



Bar Council response to the 'Increasing flexibility in legal education and training' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board consultation paper entitled 'Increasing flexibility in legal education and training' on proposals for draft statutory guidance under section 162 of the Legal Services Act 2007.¹

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

4. Under section 4 of the Legal Services Act 2007, the Legal Services Board (the LSB) is obliged to "assist" in the maintenance and development of the education and training of authorised persons. This obligation falls some way short of other responsibilities placed upon the LSB, and contrasts in particular with its duty under section 3 to promote the regulatory objectives.

5. The Bar Council views this LSB consultation as directing, rather than assisting with, legal education and training. The Bar Council considers that, so far as the Bar is concerned, the LSB's intervention is unnecessary. As the LSB is aware, the BSB is itself considering its response to the legal education and training review (the LETR) report, and it will review its current education and training requirements in the light of that report.

¹ Legal Services Board, 2013, Increasing flexibility in legal education and training

6. The consequence is that the Bar Council is facing (and will have to pay for) steps taken by both regulators in the light of the LETR report. Although, in paragraph 13 of the Chairman's foreword accompanying the LSB's consultation document, Mr Edmunds states that the LSB is not trying to duplicate the approved regulators' plans, that is likely to be the effect of the LSB's approach, which does not seem to have been discussed beforehand with any of the approved regulators.

7. Having made that point, the Bar Council wishes to be constructive regarding the LSB's consultation. In general terms, as appears from the observations below, it does not take issue with the LSB's proposed outcomes regarding legal education and training; rather, it subscribes to the principles set out in the Paper and to those outcomes, with a small number of qualifications.

8. As the LSB should be aware, the Bar Council believes that it and the other institutions of the Bar have worked within those principles for many years, indeed since well before the passing of the Legal Services Act 2007. Training at the Bar is detailed and long-established; but the Bar Council, the BSB, the Advocacy Training Council (representing all the Inns of Court), the Inns themselves and the Circuits are constantly reviewing and amending their training programmes to reflect contemporary requirements and to ensure that barristers are fully trained to meet the challenges of their profession. Their work on CPD is supplemented by more focused training events provided by the Specialist Bar Associations. Nevertheless the Bar always welcomes suggestions from others on how the content and structure of its courses can be improved. If the LSB believes that there are any shortcomings in the Bar Council's approach, the Bar Council trusts that it will point them out.

Question 1: Do you agree that these outcomes are the right ones?

9. Yes, although we would not necessarily wish to be associated with all the reasoning underpinning each headline outcome.

10. The only additional comment that we would wish to make is that outcome (v) ("*education and training regulations place no direct or indirect restrictions on the numbers entering the profession*") should be read in the light of outcome (iii) ("*standards are set that find the right balance between what is required at entry and what can be fulfilled through ongoing competency requirements*"). As the LSB is aware, the BSB has recently introduced a Bar aptitude test, with the aim of ensuring that only individuals who achieve a required level of competence can take the Bar Professional Training Course (BPTC). The purpose of this test is not to limit the numbers entering the profession, but rather to ensure that those who ultimately have no reasonable prospect of entering the profession, through lack of competence, are not put to the expense of taking the BPTC.

Question 2: Do you think that all the outcomes should have equal priority?

11. We consider that all the outcomes are important, and we do not consider that there is any need to rank them.

Question 3: Do you agree with our guidance 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?

12. Not merely do we agree, but it has long been the case that the Bar Council has focused its education and training requirements on the ability of its members to fulfil the demanding role of barrister at the point of authorisation.

Question 4: What are the specific obstacles that need to be removed to facilitate movement across different branches of the profession?

13. In order for solicitors to move to become barristers, the Bar Council adheres to the view that it is in the public interest for solicitors to acquire the specific skills that are required for them to join this high risk branch of the legal profession. For that reason, transferring solicitors are required to undertake a specific advocacy skills course. This requirement should remain: the interests of the public in receiving high standards of service from the Bar should be placed above the object of facilitating transferability among members of the legal profession.

