

Consultation response

LSB: Increasing flexibility in legal education and training

Overview

1. Overall the Panel supports the LSB's proposed outcomes. However, this is subject to several important caveats:
 - Regulators must demonstrate better systems and controls to inform risks to consumers than currently;
 - Consumer-led competition in the legal services market is weak and cannot be relied upon to deliver an effective market. It is still important that regulators have in place a strong consumer protection framework;
 - There should be a greater focus on the diverse needs of consumers as well as on diversity within the profession.
2. The Panel agrees that greater flexibility in the delivery of education and training is desirable. Under an activity-based framework regulators would ensure Day One competence for all authorised persons. Also a diverse range of providers, not just traditional lawyers, would be authorised to provide legal services. It is important that regulators focus on ensuring competence rather than on prescribing the specific routes to achieving that competence.
3. Regulators should move away from predominantly 'time served' models, which tend to be based on inputs rather than outcomes. Any greater freedoms would need to be matched with tougher sanctions for non compliance to ensure CPD is taken seriously.
4. The Panel has consistently argued for reaccreditation in high risk areas of law. Competence on Day One does not mean competence throughout an entire career – there could be changes in legislation, in processes, or in consumer expectations, and skills can deteriorate over time. Ongoing checks would allow front-line regulators to see 'warning signs', enabling action on issues before they become more serious.
5. Finally, we do not think that numbers entering the profession should be restricted as this will have the effect of further restricting choice for consumers. There is a danger that efforts to restrict numbers could also have unintended consequences for diversity.

The proposals

6. The Legal Services Board (LSB) is consulting on proposals for draft statutory guidance to be issued on legal education and training under section 162 of the Legal Services Act 2007. Guidance would set out the LSB's views in this area and provide the LSB with a basis from which to review progress or take action in future. There are five outcomes which the LSB believes will deliver greater flexibility from education and training:
 - Education and training requirements focus on what an individual must know, understand and be able to do at the point of authorisation;
 - Providers of education and training have the flexibility to determine how best to deliver the outcomes required;
 - Standards are set that find the right balance between what is required at entry and what can be fulfilled through ongoing competency requirements;
 - Obligations in respect of education and training are balanced appropriately between the individual and the entity, both at the point of entry and ongoing; and
 - Education and training requirements place no direct or indirect restrictions on the numbers entering the profession.

The Panel's response

7. The Panel has engaged with the Legal Education and Training Review (LETR) from the beginning, providing a detailed response to the first discussion paper, and following this up with a further submission focused on key strategic points. Now the review has been published our attention

turns to the responses from the approved regulators. We view this consultation as timely because the momentum gained must not be lost. In particular, some aspects of the current regime, such as CPD, have been shown to have failed so it is vital that progress does not stall now.

8. We note that there are clear challenges facing the regulators in working together: collaboration over the Quality Assurance Scheme for Advocates (QASA) has proved difficult for example. So the Panel considers the LSB oversight role is critical to ensure momentum is sustained and regulators do not diverge to the extent that flexible labour market objectives are frustrated. We agree that change can be incremental but should not be slow, and that the objectives in the guidance should define a strategy for education and training over the medium term.
9. Our response restates our submission to the LETR research team and should be read alongside that document.

Q1. Do you agree the proposed outcomes are the right ones?

10. Yes. We comment on individual outcomes below, but make some broader points here.
11. The legal education and training system is one part of a wider regulatory framework. Our confidence in regulators loosening controls in the education area is connected to the effectiveness of the wider framework. For example, the LSB is right to say there should be strong links with the supervision functions. However, our experience – on financial protection arrangements and using ombudsman complaints data – is that the

regulators as a whole are not mining all the relevant data available to them. Until they can do this they will not be in a position to determine risks and monitor impacts. In addition, there appears a dearth of planned research with consumers over the next year. The Panel urges the LSB to make sure that approved regulators are gathering and acting on more and better information about the risks to consumers before requirements are loosened.

