

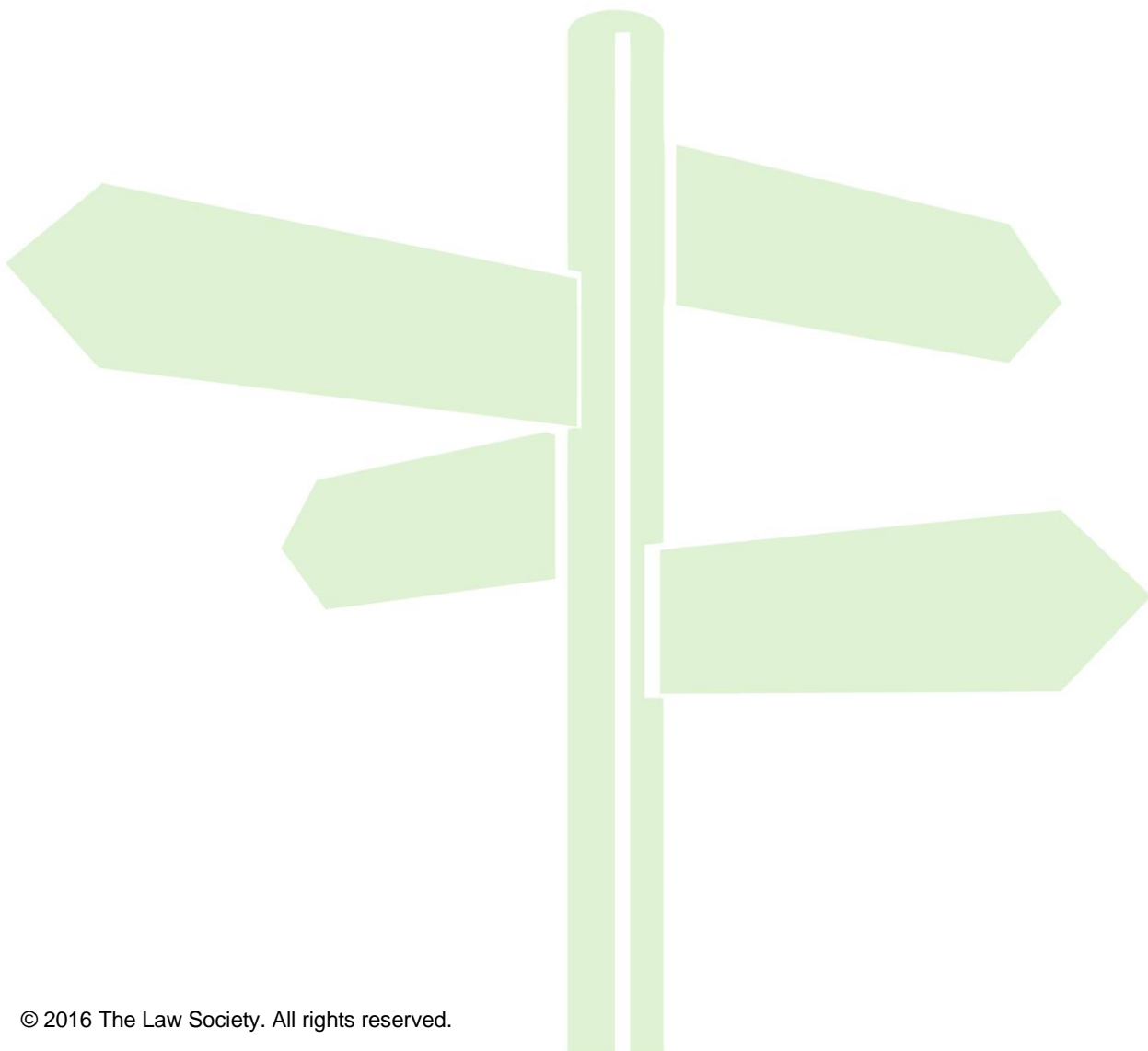


The Law Society

Looking to the future: phase two of our Handbook reforms

The Junior Lawyers Division's response to SRA consultation

December 2017



“Looking to the future: phase two of our Handbook reforms”

Junior Lawyers Division response to SRA consultation (September 2017)

The Junior Lawyers Division (JLD) is a division of the Law Society of England and Wales. The JLD is one of the largest communities within the Law Society with approximately 70,000 members. Membership of the JLD is free and automatic for those within its membership group including Legal Practice Course (LPC) students, LPC graduates, trainee solicitors and solicitors one to five years qualified.

