



LEGAL SERVICES  
**BOARD**

# EDUCATION AND TRAINING: ITS ROLE IN REGULATION?

February 2012

1. With the Legal Services Board (LSB) increasingly focused on the role of education and training in making the legal services market work for consumers, the Solicitors Regulation Authority (SRA), Bar Standards Board (BSB) and Institute of Legal Executives Professional Standards (IPS) have come together to undertake a fundamental review. Rather than ask the question of how to approach education and training for individual professionals, the review needs to focus upon the more challenging question of what role education and training play in regulation of legal services.
2. To help inform our own view and generate as broad a debate as possible, we are running a series of seminars in England and Wales to be held from February to May this year. Each seminar will be co-branded with a different organisation and focus on its own theme or hypothesis. This paper seeks to set out some of the key issues for consideration throughout the series and put forward the view that reform of the education and training regime for those participating in the market for legal services is closely linked to liberalisation of the market.
3. The review is taking place at a time of unprecedented change. Liberalisation in legal services is accompanied by increasing competition as we see alternative business structures (ABS) bring external capital, ownership and control to lawyers' businesses. From global law firms to large retail providers and franchises, and from traditional two partner law firms to advocates working exclusively for one firm, the world of the legal professional has changed. The crucial test of all of these changes is against a vision of improved access and value for consumers.
4. The current education and training framework is rooted in and still shaped by the origins of the legal profession. Independent regulation leads to subtle and important distinctions between the legal profession typified by professional titles of solicitor and barrister and the providers of legal services: the professional is no longer the sole legal service provider, just one potential part of the delivery chain. The Legal Services Act 2007 (LSA2007) means that legal professionals are not even guaranteed the role of ownership, control and management of legal providers. The education and training review recognises this fact but also acknowledges that education and training is one of a number of regulatory tools that must be applied across the whole legal workforce to support the delivery of the regulatory objectives set out in the LSA2007.
5. The shift towards a regulatory focus on the entity and how it chooses and trains its workforce is inevitable. Entity regulation means that the regulator is interested in much more than the education and training standards of those individual professionals who make up only part of the legal workforce they regulate. We have seen evidence of the risks associated with a model primarily focused on a general legal qualification for individual professionals and a continued focus on perfecting this route without any reference to the role of the wider workforce, and indeed the entity, could miss real risks to the regulatory objectives<sup>1</sup>.
6. One of the consequences of change is that firms are already making decisions about the nature of their workforce. As regulators allow more innovation to flourish, legal education and training has to become more responsive, nuanced and flexible. Regulators will need to focus on outcomes and the risks to those outcomes that exist in particular firms. In short there can be no one size fits all answer to education and training within a regulated

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entity, and education and training are themselves among a range regulatory tools at the disposal of regulators.

7. The link between reserved and non-reserved services is instructive in identifying the real risks and how regulation can act positively to deliver the regulatory objectives. Will writers, employment advisers, health and safety legal consultants, social welfare law advisors and more: are now all delivering legal services in different ways both inside and outside of regulation. Each of these firms, each of these models, needs a workforce fit for purpose. What is clear is that those outside of regulation are not reliant upon regulated lawyers to design and deliver their services. These firms have already made workforce decisions – what are the skills and experience needed among the workforce and how best can they be maintained? Like the majority of business operating in the UK and globally, they do not necessarily need regulators to provide them with definitive answers to their workforce questions.
8. It is worth considering an example. If the LSB recommends that will writing and estate administration are to be regulated then guidance to potential approved regulators of this activity will need to focus on outcomes rather than rules. That will ensure that innovation is not stymied and competitive forces harnessed for the good of consumers. Thus, regulation of this area will not be based upon control of entry through slow professional qualification: that has not served consumers at all well in will writing. More likely is that each firm should take decisions about the workforce that it needs to deliver its service offer to consumers and justify how those decisions will support the outcomes that are specified by the regulator. For some firms this will be solicitors, for others that rely upon outsourcing it will be very different; but it is for the firm to be given the space to make those decisions rather than for the regulator to impose any particular workforce model.
9. In response to consumer demand legal businesses are changing. Global businesses want global law firms. Educated and empowered consumers see some legal services as akin to retail products. And the increasingly 'law thick' world we inhabit makes it harder than ever for individuals to pass through their lives without using legal services. The workforce engaging with this diverse pool of clients has to be educated and trained to do so: a breadth of skills and a view of quality that does not fit the most traditional views of legal education only for the professions.
10. Meeting consumer demand requires innovation. Intensifying competition alongside ever more imaginative uses of technology provides new opportunities in all markets. In the legal services market innovators identify new ways to deliver services with one eye on what regulatory restrictions will corral their ambitions. Regulators have to make sure that the education and training restrictions that they impose are able to cope with these new models – identifying the new risks and targeting them rather than relying on existing models of professional education designed for a more stable and fixed environment.
11. Is it still necessary for the regulator to take the qualifications set by the branches of the profession as the only minimum qualifications for individuals authorised to carry out the reserved services? Authorisation of solicitors and barristers (if not other types of regulated lawyer) is still linked solely to professional titles, but this does not necessarily need to be the case and the decision to review the regulatory requirements for education and training recognises the potential for a permanent separation of authorisation and professional titles. Reserved activities will continue to be reserved to authorised persons; but regulators can set standards of entry which are separate from the qualification for broad professional titles. The professional qualifications could potentially then provide a passport to some authorisation or potentially not depending on the activities undertaken and the training or qualifications held. Any particular activity (such as conveyancing or