12. Consumer-driven competition in legal services is currently weak, and cannot be relied upon to deliver an effective market. While this remains the case, we are nervous about deregulatory changes that rely heavily on employers to self-regulate the quality of their workforces. Further, the scope to improve consumer-driven competition is somewhat limited due to inherent features of the market. Therefore, it will remain the case that regulators should have a strong consumer protection framework that aims to prevent detriment through entry standards and that individuals continue to be held accountable for their conduct.
13. An area which should have more emphasis is how lawyers understand the diverse needs of consumers as well as diversity within the profession. A diverse profession is important, and the Panel strongly supports this, but research carried out by the Panel and its partners has found a need for more focus on making reasonable adjustments for specific vulnerable client groups, including better communication.
14. On a wider related issue, we note that the consultation identified that the LETR research team did not receive significant consumer input other than our own

contribution and that of in-house lawyers as buyers of legal services. While prospective lawyers are consumers of the education and training system, its ultimate purpose is to protect consumers of legal services. Legal education and training regulation should be designed around the needs of consumers, which is why we consistently argued for greater consumer input into the review. When taking the recommendations of the LETR forward the approved regulators should test their proposals with consumers and engage with expert consumer representatives. This is even more important since the level of consumer input to date has not been sufficient.

Q2. Do you think all of the outcomes should have equal priority?

15. The Panel's priorities are a focus on an activity-based system and Day One outcomes, coupled with reform of the current CPD system and a move to periodic reaccreditation in high risk areas. We would also like to see mandatory equalities training and a greater focus on consumer needs in the design of legal education and training. Overall, however, we consider the LSB's desired outcomes to complement each other and therefore that equal weight should be placed on each outcome. That said the weight of attention historically has been on entry standards and less on ensuring ongoing competence; this focus needs to be rebalanced going forward.

Q3. Do you agree that a risk based approach to education and training should focus more on what an individual must know, understand and be able to do at the point of authorisation?

16. It is important that an individual is competent to provide safe advice to consumers on Day One. Lawyers will then go on to develop and build on their expertise and experience. Day One should be the point at which lawyers are prepared to fulfil the roles and responsibilities entrusted to them, acting unsupervised. The draft guidance focuses on knowledge, understanding and skills. We support such a broad-based definition of competence, which should also embrace professional ethics, client care and diversity.
17. In our submission to the LETR research team we emphasised that the education and training regime should support the authorisation regime as its core purpose. The Panel has repeatedly argued for an activity-based authorisation regime since different legal activities carry varying levels of quality risks and so different competency thresholds are needed. We also suggested that at the point of authorisation an approved person might be permitted to provide certain services, with authorisation to provide other (higher risk) services granted separately – for example in the form of separate endorsements on practising certificates. Such mechanisms would be consistent with the first outcome in the proposed guidance.

Q4. What are the specific obstacles that need to be removed to facilitate movement across different branches of the profession?

18. The current focus of authorisation on the individual, rather than the activity or entity, is a key obstacle. If the common starting point was the competencies required to perform certain activities, then differences between the entry requirements of the

various regulators should be fewer and so ease of mobility would be improved.

19. The very presence of multiple regulators is a barrier. The Panel's response to the Ministry of Justice Simplification Review indicates our preference for a single legal services regulator. If control of authorisation was located in one place, it would become far easier to regulate the movement of individuals across professional boundaries.
20. The LETR report mapped methods of transfer and this revealed the routes do not neatly relate to each other, often lack a clear rationale, and lack transparency and currency. A concerted review of these arrangements, brokered by an independent person or entity, would help break through these transfer barriers, many of which may be design accidents or no longer needed.

Q5. Do you agree that regulators should move away from 'time served' models?

