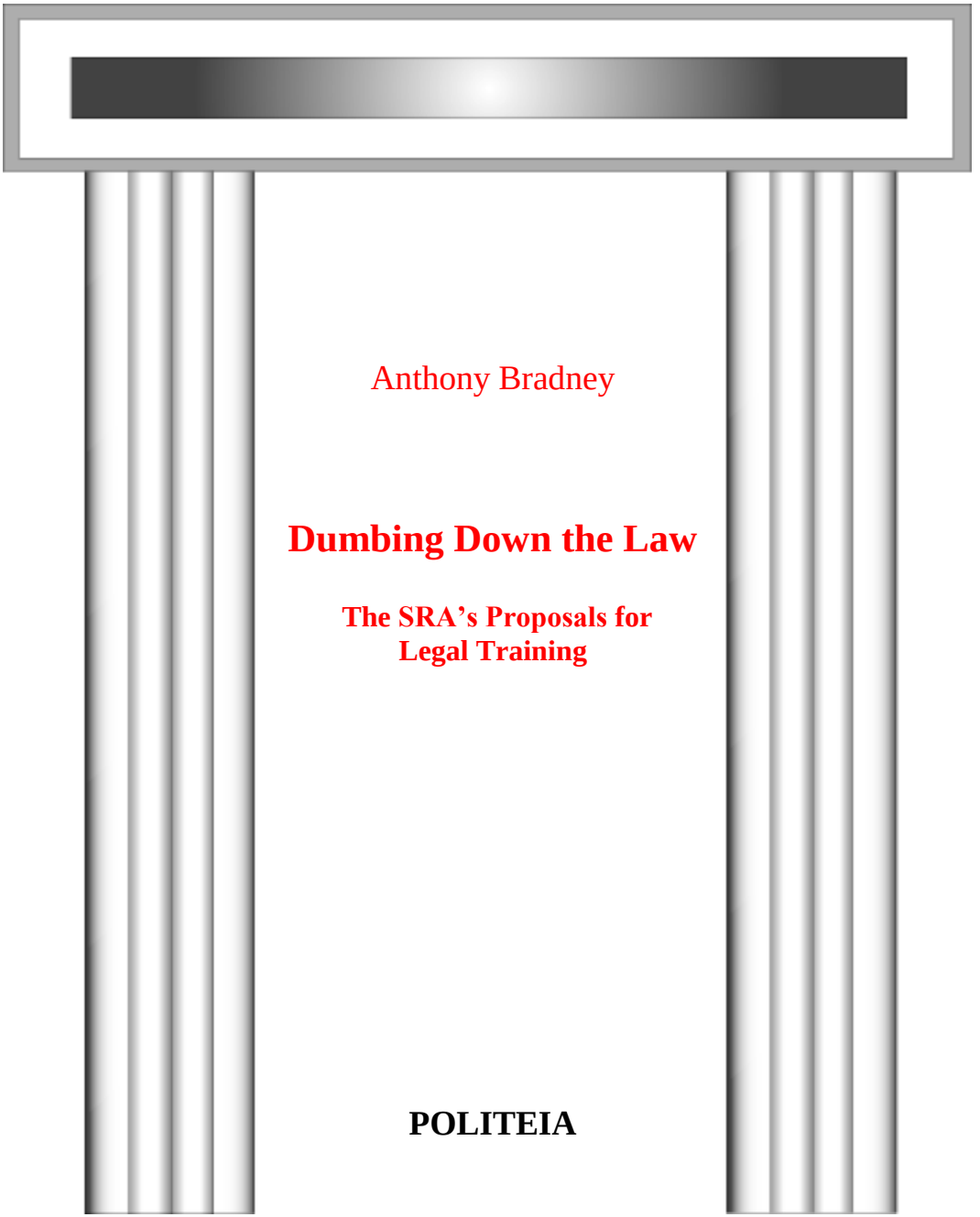

Anthony Bradney

Dumbing Down the Law

The SRA's Proposals for Legal Training

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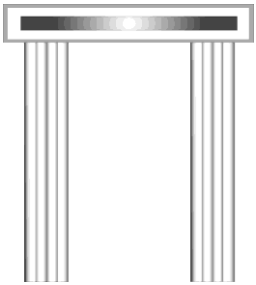

