

Assessment Report
Final Version
Setting Standards for the Bar Examination
in the Maldives

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Appreciation

[1] From the outset I wish to express my sincere appreciation to all who have given of their time and expertise to so enthusiastically and thoughtfully contribute to my deeper understanding of the issues and challenged being faced relating to the design and standards for future Bar Examinations in the Maldives. I include in my thanks and words of appreciation:

Bar Council of the Maldives

Maldives Qualification Authority

Members of the Supreme Court of the Maldives

New Maldivian Lawyers [1-3 year Call]

Private Practitioners

Prosecutor General's Office

School Deans and professors

Senior Member of the Police Department of the Maldives

The Attorney General

UNDP Staff and especially Ms. Fathimath Hamna Shareef

With especial thanks to Bar Council President Maumoon Hameed,

Dr. Marium Jabyn, Secretary-General of the Bar Council and to Ms.

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Background

[2] The government of the Maldives is undertaking a comprehensive reform of various facets of governance, including a review of the country's system of justice. Reform of the justice system is an integral and crucial component of the envisaged reform. As part of this reform agenda, the *Legal Professions Act* (Law no: 5/2019) was enacted in June 2019 creating an independent Bar Council to regulate the legal profession.

[3] The *Legal Professions Act* mandates the Bar Council to regulate all matters relating to the operations and services of lawyers in the country. This mandate includes issuing licenses for the practise of law, improving the quality of legal education, conducting the Bar Examination, providing additional training to lawyers, regulating lawyers, investigating and taking necessary disciplinary action against lawyers, ensuring the public has access to legal aid and representation and endeavouring to develop the legal profession in the Maldives.

[4] Implementing the provisions of the *Legal Professions Act* is a tremendous undertaking. Those charged with the responsibilities and duties under this Act are essentially starting from the ground up. Indeed, they are in the position of charting a new course for the development of the legal profession in the Maldives.

[5] The majority of lawyers in the Maldives, who are registered to practise law in the Maldives, obtained their primary qualifying certificates or degrees from local institutions. Prior to the enactment of the new *Legal Professions Act* in June 2019, persons with law degrees seeking to practise law in the Maldives were not required to take a Bar Admission Examination or indeed undertake any professional legal training courses as prerequisites to the granting of their license to practise. Thus candidates' ability to meet at least minimally acceptable standards of legal practice competence had not been tested in order for them to gain admission to the Bar.

[6] The *Legal Professions Act* seeks the strengthening of legal education as a key to improving the quality of the legal and justice sector institutions in the Maldives. Accordingly, in future it is contemplated that the issuing of licenses to practise law will be subject to successful completion of a "Bar Examination" coupled with successful

completion of a year-long legal training programme. The Bar Council views the formulation of the Bar Examination as an important step in the development process of ensuring minimum levels of competent legal practice of those entering the legal profession in the Maldives.

Outputs and outcomes

[7] The principal output of the Consultancy is this Assessment Report that addresses fundamental issues involved in establishing a Bar Examination, for the first time, as a condition for entry into the legal profession in the Maldives. The Assessment Report is based on a series of extensive interviews with all key stakeholders and a review of all relevant reports and legislation. It also includes a review of the literature related to competence and to professional and legal education. It is intended to be comprehensive in scope with a particular focus on the development of standards for the first and future Bar Examinations. The Assessment Report will include a detailed analysis of valid and fair standards and transparent criteria for assessing competence to practise law at a level of competence determined as appropriate and requisite for a person commencing the practice of law in the Maldives.

[8] The Assessment Report will address two principal issues: 1. the nature of Bar Examination Standards and 2. The most effective, fair and transparent methods of assessing legal practice competence in relation to proposed Bar Examination Standards.

The research question

[9] The research question, more broadly framed, may read, “Given accurate information about learning outcomes and knowledge acquisition achieved by law students as a result of their law school education, and given any further training that is considered necessary preparatory to legal practice, what standards of competent legal practice must an applicant for a license to practise law in the Maldives be required to meet in order to be granted admission to the legal profession in the Maldives?” The related question is, “What is the best and fairest way to measure the level of legal competence requisite for admission to the legal profession in the Maldives?”

[10] The Assessment Report is informed by several and various sources. These include, but are not limited to:

- (a) The views of the Bar Council, the Judiciary and all key Stakeholders;
- (b) Research undertaken by the Consultant;
- (c) The requirements of the *Legal Profession Act*;
- (d) Expected (and stated) performance outcomes identified in any current pre-admission legal training;
- (e) Pre-admission training curriculum content and practice;
- (f) Local law school curriculum including a review of the examinations and standards currently required to be met for successful completion of the programme;
- (g) Identification of the legal tasks that a First Year lawyer is expected to competently perform;
- (h) The range of legal knowledge, skills, contextual and situational awareness and appropriate attitudes related to competent performance of those legal tasks considered requisite and appropriate for a First Year lawyer in the Maldives;
- (i) Relevant factors in the current legal education system and their significance in relation to pre-admission training;
- (j) Relevant factors in the licensing system before and after June 2019, the date of the effect of the *Legal Profession Act*.

[11] This is the third iteration of this Report. This final version contains sufficient detail to guide and inform action in setting the standards of legal competence to be assessed by the Bar Council that must be met by all applicants for admission to the Bar in the Republic of the Maldives.

The Legal Profession Act

[12] There are several provisions of the *Legal Profession Act* that have particular relevance to the work of the Consultancy, and that also inform the decision-making of the Bar Council. I cite those legislative provisions here for reference and to also underline their

significance and relevance to the task of standards' setting. I also include some brief comments regarding their potential application.

Section 7 specifies the functions and responsibilities of the Bar Council to include:

(c) Formulating a regulation stipulating licensing conditions; and issuing, suspending and revoking licenses according to the regulation;

Comment: *stipulating licensing conditions* give may give a broader ambit of authority related to Bar examinations and threshold standards.

(d) Developing and periodically reviewing standards of legal skills required for licensing;

Comment: *reviewing standards of legal skills* clearly connotes more than simply knowledge testing.

(i) Declaring standards pertaining to the quality of the legal profession, overseeing and researching ways to improve the quality of legal services, and enforcing such standards and regularly overseeing the quality of service providers;

Comment: *Declaring standards pertaining to the quality of the legal profession* reinforces the standards setting jurisdiction of the Bar Council.

(s) Formulating regulations on admissions criteria, syllabi, curricula, and duration of courses developed at higher education institutes providing legal education;

(u) If necessary, taking action and assessing the examinations at higher education institutions in and in a multiuse providing courses on legal education;

(v) Declaring academic institutions and training centres that are approved by the Bar Council in relation to acquiring license to practice law in the Maldives.

Section 31 (a) provides that after completing their law degree at an approved institution, applicants for a license to practice law must complete the Bar Examination and required training; (b) provides that the training shall be for one year.

Section 32 provides that the curriculum, examination method, dates of examination and the eligibility criteria for the Bar Examination shall be determined by the Bar Council.

Comment: It is notable that in addition to granting the jurisdiction to determine the examination method this

provision also extends the jurisdiction to determining eligibility criteria for the Bar Examination itself.

Section 39 sets out ethical and performance standards for lawyers. These may usefully inform consideration of standards in relation to the Bar Examination. The provisions of section 39 are framed as follows:

- (a) anything that *might hinder* the rights and interests of the client, through neglect or carelessness.
- (b) To neglect necessary action that may result in *the possibility of causing harm* to the case for which the client has sought assistance
- (c) Abusing information shared by the client or any powers granted by the client or documents to one's own benefit.
- (d) Anything that may result in conflict of interest over the interest of the client or anything that may conflict with the interests of one kind and another.
- (e) *Anything that may hinder the public confidence* and those working for the legal profession.

(Italics added)

Comment: It is notable that the threshold test for the duty of care to a client is "do not risk the possibility of causing harm". This is a very high standard. It is higher than the common-law negligence test of reasonable foreseeability of harm. It is higher than the standard of "do no harm".

Section 42 also has clear implications in terms of standards for the Bar Examination it provides: a lawyer should not accept a case under the following circumstances.

- (a) if there is reason to believe that the lawyer cannot work independently; and
- (d) accepting cases that require specific area of expertise and the lawyer is not an expert in the required area.

Comment: One of the implications is that a lawyer should not be permitted to accept cases that require a specific area of expertise. It is open to the Bar Council to determine and regulate what it considers as required expertise in any given area of legal practice.

