

Literature Review

7. Current Equality, Diversity and Social Mobility Issues

Introduction

1. Equality, diversity and social mobility are an overarching and underpinning concern of this Review. They constitute an important part of both the socio-economic and regulatory contexts. Advancing equality of opportunity is widely seen as a significant function of public goods such as higher education. Higher education has long been regarded as an important mechanism for improving social mobility and thereby unlocking ‘the talents’ in society (Kelsall 1957; Department of Constitutional Affairs 2004, 3). To not address social mobility arguably undermines its emancipatory and democratic functions and values (Rhoads and Torres 2006).
2. Ensuring equality of opportunity is also an important legal and regulatory objective for both further and higher education institutions and legal service providers. One of the regulatory objectives of the Legal Services Act 2007 is to encourage an independent, strong, *diverse* and effective legal profession (s.1(1)(f) - our emphasis). The Legal Services Board, in its Business Plan for 2010/11 observed:
 81. Systems of education and training provide the lynchpin for delivering success in any workforce development strategy. Fair access to education and training, and flexibility in the way it can be accessed, may help to unlock the opportunities that will allow the widest pool of talent to enter and progress within the legal sector.
3. In this paper we explore the ways in which existing education and training practices constitute initial and continuing barriers to access, and are hence a potential constraint on diversity and social mobility. This initial literature review should also help identify the risks and consequences for equality and diversity of any regulatory or structural changes that may be proposed by the Legal Education and Training Review.

Definitions

4. Equality, diversity and social mobility are related but distinct concepts, and reflect different strategic approaches to equality and diversity issues in education and the workplace.
5. *Equality* focuses on the legal obligation to comply with anti-discrimination and equal opportunity standards, currently as framed in the legal requirements of the single *Equality Act 2010* which replaces earlier anti-discrimination legislation. Equality protects people from being discriminated against on the basis of nine protected characteristics, i.e. sex, race, disability, sexual orientation, marital or civil partnership status, pregnancy and maternity, religion, belief, or age.
6. *Diversity* definitions vary widely (Ashley 2011). Nevertheless diversity can be broadly understood as an approach that compliments equality approaches, by focusing on cultural rather than behavioural change. Diversity policies are designed to recognise, value and reward human difference – in all its forms – whether social, cultural, ethnic, gendered, etc. It thus encompasses a wider range of conditions and characteristics than equality.
7. *Social mobility* ‘refers to the ability of individuals from disadvantaged backgrounds to move up in the world, akin to the notion of equality of opportunity’ (Crawford et al. 2011, 6). John Goldthorpe, in one of the classic texts of mobility studies similarly, though rather more broadly asserts that mobility is associated with:
 - a tendency towards greater equality of chances of access, for individuals of all social origins, to positions differently located within the social division of labour. (Goldthorpe 1987, p. 27)

8. Social mobility policies are thus directed towards reducing disadvantage, which is usually defined by reference to some concept of socio-economic status (SES) or social class. Rather like diversity, therefore, social mobility is not restricted to the characteristics protected by equality legislation, and recognises that specific interventions may be required to support those disadvantaged by social class rather than by legally protected characteristics. Mobility may be characterised as either *horizontal*, that is, movement from one position to another within the same social level - for example, by changing jobs or geographical location without altering occupation or SES - or, more commonly, *vertical mobility*, that is, the extent to which an individual or group may improve or worsen their position in the social hierarchy. This paper is primarily concerned with vertical mobility.
9. Social mobility has become a significant political and social policy issue (Milburn 2009; HM Government 2011). The UK has one of the lowest rates of social mobility in Europe, and falls below average rates of social mobility in international comparisons; moreover the rate of mobility within the UK has declined since the 'baby boomer' years (HM Government 2011, 16-17).¹ Continuing failure to address such structural inequalities may not only undermine equal opportunities, but also limit economic growth (OECD 2010).
10. Current government policy emphasises two things. First, it focuses primarily on *relative* rather than *absolute* social mobility (Crawford et al 2011, 6; HM Government 2011, 15). This has important policy implications. To put it simply, social mobility is difficult to target directly, so policies focus on strategies for increasing access to particular goods that are the drivers of social mobility – education, skilled jobs, etc. This has two related consequences: (i) if those policies are effective, then obviously the targeted groups should gain proportionately more access to those goods (ie upwards towards equality), and (ii) as a result, in the context of a finite supply, other groups that have historically enjoyed a disproportionate share of those goods may see their share reduce downwards towards equality, but hence experience some (relative) downward social mobility. We will return to this point later. Secondly, the emphasis on relative mobility also means that the government's approach remains meritocratic. Its emphasis is on increasing 'fair access' to opportunity: 'making life chances more equal at the critical moments for social mobility' (HM Government 2011, 6) – the early years of childhood, readiness for primary school, GCSE attainment, choices at 16+, entry into training and apprenticeships, and access to higher education and professional work. There may be arguments about the strengths and weaknesses of that approach, but for present purposes at least we follow the style of 'lifecycle' analysis that this employs.
11. Before we leave definitions behind, there is another concept relevant to this subject, namely 'intersectionality', which can be used as an analytic tool to understand and respond to the ways in which factors such as gender, race and class intersect, or 'stack-up' and interact. Intersectionality can uncover the qualitatively different experiences of discrimination and disadvantage felt by those at the intersections. At the same time, it also highlights the difficulty of separating out the root causes of social disadvantage, and perhaps challenges, to a degree, the utility of equality approaches that require the isolation of discrimination as a cause.

¹ The 2009 Milburn Report demonstrates evidence of this in the context of the legal profession. Comparing the backgrounds of individuals at the top of the legal profession today with their counterparts ten or twenty years ago, it shows an increase in the proportion of individuals from independent schools from 68-73% in the case of barristers, 70-74% in the case of judges and 55-68% in the case of solicitors (Milburn 2009, 6).

Education to age 18

12. 'Ability' is shaped and moulded by opportunity. In this section we examine how influences and experiences in the early years and on through compulsory and post-compulsory schooling do much to shape access to legal education and training.

Childhood and schooling

13. Early years education is, of course, well outside the remit of this review, but it needs to be borne in mind that the legal education system is, in part, an inheritor of existing inequality and disadvantage. These problems require greater structural intervention at an earlier stage, and early disadvantages can limit or reduce the scope and efficacy of later engagement. (This is not to assume that later interventions lack value and impact.)
14. The impact of social disadvantage emerges extremely early in childhood and tends to be reinforced throughout the early years and schooling. For a socially disadvantaged child, large socio-economic gaps in cognitive skills are already evident by three years of age (Crawford et al. 2011, 11). By age 11, educational attainment is already a significant predictor of later life chances (Chowdry et al. 2010, 14–15).
15. It is widely recognised that social class is itself a key predictor of educational achievement, though low educational attainment in turn is a significant, and to some degree independent, factor in building and maintaining an intergenerational cycle of disadvantage (Egerton 1997; Lampard 2007; Perry and B. Francis 2010; Schoon 2008). For example, by the age of 16, 79% of children born in 1989/90 to degree educated parents achieved at least five GCSE passes at grades A-C, compared with only 33% of those whose parents did not have GCSEs/O-levels (Ermisch and Del Bono 2010, 13). Such effects are exacerbated by structural, systemic, inertia within the education system itself. Quantitative data indicate that, historically, the expansion of state schooling, and successive changes to the state school system have had relatively little long-term impact on patterns of social mobility in the UK (Heath and Clifford 1990; Shavit and Blossfeld 1993).² The school system as a whole remains heavily stratified in class terms.
16. Secondary school attainment and the decisions made at 14-16 are also important in shaping HE participation – possibly even more significant than those made in sixth form (Crawford et al 2011, 25). A range of research demonstrates consistently that at age 16 pupils with Black Caribbean heritage, other Black heritage or Pakistani ethnicity achieve considerably lower average scores than white pupils, whereas students with Indian or Chinese ethnicity tend to score higher than their white peers. Moreover, research also tends to show that, while ethnicity has some independent effects, the majority of the difference in performance between BME and white pupils seems to be accounted for by social background. In terms of value added, between ages 11 and 16 ethnic groups either catch up or in fact surpass the performance of their white counterparts (Bhattacharyya, Ison, and Blair 2003; Wilson, Burgess, and Briggs 2006).
17. The importance of this stage is not just about getting the grades to progress, however. The decisions a pupil makes in Year 10 in terms of pathways through the 14-16 curriculum,³ and choices between traditional academic GCSEs and applied subjects will shape her future options at A level and beyond, particularly as regards the status of HE institution to which

² The significance of the much vaunted grammar school effect appears, statistically, to be overstated on the evidence of these studies.

