letr
legal education and training review

IPS IFEX PROFESSIONAL STANDARDS

BAR STANDARDS BOARD REGULATING BARRISTERS

Solicitors Regulation Authority

Discussion Paper 01/2012

Key Issues(1): Call for Evidence

Deadline for responses: 10 May 2012

Introduction

1. The Legal Education and Training Review, jointly commissioned by the Solicitors Regulation Authority (SRA), the Bar Standards Board (BSB) and the Institute of Legal Executives Professional Standards (IPS) was announced by David Edmonds, Legal Services Board Chair, in November 2010. The Review is intended to be the largest review of legal education and training ('LET') since the 1971 Ormrod Report. Its remit is to examine the requirements of legal education and training in the delivery of the regulatory objectives set out in the Legal Services Act 2007. It is to be based on an extensive, evidence-based process, and the first such review to extend its remit to the whole legal services sector.

2. In terms of process, expressions of interest in undertaking the research to underpin the review were invited in January 2011, followed by a formal tendering process. In May 2011 it was announced that the research contract had been awarded to the UKCLE Research Consortium (the 'research team'), comprising researchers from the University of Warwick, the Institute of Advanced Legal Studies (University of London), Nottingham Trent University, and the University of Northumbria. An initial period was taken-up in creating and agreeing the project design and infrastructure, including website,[1] with the research work proper commencing in July 2011.

3. The tender specification for the research identified four phases of work:

    - Phase 1: A literature review, including an element of comparative work relating to other jurisdictions and professions;

    - Phase 2: 'Contextual analysis' - identifying the knowledge, skills and attributes currently required in the legal services sector;

    - Phase 3: 'Workforce development' - identifying potential future structural change and its implications for future education and training needs, and

    - Phase 4: Report and recommendations – summarising the outcomes of the research and setting out evidenced priorities for action and recommendations to address these issues.

4. The research team has particularly been tasked in making recommendations with regard to:

    - the legal skills, knowledge and experience demanded of different legal service providers currently;
    - the legal skills, knowledge and experience demanded of legal service providers and other key roles in the provision of legal services in diverse business models and future legal services entities;
    - the education and training system(s) required to deliver high quality, competitive legal services and high ethical standards of practice for lawyers and legal services entities now and in the future;
    - qualification routes that are responsive to emerging needs;
    - an education and training system that is responsive to different career pathways, promotes mobility and transferability between branches of the profession and encourages diversity in the profession;
    - an education and training system that enables flexible, ongoing education and training options;

[1] At http://letr.org.uk

- the extent to which, if any, formal regulation of legal education and training should be extended to include groups other than those currently regulated by the SRA, BSB, IPS and other Approved Regulators, and
- recommendations specific to the Legal Services Board, Approved Regulators and other relevant bodies, supported by an analysis against better regulation principles.

5. The research team are due to report to the commissioning bodies in December 2012. Implementation of any of our recommendations is then a matter for the Approved Regulators under the Legal Services Act 2007. Formal consultations on any regulatory changes consequent on our report will be conducted as required by the relevant Approved Regulator(s).

Assumptions underpinning the research

6. There are four central assumptions which underlie the research team's work and help set the parameters for the Review. We invite comments on any of these assumptions.

Recommendations for change must, so far as possible, be evidenced-based.

7. Previous reviews of LET have commissioned relatively little research. Much of the debate about the fitness for purpose of the current LET regime has proceeded by assertion, based often on limited evidence. The research team's approach will be to draw on a meta-analysis of existing research and data wherever possible. It is also undertaking new research as necessary to address the research questions raised in phases 2 and 3. Research includes:

    a. Qualitative research comprising interviews and focus groups with key stakeholder and representative groups, individual practitioners, law teachers, students/trainees, clients/consumer representatives, and 'thought leaders' in professional education.
    b. Stakeholder questionnaire survey
    c. Interviews with representatives of Approved Regulators/OISC/Ministry of Justice
    d. Quantitative workforce projection
    e. Desk-based research analysing and comparing existing competence frameworks, training standards and regulations, etc
    f. Analysis of responses to LETR Discussion Papers
    g. Equality impact and cost benefit analysis of alternative scenarios

8. The timing and time constraints of the project will impose some limits on the range of research that is possible. It is likely therefore that recommendations will also include suggestions for further research.

The Review's primary focus is on the regulation of LET.

9. Moves to bring in alternative business structures and the shift to greater use of outcomes-focused regulation (OFR) are critical contexts for the research. In addition, the Legal Services Act 2007 has signalled a shift in discourse, marked by a sharper professional focus on the need to regulate LET. The frontline regulators must ensure that their systems of education and training meet the regulatory objectives of the 2007 Act, particularly the objective of encouraging an independent, strong, diverse and effective legal profession. The Legal Services Board, as oversight regulator, also has a statutory obligation under s.4 of the Act to assist the frontline regulators in the maintenance and development of LET standards.

10. What does a shift in focus from education and training to the *regulation* of education entail? As a member of one of our stakeholder groups recently observed, there is a risk here of creating a false dualism between the thing itself and its regulation. We agree. It is not possible to talk

sensibly about the regulation of education and training without some quite extensive analysis of LET processes (both actual and preferred). Nevertheless, it does mean that, in terms of our recommendations, the primary focus will be on:

- The role of LET itself as a regulatory tool for assuring competence
- The appropriate form(s) such regulation should take (particularly the balance between specific training regulation and the use of conduct of business rules and entity regulation as drivers of LET compliance)
- The scope and reach of regulation – eg, whether reach should be extended into currently unregulated areas of work; whether it is appropriate to move away from the dominance of regulation by title to greater emphasis on activity-based authorisation and, possibly, regulation.

We return to these issues later in this paper.

11. The regulatory context is also critical in that any recommendations of the Review regarding LET regulation must:
    - themselves be consistent with the regulatory objectives of the 2007 Act;
    - be proportionate;
    - avoid any negative impact on, and, so far as possible, enhance equality and diversity;
    - not be anti-competitive (both as regards individual access to the professions, and access to the legal services market), and
    - satisfy Better Regulation principles.

The focus of the Review is on 'effectiveness' – the ability to assure competence to deliver legal services.

12. As noted, the Review is not concerned with the intrinsic qualities of any stage of legal education and training as such. Its focus is on how the regulators might assure themselves and the public that those delivering legal services are competent to practise at both the commencement of and throughout their careers: competence is the legal basis for becoming and remaining an 'authorised person' under the LSA.

13. Broader questions about the values and purposes of LET, eg, as a liberal higher education or as preparation for employment outside the legal services sector, will only be addressed by the Review insofar as they are relevant to assessing the effectiveness, proper scope and proportionality of *legal services* education and training regulation.

14. The current LET regime arguably does not focus sufficiently on competence. Competence is currently assured by the regulated professions through a mixture of conduct of business and training regulation. The effectiveness and balance of this regulatory mix will be a significant issue for the research, particularly in the context of current moves by a number of the Approved Regulators towards more outcome-focused regulation (OFR).

The Review is sector-wide in its scope.

15. The Review is not limited to examining LET in the professions that have commissioned this work. It is the commissioning bodies' intention that the Review should be sector-wide in scope. This makes sense in the context of moves towards more market-based, sectoral, regulation, but also raises significant challenges in terms of capturing a representative range of activity across the sector within the limited timeframe of the Review. Those who consider the time allocation for this project excessive may wish to recall that the Ormrod Review took three years to report, whilst the Law Society's Training Framework Review lasted some five years; both of these had a

narrower remit than LETR's. Our approach has so far been informed in part by the extent of existing research data and literature, but we have also sought to achieve a balance based on the relative importance and scale of activity undertaken by different groups (the regulated communities represented by BSB, IPS and SRA do constitute by far the majority of the regulated workforce) and the regulatory risks created by different parts of the workforce. We discuss this further in the next section.