Issues Identification

[13] There is a broad range of issues facing the Bar Council in formulating and setting standards for the Bar Examination. I will list each of these issues and then discuss each of them in turn. The issues include the following:

Context

The Rule of Law

The rationale for self-regulating professions

The legal profession as a self-regulating profession

Pillars of the Rule of Law: Independence of the Judiciary and Independence of the Bar

Protection of the public

Values underpinning decision-making

International trends

Trends in legal education

Standardisation

Law schools' curricula

Design options for law school curricula

Transparency of the learning and testing environment for law students

Written resource materials

The necessary qualifications of those who profess, teach and practise law

Learning objectives and learning conditions

Assessment of the attainment of learning objectives

Year or month long legal training course as a necessary precondition to taking the Bar Examination

Language

Language as instrument

Language as culture

Language for learning international legal norms and values

The language question and how it shapes legal education in the Maldives

The language question and how it shapes the legal profession in the Maldives

Legal Competence

Defining legal competence

Competence assessment

Explicating competence assessment

Options for legal competence assessment

Options for the assessment of legal competencies

Implications of competence assessment

The need for competency-based learning

The need for law faculties to be able to conduct competency-based learning
The need to train assessors (examiners) in competence assessment
The need for appropriate facilities for training and assessment

Context

[14] The nascent stage of the regulation of the legal profession in the Maldives makes it vulnerable to forces and interests intent on maintaining the status quo ante. However, the purpose of the new *Legal Profession Act* is very clear. It is the establishment of an independent and impartial institution, the Bar Council, that issues licenses for legal practice and that regulates the legal profession with a dual emphasis of enhancing the integrity of legal services and increasing the quality of legal education underpinned by a clear concern to ensure the protection of the public. This legislated purpose cannot be achieved by deference to the status quo ante. The practice of law is an earned privilege not a right.

First Do no harm

[15] The paramount principle that underpins the regulation of the legal profession, as it does most self-regulating professions, is the protection of the public. The injunction of this principle is *Primum Non Nocere*. First, do no harm. However, as we have observed, the underlying injunction of section 39 the *Legal Profession Act* goes further. It can be summarised: "Do not risk causing harm"!

[16] *The Legal Profession Act* contains several provisions the sole purpose of which is to seek to ensure the protection of the public from lawyers who are not competent, who are not ethical, who do not work to the best of their capacity to assist their clients, or who undertake legal work for which they are not qualified to act or qualified to act independently.

The Bar Council as Gatekeepers and Protectors of The Public Interest

[17] The role of the Bar Council includes that of Maldivian society's gatekeepers to the legal profession. The Bar Council has to be confident that those persons to whom it gives access to the profession of law are sufficiently competent and ethical that their

practice of law will not risk harm to clients or society. As one interviewee said to me, there are many issues that for clients are life and death issues. Maldivian society has a legislated right to have assistance from lawyers who are competent and ethical. The legal rights of an applicant for admission to the Bar are few when compared to the rights of a lawyer who has been called to the Bar. For evidence of this one only has to review the caselaw on the topic of the rights of professionals to continue their practice even in the face of serious disciplinary issues and findings. It is far better in terms of cost to society, to regulatory bodies, to the reputation of the profession and to clients who may be harmed, to ensure that persons unfit for the practice of law do not gain admittance to practise it.

Fairness and practice rights

[18] For those whose concern is the fairness of the process for admission to the Bar, the process for admission must meet the highest legal standards. At the same time it needs to be acknowledged frankly that a law degree is not a passport to the right to practise the profession of law. This is now acknowledged in many jurisdictions. It has prompted law school administrations to rethink the purpose of the law school and the nature of their curricula. It has resulted in reconceiving law schools as professional schools for the learning of the knowledge, skills and attitudes by persons, the majority of whom, will seek admission to the practice of law. The interrelationship between education and practice is pithily framed by Murphy (2000, p. 357) “The future of legal education will depend on the future of law. The future of law will depend on the future of legal practice”. The competence of lawyers informs and supports the Rule of Law.

Legal competence - the foundation of the Rule of Law

[19] The interpretation and application of law is by the legal profession. Advocacy, for example, is rightly viewed as a core legal skill (Mannion, 2010; Nathanson, 1997). “Judicial decisions are shaped by the quality of advocacy in the courts. The quality of advocacy in the courts is a function of the education and training of lawyers” (Tobin, 2014). But more than that, effective and efficient trial advocacy is of root significance to issues of fairness and justice, of access to justice and to the provision of client-centred legal services (Albiston & Sandefur, 2013; Maru, 2010; Rhode, 2013 cited in Tobin, 2014).

The relevance of legal education to legal practice

[20] Underpinning the question of what constitutes competent advocacy, for example, is a question about the nature and relevance of legal education to legal practice (Adcock, 2013; Salyzyn, 2013; Spieler, 2013; Tanford, 1991 cited in Tobin, 2014a). The view from the Bench and the Bar is that practical competencies, such as courtroom skills, are neglected in law schools (Edwards, 1992; Newton 2012). The same assessment can be made of a broad range of legal practice competencies.

The need for the reform of legal education

[21] The need for the reform of legal education is not confined to the Maldives. I refer to numerous ‘watershed reports’ and related discussion papers from the United States (Backer, 2008; McCrate, 1992; Sullivan, et al., 2007); from Canada (Arthurs, 1983); from England and Wales (Ormrod Report, 1971; Boon, & Webb, 2008; Webb, Ching, Maharg & Sherr 2013); from Hong Kong (Gold, 1991); and from Australia (Coper, 2008). The conclusion from this review is that there is an apparent “consensus about the parlous state of legal education” (Tobin, 2014).

[22] This conclusion finds further support in a range of literature that discusses the future of legal education. The situation is perceived to be so dire that one author views the state of legal education and law schools as the proverbial canary in the coal mine of higher education (Matasar, 2014). Different aspects of the same concern, about the future of legal education, occupy the thoughts of many in legal education and the legal profession (see Fitts, 2011; Kift, Field & Wells, 2008; Kornet, 2014; Lansdell, 2009; Moliterno, 2014; Nichol, 2014; Olivas, 2013; Ribstein, 2011; Silver, 2014; Zeppos, 2007). What is noticeable about these papers, authored mainly by legal academics, is the failure to identify strategies to bridge the gap between legal education and legal practice.

The disconnect between legal academia and legal practice

[23] The literature in the main sees a pronounced “disconnect” between academia and the real world of legal practice. It is cited as the principle reason why legal education is

failing to adequately prepare lawyers for legal practice (Boon, Flood, & Webb, 2005; Coper, 2008; Edwards, 1992; Irish, 2006; Jones, 2013; Joy, 2013; Kruse, 2013; Maddi, 1978).

Epistemic uncertainty

[24] Boon, Flood, and Webb (2005, p.79) point also to an admixture of “epistemic uncertainty” about the nature of legal education combined with ad hoc responses “to national, regional and globalising pressures” as giving rise to and exacerbating the core concern about the relevance of legal education to legal practice”. The literature speaks to an increased emphasis on the teaching of legal skills and competencies and a lessened emphasis on legal doctrine (Burrige, 2005; Burton, & McNamara, 2009; Davis, 2006; Krannich, Holbrook, & McAdams, 2008; Kruse, 2013; Yates, 2011).

Fit for practice

[25] The central concern is whether the current curricula of law schools constitutes adequate preparation for legal practice. Stimulated by this concern, there is growing agreement of the need for structural change in legal education (McEntee, Lynch, & Tokaz, 2012), for changes to legal education curricula, educational methods and student assessment (Newton, 2012), and for the subordination of the teaching of theory to the teaching of practical skills (Maxeiner, 2008; Yates, 2011).

The need for empirical research

[26] Moreover, legal education and legal practice are not informed by empirical research (Edmond & Hamer, 2010, p.675). Empirical legal research, derived from legal practice, has the greatest potential for effecting change in legal education (Schön, 1995; Cane & Kritzer, 2010; Findley & Sales, 2012). “One of the most challenging problems in legal scholarship is the measurement of attorney ability” (Abrams & Yoon, 2007, p. 1145). This may be due to the fact that there is little in most law schools' curricula that could be described as competency-based learning. Few law professors are educated in the science and skills of how to conduct empirical research.

International trends

[27] International trends are impacting legal education and the regulation of the professions (Leighton, 2014; Taylor, 2012, p. 84). These trends include the development of international standards for higher education and also international standards for regulating the professions (Bird, 2013; Faulconbridge & Muzio, 2009; Webb, 2013; Webb, Ching, Maharg et al., 2013) and for law school accreditation: “Standards form the architecture for legal education” (Conison, 2011).

[28] This is reflective also of a new transnational perspective that is shifting focus away from book law and onto “law-in-action” (Davis, 2007, p.39). A competent barrister should have no difficulty in appearing before any court in the commonwealth. Should the same not also hold true for a barrister from the Maldives?