³ Only English, maths, science, physical education, religion and citizenship are statutorily prescribed.

she is likely to be admitted. A growing body of literature emphasises the importance of career support and mentoring at this stage.

Post-compulsory education

18. Overall a greater proportion of BME than white people stay on in post-16 education, with a correspondingly smaller proportion of the BME population in work, or on the job training at 16/17 (Bhattacharyya et al. 2003). Since the mid-2000s, the number of young people staying on in post-16 education has steadily risen in the face of a declining youth employment rate. However, while the gap in post-16 participation has narrowed between rich and poor, inequality of access to higher education has continued to widen (Blanden, Gregg and Machin 2005, 2-3). In large part this reflects the extent to which HE expansion has disproportionately benefitted the wealthier in society – a phenomenon defined by some analysts as ‘maximally maintained inequality’ (MMI) (Raftery and Hout 1993), ie, a process whereby the already advantaged are able to leverage their economic and cultural capital to benefit from social policy changes. As Brennan and Osborne observe:

The diversity of students in terms of social and educational origins within UK HE as a whole does not appear to match the policy rhetoric. The most advantaged 20% of young people are up to six times more likely to enter HE than the most disadvantaged 20%. These differences are further skewed in the most selective disciplines. (Brennan and Osborne 2008, 180)

19. In short, socially disadvantaged students who do stay on, are still more likely to end up studying vocational courses in FE colleges, and they are more likely to be studying for basic and lower level qualifications than at level 3 (Crawford et al 2011, 18-19).

Access to higher education

20. Prior educational attainment is the key predictor for entry into higher education and, statistically, this accounts for most of the gendered and ethnic differences observed in HE participation rates (Broecke and Hamid 2008; Chowdry et al 2010).⁴ It is also a dominant factor in studies of disability. By age 16, disabled people tend to have lower GCSE attainment than those without disabilities; they are also less likely to be studying for Level 3 qualifications (including A Levels), and less likely than average to have achieved such qualifications by age 18 or 19 (DIUS 2009). Moreover, advantage and disadvantage is about much more than just the grades. The admissions process is skewed in three particular ways.
21. First, the dominance of A level entry is an important means by which inequality is embedded in the admissions system, particularly in controlling access to high demand subjects (like law) at elite universities.⁵ Since the uptake of A levels reflects GCSE performance, it is itself skewed in terms of class and ethnicity. It has been argued that this systematically disadvantages ethnic minority students and as such is a form of indirect discrimination (Modood and Shiner 1994).
22. Secondly, other things being equal, the admissions system strongly favours privately educated applicants, particularly in accessing elite universities. According to the Independent Schools Council, the independent sector educates around 6.5% of the total number of schoolchildren in the UK (some 7% of the total number in England) and over 18% of pupils at 16+. However, it accounts for over 48% of the entrants to the UK’s 30 most selective universities (The Sutton Trust 2010, 5–6). Even when judged within a cohort of

⁴ They conclude (2008, 19-20) that, by the late 1990s gender has no clear independent effect once we control for prior attainment at GCSE.

⁵ Coffield and Vignoles (1997) noted that in 1992, the pre-1992 universities admitted 16% of students without A levels, whilst post-1992 universities admitted 41%.

academically successful young people, those who attend private schools are still more likely to progress to elite universities and to study more traditional subjects than their state educated peers (Power et al. 2003; The Sutton Trust 2004, 2011). Results of recent research at Oxford (Zimdars 2007), demonstrating that, after controlling for A level grades, the privately educated tend to be out-performed in final degree classification by state-educated students, adds to the evidence of a lack of meritocratic justification for this trend.

23. Thirdly, there is also evidence that disadvantaged young people tend to self-select away from the elite and apply, instead, to less demanding pre-92s, and, overwhelmingly, to the post-1992 universities. A lack of confidence and lack of quality information are widely cited as key causes for this. The level and quality of advice, support and encouragement a pupil gets from parents, teachers and career advisers, etc, may be critical in determining their next steps, and this can vary widely.⁶ For many schools, including some that send significant numbers into higher education, the elite, and particularly Oxbridge are still not 'on the radar'. The extent to which schools, colleges and universities perform what Burton Clark calls a 'cooling-out' function (Clark 1960) at this stage, by managing and possibly limiting student expectations seems under-researched. More directly relevant to the work of the review is the extent to which there is an expanded role for the universities and professions in supporting and mentoring potential applicants at this stage (cf Milburn 2009, recommendations 4, 6, 9; Milburn 2012a, 2012b). As the Sutton Trust (2011, 18) concludes, the considerable outreach activity by the elite universities still has some way to go in a range of schools. Moreover, as the most recent Milburn Report (2012a: 35) has observed

Overall, it is unclear what impact the significant expenditure on outreach has had and some research has suggested that much of the progress of recent years in broadening the social intake of higher education has been driven by improving GCSE results rather than the efforts of universities

Access and admission to law

24. Demand to study law has been consistently strong over many years. In 2009 there were 29,211 applicants to study first-degree courses in law in England and Wales, of whom 19,882 (68.1%) were accepted (Fletcher and Muratova 2010). Competition for places can be fierce, particularly amongst the most popular universities, with ratios of applicants to admissions easily exceeding 10:1.⁷
25. A level entry requirements remain correspondingly high. Within the Sutton 13, standard offers⁸ range from A*AA to AAB, with the majority expecting AAA. The two private universities (University of Buckingham and BPP University College) both publish standard offers of 300 tariff points – equivalent to three Bs at A Level.⁹ Published requirements amongst the recruiting universities represent, as one would expect, a broader range of

⁶ A recent poll conducted for City & Guilds showed that a quarter of young people in a representative sample claimed to have received no formal careers advice, increasing to 28% of those following vocational as opposed to general qualifications (Batterham and Levesley 2011, 19–20). The survey also found that parents were the most widely relied upon source of careers advice and support, and that less educated parents were generally less confident in giving advice.

⁷ Harris and Beinart (2005, 318) reported an overall ratio of applications to places of 9.7:1 in 2002-03, as compared to 12.8:1 in 1994-95 (Harris and M. Jones 1997, 60). Both surveys reported wide institutional variations in the ratio, with the range in 2002 being from 1.3:1 to 24.6:1. Both surveys also noted that the application to place ratio tends to be higher in pre-92 universities, but that some of the highest ratios actually occur in the post-92 sector.

⁸ The standard offer represents the normal attainment expected by that university. It should, however, be understood as no more than indicative of the actual level of achievement within a cohort. The mean tariff points across a cohort may, in some cases, vary markedly from the standard offer, for a variety of reasons. Standard offers may not just reflect relative demand or existing status, we believe they may also be used strategically in an attempt to raise standards in and/or enhance the reputation of a law school.

⁹ A level grades attract 'tariff points' as follows: Grade A = 120 points, Grade B = 100, Grade C = 80, Grade D = 60, and Grade E = 40. AS levels attract half the tariff points of the equivalent A level grade.

achievement than the pre-92s, roughly from ABB through to BCC and possibly below. Harris and Beinart (2005, 325) found that the gap in median¹⁰ standard offers between pre- and post-92 universities was 100 tariff points (equivalent to one extra B grade): 340 tariff points (AAB) at pre-92s, as compared with 240 points (BCD equivalent) at the new universities surveyed. In sum, then, there remains a significant entry qualification gap between old and new universities that does much to explain the class and ethnic stratification of the sector (discussed below).

