The Law Society

Increasing flexibility in legal education and training

Response of the Law Society of England and Wales

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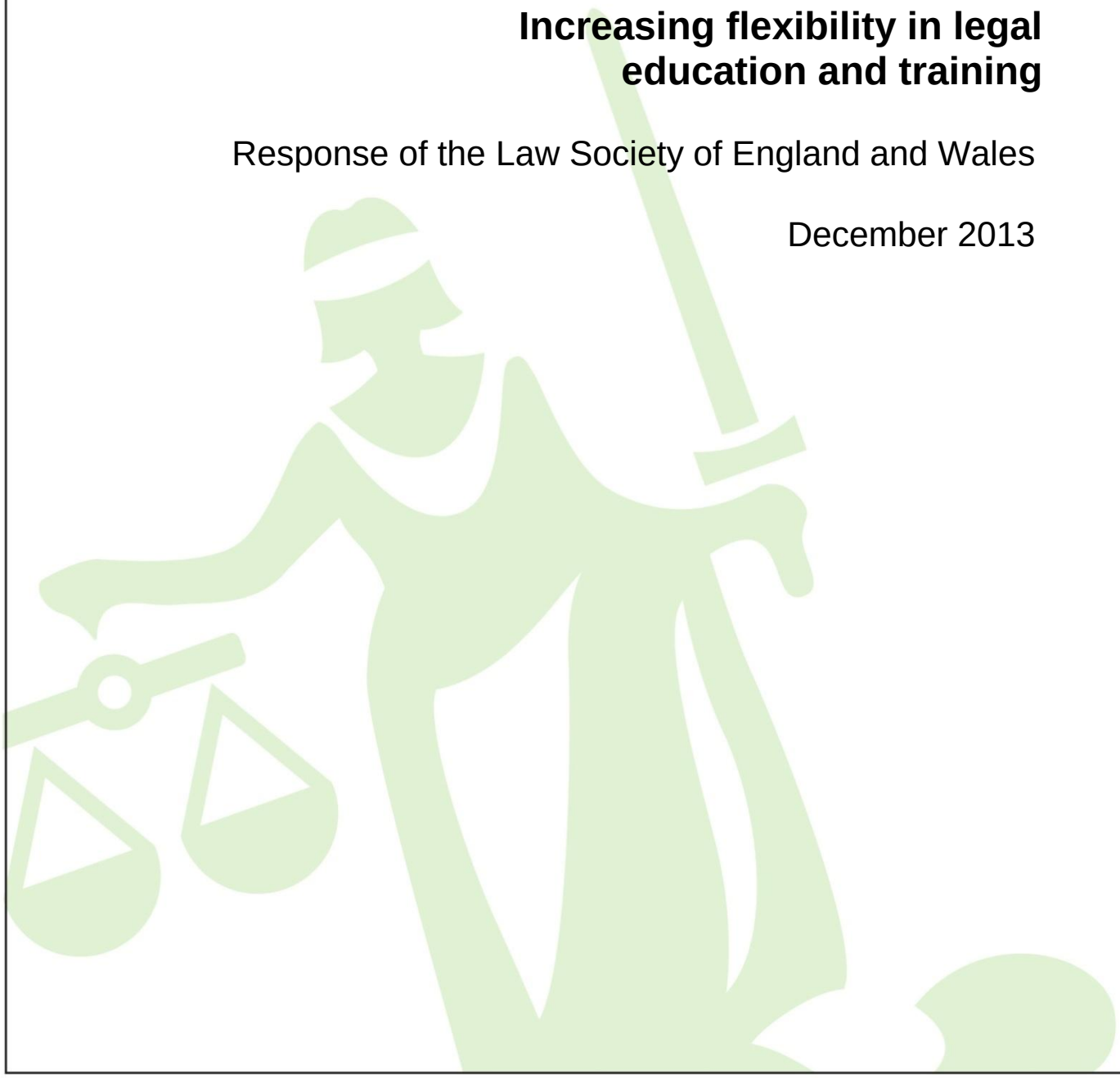

THE LAW SOCIETY'S RESPONSE

Introduction

The Law Society ("The Society") is the representative body for over 145,000 solicitors in England and Wales. It presents the policy of its council made on behalf of the solicitors' profession as a whole, and lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers.