will writing for example) might be authorised alternatively via a particular and activity focused route. Further authorisations might be based upon qualifications, experience, CPD for example, but a modular approach allows both a more dynamic labour market and a risk based focus to regulatory requirements in education and training.

12. This approach could open up the regulators to take a much wider view of the people it authorises, the roles they take and the importance of entity based regulation. It is not to undermine the value of the profession but is merely a recognition that not all legal services are, will be or should be delivered by those with professional titles. Furthermore, such an approach allows for more fluidity between regulators for the individual: the initial route to authorisation should not determine a whole career. There are already multiple regulators for all but one of the reserved activities. Common minimum standards are important for consumers, but this should also support the removal of labour market barriers that prevent innovation, competition and a stronger consumer focus.
13. An outcomes focus suggests that the activities undertaken could become more indicative of the risks posed rather than the individuals from the different branches of the profession that they employ. The entry level skills for authorised persons could thus depend on their position within the firm, the systems and processes they employ and the activities they choose to undertake with employers held accountable. Consumers are still likely to look for the professional brands they know and trust when seeking legal services (e.g. solicitor, barrister) but these will exist within a broader regulatory framework. And of course the current liberalisation of the legal services market may well lead to consumer brands playing a bigger role in some parts of the legal market.
14. Our current system of education and training has a good reputation – English and Welsh lawyers are well thought of across the globe and this underpins the reputation of UK justice. Yet when we considered will writing services we saw substantial evidence of poor quality among regulated lawyers: the gap between reputation and evidenced quality is perhaps larger than we would like. This is no surprise when education and training is general rather than closely tied to particular activities and practice that any individual lawyer might undertake. Even now the initial legal education of a solicitor or barrister will be largely the same whatever sort of practice the individual is heading towards. This is hardly risk based, targeted or proportionate. It is also almost certainly a threat to quality of services. Education and training has to focus on the activities that the firm and individual are delivering rather than on an approach of making an individual fit to hold the professional title of Solicitor or Barrister.
15. Some law firms (mainly the city based firms) are powerful enough within the education market to shape the provision of education and training to meet their needs. But this means that legal education risks gets shoehorned into meeting the diverse workforce needs of legal services providers through one model of education. Some have argued that this means the needs of city firms dictate the legal education of a workforce that will be wholly focused on retail legal services. This is the inevitable result of detailed rules and prescriptive regulation.
16. To better understand the link between quality and education and training perhaps it is important to consider again the plurality of services and consumers that exist. The inherent difficulty for consumers whether small and micro business or individual consumers, is that they frequently cannot judge quality even after the event. That makes a strong case for regulatory supervision of quality in order to avoid a race to the bottom. Education and training can be powerful tools but if they continue to focus only on regulated lawyers and not the rest of the workforce then quality of service provided may still decline. The continued focus on evaluation of Continuing Professional Development

(CPD) by requirements on number of hours per individual also ignores the corporate level responsibility and the importance of linking development activity to relevant outcomes.

