

Comprehensive Review of Legal Education and Training
in Hong Kong

Submissions from the Hong Kong Bar Association to
LegCo's AJLS Panel Meeting 25 June 2018

1. In July 2015 the Standing Committee on Legal Education and Training (“**SCLET**”) appointed Consultants to conduct a comprehensive review of legal education and training in Hong Kong.
2. In October 2017, the Consultants released their interim report (the “**Interim Report**”) and invited comments from the public and stakeholders.
3. Representatives from the Bar met the Consultants to give their views to the Consultants and following the meeting, the Bar has sent its written comments to the Interim Report in February 2018.
4. In April 2018, the Consultants released their final report (the “**Final Report**”). The Bar is pleased to note that the views it expressed in its written comments to the Interim Report have been largely taken on board by the Consultants and as a result, the Bar has no major disagreement with the contents of the Report; many of the recommendations have the support of the Bar. The Bar only differs from the Consultants’ Report in 2 significant areas (i.e., the recommendations concerning the migration of Civil and Criminal Procedures to the PCLL stage, pupillage and the BQE, which will be further elaborated below).
5. Despite the timetable for submissions of comments to the Interim Report, the Law Society did not send its comments on the Interim Report to the Consultants until May 2018 when the Law Society made some rather radical comments and proposals which for obvious reasons were not addressed in the Final Report published in April 2018. As a result of the Law Society’s unexpected move, the SCLET has asked the Consultants to

comment on the Law Society's comments and proposals. The Consultants have since given their comments which are set out in an additional report published in May 2018 (the "**May Report**"). The Final Report and the May Report are hereafter collectively referred to as the "**Reports**" or the "**Consultants' Reports**".

6. In view of the very drastic proposals from the Law Society, which would impact not just on the vocational training of solicitors alone but also indirectly affect the vocational training and supply of barristers, the Bar feels obliged to register the following matters of concern.
7. As a preliminary observation, the Bar notes that the proposals from the Law Society stem from its perception of the duty imposed by section 4 of the Legal Practitioners Ordinance, Cap. 159 (the "**LPO**"), which is said to place the Law Society in the position of "the autonomous regulator of the solicitor's profession, and by extension, the gate-keeper of quality" (§ 2).
8. Whilst the Law Society undoubtedly has an important role to play in setting the qualifications for admission to the solicitor's profession, under the regime laid down by the LPO the Law Society is at most only a major stakeholder and does not enjoy sole responsibility as, let alone the exclusive right to be, "the gate-keeper of quality" in respect entrants to the legal professions.
9. The important point here is to note that section 3 of the LPO expressly provides that solicitors are officers of the Court and under section 4 of the LPO it is the Court (in such manner as may be prescribed by the Chief Justice) who is charged with the responsibility of admitting as solicitors persons whom the Court considers to be fit and proper. Whilst the Council of the Law Society has the power and responsibility to prescribe the requirements with respect to employment as a trainee solicitor, the passing of examinations and the completion of courses under section 4 (1)(a) of the LPO, that responsibility can only be carried out pursuant to the power of the Council to make rules under section 73(1)(d) of the LPO,

the exercise of which power is subject to the prior approval of the Chief Justice under section 73(2) of the LPO¹.