We welcome the opportunity to respond to the Legal Services Board's (LSB) consultation on *Increasing flexibility in legal education and training*.

The Society agrees that there is scope for change in the way in which lawyers are trained. Indeed, the Society itself began a full-scale review in the early 2000s which was overtaken first by the arrival of the SRA and then by the Legal Education and Training Review (LETR). In particular, we support greater flexibility and a move away from "time-served" approach. We welcome the bulk of the recommendations in the LETR and are keen to work with the SRA on their implementation.

We would make the following initial points about the LSB's approach.

First, we do not understand why it is appropriate for the LSB to issue a statutory Direction at this stage. The LETR was published in June this year. The SRA has already issued its initial statement about its approach, which is informed by the findings and recommendations of the LETR and is in many respects consistent with that set out by the LSB. Other Approved Regulators (ARs), who commissioned the Review (LETR), are proceeding with consideration of its recommendations. We can understand that the LSB may wish to set out its own views following the LETR and, clearly, it is important the ARs should be aware of them. However, a Direction of this sort has significant consequences for regulators and needs to be issued only where it is proportionate to do so. At the moment, we are unaware of evidence that the ARs are taking no action or are likely to proceed in a way which is contrary to the Review's recommendations or, indeed, of the LSB's preferred approach. A Direction should only be issued in circumstances where it appears likely that the ARs may not comply or where there is strong need for it. We do not believe that there is evidence of either here.

Moreover, the LSB's proposed outcomes, even though expressed in general terms in the context of a brief consultation document, do risk not allowing individual regulators to choose their own best way to proceed in the light of the LETR's evidence and recommendations.

Above all, this Direction and responding to it causes an additional distraction both for ARs and stakeholders. It would be much more appropriate for the LSB to allow the ARs to hold their own consultations and deliver their own proposals.

Secondly, we are concerned that the LSB's approach devalues the significant work undertaken by the LETR and attempts to impose its own political agenda. The paper refers to the LETR as being a single piece of evidence and refers to the need to examine others, referring particularly to the Consumer Panel's evidence. Yet that evidence itself indicated the paucity of evidence. By contrast, the LETR's work of evidence-gathering and analysis occupied more than two years. Naturally, we would expect that regulators would undertake further consultation with stakeholders but we hope that would be strongly informed by the LETR's work and would not hold up moving on with reform.

We were also particularly concerned at the points raised about education and training requirements acting as a barrier to meeting legal need. The evidence that we have seen

does not suggest that such a conclusion is necessarily merited. There are areas of legal services work (e.g. conveyancing) where there is no obvious shortage of supply and where there is keen competition on price. This suggests that the failure of individuals to access legal services may well be to do with the complexity of the problems, lack of funding and people taking a pragmatic view about whether legal advice was necessarily the best answer to the problem. Moreover, there is ample scope for firms to undertake work through paralegal staff and to compete for this market, should they consider it commercially viable to do so.

We are also concerned about the return to the LSB's ideas for activity-based regulation, which was not recommended by the LETR and has the potential to reduce the quality of services offered to consumers. The LSB's paper ignores the need for a breadth of legal knowledge, particularly in an area where there is little consumer knowledge. It also ignores the need to aspire to excellence as exemplified by the professions.

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

The Law Society's chief concern with the outcomes outlined in the consultation paper is that they are based too much on a need for flexibility and dealing with entry, while ignoring some of the other regulatory objectives – notably the professional principles.

In our view "Outcome 5" is not an outcome but rather a negative regulatory requirement. It does not stand alone in the way that the others do. While we agree that numerical restrictions are unjustifiable, we would be very concerned if the concept of "indirect restriction" were to undermine the appropriate "quality control" measures that are necessary in the public interest.