Standardisation

[29] The issue of the need for standardisation of legal education and law school curricula in the Maldives was a consistent theme mentioned by my interlocutors in the Maldives. The *Legal Profession Act* provides the Bar Council with the legal authority to begin to reshape law school curricula. This includes not only the learning experiences but how they are managed. It implies the need for new learning from the faculty themselves so that they can effectively make the transition from lecturers to managers of learning experiences. This is not a new area of educational practice. Many of the principles that would inform a redesigned learning process for law schools can be found in the adult education literature and professional education literature and related research as well as problem-based and competency-based learning.

New resource materials

[30] Another implication is the need for new written resource materials and other learning tools such as the use of multi-media. These considerations also raise the question of the necessary qualifications of law faculty and their leaders. There are some key principles that can inform the process of standardisation in the positive sense that it seeks to ensure fairness.

The length of training courses

[31] Another question that has been raised is about the length of a post law degree training course as well as the time that should be allocated for the sitting of the Bar Examination. Of course, neither question can be addressed in the abstract. The time allocation is a consideration only after the learning and assessment objectives have been determined along with the most appropriate methodologies for their delivery, application and testing. Competency testing necessarily must inform how much time is required to conduct the assessments. One of the best ways to do this is to pilot test the assessments to address their sufficiency, related logistics and issues of standardisation and from this experience calculate the amount of time that would reasonably be required to administer the Bar Examinations and in what circumstances.

Language

[32] One of the most significant issues, and one mentioned by almost everyone I have interviewed from the Maldives in connection with standards for the Bar Examination, is that of language. It is an issue for the obvious and valid reason that Dhivehi is the mother tongue of the Maldives and its population. It is a language that is a defining element of the culture of the Maldives. It is the official language of the Republic of the Maldives and it is the language of the courts, the legislation and of people's everyday interactions.

[33] However, the introduction of English as a medium of instruction, at secondary and tertiary level of education, and because of the government's recognition of the opportunities offered through tourism, the use of English is now firmly established in the Maldives. "As such, Maldives is quite similar to the countries in the Gulf region" (cf. Randall & Samimi, 2010; Boyle, 2012 cited in Meierkord, C. (2018)).

[34] Moreover, the teaching basis for the traditional core of English common law subjects, Contract, Torts, Constitutional and Administrative Law, Land Law, Equity, Trusts, and Criminal Law is found in legal precedents in English and in legal texts in English. The dominant language of international commerce is English. The dominant language of treaties and international law is English. The question comes down to an issue of practice competence. That is, whether or not lawyers in the Maldives must be sufficiently fluent in English to permit them to practise in areas of the law that are transacted in English and that

are informed primarily by precedents in English and the English Common Law. As another interlocutor stated to me during one of the many interviews I have conducted, “Higher education is not an oral tradition. It relies upon the written word with reliance on written text books and research”.

Legal Competence

[35] Definitions of professional competence are context dependent. However, a shared characteristic of professional competence, irrespective of the profession concerned, is the ability to perform complex core tasks by integrating and applying appropriate knowledge, skills, attitudes, and situational and contextual awareness to domain specific problems according to accepted professional standards. (Tobin, A.G.V. (1987); Tigelaar, D., & van der Vleuten, C. (2015)). Gilbert imports the notion of “worthy performance” in a specified professional domain into the definition of competence. For Gilbert, competent professionals are those who can create valuable results without using excessively costly behaviour (Gilbert, T. (1978)). This definition has particular relevance to professions such as law and medicine. In law the least costly behaviour is measured not only in financial terms but in human terms. In medicine this fits with the adage that the cure should not be worse than the disease. And coming closer to education and training for competence, Grant et al. (1979) assert that a competence-based education tends to be a form of education that derives a curriculum from an analysis of a role in modern society and that attempts to certify student progress on the basis of demonstrated (acceptable) performance in some or all aspects of that role.

Legal Task Analysis

[36] The starting point in transitioning to competency-based learning and assessment is the analysis of a lawyer’s role in modern society. This involves an analysis of the legal tasks most commonly undertaken by the general practitioner. If one identifies the relevant knowledge areas of the law this assists in providing the knowledge basis that informs and underpins the legal tasks. Key or critical performance elements of and within the tasks can be identified. Exemplary practitioners can readily identify these critical elements. They form the sine qua non of the competence assessment.

Competence Assessment

[37] How does one test for competence? The best testing is criterion sampling (McClelland, 1973). It is an obvious point that we all know. If you want to know how well a person can drive a car (the criterion – “can drive a car” - or in our context - can “drive” a legal task) then you sample his or her ability to do so by giving a driving test. You do not give a paper and pencil test and ask the testee to describe all of the key steps involved in driving a car! Even a perfect score on the paper and pencil test does not necessarily confirm the person’s ability to actually drive a car and to requisite and generally known standards. Paper and pencil measures, such as multiple choice and short essay answers, are not comparable or interchangeable with hands-on measures of the performance of real life tasks (Shavelson, 2010). On the other hand, tests that sample and measure performance of professional tasks are more likely to predict competent performance on the job (McClelland, 1973, p.7).

Criterion sampling

[38] Criterion sampling involves both theory and practice. If you want to know how to conduct an effective legal interview you need to know how the behaviours of good and poor legal interviewers differ. If you want to know how to conduct an effective cross examination then you need to know the behaviours of good and poor cross examiners. The same can be said of most legal skills, that is, we can observe and discriminate between good/effective and poor/ineffective performances in legal reasoning, legal drafting, legal argument, written and oral advocacy, legal advising, legal problem solving, legal negotiating, legal research and so on. We can observe the behaviours and often also their results.

Observable behaviours

[39] When engaged in the performance of a legal task not only the lawyer’s behaviour, or that of a candidate for the Bar, can be observed but also the level of the performance of the legal task can be observed. If we want to assess legal competence in an area of legal practice then we know there is a “domain of legal knowledge” and a “domain of legal practice know how” that consist of many performance and knowledge elements.

[40] However, it is not practical to observe all of those elements for the purposes of an assessment. For an assessment we need to make a purposive selection of samples of behaviour from which it is reasonable to draw inferences, interpretations and make assessments. The purposive sample includes legal tasks that are critical, that are frequent, and that are identical to or closely resemble the real task in the real world. These elements can be drawn from and by experts in the particular legal task under consideration or being researched.

[41] The elements of a competency assessment:

- a. A skill, a physical or intellectual ability or both
- b. A performance capacity that involves doing as well as knowing
- c. Standardization of the conditions under which performance is observed
- d. Some level or standard of performance (at a level sufficient to be able to perform the task in an appropriate professional work setting to an acceptable standard and also consistent with appropriate ethical standards). If the standards are met then the performer is declared competent at the level of the competence standard that has been applied.
- e. Competence can be improved. That is the professional continues to improve and enhance their competence so that any assessment is never definitive or final. It is a lifelong learning project. In the process the professional is provided with detailed competency assessment criteria that they may use to self assess their progress and improvement.
- f. It is underpinned by a complex ability that consists of a bundle or accumulation of less complex abilities and skills and these place a high cognitive demand on the performer. In addition to the cognitive skills, competence also includes conation – the will to act - and emotion that fosters empathy. It is not separated from real life and includes personal and social responsibility skills and ethics.
- g. It needs to be observed in real life situations (or simulations that reproduce key elements of the situation) to which the professional tasks are applied.

(see Shavelson, 2010, at p.44)

How to construct a legal competence assessment

[42] Let us move from the theoretical to the practical. I will set out each of the key steps involved in the construction of a competency assessment and provide a brief commentary on each.

1. Identify The Legal Practice Area

If one is devising a legal competence assessment the first step is to identify the legal practice area from within which to select those tasks that are representative of its core elements.

2. Select A Purposive Sample and identify the legal tasks and related legal knowledge

Depending on the number of core elements identified, it may be necessary to identify and select a purposive sample that consists of observable tasks and that identifies the skills and knowledge required for their performance.

3. Develop Performance Standards

Develop performance standards for completion of each legal task. These standards reflect measurements in relation to observed behaviour, or in some instances the product of the observed behaviour or both. This requires the legal task to be analysed in detail in terms of its constituent critical behaviours the absence of any one of which would make the accomplishment of the task either impossible to perform or that prevents effective performance of the task to the extent that the task does not accomplish its primary objective. This includes, necessarily, the accuracy of the legal information that is used or relied upon in the performance of the task.

4. Record a range of performances of the legal task

Gather empirical data about the legal task. This may take the form of video recordings of the performance of the legal task each demonstrating the core elements that are under examination. It may include the identification of exemplary legal products such as pleadings and contracts and related interviews with their authors that identifies the critical tasks that went into their production. This creates what I refer to as “stimulus material”. It is used for several purposes.

It is scrutinized by the practice experts to identify or confirm the critical behaviours involved in the completion of the task as well as the related supportive or facilitative behaviours. It assists in identifying ways in which the legal knowledge elements are made explicit. It identifies other variables that may affect the assessment and seeks to identify ways to “standardise” the context for observations. Importantly, it can be accessed by students for learning purposes.