26. Reliance on ‘traditional’ entry criteria and admissions practices may well disadvantage non-traditional applicants. Requiring high grades at A level and GCSE, looking for evidence of a high stock of cultural knowledge, and/or for relevant unpaid work experience are all likely to narrow the pool of suitable applicants. There has been very little empirical research into the law admissions process and its outcomes, and what there has been is now dated – in many cases seriously so (Lee 1984; Bermingham, Hall, and Webb 1996; Halpern 1994), though some of this data can be supplemented with information from later, more general, studies of law schools and their students (Bone 2009; Harris and Beinart 2005; Harris and Jones 1997). Not surprisingly, it paints a mixed picture, emphasising that recruitment decisions are essentially qualitative judgments, based upon a relatively wide range of evidence.
27. Survey responses to both Harris and Jones (1997, 62) and Harris and Beinart (2005, 326-30) stressed the importance of A level grades in assessing standard entrants, and, particularly in some of the pre-92 universities, even non-traditional entrants. Such data as are available support the view that A levels remain the predominant entry qualification for law. 82.7% of the 754 students surveyed by Bermingham, Hall and Webb in 1995 had completed A levels; the Law Society Cohort Study similarly found that 81% of students in 1994-95 were admitted on the basis of A levels (Shiner and Newburn 1995). More recently, 71.5% of Bone’s (2009) survey of over 1000 students (based on two pre-92 and seven post-92 universities) were studying for A levels in the preceding year. As noted above, research generally suggests that reliance on A levels reinforces existing patterns of social mobility and stratification, and this certainly appears to have been the case in law. Thus, Shiner and Newburn (1995) found ‘significantly fewer’ black than Asian or white students being admitted on the basis of A levels. Bermingham, Hall and Webb (1996, 23-24), in their analysis of UCAS application and acceptance data for law in 1994, similarly noted that Black African and Black Caribbean students in particular performed less well than the average, and also identified a clear linear relationship between average A level attainment and social class.
28. The quality of references and the applicant’s own personal statement, both required as part of the UCAS application, are also highly important. These may provide evidence of potential ability, possibly written language skills (in the case of the written personal statement) and motivation, all of which have been identified as important factors in the admissions process. These may have acquired even greater weight as fewer institutions interview prospective applicants than historically: 56% of institutions surveyed by Harris and Beinart did not use interviews at all for standard entrants, though interviews of non-standard and part-time students remained important for the majority of providers. Whether interviews are necessarily a fair and effective recruitment measure is, of course, itself questionable, since they may also privilege the acquisition of certain kinds of cultural capital (Zimdars, A. Sullivan, and Heath 2009, 659–60). Interestingly, there is little evidence that institutions put

¹⁰ The median refers to the mid-point on a range of items as opposed to its arithmetic mean or average. The median is usually used as an indication of relative distribution. Eg, whether the median is above or below the mean of a set of numbers gives us an indication of whether and in what way that distribution is skewed.

much weight on previous legal work experience, except perhaps when recruiting part-time students, where it may be used as a proxy for interest and aptitude.

29. These data in our view tend to indicate that different *weightings* are applied to similar criteria in respect of standard and non-standard entrants, rather than more substantially different criteria. It has been suggested that the use of additional criteria, including a stronger focus on factors such as motivation, capacity for independent working, and organisational skills, the use of standardised aptitude tests, and additional contextual information would benefit non-standard applicants (see, eg, Bibbings 2006, 82). This is perhaps contestable. As regards aptitude tests, evidence from research conducted in the US context points to their controversial history and has been said to demonstrate ‘conclusively’ that such tests favour white students over those from ethnic minority backgrounds (Dewberry 2011, 32; Cannon 1989) – see also chapter 4 of this literature review. There is, however, relatively little reliable evidence from the literature of the extent to which these methods are currently used by UK law schools, and with what impact.¹¹
30. One other factor that has the potential to impact the diversity of law school admissions has been the introduction of student fees. So far there is no strong empirical evidence that the introduction of fees has reduced the relative HE participation rate of poorer students (Chowdry et al 2010, 5). Whether the significant increase in fees planned for 2012 entry will have a stronger disincentive effect in the long-term future is moot.¹²
31. The Education White Paper proposes increasing grants and maintenance loans available to low-income students, including a proposed new National Scholarship Programme. These will continue to be supplemented by institutional bursaries and scholarships that are set out in individual access agreements with the Office for Fair Access (OFFA). There is some evidence that bursary levels at elite institutions have tended to be more generous, though research commissioned by OFFA has found absolutely no statistical evidence that disadvantaged applicants are incentivised thereby to apply to those institutions (Corver 2010).

The university experience

32. In this section we focus on three key aspects of the law school¹³ experience: firstly we look at the demographic profile of the student body; we then consider finance and debt, and access to work experience as potentially important variables in shaping progression to professional training and practice.

Demographic profile

33. In 2009-10, over 58,000 students were studying for first degrees in law, a 3% increase over the previous year,¹⁴ and an increase of over 13,000 students on 2002-03 figures (see Harris and Beinart 2005, 320). There were also 14,000 students studying the subject part-time in

¹¹ The exception is the LNAT test that is currently used by eight UK and two overseas institutions. Among original members, the University of East Anglia withdrew from the scheme in 2007, apparently on the basis that it did not support their WP objectives. Exeter withdrew in 2009, and Cambridge in 2010, the latter on the basis that LNAT scores did not correlate well to final degree classifications. Cambridge has now created its own admissions test. On the other hand, Manchester University joined LNAT in 2011, and other schools are apparently in discussions with LNAT.

¹² There is, as yet (April 2013), little substantive literature to report on the likely impact of the new fee regime in England. We discuss the issue in greater depth in LETR Discussion Paper 02/2011, updated in chapter 9, para 38 of this Literature Review.

¹³ We use ‘law school’ in the sense commonly used in UK legal education to refer to university law schools and departments, not to exclusively vocational course providers.

¹⁴ With a full-time (f/t) undergraduate population of over 1.3M, f/t law students thus account for 4.36% of the total. Note that a 3% increase in student numbers was below the 5% increase recorded for the sector as a whole.

2009. The number of LLB graduates has more than doubled since 1989.

34. Data on the demographic profile of law students suggest that it broadly conforms to the patterns identified across higher education more generally, though, as we shall see, the law school population is more ethnically diverse than the norm. Published HESA statistics confirm the continuing trend of the last twenty to thirty years, whereby the law student population today is increasingly female, with men accounting for just 40% of that population. HESA does not publish data on age, ethnicity, disability or social class at the discipline level. Consequently, in terms of a review of available literature and data sets, we are obliged to fall back on other resources that are (even) less complete and often dated. It follows that the findings discussed below need to be regarded with some caution.
35. Turning to the issue of social class, data show some increase in mobility decade by decade. In the 1950s, 84% of law undergraduates were drawn from the top two social classes (Department of Constitutional Affairs 2004, 7). By the early 1980s, research suggested that around 70% of law students still came from professional and executive/managerial backgrounds (McDonald 1982; Webb 1986). Studies in the mid-90s continued to find that there was a marked bias in recruitment. Birmingham et al found that almost 60% of students were still from the top two social classes I and II,¹⁵ and only 8.6% from semi-skilled and unskilled manual backgrounds (see Birmingham, Hall and Webb 1996, 20), while Shiner and Newburn (1995) reported a marked skew in law schools towards the children of professional and graduate parents. So far as we are aware, there have been no significant published studies addressing the social class of law students in England and Wales since. Analysis of UCAS data from Scotland, though not wholly comparable, demonstrates little change in social class composition within that jurisdiction between the mid-1990s and 2000 (Anderson, Murray, and Maharg 2003). Although higher education participation rates have undoubtedly increased in the last decade, as we have noted above, most general studies cast some doubt on the extent to which this has meaningfully reduced the social inequalities embedded in the HE system.
36. As regards ethnicity, Cole et al (2009, 29) report that, in total, BME students accounted for 32.1% of students starting a first degree in law in 2008. This is significantly above their population representation, and above average BME participation in HE. In 2008-09, BME students comprised 19.5% of the total undergraduate population (ECU 2010, 87). Double the proportion of BME as compared to white students read law (at 6.3% as compared with 3.1% - ECU 2010, 90). This emphasises the extent to which law stands out as a preferred subject for BME applicants – it is in fact the fifth most popular subject area after business studies, subjects allied to medicine, social studies, and biological sciences (ECU 2010, 91). Within this total, female acceptances (32.6%) were slightly more likely than males (31%) to be drawn from ethnic minorities.
37. This headline trend does not, however, preclude some marked variations between ethnic group participation. The low participation rate of African Caribbean students in law has been particularly marked (Carr and Tunnah 2004, 9). Educational and ethnic differences apparent in students' own backgrounds clearly helps shape patterns of participation. Shiner and Newburn (1995) reported that, while 60% of white respondents had at least one parent with a degree or professional qualification, this applied to only 47% of African Caribbean; 40% of

¹⁵ This study followed UCAS in using the then Registrar General's Classification of Occupations as the determinant of social class based on father's or head of household's occupation. This divides the population into six broad occupational sets I - higher professional; II - managerial; III - clerical and skilled non-manual; IV - skilled manual, V - semi-skilled manual; VI - unskilled workers.