21. We agree that regulators should move away from predominantly 'time served' models, which tend to be based on inputs rather than outcomes. ILEX Professional Standards (IPS) have recently moved towards a more outputs based system, and the Panel has been supportive of this. The current CPD regime is widely discredited, and we consider that creating the right culture, and individuals identifying their own development needs and leading their own development programmes, would be better. However, any greater freedoms would need to be matched with tougher sanctions for non compliance. This is vital to ensure CPD is taken seriously.

Q6. Do you agree that the regulation of students in particular needs to be

reviewed in light of best practices in other sectors?

22. The LSB consultation notes developments in healthcare, where the General Optical Council (GOC) is currently the only statutory regulator with a compulsory student registration regime. In considering removing this requirement, the GOC consultation referred to recommendations made by the Law Commissions and concluded that students are aspiring professionals rather than full members of the profession and as such the same regulatory approach is not necessary during training as that which is used for fully qualified professionals.
23. We note the SRA, for example, currently requires students to register before they can start the Legal Practice Course. Their rules in this area suggest a not insignificant regulatory burden, but less than 1% of students have a suitability issue identified at this stage. This suggests the process is disproportionate. We are pleased this has been targeted by the SRA as part of their focus on removing unnecessary regulatory restrictions.¹
24. Given legal services students will most likely be acting under the supervision of a qualified person, and most probably in a regulated entity, we agree that it seems disproportionate and not in line with better regulation principles to require students to register. Instead, there are arguments to support emphasis on professional ethics during training, and the regulator engaging with students throughout their training period to ensure professional behaviour from students.

Q7. Do you agree that regulators should allow more flexibility in the way that education and training requirements are delivered by no longer prescribing particular routes?

25. The Panel agrees that greater flexibility in the delivery of education and training is desirable. Under an activity-based framework regulators would ensure Day One competence for all authorised persons. And a diverse range of providers, not just traditional lawyers, would be authorised to provide legal services. It is important that regulators focus on ensuring competence rather than on prescribing the specific routes to achieving that competence.
26. However, we foresee there does need to be some system of recognition of entry routes by regulators to give prospective entrants confidence to apply for places and to give institutions providing the training the certainty to invest. Moreover, in order to link the education and training system to the authorisation regime, regulators need to be the ultimate arbiters of standards rather than actors such as training providers or employers. We agree it is impractical for regulators to approve every entry route, but any criteria issued by the regulator needs to balance the right amount of high-level principle and prescription to ensure the minimum competencies are achieved at Day One.

Q8. Do you think such a change will impact positively on equality and diversity?

27. It is likely that a more flexible regime, in particular one which includes non-graduate routes, will open up the possibility of a more diverse workforce. Apprenticeships, for

example, could allow those who cannot afford to undertake a law degree upfront to access the profession. This route has already been developed by IPS and we would like to see it adopted more widely. The recent Social Mobility and Child Poverty Commission *State of the Nation 2013* report encourages apprenticeships as a way to increase access to the professions. The same report found social class is a more significant barrier than gender to obtaining a top job, underlining the importance of such initiatives.²

28. More flexibility may also mean that people are able to change direction as their career develops – at the moment for example, a chartered legal executive can re-qualify as a solicitor or become a judge, yet may not become a barrister if they are not a graduate. This links to Question 4.
29. The Panel notes the recent *State of the Nation* report findings on the impact of internships. Graduates who have completed an internship are three times more likely to be offered a job. However, the report found informal connections often dictate who gets an internship, while unpaid internships exclude those who cannot afford to work for free. This raises fundamental issues of fairness around access to the profession. We have seen reports in the trade press of internships in law firms and mini-pupillages being auctioned off. We consider this raises issues of professional conduct which warrant investigation and potentially action from the regulators.
30. It is equally important that there is focus on the diverse needs of consumers. Research commissioned by the Panel on deaf consumers with legal needs and people

with learning disabilities who need advice about the law found that often there were problems with communication, where for example advisors did not leave enough time to allow people to communicate their needs adequately, or where advisors did not explain their advice in an accessible way.³ The Panel would welcome mandatory equalities training focusing on areas such as communication and reasonable adjustments. This is something which could potentially be included within CPD.