Add to the stimulus materials "practice materials" taken from or closely modelled on exemplary legal products, such as legal briefs and opinions, brief contracts, written legal argument. For all of these products context materials need to be added, that is to say a description of the real world circumstances that gave rise to their creation and use. The stimulus materials should include documents such as letters of instruction from senior lawyers and clients; correspondence from opposing counsel challenging an interpretation or application of legal principles; trial briefs, trial transcripts, appellate judgements and the like. All of these legal practice materials once assembled can be created deployed in the construction of the relevant competency assessment. They also form a basis for course materials in acquiring or enhancing performance in the relevant competency.

5. Construct a “Behaviourally Anchored” Checklist and Performance Guide that also Serves as the basis for an Assessment Tool.

The core elements or critical behaviours can identified, observed and therefore be measured. Measures can include frequency, context timing of the use of the skill, procedural sequencing, appropriateness of the use of the behaviour in the specific context, the selection of the use of behaviours appropriate to the skill, the nature of the performance of those behaviours, the use of language, the accuracy of the legal knowledge presented or applied, the clarity of communication about legal issues and legal tests, accurate identification and presentation of key facts, the relevance of the behaviours to the skill and to the task and how well those behaviours are executed. The result of this detailed analysis is the construction of a “behaviourally anchored” checklist and performance guide that can also serve as an assessment tool. This performance guide is given to the learners so that they know the performance criteria for the execution and improved performance of the skill as well as the criteria that will be used in the assessment for the Bar.

6. Create & Test The Assessment Tool And Train Raters

Test the assessment tool and train raters to a level of general consistency in its use and application. Train law teachers who are transitioning to competency-based learning in its application and use.

7. Assess inter-rater reliability

Undertake research on inter-rater reliability on the use of the particular assessment tool with a range of varying performances and raters.

Behaviourally anchored Rating Scales (BARS)

[43] There are a range of options to consider regarding the assessment of competence. However, the key factor in the use of any appraisal tool or instrument is that of fairness. One could, for example, have assessor's rate performances they observe on the basis of some general criteria the application of which derives from the assessor's subjective view of the level of competence of the observed performance. The bias that is introduced with subjective opinions is hard to minimize even with the best of intentions of the assessor (Millard, Luthans & Ottheman, 1976; Schrader et al., (2007) cited in Debnath, S., Lee, B., & Tandon, S. (2015)). This is the principal reason that I recommend the use of an objective rating scale that not only is it constructed from an analysis of real world legal tasks but that the rating scale also serves as a key learning tool in the acquisition of the skills that underpin the task and provides a basis for criterion-referenced feedback. Ultimately, what is being sought is a professional who is involved in a continuous process of lifelong learning and competency enhancement. The latter is facilitated when the professional has to the ability and tools to self-assess their own performances in legal practice.

Additional advantages to the use of BARS

[44] There are additional advantages to the use of BARS that are borne out by the research. They are superior to other evaluation instruments in terms of utilization and qualitative criteria, such as rating accuracy and feedback (Borman, 1986; Jacobs et al., 1980; op cit.). They are more effective in bringing about behavioural change (Hom et al., 1982, op cit.). Involving raters /assessors in their development provides frame-of reference training for the raters (Woehf & Huffcutt, 1994 cited in Debnath, S., Lee, B., & Tandon, S. (2015)). This common frame of reference helps improve inter-rater reliability (Cardy & Dobbins, 1994 op

cit.) and contributes to higher rating accuracy than other appraisal methods (Bernardun & Beatty, 1994, op cit.).

Fairness aspects

[45] The fairness aspects of the design and use of BARS are worth emphasising. The fairness perception is related to the fact that (a) evaluations are designed to capture the actual performance behaviour; and (b) each step in the process, such as clarification of performance behaviours and standards and feedback, is transparent. The other positive aspect is that they are better placed to meet legal requirements than many other evaluation methods (Malos, 1988 cited in Debnath, S., Lee, B., & Tandon, S. (2015)). The research literature also indicates supportive findings related to their psychometric characteristics in terms of reliability and validity.

The unique strength of BARS to enable detailed and effective feedback which leads to performance improvement

[46] Of compelling importance is the unique strength of BARS to enable detailed and effective feedback which leads to performance improvement because of the clarity and specificity of the feedback. One of the criticised shortcomings of the use of BARS is when they are applied in industrial workplace settings. One of the key reasons for this is that in those settings, due to rapidly changing business environments, workplace tasks are continually evolving. This is less the case for the practice of law. The advantage in the legal profession is that core legal tasks, such as interviewing, advising, and advocacy tend to remain consistent without undergoing radical change. Thus the use of BARS in legal education and training and the use of the same BARS for competency assessment is a clear advantage for the learner. This is not to say that the practice of law does not require the addition of new competencies such as practice management, the use of databases, computerised software and communications and records technology.

[47] The use of behaviourally anchored rating scales (BARS) both as elements of performance assessment as well as their use as performance guides in the learning or enhancing of skilled performance has a history of acceptable use for the past fifty years (Debnath, S., Lee, B., & Tandon, S. (2015)). More studies have investigated the use of BARS than any other methods (Cardy, R. & Dobbins, G.H., 1994 cited in Debnath, S., Lee, B., & Tandon, S. (2015)).

Example of a Behaviourally Anchored Rating Scale Used to Assess Competence in an aspect of Trial Advocacy

[48] I set out below an extract from a behaviourally anchored rating scale that I designed and applied in the in-court appraisal of the performance of prosecutors. I trained a team of 12 senior prosecutors in the application of the assessment criteria and the scales. They went to court and observed trials and noted and recorded, in this case, the frequency of the behaviours that were considered critical to effective performance.

[49] A competency element of the legal competence of advocacy is the opening address. There are major performance elements in the competency of conducting an opening address. Some of these elements include:

Set out the theory of the case

Explain the theory of the case

Use clear and straightforward language

Organize the presentation logically

Provide the trier(s) of fact with a useful frame of reference for listening to and assessing the evidence

Identify all major issues in the case

[50] In this example, six performance elements have been selected that are considered key elements of the legal competency of presenting an opening address before a court. Each element can be observed as well as the frequency of its occurrence. For example, only part of the opening address may be logically organised or the use of clear and straightforward language may vary according to the nature of the topic being presented. Thus not only the behaviours but the frequency of their use can be observed and recorded.

[51] In the following excerpt from the Opening Address BARS, each scale represents a major performance dimension of the legal competence under scrutiny. The scale is usually anchored by critical behaviours involved in the accomplishment of the task. In identifying the behaviours the emphasis is on those tasks that are observable and that reflect various levels of desirable performance. The critical behaviours are those that the assessment team has identified as so essential to overall competent performance that their omission alone, notwithstanding other behaviours, is tantamount to incompetence.

Purpose

The In-Court Performance Appraisal and the comments which are made on several of the performance criteria have several purposes:

1. To attempt to make explicit the performance standards or expectations which inform the various evaluation criteria;
2. To attempt to minimize any tendencies towards subjective appraisals by providing the appraisers with a specific guide as to how to apply the performance criteria;
3. To provide Counsel with information about the general meaning of the assessment criteria and how they might be applied.

Rating Scales

A four point scale is used in this appraisal instrument with respect to each and every performance measure. The scale is described in the form as follows:

Sometimes often mostly always

The extreme left hand part of the scale is the lowest rating and indicates the frequency with which a specific performance was observed. (RD) means it was observed infrequently or **sometimes**. The next rating (CI) means that the requisite performance was observed **often**. The next rating (C2) means that the requisite performance was observed most of the time (**mostly**). A rating of (E) means that the requisite performance was observed consistently all of the time (**always**).

The initials RD; CI; C2 and E have been selected here to correspond to the designations used by the Annual Performance Review document. There these initials are abbreviations for the following "requires development"; "competency level 1"; "competency level 2"; "excellent"

Your task as appraiser (rater) is to measure the "frequency" of the desired performance.

OPENING ADDRESS

11 The theory of the case was clearly set out

Clearly = unambiguous; intelligible; distinct; not confused; certain; well-defined; clear cut.

[] [] [] []
Sometimes often mostly always

12 The explanation of the theory fit well with the facts

Fit well = match; correspondence; consistent with; coinciding with; in accordance with.

[] [] [] []
Sometimes often mostly always

13 The theory of the case was explained in simple language

No specialized legal terms or terms of art were used or if they were used an understandable explanation was given of them.

[] [] [] []
Sometimes often mostly always

1.4 The explanation of the theory and related facts was logically organized

Logically organized = according to a particular scheme or chain of reasoning.