Where we are now

16. A first draft version of the literature review was completed at the end of January 2012, with a summary published as *Headline Findings* in March. The review was based upon literature published during the period between 1971 and 2012. The main purpose of the literature review is to assist the research team in analyzing the complex relationship between legal education and regulation in England and Wales today, with particular attention given to the analysis of regulatory attitudes and understandings in standard reports and secondary texts. There is a substantial comparative element to this literature review, and as such it is extended beyond the existing literature relating to legal education and training in England and Wales, synthesising literature from other jurisdictions and professions to reframe existing debates and create an original analytical framework for discussion. A lightly revised version of the draft is being prepared for publication currently, with the final version being published in December 2012, together with an online bibliography of sources.

17. Desk research has also been used to produce a number of other papers. In July 2011 we published our first *Briefing Paper* (01/2011) on the notion of competence, and produced *Discussion Paper 01/2011* for the Consultation Steering Panel, inviting comment on our main research questions and assumptions. A first draft of *Discussion Paper 02/2011*, on equality, diversity and social mobility, another underlying theme of the Review, was discussed with the CSP in November 2011. A final version of that paper will be published in April 2012. An analysis of the knowledge, skills and attributes expected of lawyers drawn from a comparison of a number of competence frameworks used in the sector has just been published as *Briefing Paper 01/2012*. A summary review of existing entry criteria published by the approved regulators has also been undertaken. This has not been published, but informs some of the work in this paper, and will assist in our final recommendations. A list of planned publications for 2012 is published on the LETR website.

18. Field research for Phases 2 and 3 is substantially underway, but also still has some way to go.[2] It must be borne in mind that the data in this paper represents a snapshot of where we are now. In particular, much work remains to be done regarding CILEx, the smaller Approved Regulators[3] and the unregulated sector. These elements will be highlighted in later papers. Equality and diversity issues will be addressed at all key stages of the research, and an Equality and Diversity Forum is being established to support this aspect of the Review

19. Questionnaires have been devised for distribution to providers of legal services. Much of our qualitative work thus far has concentrated on the City, and we have already completed a number of interviews, focus groups and discussions, including with:

    - representatives of the Legal Education and Training Group, an association of legal training and development professionals whose membership is drawn from the larger UK and international firms;

[2] Our intention is that bulk of the fieldwork will be completed by July, with any subsequent follow-ups completed by October.

[3] This term was used by Smedley (2011) to encompass all of the LSA Approved Regulators except the Law Society and Bar Council. There is, however, no formal or statutory definition.

- partners from large commercial law firms, and senior barristers, working in the international market for legal services;
- a group of third year post-qualification solicitors in a mid-sized City firm;
- partners in a busy high street firm specialising in criminal and family work, and their trainees;
- representatives from a range of organisations including Accutrainee, the Institute of Paralegals, the Institute of Professional Willwriters.

20. To get a broader perspective we have also begun a series of ten focus group discussions with members of a number of local Law Societies' Legal Education Committees, which are taking us around England and Wales, and giving us an opportunity to discover the particular needs and concerns of solicitors working in different regions and different fields of work. Phase 3 focus groups have also commenced across the regions, with representatives from a cross-section of the professions (selected in consultation with the local profession, including Bar Circuits, and CILEx Branches), law students, and academics. Specific focus groups are planned for the professions in Wales.

21. In addition representatives of the research team are attending a range of meetings with stakeholders. So far these have included the Education and Training Committees of the Law Society and the Bar Standards Board, and the Committee of Heads of University Law Schools. A range of further discussions and focus groups are in development or already planned, including meetings (or further meetings) with all the Approved Regulators, and with representatives of the Inns of Court, and stakeholder groups including the Association of Personal Injury Lawyers, the Bar Association for Commerce, Finance and Industry and the National Association of Licensed Paralegals. The main fieldwork looking at developments in the currently unregulated sector will commence in April.

22. We are attending or participating in a wide range of external events, including a programme of seminars organised this Spring by the Legal Services Board and a number of partner institutions, on the theme of workforce development. Progress on the research will be discussed at a Westminster Legal Policy Form event in May, and at the LETR Symposium in Manchester in July. An updated events list is maintained on the LETR website. Where possible, we will also be staging a series of rather more *ad hoc* focus groups at external events likely to concentrate people whose opinions we might not otherwise capture, for instance a focus group has been held with attendees at a symposium at the University of Chester Law School, exploring the experience of Black and Minority Ethnic students in higher education. Similar opportunities are planned (for example) for the Institute of Professional Willwriters' AGM, and at the legal education debate and meeting of the National Law Students Forum, both at Nottingham Law School.

Call for evidence

23. We welcome submissions of evidence related to any issues arising within the ambit of this review. We will receive unsolicited papers as well as direct responses to issues and questions identified by our Discussion Papers.

24. As regards this particular paper, the sections that follow set out a brief description of the context for the Review, focussing particularly on the current regulatory framework, and go on to discuss emerging issues from the work undertaken to date. The paper then describes some of the key strengths and weaknesses of the current system, and seeks to establish a relatively high-level consensus on what needs to change. While comments on any aspect of this paper are welcome, the following are topics on which the research team would be particularly interested in receiving views, analysis and evidence:

    - The extent to which the overarching structure of LET is or is not 'fit for purpose';

- Any weaknesses that exist in respect of the existing stages in LET, and the extent to which there is willingness to consider radical change in the LET system;
- The extent to which the objectives and assumptions of the Legal Services Act (LSA) and the moves to OFR may be creating new or additional problems for the regulation of LET.

These points are expanded upon as the paper develops.

The regulatory context

25. The distinction drawn by Hood *et al.* (2001: 28) between the context and content of regulation is helpful here. They distinguish the context of regulation as "the backdrop of regulation", including its legal, policy, and economic settings, whereas content refers to "regulatory objectives, the way regulatory responsibilities are organized, and operating styles".

The context of regulation

26. The context of regulation is shaped by both the Legal Services Act and the structure of the sector itself. The Legal Services Act 2007 provides a key context for this work. The Act not only set-up the current regulatory regime, it is at the heart of the market liberalisation ethos that is driving regulatory practice in the legal services sector. This of itself is significant. Though it is a liberalisation measure, the Act is clearly not strictly deregulatory in function or intent. Its primary intention is to raise the competitiveness of, quality of, and access to legal services, partly by opening up the market to new business models, but also by assuring appropriate levels of both frontline and oversight regulation.

27. At the same time, however, the Act is also a problematic part of the context of the review. To see why, we need to start with the sector being regulated.

28. The legal services sector in England and Wales is (in terms of regulatory reach) one of the least regulated and possibly most segmented in the Western world. For those areas of work ('reserved activities') which are regulated, there are eight approved regulators under the LSA, each governing a regulated occupation: solicitors, barristers, chartered legal executives, licensed conveyancers, notaries and scriveners, trade mark and patent attorneys, costs lawyers, and chartered accountants with rights in probate. This level of interconnection between a reserve of activity and the protection, or at least regulation, of title is itself a distinctive feature of the system in England and Wales (see Centre for Strategy and Evaluation Services 2012).

29. The notion of 'reserved activity' is an important indicator of regulatory reach under the LSA, but not the only such indicator. With some limited exceptions, reserved activities can only be undertaken by authorised persons. Powers exist under the LSA to either extend or reduce the range of reserved activities, and there is a continuing debate about how the scope of reserved activities needs to change in the new market environment (see Legal Services Institute 2010, 2011). At the same time, however, the practice of regulating by title as well as activity necessarily extends regulatory reach – ie, unreserved activities conducted by a person practising under a regulated title remain, in effect, regulated, even if that person undertakes no reserved work. The extent to which the ambit of reserved activity determines or should influence the scope of regulated education and training is thus also a matter of direct interest to the Review. There may also be specific areas where the boundary between regulated and unregulated work may be difficult given the complexity of the issues and/or the framing of the rules – an example would be the SRA's current separate business rules.