Please note, with reference to the SRA's consultation titled *“Looking to the future: phase two of our Handbook reforms”* published September 2017 (the “Consultation”), the JLD's response deals primarily with concerns, which, in the Junior Lawyer Division's (“JLD”) view, are of material importance to our 70,000 members.

Question 2

- a. Do you agree with our proposal that the current requirement for firms to have within the management structure an individual who is “qualified to supervise” should be removed?**
- b. If you disagree, what evidence do you have to help us understand the need for a post-qualification restriction and the length of time that is right for such a restriction?**

The JLD strongly disagrees with the SRA's proposal. As the SRA acknowledges in the Consultation (paragraph 32) - the effect of this rule is that a solicitor cannot set up as a sole Practitioner unless they have been entitled to practice for three years. We disagree that the qualified to supervise rule should be removed in its entirety. The JLD believes that the removal of the rule would be directly contrary to the SRA's stated purpose of protecting the public by ensuring that solicitors meet high standards.

We echo the concerns of the Solicitors' Disciplinary Tribunal (“SDT”) and its warning that this proposal will be dangerous in terms of client protection and public confidence and we strongly request the SRA to reconsider this proposal. The Consultation suggests that the SDT have misunderstood a particular nuance of the existing framework, however this is immaterial to the broader points of principle above.

Experience and judgement

The proposal represents a risk to consumers as the effect of introducing it would be that Newly Qualified (“NQ”) solicitors could set up as Sole Practitioners. At this stage in their career, they may only have worked for two years at trainee level and may only have completed a six-month training seat in the particular area of law in which they wish to practise (for example family, welfare, criminal or employment law - popular choices for Sole Practitioners to work in and some of which are reserved activities). Even if an NQ had previously worked for some time in a role other than as a solicitor in a particular area(s) of law, for example, as a paralegal, the difference in experience and judgement between this and that of a trainee (or indeed a qualified

solicitor) is likely to be significant. Legal proficiency is also developed 'on the job' as well as in a training seat and accordingly an NQ is very unlikely to have the requisite experience to provide an appropriate level of service to clients.

Aside from the risk it poses to consumers in terms of substandard technical ability, inexperience is additionally dangerous as it can be extremely difficult to detect. In particular, an inexperienced NQ may not be able to identify what they do not know; they will be at risk of 'unknown unknowns' which a more experienced solicitor will not be (as they will have encountered more novel situations within the safety net of supervision). That said, the JLD is mindful that there might be rare occasions when - as a result of a long period of closely supervised high-level paralegal or other experience - an NQ may have attained the experience and judgement to undertake limited, non-contentious work of a non-complex nature (such as residential conveyancing). However, this would be rare and should be dealt with by extremely narrow exemptions to the current rule.

No effect on competition

The Consultation refers to the proposal as representing the removal of a barrier to market entry. The JLD notes the SRA's intention to increase competition in the legal market, and presumes that the SRA envisages that the outcome of this proposal will be lower fees for clients. However, the JLD believes that this would not be the case if the proposal would be enacted. NQ Solicitors would presumably only make the move to sole practice if they thought that they could increase their earning potential, meaning that they will not be inclined to charge lower than market fees. More importantly, we expect that they will incur higher insurance premiums (assuming that they can be insured at all) to reflect their inexperience and these will likely have to be passed on to consumers. This would mean that it is highly unlikely that their fees could realistically be low enough to meaningfully increase competition.