Indian and 20% of Pakistani or Bangladeshi students. As Sullivan notes, data from the Law Society's Cohort Study in the 1990s also confirmed that:

Those from less privileged backgrounds are concentrated in new universities, with well over half (56%) of those who attended a comprehensive school attending a new university, as had 59% of those whose parents did not have a degree or professional qualification. This was in comparison to 33% who had been to an independent school and 34% of those who had a graduate parent.... Ethnic minority law graduates are significantly more likely than their white equivalents to have studied at a new university with 87% of African Caribbean having done so. (R. Sullivan 2010, 5, 6)

38. The 'choice' of university, of course acts in itself as an important filter mechanism and indicator of class (Sommerlad, 2008b). Attendance at a new university still creates, if not barriers, then at least hurdles to progression, which first-generation students may well be unaware of. As one of Sommerlad's respondents observed: 'you're at a disadvantage because you didn't sort of go to a .. not a proper university .. I never really thought it would make any difference where you did [the law degree] ... but it does'.
39. Getting a broader social mix into university is only the first step. Keeping them there, and enabling them to perform to a level that supports them to progress into the profession also matters. UK retention data compiled by the NAO indicate that about 78% of UK students in the period 2000-05 completed their degrees, with a continuation rate (from first to second year of full-time study) of around 90-91%. These figures place the UK in the world top five for retention (National Audit Office 2007). From that data set, continuation rates for law are comfortably within the 'top 10' by subject area, with about 92% of first years progressing to their second year, which may suggest that there is fairly limited room – or necessity - for greater intervention, though we should be cautious in reaching that conclusion. The risks of non-completion are not evenly distributed. Being a full-time as opposed to part-time student is the single largest determinant of completion, but the next most significant tends to be level of pre-entry qualifications (Arulampalam, Naylor, and Smith 2004; Smith and Naylor 2001; National Audit Office 2007). This does much to explain the higher completion rates generally found in elite as compared to at least some post-92 institutions.
40. The proportion of good degrees (2:i or First) awarded has been increasing across the board, from around 38-40% of graduates in the late 1970s, to about 60% by the middle of this decade (Richardson 2008, 4). Figures for law are broadly in line with this trend, though consistently slightly below the average. Thus, over half of law graduates (56.6%) in the summer of 2009 achieved firsts or 2:i classifications. While this means the 'good degree' has become less significant as a filtering mechanism over the last twenty to thirty years, the increase is neither gender nor ethnically neutral. More women now graduate with firsts and upper seconds than men: 58.0% as opposed to 54.2%. (Fletcher and Muratova 2010, 6). There are no figures showing the class of law degree awarded to different ethnic groups. However, studies reporting on various other datasets from the mid 90s to the mid 2000s have consistently shown that white students are more likely to graduate with a good degree than students from any other ethnic group (see Richardson 2008,10-11; ECU 2010, 9). The attainment gap remains largest between white and black students, at about 29% (ECU 2010, 92). There is also some evidence to show that the percentage increase in first and upper-second class degrees has been more marked in pre-1992 than in post-1992 universities (Harris and Beinart 2005, 332), which might also account for some of this apparent ethnic difference.

Finance and debt

41. Patterns of debt vary by social class, gender, ethnicity, disability and type of institution attended. Whether debt in and of itself is a significant cause of withdrawal is less certain, though it may often be one of a range of factors (Bennett 2003; Christie, Munro, and Fisher 2004; Pennell and West 2005; Purcell and Elias 2010). Not surprisingly, there is evidence that financial constraints and levels of indebtedness impact the ability of students to take on unpaid work placements (Shiner and Newburn 1995, 39), *pro bono*, and other activities used by legal sector recruiters in selecting interns, trainees and pupils (Francis and Sommerlad 2009). Whether these effects are exacerbated by the new fees regime is obviously a concern for the future.

Access to work experience

42. Obtaining formal work experience during university is a critical step in securing a training contract or pupillage. Shiner's work on the Cohort Study demonstrated that 63% of those who gained work experience with a solicitors' firm were offered a training contract, with a virtually identical proportion of those taking mini-pupillages being subsequently offered a full pupillage (Shiner 1997). Work experience itself, however, is not equitably distributed. Shiner and Newburn (1995) thus found that students who gained work experience with solicitors and barristers were disproportionately from private schools and Oxbridge, and that ethnic minority students (with the exception of Indian students) were less likely to obtain work experience. Recent research by Andrew Francis and Hilary Sommerlad has added a useful qualitative gloss to this (A. Francis and Sommerlad 2009, 2011). Their research emphasises how access to formal work experience is shaped by a mix of credentials and ascriptive criteria, which they describe as a combination of social capital, UCAS tariff scores of 360+, attendance at a pre-1992 university and prior informal work experience. Their study also points to the extent to which opportunities to undertake informal work experience, often in years 11 and 12 of school are themselves 'classed' and shaped by social capital, in terms of personal and family connections with the profession. In particular they highlight the practice, acknowledged in interviews, of commercial firms awarding informal work experience to the children of clients as part of their business development activities.

'HE in FE'

43. Before leaving this section of the chapter we need to say something briefly about the role of 'HE in FE' – that is HE provision in further education colleges. This is being advanced by Government policy as part of the widening participation agenda. Aside from the work FE colleges may take-on in enabling participation in HE, there is growing crossover and partnership between the FE and HE sectors in a number of areas of provision. Foundation degrees are a particular example of this. Foundation degrees were launched in 2001 to provide a new range of vocationally-focused intermediate level (ie level 4) higher education qualifications, they are thus recognised qualifications in their own right, but also provide an alternative entry route into traditional HE awards. Entry criteria are significantly below those needed for a traditional degree, ranging from 40-120 tariff points in the examples we identified. Some foundation degrees may carry exemption from the CILEx level 3 Diploma, and students who do well in a foundation degree may be admitted to the second year of an LLB programme. Foundation degrees thus could have a potential role in widening participation in legal education. Harris and Beinart (2005), however, noted very little HE interest in law foundation degrees in their early days. It is questionable whether this situation has much changed. Our own research so far indicates that only eight such awards are offered by FE colleges in England and one in Wales, suggesting that, so far, their impact on law is clearly not on a grand scale, but there has not been any formal research or evaluation of that impact so far as we are aware.

44. There is also little evidence about whether, and if so how, professional bodies generally have taken the development of foundation degrees into account. A survey examining professional bodies' engagement with foundation degrees by PARN in 2010 garnered an 18% response rate (44 out of 238 bodies), only 7% of which agreed that foundation degrees had changed the way they thought about routes to entry (Williams and Hanson 2010).