14. Movement in the opposite direction regrettably remains difficult, in the experience of the Bar Council: it is bureaucratic, exclusionary and anti-competitive. We consider that this is a specific obstacle which is not in the public interest.

Question 5: Do you agree that regulators should move away from “time-served” models?

15. We do not believe that sheer length of time spent in training is any necessary guarantee of quality. However, the Bar Council sees no alternative to its current requirement that barristers should have (a) some familiarity with their academic subject; (b) vocational training; and (c) a period of work-based learning in their craft.

16. As to the first, all barristers need a grounding in core subjects (a matter to which we return below), and it is difficult to see how this grounding can be instilled without undergoing a course of training (currently less than one year in the case of the Graduate Diploma in Law, GDL).

17. Secondly, the Bar Council’s requirement that barristers should take and pass the vocational course (the BPTC) is grounded in its belief, which it does not see challenged in the LETR report, that a period of vocational training is essential to practice at the Bar. Here again, however, the Bar Council is not wedded to any particular period of time for the BPTC, provided that the course is covered in the necessary depth.

18. Thirdly, the Bar Council considers, in tune with the authors of the LETR report, that a period of workplace training, in the shape of pupillage, is a critical element in the barrister’s training. The special value of workplace training, whether at the Bar or in other branches of the profession, is that it gives trainees a solid grounding in professional ethics and professional client relationships, and develops a practical understanding of how

advocacy works, as well as the more technical practice of law. Jurisdictions which do not require this training, as in the USA, regret that they do not do so.

19. Although the length of pupillage has (since 1955 at least) been standardised at one year, there is of course flexibility built in to this requirement²: in their second six months of pupillage, pupils may take on paid work, and are accordingly able to develop their own practices from the end of the first six months on, with the security of the first six months under the guidance of their pupil supervisors, and their continued guidance during their second six months. The Bar Council review this requirement continually, and are satisfied that it is the best working model.

Question 6: Do you agree that the regulation of students in particular needs to be reviewed in light of best practice in other sectors?

20. We consider that it is always valuable to consider best practice in other sectors where professional training is required, such as medicine, teaching and accountancy. However, we doubt whether regulation in other sectors such as these easily translates to the very different requirements of the Bar.

Question 7: 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?

21. The Bar Council can only speak for itself. We have set out above our insistence that working barristers should have a grounding in academic law, even if that is delivered over a period as short as the GDL currently allows; that a period of vocational training is essential; and that a period of training in the workplace (i.e. pupillage) is also critical.

22. We are not insistent that the Bar be a graduate profession, and our submission to the LETR made this point. In practice, the BSB imposes a graduate requirement with a limited waiver policy, and we do not disagree with that.

23. Taken together, this training is designed to ensure that the public interest in the availability of a highly trained cadre of advocates is maintained. We accept that there are other routes available for prospective advocates (for example to solicitors), but we question whether those routes are capable of guaranteeing the high standards of expertise demanded, and displayed, by barristers. If the LSB considers that other routes should be offered in addition, then that is a matter that may merit discussion. It is not, however, a reason for altering the education and training requirements for barristers.

² And this is particularly the case (see paragraph 12 above) with transferring solicitors or transferring lawyers from other jurisdictions, where the pupillage requirements may be waived or varied.

Question 8: Do you think such a change will impact positively on equality and diversity?

24. As the latest research shows³, the Bar has made substantial progress with regard to ethnicity and diversity in recent years. The Bar Council continues to work on this issue. Naturally, with a more flexible legal education and training system, it will be even more important to pay due regard to any impacts different routes into the profession might have on equality and diversity. The Bar Council is committed to monitoring the diversity profiles of those in the legal education system, and knows that providers will be keen to do the same. Moreover, it is working hard to improve the retention of women and BME barristers, and will be mindful of any impact that alternative pathways might have on these efforts. Further, the Bar Council seeks reassurance that the LSB will pay due regard to the statutory duties imposed on it by the Equality Act 2010 in this respect.

Question 9: Do you agree that regulators should review their approach to quality assurance in light of developments in sector specific regulation of education providers?

