation in the pilot will, by waiver of the Training Regulations, permit them to qualify, participants in the NLS part of the pilot have everything to gain and much to lose. Many, however, have been working in the legal sector or elsewhere for substantial periods, and bring their prior experience with them permitting, in principle, a high level of achievement of those outcomes which are not confined to legal practice. A second cohort of those working part-time (or full-time but completing the LPC part-time) has just commenced. All have named supervisors in their workplace and all have access to a “nominated solicitor” (who may or may not also be the day to day supervisor) responsible for reviewing their development plan and facilitating their collection of evidence. This exposure to a very deliberate and focused form of developmental supervision, I suggest, could found a basis for the measurement of the “effective supervision” envisaged by Agenda for Quality.

In addition, however, each participant has a nominated “reviewer” selected from a group of hardworking and committed qualified NLS teaching staff. Each reviewer works with the candidate to consider his or her ongoing development plan and the material accumulated within the candidate’s portfolio through four meetings (after each of which formative feedback is provided) during the work-based learning period. The portfolio is critical as it is the means by which the candidate shows, not only that he or she is meeting the threshold criteria of work in three areas of law and participating in both contentious and non-contentious work, but it also contains the candidate’s evidence of his or her growing capacity

to perform, and achievement of, each of the 37 outcomes. Those outcomes are assessed, in the NLS part of the pilot, against a set of marking criteria linked to NVQ/HE standards but subject to the overriding criterion that, by the end of the project, the summative assessor should be able to say that he or she has confidence that “achievement of [the pass] level of performance can be expected from the candidate as the norm in the new situations he or she will encounter in practice”.<sup>116</sup>

## CONCLUSION AND IMPLICATIONS

Whilst it is too soon to attempt to provide conclusions from the pilot project, I suggest that such conclusions will include views about:

- a) the nature and demonstration of the thresholds that an appropriate amount of time should be spent working in different distinct areas of law and in both contentious and non-contentious work;
- b) articulation of the outcomes;
- c) the relationship between the scope of those activities included (or indeed activities not explicitly included such as negotiation skills) and the realities of a wide range of types of practice;
- d) an appropriate level (or levels) for summative assessment;
- e) the logistics of evidencing outcomes, particularly perhaps where those carrying out assessment are more distant from the candidate and
- f) ultimately, I suggest, the effect of use of such a framework, with its emphasis on personal development, on the individual’s attitude to aspiring beyond a merely “bottom line”, non-negligent, level of performance.

What is apparent, however, is that the work-based learning candidate does require, over and above support both internally and, in the case of the NLS candidates, externally, drive, commitment and responsibility to learning and to evidencing their achievement. Mr Guppy, as one of those pioneers, would do well. As far as Agenda for Quality is concerned, however, it is Mr Kenge himself, who “appeared to enjoy beyond everything the sound of his own voice ...it was mellow and full, and gave great importance to every word he uttered”,<sup>117</sup> whose own competence, operational acuity and effective supervision, rather than his personal charisma, is, I suggest, as or more critical to the overall post-qualification quality of the profession’s actual performance in the new, infinitely more competitive world of the Legal Services Act 2007.



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<sup>1</sup> Davies, A, *Bleak House* (BBC/WGBH Boston DVD, 2006), episode 15, quotation transcribed from the recording. Dickens' Mr Guppy expresses the same sentiment in the text with rather more prolixity.

<sup>2</sup> Dickens, C, *Bleak House* (Oxford: Oxford University Press, 1853, 2008 reissue), p 893.

<sup>3</sup> Solicitors Regulation Authority, *Solicitors' Code of Conduct 2007* (London: Solicitors' Regulation Authority, July 2007), r 5.02 2(b).

<sup>4</sup> Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services* (London: Solicitors Regulation Authority, 2009). Available at <http://www.sra.org.uk/sra/consultations/agenda-for-quality-june-2009.page>, accessed 8 January 2010.