30. It is also notable that two other regulated groups exist outside of this regime: immigration advisers regulated by the Office of the Immigration Services Commissioner (OISC), and claims

management companies regulated directly by the Ministry of Justice. Both of these groups were brought into regulation because of perceived risks to consumers arising from the activities of unregulated actors.

31. There is also a large and difficult to define, let alone quantify, body of paralegals, most of whom are likely to be employed within a regulated environment. The term 'paralegal' potentially incorporates everyone from LPC/BPTC graduands unable to obtain traineeships or pupillages through to outdoor clerks, and some advice workers. With increased commoditisation and routinisation of transactional work, the continuing reduction in legal aid, and the growth of legal process outsourcing, paralegals are likely to be a growing component of the legal services sector.

32. Outside of these two groups there is also an indeterminate unregulated sector. This includes some relatively clearly defined categories of work – will writing, employment advice and representation, trust administration, possibly some advisory work in the third sector, 'professional' McKenzie friends, etc, but also a grey area of unreserved activities undertaken by those calling themselves 'lawyers' or 'legal consultants' (or other unprotected titles). The concern with these categories of work is the obvious risk that may flow to consumers from the lack of regulation. Whilst it is hard to generalise, our preliminary work indicates that the unregulated sector may include individuals with overseas legal qualifications but no practising rights in the UK, solicitors who have been struck-off the Roll, and others with little or no formal training. Recent critical reports on standards of will writing (Legal Services Consumer Panel 2011)[4] and employment tribunal representation[5] have raised questions as to whether both of these areas ought to be brought within regulation.

33. In terms of the relative scales of the regulated and unregulated sectors, according to the Office of National Statistics, the legal sector employed 323,000 individuals in 2008, with 62% of the workforce in 2009 educated to at least degree level (Skills for Justice, 2010). Around half of this number is employed in regulated occupations, that is, either as persons authorised to deliver reserved legal activities under the Legal Services Act 2007, s.18, or as regulated immigration advisors. As of March 2010 there were 136,556 authorised persons, and a further 4150 regulated immigration advisers, making a total of 140,706 directly regulated individuals in the legal services sector.[6] Barristers and solicitors in 2010 together accounted for approximately 89% of the total regulated workforce. The remainder of the workforce is distributed as shown in the following table.

[4] Though it should be noted that this work was also critical of the quality of a significant minority of wills drafted by regulated professionals.

[5] 'Tribunal judges call for regulatory controls over non-lawyer employment advisers'. *Legal Futures,* 2 December 2011. http://www.legalfutures.co.uk/legal-services-act/legal-services-board/tribunal-judges-call-for-regulatory-controls-over-non-lawyer-employment-advisers

[6] Claims management companies are regulated by the Ministry of Justice as entities, not individuals, and so are also excluded from this analysis.

Group	No	As % of other regulated groups	As % of regulated sector
Chartered Legal Executives[7]	7,129	45.6%	5.1%
Regulated Immigration Advisers[8]	4,150	26.6%	2.9%
Patent & Trade Mark Attorneys[9]	2,098	13.4%	1.5%
Licensed Conveyancers	1,076	6.9%	0.8%
Notaries[10] & Scriveners	881	5.6%	0.6%
Costs Lawyers	296[11]	1.9%	0.2%
TOTALS	**15,630**	**100%**	**11.1%**

34. These figures exclude paralegal and support workers in the sector who are employed by regulated entities but are not themselves authorised to deliver reserved legal or immigration services. A high proportion of members of other regulated professions are employed in solicitors' practices. Unpublished SRA data thus indicate that 40% of the fee earners employed by solicitors' firms are not solicitors. It is not clear from these data what proportion of them are authorised persons (eg as chartered legal executives or licensed conveyancers). Paralegals are *indirectly* regulated by virtue of their employment in regulated entities. The data also exclude those – eg will writers - who deliver unreserved legal services through unregulated entities or on their own account.

35. Perhaps one of the key problems with the LSA is that it did not grapple with the underlying complexity of the sector, but largely imposed a new regulatory structure on top of what was already there. As Smedley (2011: 5) observes:

> There was no robust assessment by an independent body of the requirements of the new legislation, nor of the fitness or otherwise of the pre-existing regulators and representative bodies to meet these requirements. Still less was there any attempted overview of what the net effect would be of having every representative body establish its own regulatory arm.

36. The introduction of a principle of competition between regulators has arguably encouraged regulatory diversity and a proliferation of regulators. The Law Society, Bar Council, Chartered Institute of Legal Executives, Chartered Institute of Patent Attorneys and Institute of Trade Mark

[7] This figure only accounts for those who are fully qualified members as Chartered Legal Executives (formerly Fellows). CILEx total membership figures include (approximately) a further 14,000 "students and paralegals" (CILEx communication to the research team). Many of these will be working whilst studying, and so also part of the wider legal services sector workforce.
[8] As at March 2010. This figure is included for purposes of comparability, but it should be noted that there has been a significant fall in the number of regulated advisers, to 3,346 in March 2011: see OISC Annual Report 2010-11 at http://oisc.homeoffice.gov.uk/servefile.aspx?docid=201
[9] There are 358 individuals who are dual registered with IPReg; the combined figure is therefore presented here to avoid double counting.
[10] However note that there is a substantial element of double counting in this figure. The Faculty Office estimates that over 80% of notaries are dual-qualified as solicitors.
[11] This figure is anomalously low. This fact is explained by changes following from the Association of Costs Lawyers' (ACL - previously the Association of Law Costs Draftsmen) recognition as an authorised body from January 2007. Up until January 2012, the ACL had two categories of membership: fully qualified 'Costs Lawyers' who can exercise a right of audience and are authorised to conduct costs litigation, and 'Fellows' who had not passed the ALC examinations and did not have a practising certificate in their own right. Fellows have now been abolished as a category, but were given a grace period to take the examinations and become full Costs Lawyers. A substantial number of Fellows completed their training in 2010-11. As a result of these one-off technical changes working through the system, by December 2011, the total number of qualified Costs Lawyers had risen to 581.

Attorneys were, formally, the representative and regulatory bodies for their professions; their position has been maintained by the LSA, though each of these has created an independent regulatory arm.[12] The Council for Licensed Conveyancers and the Faculty Office, (which were already regulators without representative functions) were also brought into the new regime. To these we must add the Association of Costs Lawyers which has subsequently also decided to establish a new regulatory arm, and the ICAEW (chartered accountants) which has gained authorisation in respect of limited rights for its members to carry out probate work.

37. The introduction of Alternative Business Structures will further complicate this already complex regulatory landscape, by:

- introducing a greater emphasis on entity regulation in addition to the existing matrix of regulation by activity and title (discussed further below);
- introducing layers of 'double deontology' within entities, whereby (different) individuals may be subject to the requirements of their regulator(s) of title, while the entity itself will be regulated by its regulator of choice;
- the aspiration of some of the smaller bodies to extend their practising rights and become Licensing Authorities under the Act.

38. Another relevant factor for our purposes is the extent to which each of the regulated professions has its own, independent, training regime. This in itself may be a source of inflexibility and possibly confusion for prospective entrants into the workforce, and may increase training (and hence potentially transaction) costs. Criteria for mobility between occupations appear to have evolved rather than be developed in ways that are wholly rational. Chartered legal executives, for example, may re-qualify as solicitors, but, because they are not graduates, cannot become barristers, despite the fact that they may acquire advocacy rights and be appointed to the Bench. Dual qualification is normalised in some areas of work (eg notaries and solicitors); permitted in others (eg CILEx and ACL), while in others it is, at best, unclear. Systems of exemption and credit appear underdeveloped, particularly as regards some of the smaller regulators.

39. This approach sets England and Wales at odds with most other LET systems. Across the range of jurisdictions and disciplines we have analysed, a clear convergence is evident in the preferred form and nature of regulation; a single regulator model that focuses on monitoring educational outcomes.