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The SRA's Proposals for Legal Training

Anthony Bradney

POLITEIA

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CONTENTS

Introduction

The recent Government Green Paper on Higher Education began by observing that the United Kingdom's higher education system was 'a national success story'.[1] Application rates to university attest to the attractiveness of law as a discipline for students. Last year the Law Society noted that 'the UK has an excellent global reputation for law'.[2] This reputation translates, in concrete terms, into the significant amount of monies brought into the country by its leading firms of solicitors. Given the still parlous state of the British economy there is every reason to hope that any attempt to reform these hugely successful areas might be approached with caution. Evidence, careful analysis and close consultation ought to be watchwords. However in the whimsical world of the Solicitors Regulation Authority (SRA) things work differently. Bulls manage china shops. Guess-work and paradox appear to be seen as sound policy bases. Assertion is seen as a useful substitute for argument. Fairy stories replace the unwelcome truths of reality.

In this paper I will chart the recent history of the SRA's interventions in this area, speculate on why it has so consistently ignored the advice that it has been given and end by asking what impact their strange suggestions might have for both universities and solicitors.

[1] 'Fulfilling our Potential: Teaching Excellence, Social Mobility and Student Choice' (2015) p 8.

[2] 'Report into the global competitiveness of the England and Wales solicitor qualification' (2015) p 17.

I
The Background:
The Legal Education and Training Review

The story begins with the Legal Education and Training Review (LETR). This piece of research was commissioned by, amongst others, the SRA. It looked at a huge range of issues including the way in which people currently qualify as solicitors. As Law Society statistical reports have noted for many years the largest group of such people currently begin by first undertaking a law degree (a QLD), then take the Legal Practice Course (LPC) and finally conclude with a training contract with an established firm of solicitors. A somewhat smaller group first read for a non-law degree, then do the Graduate Diploma in Law (GDL) and after that join law graduates on the Legal Practice Course. Looking at the routes to qualification the LETR concluded that 'the dominant opinion derived from the research is that the system of LSET [Legal Services Education and Training] works well…'.[3] 79 per cent of respondents to LETR wanted to keep the QLD.[4]

LETR did suggest some changes to the process of qualification. This was not surprising. Almost by definition the provision of education is something that is in a constant state of flux and reform. However the changes that were suggested were intended as improvements to an existing system. Babies were not to be thrown out with the bathwater.

However this was not what that the SRA wanted to hear. Spending public money commissioning independent research was, for the SRA, a waste if that research remained stubbornly independent. In what has quickly become a consistent pattern the SRA decided that if one was being told what one did not want to hear the best thing to do was to look elsewhere.

[3] LETR 'Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales' (2013) p 46.

[4] LETR op cit p 26.

II
The SRA's First 'Consultation' Exercise

In the first paper that the SRA issued on reform of the solicitors' qualification route it set out what they described as a Competence Statement that was intended to 'capture the key activities required for effective performance as a solicitor'.[5] The Competence Statement contained both a description of skills and abilities that a solicitor would be expected to have at the point of qualification and a statement of the legal knowledge that the solicitor would have. For those reading the SRA's paper the key question was why did the SRA fix on these things as being what were needed by solicitors in their everyday work.

On the face of it the SRA seemed to have done considerable work in accumulating evidence to justify what was in their Competence Statement. The SRA's paper mentioned, amongst other things, an external research company who carried out a scoping exercise, 3 workshops, the use of a Delphi group and the employment of a research contractor who carried out interviews.[6] Appendix 1 of the paper lists the people and organisations who provide 'input and guidance' for the SRA when it was putting together its statement of legal knowledge.[7] However once one read the paper closely it began to be obvious that there were fundamental flaws in the way that the SRA was presenting its evidence.