Inadequate safeguards

Paragraph 39 lists various safeguards which the SRA contends will protect consumers in the event of the proposal being successful. The JLD believes that they are inadequate. The SRA's power to refuse to authorise a recognised Sole Practitioner or firm is meaningless as it cannot predict the legal situations which an NQ Sole Practitioner, for example, may encounter (and not be experienced enough to deal with) once they are approved. The JLD notes that the current and future rules will contain the requirement not to act outside one's competence, (and for there to be safeguards in place to detect this) but for the reasons stated above we feel that the inexperience of NQ solicitors means they cannot reliably detect the limits of their competence. Solicitors already have a duty not to act outside their competence as doing so breaches their duty to their client and also makes them professionally negligent. This obligation has not prevented the SDT hearing many cases of negligent solicitors who have acted contrary to that implied duty so we fail to see how this now explicit duty will make a difference.

With respect to the SRA ethics helpline, an NQ may not detect a nuanced ethical problem in the same way a senior colleague would. The proposed digital register will also not act as a safeguard to clients, who will presumably believe that the presence of a solicitor on it means that they are adequately competent regardless of their length of experience (which the JLD believes is not the case). The JLD has made its concerns about the SQE abundantly clear in separate consultation responses, and

does not believe that its introduction will in any way ameliorate the current proposal; if anything, it may make its effects worse.

A useful parallel can be drawn with medical professionals. The GMC's Approved Practice Settings system requires all UK and international medical graduates who are new to full registration to work with appropriate supervision and appraisal arrangements (or assessments). They must work with mechanisms in place to:

- 1) provide them with appropriate supervision and regular appraisal;
- 2) identify and act upon concerns about a doctor's fitness to practice;
- 3) support the provision of relevant training and continuing professional development; and
- 4) provide regulatory assurance.¹

Doctors new to registration must practice in such a fashion until they have been through their first 'revalidation', which will usually take place after approximately five years on the medical register.² It should be borne in mind that this highly analogous system of protecting patients through making sure junior doctors gain experience whilst being supervised operates even though similar safeguards as those proposed by the SRA (such as acting within competence) already apply to doctors.³ This clearly indicates that safeguards alone are insufficient.

We note that the SRA has previously been happy to draw comparisons with the medical profession when it comes to the issue of MCQs in the context of the SQE.

Setting junior lawyers up to fail

The consequences of the proposal are compounded when considered in conjunction with the "Better Information" consultation which imposes potentially more onerous obligations on firms and Sole Practitioners, with which we would expect most NQs to struggle. We are therefore significantly concerned that the SRA are setting up solicitors to fail, whilst allowing them to expend significant amounts of time and money on training and setting up on their own in the meantime.

How to address concerns with the existing rule

The Consultation makes the points that the current rule does not make a stipulation about how recent the three year time period must be (paragraph 35), that it can be confusing and conflates several other aspects (paragraph 33). If these are genuine concerns of the SRA then the JLD would urge them to redraft the current rule (so that the effect whereby a solicitor cannot be a Sole Practitioner without a certain number of years' experience is maintained), but with greater clarity as necessary.

In summary, the JLD believes that the current rule safeguards clients, and that this proposal will expose them to risk, without having the beneficial effect the SRA suggest it will have on increasing competition. We ask the SRA to reconsider this proposal in light of its primary purpose to safeguard clients.

¹https://www.gmc-uk.org/doctors/before_you_apply/approved_practice_settings.asp

²<https://www.gmc-uk.org/doctors/revalidation/12383.asp>

³https://www.gmc-uk.org/guidance/good_medical_practice/duties_of_a_doctor.asp

Question 6

What are your views on the policy position set out above to streamline character and suitability requirements, and to increase the flexibility of our assessment of character and suitability?