Q9. Do you agree that regulators should review their approach to quality assurance in light of developments in sector specific regulation of education providers?

31. Yes. We note the SRA and the Bar Standards Board (BSB) have already committed to reassessing regulation at the academic stage, and will take particular account of the role of the Quality Assurance Agency (QAA) during this process. Clearly, the performance of sector-wide agencies such as the QAA, and whether the unique needs of legal services are adequately covered by their general mechanisms, will influence the extent to which legal services regulators can rely on external validation of entry routes, but in principle the Panel is supportive of this approach.

Q10. Do you agree that entry requirements set by regulators should focus on competence?

32. Yes, and this needs to be a broad-based notion of competence – see Q3 above.

Q11. Do you agree with our proposal that there may be areas where broad based knowledge is not essential for authorisation? Can you provide any

further examples of where this happens already?

33. The Panel's submission to the LETR distinguished between roles and responsibilities for which no legal training is required, those for which general legal training requirements alone are adequate preparation, and specialist areas where requirements beyond or instead of this initial training are necessary.
34. We said the current system is trying to train a typical lawyer, when in reality the legal market is becoming more diverse and specialised. There remains value in some lawyers having a broad based foundation in law, to the extent that some areas of advice benefit from knowledge of a range of different legal areas and it enables advisors to spot other issues and signpost consumers to specialist support. If there is to be a market of specialists, there will be room in the market for generalists who can deal with basic issues and help consumers find the right expert for their circumstances.
35. Different activities mean different levels of risk for consumers and we agree that for some responsibilities and roles less or no formal legal *training* would be acceptable. The cost of education and training is likely to be a major factor in the price of legal services. Given pressures on the legal aid budget and concerns about the affordability of services purchased by consumers, it is important not to require every individual wishing to provide legal advice to obtain knowledge they are unlikely ever to use.
36. Pinpointing where generalist knowledge is needed goes beyond the scope of this consultation. However, we note that third sector advice workers provide a good

service on consumer or housing issues, for example, without having a broad based foundation knowledge of law. Members of the public successfully administer estates and apply for powers of attorney. The consultation cites will-writing as an example where broad based knowledge does not mitigate the quality risks. The lesson we draw from will-writing is that the current training regime is so broad based that it dilutes specialist expertise; here the right solution is to recognise this is a higher risk area of law and require specialist training.

37. For activities where training is not required, other types of *regulation* may still be justified, for example estate administration. This is largely an administrative procedure, but where the risks of fraud are high and it is desirable that consumers should be able to obtain redress. Here regulators should not insist on legal training, but instead focus requirements on insurance and redress.

Q12. Do you agree that reaccreditation requirements should be introduced in areas where the risks are highest?

38. Yes, the Panel has consistently argued for reaccreditation in high risk areas of law. Competence on Day One does not mean competence throughout an entire career – there could be changes in legislation, in processes, or in consumer expectations. Furthermore, skills can deteriorate over time. Consumers assume that an individual listed on the professional register is competent and if this turns out not to be the case the integrity of the register is brought into question, while trust in legal services is undermined. We agree with the LSB's point that where risks justify significant 'before the event' requirements then it stands to reason that the risks must be high enough

to require some form of periodic reaccreditation. Ongoing checks would allow front-line regulators to see 'warning signs' at an early stage, enabling action on issues before they become more serious.