Vocational Training: the LPC/BPTC

45. Despite the economic downturn, numbers on LPC and BPTC currently exceed the number of training contracts and pupillages available annually. There is a risk that this disparity, and the intensity of competition that it produces, may increase pressures on diversity and social mobility.
46. Detailed enrolment data for the BVC/BPTC are published on the BSB website. The latest published data are as follows:¹⁶

BVC Year	03/04	04/05	05/06	06/07	07/08	08/09	09/10
Applicants	2570	2883	2917	2870	2864	2540	2657
Enrolments	1449	1665	1745	1932	1837	1749	1793
Successful¹⁷	1251	1392	1480	1560	1720	1330	1432 ¹⁸

Table 7.1: BVC/BPTC enrolments

47. It can be seen that numbers have remained relatively constant (with the exception of the peak in 2006-07), with an annualised percentage growth rate for the last five years of 0.6% (Sauborah 2011a, 25). However, this must nevertheless be contrasted with a training market consisting of, on average, 500-550 pupillages at the independent Bar and a far smaller number at the employed Bar. Note also that the data published by the BSB refer only to applications and enrolments, not to target or validated numbers at BVC/BPTC providers, so trends in recruitment to target numbers cannot be extrapolated from that data.
48. The average pass rate for the BVC over the last five years has been 83.1%, but there have been significant variations – from a high of 94% in 2007/08 to a low of 76% the following year (Sauborah 2011, 25). Detailed data on gender and ethnicity show, interestingly, an almost equal split between male and female students, and, until 2009-10 when it jumped to 44%, consistently over 30% BME participation.¹⁹

¹⁶ <http://www.barstandardsboard.org.uk/news/statistics/>

¹⁷ The figures here represent those students who successfully completed the BVC in the year in which they enrolled. It does not take into account those students who deferred their place or who were referred and took resits after the September examination board.

¹⁸ 1432 is a provisional figure.

¹⁹ It should be noted both that there is a high (12%+ since 2005-06) and seemingly increasing non-response rate to this item, and that the statistics do not distinguish home from non-EU students. The latter may comprise 20-30% of a cohort, and it is possible that this latest increase/spike may reflect a significant increase in overseas recruitment. This could be readily confirmed by qualitative research.

49. Headline data for the LPC are published in the Law Society Annual Statistical Reports.²⁰ Available data for the last five years appear below in Table 7.2. This records available places, not enrolments, but we do know that enrolments are running markedly below capacity,²¹ and this is reflected in the level of passes. Thus, in 2008/09 there were 5824 first-time passes (Dixon 2011) as against some 13,000 places. Even allowing for failures, this suggests courses collectively may have been running at little more than 60% capacity.

	LPC places	Training contracts (TCs) registered	%age year-on change in TCs
2006-07	10,325 FT 2,498 PT	6,012	+4.5
2007-08	10,675 FT 3,064 PT	6,303	+4.8
2008-09	10,803 FT 3,152 PT	5,809	-7.8
2009-10	11,370 FT 3,112 PT	4,874	-16.1
2010-11	12,142 FT 3,112 PT	-	-

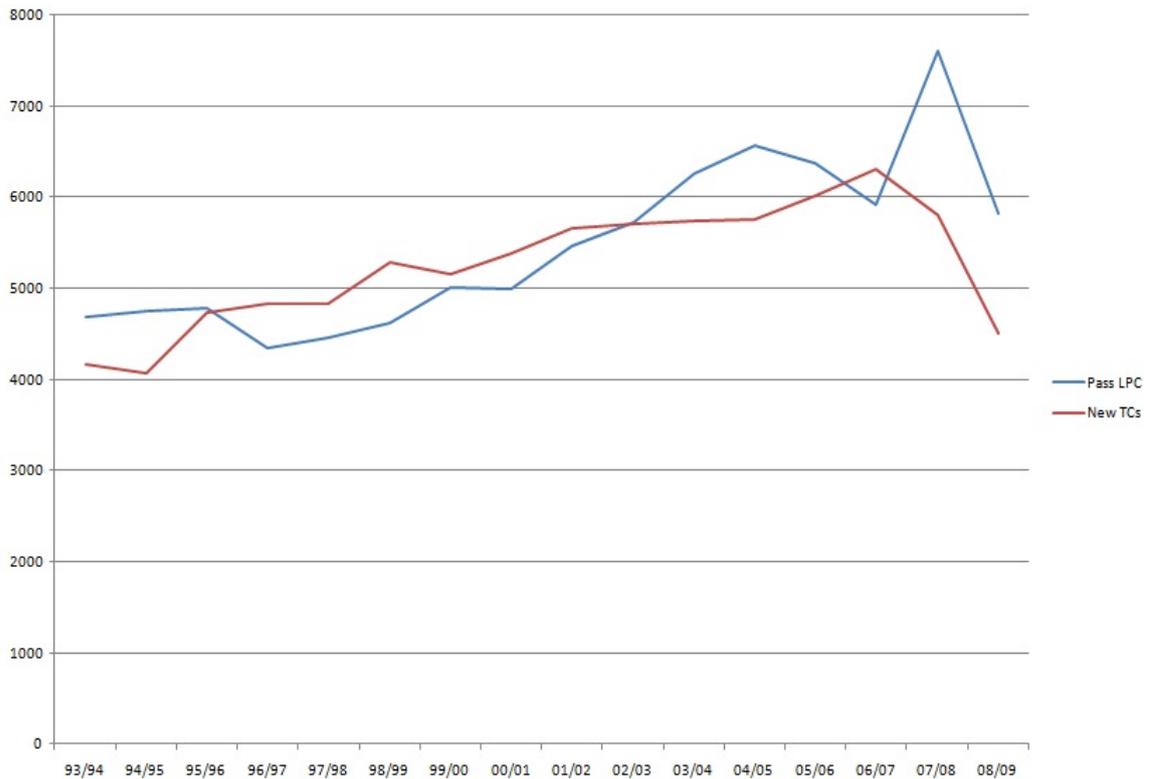
Table 7.2: Available places on LPC courses and available training contracts
Extracted from *Trends in the Solicitors' Profession 2007, 2008, 2009, 2010*.

50. Annual pass rates are similar to the BVC/BPTC, averaging around 80%. David Dixon's (2011) study of the correlation of LPC passes to available training contracts shows some interesting trends, summarised in the following graph.²²

²⁰ Available online at <http://www.lawsociety.org.uk/aboutlawsociety/whatwedo/researchandtrends/archive.law>

²¹ It was reported last year that, of the available LPC places nationally, only 9,337 were actually filled – see <http://www.guardian.co.uk/law/2010/jul/13/legal-training-law-students>.

²² Data for this graph were extracted by Richard Moorhead and published in his 'Lawyer Watch' blog at <http://lawyerwatch.wordpress.com/2010/11/09/a-history-of-lpc-numbers/>



51. Overall the figures indicate that the mismatch between student numbers and training contracts, has, at least until the late 2000s been much less than often assumed. Indeed, for extended periods since the introduction of the LPC, there have been fewer LPC students graduating than there were training contracts. However, these figures do not include the additional graduates coming into the marketplace following re-takes, which could add significantly to the total number of applicants, nor can this analysis gauge the cumulative effect of successive years of over-supply, so it is reasonable to assume that the disparity between applicants and training places is underestimated by this analysis.
52. Research from the 1990s identified both the LPC and BVC as barriers to greater social mobility within the legal profession. As Sullivan (2010, 8) notes the Law Society Cohort Study indicated that:
- 42% of individuals who did not apply for the LPC cited financial reasons for their failure to do so (*Shiner and Newburn, 1995*). This financial barrier is more prevalent for those from lower socioeconomic backgrounds, with 38% of students found to fund their LPC with money from their parents. Students from less privileged backgrounds, defined as those who had attended a comprehensive school or those whose parents did not have professional qualifications, were less likely than their more privileged peers to have received professional sponsorship or parental contributions, but were more likely to have used a commercial loan (*Shiner and Newburn, 1995*). Those who do not receive professional sponsorship during their LPC are also more likely to carry out paid employment, a possible detriment to their performance (*Vignaendra, 2001*).
 - The university attended influences the source of finance for the LPC, with 74% of Oxbridge graduates receiving professional sponsorship, in comparison to just 27% of old university graduates and 14% of new university graduates
53. Similarly, the BVC was also criticised in this period for a distinct Oxbridge bias (*Shiner 1997*). *Shiner's* work also raised another important issue, which was the continuing effect of academic performance on BVC and LPC recruitment. Using multivariate analysis, *Shiner*

showed that prior academic performance was the dominant factor in gaining an LPC or BVC place.²³ Indeed, the Oxbridge bias in BVC recruitment virtually disappeared once one controlled for prior academic attainment. This study also showed that students who had completed the CPE (GDL) had a clear advantage over law graduates in obtaining places.