Research should be an attempt to uncover reality. Showing what reality is involves showing how one knows that to be the case. Evidence is something that the reader can check and verify. All of these things are uncontroversial and obvious propositions. Academics take them particularly seriously. One of the things that students get from their degree level studies is an appreciation of the importance of these verities. However these rules are applicable just as much outside the academic world as within it. Rational debate is dependent on

[5] SRA 'Training for Tomorrow' (2014) p 4.
[6] SRA loc cit.
[7] SRA op cit p 29.

complying with them. Once they are abandoned argument becomes politics, advertising or worse.

Once one began to assess the evidence for their reforms presented by the SRA numerous questions began to emerge. Who had been involve in the workshops they had run and why? What questions had been asked and how had the answers been recorded? Given that academics had conducted the research for LETR why had non-academics been used in the SRA research? Who were they? If they were 'independent' were they independent of the SRA and willing to tell the SRA things that they did not want to hear? Who nominated the members of the Delphi group and how did it work? How representative were respondents to the online survey? In sum was the evidence presented valid and verifiable?

Although the SRA had chosen not to make what it thought was its evidence transparent academics and others were able over the next few months to gather extra information. Some members of the Delphi group were, for example, identified. Participants in some of the workshops came forward. Extra information however only deepened doubts about the evidence that the SRA had presented. Some people who had taken part in the consultation exercises were unsure that their position had been properly represented. It quickly became clear that not all of those who had provided 'input and guidance' when the statement of legal knowledge was drawn up in fact supported the SRA's proposed reforms.

The various learned associations representing those in university law schools, the Association of Law Teachers, the Committee of Heads of University Law Schools, the Society of Legal Scholars and the Socio-Legal Studies Association, were all clear that the SRA's suggestions were fundamentally flawed. For example, the Society of Legal Scholars in its response commented that

> 'neither the Legal Education and Training Review nor subsequent research has shown that there is a substantial body of evidence that shows the need for radical changes to existing arrangements. Overall, the Society wishes to make

> the point that there is a danger of over-regulation based on inadequate evidence.'

To the SRA's question 'Have we struck the right balance in the Statement of Legal Knowledge between the broad qualification consumers tell us they understand by the title solicitor and the degree of focus which comes in time with practice in a particular area?' The Society responded 'No'.[8] Other learned associations responded in the same vein.

The title of solicitor is a general one giving the individual a right to practice in a broad range of areas. However over the years the nature of an individual solicitor's work has changed. As research from many sources has shown most solicitors are now, and have been for some time, specialists. What they legally could do and what in practice they actually do, and would hold themselves out as being competent to do, are very different things. Equally the way in which solicitors pursue their specialisms varies widely. The work of a magic circle firm, a high street firm, a legal aid firm and a host of other kinds of firm is wholly different across a spectrum of matters. Everything, including type of client, area of legal expertise, number of solicitors in the firm, percentage of support staff, location and salary, varies. To say to someone that you are a solicitor tells them nothing of any significance or interest. What matters now is what kind of solicitor you are.

In practical terms the SRA's Competence Statement is a detailed description of a solicitor who no longer exists; it is a description of almost everything a solicitor might do. At the same time, where the work of a real solicitor does coincide with the Competence Statement, the Statement is vague and general; whatever the specialism the Competence Statement says little about it. The SRA might, with some justice, protest that they have done little more than copy an existing system of qualification. Their new Competence Statement takes the old QLD and LPC requirements and adds further matters to them. In this sense it is far from radical. However these old requirements

[8] http://www.legalscholars.ac.uk/pubdocs/SRA-competence-statement-questionnaire-SLS.pdf.

already reflected a legal age that has long since passed. The SRA has taken an old-fashioned system and made it more old-fashioned. Time moves on but for the SRA time moves backward.

III
The SRA & the Responses
Misunderstanding or Misrepresentation?

According to the SRA there were 72 responses to their first paper on changes to the process of legal qualification for solicitors.[9] The SRA first collated and then analysed these responses. The picture that the SRA presented was of respondents who were broadly supportive of their suggested reforms. There were, it indicated, differences over detail and a few who were unhappy but, in the main, the proposlas had been well-received.