40. New qualifications for a variety of paralegal workers in the legal services sector (including court staff and advice workers) are also being created both outside and within the system of National Occupational Standards (NOS). Modern Apprenticeships in law are also being developed in a way that may revive and extend non-graduate entry, though these are initially seen as entry routes into paralegal rather than 'graduate level' careers. There has been no specific Sector Skills Council (the state-sponsored bodies responsible for developing NOS) for the legal services sector; however, Skills for Justice, which has worked predominantly with the criminal and community justice sectors, policing and the emergency services, is expanding its footprint in the legal services sector, and is currently undertaking its own review of the present and future qualification needs of the sector.

The content of existing regulation

41. In looking at the content of existing regulation we consider issues arising as regards the objectives of the LSA, the organisation of regulatory responsibilities, and the different approaches to regulation in use.

[12] In the case of CIPA ad ITMA this is a single body: the Intellectual Property Regulation Board.

Regulatory objectives

42. The LSA introduced, in s.1, a set of statutory regulatory objectives which provide the framework for considering the effectiveness of the Approved Regulators. Any assessment of the 'fitness for purpose' of legal services education and training must begin with these objectives.

43. The objectives identify the following priorities:

- Protecting and promoting the public interest
- Supporting the constitutional principle of the rule of law
- Improving access to justice
- Protecting and promoting the interests of consumers
- Promoting competition in the provision of services in the legal sector
- Encouraging an independent, strong, diverse and effective legal profession
- Increasing public understanding of citizens' legal rights and duties; and
- Promoting and maintaining adherence to the professional principles – independence and integrity; proper standards of work; observing the best interests of the client; upholding the duty to the court; and maintaining client confidentiality.

44. Regulators are required by s.28 LSA to regulate the community for which they are responsible in ways compatible with these objectives. As Smedley (2011: 8) observes, this is an extremely challenging task:

> So, every regulator must devise and implement systems to ensure that the public interest in legal services provision is protected, for example, while promoting competition and, at the same time, promoting consumer interests while ensuring proper standards of work. As if this were not challenging enough, regulators are meant in addition to improve access to justice, increase public understanding of people's rights and also promote diversity in the legal profession. Regulators, while balancing these different priorities and discharging these divergent functions, must maintain a focus on the consumer while simultaneously encouraging an independent and strong legal profession.

45. The list is such that different regulators may legitimately prioritise different objectives at different points, or may quite properly apply the same objective differently (perhaps emphasising 'effectiveness' over 'diversity'). Even in terms of this review, the objectives beg a number of questions. Thus, though it is largely assumed that legal education and training contributes primarily to "encouraging an independent, strong, diverse and effective legal profession", it may also contribute to access to justice, increasing public understanding, and promoting the professional principles. Interpreting and balancing LET's contribution to these objectives may prove challenging, and perhaps also controversial: to what extent should it be the function of undergraduate legal education to "promote" the professional principles, for example?

Regulatory responsibilities

46. Regulatory responsibilities for LET are distributed across a range of players. Each Approved Regulator sets its own rules and standards for qualifying education and training. Approaches vary considerably as regards detail of curriculum specification, alignment of qualifications to national standards, the extent of the regulatory body's involvement in delivering training, and quality assurance systems. Most regulators operate, at least in part, with the mainstream further and/or higher education sectors in providing qualifying education and training. Qualifications for notaries, trade mark attorneys, and patent attorneys, for example, are thus delivered exclusively in conjunction with specific higher education institutions. Qualifying law degrees (QLDs)are

jointly approved by the Law Society and Bar. QLDs in England and Wales. are relatively lightly regulated as compared with most other Common Law jurisdictions, being subject to the knowledge requirements of the current Joint Statement and the QAA Benchmark Statement for Law. The former is primarily content driven, prescribing the 'seven foundations' of legal knowledge, while the latter provides a statement of minimum, and modal, standards for both cognitive and other skills components. Beyond Joint Academic Stage Board representation on validation and review panels, responsibility for quality assurance rests largely with the university and college sector, subject to the general quality assurance oversight of the Quality Assurance Agency.

47. The specification of outcomes and quality assurance mechanisms for professional training courses and CPD requirements are also a matter for each of the frontline regulators. We look at some of the issues in respect of these in the next section.

48. A number of the approved regulators have been reviewing CPD independently of LETR, and their work will be taken into account over the course of this Review. CPD is widely acknowledged to be a problem area, being possibly over-dependent on input measures (specified hours) and lacking rigorous quality assurance. This highlights a larger underlying question for the research, which is whether, and to what extent, there needs to be prescription of *input* e.g., contact hours or notional study time; CPD hours, etc, and/or *process* (e.g., how courses should be taught or assessed) and/or *structures,* and, if so, what inputs, processes and/or structures should be prescribed. Insofar as competence is assessed, it is generally by outcomes - the ability to do the things that make up the job. However, the use of CPD outcomes is neither uniform nor widespread across the sector. That said, there are significant concerns about the suitability of a purely competence-based approach in the context of higher and professional learning.[13]

49. In addition to generic CPD, there is also the issue of higher or post-qualification specialisation. Examples of activities and roles for which specialist training currently exists include:

- Rights to conduct litigation (barristers, costs lawyers, trade mark attorneys, patent attorneys)
- Advocacy rights (solicitors, legal executives, costs lawyers, trade mark attorneys, patent attorneys)
- Queen's Counsel
- Direct access to lay and professional clients (barristers)
- Police station representatives (solicitors, legal executives, paralegals)
- Pupil supervisor (barrister)
- Training principal (solicitor)
- Qualification to supervise (solicitor)
- Property selling services (solicitor)
- Law Society accreditation schemes (generally available to both solicitors and legal executives).

While some schemes, like QASA and police station representation training, cut across professional boundaries, many do not. This in itself may be regarded as a missed opportunity. The need for further specialist training in the context of the new roles created by ABSs also needs to be considered.

50. A potentially key issue for the review will be to examine the role of activity-based authorisation, and also the potential for sector-wide, activity-based regulation. The distinction between activity-based authorisation and activity-based regulation, as we use these terms, requires some explanation.

[13] See LETR *Briefing Paper 01/2011.*

51. Activity-based authorisation, it can be said, recognises the fragmentation of legal work and the increasingly mythological 'ideal' of the general practitioner who is licensed to undertake any work within his/her authorised title. Activity-based authorisation can be seen as an extension of the idea of specialist accreditation – in short enabling and recognising specialisation as the norm rather than exception, and possibly at an earlier stage in one's career. Activity-based authorisation could be developed within the existing regulatory structure, either by individual regulators, or collaboratively, like QASA. The result of a greater move to activity-based authorisation would be a relatively complex matrix of regulated activities mapped against regulated titles.

52. Activity-based regulation takes this idea a stage further by creating, in effect, national standards for key legal activities, which might then be mapped, by level, against regulated titles. A move to fully-fledged activity-based regulation does not necessarily replace regulation by title,[14] though it arguably reduces the significance of title in setting competence boundaries. Proponents would suggest that it reflects the extent to which what one does (and often the type of client served) may already be a greater distinguishing factor for many lawyers than what one is called. Activity-based regulation could provide greater consistency of standards across the sector, and possibly facilitate career mobility as well. Whether the current regulatory framework, including the principle of competition between regulators, acts as a barrier to maximising the potential benefits of activity-based regulation is a matter for consideration.

Approaches to regulation

53. Two related issues need to be considered briefly here: the balance to be achieved between conduct of business regulation (COBR) and 'conventional' training regulations, and the move by a number of regulators to outcomes-focused regulation (OFR).

54. In modern regulatory theory COBR is a term used to describe the regulations and standards applied to the ways in which the actual business of a firm is transacted. In the legal context it thus applies to much of the normal territory of professional standards and conduct – competence, conflicts of interest, professional integrity, etc. COBR is primarily justified as a means of limiting the risks associated with principal-agent problems, and particularly the information asymmetries that accompany the delivery of (most) professional services.