54. Both of these trends may constitute barriers to entry for those BME or lower SES students, who are more likely to have weaker A levels and lower degree attainment. Moreover, Shiner and Halpern's work in 1995 had also pointed to the fact that BME and lower SES students were less likely to take the CPE than a law degree, so that the CPE of itself also could contribute to narrowing the social class composition of the profession, particularly as some larger legal recruiters are known to take 40-50% of non-law graduate trainees.
55. We can also provisionally identify four other diversity issues around the vocational courses, though the formal evidence for these is sparse. First, where you complete your LPC, and possibly BPTC, may be another way in which class and opportunity are inscribed in students' training decisions (see also Sommerlad 2008b). Certainly as regards the LPC, there is some recognition of an informal divide between 'national' and 'local' training providers and a 'pecking order' that is influenced in large part by ties to the big corporate law firms.
56. Secondly, the awards may have limited market value outside the sphere of legal professional training. Anecdotally this appears to be a bigger problem for the LPC than BVC/BPTC, but it does amplify the risks of failing to attract a training contract or pupillage, as it is not clear that the qualifications have significant value in the graduate marketplace more generally, other than enabling work as a paralegal. Given the social and educational barriers attending the acquisition of pupillage and training contracts, the disincentive effects of this risk may be greater for some BME and non traditional students.
57. Thirdly, we know very little about the numbers, demographic characteristics, employment basis and career progression of those who complete vocational training and move into paralegal, knowledge management or outsourcing roles within the sector. Anecdotally this is thought to be a not insubstantial segment of the workforce, and one that will potentially grow as technology and new business practices routinize and disassemble a greater range of transactional work.
58. Lastly, there is a significant gap between the published 'on paper' requirements for obtaining a place on the BVC/BPTC (both of which accept 2:ii students), and what the market most often requires to progress into practice. There may thus be a concern that the formal requirements give a false impression of the opportunities/relative ease of access, particularly for students who do not have a strong cultural understanding of the profession and its recruitment market. On the other hand, of course, raising entry requirements is unlikely to be easy. It may be seen as anti-competitive, by raising an artificial restriction on entry. It is notable in this context that the recommendation of the Wood Report to raise the entry standard to the BVC has not been acted upon. Given the evidence that ethnic minority students are less likely to graduate with a good degree, an increase in entry standards could negatively impact diversity.
59. It should also be noted that the Bar has introduced its aptitude test (discussed in chapter 4), and the Law Society has also been showing some support for this idea. The comments we make about aptitude tests elsewhere in this chapter are relevant to these initiatives.

²³ Whether its influence is so great on the LPC when there is excess capacity may be a pertinent question.

Recruitment and entry to practice

60. As a starting point it must be acknowledged that the legal profession has become increasingly diverse. Women now make up over 45% of solicitors on the Roll and 60% of admissions (Sommerlad et al. 2010, 6). They constituted over 34% of barristers and 44% of new tenants in 2010 (Sauboorah 2011a, 13, 20). There has also been a substantial increase in the proportion of BME lawyers. In 2008-9 they made up 13% of solicitors on the Roll, 24% of admissions to the Roll and 16% of barristers. The numbers of BME solicitors with a practising certificate rose by 243.7 % between 1996 and 2006 (Sommerlad, Webley, et al. 2010, 6). At the same time, there are some interesting and perhaps significant differences.
61. In assessing how the solicitors' profession and the Bar perform in terms of ethnic diversity, the question of comparator is crucial. As against the general population, the professions could both be considered to be performing well, on the basis that BME persons constitute about 7.9% of the total population (2001 Census) and around 13% of the working age population. The professions do slightly less well when measured against the 15% of the general university population (Zimdars 2010, 123-4). But the contrast becomes least favourable when we compare this with the figures of (about) 32% of undergraduate law 'starters', or 31% of Law Society student members, and 25.8% of pupillage applicants (Carney 2011). By these standards there appears, *prima facie*, to be appreciable ethnic under-recruitment. Of course this does not prove that there is necessarily direct discrimination in recruitment processes, but it does beg the question whether, and if so to what extent, existing 'meritocratic' and ascriptive recruitment criteria impact BME applicants unequally. It is also notable that the proportion of women entering practice at the Bar is markedly less than the equivalent populations of both women law graduates and women trainee solicitors, and below the university population comparator (Zimdars 2010, 124).
62. The Bar Council and Bar Standards Board have published a useful range of data on pupils' social and academic background. Data in the Wood Report on pupillage (BSB 2010) demonstrates that those who successfully obtain pupillage are drawn heavily from professional and managerial backgrounds. Nearly one-third have attended fee-paying schools, and the population has consistently been skewed towards the academic elite, with a far higher proportion of Oxbridge graduates and students with First Class honours than would be predicted from population norms. Drawing on recent cross-sectional data, the academic bias, relative to pupil applicants, is also striking (Table 7.3):

2009-10	Pupillage applicant (Carney 2011)	New pupils (Sauboorah 2011b)
Oxbridge	12.6%	23%
First class degree	14.9%	23.5%

Table 7.3: Elite academic backgrounds of pupil barristers

63. This would appear to be consistent with the Wood Report's conclusion that 'the principal qualification for obtaining pupillage appears to be 'high educational achievement'. The extent to which this perpetuates or actually accentuates earlier ethnic and class effects is moot. The Wood Report also concludes that, without further information on the characteristics of those who are rejected, it is not possible to make a proper judgment of the fairness of recruitment processes, and notes that research to compare successful and

unsuccessful applicants is underway. Such research is to be welcomed, though as Zimdars (2010, 131) asserts, even on the data we have ‘there still seems scope to expand the intake of new barristers from lower social-class origins and to recruit from a larger number of universities.’

64. Comparable data have not been published for trainee solicitors. Looking at the profession as a whole data suggests that solicitors are drawn from a wider demographic. Data on socio-economic background for the profession in 2009 shows that 73% came from professional/managerial backgrounds, and 27% had attended an independent school. Only seven per cent of solicitors had graduated from Oxbridge, and 30% had attended a ‘Redbrick’ university. As we would expect, solicitors from non-professional backgrounds were more likely to have attended a college, polytechnic or post-92 university than those from a professional background (44% as compared with 33%) (Law Society of England and Wales 2011, 4, 12).
65. However, what recent research there has been indicates a continuing and strong Oxbridge/pre-1992 university bias in recruitment. This is often seen as a particular consequence of the recruitment practices of the larger corporate and elite law firms. These constitute a significant share of the recruitment market, and have tended to target a relatively narrow range of universities, though there is evidence from the firms themselves and from ‘trade press’ sources that this practice is changing. Nevertheless, Oxbridge applicants who had gained a lower second or below were, on balance, more likely to be offered a training contract than those from other ‘old’ universities or post 1992 institutions who achieved better; 79% of those who gained a first or upper second from an old university were offered a training contract in comparison to 60% of those who had achieved the same from a new university.
66. As a number of studies highlight, these recruitment practices are not anti-diversity as such. Rather they can be seen primarily as a means by which recruits are brought into the firm who have the kinds of cultural capital that will facilitate their entry into the firm’s social (and training) milieu, and ensure their (perceived) acceptability to clients. It can thus be seen as part of a process that involves elements of professional closure (by restricting access) (Bolton and D. Muzio 2007; Sommerlad 2007), ‘upmarket branding’ (Ashley 2010, 721) and ‘identity regulation’ of those within the organisation (Cook and Faulconbridge n.d.). This leads, albeit perhaps unintentionally, or at least incidentally, to the reproduction of a relatively homogenous profession in terms of educational background.