Sometimes often mostly always

1.5 All the major issues were identified

At a minimum counsel has identified all those issues on which the case turns

Sometimes often mostly always

1.6 The opening provided the trier(s) of fact with a useful frame of reference for listening to and assessing the evidence

Counsel has given the trier of fact a framework or organizational structure within which to place the evidence and has also provided the trier of fact with criteria which are specific and relevant to this case which can be used to test the evidence

Sometimes often mostly always

[52] It is also possible to provide a further level of assessment detail by making this scale qualitative. The risk in doing so is that it introduces a subjective factor into rater's assessment. That is why, in this opening address example, the raters are trained to observe specific behaviours and their frequency. At a later stage in the analysis the judgement can be made to set "mostly", for example, as the measure of acceptable competence and that the overall assessment of competence in the conduct of an opening address at a minimally acceptable level could be based on achieving a rating of "mostly" on at least 4 of the performance elements and a rating of no less than "often" on the remaining two performance elements. Another way of addressing the rating issue is to identify some of the performance elements as critical, such as for example, **The theory of the case was clearly set out**. Failure to perform this element "mostly" or "always" could result in failing to meet the requirements for conducting a competent opening address. This type of task and competency analysis can be undertaken for every element of the conduct of a trial by a lawyer.

Detailed descriptions of the legal practice competencies

[53] Detailed descriptions of the legal practice competencies can be used to build assessments. Empirical study is the preferred method for determining various levels of competence. One way to identify the elements of a practice competency is to interrogate exemplars in specific areas of legal practice. Competence links knowledge with skills along a spectrum of performance of legal tasks. A candidate's legal competence can then be

assessed with reference to tasks that can be assigned or designed to be performed at specific levels of difficulty.

[54] There are various decision points that have to be taken along the road to the design of competence assessments. These include:

Whether competence is described or reported at a single level or across different components of overall competence. (Consistent with the analysis being offered here, the preferred approach is assessment across different components of overall competence in a defined area of legal knowledge and legal practice).

Whether candidates all complete the same assessment tasks or complete different samples of assessment tasks. (The answer is mainly influenced by the governing logistics and the timing and sequencing of the assessments).

Characteristics of the assessment tasks

[55] The make-up of the assessment tasks should generally have the following characteristics:

Reflect a balanced view of all aspects of a legal competency;

Have an intrinsic worth and face validity and be of interest to the candidates;

Relate to authentic legal tasks rather than contrived situations, sometimes even with real world challenges such as incomplete facts or irrelevant data;

The tasks should be transparent so that candidates know the range of acceptable responses;

All critical or essential tasks are included;

Some tasks might be dependent. So, for example, the task might involve various parts such as legal research the results of which inform possible solutions to a problem presented in a memorandum from a senior partner in the law firm that requires solution for which the candidate has to prepare a legal opinion.

[56] By this stage of our analysis it is becoming evident that competency assessments take more time to complete and have a higher cognitive load because they are more complex. There are also more design considerations than for a paper and pencil assessment. Design issues include the layout of the task and the amount of scaffolding that may be required to support the task. Again, the "scaffolding" requirements are

circumscribed as the principal venues for the execution of most legal tasks are law offices, law libraries or the courts. However, for the assessment of interactive skills such as questioning, advocacy and advising there is a need for persons to play roles such as client, witness, defendant, claimant and judge.

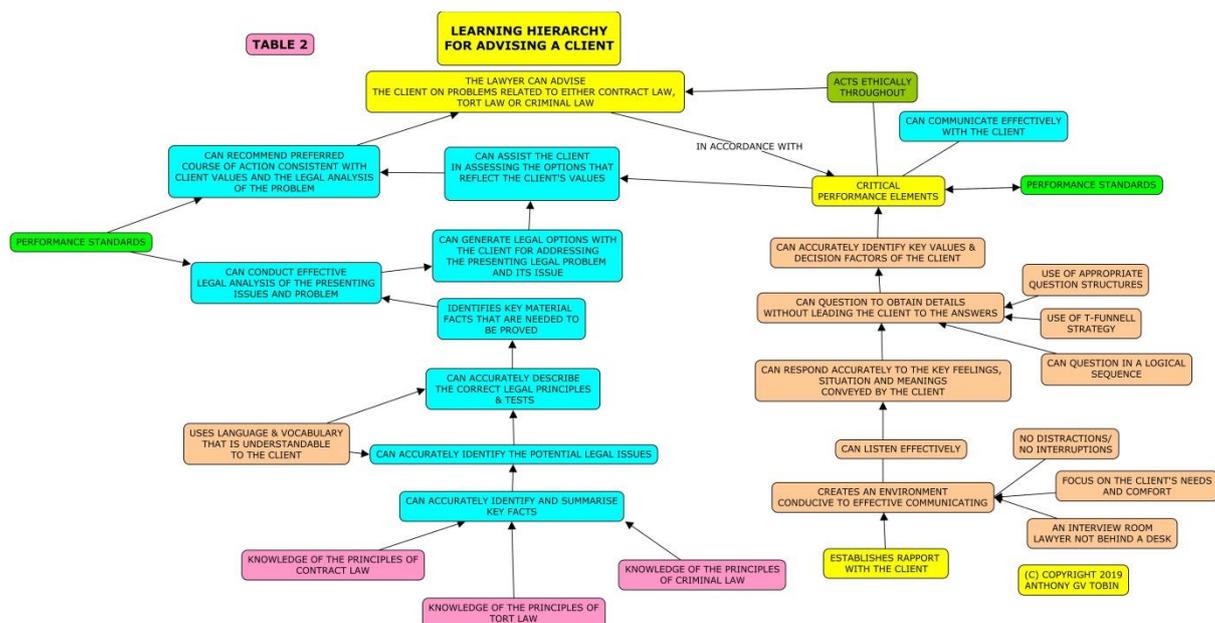
Learning Hierarchies: identifying and sequencing the core elements of legal competencies

[57] It may be helpful to illustrate how one might identify the legal tasks of a lawyer that are involved, for example, in "Learning Hierarchy for Advising a Client" (See Table 2). Identified tasks are organised into learning hierarchies (See: Gagné, R. (1961)). In Table 3 I have detailed the elements of some Standards for the competencies of "Advising a Client" and some related Quantified Performance Standards in Table 3A. Table 4 is a learning hierarchy I constructed for Oral Legal Argument (a subset of which is written legal argument).

[58] The hierarchies identify the tasks, the key skills and indicate performance standards for each task (the latter are too detailed to include in the Table and are addressed later). Having a list of predetermined behaviours allows the assessor to rate the frequency or occurrence of effective and ineffective behaviours. This option allows little discretion for the assessor except that the assessor also has to rely on their own expert knowledge of the law and expert understanding of the particular facts of the scenario to place the ratings in an appropriate analytical context. Of course, if, in the example of legal argument, the candidate is also required to prepare an outline plan of their written argument, that plan can also be subject to assessment using a behaviourally anchored rating scale. This legal product also provides the opportunity for additional and objective corroborative evidence of the candidate's level of performance regarding the construction of a legal argument. Another alternative is to assess the candidate solely on their preparation of written legal argument if the intent is not to include assessment of oral argument as a feature of the overall examination. In that case the assessment standards that apply are those relating only to written legal argument.

[59] You will find in Table 2, (next page), a Learning Hierarchy constructed for "Advising a Client". The Table is read from the bottom upwards. At the base of the Learning Hierarchy are three legal knowledge domains: contract law; criminal law and tort

law. The Hierarchy assumes that the candidate / student has the requisite legal knowledge in each of these domains. The Hierarchy establishes the learning progression of dependencies. Each competency cluster contains complex skills, sub-skills and substantive and procedural knowledge. This Learning Hierarchy contains the core elements for the construction of a learning module through which the student/candidate can acquire the requisite skills to competently advise a client. There are performance guides and assessment standards for each of the core competencies.



[60] Tables and 3 and 3A, (next two pages), describe some performance standard elements related to competencies of the Learning Hierarchy for Advising a Client (Table 2). Those competencies are in the left-hand column. The performance elements are in the light green rows. The rating scale is based on a frequency count of the critical behaviours. In Table 3A the same performance assessment criteria are given a numerical weighting with 5 being the highest.