10. At any rate the LPO clearly prescribes that the PCLL is the common qualification for entrance into the professions and PCLL is defined to be the PCLL courses offered by the 3 universities. Hence it is plain that the universities concerned would also have an interest on the standard and quality for entrance into the professions.
11. It is therefore quite wrong for anyone to suggest that the Law Society is “the gate-keeper of quality” in the sense of having sole responsibility (or right) to set the qualifications for admission to the solicitor’s profession.
12. Moreover, insofar as the Law Society is critical of the bottleneck at the PCLL entrance stage and that entry into the profession is being determined artificially by PCLL admissions (§ 4 & 5), the Bar would caution against jumping to the conclusion that PCLL is being used as an “artificial barrier” to entry to the profession just because the point of admission to the PCLL course is something of a “bottleneck” in the sense that those aspiring to become practising lawyers would not be able to attain their goal if they fail to secure a place on the PCLL course and the number of available places is vastly exceeded by the number of graduates with a law degree which meets the minimum requirements of attending PCLL. There is bound to be a “bottleneck” somewhere along the line and if it is not at the point of entry to the PCLL course then it would have to be further down the line such as at the point of obtaining trainee contracts (or pupillages) or employment as newly-qualified solicitors (or tenancies for barristers). Having the “bottleneck” at the point of entry to the PCLL course is not *per se* a bad thing and may arguably be more logical in that it is the point of transition from the academic to the vocational stage of legal education. There is nothing wrong with the “bottleneck” if it is the result of applicants failing to meet the stringent admission criteria set by the course providers for admission to their PCLL programme and not the

¹ The power to grant prior approval would also include a power to withdraw approval –see section 4(c) of the Interpretation and General Clauses Ordinance, Cap. 1.

result of a restriction on numbers by design or due to lack of resources. The Bar does not subscribe to the view that just because someone meets the minimum academic requirements for entry to the PCLL course he has a legitimate expectation to be given a place in the course, and from a societal perspective it would be economically wasteful to put through the PCLL course those who do not have the requisite aptitude to succeed in practice regardless of whether that is publicly or privately funded. The Bar has been informed by the universities that in fact they have the necessary resources to increase the number of PCLL places if need be and the fact that they have not done so is because the number of places currently available is more or less sufficient to enable all those whom the course providers consider as possessing the ability and right aptitude to go through the PCLL to obtain a place in the course. On that basis, The Bar does not see any justification for saying that the restricted number of places on the PCLL course is an “artificial barrier” to entry to the profession. Instead of increasing the number of PCLL places, perhaps more should be done to dispel the misconception that those who meet the minimum academic requirements for entry to the PCLL course have a legitimate expectation to be given a place in the course and to emphasise that a law degree is not necessarily the foundation for a legal career and that it may be valuable in other professional disciplines as well as general commerce. In this connexion, it should be noted that the current minimum requirement for PCLL of a 2:2 degree in law which was set more than forty years ago is now too low having regard to the grade inflation which has since taken place, even though the Bar has no wish to push for an upward revision as it recognises the political reality that the public is likely (albeit erroneously) to perceive it as yet another attempt at artificial restriction on entry to the legal profession.

13. Apart from those preliminary observations, the Bar also has serious reservations about the Law Society’s proposals.

14. In its comments on the Interim Report released on 8 May 2018, the Law Society welcomes the idea of having an unified law school that the

Consultants had suggested for the stakeholders' consideration in their Interim Report.

15. On the basis that the unified law school could be established within 3 years the Law Society said that it was willing to put an immediate moratorium on the implementation of the CEE which would otherwise take place in September 2021 (§§ 20 & 21).
16. However, according to the Law Society, pending the implementation of the unified law school and that sufficient PCLL places be made available *in order to fairly and appropriately accommodate at least the current level of PCLL applications*, the Law Society proposes to implement an interim alternative entry path to those who either are not able to gain entry to PCLL or prefer to undertake some other qualified vocation training by holding the LSE as early as in September 2019 (§ 28). It is proposed that the entry requirements and syllabi of the LSE be comparable to the PCLL and that vocational course envisaged by the Law Society need not be partly or entirely undertaken in Hong Kong. The LSE will be determined and supervised by the Law Society although not necessarily administered by the Law Society (thus excluding any supervision intervention from any other body including the SCLET). The Law Society is in discussion with at least 2 institutions who have expressed interest in providing the course. The institutions are not identified.
17. Insofar as it was, and apparently has always been, the Law Society's argument that the PCLL was not desirable because the syllabi of the course of the 3 universities were not identical, it is not clear as to which university's syllabi the proposed vocational course would be used as the comparable.
18. The Bar considers that the idea of LSE is ill thought out. No case for the necessity of a LSE or the desirability of having a LSE is made out. The LSE as proposed is an alternative to the PCLL and the Consultants had already thoroughly considered whether a "CEE" as an alternative to the PCLL was

desirable and came to a negative conclusion in § 6.8 (pages 121 & 122) of Consultants' Interim Report.

