

# Consultation response

## SRA: training for tomorrow – a new approach to continuing competence

### Overview

1. The Panel has consistently maintained that the current CPD system is failing and open to abuse. Concerns about CPD were echoed by the LETR report.
2. There is much in option 1 that we support, but several important issues need to be addressed before we would support the SRA proceeding with this. The strengths include that it should move the CPD system from one based on static inputs to a model where individuals and entities reflect on development needs and plan and implement training accordingly.
3. However, we have serious reservations about option 1, which relate to:
  - Individual accountability
  - Monitoring quality of work
  - How CPD fits within the SRA's wider quality assurance processes
4. Option two is therefore the Panel's preferred option. This retains the advantages of a flexible system based on outcomes rather than inputs, similar to option one. However, option two goes further and would require solicitors to show evidence of planning, recording and reflecting on development activity.
5. We do not think option 3 (retaining a minimum hours scheme, with some modifications) would achieve the desired outcomes. Option 3 would essentially continue a discredited model that is out of step with good practice.
6. In terms of monitoring continuing competence, the SRA will need to challenge a senior officer within the entity where there are deficiencies with CPD, but it seems clear that the COLP ultimately has responsibility for compliance with CPD regulations as with all other regulations.
7. Finally, the consultation has nothing to say about the sanctions on individuals and entities for not carrying out adequate CPD and how these will be implemented and monitored. Where solicitors and entities are being given more responsibility for self-regulation this needs to be matched with tough sanctions for those who abuse this trust.
8. The effectiveness of the proposals also hang on the SRA knowing when firms are not providing legal services of an appropriate standard. Far more detail about how this information will be gathered is needed.

## The proposals

9. The SRA is seeking views on proposed changes to continuing professional development (CPD). It acknowledges that the current regime is largely a 'tick box' exercise requiring individuals to certify that they have undertaken the mandatory number of hours of CPD with no real focus on the quality or appropriateness of the professional development undertaken.
10. Three options are being consulted on:
  - Option 1 – a shift from procedural compliance to competence, achieved by removing specific regulations and relying instead on existing provisions requiring regulated entities and individuals to deliver competent legal services and train and supervise their staff. Implicit in this requirement is an obligation to reflect on the quality of current practice, identify areas for improvement and undertake appropriate development activity. The SRA would provide non-mandatory guidance. Option 1 is the SRA's preference.
  - Option 2 – regulations requiring solicitors to plan and reflect on their development, which they would have to document in an annual cycle.
  - Option 3 – retain a minimum hours scheme with some modifications.

## The Panel's response

11. It is welcome that the SRA wishes to take a new approach to CPD. Partly this reflects the importance of ongoing competence to the consumer interest. Consumers assume an individual appearing on the professional

register is competent and if this is shown not to be the case it brings the integrity of the professional register into question. Moreover, we have consistently maintained that the current system is failing and open to abuse. Concerns about CPD were echoed by the findings of the Legal Education and Training Review (LETR). The LETR recommends a model of CPD that requires participants to plan, implement and reflect on their training needs, and to undertake structured learning activities. The Panel is supportive of these aims.

12. We have considered each of the three options in turn. However, the Panel does not consider that CPD alone is adequate to protect consumers from poor advice. CPD is one device, which falls within a spectrum of tools available to the SRA. Other options include monitoring, enforcement action and periodic re-accreditation. All of these should be used as necessary to ensure advice provided to consumers is safe.

## Option one

13. There is much in the principles that lie behind this proposal that we support, but several important issues need to be addressed before we would be content for the SRA to proceed with this.
14. The strengths include that it should move the CPD system from one based on static inputs to a model where individuals and entities reflect on development needs and plan and implement training accordingly. This could create a more flexible system better able to cater for individual needs. It should lead individuals and entities to focus competence on the needs of clients and

target remedial activities based on risk. The SRA would publish non-binding guidance for practitioners to help practitioners implement this reflective cycle.

15. However, we have serious reservations about option 1, which we expand on in turn below. These relate to:
  - Individual accountability
  - Monitoring quality of work
  - How CPD fits within the SRA's wider quality assurance processes

#### Individual accountability

16. The approach mainly focuses responsibility on the regulated individual or entity to deliver competent legal services. Under the proposals a failure to carry out CPD could potentially only be highlighted if poor quality work was discovered at the entity level. Ultimately, though, CPD is a personal commitment and this may get lost in a system where it is no longer obligatory or has to be documented, notwithstanding the proposed guidance. While we support an overall regulatory approach focused on entities, there should continue to be a strong focus on individual accountability within this system.
17. The Panel has previously warned that weak consumer-driven competition in legal services means that the market alone cannot currently be relied upon to regulate entities effectively. To an extent this reflects inherent features of professional services markets, i.e. asymmetries of information. However, consumers also lack the tools to compare quality of providers. The Legal Services Board has challenged regulators around the provision and

transparency of performance information<sup>1</sup>, but there has been very limited action here.