Barristers and solicitors: career progression/retention

67. A wide range of research has demonstrated correlations between ethnic origin, gender and social class, and progression and retention. Concerns have been expressed that BME and (younger) women lawyers are disproportionately likely to leave the profession, creating a loss of talent and waste of training resources. Studies show that key career ‘choices’ as regards areas of practice, or the decision to move in-house, pursue partnership or apply to take silk are shaped differently by diversity characteristics. Market risks, regulatory risks and burdens, and training needs are not the same across all sectors, and the extent to which sub-sectors of the market (eg high street and legal aid practice) are differently raced and gendered will mean that these risks, etc, are also borne differently by these groups. In the present volatile and uncertain climate structural changes to the profession, caused, for example, by legal aid cuts, deprofessionalisation, structural changes in the tournament for partnership, and the move to ABSs may have quite disproportionate consequences for at

least some diversity groups.²⁴

68. The primary issue for this Review, however, is whether the current training regimes actively contribute to, or at least do not ameliorate negative effects of professional culture and structures on career progression and retention.²⁵ At the same time, the issue of training cannot be wholly separated from wider issues about the business models that dominate the sector. These are seen as the major barrier to developing good – and fair - management and working practices. Solicitors firms, for example, are thus criticised for perpetuating a male work paradigm characterised by a long hours culture, ‘presenteeism’ and a resistance to flexible working (Duff and Webley 2004; Insights Oxford 2010; Sommerlad et al 2010).²⁶

Training Needs

69. Specific training gaps that have been identified thus far include:

Management skills, structures and cultures

70. The lack of good management training and management skills is highlighted, particularly by qualitative research, as an underlying problem in a range of diversity studies. In some, perhaps many, firms employees feel that management is not regarded as a critical activity. Indeed a common view seems to be that ‘time spent on management is time lost on billable hours’ (Insights Oxford 2010, 13). Smaller firms in particular are often seen as ‘making it up as they go along’ (Law Society of England and Wales 2010, 7). Poor management is thus seen to perpetuate informal and often unfair working practices and cultures, for example:
- a. Equity partnership itself is seen as a vehicle for perpetuating an ‘old boys club’, a tendency that may be exacerbated by the use of salaried partnerships as an intermediate rung (Insight Oxford 2010, 16; Sommerlad et al 2010, 32)
 - b. lack of clarity over promotion criteria used by firms (Insight Oxford Ltd 2010; Law Society of England and Wales 2010)
 - c. Absence of clear pay structures and published pay scales (Law Society of England and Wales 2010)
 - d. Absence of support structures, particularly coaching and mentoring, and support for diversity networks. These are important to redress the balance of informal support and mentoring which ‘was reported as characterising most respondents’ workplaces, and the fact that in practice this meant that powerful senior figures (generally white men) tended to foster the careers of young white men.’ (Sommerlad et al 2010, 7)
 - e. In similar vein, firms’ attitudes to women returners constitute the main deterrent to returning (Siem 2004, 105).

²⁴ Though not all are necessarily negative. ABSs, for example, could provide new openings and opportunities, particularly for private client work, and introduce new organisational structures that lack some of the negative economic and cultural practices that may be associated with the traditional law firm/chambers models.

²⁵ Again, although such criticism is widespread, it should also be understood in the context of underlying high levels of work satisfaction and commitment – see, eg, Duff and Webley (2004) and Janet Walsh’s unpublished (2009) research on women solicitors – reported in the *Law Society Gazette*, 25 March 2010, and available at <http://www.lawgazette.co.uk/news/women-solicitors-believe-flexible-working-damages-career>.

²⁶ Challenges are also likely to exist for the chambers model – which has been discussed far less in the literature – partly because it does not employ its members, but also because it may operate through a looser organisational structure than most other forms of business organisation.

71. It will be obvious that many of these are not purely diversity issues; they are poor practices by any modern management standards, but ones that also appear to have a disproportionate impact on employees with protected characteristics.

Training for transition

72. The complexities of modern legal practice create a range of critical transition points in individuals' careers where training may produce significant benefits. Studies thus emphasise the difficulty of changing specialisation (Duff and Webley 2004); the need for 'up-skilling' following a career break (Siems 2004, 105–6), and the pressures of setting up one's own practice. Some of these have been a matter of concern in studies dating back to the mid-1990s (eg, re-training for women returners) and it is at least a matter of note that these issues are still arising.
73. In the context of setting up a new practice, it is notable that disproportionate numbers of BME solicitors are setting up their own practices. This was seen in a number of studies as a direct consequence of the foreclosure of other career routes (Law Society of England and Wales 2010). We also know from the Ouseley Report that smaller firms are more likely to get into business and disciplinary difficulties, and have evidence of a disproportionate number of complaints being brought against BME solicitors (SRA 2008). Taken together, these raise a more general equality question for the Review: whether such disproportionality exists among other (LSA) regulated professions (the interim PK report for the SRA in 2009 found little available evidence), and whether there are specific gaps in the support available to lawyers in training and at critical later transition points which, if addressed, might reduce that disproportionality.

Diversity training

74. The need for diversity training has been noted in a number of studies, and particular gaps, such as developing managers' awareness of LGB issues, have been highlighted (Interlaw Diversity Forum 2010, 24). Sommerlad et al (2010) recommend that diversity training should take place at several career points including the LLB, LPC and BPTC stages and for qualified lawyers (as CPD). They suggest consideration should also be given to the regulators requiring training of current senior partners/ line managers.
75. While there is no doubt that diversity training appears the 'right thing to do', is mandation the best way forward? Its effects and effectiveness are open to question. It might be argued that it is not the job of the regulators to advance social justice in this way, or that much of the diversity debate is currently framed in ways that undermines the dignity and self-respect of its intended beneficiaries, or that care needs to be taken to limit the backlash from those who regard it as tokenism on one side and mere 'political correctness' on the other. Equally, it is the job of the approved regulators to ensure compliance with the equality and diversity principles and outcomes contained in their own codes and handbooks. The arguments are many and nuanced, more nuanced than the space in this review allows (Ashley 2011; Braithwaite 2010b; Nicolson 2005).
76. A more practical concern may be its limited efficacy. Ashley (2010, 720-21) thus argues that, even in firms where policies are in place, including a culture of diversity training, diversity still tends to operate within parameters of risk that are set by assumed cultural (and particularly perceived client) expectations of what a lawyer needs to be, a finding supported by other research which points to the role of diversity staff in negotiating and compromising the impact of diversity policies (Braithwaite 2010a). To step outside of those cultural parameters is thus to risk diminishing the perceived value of the firm's services, and this, for

the firms involved, overrides other considerations. This points, perhaps, to a larger root problem: how should the system not just of education and training, but of regulation more generally, respond? How far should one go in setting, monitoring, and enforcing formal diversity standards, particularly in a context where the underlying structural and cultural inequalities are largely beyond the reach of legal services regulation?

The costs of CPD

77. CPD as a topic is considered more fully in chapter 5 of this review. We have already noted there that there is very little existing literature, and that is doubly true in respect of equality, diversity and social mobility within the legal profession.
78. The cost of CPD may be a particular issue for the smaller professions and paralegal bodies, and, given the make-up of those groups, the creation or increase in CPD requirements may have diversity implications.²⁷
79. Turning to the larger professions, barristers in independent practice stand out as they are, of course, individually responsible for their CPD. The Bar Council, in its evidence to ACLEC, raised concerns about the impact of CPD cost, particularly on new practitioners who would already be managing significant debt. This contrasted with the earlier views of the Bar Council's Potter/Southwell Working Party in 1991 (ACLEC 1997, 40-41) which concluded that competition and the resources and support of the Inns would be sufficient to keep costs manageable. Whilst these reports did not address CPD specifically as a diversity issue, it was briefly addressed in the later Neuberger Report as a potential barrier to progression, but was not made the subject of specific recommendations.
80. So far there appears to be little or no published evidence of the costs of CPD acting as a barrier in the solicitors' profession. Most CPD is met by firms as part of the costs of regulation, and much may be provided in-house. In addition, many of the registered providers (e.g. BPP) provide discounts for sole practitioners, arguably reducing the risk of CPD acting as a barrier there. As noted above, for groups like women returners, who wish to update their skills *before* re-entering practice, access to low cost CPD could make a difference.
81. It is difficult to draw parallels with other professions (such as medicine or teaching), where there is a more developed literature, as the CPD undertaken by clinicians and teachers is funded by the state (Brown et al, 2002:652) as opposed to individuals or firms.