The SRA's analysis of responses puzzled the learned associations. They thought they had been clear in stating their general dissatisfaction with what had been put forward. It is always possible to misunderstand something that one has been sent, particularly if the writer is unclear. Yet the word 'no' in a response seemed straightforward. The associations were entirely unconvinced as to the merits of what was being suggested. This was not what the SRA was saying.

Over the next few months the learned associations continued to press their concerns with the SRA. In response the SRA noted that the solicitors themselves were generally happy with what was being put forward. Those in the learned associations who had read not just the SRA's analysis of responses but the actual responses themselves took a different view. The Law Society's response, for example, had argued that there was no need for 'a root and branch reform of legal education and training. Indeed the LETR research report did not suggest that the current system was failing'.[10] Since the SRA made it clear that it was in conversation with solicitors, and that they were in fact happy, and given the possibilities of misunderstanding written material, it was clear that the learned associations needed to discuss

[9] SRA 'A Competence Statement for Solicitors: SRA response to the consultation' (2015) p 2. Law Society
[10] 'SRA Training for Tomorrow: A Competence Statement for Solicitors Response of the Law Society of England and Wales' (2015) p 7.

the SRA's work with solicitors themselves. Once this process began it quickly became evident that solicitors in general were just as unhappy with what the SRA was arguing for as were academics.

The way in which the SRA dealt with responses to their first consultation exercise raises a series of questions. First have they misunderstood or misrepresented what is being said to them, or is it both? Secondly if they cannot understand responses to their own paper how far can they be trusted to understand the evidence which they said underpinned their initial suggestions? Finally if they are in fact not just misunderstanding what is being said but misrepresenting it, to what degree is this a real consultation exercise. Is there the possibility of genuine change, including the acceptance that the whole venture is misconceived, or are we in the middle of a paper exercise that will merely shift a few commas and change a subheading?

IV
The SRA's Second 'Consultation' Exercise

In their 2014 paper the SRA had noted that their three different ways to assess the new Competence Statement. First it would be possible to keep the prevailing QLD/LPC arrangements. Secondly it would be possible to particular training providers to assess students. Finally it would be possible to create a centralised system whereby competence was assessed. At the time the SRA expressed no view as to which system was better, merely saying that it would issue a further consultation paper.[11] A number of responses to the 2014 paper commented that considering the merits of the SRA's suggestions without knowing how they were to be assessed was difficult if not impossible.

By 2015 the SRA was no longer uncertain about what system of assessment should be used. In their paper, 'Training for Tomorrow: assessing competence' they suggested that there should be a centralised Solicitors Qualifying Examination (SQE). In the future neither degrees nor the LPC would form part of the process of assessing what someone seeking to be a solicitor knows. In its paper they observed that 'HEFCE concludes: *the current quality assessment system [including that for the QLD] does not provide direct assurance about the standard of awards made to students, or their broad comparability*.'[12]

Since the current system does not lead to common standards this justifies introducing a new system that will be centrally controlled. Questioning the fundamental reliability of the higher education system in the United Kingdom is a strong claim. One might reasonably think that strong evidence would be provided to substantiate what was being said. However this proved not to be the case.

One evidence base for the 2015 paper is a series of quotations from academics and employers about assessment arrangements. The SRA

[11] SRA (2014) op cit pp 29-30.
[12] SRA (2015) loc cit.

must consider these quotations to be important because, in the paper, they are highlighted, given a separate colour and put in special boxes so as to draw the reader's attention to them. However footnote 20 of the paper tells us that these 'quotations' 'are not verbatim quotes, but they accurately reflect the views expressed to us'.[13] Given the inability of the SRA to accurately reflect the spirit of views about its first paper, there will be considerable scepticism about the validity of this approach. A quotation is a quotation. Once a reader can see it they can then assess what it means. Sadly the SRA's use of other evidence seems just as cavalier. Thus, for example, the SRA makes much use of the HEFCE quotation above. It is referred to three times in their 2015 paper. It also refers to the same HEFCE paper in its response to the Bar Standards Board paper on proposals for reform to the process of qualifying as a barrister.[14] However whenever it uses this reference the SRA does not point out that the document it is referring to is merely a consultation exercise, that the precise passage that it is referencing is about proposals to reform the external examiner system and not an abandonment of the current system, and that earlier in the same paper HEFCE observe that