19. In the May Report, the Consultants specifically considered the comments of the Law Society. The Consultants explained that they did not make any recommendation for the establishment of the unified law school in their Final Report mainly on the basis that it was unlikely that such newly established law school would receive financial support and subsidy from the Government and given the existing PCLL providers' willingness to work together on admission and consistency issues, there is no advantage of a single unified law school.

20. On the issue of the LSE, the Consultants considered that it was the same as the idea of an alternate CEE previously discussed in § 6.8 of their Final Report and they considered that no case has been made out by the Law Society for them to change their mind. The Consultants had particularly pointed out the concerns of:

(1) The perception by employers and students that the LSE is a "second class" pathway for those who could not get admission to the PCLL. It may be added that this must be true as the PCLL is a common qualification for both professions while the LSE will at the most only qualify the students for solicitors.

(2) The risk as to the standards for new entrants notably insofar as pass rates may become a proxy for provider quality leading to a "race to the bottom" of grade inflation.

(3) The addition of LSE as a qualification would require very careful maintenance of assessment of comparability and standards in such mixed qualification system, and it is not clear that the profession has the additional resources for such a task.

(4) The LSE or the alternate CEE would not address any concerns about variability of standards of the vocational courses and on the contrary would add to them.

- (5) Concerns about resources, monitoring and oversight would likely be exacerbated, particularly if as suggested by the Law Society that part or all of the course work were undertaken overseas.

The Consultants further took the view that the LSE should not be implemented without the full scrutiny of the SCLET (§ 7.1 of Final Report)

21. In § 7.2 of the May Report, the Consultants further queried whether the Trainee Solicitors Rules relied upon by the Law Society for its LSE proposal, which were expressed to be made under section 73 of the Legal Practitioners Ordinance, would justify the implementation of the LSE as proposed. In the words of the Consultants : “It is difficult to contemplate that the provisions of those Rules could be read as permitting examinations to be set or approved without reference to the duty of the Chief Justice under section 73(2). If the Trainee Solicitors Rules were to be read in that way, it would call into question the validity of the Rules since it would mean that the Chief Justice had abdicated the statutory responsibility for the function imposed under Section 73(2)”.

22. In relation to the LSE issue the Bar’s views are as follows:

- (1) The Bar agrees with the views of the Consultants.
- (2) On the vires of the rule relied upon by the Law Society, the Bar questions (without expressing any concluded view on this issue) whether the Law Society is entitled to proceed with holding the LSE and prescribing a new course for its LSE without making any further rules or any further reference to the Chief Justice. In this connexion, reference should be made to § 5-158 of De Smith’s Judicial Review 7th ed.
- (3) The Bar does not accept the proposition that the Law Society is alone the gate-keeper of standard and skills of entrants to the solicitors’ profession. The legislation clearly provides that the PCLL is a common qualification for entrants to both professions and PCLL is defined as the PCLL courses offered by the 3 named universities.

It is difficult to see how one can say that the keeping of the standard for entrance to the solicitors profession is not also the concern and duty of the universities and indirectly also the Bar who is equally concerned with the standard of the PCLL. Furthermore, the function of the SCLET would clearly cover the maintenance of the entrance standard of the professions, and the composition of SCLET clearly includes representatives from the Bar and other stakeholders.

(4) In any event, the creation of an alternative route for admission of solicitors would clearly have an impact on the PCLL, and the number of people seeking pupillage to join the Bar.

(5) The standard of solicitors would also affect the work of the Bar.