If it is appropriate to have outcomes, the Society suggests the following set:

The Law Society's Five Objectives for Legal Education and Training

1. The legal education and training system should be designed so as to promote the pursuit of excellence by all those involved.
2. It should be of such consistent quality as to enable able and committed students, trainees and practitioners to achieve their potential as lawyers.
3. It should provide all lawyers with a broad foundation of legal knowledge and practical skills and support career development and good practice management in a diverse and increasingly specialised legal sector.
4. It should be accessible to all potential entrants, who show the necessary ability and willingness to commit to the standards of the legal profession, irrespective of their background and personal circumstances.
5. It should provide all prospective and practising lawyers with a proper and up-to-date understanding of the principles of professional conduct and ethics which ensure that the interests of clients are paramount and support the unique role of the legal profession in the administration of justice.

These objectives deal with the full range of regulatory objectives (including those about the rule of law and the professional principles) set out in section 1 of the Legal Services Act 2007. They encompass those proposed by the LSB (by recognising the need for flexibility and accessibility) but also stress the need for high standards, the need to aspire towards excellence and the essential role that lawyers play in the administration of justice and the rule of law. It is disappointing that these appear to be ignored by the LSB.

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

If the LSB insists on these objectives, the Society does not think all of the outcomes set out by the LSB should have equal priority. The key outcomes are ensuring that individuals have the necessary knowledge, skills and attributes at the point of qualification or authorisation as referenced in outcome 1, and that individuals continue to be competent at an appropriate level throughout their practice, as referenced in outcome 3. Outcomes 2 and 4 then suggest appropriate ways of ensuring that these outcomes are achieved in a fair and flexible way. We do not think that outcome 5 is appropriate for the reasons stated above in Question 1.

The Law Society's proposed objectives, in our view, have an equal ranking.

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?

This approach is in keeping with the key outcome of ensuring the necessary knowledge, skills and attributes at the point of qualification although it is unclear what is meant in the question by 'more'. We note that the Solicitors Regulation Authority (SRA) are currently in the process of formulating their approach based on a similar concept, which suggests that the LSB guidance would be a duplication of what the SRA are already working to achieve.

We would like to reiterate that continuing education is no less important than the "day one" outcomes. We support the inclusion of professional principles and ethics.

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

Our response to this question is to query why there seems to be an assumption that this is presently difficult.

It is presently easy for solicitors and barristers to move over with the only requirements being to demonstrate an ability to undertake work which is key in one profession (e.g. accounts) but less so in the other. There are also ready routes to qualification via the Chartered Institute of Legal Executives (CILEx) and the Qualified Lawyers Transfer Scheme (QLTS) offering a route for transferring from other jurisdictions and from the Bar.

"Restrictions" on movement are necessary to ensure that the individual can demonstrate the knowledge and skills required at point of entry to the profession he/she wishes to move to. The core roles of solicitors and barristers are different which justifies some differences on the way to qualification.

We would welcome further debate on the idea of a shared vocational stage as discussed during the LETR. This approach has the potential to raise social mobility issues around increased costs, however this must be balanced against the social mobility benefits of a greater choice of routes. The issues could be mitigated in part if this option was offered in addition to the existing routes. It could initially be a course option that meets requirements of both SRA and Bar Standards Board (BSB). Our view is that further debate would be useful to make sure the options are properly examined.

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

The Society agrees to the extent that "time served" is not a sufficient condition for meeting requirements at point of entry. In our view, however, where no prior experience is offered, a minimum period of pre-qualification supervised practice should be retained. To move

away from 'time served' models fits with the approach mooted by the SRA in the planned development of a competency framework. On the whole there is no reason why an outcomes model should not be able to assure standards of entry to the professions, although there may be some areas where a greater degree of prescription is desirable. One possibility is that the work-based learning portion of any route should be allocated a period of not less than, for example, 18 months to be completed.

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

We are not clear what the consultation paper means with reference to “students”. We understand the term to cover individuals taking the Legal Practice Course or the Bar Professional Training Course. The current system places very limited regulation on students beyond the requirement to register. There can be advantages to this in that matters relating to an individual's integrity (e.g. plagiarism or criminal offences) can be identified at that stage and enable regulators to assess risk. We doubt, however, that the majority of students realise that they are “regulated”. We believe that it should be for the regulators to determine how far regulation of students is proportionate to the risks they pose.