<sup>5</sup> Saunders, N, "From Cramming to Skills – the Development of Solicitors' Education and Training since Ormrod", (1996) 30(2) *The Law Teacher* 168.

<sup>6</sup> The fact that the work-based learning outcomes describe the knowledge and skills acquired during the academic and vocational stages as "expertise" betrays such an assumption,

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Solicitors Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors' Regulation Authority, 2009).

<sup>7</sup> Eraut, M, *Developing Professional Knowledge and Competence*, (London: Falmer, 1994) pp 11-12.

<sup>8</sup> There are exceptions such as the “exempting law degrees” combining LLB and LPC offered by some institutions, including Nottingham Law School.

<sup>9</sup> See for comments on this topic: Bradney, A, “Raising the Drawbridge: Defending University Law Schools”, (1995) 1 *Web Journal of Current Legal Issues*; Birks, P, “Compulsory Subjects: Will the Seven Foundations ever Crumble?”, (1995) 1 *Web Journal of Current Legal Issues*; Bradney, A, “The Rise and Rise of Legal Education”, (1997) 4 *Web Journal of Current Legal Issues*; Vollans, T, “The Law School with Two Masters?”, (2008) 2 *Web Journal of Current Legal Issues*.

<sup>10</sup> See, for example: Benjamin, G A H; Kasniak, A; Sales, B and Shanfield, S B, 1986, “The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers” (1986) *American Bar Foundation Research Journal*, 225; Boon, A, Duff, C and Shiner, M, 2001, “Career Paths and Choices in a Highly Differentiated Profession: the Position of Newly Qualified Solicitors”, (2001) 64(4) *Modern Law Review*, 563; Wallace, J E “Work Commitment in the legal profession: a study of Baby Boomers and Generation Xers”, (2006) 13(2) *International Journal of the Legal Profession*, 137; Dinovitzer, R and Garth, B G , 2007, “Lawyer Satisfaction in the Process of Structuring Legal Careers”, (2007) 41 *Law and Society Review*, 1.

<sup>11</sup> Boon, A and Whyte, A, “Looking Back: Analysing Experiences of Legal Experience and Training”, (2007) 41(2) *The Law Teacher*, 169-190 at p 189.

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<sup>12</sup> See Webb, J and Fancourt, A, “The Law Society’s Training Framework Review: On the Straight and Narrow or the Long and Winding Road”, (2004) 38(3) *The Law Teacher* 293 at p 295.

<sup>13</sup> Law Society of England and Wales, *Legal Practice Course, written standards, version 10* (London: Law Society of England and Wales, 2004).

<sup>14</sup> Slorach, S and Nathanson, S, “Design and Build: the Legal Practice Course at Nottingham Law School” (1996) 30(2) *The Law Teacher* 187.

<sup>15</sup> Boon, A and Whyte, A, *Legal Education as Vocational Preparation?: Perspectives of Newly Qualified Solicitors*, (London: University of Westminster, 2002) at p 16.

<sup>16</sup> Eraut, 1994, *op cit*.

<sup>17</sup> Fancourt, A, “Hitting the ground running? Does the Legal Practice Course prepare students adequately for the training contract?” (Warwick: UKCLE, 2004) at p 62. Summarised at: <http://www.ukcle.ac.uk/research/ukcle/fancourt.html>, accessed 18 January 2010.

<sup>18</sup> Boon, A and Whyte, A., “Looking Back: Analysing Experiences of Legal Experience and Training”, (2007) 41(2) *The Law Teacher* 169-190.

<sup>19</sup> Boon and Whyte, *ibid*.

<sup>20</sup> Solicitors Regulation Authority, *Training Trainee Solicitors; The Solicitors Regulation Authority Requirements* (version 1, London: Solicitors’ Regulation Authority, July 2007) at p 3.

<sup>21</sup> See, for example, on differing career paths for young lawyers: Boon, A, Duff, C and Shiner, M., “Career Paths and Choices in a Highly Differentiated Profession: the Position of Newly Qualified Solicitors”, (2001) 64(4) *Modern Law Review*, 563.