17. The plurality described above also encompasses the global law firms with global clients that have the ability to swiftly punish poor quality. It is hard to make a regulatory case for the same restrictions in that part of the market as elsewhere. Even for the individual consumer the diversity of services (from distressed purchase of advice on a criminal matter through to advice around the tenancy agreement for a student) leads almost inevitably to a different set of risks that require different regulatory responses. The risks that arise from different legal activities are immensely varied and education and training needs to reflect that more effectively.
18. The international dimensions of law and education merely serve to further highlight the issues around plurality of practice and the need to focus on outcomes and risk. The Juris Doctor (JD) model that dominates the USA legal education model offers an alternative workforce strategy for global law firms. The decision that matches consumer requirements and expectations to service design and the workforce to deliver it is a decision for business strategists. Balancing supply, cost, quality and effectiveness between different models of qualification therefore becomes a decision for the firm rather than the regulator.
19. As the nature of global law changes, the balancing of those choices by firms will not be bound by historical ties or what it means to be a lawyer in England and Wales. The international reputation of the profession is high in part owed to the standards of education and training. However, could there be more than one route through such as the development of a JD in the UK or indeed other models enabling employers to decide what is required of their workforce. Regulators could develop outcomes based criteria by which they would assess and approve the models with an implicit possibility of multiple routes to authorisation.
20. There is a related question around whether a regulatory intervention is needed to ensure the global competitiveness of legal education. John Flood's paper on Legal Education in the Global Context would suggest that global competition occurs on two levels, educating the professionals working in large corporate firms and competition between educational establishments<sup>2</sup>. From an access to justice perspective the most significant problem occurs in professional qualifications are set at such a high level that it becomes unprofitable to offer basic legal services. On the second issue, the dynamism of educational establishments and competition should ensure that they are aware and alive to international competition.
21. Innovation applies as much to the education and training worlds as it does the legal services market. What barriers, restrictions and restraints on education providers can be justified by legal services regulators? Education regulators are already providing assurance about the quality of courses and exams so we should ask what the residual role is for legal services regulators. The answer must be to focus upon outcomes rather than inputs – or what a person needs to be able to demonstrate and evidence in order to be authorised for any particular activity. Legal services regulation should no more provide unnecessary restrictions to innovation and liberalisation in the provision of education than it should for legal services more generally. Given the role of English and

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Welsh lawyers internationally, education and training providers must be able to keep pace: operating globally to support global law firms.

22. The overriding theme of the education and training review must surely be to identify the function of education and training requirements in the toolkit of regulators in making the market work for consumers. That will need to focus on outcomes and risks rather than syllabus and teaching methods. It is about the here and now; the risks to the regulatory objectives that exist in the current market and the outcomes consumers of all types demand and deserve. And in order to play a meaningful role in tackling these risks, the regulators demands of education and training must be targeted and proportionate.
23. So what sort of outcomes might be on the table following the review?
- Given that most firms are already making decisions about their workforce we should focus regulation in respect of education and training at the entity level more often. A firm is often best placed to know what skills its workforce needs and should be held to account by regulators for the decisions it makes, using a set of regulatory outcomes (including diversity and social mobility) as criteria upon which to judge
  - Regulators must use detailed and prescriptive entry qualifications only where they can be justified against real and evidenced risks (in relation to both clients and the type of activity). For example, where individuals or small businesses are infrequent consumers, making a distress purchase or are vulnerable and not empowered to hold providers to account. Ongoing professional development should also be set in the context of outcomes and risk
  - Authorisation of individuals and firms to undertake specific legal activities should be more closely related to education and training, as well as systems and controls within firms. This might apply to practice in certain types of law, activities such as advocacy or systems such as handling client money
  - Flexibility in qualification is central to a dynamic labour market that supports an innovative sector. Regulators could encourage and support a mix of professional qualifications that lead to authorisation across a range of activities alongside routes to authorisation for specific activities. The modular approach should continue to operate throughout the careers of lawyers, providing flexibility to the individual throughout their career
  - Given the role of lawyers in supporting the constitutional principle of the rule of law it is no surprise that the focus on diversity of the legal profession is so sharp<sup>3</sup>. To build and retain public confidence, the legal services market must be seen to reflect the diversity of the nation it serves. The education and training review will have to help regulators deliver diversity and social mobility at entry, retention and progression.
24. Having speculated what the review might lead to, how can the LSB judge the actual output when asked to approve them? It is too early to be certain because the review will produce evidence and analysis during 2012 that will help us and others develop our thinking. But we will without doubt, test any proposals against the Regulatory Objectives and principles of Better Regulation. There are no sacred cows and no grand plans: education and training must play its part in regulators making the market work for its consumers.

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<sup>3</sup> Diversity is also central to the Regulatory Objective to 'encourage an independent, strong, diverse and effective legal profession'