The JLD welcomes certain elements of the policy position, in particular more comprehensive guidance, better information for students and using the SRA's power to impose practice conditions at the point of authorisation. However, we strongly disagree with the proposal to cease providing binding determinations to people before they commence their Period of Recognised Training ("PRT") (or future equivalent) that would have previously satisfied the requirements.

The Consultation suggests that the current mechanism restricts the SRA's ability to use its discretion to treat cases on a common-sense case-by-case basis (paragraphs 54 and 57), to take account of aggravating or mitigating circumstances or to demonstrate rehabilitation (paragraph 61). The JLD does not believe this to be the case. The current guidance⁴ notes for example that the SRA 'may' or will 'more likely than not' refuse to admit someone in various circumstances. This wording - and the fact that people who currently report an issue must provide two references - clearly indicates discretion and the opportunity for someone to demonstrate rehabilitation, which will obviously be analysed on a case-by-case basis. As such, there does not seem to be a barrier to such an approach at present. If the SRA believes that the current mechanism does not allow it to use its discretion to treat cases on a common sense case-by-case basis and to take account of aggravating or mitigating circumstances, then the JLD does not believe that any change in this respect requires the additional proposed change (whereby binding determinations are never given) to take place.

The JLD assumes that the SRA's intentions in terms of removing the system of binding determinations are aimed at allowing people who would previously have (narrowly) failed the test to take part in activity which mitigates their previous actions and evidences their rehabilitation. This is welcomed and in cases where an applicant has only narrowly fallen below the required standard the JLD agrees that this approach should be taken. However, to apply it more broadly to people who would previously have received a binding determination that they satisfied the requirements would be a significant mistake. As the Consultation notes (paragraph 60) many people pre-emptively apply before undertaking the LPC, so they know whether they will be admitted before committing to course fees. It should be noted that full-time students who are in work will also be weighing up whether they can commit to leaving their jobs to undertake the course. (This situation will not necessarily be ameliorated by the introduction of the SQE since it is expected that preparatory courses will be widely available). Even if early individual advice is given that someone (who under the current system would be definitively told that they satisfy the requirements) will *probably* pass the test on admission, this does not provide the level of reassurance necessary for someone to make the large commitment required to join the profession, including incurring LPC fees or to leaving their job. At best, the proposed new system will mean that someone (who under the current system would be definitively told that they had passed) will spend their LPC year (or years if studying part-time) and PRT under constant pressure as they cannot be confident of admission afterwards. Given the recent reports about the extremely high levels of

⁴<https://www.sra.org.uk/solicitors/handbook/suitabilitytest/content.page>

stress in the legal profession^{5,6}, we are particularly concerned about the impact this additional and unnecessary stress will have on those who suffer from medical conditions such as depression or anxiety. We also fear that in the same circumstances this non-binding determination - even if positive - could mean that an applicant does not continue to pursue a legal career.

In light of the above, the JLD would support a change to the current system whereby people who would otherwise narrowly fail are given a non-binding indication to this effect but are told that there might be scope for them to change this if they can demonstrate rehabilitation through prescribed mitigating activities. This would let the person make an informed decision about their future, and would allow people who have only narrowly failed the test (but show potential) to have a second chance to pass. However, we strongly believe that people who would currently pass the test are given a binding answer in this respect, so that they can justify the significant commitment to the LPC (or its future equivalent) and undertake it and their PRT without the anxiety that they may subsequently fail to satisfy the requirements on admission.

Question 7

Do you agree with our proposed transitional arrangements for anyone who has started along the path to qualification under the existing routes when the SQE comes into force?

The JLD agrees that a transitional period needs to be considered carefully – in particular, thought should be given to ensure that all routes of qualification are captured, and that the maximum amount of time currently permitted in order to qualify under each route is taken into account for the purposes of formulating the transitional period.

With reference to the inclusion of candidates enrolled on the qualifying law degree (“QLD”) and common professional exam (“CPE”) courses as being given the choice of which system to qualify under, the JLD is in support of the SRA’s proposed position. Further, the JLD supports the SRA’s proposal that candidates who started to train before the SQE comes into force, and who complete their training during a transitional period, are permitted a full exemption from the requirement to qualify through the SQE.