(6) There is no evidence of any under supply of PCLL graduates produced by the 3 universities. The Bar does not subscribe to the idea that a person entering into the university to read law should have a reasonable expectation that he could be a practising lawyer and have a place in the vocational training stage of the PCLL. This is particularly so where nearly half of the applicants for PCLL are law graduates from overseas universities where many of their law graduates do not end up in the legal professions. The number of lawyers should be determined by the market and it is not in the public interest to create a bottleneck at the juncture of seeking employment as solicitors. That would be a waste of training resources, and would create a large number of people seeking to join the Bar where their aspiration or aptitude does not render them suitable to be barristers.

(7) One purported false justification for advocating the CEE is the alleged capital sin of the current arrangement whereby the PCLL is provided by 3 different universities with no uniformity of syllabi and assessments. The introduction of the LSE will just add to the divergence of the standard and quality.

(8) The LSE proposal of the Law Society is lacking in a number of important details : who is going to teach the LSE course, the

qualification and standard of those institutions, their syllabi, the intake criteria, the method of assessment, and what assurances one has on the maintenance of the standard of the courses.

23. The Bar would like to point out that in their Interim Report, the Consultants had recommended that Civil Procedure and Criminal Procedure should be removed from the undergraduate courses and be taught at the PCLL stage. In their Final Report, the Consultants (at page 67 § 4.5.2) retracted their position somewhat and said :

“However we stop short of making this a substantive recommendation as such. We believe a change of this magnitude requires additional local consideration, particularly in terms of the extent of change and the necessary knock-on consequences, including whether there may also be scope to identify content that should over in the other direction. We note also that this debate may be better addressed within a larger discussion of whether regulation of the academic stage should also move to the outcome based as opposed to content or subject based prescription ... ”

24. The Bar considers that the recommendation in the Interim Report should be implemented. Notwithstanding the rather heavy schedule of the PCLL, Civil and Criminal Procedures are more appropriate to be taught at the vocational PCLL stage. This is particularly so because many PCLL applicants are from overseas universities and unless Civil and Criminal Procedures are moved to the PCLL stage, in all probabilities these overseas law graduates would have to take the conversion examination on these 2 subjects. Of course if the 2 procedure courses are to be moved to the PCLL not as separate courses but are to be merged into Civil and Criminal Practice course, then the length of the merged courses would have to be suitably enlarged. The Bar is aware that previously when the 2 procedure subjects were taught as part of Civil and Criminal Practice course, there was the feeling amongst students that not sufficient time was devoted to the practical side such as in the drafting exercises and the mock practice presentation. If it is felt that the PCLL course would then be too heavy for students, the universities would have to consider whether the students may be asked to take fewer optional courses. A lot

of the optional courses relate to specialised area of the law such as on company listings with quite heavy substantive law contents. This type of courses may be moved to the academic undergraduate stage.

25. Therefore the Bar is strongly of the view that these 2 courses should be moved to the PCLL stage despite the reservation of the Consultants. With the co-operation of the universities, it should be possible to implement this change when re-organising the PCLL and the undergraduate law degree course.

26. With regard to the proposals for reform of pupillage set out in the Report, the impression of the Bar is that in drafting their recommendations the Consultants had in mind a much more developed chambers system such as that obtains in England and insufficient regard has been paid to local conditions in Hong Kong where there are still a large number of sole practitioners and small sets of chambers with only a few members. Once the local conditions are taken into consideration, it will be seen that the recommendations will not work unless the provision of pupillages is to be restricted to the few large sets which is unlikely to be well-received by either the general membership of the Bar or the general public at large.

27. On the subject of BQE, the Bar wishes to draw attention to the historical background and the decision not to continue to recognise English and Commonwealth qualifications shortly after 1997 due to increasing divergence between the law and practice in different jurisdictions and to specify PCLL as the exclusive route for those newly qualified to enter the profession. BQE was introduced only to facilitate cross-border transfer of practitioners already established in their home jurisdictions. Hence, the Bar takes the view that it would not be right to revise the standard of BQE to that of a day-one practitioner.

Dated the 21st day of June, 2018.

Hong Kong Bar Association