55. There is no prescribed form of COB regulation:

> The skill lies not so much in the choice of instruments, but in how they are combined in the overall policy mix. It is not a question, for instance, of rules *versus* principles, but how the full range of instruments are used to create an overall effect. In this regard, much of the debate about regulation is based on false dichotomies. The various instruments can be used in a variety of combinations, and with various degrees of intensity. (Llewellyn 1999: 48).

56. Nevertheless, there has been some tendency in the UK over the last decade to align COB regulation in practice to a risk- or principles-based approach, or, latterly, to a related approach that is being described as OFR. The rationale behind these moves tends to be that over-extensive or too detailed regulation:

- Increases compliance and hence transaction costs
- Lacks adaptivity and requires more constant oversight and review as highly detailed regulations may become redundant over time

[14] This may be important insofar as a regulated title can provide at least some indication of quality (assurance) to consumers.

- reduces incentives on the owners and managers of regulated firms to monitor and control themselves
- discourage or reduce incentives for consumers to undertake appropriate due diligence
- limits business owners' and managers' flexibility in deciding how best to meet their obligations and deliver services to the marketplace
- limits business owners' and managers' ability to innovate and compete more effectively in delivering services

57. OFR-COBR could well have a role in indirectly regulating education and training. COBR requirements may thus be set in such a way that they cannot be met without addressing training needs. Risk compensation theory points to the need for flexibility and a targeted approach to regulation, and to giving responsibility to the actors in the regulated field to regulate their own behaviour, subject to monitoring. This requirement of some element of 'regulatory conversation': sufficient monitoring and supervision, either from the entity under the supervision of the regulator, or by the regulator directly, is likely to be key, but this has also tended historically to be a weak point in the operation of legal services regulation, which has been subject to both under- and over-enforcement. There may also be questions as to whether such COBR standards are sufficiently transparent and concrete to be readily enforceable.

58. The literature on 'regulatory space' (eg, Hancher and Moran 1989) highlights the extent to which modern regulatory systems are characterised by the interdependence of regulatory actors in ways that sometimes blur distinctions between regulator and regulated; between public power and private influence, and between state and market. Thinking of regulation as a 'space' gives it temporality and geography. Like any space, it has boundaries; it is available for occupation. It may be divided unevenly among different participants. It will be shaped by a variety of forces including the complex patterns of co-operation and competition between, and the limits (or lack of limits) set by, the range of organisational forms that the actors inhabit.

59. In an education context, the shift in focus from prescriptive, rules-based regulation to regulation that is outcomes-focused may also help to foster a learning environment that encourages providers of legal education to reflect on their role as educators and on their own developing educational professionalism in the widest sense, resulting in benefits for educators and students alike. However, with greater freedom comes the potential for greater risk, as increased reliance is placed on the entities' internal control systems.

60. For regulators this creates a dilemma between what the literature defines as the solutions of hierarchical intervention (top-down command and control) and the solutions of design (where the field of practice is designed by regulators in order to mitigate the risk of misconduct); and between the controls of the marketplace (largely competition) and the practices of community (the nurturing of social norms). There is, however, a body of regulatory literature from other domains (urban planning and traffic management, for instance) that points out the ethical disadvantages inherent in both hierarchy and design, and advocates different approaches to both risk and regulation. COBR, in other words, is likely to be insufficient in itself as a regulation principle for legal education.

61. Some of the literature on the use of OFR as COBR points to the requirement for the creation of a new relationship between providers of legal education and regulators. The move towards shared outcomes across the sector, combined with economic pressure to lower costs for students and entrants to the profession, may encourage providers to collaborate and develop shared learning spaces, or communities of practice, across both providers and stages. As such the most effective regulatory role may shift from that of a body, which tacitly encourages market competition in the provision of legal education, to one that encourages collaboration and cohesion between education providers across the sector.

Emerging issues

62. In this section we highlight a number of the specific issues that are arising out of our work, both from the literature review and from stakeholder engagement with our research.

Knowledge and skills gaps

63. So far there is limited agreement on these, with opinions dividing between areas of specialisation. The most common concern expressed by the more senior people to whom we have spoken is the poor "standard of writing" among new recruits. The argument made is that a good primary education should guarantee basic competence in writing, this should be solidified in secondary school, and by the end of an undergraduate degree it might be expected that an individual could write in concise, coherent, and cogent English. Yet "illiterate" graduates are far from uncommon, according to our respondents. Even allowing for hyperbole, this is troubling. They cite technological changes – like the widespread use of word processors with spellcheckers – making it less necessary for individuals to remember the precise spellings of words. They also suggest a decline in the use of differentiated and deferential language, perhaps as mirrored elsewhere in society, a less dogmatic approach to the use of correct and formal language, and to a greater or lesser degree, a normalisation of "text speak" for the cohort currently involved in traineeships and pupillages. The longer term effects of not having to display a sustained argument in school examinations, as opposed to short answers, has also produced a poverty of overview, and a lack of thematic clarity in sustained prose.

64. Respondents tend to accept that this may be, at least in part, a cultural change, with the social and business formalities of one generation colliding with a more current, relaxed approach to language, and it may be that looking back on this in a decade's time it will seem an anachronistic fuss. On the other hand, new recruits are often expected to do their own typing; and they no longer have the discipline of drafting in their heads which was enforced by dictation, nor do they have the secretarial staff who once acted as filters for early errors. The immediacy of e-mail means that it is very easy for communications to be dispatched with little consideration and the law is not a profession that readily accommodates imprecision. The specific meaning of a word, or the presence or absence of a comma, can be matters of huge significance, so it may be that formal language needs to be more forcefully asserted during lawyers' professional education, and greater attention paid to such presumed commonplaces as the basics of drafting, or the conventions of writing a letter or taking notes at a meeting, which may no longer be part of the currency of the new joiners' lives.

65. In England and Wales there is a complex debate about the place of ethics in undergraduate studies. Ethics, professionalism and 'legal values' has been emphasised as a lacuna, particularly by a recent Law Society initiative (Economides and Rogers 2009; Boon 2011) and in a growing legal education literature. Any proposed extension of the academic core is inevitably controversial and we would welcome comment on this. Even among those who call for a greater emphasis on ethics and values, there is a continuing debate as to whether emphasis at the academic stage should be on the ethics and values of law, or professional legal ethics as such.

66. Similar debates have taken place in Australia; and a recent initiative has attempted to map out ways to implementation. Developed with a range of stakeholders, the Learning and Teaching Academic Standards (LTAS) project in Law has developed a set of what it terms six Threshold Learning Outcomes (TLOs) for the LLB. TLO 2 is the statement on 'Ethics and professional responsibility', and its four points show a sophisticated view of the content of such an outcome, and indicators as to how the general outcome may be achieved with undergraduates on law programmes. The LTAS project thus goes beyond mere statement, into a view of how such a statement can be operationalized.

67. The relative absence of professional ethics from the law degree has acted as a constraint on its development as an academic subject. It is arguable that this has also contributed to a lack of any consensus definition of legal professionalism in England and Wales, and attendant lack of awareness of critical debates in other jurisdictions and professions. Has this in turn constrained the development of a coherent body of values and attitudes in legal education that can be subscribed to by key sectors in the profession? Has it also impacted negatively on the ability of the profession to develop a coherent body of legal educational standards in this area?

68. Given the changes being brought about by LSA 2007, some of the literature argues that the Joint Statement will require substantial re-negotiation, to align it with recent changes to professional standards, as these are developing within the profession and within professional legal education. Given an increasing emphasis placed on critical reasoning skills by entry tests such as the Law National Admission Test (LNAT) and BCAT, it may be that greater emphasis should be placed within the Statement on the acquisition of critical reasoning skills. Other disciplines have made much more significant progress in determining the most effective methods of achieving this for their disciplines – Problem-Based Learning in medicine is a good example, where a new heuristic is fast becoming a 'signature pedagogy' not just because of widespread practice but also because the research literature into the pedagogy has persuaded both providers of medical education and regulators of its value.

