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Training Committee response to LSB consultation on statutory guidance

The City of London Law Society (the "CLLS") represents approximately 15,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response to the consultation of the Legal Services Board ("LSB") on proposals to issue draft statutory guidance under the Legal Services Act 2007 entitled "Increasing flexibility in legal education and training" (the "Consultation Paper") has been prepared by the CLLS Training Committee. The membership of the Committee is set out below.

We have adopted the abbreviations used in the Consultation Paper.

Introduction

We regard the Consultation Paper as deeply flawed, both as to the concepts it addresses and as to the consultation process itself.

The first point is that we believe that this would be the first occasion on which the LSB has issued statutory guidance in the field of education. Not only does the Consultation Paper barely touch on the reasons for doing this (paragraph 23 of the Consultation Paper merely states a belief that it should be done), but there is no consultation at all on whether it is right to issue statutory guidance. This is a serious failure, given that the front line regulators have already started action.

The second point is what does look like an inconsistent approach to evidence, which is a key aspect of proper regulation. In paragraph 20 the LSB refers to the LETR as "only one piece of evidence" and then refers to the views of the Legal Services Consumer Panel. However, in its submission to the LETR in June 2012, the Legal Services Consumer Panel said, in paragraph 3.3, that "there is a massive hole in the evidence base to allow a reasoned assessment about current levels of quality in the sector", although it went on to refer to some small scale studies in

particular areas. So on its own reasoning the Consumer Panel's views on legal quality are not based on evidence; they seem to us to be no more than opinions (and ones, at that, with which we disagree). It is equally not clear whether the LSB regards the views of the Panel as "evidence", or, if not, to what "evidence" is the LSB referring if the LETR is only "one piece"?

And reinforcing this point is what appears to be a l lack of knowledge by the LSB of the detail of legal education in practice (see our response on Consultation Question 13).

So in short, we have a public body about to exercise statutory powers in an area for the first time without consultation as to whether it should do so and demonstrably misdirecting itself about the evidence on which it intends to act.

The LSB needs to take into account that the three sponsors of the LETR (the SRA, the Bar Standards Board and ILEX Professional Standards) have already given an indication that they intend to develop regulation of education and training which is outcomes focused and risk based and to act quickly. They are also much closer to the regulated sector and may be taken to be more aware of the practical issues. This surely shows that no statutory guidance is needed. We suspect that if LSB acted in the way required of public bodies generally it would proceed no further with this process. The front line regulators are far better placed to assess issues like this. Of course, if what they do is defective, statutory guidance may be sensible. But until there is evidence of a problem why issue guidance?

Having said all that, while we think that some of the draft statutory guidance is unexceptionable or aspirational, there are some key areas which are either incapable of fulfillment, or potentially very damaging to the legal services sector. The Consultation Paper has all the hallmarks of something which has been prepared without proper thought. Perhaps wrongly, we can only suspect that it was rushed out to pre-empt the statements of the three front line regulators.

We are also concerned that the Consultation Paper does not address a number of the regulatory objectives. In addition, the Consultation Paper does not refer to the quality of legal education and training which is a key underlying support of the regulatory objectives. We believe the result is a limited paper which is not an appropriate basis from which to start.

There is yet another major flaw in the Consultation Paper. It is that the consultation questions asked relate to the less contentious parts of the proposed statutory guidance; indeed the more contentious the concept introduced by the LSB, the less likely it is that a consultation question is asked. This may not be the intention but it could be seen as an attempt to direct the outcome of the consultation. Again, this is not consistent with best regulation practice.

<u>The Outcomes Focused approach</u>

We entirely understand the notion that the regulation of legal services should be mainly OFR-based. However, in terms of education, OFR raises significant problems which are not addressed by the LSB.

These difficulties are compounded by the apparent failure by the LSB of not giving any particular attention to what the relevant outcomes are. In some places, the proposition by the LSB seems to be that the outcome of education is the development of a specific body of knowledge (see for example Question 3). Much of the Consultation Paper does proceed on this basis. We expressly disagree. A legal education needs to impart far more than some internal library of knowledge. It has to help develop overall cognitive skills about how to acquire, organise and apply knowledge and skills, as what is required will, inevitably, change over a professional's career.

No matter what rules are devised to assess outcomes, it is never going to be possible to adequately test all aspects of what legal services professionals need by way of education and training.

So, in our view, process (ie, how legal education is delivered) cannot safely be treated as irrelevant (and see our answer to Consultation Question 8). The failure to recognise this creates major problems for the LSB's approach.