<sup>22</sup> Solicitors Regulation Authority, 2007, *op cit* at p 15.

<sup>23</sup> Solicitors Regulation Authority, 2007, *ibid* at p 9.

<sup>24</sup> Solicitors Regulation Authority, 2007, *ibid* at p 15.

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- <sup>25</sup> Solicitors Regulation Authority, *Training trainee solicitors: The Solicitors Regulation Authority Requirements* (London: Solicitors Regulation Authority, 2008) at p 13.
- <sup>26</sup> Solicitors Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors' Regulation Authority, 2009) at p 14ff.
- <sup>27</sup> See Boon and Whyte, 2007, *op cit* at p 177.
- <sup>28</sup> Boon and Whyte, 2002, *op cit* at p 32.
- <sup>29</sup> Solicitors Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors' Regulation Authority, 2009).
- <sup>30</sup> Law Society of England and Wales, *Training Framework Review Consultation Paper* (London: Law Society of England and Wales, 2001).
- <sup>31</sup> Law Society of England and Wales, 2001, *ibid*, at p 2.
- <sup>32</sup> Law Society of England and Wales, 2001, *ibid* at p 6.
- <sup>33</sup> Boon and Webb, 2002, *op cit*.
- <sup>34</sup> Australasian Professional Legal Education Council, *Competency Standards for Entry Level Lawyers* (Melbourne: APLEC, 2000, updated 2002). Available at [http://www.aplec.asn.au/aplec/dsp\\_resources.cfm](http://www.aplec.asn.au/aplec/dsp_resources.cfm), accessed 8 January 2010.
- <sup>35</sup> Law Society of England and Wales, *Second Consultation Paper on a New Training Framework for Solicitors*, (London: Law Society of England and Wales, 2003).
- <sup>36</sup> Law Society, 2003, *ibid*, annex 3.
- <sup>37</sup> Brayne, H, *Assessment of legal dispute resolution and legal transaction skills, flexible pathways and assessments* (London: Law Society of England and Wales, 2004); Grace, S, Thomas, H, and Butcher, C, *Project to support implementation of a new training framework for solicitors qualifying in England and Wales* (London: Law Society of England and Wales, 2004); Johnson, N and Bone, A, *Project to support implementation of the Law Society's new training framework review for solicitors qualifying in England and Wales* (London: Law

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<sup>38</sup> As, for example, consumer and governmental interest in quality of service: Office of Fair Trading, *Competition in Professions* (London: OFT, March 2001); Farrar, J, “Arrogant, incompetent, negligent and unprofessional ...”, (August 2001) *Which?*, 8-11; Clementi, D, *Review of the Regulatory Framework for Legal Services in England and Wales: a consultation paper* (London: Department for Constitutional Affairs, March 2004); Clementi, D, *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*, (London: Department for Constitutional Affairs, December 2004). Available at: <http://www.legal-services-review.org.uk/content/report/index.htm>, accessed 18 January 2010; Department for Constitutional Affairs, *The Future of Legal Services: Putting Consumers First* (Cm 6679, Norwich, HMSO, October 2005).

<sup>39</sup> Farrar, *op cit*; Paraskeva, J, *Blueprint for Change* (London: Law Society of England and Wales, 2001).

<sup>40</sup> Clementi, 2004, *op cit*.

<sup>41</sup> Solicitors’ Regulation Authority, *Education, Training and Development for Solicitors: The Way Ahead* (London: Solicitors’ Regulation Authority, February 2007). See also Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services*, 2009, *op cit*.

<sup>42</sup> See Law Society of England and Wales, *Paper on the Training Framework Review*, (London: Law Society of England and Wales, 19 January 2005); *Morgenbesser v Consiglio dell’Ordine degli Avvocati di Genova* 2003, Case C-313, [2003] ECR I-13467, ECJ.