69. There are numerous other instances of perceived gaps and limitations being brought to our attention, for example, a number of comments have been made regarding the need to develop basic business and commercial awareness at various stages in training; the Statute Law Society has highlighted concerns over training in the use of statutory materials and statutory interpretation; the need to develop a deeper awareness of the legal structures consequences of devolution have also been identified, and not just for lawyers practising in Wales.

The numbers game – entry to the profession

70. The numbers of entering prospective lawyers is emerging as a matter of great concern (and a possible area for considerable change) both from the view of existing professionals and from the view of the entering cohort. Competition for traineeships for solicitors and pupillages for barristers is a major talking point. With few effective limits on the numbers of students admitted to undergraduate law courses, GDLs, LPCs or BPTCs, the real bottleneck comes quite late in the training process, and after a considerable investment in training may have been made.

71. Many prospective lawyers are pleased to be hired as paralegals rather than be forced to look for work outside of the law. However they claim that they do the same or similar work as their colleagues in the next office who have training contracts (and are already on the qualification track to becoming solicitors). While the pool of prospective solicitors and barristers grows larger, the harsh realities of the current economy mean that there are fewer places for them. The big City firms which have long offered a majority of traineeships are reducing recruitment, and some have suggested further, more radical reductions such as cutting the numbers down to the number of partners needed in 10 years time (which if replicated throughout the sector would cause a crisis). Some regional firms have stopped offering traineeships entirely, because they are unable to retain newly qualified solicitors – who are drawn inexorably to the big money available in the City. Experiments in indentured traineeships have proved inadequate. But it is not just the scarcity of traineeships and pupillages that is problematic; the selection process is also a matter of concern.

Selection systems

72. There is much work to be carried out to ensure that admission to the profession and to academic programmes is fair. The principles of fair admissions put forward in the Schwartz Report (2004) should be the benchmark standard for admissions processes. There is, for instance, little literature on the function and effect of standardized admissions tests in England and Wales. However, there is a sophisticated body of critical literature in the US and elsewhere on the effects of such tests for admissions issues such as gender, BME entry, socioeconomic effects, and the like. Further research of the effect of standardised admissions tests should be conducted, and further development of the tests themselves. The impact of the LNAT, and alternatives to the LNAT should be explored further by regulators, education providers and educational researchers. The work of the BSB on aspects of the BCAT is instructive in this regard. The SRA's role in the recent formation of the Qualified Lawyer Transfer Scheme (QLTS), which replaced the widely discredited QLTT, is a good example of this in practice. In the development of a controversial matter such as entry tests, it is important that the independent regulators are seen to take a lead in co-producing evidence-based research, identifying good practice, and setting appropriate guidelines.

73. Many of our findings to date reinforce the picture painted by existing research, but also add some nuances to the rather stark statistics. Many of the larger firms now hire roughly equal proportions of law graduates and non-law graduates, and they suggest that after (say) six months there is little difference between the two. One firm noted their analysis that law graduates were likely to stay with the firm for 18-24 months longer than non-law graduates. Training partners at City firms have told us that they will mainly recruit from "top universities", which means that there are many students training in universities around the country with expectations for a career that they are extremely unlikely to obtain. One firm – which visits "dozens" of universities – admitted that they could fill all their traineeships with graduates from Oxford and Cambridge, but like many others they cast their net more widely to avoid the development of a monoculture. They were already recruiting beginning third-year undergraduates on the basis of A-Level results (a criterion which the literature suggests serves to re-inscribe many of the inequalities of the school system into the labour market), and aware of the difficulties that the rise in tuition fees could cause people from disadvantaged backgrounds they were considering the possibility of sponsoring prospective trainees through their entire university education. All respondents expressed a desire to build a more diverse profession, and to promote social mobility, but they conceded that this latter objective may be particularly difficult to achieve.

The Professional Courses – LPC and BPTC

74. For almost a decade the LPC has not been a single course for all aspiring solicitors learning a common, basic set of law and practice in order to prepare them for Day One of the training contract. Many of the larger firms have negotiated with the SRA and with specific course providers to produce specialist and accelerated LPC courses. Such courses might be taken within a group of firms of similar size working together, and the socialisation effects of such courses means that young trainees and solicitors will already know many of their entering cohort coming into similar sized firms. In other of the larger firms a single course is written for a firm, with their involvement, using that firm's precedents. Such firms can insist (if they needed to do so) that their prospective trainees take the specific courses and all such firms tend to pay for the trainees' course fees and also provide a living allowance for that year before entering traineeship. One national firm has recently agreed a new form of combined LPC and training contract in which a pilot group of some 12 trainees will do a part of the LPC at the same time as their training contract in the firm, and reduce the qualification period (and the period the firm tends to pay for) by about 8 months.

75. Other more flexible training models are being developed. A number of courses combining the academic and vocational stages also exist – the best known being the four year programme at Northumbria University which offers an exempting degree combined with either the LPC or BPTC. Northumbria has also developed the first M. Law programme that enables students to graduate as fully qualified solicitors after five years integrated training. These developments indicate that a certain amount of flexibility already exists in (or at least is being worked into) the current system, but they also point to the limits inherent in the structure.

76. Course providers also deliver electives more fitting for smaller or High Street firms. But most often the students taking these courses are unlikely to have been sponsored through their professional course study, unlikely to be working with a group of others secure in the knowledge of their future, unlikely to be working with their own firm's precedents, or to be invited back to the office for drinks and evenings with the senior partner. There is already a very clear "hemispheric" divide at this stage of professional training, well before entering traineeship.

77. Despite the substantial financial commitment by the Inns of Court, there is a perception that there is less sponsorship available for the BPTC. There are no specific BPTC courses organised for specific chambers. The competition for pupillages is even harder than for traineeships and most BPTC students are destined not to get pupillages and therefore not to complete their professional training. Like the LPC, the BPTC seems to divide opinion. The Wood Report on the BVC identified much practitioner scepticism and uncertainty about what the course added. One senior barrister interviewed by us, whose chambers prepare and present their own in–house programme for pupils once they enter chambers, similarly wondered whether the BPTC was worth anything at all for their pupils other than a rite of passage, since the entering pupils were selected before they took that course, and it was heavily supplemented once they arrived in chambers.

Rival international qualifications and the ease of "The New York Bar"

78. Although a number of large firms mentioned the issue of external qualifications rivalling those of England and Wales, one respondent expressed this more clearly than others. The following is a shortened abstract of this explanation.

79. The majority of lawyers practising in a large international firm are not originally from either the UK or the US. Most of them are from "the rest of the world" and a growing proportion of them are from "emerging markets" where the domestic system of legal education, training and admission to practice is not very well developed or regulated. Therefore, being "admitted" in one of those jurisdictions is not really a passport to successful international practice at the highest level. If local lawyers want to have a career with an international firm, they need a recognised international qualification which they can use alongside their domestic qualification. Because much of international legal work nowadays focuses on comparative law analysis involving more than one jurisdiction and is conducted in the English language, a fluency in English and a familiarity with Anglo-American legal concepts and terminology is very important.

80. A large number of internationally minded, ambitious lawyers from around the world now choose to study one year LLM degrees in an English speaking environment after they have completed their domestic degree and become qualified in their home jurisdiction. Those taking these LLMs frequently have already a few years of domestic practice under their belt. Having completed their LLM they are highly attractive hiring targets for both international law firms and leading domestic firms operating in their home jurisdiction.

81. They have broadly two choices: an LLM in the US, or in the UK. There are plenty of good LLM courses available in both jurisdictions, but the best people tend to do LLMs in the US. This is because once they have completed their US LLM it is relatively easy for them to take the New

York Bar, and therefore to acquire a recognised international qualification. Furthermore, under the US system, they automatically have an entitlement to a work experience "green card" giving them at least the theoretical possibility of up to 9 months of practical experience in the US immediately after completing an LLM and taking the New York Bar. This means that in less than two years they can experience complete immersion in an English speaking legal environment, have top class law school training in an Anglo-American legal system, obtain an internationally recognised legal qualification which is increasingly the passport to international practice and complete a short period of work experience with a major firm in a global financial centre. It was suggested to us that if the circumstances described above do not change within the next few years, more and more of the leading law schools around the world, outside of the UK and the US, will align themselves principally with leading US law schools and encourage their best law students to go the US to do their LLM there and take the New York Bar.