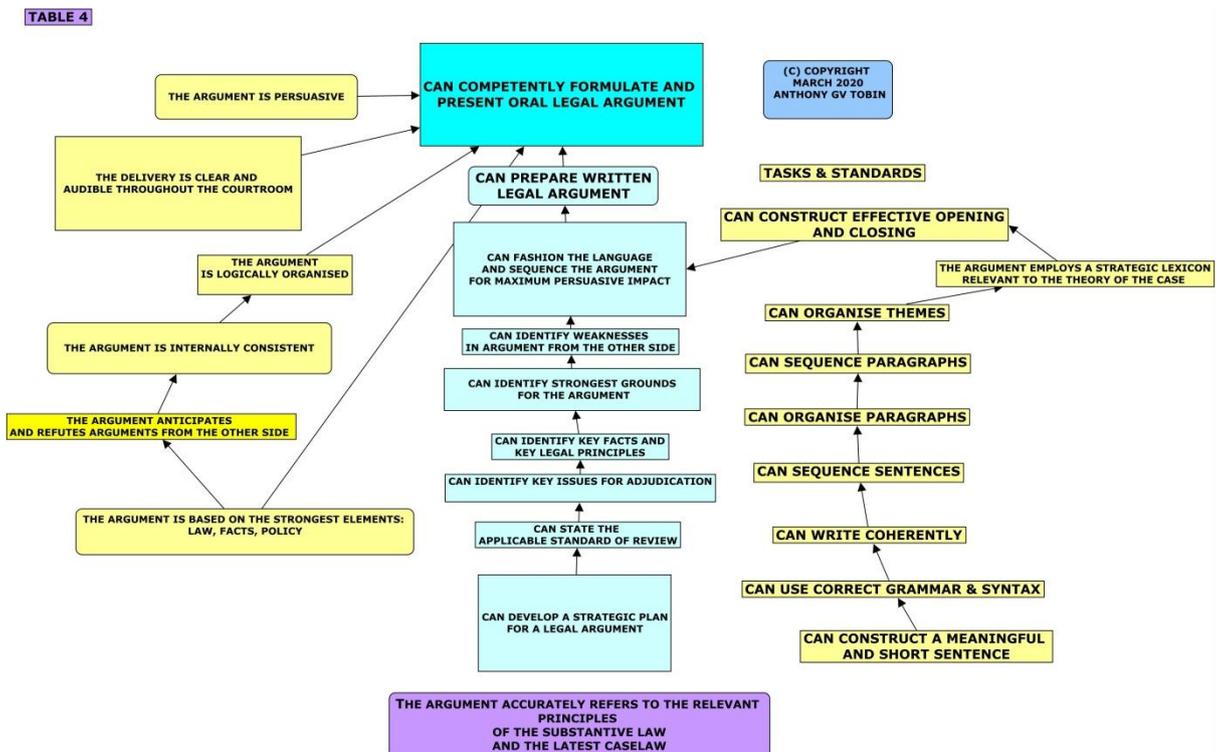
Table 3: Some Performance Standards					
Competency	Based on Constituent Elements of some the Core Competencies of Advising a Client				
Can accurately identify potential legal issues	explains accurately and clearly the relevant legal principles	assesses the relative strength of the case and the evidence	accurately describes potential legal defences or challenges	answers all client's questions	Unable to answer client's key questions
Frequency scale	rarely	sometimes	often	mostly	always
Can accurately identify client's key values and decision factors	assists client assess what is important to them	assists client identifying decision factors	explains how these values will be reflected in their decisions	seeks clarifications to obtain certainty	Fails to ask client about what's important to them
Frequency scale	rarely	sometimes	often	mostly	always
Can question	purposefully sequences questions to effect	uses question structure appropriately	questions are contextually accurate	uses T-funnel technique	Disorganised / unorganised questioning
Frequency scale	rarely	sometimes	often	mostly	always
Can respond accurately to key feelings, situation and meanings	Identifies feeling and its intensity	accurately identifies key actors and their behaviours	accurately reflects to client why this is important to them	Ensures client affirms lawyer's communication of understanding	Does not provide accurate response to client's feelings
Frequency scale	rarely	sometimes	often	mostly	always
Can formulate an accurate listening response	Identifies feeling and its intensity	accurately identifies key actors and their behaviours	accurately reflects to client why this is important to them	Ensures client affirms lawyer's communication of understanding	Listening response is inaccurate
Frequency scale	rarely	sometimes	often	mostly	always
Can create environment conducive to effective communication	No distractions No interruptions Appropriate lighting	asks about client comfort; Client is not offered subordinate seating	attends effectively /posture/distance/eye contact, etc.	uses language appropriate for the client warm, respectful and professional voice tone	No eye contact with client; does not attend to client; fails to communicate interest and attention
Frequency scale	rarely	sometimes	often	mostly	always
Prepared by Anthony G.V. Tobin, September, 2020					

Prepared by Anthony G.V. Tobin, September, 2020						
Table 3A: Some Performance Standards						
Based on Constituent Elements of some Core Competencies of Advising a Client						
Quantifying Performance Elements						
Competency						
1		5.0	4.0	3.0	2.0	1.0
Can accurately identify potential legal issues	explains accurately and clearly the relevant legal principles	assesses the relative strength of the case and the evidence	accurately describes potential legal defences or challenges	answers all client's questions	Unable to answer client's key questions	
2		5.0	4.0	3.0	2.0	1.0
Can accurately identify client's key values and decision factors	assists client assess what is important to them	assists client identifying decision factors	explains how these values will be reflected in their decisions	seeks clarifications to obtain certainty	Fails to ask client about what's important to them	
3		5.0	4.0	3.0	2.0	1.0
Can question	purposefully sequences questions to effect	uses question structure appropriately	questions are contextually accurate	uses T-funnel technique	Disorganised / unorganised questioning	
4		5.0	4.0	3.0	2.0	1.0
Can respond accurately to key feelings, situation and meanings	Identifies feeling and its intensity, situation and meaning	accurately identifies key actors and their behaviours	accurately reflects to client's meanings - why this is important to them	Ensures client affirms lawyer's communication of understanding	Does not provide accurate response to client's feelings	
5		5.0	4.0	3.0	2.0	1.0
Can formulate an accurate listening response	Identifies expressed feelings and its intensity	accurately identifies key actors and their behaviours	accurately reflects to client why this is important to them	Ensures client affirms lawyer's communication of understanding	Listening response is inaccurate	
6		5.0	4.0	3.0	2.0	1.0
Can create environment conducive to effective communication	No distractions No interruptions Appropriate lighting	asks about client comfort; Client is not offered subordinate seating	attends effectively /posture/distance/eye contact, etc.	uses language appropriate for the client warm, respectful and professional voice tone	No eye contact with client; does not attend to client; fails to communicate interest and attention	

Competency Assessment criteria are public

[61] How to pass a competency assessment is public knowledge. This means that, at the least, the assessment criteria are known in advance by the candidate / test taker. The assessment criteria also serve as performance guides for the legal tasks that are under scrutiny. Indeed, the performance guides are key elements for the learning of the competency.

Table 4: Can Competently Formulate and Present Oral Legal Argument



[62] It will be observed that in Table 4 that legal knowledge underpinning the hierarchy is assumed to be known. Indeed, not only must the relevant legal principles be understood they must also be fastened to the key facts and appropriately discriminated and explicated. In this example of the competency of legal argument it is evident that "can prepare written legal argument" is a subset of "can present oral legal argument". Accordingly, in the assessment of the Final Competency "Can Formulate and present oral legal argument" non-legal skills are included. Accordingly, we see here included are skills and knowledge in the use of language, the construction and organisation of sentences, paragraphs and themes. In the area of the legal domain, the key legal competency is the ability to discern the strongest elements of the case whether it is the law, the facts or social policy considerations and have these inform and shape the argument.

Integrating the learning of legal knowledge with the learning of legal skills

[63] I diverge here to illustrate, very briefly, how it is possible to integrate the learning of legal knowledge with the learning of legal skills and practice competence, and

also their assessment. The assignment of the legal practice competency to the domains of legal knowledge is arbitrary in this example. However, it is obviously open to the Bar Council to assign the assessment of legal competencies to occur within the context of particular legal knowledge domains.

Examination Design Options

Table 5: An Illustrative example only of a part of a Curriculum or Competency Assessment Design that integrates the Domains of Legal Knowledge with the Domains of Legal Practice Skills

	Domains of Legal Practice Skills	Legal interviewing	Legal advocacy	Legal advising	Legal questioning	Legal writing & Drafting	Legal research
Domains of Legal Knowledge							
Constitutional Law							
Contract Law							
Criminal Law							
Tort Law							
Land Law / Property Law							
Maldivian Justice System							

[64] This matrix also illustrates the following:

1. Legal practice skills can be learned and assessed in most legal knowledge domains.
2. The integration of domains (legal knowledge and legal skills) results in easing the logistics of assessments as the assessment of legal knowledge and legal practice skills can occur concurrently. It also avoids the misleading conceptual dichotomy between legal competence and legal knowledge. In the real world of legal practice legal knowledge and legal know how are integrated and fused in professional performance.
3. The integrated design affords maximum learning flexibility. It opens the possibility for students or assessor to be able to select the legal knowledge domain in which to learn / the relevant legal practice competency and for the student to be assessed accordingly.
4. The design is conducive to modular curriculum or learning experience design as any one cell in the matrix may constitute the elements of a learning module. The integration of the legal knowledge domain with the legal skills domain may stimulate new learning experiences so that,

for example, the learning of specific areas of legal knowledge that seem most apposite to the demonstration of certain legal skills can be formulated and designed.