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- <sup>43</sup> Law Society of England and Wales, *A New Framework for work based learning consultation paper*, (London: Law Society of England and Wales, 2006).
- <sup>44</sup> Law Society, 2006, *ibid*, at p 3.
- <sup>45</sup> Twining, W, “Pericles and the Plumber” (1967) 83 *Law Quarterly Review* 396.
- <sup>46</sup> Gibb, F, “Solicitors face tough drive over competence”, *The Times*, 1 August 2006.
- <sup>47</sup> Webb and Fancourt, *op cit* at p 27.
- <sup>48</sup> Solicitors’ Regulation Authority, *Information for Providers of Legal Practice Courses* (London: Solicitors’ Regulation Authority, 2008).
- <sup>49</sup> Madden, CA and Mitchell, VA, 1993, *Professions, Standards and Competence, a Survey of Continuing Education for the Professions*, (Bristol: University of Bristol Department for Continuing Education).
- <sup>50</sup> Cruickshank in Webb, J, and Maughan, C, *Teaching Lawyers’ Skills*, (London: Butterworths, 1997) at p 227.
- <sup>51</sup> Friedman, A and Phillips, M, “The Role of Mentoring in the CPD programmes of professional associations” (2002) 21(3) *International Journal of Lifelong Education* 269-284.
- <sup>52</sup> Solicitors Regulation Authority, *Training Regulations 1990* (London: Solicitors’ Regulation Authority, November 2000).
- <sup>53</sup> Solicitors Regulation Authority, *Education, Training and Development for Solicitors: The Way Ahead* (London: Solicitors’ Regulation Authority, February 2007) at p 4.
- <sup>54</sup> Solicitors Regulation Authority, February 2007, *ibid*, at p 12.
- <sup>55</sup> Eccelston, S, “Continuing Professional Development”, (1994/5) *Holdsworth Law Review*, 184.
- <sup>56</sup> Solicitors Regulation Authority, *Professional Accreditation Schemes, Application Criteria and Guidance Notes* (version 1, London: Solicitors’ Regulation Authority, July 2007).
- <sup>57</sup> Solicitors Regulation Authority, November 2000, *op cit* at p 4.

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<sup>58</sup> Roper, C, “The Need for a Conceptual Framework for Continuing Professional Development for Lawyers”, (1997) 15(1) *Journal of Professional Legal Education*, 169 at p 172. See also Roper, C, *Foundations for CLE: a guide to research theories and ideas underlying continuing education for lawyers* (Sydney: CLE, 1999). For further comment on what is desired in CPD provision, see the Irish study reported at McGuire, D, *et al*, “Learn your lesson. How legal CPD really works – first ever survey”, (January 2002) *Axiom*, 1012 and “Careering ahead. How legal CPD works – part two”, (January 2002) *Axiom*, 1016.

<sup>59</sup> Solicitors Regulation Authority, February 2007, *op cit*.

<sup>60</sup> Eraut, 1994, *op cit* at p 164.

<sup>61</sup> Dreyfus, H L and Dreyfus, S E, *Mind over Machine*, (New York: The Free Press, 1986).

<sup>62</sup> Sherr, A, “Legal Education, Legal Competence and Little Bo Peep”, (1998) 32(1) *The Law Teacher* 37.

<sup>63</sup> Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services*, 2009, *op cit*.

<sup>64</sup> Hunt, D, *The Hunt Review of the Regulation of Legal Services*, (London: Law Society of England and Wales, 2009). Available at <http://www.legalregulationreview.com/home.html>. accessed 8 January 2010.

<sup>65</sup> Hunt, 2009, *ibid* at p 88.

<sup>66</sup> Eraut, 1994, *op cit* at p 167.

<sup>67</sup> Eraut, 1994, *ibid* at p 215.

<sup>68</sup> At the time of writing (January 2010), governed by Solicitors Regulation Authority, *Higher Courts Qualification Regulations 2000* (London: Solicitors Regulation Authority, 2008).

Available at <http://www.sra.org.uk/sra/regulatory-framework/higher-courts-qualification-regulations-2000.page>, accessed 8 January 2010.