82. Admission to the New York Bar is increasingly becoming the "gold standard" for those top young lawyers from civil law jurisdictions with serious international aspirations. That means they have much greater affinity with the US, not just from a legal point of view, but from a wider cultural, economic and social perspective. This is constantly reinforced by the need for them to maintain their status as members of the New York Bar via the completion of CLE requirements etc. They are also likely to be active alumni of the relevant US law school and, if they have had a period of placement with a US firm, of that firm as well.

83. All of this puts the profession in England & Wales and law firms based here at a serious competitive disadvantage. Any review of legal education, training and admission requirements in England & Wales should look seriously at making England & Wales a more accessible and attractive jurisdiction for lawyers from the rest of the world to obtain a "second" more international qualification in, without, more or less, having to start again from scratch.

CPD

84. Many, but not all, respondents have been fairly dismissive of CPD. Not the idea of lifelong learning nor the need to keep up with change or the idea of continuing professional development, but the way in which it is currently instituted and measured. It is most widely regarded as a box-ticking exercise, rather than a means to ensure that professionals are keeping abreast of developments in their field. It was said that the one way to ensure full attendance for a CPD course was to hold it in October just before the end of the Practising Certificate year; and that people would be sitting at the back of a conference, entirely unrelated to their main area of work, reading a newspaper or surfing the net. One senior barrister complained that genuine learning experiences, such as researching for an opinion, did not count towards his CPD requirement.

85. Although for many the CPD system was generally held in low regard, CPD courses within some areas of work, (personal injury for instance), have received high praise; most respondents insist that they do far more CPD than is required; and one respondent has suggested that the CPD requirement should be at least doubled, to bring it more in to line with the requirements of comparable professions.

86. Reports from one very large firm (echoed elsewhere) showed an impressive range of full “Diploma” type internal courses, which were capable of being fitted directly to the specific work needs and personal aspirations of each of the legal and non-legal staff across the firm’s offices throughout the world. Most larger firms took responsibility for all of the CPD requirements of their partners and staff in-house, by bringing outside trainers in, or using their own partners and staff to carry out the teaching. The closer the actual CPD training to the needs of those being trained in the different areas at different levels, the more satisfied people expressed themselves to be with CPD.

Joint training with the other legal professions

87. As we develop our questioning into the study there seems to be greater openness to the view that solicitors and barrister should do at least part of their training together. One trainee solicitor explained that he chose to be a solicitor advocate rather than a barrister because he knew he wanted to be a criminal defence lawyer, and thought that the former would offer him more courtroom experience. It seems clear that each of the professions needs to understand much more about how the other works, and it may well be sensible for more than just one aspect of training to be carried out together, perhaps including some element of work experience. Although it has not yet been broached in our focus groups, it may also be appropriate to consider training together with CILEx students and members, and we welcome views on what could be achieved by greater collaboration.

Role of technology

88. There is a growing consensus in the literature on the importance of technology as a platform for administration of programmes, management of learning resources, providing access to legal education, and enabling communication and deeper learning of many aspects of knowledge, skills and values. There may need to be greater regulatory interest in the ways that technology can be used to manage learning, particularly in work-based learning and in this respect the innovative work being done in other disciplines, other jurisdictions and in a range of firms on e-portfolio learning should be the focus for regulatory attention and resource.

What happens if you abolish the regulatory requirement for...

89. All of the above, and much of the other information and thought arising from the research, has led us to begin asking some more fundamental questions about the regulated system of legal education and training in England and Wales. We are therefore asking about the benefits and losses which would occur if different elements of the current system were not present.

90. In all of the cases that follow what is hypothetically 'abolished' is the activity or stage in its present format. It is acknowledged that there is a degree of differentiation between the stages (e.g. the content of the LPC is not identical to that of the BPTC, the CILEx diplomas may be more successfully integrated with practice than some degree formats) and that adjustments could be made to that present format which might affect the suggested gains or losses (e.g. a mandatory CPD scheme could accredit a wider range of learning activities than at present; a training contract could be envisaged which did not demand the "three areas of law and some contentious and some non-contentious work" threshold).

91. Matters listed are not placed in any order of significance/priority of impact. Nor are issues appearing on the same horizontal line directly opposed. Each stage is treated separately and not cumulatively. The focus in this discussion – with the exception of the final section - is on each stage as a required participatory activity. This is distinct from determining that the outcomes which are currently expected from each stage should in some way be tested (as for example, in the SRA QLTS, which has assessment but no mandatory prior training).

92. **The degree/GDL/CILEx diplomas/equivalent "academic stage"**

Potential gains	*Potential losses*
Increased ability to design innovative, differentiated academic provision/to pick and mix between acquisition of substantive law in different formats and at different stages	Mandated/regulated breadth of coverage of substantive subjects and regulatory oversight of providers at point of delivery.
Ability for employers/sectors to define the areas of substantive law relevant to them	Common expectations of what has been covered in diet of substantive subjects, ability to experience a range of areas of law
Ability to provide wider recognition of prior experience/learning in non-legal fields (e.g. learning of substantive law on the job or in a different profession or dual qualification/transfer between professions).	Status as a graduate/graduate equivalent profession
Ability to integrate acquisition of substantive legal knowledge; procedure/practice and practical legal experience more closely/in a different sequence	Revenue/employment for providers/accreditors
Cost to individuals	International cross-recognition
Ability to provide a truly liberal arts law degree without interference from the professions	Potential for pejorative "two-tier" system and increased discrimination based on means of acquisition of substantive legal knowledge
Ability to compress academic learning into a shorter period where appropriate	Choice of career/area of practice needs to be determined at an earlier stage
Increased access where, e.g. there have been inequalities in A level performance/ability to access university or a particular type of university.	Confusion in understanding a multiplicity of options
	Decreased academic provision overall/concentration geographically of certain types of provision as market changes
	Pressure to compress academic learning into a shorter period where in appropriate

93. **The LPC/BPTC/equivalent "vocational stage"**

Potential gains	*Potential losses*
Cost to individuals	Common expectations of what has been covered in diet of practice subjects, ability to "experience" a range of fields
Individuals do not need to commit to a specific profession at an early stage (which may remain inchoate if employment/pupillage/training contract not subsequently obtained)	Mandated/regulated coverage and oversight of providers at point of delivery
Increased ability to design innovative, differentiated vocational provision/to pick and mix between acquisition of procedural/practice law in different formats and at different stages	Revenue/employment for providers/accreditors
Increased ability for employers/sectors to define the areas of procedure/practice law relevant to them	International cross-recognition?
Ability to provide wider recognition of prior experience/learning in non-legal fields (e.g. learning of procedure/practice law on the job or in a different profession or dual qualification/transfer between professions).	Confusion in understanding a multiplicity of options
Ability to integrate acquisition of procedure/practice legal knowledge, substantive law and practical legal experience more closely/in a different sequence	Potential for pejorative "two-tier" system and increased discrimination based on means of acquisition of practice knowledge
Ability to compress vocational learning into a shorter period where appropriate	Pressure to compress vocational learning into a shorter period where inappropriate
Ability to change career choice and adjust educational activities to suit at an earlier stage/more flexibly.	Potential for employers to have to cover such issues at their own expense, post-employment
Increased access where, e.g. there are impediments in performing in currently required contexts (eg, Asperger's spectrum)	Assuring baseline competences are sufficiently met.

94. **The training contract/pupillage/period of supervised practice**

It is perhaps necessary here to make a distinction between the award of a title at a particular stage, and the need for an individual in the early stages of his or her career, whatever his or her title, to receive support (or 'supervised practice') in the workplace as a novice practitioner.