We have no difficulty in principle in agreeing that as things stand the legal regulators should not be reviewing, say, the quality of the provision of university courses. However, they are entitled, surely, to determine what should be taught as part of a Qualifying Law Degree. And in terms of the LPC/BPTC, it may be right that they have responsibility for both quality and content.

There would be real difficulties with a completely "OFR" approach. If young people worked for 5 or so years to obtain a legal education, only then to be assessed on the "outcomes" in a single test or series of tests and failed, they would understandably be aggrieved. It could well damage the reputation of all of the regulators.

There is also an important "consumer protection" role in this. The LSB has in the past talked about the asymmetry between the knowledge of legal services providers and "consumers", and clearly in some areas this is true. However, the same asymmetry exists between the providers of legal training and those wishing to be trained, particularly given that the latter tend to be young. This may be even more true when the individual comes from a deprived background.

So, removing the regulators from the process of training by telling them to focus only on outcomes may have several negative effects on equality and diversity, and fail lots of aspiring young professionals.

The other unstated proposition in the LSB paper is that appropriate tests of "outcomes" exist. We doubt that this is so, although it may be that tests can cover a significant range of outcomes. However, as with the final examinations of doctors (where role playing actors are often involved), such tests may be extremely expensive. For doctors the State (rightly) pays that expense. But the State will (rightly) not pay for such tests for lawyers. And the costs may significantly inhibit people taking them. As an example, whilst there may be other factors, cost is likely to be a significant reason for the dramatic fall off in people attempting the Qualified Lawyers Transfer Test.

There are also equality and diversity implications in what tests are applied and when.

We are not saying that the testing issue should be a barrier to change. It is more that it needs to be resolved as part of change, and is far more difficult than it looks.

And another area which seems to have been overlooked by the LSB is the role of education and training in "socialising" young lawyers. It should also support the ethical side of practice. You can learn ethics without being ethical. However, training can and should inculcate an ethical approach.

In short, we do not challenge an outcomes focused approach to education and training. However, we do not believe that regulators can, as a result, be indifferent to the underlying processes.

Outcomes

We now turn to the proposed outcomes. Whilst there is some crossover on answers to the consultation questions raised, in general our concerns cannot be expressed by answering the questions.

We would regard proposed Outcome 1 as being more of the "apple pie and motherhood" aspirational type. That said there are two specific points that we would like to make:

Front line regulators will still need to assess "routes to qualification" to ensure that these are reasonably capable of delivering education and training which will enable those being trained to meet the necessary standards. We developed this point above and came back to it below.

We think there are risks with people being able to move between the professions at the point of qualification. We are certainly not, however, opposed to movement between the professions. Before the introduction of LDPs and changes to the Bar rules, many firms employed barristers who had to become solicitors to progress. The solicitors' profession welcomes many talented people who come through the CILEX route. However, movement at the point of qualification seems an extremely odd concept; commonsense surely dictates that if someone wants to train as, for example, a barrister they should do so, not train as a solicitor and change on qualification.

We then turn to Outcome 2. Again, there are some oddities, and some problems.

We will start with the first part of c. We have no difficulty with multiple routes to qualification. However, we think that it is critical that front line regulators assess each one to ensure that it is capable of working. Not to do so would seem to abdicate a key responsibility to both practitioners and the users of legal services. Approving one which is difficult so that, for example, those using it could never progress beyond some basic level, and perhaps not even that if law and practice changes, would be bad for the profession, bad for the regulators, and extremely bad for those who undertake such a route. The equality and diversity consequences might be very poor. And the need for the regulator to apply time and resources to assess routes does suggest that there cannot be an unlimited number.

The second part of c is much worse. The market, not the regulator, will decide which routes are more popular or which become "gold standard". We suspect that for barristers and solicitors the current route will remain the gold standard. What does the LSB want the BSB and the SRA to do? Discourage young people from going to university? Should any public body do that? To adopt an unobtainable objective really would be poor practice. And none of the consultation questions refer to this part of the draft guidance (see above).

We note that the BSB and the LSB do intend to stand back and allow the QAA to assess university standards. Indeed the Joint Academics Standard Board ("JASB") has never attempted to do anything else. However, that is different from a rule which says they cannot look beyond the QAA. What proper public policy purpose would such a rule serve?