However, the paper suggests that such students are likely to be working under the supervision of a qualified person. It may be either that the paper refers to people who have a training contract or who, as part of their course, provide pro bono work as part of a university law clinic. We agree that, in many cases, the existence of supervision by a qualified person will materially reduce the risks. However, the concerns about individual integrity would remain and we would reiterate that it is for the regulator to assess, in the light of the risks, what form of regulation is proportionate.

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?

This question appears to have greater relevance to the Bar and to apply less to the SRA. The SRA already have a lot of flexibility within their system, with a non-graduate route through CILEx, law graduate, non-law graduate, compressed QLDs and part-time Legal Practice Courses.

Broadly speaking, we are of the view that flexibility is always desirable so long as standards for entry to the professions do not suffer and the cost of regulating these multiple routes does not become overly burdensome.

We note the LSB’s views that one route should not be allowed to become the 'gold standard'. We can see that this is desirable – it is important that all routes must be able to demonstrate equal rigour. However, it is also important to stress that the market may well lead to one route becoming preferable to another. Firms and providers may gravitate towards a particular model. Students may perceive that a particular route suits their needs best and provides the best way of achieving a qualification. We doubt that the regulators can do anything to stop this.

In moving towards an outcomes focused model with a competency framework, the SRA are seeking to achieve these things. We support this move should be supported, subject to seeing the detail of what they wish to implement.

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

In this area the more flexible the requirements, the more opportunities there will be for those wishing to enter the profession to find one that best suits their particular circumstances. However, there must be an equality of standards between the routes in order to optimise the positive impact on equality and diversity. Current evidence would suggest that those solicitors who qualify through the CILEx route go on to earn, on average, less than those who qualify through the more traditional route. This suggests the possibility that the market currently places a lower value on qualification by this route.

As suggested above, there is a significant danger that the most able candidates and most attractive firms will identify one way as the most suitable approach for qualification. This may lead to a market perception that other routes are for the less talented. This may mean that those from disadvantaged social backgrounds may, in fact, still struggle to make a career.

There is also a danger that a qualification without a law degree may make the qualification less acceptable internationally, since many jurisdiction demand that. It will be important that potential entrants are aware of this.

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

Clearly it is right that regulators should review their approach to quality assurance and it may well be that, with a more flexible outcomes-based approach to qualifications, it is less important that law degree, LPC and CPD providers are directly scrutinised by the SRA.

It is significant that the SRA and BSB now propose to remove work from the Joint Academic Standards Board which overlaps with other agencies carrying out quality assurance in a more comprehensive way.

There is, however, clearly a balance to be struck. Training to be a solicitor represents a significant investment, often for people who are not in a position to take significant risk. Under the present system, students know that, if they pass a course, they will have reached a standard that is approved by the regulator. Without such scrutiny, there is a danger that institutions will provide training which is not adequate or appropriate and students will not be in a position to judge this until after the event.

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

This is a sensible basis for building entry requirements but we believe that it does not go far enough. Regulation should assure competence and encourage excellence. Requirements should not be set at a minimum level as this completely disregards the notion of excellence, which is what the legal professions stand for. The depth and breadth of knowledge, skills and experience that entrants to the solicitor's profession possess allows them to see beyond the immediate circumstances of a legal activity, to the wider context and to therefore identify and deal with any risks that may arise, that may otherwise have been missed by someone with the bare minimum competence.

It is the view of the Law Society that excellence above and beyond the minimum necessary competencies are what will counter risk and serve the interests of clients most effectively in any legal activities undertaken.

In principle we are happy to support a balance of day one competencies, preferably at the standard of excellence and ongoing competence. This could potentially be done through continuing professional development.

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?

The Law Society strongly doubts the wisdom of the approach that suggests that, because some transactions are relatively simple and do not require a broad base of knowledge, it follows that it should be possible to be authorised to do all such work without a broad base of knowledge.

There are two aspects to this. The first covers reserved legal services. In the Society's view, authorisation to undertake such services should mean that a practitioner has the ability to deal with a wide range of such transactions. In those reserved areas, it is likely that, in some cases, a requirement for a knowledge of other areas of law and the principles of the legal system will arise (e.g. in conveyancing, a knowledge of tax, criminal law, principles of trusts and civil law remedies may all be relevant – and the CLC qualification recognises this). This does not mean that the practitioner has to be an expert in those areas, but he or she does have to be able to identify them. This is likely to be difficult without a broad-based area of knowledge. It is also likely to be difficult to identify such cases in advance and it will be inconvenient for consumers if the result of this is likely to be that they are either given poor advice or have to seek a different adviser in the course of a transaction.