5. The design also reinforces the transferability of legal skills between most legal knowledge domains.

Design Elements

[65] A useful design principle, and a practical one, is to move gradually from simple to increasing levels of complexity. To begin with a simple design: Knowledge elements, tasks and skills dimensions and related standards are identified.

- i. All of the critical legal knowledge elements and the standards for assessing them are set out.
- ii. All of the critical skill dimensions for all requisite legal competencies that are subject to assessment are set out.
- iii. All of the standards for the performance dimensions of the legal competencies are set out.
- iv. A decision is taken to match certain legal competencies with certain legal knowledge domains (for example advocacy with criminal law).
- v. Critical elements of the legal knowledge domain are selected to be tested in the context of the practical application of elements of the legal competency of advocacy that are selected to be tested. The latter can include one or more of the following: opening and closing addresses, legal argument, examination-in-chief; cross-examination; re-examination; and speaking to sentence.

An assessment is constructed that tests, for example, knowledge of the criminal law and competency in advocacy in one or more aspects of a criminal trial.

Standard setting

[66] As you will have observed, the setting of competency assessment standards is informed by the nature of the competencies that are to be assessed. The performance of each key element of the overall competency is itself subject to assessment. In practical terms, this means that the Bar Council's "Assessment Team" has to analyse each performance for each element of a competency and make a determination as to what standard will apply to it.

[67] Let us take, as an example, one of the competencies for Advising a Client, namely, "Can formulate an accurate listening response" and its constituent competencies. The latter are as follows:

- 1 Employs key descriptive language used by the client to describe their feelings about the situation
- 2 Accurately identifies the situation of most concern described by the client including the actors, their names and their behaviours
- 3 Accurately summarises the reasons the client has stated that make this situation important for them
4. Acts ethically and communicates respect for the client
5. Demonstrates appropriate demeanour, body language and facial expressions

[68] The various options for setting a competency standard for "Can formulate an accurate listening response" could include the following, or a combination of the following:

Assessment Standard A: Must demonstrate all of the requisite underlying behaviours (1-5)

Assessment Standard B: No risk of harm (This could also act as an absolute assessment criteria. That is, the demonstration of any competency must meet this standard in addition to all other relevant applicable standards).

Assessment Standard C: Risk of harm by: by misinterpreting client; by mis-stating client on a key issue; by misunderstanding client; by failing to listen to the client; by careless remarks; by falsely attributing statement to client; by unethical conduct; by other conduct or omission. (This could also apply and act as a disqualification even if other assessment criteria have been met).

Assessment Standard D: All behaviours meet minimally acceptable competency standards applicable to a First Year Lawyer. (This requires further definition).

Assessment Standard E:

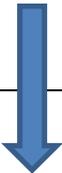
- Demonstrates none of the requisite behaviours
- Demonstrates few of the requisite behaviours
- Demonstrates some of the requisite behaviours
- Demonstrates most of the requisite behaviours
- Demonstrates all of the requisite behaviours

Strategic & Logistical Considerations

[69] Table 6 illustrates the steps in a programme for the development of Standards for the assessment of legal competencies. The time allocations are, of course, estimates. Some of the programme events can occur simultaneously. There is a range of possibilities for the organisation both of the relevant learning modules (if that is the approach the Bar

Council determines) and also for the assessment of the competencies. For example, there are several sub-ordinate competencies that are foundational to the legal competencies. Interviewing is a sub-ordinate or foundational competency to legal interviewing. Questioning is a sub-ordinate competency to cross-examination and also examination-in-chief. Questioning is also a subordinate competency of interviewing. Writing is a foundational competency of legal writing and legal drafting. It is therefore possible to assess Bar candidates in these subordinate or foundational competencies. These assessments can be conducted by assessors who are not necessarily lawyers but who are competent interviewers, writers, and so on. It is also possible to construct these "foundational assessments" to serve as prerequisites for which competence must be demonstrated prior to admission to the assessment of legal competencies. This may also ease the logistical demands of the Bar's legal assessment process. The performance assessment standards for what I have referred to as "foundational competencies" can readily be identified in the literature. They can be acquired and mastered through self-study that is informed by known performance criteria and standards.

Table 6: Standard setting events and estimated time line

Practice competencies		Advocacy	Advising	Drafting	Research	Interviewing	Time required
Legal knowledge domains	Identify key legal principles for assessment	Identify constituent competencies & Standards	60 days				
	Pair knowledge domains with practice competencies	Select & train assessors	40 days				
		Create assessment scenario elements	30 days				
		Create necessary scenario scaffolding	20 days				
	Run pilot test on all new Competency Assessment Modules						7 days
	Revise Assessment Modules based on results of pilot testing						3 days
Contract							
Criminal							
Tort							
Constitutional							
Maldives Legal System							
Land & Property							

Implications of competence assessment

[70] The first implication is that in order to be assessed for their levels of legal practice competence, candidates for the Bar need to have received the opportunity to participate in competency-based learning related to all of the requisite legal practice competencies. Currently, this is not available in the Maldives. This leads to the next implication and that is the need for law faculty, or faculty of a Bar Council learning programme, to be able to design and conduct competency-based learning. The role of professor will transition from the "fount of knowledge" paradigm to the "manager of learning" paradigm. The ability to conduct competency assessments is included as part of the training or re-education of faculty or new faculty to design and lead competency-based learning. The other important implication is that facilities that are fit for purpose (the learning of legal practice competencies and their assessment) need to be made accessible.

Reconfiguring learning environments

[71] This will involve the reconfiguring of learning environments (for example, the removal of row upon row of desks facing in only one direction). It will mean flexible arrangements of tables and chairs that foster interaction and are conducive to teamwork; it will mean the use of video-recording and playback equipment so that legal practice skills can be demonstrated and practiced with feedback and that allows for the performance to be "paused" during playback. It involves the creation of "stimulus materials" - the kinds of documents that one would usually find in case-brief or a trial brief organised so that they can be efficiently provide the factual basis for the application of the skills. It means the learning of effective feedback skills and the development and use of detailed performance guides to inform the feedback so that it is based on objective measures and the identification of specific and detailed behaviours. It involves learning the skills of accurate and close observing and development of the skill of verbatim recall.

Interrogating the Options

[72] What is determinative regarding the selection of preferred options are the Maldivian values that the Bar Council considers to be the most relevant and appropriate in the current circumstances. The emphasis is on the phrasing "current circumstances" as it is understood that the development and implementation of testing instruments that satisfy the Bar Council and that meet and fulfil all of its decision values is an incremental process,

subject to continued refinements and adjustments in response to evolving needs, circumstances and available resources.

Decision Factors & Values

[73] It is not difficult to find rationales that can be used to justify any testing regime. These are largely matters of opinion. However, what makes the difference, in my respectful view, is the extent to which the results of any examination can provide empirical evidence of the legal competence and worthiness of the candidate. That is, in granting this candidate formal approbation to practise law is it done in the knowledge that those granting approbation are satisfied that they have done all that they can reasonably do, and have the evidence in support, to be able to assert that this person does not represent a risk to the public?

[74] In my memorandum of 8 September 2020 to the Bar Council, I identified some of the values and decision factors that appear to be most relevant to the tasks of evaluating preferred options for the Bar Examination. Most of these values need little explication as their meanings are self-evident. I may provide brief comments, in brackets, for the purpose of taking further the analysis of the value in the Maldivian legal education context. I set out decision values here.

1. Assesses legal practice competence
2. Fairness – the candidate is examined on knowledge, and attitude for which learning opportunities have been provided. [It is assumed that it would be fair for the Bar Council to take the view that candidates who have earned a law degree have a basis understanding of core areas of the law]
3. Test ethical values and attitudes [The test is less authentic if the test is one dimensional and non-interactive. In other words, a paper and pencil test of ethical values omits the interpersonal dynamics that usually create the context that generates questionable conduct or in which unethical conduct on the part of the lawyer may be invited or induced.]
4. Resource demands for the assessment(s). [Initially the design and application of competency-based assessments is more resource intensive than testing options such as short answer essays or multiple choice questions]
5. Time required for the assessment [Similar considerations to 4]

6. Flexibility within the Exam testing options [Competency-based assessments, for the reason that they approximate the real world of lawyering, offer an infinite range and variety for the assessment of legal competence]
7. Allows for the incremental development of learning and testing [I will address in more detail in later, in the meantime suffice it to say that there are now Bar Courses that require completion and submission by the candidate of a plan for their life-long continuing education in the law]
8. Provides a basis for future development of the Bar [The meaning of this value is that the nature and structure of the testing can serve to inform a process of life-long process of learning in the law and the development of legal practice competence.]
9. Is consistent with international best practice [There appears to be an international consensus in the literature about best practice the same cannot be said of the varied practice of Law Societies who administer Bar Examinations]
10. Is consistent with new requirements for law school curricula
11. Is based on objective measures and standards [The scoring and determination of the passing mark on MCQ's is usually conducted ex post facto. The assessment criteria and pass threshold are not usually known in advance. This approach is little removed from traditional testing approaches in most knowledge domains. It fails to account in any real way for the issue of public protection.]
12. Results can be used to inform curricula

[75] An example of the systematic application of these values is found in Table 7 which is a Decision Matrix that uses these values to assist in identifying the preferred options.