<sup>69</sup> Queen’s Counsel Secretariat, *Queen’s Counsel for England and Wales Competition 2009*:

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*the competency framework 2008*, (London: QC Appointments, 2009). Available at <http://www.qcapplications.org.uk/competencyframework>, accessed 8 January 2010.

<sup>70</sup> Devereux, A, Tucker, J, Moorhead, R and Cape, E, *Legal Services Commission "Quality Assurance for Advocates"*, (Centre for Professional Legal Studies, Cardiff Law School, November 2009).

<sup>71</sup> Effectively defining a sequence of such frameworks, particularly if the increments relate to increased quality or complexity of performance in similar tasks rather than an increasing range of different tasks, is a challenge: Devereux *et al*, *ibid*, 85.

<sup>72</sup> Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services 2009*, *op cit* at p 16.

<sup>73</sup> For example, Boon, A, "Assessing Competence to Conduct Civil Litigation: Key Tasks and Skills", in Boon, A, Halpern, A, Mackie, K, *Skills for Legal Functions II: Representation and Advice*, (London: Institute of Advanced Legal Studies, 1992); Fitzgerald, M F, "Competence Revisited: a summary of research on lawyer competence", (1995) 13(2) *Journal of Professional Legal Education*, 227; Winter, R, "Outline of a general theory of professional competences" in Webb, J, and Maughan, C, *Teaching Lawyers' Skills*, (London: Butterworths, 1997).

<sup>74</sup> Gasteen, G, "National Competency Standards: are they the answer for Legal Education and Training?", (1995) 13(1) *Journal of Professional Legal Education*, 1 at p 248.

<sup>75</sup> Gasteen, 1995, *ibid* at p 13.

<sup>76</sup> Eraut, 1994, *op cit* at p 169.

<sup>77</sup> Solicitors' Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors' Regulation Authority, 2009).

<sup>78</sup> For example, Hogan, LK and Hort, AE, "Setting Objectives and Assessing Competence in Professional Legal Education" (1988) 13(2) *Assessment and Evaluation in Higher Education*



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92; Edwards, A and Knight, P, (eds), *Assessing Competence in Higher Education* (London: Kogan Page, 1995). A detailed exploration of defining and assessing competence on a number of levels appears in Devereux *et al*, *op cit*.

<sup>79</sup> Eraut, 1994, *op cit* at p 165.

<sup>80</sup> Jones, L and Moore, R, “Education, Competence and the Control of Expertise”, (1993) 14(4) *British Journal of the Sociology of Education*, 385.

<sup>81</sup> Crebert, G and Smith, A, “Firming up the Framework: Untangling the Web of Confusion over Competency Development in Entry Level Lawyers”, (1998) 16(1) *Journal of Professional Legal Education*, 1 at p 5.

<sup>82</sup> Webb, in Webb and Maughan, *op cit* at p 35.

<sup>83</sup> O’Reilly, D, Cunningham, L and Lester, S, (eds), *Developing the Capable Practitioner, professional capability through higher education*, (London: Kogan Page, 1999) at p 55.

<sup>84</sup> Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services*, 2009, *op cit*, at p 15.

<sup>85</sup> Solicitors Regulation Authority, 2009, *ibid*, at p 5.

<sup>86</sup> See APLEC, *op cit*.

<sup>87</sup> Hager, P, Gonczi, A and Athanasou, J A, “General Issues about Assessment of Competence”, (1994) 19(1) *Assessment and Evaluation in Higher Education*, 3 at p 5.

<sup>88</sup> See O’Reilly *et al*, 1999, *op cit*.

<sup>89</sup> Eraut, 1994, *op cit* at p 208.

<sup>90</sup> Solicitors Regulation Authority, *Training trainee solicitors: The Solicitors Regulation Authority Requirements* (London: Solicitors Regulation Authority, 2008) at p 13.

<sup>91</sup> Solicitors Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors’ Regulation Authority, 2009) at p 14ff.