18. Where consumers are unable to assess or compare technical quality, because there is a lack of published information the incentives for employers might work to minimise the investment they make in training staff. We have noted comparisons between the extensive training support that the big accountancy firms provide to staff in contrast to lawyers.<sup>2</sup> This may be a function of size of entity, but the fragmented nature of the solicitors market and lack of track record in training support at entity level does not give us confidence in a strategy focusing so acutely on entities at this time.

#### Monitoring the quality of work

19. In the proposals for monitoring continuing competence under option 1, the SRA would rely on its risk assessment, consumer engagement and supervisory activity to identify issues and engage with firms and individuals accordingly. The SRA would not interfere where firms are providing legal services of an appropriate standard, but where the SRA has evidence this is not the case, it would engage with firms to understand why and take regulatory action where necessary. Unsound education and training systems or failure to take regular CPD could be aggravating factors in any supervisory or enforcement action. At market-wide level, the SRA might issue guidance or even prescribe mandatory, targeted training requirements.
20. Yet it is unclear from the proposals how the SRA will know if poor quality work is being provided. It should not rely on consumer complaints data alone to fill this knowledge gap. Our research shows 42% of

dissatisfied consumers do nothing.<sup>3</sup> The nature of legal work means problems may come to light a long time after the work is completed or remain entirely undiscovered. Poor work might produce a sub-optimal result or cause delays even if it is legally valid. The Legal Ombudsman has limited scope to consider complaints about bad quality legal advice. We are concerned that available intelligence is not being fully exploited. Our report on financial protection arrangements, for example, showed that regulators do not collect and interrogate data relating to claims on the compensation funds they administer.<sup>4</sup>

21. The technical quality of work is rarely tested but where it has been measured the results have often been poor. In our submission to the LETR, we highlighted data on criminal advocacy, will-writing, probate and legal aid peer review scores in certain areas of law showing high failure rates among solicitors. Unlike some other regulators, the SRA does not regularly use mystery shopping as a source of intelligence, nor does it review client files for quality assurance purposes as part of its audit and inspection regime.
22. The effectiveness of the SRA's proposals hang on the SRA knowing when firms are not providing legal services of an appropriate standard, but we need far more detail about how this information will be gathered. Although input measures such as entry requirements and CPD are imperfect measures of quality assurance, if regulation of CPD is reduced, the need for alternative indicators of quality becomes greater still.

### The rest of the jigsaw

23. CPD is only one part of a regulatory toolkit that aims to ensure ongoing competence.

Indeed, the overall approach to ongoing competence forms one component of a wider regulatory philosophy and approach. One of our difficulties with the proposals is that the SRA has yet to form a view about some of these fundamental building blocks. Without seeing how all the pieces will fit together, it is difficult to assess whether the preferred CPD model will be effective. This is important given the radical nature of the highly deregulatory model proposed.

24. In our submission to the LETR in May 2012 and in the subsequent work we have done on this subject, the Panel has argued for:
  - An activity-based authorisation regime;
  - A reformed system of CPD which is focused on outcomes rather than inputs and where individuals remain accountable for their actions;
  - Periodic re-accreditation in high risk areas of law.
25. These three elements interlink. An activity-based authorisation regime should make it easier to ensure that lawyers are keeping up to date with developments in the areas of law or skill they actually practise. A focus on outcomes would help create a culture where individuals lead their own development and focus on what they need to do to stay up to date and improve their performance. But in some areas this will be insufficient and reaccreditation is needed to ensure adequate consumer protection.
26. The Panel has consistently argued for periodic reaccreditation in higher risk areas of law. This is now becoming a reality, for example through the Quality Assurance Scheme for Advocates. The Legal Services Board's new statutory guidance on

education and training reflects our position. However, we were disappointed to see a lack of support for reaccreditation in the SRA's wider *Training for Tomorrow* policy statement. The Panel's research has pinpointed areas where consumers are likely to be at higher risk of detriment: these include will-writing, probate and estate administration, and asylum advice. Yet as far as we are aware the SRA has not mapped high risk areas of law so it is not yet ready to deploy its supervisory approach based on competence risks.

27. Since these key issues are missing from the SRA's analysis of option one, this makes it difficult to support the option, as the proposal is presented in isolation. We therefore think the time is not right to move to option one – instead the Panel believes option one should be something the SRA should look to move to in the future, when the issues raised above have been clarified and all the building blocks are in place.