Some Comparatives

[76] **The U.K. Bar examination** consists of two parts. Part One consists of 183 MCQ's drawn from 11 areas of the law. Part Two consists of what is referred to as an "Objective Structured Clinical Examination" (OSCE). Part Two comprises 18 assessed exercises that include client interview (35 mins); completion of attendance note and case analysis (25 mins); advocacy / oral presentation (45 mins prep and 15 mins presentation) and three computer-based assessments in legal drafting, legal research and legal writing. Knowledge of the law and demonstration of competence are weighted equally. The candidates are not permitted to refer to materials.

[77] **British Columbia** now sets its Bar Examination at a 60% pass mark. It consists of two parts: solicitor and barrister. Under the heading of solicitor the following topics are tested: business law; real estate and Wills. Under the heading of "barrister" knowledge of the following topics is assessed: civil and criminal procedure. Practice management is also tested and ethical problems are "embedded" anywhere in any of the questions. For the 3 hour examination candidates are permitted to have with them limited materials that include the texts for the course.

Ontario's Bar Examination

[78] Ontario's Bar Examination is offered three times each year. Candidates are allowed three attempts to pass the examination within a three year period. The Bar Examination tests legal knowledge. As one commentator remarks of the Examination: "It is not an exercise in demonstrating competency but a search and destroy style examination in which candidates must find the right answer buried in their heavily indexed binders of materials".

Alberta, Manitoba, Nova Scotia and Saskatchewan

[79] The legal regulatory bodies of four Canadian provinces, Alberta, Manitoba, Nova Scotia and Saskatchewan, have formed a consortium that offers a 9 month education programme (**Practice Readiness Education Program**) that focuses on skills acquisition and testing throughout the course. The course includes skills workshops and involvement by all candidates acting as lawyers in a virtual law firm. The online learning modules involve self directed study, interactive assessments, multi-media learning and "foundation workshops". There is a final examination in which all candidates are required to demonstrate competency in all area of the competency framework. The final assessment spans one week and tests all competencies and skills that formed the course. In addition, candidates are required to submit a "final reflection" on the entire program and prepare and submit their own professional development plan.

United States of America

[80] Most states in the **United States of America** have adopted the Uniform Bar Examination. (For more information click: [view our informational pdf about the UBE.](#))

The three components of the test are as follows: 1. Performance Test : Two 90 minute tests: a simulated case file is presented in a realistic setting in which the candidate is to demonstrate fundamental lawyering skills. 2. Examination: a common set of six 30 minute essays on seven designated topics plus business associations, conflict of laws, family law, secure transactions, and trusts and estates. 3. Examination: 200 multiple-choice examination (six hours). The tested subjects are contracts, constitutional law, criminal law and procedure, evidence, real property, torts, and civil procedure.

(accessed 5 Oct 2020 <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209>)

Hong Kong

[81] In Hong Kong, candidates for the Bar must earn a Postgraduate Certificate in Laws (PCLL). This is a practical legal training programme which allows graduates to proceed to pupillage. In Hong Kong the legal profession is bifurcated into barristers and solicitors. According to the Dean of the Faculty of Law at the Chinese University of Hong Kong:

"The old emphasis upon learning more and more law has been replaced by a focus on the acquisition of generic skills, skills that you will carry with you into your chosen career. On our PCLL, you will draft commercial documents, write opinions and advices, engage in negotiation and practise the skills of alternative dispute resolution. At every stage you will be engaged in classroom settings which emphasise interaction and participation".

(<http://www.law.cuhk.edu.hk/download/pcll.pdf>)

Under the heading of Teaching at the Faculty of Law is the following description:

The focus of the PCLL is on equipping you with the skills with which you can apply your knowledge of substantive law. On the PCLL we teach via Large Group Sessions (LGSs) and Small Group Sessions (SGSs). The main purpose of LGSs is to introduce to you the legal principles and skills in each subject. LGSs tend to be, though are not exclusively, teacher-led. SGSs are classes of 10 to 15 students. In these students go over material from their preparatory reading and LGSs. They also do SGS exercises on which teachers question students and give feedback. SGSs are heavily student-focused. We employ various innovative methods to train and test students. On Trial Advocacy, for instance, we have some 30 practitioners come in to give one-on-one feedback on students' recorded advocacy performances. On Civil and Criminal Litigation Practice we assess not only on paper but by getting students on their feet to do applications, again often before practising lawyers and judges, including a Justice of the Court of Final Appeal. We frequently have guest speakers from the professions and the judiciary visit to teach particular techniques or principles, or to speak generally on their areas of expertise. We have adopted on the PCLL a policy of continuous assessment. Among other benefits, this helps students to develop incrementally and gives teachers another tool to monitor and assess students' progress.

Notably, the Hong Kong Bar Association offers limited practice certificates as well as full practising certificates for barristers.

Preferred Bar Examination Option

[82] One can see from the comparatives that I have set out that assessment modalities range from the testing of legal knowledge employing multiple choice questioning to the assessment of legal competencies that approximate the world of legal practice. I have been requested to present recommendations regarding a preferred examination option for the Bar Examination for the Maldives. In my respectful view, the preferred option, one that best meets all of the decision values identified in paragraph 74, is one in which the candidate is required to demonstrate competence according to known performance assessment standards for the accomplishment of specified legal tasks.

[83] Competency assessment comes closest to reproducing those elements of context and real world realities that the candidate will experience and be challenged by in the day to day practice of law. The testing is transparent and based on objective standards. Candidates know in advance the standards that have to be met and importantly that they will have been given the opportunity to learn how to meet them. This cannot be said of other testing methods. Especially in a jurisdiction that sadly is lacking in legal education programmes that aim and are designed to prepare the law student for competent legal practice, there can be no justification for a one year post law degree training course if its sole purpose is for the acquisition of more legal knowledge tested using MCQ style modalities.

[84] An additional benefit of the competency assessment modality is that the necessary research undertaken to identify the critical performance elements of the competencies, when taken together with the detailed performance assessment guides for both legal skills, legal knowledge and ethics, will provide an excellent foundation upon which to build an exemplary competency-based legal education programme that can prepare law students for competent legal practice that justifies their admission to the Bar of the Maldives.

Post Script:

In my final in person consultation with the Bar Council, conducted via Skype on 28 December 2020, I prepared the following Briefing Note. It is relevant here as it provides a summary statement of reasons that support the use of a Legal Competency Testing Model as the Preferred Bar Examination Method For The Maldives:

- because it mostly closely meets all of the legislative requirements and values of the *Legal Profession Act of the Maldives*
- because knowledge of black letter law does not equate with competence and ethical conduct
- because knowledge of black letter law alone is not sufficient to protect the public
- because it develops and assesses legal competence which is the best measure of public protection
- because it is principle-based and creates a vision for the future of the legal profession in the Maldives
- because it provides a level playing field for all candidates for the Bar
- because of the transparency of the process of competency based learning and assessment
- because of the objective fairness of the process of competency-based assessment
- because it offers a vision and a principled approach that can address the history of lack of regulation of the legal profession
- because it begins to address in a principled fashion the state of legal education and creates a vision for the future of the legal education in the Maldives
- because it offers an impetus and renewed vision for legal education and continuing legal education
- because it is reflective of leading research and best practice on professional development and competence enhancement
- because of the nascent stage of development of the Bar and the Judiciary
- because it emphasizes the duty of care to the client and the need for the legal profession to provide legal services that are empathic and responsive to people's needs and problems and provides the profession with the competencies to accomplish this.

- because it has the potential to enhance the professionalism of the Bar, the reputation for lawyers and judges by the public and creates a principled basis for the development of the Rule of Law
- because it has the potential to be an effective instrument of sustainable and positive, growth promoting change and responsiveness in the justice system, the delivery of legal services and enhanced legal professionalism
- because it has the potential to place the Bar Council of the Maldives in the forefront of legal education, continuing legal education and the assessment of legal competence

Profound thanks again to all from the Maldives who graciously met with me, candidly and fully answered my many questions, and collaborated and assisted me in the research and creation of this Report. I trust it will serve its purpose.

ALL OF WHICH IS VERY RESPECTFULLY SUBMITTED,



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