25. We are not sure that we understand this question. Insofar as it may be taken to suggest that regulators should be alert not to duplicate existing processes, then that is something that we endorse.

Question 10: Do you agree that entry requirements set by regulators should focus on competence?

26. Yes.

Question 11: 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?

27. In principle, we agree that, in areas where niche skills are required, it would be desirable for regulation not to impose the burden of wider education than may be necessary to achieve those skills.

28. In practice, however, we have not been able to identify any particular area (outside possibly patent work, where the regulator for that field will be better informed) where this principle may be put into practice. We note that the LSB mentions will writing (yet again), and points to the results of the investigations it has carried out in that field, where there are areas of bad practice both among trained lawyers, and those without any training.

29. In our view, however, will writing is an area where more than passing knowledge is required of a great many areas of the law, including trusts, family, property and tax. The same may be said of conveyancing. Accordingly, while we do not doubt that it may be possible to do some jobs adequately without training in related fields, we do not think that this would ever be best practice.

³ The 2012 edition of the Bar Barometer shows the latest figures on ethnicity at the Bar - http://www.barcouncil.org.uk/media/177469/bar_barometer_nov_2012_web_upload_higher_res.pdf.

Question 12: Do you agree that re-accreditation requirements should be introduced in areas where the risks are highest?

30. We do not agree. This question raises huge problems which have beset the medical profession for years. The mechanics and expense of re-accreditation in a thinking profession such as the law have never been looked at. Who should re-accredit whom? What are to be the benchmarks/criteria? How is a company lawyer or a re-insurance specialist to be re-accredited? Who is to pay? How is the supposed benefit to the public of re-accreditation to be measured?

31. We are not complacent. We acknowledge that the Bar is a high risk profession, but the continual nature of practice, together with suitable CPD requirements, the Code of Conduct and the threat of disciplinary proceedings, in our view provide the necessary degree of cover. Further, to the extent that this question is directed at the need for training in specialist fields of advocacy (such as vulnerable witness handling), this is something that is currently in hand.

Question 13: Do you agree that in most circumstances an entity is better placed than the regulator to take responsibility for education and training?

32. Solicitors (to whom, as with much else in this paper, this question would appear to be primarily directed) have their firm or other organisation as their entity, and will answer for themselves.

33. Whether for the purposes of the Bar the entity is regarded as the individual barrister, or some other body such as the Chambers, the Inns of Court, the Circuits or the Specialist Bar Associations, or the employed barrister's employer, we do not agree with the proposition advanced by this question. For the Bar, the responsibility for setting and reviewing standards and monitoring compliance is that of the regulator. Compliance and self-improvement is carried out by the barristers themselves in one or more of the ways set out above. This system seems to us to work well, and we do not agree that there is any need for it to be changed.

34. It is not clear whether the question is intended to embrace CPD. To the extent that it is, self-employed barristers, who make up the majority of the Bar, organise themselves into different groupings for the purposes of keeping their professional knowledge and skills up to date, and complying with the requirements set by the BSB. Their Chambers, Inns of Court, Circuits and Specialist Bar Associations all have a role to play in delivering the education and training that the BSB requires, and more. In the experience of the Bar Council, many barristers have traditionally spent more (sometimes a great deal more) than the 12 hours' requirement in keeping up with developments in their specialisms, because they wish to maintain the level of excellence for which they are renowned, of which they are rightly proud, and without which they would not be instructed. The same is true of the employed Bar, albeit that the training will primarily be delivered through the employer organisation.

Question 14: Can you think of any circumstances in which this may not be possible?

35. This question does not arise, given our answer to question (13) above.

Question 15: Do you agree that it is not the role of the regulator to place restrictions on the number of people entering the profession?

36. Yes, we do agree. The Bar is an extremely competitive profession, and the competition helps to ensure that only the best are able to continue in practice to serve the public. There are no barriers to entry, other than the very low level aptitude test referred to above. The BSB does not have in place any restrictions on the numbers of people entering the profession.

Question 16: Can you provide any examples for review where the current arrangements impose such restrictions and may be unnecessary?

37. We are not aware of any such restrictions.

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