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<sup>92</sup> Solicitors' Regulation Authority, *Day One Outcomes For Qualification As A Solicitor* (version 2) (London: Solicitors' Regulation Authority, April 2007).

<sup>93</sup> Solicitors' Regulation Authority, *Solicitors' Code of Conduct 2007* (London: Solicitors' Regulation Authority, July 2007).

<sup>94</sup> Sabis, C and Webert, D, "Understanding the 'knowledge' requirement of attorney competence: a roadmap for novice attorneys" (2002) *Georgetown Journal of Legal Ethics*, 915 at p 924. See also Mudd, J O and La Trielle, J W, "Professional Competence: a study of new lawyers" (1988) 49 *Montana Law Review*, 11.

<sup>95</sup> Nelson, J W, *A study of the Continuing Legal Education Needs of Beginning Solicitors*, (Sydney: CLE, 1993) at p 15.

<sup>96</sup> Eraut, 1994, *op cit* at p 14.

<sup>97</sup> Cheetham, G and Chivers, G, "Towards a holistic model of professional competence", (1996) 20(5) *Journal of European Industrial Training*, 20-30; "The reflective (and competent) practitioner" (1998) 22(7) *Journal of European Industrial Training* 267-276.

<sup>98</sup> Winter, *op cit*.

<sup>99</sup> Lester, S, "Beyond Knowledge and Competence: towards a framework for professional education", (1995) 1(3) *Capability*, 44-52. See also Carter, R, "A taxonomy of objectives for professional education" (1985) 10(2) *Studies in Higher Education* 135.

<sup>100</sup> Lester, 1995, *op cit* at p 7.

<sup>101</sup> Eraut, 1994, *op cit* at pp 218-219.

<sup>102</sup> Schön, D A, *The Reflective Practitioner*, (Aldershot: Ashgate, Arena, 1983).

<sup>103</sup> Solicitors Regulation Authority, February 2007, *Education, Training and Development for Solicitors: The Way Ahead*, *op cit* at p 11.

<sup>104</sup> Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services*, 2009, *op cit*, at p 13.

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<sup>105</sup> Solicitors Regulation Authority, 2009, *ibid*, at pp 9.ff, 11ff.

<sup>106</sup> Solicitors Regulation Authority, *A New Framework for Work Based Learning Consultation* (London: Solicitors' Regulation Authority, February 2007).

<sup>107</sup> Law Society of England and Wales, *Training Framework Review Consultation Paper* (London: Law Society of England and Wales, 2001) at p 15.

<sup>108</sup> Solicitors' Regulation Authority, *A New Framework for Work Based Learning Consultation* (London: Solicitors' Regulation Authority, February 2007).

<sup>109</sup> Solicitors' Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants* (London: Solicitors' Regulation Authority, 2009).

<sup>110</sup> Solicitors Regulation Authority, 2009, *ibid*.

<sup>111</sup> Solicitors Regulation Authority, 2009, *ibid* at p 10.

<sup>112</sup> Nevertheless, the corresponding day one outcome requires individuals to be able to "recognise and resolve ethical dilemmas", Solicitors Regulation Authority, April 2007, *op cit* at p 3.

<sup>113</sup> Skills for Justice, *National Occupational Standards for Legal Advice* (2006). Available at <http://www.skillsforjustice.com/template01.asp?PageID=356>, accessed 18 January 2010.

<sup>114</sup> Johnson and Bone, 2004, *op cit* at p 4.

<sup>115</sup> Solicitors Regulation Authority, *An Agenda For Quality: A Discussion Paper On How To Assure The Quality Of The Delivery Of Legal Services*, 2009, *op cit*.

<sup>116</sup> Solicitors Regulation Authority, *Work Based Learning Pilot: Handbook for all Participants*, 2009, *op cit* at p 10.

<sup>117</sup> Dickens, C, *op cit*, at p 30. A necessary factor in implementing Agenda for Quality, I suggest (*op cit* at p 7) will be in detaching effective "organisation or management of the environment in which legal services are provided" from the superficially or cosmetically impressive.