Outcome 3 is extremely problematic for us. This is not so much the general statement of outcomes, but the various statements underneath it. In particular:

We explicitly disagree with the statement in paragraph a. that education and training requirements should be set at the minimum level at which an individual is deemed competent for the activity or actions "they are going to carry on". It is a necessary corollary of such a statement that the individual (and indeed the regulator) knows what activities an individual will carry on at qualification. This is rarely the case, and is an extremely illiberal proposition about education. Further, the LSB needs to understand that law and practice change over time, sometimes rapidly. One purpose of pre-qualification education and training has to be to equip a person for an entire career. It may, of course, be that the LSB intends to refer to a role (such as "solicitor" or "barrister") rather than "activities". Statutory guidance needs to be clear and coherent. What does the LSB mean?

We also noted paragraph d. which raises similar issues.

There is very little in the LETR about what the LSB refers to as "CPD". It may well be that with appropriate consultation and research what the LSB suggests is correct. However, at the moment there is nothing at all for the LSB to base this guidance on. The fact that in broad terms we agree with the approach does not imply that it is appropriate for statutory guidance, especially without supporting evidence.

We have nothing general to say about Outcome 4. We agree with it.

We do have concerns about Outcome 5. It cannot be correct that the regulators place "no direct or indirect" restrictions on the members entering the profession. Any educational or probity requirement will do this, but even if restated in a coherent manner to refer only to appropriate restrictions, which we would then agree with, the guidance remains partial. See our specific answer to the Consultation Question on this. We think the general proposition is that it is for the market to decide on what it needs so regulation should seek neither to expand nor to restrict the size of the profession.

Conclusion

It will be clear that we have extremely serious reservations about the Consultation Paper. We do not accept that there needs to be statutory guidance. If there is to be guidance it has to be well thought out, based on evidence (not prejudice) and coherent and realistic. We would have thought the current Consultation Paper should be withdrawn.

We have looked for information about the size of the legal services market. There are a wide range of numbers, but the Ministry of Justice report ("UK Legal Services on the International Stage", March 2013) says that in 2011 overall contribution was £20.8 billion (we have seen much higher numbers), with exports of £4 billion. Our industry is too big and too important to be the subject of regulation based on what we see as flawed thinking. This draft guidance cannot stand.

Responses to specific questions

We qualify all of these answers by the fact that we do not agree that there should be statutory guidance.

1. Q. Do you agree that these outcomes are the right ones?

   A. Not entirely. Like the LSB Consultation Paper itself, the outcomes do not pay sufficient attention to all of the objectives set out in the Legal Services Act. If there is to be guidance it should reflect, to the extent appropriate, all of them. And as set out in our general introduction, the LSB needs to recognise a balance between those objectives.

2. Q. Do you think that all of the outcomes should have equal priority?

   A. In light of our answer to question 1, it seems inappropriate to comment. But we observe that some of the LSB's "outcomes" are not really outcomes at all.

3. Q. 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?

   A. The questions raises but does not answer the question of "more than what?". Certainly for solicitors the SRA already has "Day One Outcomes" for qualification, although there is no equivalent for continuing legal education. And the Consultation Paper really does not deal with how an assessment of knowledge, understanding and ability is to be carried out. To move to an outcomes based approach is a legitimate direction of travel but it needs to be sensibly proportionate, reliable and not inappropriately expensive.

   We would repeat here our view (above) that a legal education needs to impart more than some body of knowledge. It has to help develop overall cognitive skills about how to acquire, organise and apply knowledge and skills. Clearly there has to be a recognition that the cognitive abilities will continue to develop post qualification, but the proposition in Question 3 is far too narrow.

   This seems to us to be an extremely static view of legal education.

   As asked the question only refers to education to the point of qualification. Is this intentional?

4. Q. Do you think that such a model would facilitate movement across different branches of the profession?

A. We doubt that this is so, and the LSB paper provides no evidence to support its contention.

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

A. Yes, but with the important qualification that there are certain legal tasks where experience is critical. Obtaining experience is of course different to "serving time". And there may be some things where skills are so hard to measure that "time served" is the best measure simply because no realistic testing mechanism can be devised. However, if this were the case, flexibility should be maintained. For example, currently SRA Practice Framework Rule 12 requires 3 years' experience for a solicitor to qualify "to supervise". But unfairness is reduced by an ability for the SRA to waive this requirement. Recognising that this is not strictly a training and education issue, to us it seems a pragmatic and fair rule. Imposing some other "outcome focused" test might well be unnecessarily expensive and unfair and too difficult to assess. There are similar issues which arise in education and training.