The second aspect is in respect of qualification for a particular title, irrespective of whether reserved work is undertaken or not. In our view, the crucial quality that solicitors possess is a broad knowledge of the law so that consumers can go to them and receive advice that is informed by that knowledge. If consumers wish to go to people with less generalist qualifications then that is their choice. However, part of the crucial features of the profession and its reputation lies in its ability to provide advice that is informed by a broad knowledge of the law. We do not believe that this should be compromised by the training review.

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

Reaccreditation creates a burden for practitioners and it should be imposed only where appropriate and where there is strong evidence that it is necessary.

Protections already exist to ensure that people remain competent: continuing, regular practice is likely to provide practitioners with up to date expertise; this is bolstered by the rule only to take on work which is within the practitioner's competence and by the requirements to undertake CPD. Clearly these will not ensure that every practitioner is competent but they act substantially to mitigate the risks. There should be clear evidence of a problem of significant incompetence to justify any requirement for reaccreditation. It is not just the risk that should be considered, but the evidence that it is actually materialising.

The Society thinks that it would be sensible to use enhanced CPD requirements to further mitigate risk before considering reaccreditation. The SRA's initial proposals, under which solicitors will be required to plan, implement, evaluate and reflect annually on their training needs should address this.

We would add to these requirements that a portion of a professional's CPD should normally be relevant to their current area of practice, that this should be flexible where lawyer is re-skilling to move to new practice area, and that it should periodically include

ethics, equality and diversity and management skills also, in line with the LETR report's recommendation.

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

The Society agrees that an entity has a strong role in ensuring that its staff are adequately trained to meet the needs of that organisation. It is closest to the needs of its clients and well able to judge the quality of training. This applies particularly in respect of CPD. Having said that, the regulator must retain a responsibility for overseeing the general standards and ensuring that there is a consistency of approach. It must be the overall guardian of the standards guaranteed by use of the title.

There are instances where firms have in place extensive and well organised systems of education and training, where it may be appropriate for the regulator to devolve the day-to-day responsibility for education and training to the entity. In our view the best approach is that the decision should be made according to a general principle of devolution, with exceptions, either block or individual, for certain cases where there should be careful appraisal by the regulator of the entity's systems and there should be a periodic reappraisal at appropriate intervals. In either case the regulator should retain ultimate responsibility for the education and training of those it regulates.

In our view the entity should normally accept responsibility to the regulator for ensuring that requirements are being met as regards its trainees and lawyers. However, other arrangements would be required in certain cases, including for in-house practice in the public, private and charitable sectors, and for lawyers not currently with an entity, for example, those who maintain a practising certificate while on a break from practice and those providing locum services.

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

The Society is concerned that there are smaller firms where staff are provided with little or no support to complete their continuing professional development (CPD) due to the perceived costs involved, either of courses or of lost man-hours. For such firms the cost of ensuring that their regulated staff are up to date with their education and training requirements may be difficult to absorb and, particularly if the firm relies heavily on legal aid work, will reduce margins.

Some small firms may lack the means to budget for training and are unlikely to be in position to do so in future and there must be awareness of the burden this will create and initiatives to ameliorate it.

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

There appear to be problems associated with the number of individuals wanting to access the professional qualification as against the number of training contracts available. However, we agree that, ultimately, it is for the market to determine how many new entrants to the profession it can support, which it does through the current arrangements.

We support greater flexibility of qualification routes. However, the SRA does have a role in ensuring that there are consistent standards and it needs to ensure that those are met. In our view, the system of requiring a period of pre-qualification supervised practice, while necessarily limiting the flow of new entrants by reference to the number of training positions which the market is able to supply, is entirely justified by the public interest in

ensuring that lawyers are properly trained in dealing with the day to day problems faced by consumers.

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

Please refer to the answer to question 15.