## Option two

28. Option two is the Panel's preferred option given the concerns outlined above. This retains the advantages of a flexible system based on outcomes rather than inputs, similar to option one. However, option two would require solicitors to show evidence of planning, recording and reflecting on their development activity. This follows the approach recommended in the LETR that practitioners should be encouraged to undertake structured learning activities, and these should be recorded.
29. The consultation suggests there is already an implicit requirement in the existing

Handbook and Code of Conduct provisions for solicitors to reflect on their development needs and to undertake appropriate activity. Therefore, we do not see it as a stretch to retain a mandatory CPD requirement. Indeed, we view CPD as an inherent part of what it means to be a professional, which also accords with public expectations about the checks carried out on solicitors.<sup>5</sup>

30. As the consultation states, the processes which solicitors might use to comply with the revised CPD requirement need not be onerous. Documenting training needs and activities annually would be straightforward and individuals and entities should do this anyway as a matter of good practice. Although the SRA is concerned about the level of prescription regulations might have, we think it should be possible to set this at a high enough level which provides scope for different and innovative approaches that are consistent with the basic requirement for solicitors to reflect, learn and record what they have done. A crucial benefit is there would no longer be any requirement to report this information to the SRA, which removes an administrative burden from both entities and the SRA. However, we would expect the SRA to check CPD records as part of its supervision regime.
31. Together these elements should help encourage the necessary self-discipline among solicitors. For us, this also strikes the right balance, for the time being, about giving solicitors greater freedom to decide their own learning approach while keeping appropriate checks and balances in place.

### Option three

32. We do not think option 3 (retaining a minimum hours scheme but with some modifications) is a viable option. This would essentially continue a discredited model that is out of step with good practice. While we can see that keeping a minimum hours requirement would retain certainty for solicitors who want to know where they stand and is easier for the SRA to monitor, it loses sight of the consumer outcomes that effective CPD is meant to support.
33. The Panel has previously identified the weaknesses of the minimum hours model used across the regulators, as follows:
- They are inputs rather than outcomes-focused and are too rigid to take account of the differing experience and needs of lawyers;
  - The minimum hour thresholds vary between the approved regulators, but they are low when compared to other professions;
  - There is often no requirement for CPD to be related to areas of practice or identified knowledge or skill gaps;
  - There are weak controls on the content of accredited CPD, with hours amassed by attending events which should not be allowed to count, such as conferences on how to maximise profit or skiing holidays;
  - Even though CPD tends to be self-certified, a significant minority of lawyers do not manage to complete their required hours; and
  - The usual sanctions for non-compliance – usually a slap on the wrist or a small fine – are not an effective deterrent.

34. While modifications to the existing regime might address some of these weaknesses, an outcomes focused model, on the other hand, would encourage solicitors to reflect properly about the areas they need to improve and act on these.

### Monitoring continuing competence

35. We have commented on the proposed monitoring regime for Option 1, above. In relation to options 2 and 3, the SRA is consulting on three possible approaches:
- Requiring the Compliance Officer for Legal Practice (COLP) to take responsibility for the competence of legal services and/or compliance with CPD requirements and to report material breaches to the SRA.
  - Requiring entities to nominate the COLP or another person to take responsibility for compliance; or to require a specific individual to be in place but for this to be reported to the SRA only in the event of the need for targeted supervision or enforcement activity by the SRA.
  - Require all regulated entities to make an annual declaration to the SRA that the solicitors employed by them had complied with the CPD requirement.
36. The Panel is not convinced any of these options would add great value to the existing documentation requirements that would form part of the regulations. The key is that the SRA has an evidence base to use to establish whether adequate CPD has been undertaken. The SRA will need to challenge a senior officer within the entity where there are deficiencies, but it seems

clear enough that the COLP ultimately has responsibility for compliance with CPD regulations as with all other regulations.

37. The consultation has nothing to say about the sanctions on individuals and entities for not carrying out adequate CPD. Where poor quality advice provision is discovered we are supportive of using training as a regulatory tool to drive up standards. However, especially where solicitors and entities are being given greater freedoms this needs to be matched with tough sanctions for those who abuse this trust. While breaches of CPD regulations will be treated in line with the SRA's general enforcement regime, stating this explicitly in the CPD regulations would underline the importance of this issue to the SRA.

## April 2014

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<sup>1</sup> Legal Services Board, Approaches to quality, September 2012.

<sup>2</sup> Professor Richard Susskind OBE, Provocations and Perspectives: A working paper submitted to the UK CLE Research Consortium (Legal Education and Training Review), October 2012.

<sup>3</sup> Legal Services Consumer Panel, tracker survey, 2013.

<sup>4</sup> Legal Services Consumer Panel, Financial protection arrangements, June 2013.

<sup>5</sup> Vanilla Research, Quality in legal services, Legal Services Consumer Panel, November 2010.