> 'proposals should not be seen to cast doubt on the ability of the current system to secure the reputation of the UK higher education system over recent years.'[15]

Indeed the SRA never provides a complete reference to the passage that they are quoting, making it difficult for the reader to track down the precise source and assess the validity of their arguments about what it says.

In the whimsical world of the SRA what counts as evidence takes on a different meaning to that which it has in the world outside. Rather than making a sustained and detailed case for abandoning the present system of assessment the SRA relies on some flimsy propositions that

[13] SRA (2015) op cit p 11.

[14] ww.sra.org.uk/sra/consultations/consultation-responses/bar-future-training.page.

[15] HEFCE 'Future Approaches to Quality Assurance in England, Wales and Northern Ireland' (2015) p 25 and p 7.

are wholly at odds with what the rest of the world believes. It is manifestly clear, has always been manifestly clear, that any system that involves the exercise of discretionary judgement will involve some variability in standards. This is true when degrees are being given; it is also true when judges pronounce sentence. That is one reason why universities have long used a system of external examiners. Universities, like judges, strive to reduce the degree of variance in their judgements. They constantly look at their systems and think about possible changes that might improve them. This, however, is a long way from saying that they are fatally flawed as they are. Universities display their basic trust in their systems every time they employ new academic staff, relying on their degree results as part of the criteria for appointment. Employers throughout the United Kingdom do the same. Things can be improved. Things can always be improved. Neither proposition justifies rejecting the validity of the way in which tens of thousands of solicitors have qualified in the past decades.

For the SRA evidence is anything that can be made to be useful to support what it already believes. Its fundamental position is faith based. What is unclear is what the religion is that they are worshipping.

V
Assessment and Learning

At the moment the SRA is uncertain as to whether or not there will be any prior requirements before taking the SQE. For the SRA in the future it will be passing the SQE that matters; it is that pass which will show competence to be a solicitor. Anyone, no matter what their past educational attainments, may be able to take the SQE. Equally the SRA has made it clear that it will not have any interest in regulating any courses which are intended to help people pass the SQE. Such an approach completes inverts the proper relationship between assessment and learning.

Assessment attempts to measure what has been learnt. All assessments fail in this task to some degree or in some way. Every assessment method is imperfect. Most university law schools use a range of different assessment practices precisely because of the limits that are attached to each individual method. Degrees are awarded not because one test has been passed but because of progress in a number of assessments over a number of years. In a degree assessments measure both how much knowledge has been learnt and what skills have been acquired. Different kinds of assessments are better in different contexts. But it is the learning not the assessment that matters. At university assessments are trying to capture what a student has acquired over their years of study. The transformation that takes place when degree level work is undertaken is not simply, or even most importantly, the acquisition of factual knowledge. Instead it involves an inculcation of a habit of mind. The student learns respect for evidence as well as how to discern what are and what are not legitimate arguments. The student becomes skilled in making difficult judgements in areas where discretion has to be applied. At the same time the student learns how to gather the information that they will need in order to make their arguments. Assessments, degree classifications, try to measure of all of this. They provide an imperfect indication of what the student has learnt and how they have changed during the process of learning.