Potential gains	*Potential losses*
Title (where it is awarded only after this stage) could be awarded at an earlier stage: bottleneck in award of status removed.	Leverage for individuals in being provided with a guaranteed "apprenticeship", period of transition, learning support in the initial stages of the career. Ability for regulators to mandate the same (insofar as this is possible) and protection for consumers inherent in mandated supervision requirements
Solicitors in particular: ability to tailor initial stages of career more closely to organisation/field of practice	Ability for existing market/profession to control entry to the profession
Potential for wider range of organisations to offer initial employment.	Common expectations of what has been covered in initial stages of career.
Increased access to status/employment/social mobility for those inhibited in obtaining pupillage/training contracts (e.g less "portable" mature graduates)	Solicitors in particular: mandated breadth of experience in initial stages of career, ability to experience a range of fields of practice
Ability to provide wider recognition of prior experience/learning in non-legal fields (e.g. career changers with pre-existing client relationships, workload management skills or dual qualification/transfer between professions).	Consumer understanding of meaning of the title and its relationship to experience in the field/competence.
Increased ability to move between employments in initial stages of career/increased ease for employers to discard unsatisfactory individuals in initial stages of career	Potential for pejorative "two-tier" system and increased discrimination based on breadth, consistency or type of early career experience
Increased flexibility in recruitment, ability to respond quickly to need for additional staff/fewer staff	Potential for less certainty in planning for employers: individuals not tied down for predictable periods. Less certainty for individuals in a guaranteed period of initial employment.
Ability to allow increased responsibility/access to clients within a shorter period where appropriate	Pressure to demand increased responsibility/access to clients within a shorter period where inappropriate

95. **Mandatory CPD**

Potential gains	*Potential losses*
A focus on learning for its own sake rather than for compliance; individual responsibility	Regulatory control of a minimum of learning conscious activity for all members of the profession
Recognition by individuals of wider forms of learning style, activity and output than encompassed in current schemes	Ability for regulators to prescribe mandatory content, remedial CPD, disciplinary sanctions
Cost saving for individuals and employers (as providers)	Revenue for external/commercial providers/accreditors
Removal of issues of access (e.g. low waged, part-time) to appropriate CPD activity in order to satisfy minimum participation levels/retain rights to practice	Reputation/status: "all proper professions have a mandatory CPD scheme"
	Leverage for employees to be permitted a minimum hourage of learning-conscious activity

96. **Post qualification rights/accreditations (eg direct access, litigation and advocacy rights)**

Potential gains	*Potential losses*
Cost saving for individuals and employers (as providers)	Revenue for external/commercial providers/accreditors
Ability to train for such rights/activities at an earlier stage (eg to propose to practise as an advocate with direct access from the initial stages and to tailor education accordingly)	Ability for regulators to prescribe mandatory content, assessment/re-accreditation, disciplinary sanctions
Increased ability to change career/area of practice	Ability for regulators/profession to control entry to risky/complex rights or areas of practice
Removal of an artificial barrier that may set standards above those required by the market (a 'gold plate' standard)	Pressure on regulators to demand such activities of individuals where their competence may be in doubt.
Increased access where, e.g. there are impediments in performing in current required context (eg, cultural constraints, communication abilities) in order to obtain rights	
Ability to provide wider recognition of prior	

experience/learning in non-legal fields (e.g. learning of client relationship, management or advocacy skills in a different profession).	
A focus on learning for its own sake rather than for compliance; individual responsibility for competence rather than reliance on paper/assumed competence	

Thinking about reform

97. The point has been made that there is unlikely to be a "single magic bullet for education and training" (Edmonds 2010). We agree. The literature points to various factors that have made it difficult for both the academy and the profession to design and sustain a coherent network of pathways into the legal profession. The tri-partite structure of legal education and training that has dominated since Ormrod can be seen as a patch-up solution to the twentieth-century problem of a growing division between universities and the profession. Some suggest it lacks the flexibility and focus required for twenty-first century legal education. The recent literature on technology in law schools also reveals how curriculum structure can encourage or constrain innovation. Some of the literature points out that regulators should be aware of the powerful indirect effect that learning environments have upon the systemic context of learning. It is arguable that any 'lack of fitness' of the current system may derive as much from these current structural constraints, and in particular, the lack of continuum, and the gaps and inconsistencies that may be encountered on the journey, as it does from the failings of any single stage.

98. In this paper we have asked a number of 'what ifs' around the existing stages. We summarise these here:

- The Qualifying Law Degree – are the Foundations still a sufficient knowledge base? Should any 'subjects' be prescribed, or should its outcomes be redefined in terms of cognitive and other skills? Has its mission and focus changed so much that it is no longer adequate as an initial stage of training?
- The GDL or equivalent – could there be a larger range of possible entry qualifications for those without law degrees?
- The LPC / BPTC – is the LPC now so broken up into specific courses serving different hemispheres that the idea of a common core is gone? Does the BPTC provide sufficient training for any of those actually beginning pupillage, and if not should there be another form of course or qualification which would also suit those who will not achieve pupillages? Are either the LPC or BPTC necessary or desirable elements of the qualification pathway?
- The Training Contract / Pupillage – are these now such bottlenecks, so totally controlled by the existing professionals, that they fall foul of any attempts to achieve fair access? Are they insufficiently regulated to assure the quality of training? Or are they the best possible training for those who will be our professionals of the future, already well-funded by those organisations benefitting from them?
- The 3 year rule and tenancy– even if the apprenticeship bottleneck disappeared, barristers would have to be selected for tenancies and solicitors would have to practice under others for 3 years before they could put up their own brass plate. Is this still necessary?
- CPD – is this one area where there is a broad consensus for reform? Is there particular agreement on the need to move away from input-driven approaches? Is sufficient emphasis being placed on 'CPD' for the growing numbers and greater range of paralegal staff?

- Mobility within the sector – where are they key restrictions on mobility? Are the pathways within and between occupational groups within the sector sufficient and sufficiently transparent? What more should be done to facilitate career mobility?

99. Moreover, we are not persuaded that designing ever more complex routes in and around the profession is necessarily the way forward for legal education and training. If nothing more, that would probably create more anomalies among the differentiated professional cadres within the profession than we have at present. We would argue that what is required is simplification: a structure that increases choice over the processes of qualification, whilst delivering greater certainty to the professions and to consumers as to the quality of outcomes achieved.

100. This could be achieved in a number of ways, and part of the continuing work of the Review will be to map out options in more detail. Amongst the more radical (perhaps) of those that we might suggest as worthy of consideration:

- Abolition of the concept of a qualifying law degree;
- The introduction of national assessments at the point of entry to the profession;
- The specification of sector-wide national standards for key areas of work, and a move to greater activity-based authorisation/regulation;
- Removal of at least some of the linear breaks and distinctions between 'vocational courses' and work-based learning, whether through the training contract, pupillage or paralegal experience;
- Facilitation of greater common training between regulated occupations, both course-based and work-based (insofar as that distinction is retained);
- Replacement of the pupillage/training contract with a more flexible period of 'supervised practice';
- Development of a sector-wide CPD scheme or alignment of schemes?

101. Ensuring a flexible, responsive, training regime will also require regulators that are not just open to but encouraging of innovation. Regulatory entities can sometimes struggle to drive innovation because they see it as their primary job to ensure adherence to standards. Important though this is it does not preclude them from championing innovation. Indeed insofar as it is their job to 'steer' rather than 'row', they are well-placed to support innovation and central to ongoing reform. The ways in which that function could best be achieved is also a matter on which we would welcome input.

Responses

102. We welcome comments and evidence on all or any of the issues raised in this Discussion Paper from any interested person or organisation. In responding, please identify your name and organisation; if you are willing for the research team to contact you further in response to your feedback or evidence, please also include your preferred contact details. Other than that, there is no specified format that your comments should follow.

103. Responses should be submitted by email to letrbox@letr.org.uk.

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