“Invested in a QLD”

Paragraph 79 of the Consultation states that candidates who have ‘invested’ in a QLD at the time the SQE is introduced will be afforded a full exemption. It would be helpful if the SRA could expand on how the term ‘invested’ will be defined. For example, does ‘investment’ include candidates who are *applying* for QLD courses, or those who have been *accepted* onto QLD courses or those who have *commenced* study on a QLD – please clarify.

Discretion to approve qualification through a LPC and QWE

⁵<http://www.hse.gov.uk/statistics/causdis/stress/stress.pdf>

⁶<http://communities.lawsociety.org.uk/Uploads/g/x/g/jld-resilience-and-wellbeing-survey-report-2017.pdf>

The JLD agrees with the SRA's position that candidates should not be entitled to 'mix and match' old and new qualifications during the transitional period as the difficulties in managing consistency across assessments is recognised. We further recognise the potential risk that candidates may not be assessed on all of the reserved activities should such an approach be adopted.

The JLD does however note at paragraph 82 of the Consultation that if a candidate completes their LPC prior to the introduction of the SQE, but has not secured a training contract (in order to complete their PRT), then such candidates are unable to substitute the PRT for qualifying work experience ("QWE"). We query whether the SRA has considered the potential reaction of the legal market, and the degree of risk that the number of training contracts made available could significantly decline as a result of the SQE's introduction – this would, as a natural byproduct, render a significant number of candidates to a state of limbo, unable to secure a training contract due to dwindling numbers, and denied the opportunity to complete their qualification under SQE with QWE. Whilst the waiver referred to in the Consultation states its use will be reserved for 'exceptional circumstances', we fear the SRA has underestimated the scope of this potential issue and is failing to make reasonable provision.

We note that there may be a risk that candidates qualify without having been assessed at the point of sign-off through a PRT or through SQE stage two if allowed to complete their qualification by undertaking QWE, however, the JLD believes it is imperative that the SRA's discretion is reserved in this respect. The final form of the SQE is still largely unknown, and until tested, the risk for potential unfairness remains significant. For this reason, the JLD believes the SRA should ensure processes are implemented which allow candidates to apply for a waiver, if not widened from the currently proposed position in the Consultation in light of the JLD's comments in the above paragraph.

The rationale for an 11 year cut-off

With regard to the proposed cut-off date of 11 years after the introduction of the SQE, it is unclear how the SRA has arrived at this figure. Please provide the rationale for this calculation. In any event, the JLD believes that the longest possible period of time under each route should be used in the calculation of this period, with an additional period to make provision for any unforeseen circumstances. Further, we believe the SRA should consider a mechanism by which candidates can apply for exemptions to the cut-off, in the event that unique circumstances arise which have not been previously considered. As submitted previously in this response, there are numerous unknown variables involved with the introduction of SQE and we ask that the SRA ensures that (1) it has taken account of all *known* variables; and (2) it makes provision for any *unknown* variables. A hard cut-off does not make provision for the latter.

Qualification by equivalent means

The issues caused by the cut-off date are compounded by the SRA's proposals to withdraw from equivalent means testing for candidates who commence their training after the introduction of SQE.

The JLD notes that many firms are reluctant to sign-off the qualification of candidates by equivalent means as the employer is required to thereafter treat such candidates as solicitors, which has a consequential financial impact to the respective practice. Indeed, more generally, the JLD is concerned that such practices will become increasingly more common under SQE as employers may be required to assist candidates in applying for SQE stage two.

Paragraph 87 of the Consultation states that the SRA believes “*equivalent means will no longer be necessary because we will no longer specify the form that preparatory training must take*”. We ask the SRA to expand on their intention, rationale, and intended timescale for removing equivalent means testing.

**Junior Lawyers Division
December 2017**