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

A. Yes. Current practice does need substantial revision.

7. Q. 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?

A. We agree that regulators should be more flexible than they are at the moment. That said, regulators must be satisfied that it is reasonable to expect that each method of delivery of education and training is apposite to educate and train professionals to an appropriate level of competence. That might also imply that regulators (who all have limited time and resource) will only allow a limited number of routes to qualification. Ultimately our answer to question 7 would be "no".

In addition, if students feel that there are no parts in this legal education at which regulators will accept that certain standards have been achieved, but everything will depend on some final test, they may feel unwilling to embark on what might seem to be a speculative project of education. And it may be students from more deprived backgrounds, who have less confidence in their ability to secure support from relatives or others if their study does not succeed, who are more likely than students from more affluent backgrounds to take such a view.

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

A. Not necessarily. If a route to qualification is opened up which does not provide sufficiently rigorous education and training (so not helping the students gain

suitable employment), those who take it may be seriously disadvantaged which would have a negative effect on equality and diversity. There is a need for a balanced approach which does not put inappropriate burdens on regulators which either cannot be met or cannot be met without a disproportionate amount of time and money.

We are of the view that great care needs to be taken to ensure that equality and diversity are not hurt by these proposed changes, which is a real risk.

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

A. We are a little unclear about what this question means. If it is a reference back to the comments in the Consultation Paper about leaving the review of the quality of law degree courses to the QAA, we agree, subject to our concern expressed above.

What other sector specific regulation does the LSB have in mind?

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

A. That is one important factor. Probity is another. Understanding the regulatory and ethical rules is another, although we accept that this might be implied by "competence".

11. Q. 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?

A. We feel this will rarely be true, and the question confuses "knowledge" with education. The point about a broadly based education is that it helps the educated learn how to respond to changing circumstances. One of the problems of a narrow education is that it may not equip a practitioner to understand all of the issues raised by any particular situation, nor equip them with the skills to deal with changes in law and practice.

A clear distinction needs to be made between "qualified" legal services professionals and "unqualified" fee-earners. An unqualified fee-earners arguably needs just the knowledge and skills to perform his or her day to day tasks, and be subject to supervision where necessary to ensure that the wider context is not overlooked. A qualified professional should in theory not need supervision (depending on what they do). A qualified professional needs a wider skill set.

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

A. Not necessarily. A more rigorous approach to continuing legal education may be just as effective and much less expensive. Imposing the expense of reaccreditation on solicitors or other practitioners may cause a number to withdraw, cause damage to consumers, and may raise significant equality and diversity issues.

We would recommend that reaccreditation processes such as QASA, if it proceeds, be monitored to see what the outcomes are.

We are not, however, opposed to reaccreditation schemes in all cases, provided that they are proportionate, improve public protection, and do not damage diversity by imposing undue charges or other burdens on legal service providers who are already under stress.

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

A. No. Few (if any) employers will have the skills to properly devise and assess training programmes to enable qualification. Employers may be better placed in relation to continuing legal education, and it may be that this is what the LSB intends to refer to. However, care needs to be taken even here. Whilst entity responsibility for continuing training and education would work and would probably be the best solution for our member firms, there may be other firms for which this is not realistic. Imposing significant additional obligations on firms in areas suffering significant difficulty because of the changes in legal aid (which firms deal with important issues for consumers) may be counterproductive. And such firms are important for equality and diversity in all sorts of ways. So any policy change of this type needs to be approached with care.

We entirely comprehend the difficulties that regulators have in this area.

The truth is that many of the firms who will struggle to fulfill any additional obligations are those doing things which bring their staff into contact with extremely vulnerable individuals. A case could almost be made that it is exactly these firms who most need to step up their roll in educating and training staff.

There is no easy answer on this issue, and we feel strongly that the LSB, which is by its nature far removed from day to day supervision of firms like those we describe above, should allow front line regulators to decide the regulatory framework.

In addition of course, entity responsibilities may not work for in house lawyers in the private sector, government, charitable or other areas.

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

A. Yes. See our answer to question 13.

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

A. Rules which limit qualification either by reference to knowledge, understanding or skills, or by reference to probity, are restrictions to entry and need to be set by the regulator.

If the LSB intends a reference to "inappropriate restrictions", we agree. However, this is by reference to part of a wider proposition that the market, not the regulator, should determine the size of the profession. So a corollary would be that the regulator should not actively promote the expansion of the profession. The regulator should set appropriate standards and allow the market to decide on numbers.

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

A. We are not aware of any within the solicitors' profession.

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TRAINING COMMITTEE

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