Most people, including most employers, understand the inevitable imperfections there are in assessing students for their degrees. They value what the graduate will bring to their employment and use the degree and its classification as part of the way in which they decide who to employ. Alongside this they also use a range of other techniques to find out what else the graduate has got out of the course they have studied. The SRA expects the majority of future solicitors to be graduates. Employers will therefore still be able to assess prospective employees in the way they have done for many years. What place, however, will the new SQE have in their judgements? The habit of mind that is acquired as a result of a graduate education is the fruit of years of study. The reiteration of material and techniques through different levels of study in degree level courses is intended to make what is learnt deep-rooted rather than shallow. Because the SRA ignores paths to learning this will be lost in the case of the SQE. The fact that someone has passed the SQE will not tell anyone how well they acquired their knowledge. Passing the SQE will say that the candidate at the moment of the examination knew something. Whether or not that knowledge had been acquired simply for the examination and whether or not it had been forgotten the day after the examination will be an unknown factor.

The SQE and 'Objective' Examinations

The reason that the SRA gives for having a centralised assessment is the avoidance of variability in standards of assessment. However centralising an assessment does not, of itself, prevent variability in standards. In the light of this for the purposes of Part 1 of the SQE, broadly the academic stage, the SRA is proposing to set 'objective' tests that can be computer-marked. The SRA says that the tests will be set at graduate level. They will involve the use of multiple-choice questions. The question is, what this will mean in the context of a discipline like law.

What is important here in looking at the validity of this approach is that these tests will be the only form of assessment for Part 1 of the SQE. Some university law schools have used multiple-choice questions as part of their assessment regime for decades. As an

assessment method they have both pragmatic and pedagogic advantages. Since they can be computer-marked they are, for example, quick and cheap to mark. They can also make a student demonstrate knowledge of a whole syllabus. In the case of some other assessment methods, such as the setting of assignments, students are being tested on only a small part of the syllabus. There is therefore an arguable case for a varied diet of assessment including the use of multiple-choice questions. However the SRA is not proposing a varied diet. The only thing on the menu will be these objective questions. However, what is graduate level objective knowledge in the context of law?

There clearly are some things that are objectively true with regard to English law and the English legal system. County courts do not have a criminal jurisdiction, for example. However much of English law is about analysis, debate and disagreement. It seems likely that the SQE will be limited to an examination of legal doctrine. But even here ascertaining what a legal rule is and how it can be applied is frequently fraught with problems. Even when there is a preponderance of opinion about the correct approach to a given issue it remains only that, a preponderance of opinion, not an objectively right answer. One of the things that students at university law schools learn slowly over time is how to arrive at a view as to what the law is and then how to present an argument for their view of the law which might convince other lawyers. In doing this they also learn about the possibility of other answers. This is one of the things that graduate level knowledge about law is about. University law courses tend to focus on areas of doubt rather than areas of relative certainty. The SQE must perforce do the reverse. What competence in making arguments for a client will someone who has passed the SQE show, if what they have learnt is ‘objective knowledge’ about law? If the ‘objective knowledge’ and the client’s needs are at odds what will they do? Or, as worryingly, will the knowledge they are being tested on be so trivial as not be graduate level knowledge at all?

No-one, including the SRA, can say with any certainty what impact their proposed reforms will have on education to be a solicitor in the future. This in itself is a significant point. To take a system which has been working for many years and which has broad support and tear it up in favour of something that may or may not work is not an obviously responsible thing to do. Of course the SRA will not be directly affected by any problems that occur. It is firms of solicitors and future students who will be left to puzzle with whatever it is that the SRA finally decides to do. It is evident that they are doing this in the face of advice to the contrary from both the academic and the practising professions. It is equally evident that the SRA is immune to argument and reason. This being the case it is necessary to speculate about what might happen if they introduce their reforms.

The Impact on University Law Schools

Academic law schools in universities are thriving. Applications from undergraduate places for the sector taken as a whole are stable. New law schools continue to open. In terms of employment law degrees are perceived as being one of the useful degrees to have.[16] In terms of financial benefit law degrees, when compared with other academic degrees, do in fact generate one of the best returns for students.[17] Yet it is worth noting that for some years for the sector taken as a whole only a minority of law graduates go on to qualify as a solicitor. The economic value of a law degree rests on the fact that it is precisely not just part of the training that is necessary to become a solicitor. A law degree can lead on to becoming a solicitor but it can also lead on to becoming many other things. The number of training contracts goes up and down but academic law schools remain stable because they are

[16] A Furnham and K Pertrides 'The best university degrees to get a job' (2010) 42 Higher Education Review 50 at p 54.