39. However, it is important that periodic reaccreditation is seen by the profession as a career-enhancing measure not a career-threatening one, supporting learning and offering a demonstration of its commitment to professionalism to the outside world. On this last point, we need to learn the lessons from medicine where the proposals needlessly provoked great divisions between regulators and the regulated.
40. Our submission to the LETR research team in 2012 suggested five important features for periodic reaccreditation:
 - It should be linked to the authorisation regime, prioritising higher risk areas of law;
 - It should be objective, based on actual performance (not merely the absence of concerns), and should be independently evaluated;
 - It must have teeth – those who are repeatedly unable to demonstrate they are competent should lose their rights to practice;
 - It must include consumer input; and
 - It should take into account other evidence such as CPD, appraisals, peer reviews, accreditations, and complaints and regulatory history.
41. The historic focus of education and training has been on entry routes, with regulation of ongoing competence relatively neglected. We encourage the LSB to signal the weight it gives to ensuring ongoing competence

and ensure that progress is made on this front without further delay.

Q13. Do you agree that in most circumstances an entity is better placed than the regulator to take responsibility for education and training?

42. Employers know the training needs of their workforce best and so should enjoy some freedom to shape their staff team and train employees in the way that best serves their business and its consumers. Competition should incentivise entities to provide high standards in both service quality and technical expertise to their customers. However, to work this dynamic depends on consumers being demanding of providers, but in reality consumer-driven competition in the legal services market is weak. This means the incentives of lawyers are not always aligned with those of consumers, and market forces alone will not regulate entities in the consumer interest.
43. Therefore, there is a risk that employers will not have sufficiently rigorous education and training requirements. This makes it important that regulators continue to set authorisation requirements for individuals, with a strong focus on outcomes, and that individuals remain accountable for their actions through the sanctioning regime. In line with our response to Question 7, regulators should allow greater flexibility on routes to authorisation – and this includes employers being able to devise training packages – but regulators must retain ultimate control over standards.

Q14. Can you think of any circumstances in which this may not be possible?

44. See response to Question 13.

Q15. Do you agree that it is not the role of the regulator to place restrictions on the number of people entering the profession?

45. In our previous submission to the LETR research team we stated that regulators should rarely, if ever, limit entry to legal markets to the traditional professions. We would like to see a market where those who are able to demonstrate they are competent are permitted to provide legal services to consumers. This should have the effect of enabling a market with a diverse mix of providers, giving consumers a good variety of providers to choose from.
46. The Panel does not consider that the numbers entering the professions should be restricted either as this will have the effect of further restricting choice for consumers. We also agree with the LSB's points about latent demand. Research carried out by the Legal Services Board identified that 27% of respondents had a legal need which they handled alone, while a further 14% did nothing about the legal need.⁴
47. We share the LSB's analysis that the issue is not one of over-supply but the market not being able to sustain the number of lawyers at the current cost. Restricting the numbers of those able to provide legal services by tightening entry controls would increase the cost of legal services. Cheaper entry routes that lower costs while ensuring high standards of work need to be found.

Q16. Can you provide any examples for review where the current arrangements impose such restrictions and may be unnecessary?

48. There is a risk that efforts to restrict the number of law graduates to the current

number of vacancies in the job market could have unintended consequences for diversity. Aptitude tests, such as the Bar Course Aptitude Test, may favour those from certain ethnic and class backgrounds, and by doing so undermine diversity efforts. LSB research on aptitude tests highlights that results can be influenced by factors such as family background and education.⁵

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¹ See <http://www.sra.org.uk/sra/policy/training-for-tomorrow/resources/policy-statement.page>

² See <https://www.gov.uk/government/publications/state-of-the-nation-2013>

³ See <http://www.legalservicesconsumerpanel.org.uk/ourwork/vulnerablconsumers/Legal%20Advice%20Learning%20Disabilities%20Final%20Report.pdf> and http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Legal%20Choixes%20Silent%20Process%20.pdf.

⁴ See: <https://research.legalservicesboard.org.uk/wp-content/media/2012-Individual-consumers-legal-needs-report.pdf>

⁵ See: <https://research.legalservicesboard.org.uk/wp-content/media/Aptitude-tests-and-the-legal-profession-2011.pdf>