[17] I Walker and Y Zhu 'Differences by Degree: Evidence of the Net Financial Rates of Return to Undergraduate Study for England and Wales' (2010) Lancaster University Management School pp 13-14.

not tied to the solicitor's profession. British law schools do not promise their students a place in practice. They are very well aware of what happened to university law schools in the USA that did make such promises and in the end being faced legal action by disappointed students. This picture of the present is a backdrop for the future.

The SRA hopes that law schools in the future will incorporate the component parts of their Competence Statement in revised degrees. Why would they do this? A degree for solicitors brings with it the guarantee of disappointed graduates in the future; graduates that not only cannot find a job as a solicitor but also find that, since their education was tied to being a solicitor, it has little if any attraction to other employers. In the past some universities have run LPC courses. Some of these have now closed down whilst others struggle to find students. As these universities will attest a business case for a degree for solicitors does not exist. Law degrees which are flexible in what students can do with them are educationally sound, good for students and commercially successful. If law schools do not take this route what will happen?

Setting up the SQE will inevitably lead to courses that teach you how to pass the SQE. Since the courses will not be regulated by the SRA the courses are likely to be driven by commercial imperatives. How can you construct a course that will attract the largest number of students? The answer is likely to be that such courses will be relatively short in order to keep costs low. They will be cramming courses with all that that implies. Some of them may well be successful in their aims. Students will pass the SQE even though, shortly after they have passed, they will have forgotten all that they have learnt. For students who secure jobs with firm which in the past have paid students to go on the LPC the new courses and the SQE will not matter. Firms will pay for them to cram for the SQE. However for other students the SQE the cramming courses become an additional financial burden. Some students will come from backgrounds where this does not matter. Other students will come from backgrounds where finance is a more important factor and these students, no matter what their educational attainments, will be put off becoming solicitors. A further barrier to entry to the profession will be created.

The Impact on Solicitors

The probable impact that the SRA's reforms will have on solicitors is far more serious than the impact that it will have on university law schools. We live in a world where in order to become a nurse or a teacher you need to have a degree. The SQE and the new apprenticeship route to becoming a solicitor says something about the relative professional standing of solicitors. The reality in the future, like the reality now, will be that the vast majority of solicitors will have degrees. However reality and appearances can be different. Emphasising the lack of connection between degrees and qualification, as the SRA is doing, when other occupations are doing the reverse will diminish confidence in solicitors. Of particular importance is the fact that the Bar Standards Board at present are minded to do the reverse of what the SRA is doing, keeping the requirement to have a degree for qualification as a barrister but increasing the class of degree that will be necessary from lower second to upper second. With it now being possible for clients to directly approach a barrister in the future the Bar may be able to argue that barristers are more highly qualified then solicitors, especially when compared with those solicitors in smaller firms, and advertise themselves as such to the public at large.

VII
The Proposed Change:
Many Risks and No Advantages

Pointing to flaws in what exists is always possible and is sometimes valuable. Changes, however, need to be clear improvements. What the SRA has produced so far has convinced very few people apart from themselves. The SRA's reforms are an experiment that is dangerous for the solicitors' profession and dangerous for those thinking of joining it in the future. But the SRA has faith in itself and faith is often impervious to reason. Change may come but this time change will bring many risks and no advantages.

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This country is known the world over for the reputation and standing of its legal profession and the standard needed to qualify.

But the Solicitors' Regulation Authority now proposes to introduce radical changes to the process of how solicitors should in future qualify. **Professor Anthony Bradney** explains that there is every reason for the profession to be concerned.

The SRA has not produced convincing reasons for why these changes are necessary. Nor has it indicated how the proposals will improve matters. Rather, as ***Dumbing Down the Law – The SRA's Proposals for Legal Training*** shows, if implemented its reforms will severely damage the reputation of solicitors nationally and internationally.

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