Diversity initiatives

82. Diversity initiatives exist at many different points and perform a multiplicity of functions within legal education and the professions.
83. Many diversity initiatives are geared to widening access to legal education and the profession, such as Pathways to Law, the PRIME initiative, and a variety of initiatives supported independently by the Bar and Inns of Court. The amount of such outreach activity is considerable and has been commended (Milburn 2012a). A recent paper published by the LSB usefully identifies a range of such activities, though it offers little meaningful evaluation (LSB 2010). We do not intend to repeat those large amounts of descriptive information here, but this work does highlight both the extent of activity being undertaken by a wide range of

²⁷ For example, the cost of CPD has already been highlighted in our research as an existing challenge by the Institute of Professional Willwriters.

professional bodies and groups, often working in conjunction with charitable institutions, HEIs, community groups and others. That study also does not highlight other access and outreach work by schools, HEIs and others that is geared more generally to widening participation in HE. This also cannot be discounted. When we start to look at the volume of organisations and activities involved, this highlights the fragmentary and complex nature of provision. These initiatives undoubtedly make a difference at the level of the individuals supported, but collectively, it is rather less clear what scale and reach such initiatives have.

84. The underlying point is that there is relatively little published (or indeed, so far as we can tell unpublished) research and evaluation, identifying and assessing the impact or effectiveness of such interventions. This seems to be a pressing concern, and one that has also been highlighted by the Legal Services Board in both its Diversity Forum of Professional Regulators, and its recent consultation on diversity,²⁸ and by the Milburn Report (2012a: 40). Are such initiatives an effective means of bringing about systemic, intergenerational, change or do they primarily ameliorate some instances of individual disadvantage? What is or would be the most effective uses of scarce resources in this area? These are questions to which we need answers.
85. Diversity initiatives may also be developed, primarily by representative bodies and individual organisations, as part of a policy of developing and retaining a well-qualified and diverse workforce. Examples here include the Law Society's Diversity and Inclusion Charter, which was launched with the support of over 80 firms in 2009, as well as law firm and Bar Council participation in the government's Business Compact initiative. The Charter initiative is particularly interesting insofar as it requires member firms to self-assess against the Law Society's Equality and Diversity Standards. In other words it adopts through a voluntary scheme a methodology akin to the self-assessment of ethical infrastructure adopted by the regulator in New South Wales (Parker, Gordon, and Mark 2010). This fits well with outcomes-focused approaches to standards and regulation.
86. The use of such schemes to develop, among other things, leadership in promoting equality and diversity objectives, assurance mechanisms for fair employment practices, diversity work placement and student mentoring schemes; formal in-house mentoring of new professionals and the establishment of diversity networks are seen in policy terms as important steps forward. However, it has also been argued that many such initiatives are largely confined to large corporate law firms, and the in-house sector, and are in general likely to reach only a limited number of individuals, and hence unlikely to produce significant or rapid changes to the overall culture of the profession (Sommerlad et al 2010).

Other legal service providers

87. The size of the total legal services sector in England and Wales is uncertain. One recent estimate suggests it may be in the region of 300,000 persons.²⁹ Around half of this number are 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. Within the legal services sector in 2010 there were 136,556 authorised persons, and a further 4150 regulated immigration advisors, making a total of 140,706 directly³⁰

²⁸ http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/diversity_consultation_publish.pdf

²⁹ International Financial Services London puts the UK wide figure at about 320,000 in 2010;

³⁰ These figures thus 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

regulated individuals.³¹ Solicitors and barristers comprise the largest of these regulated groups, together accounting for approximately 89% of the total regulated workforce.

88. There is very little literature relating to other professional and occupational groups within the legal services sector. This includes an absence of demographic data in the public domain. The LSB's requirement of more extensive monitoring of protected characteristics across the workforce will help in analysing future trends, but that will be too late in the context of this review. The reporting requirement does not extend to entities regulated by OISC or the Ministry of Justice, neither of which currently publish individual level diversity data on their regulated communities.
89. What we have been able to ascertain so far by research from public information and unpublished sources is considered more fully in LETR Discussion Paper 02/2011. In sum it shows a range of entry patterns and demographics. It emphasises the extent to which at least some of the groups are very highly, or at least increasingly, feminised (eg willwriters, CILEx), or appear to have a large BME composition (OISC-registered immigration advisers), but there is no overarching pattern apparent at this stage.
90. The one group for whom there is a developing literature is CILEx. CILEx has moved in recent years from the position of a 'subordinate' to an independent profession, distinct, at least in regulatory terms, from the both the solicitor and paralegal workforces. Demographically Chartered legal executives are drawn from a far wider social background than solicitors: 85% of them come from families where neither parent went to university; three out of four are women.
91. How far the feminisation of the profession, in the present cultural setting, reinforces or re-inscribes legal executives' subordinate status, is moot. Whilst the profession collectively has pursued a strategy of achieving 'classical professionalism', Francis notes that legal executives in practice seem to tread a fine line between those who are treated as equal fee-earners, and enjoy similar levels of autonomy to their solicitor colleagues and those who negotiate the more difficult terrain of being seen as either a failed solicitor or glorified legal secretary/paralegal (Francis 2006, 2011). Francis's work also highlights that these distinctions are potentially gendered: that male legal executives, particularly in larger firms, may more readily wield autonomy, or else 'more naturally' choose to 'get out quick' and cross-qualify as solicitors (Francis 2011, 76, 78-9). These inequalities have also been reflected in pay differentials between men and women legal executives (Sidaway and Punt 1997, 26).
92. At present relatively few CILEX lawyers actually exercise their option to qualify as solicitors by completing the LPC. In 2008/09 the number of CILEx lawyers admitted to the role was 147, or 1.7% of all admissions (Dixon 2011, 8). To that extent, the impact of the CILEx route on the potential diversity of the solicitors' profession is, numerically at least, relatively limited.
93. CILEx has latterly been giving greater prominence to its graduate entry route. Whilst this is an obvious strategic response to the current market, Francis (2011, 81) asserts that it also thereby risks undermining the status of its traditional membership, and exposing its claims

persons. Such individuals are *indirectly* regulated by virtue of their employment in regulated entities. The data also exclude those – eg willwriters - who deliver unreserved legal services through unregulated entities or on their own account.

³¹ Claims management companies are regulated by the Ministry of Justice as entities, not individuals, and so are also excluded from this analysis.

to providing a diverse and open route into the sector to charges of political expediency. It may also reflect and (arguably) help reinforce existing status distinctions between elite and non-elite university graduates, as the CILEx route is potentially most attractive to post-92 providers.

International Comparisons

94. In this section we consider developments in two other Common Law jurisdictions: the USA and Australia. In both jurisdictions there is an extensive literature on gender equality in the legal profession. In the US there is also a great deal of work on the experiences of black and hispanic lawyers in law school and in the profession. In this section, however, we intend to focus primarily on issues that bear perhaps more usefully on some of the regulatory and other gaps identified elsewhere in this paper.

USA

95. The distinction between the US and UK strategies for addressing issues of equality and diversity within the legal profession may be best understood within the wider context of differing regulatory paradigms. The US method, as expressed in the American Bar Association (ABA) mission statement is outcomes focussed, and as such sets a quantifiable goal against which the success or failure of any initiative aimed at improving diversity may be measured. In contrast to the approach taken by the regulators in England and Wales, who have tended not to commit themselves to an outcomes based definition of a diverse legal profession, the ABA considers the goal of its equality and diversity initiatives to be a legal profession that proportionately reflects the ethnic composition of the population of the United States (Commission on Racial and Ethnic Diversity in the Profession 2010, 3).
96. The ABA first introduced a commitment to supporting the participation of minorities in the legal profession in 1986. As such, its mission statement was amended to demonstrate an organisational commitment to: ‘...promote the full and equal participation in the legal profession by minorities’ (Commission on Racial and Ethnic Diversity in the Profession 2010, 1). At this time the ABA established the Commission on Racial and Ethnic Diversity in the Profession to both drive and monitor progress towards achieving this aim. In 2008 the ABA House of Delegates undertook to reform the goals and mission of the ABA, reducing the organisation’s mission statement to four key goals. The third of these Goals is to: ‘Eliminate Bias and Enhance Diversity’, and its attendant objectives are stated as firstly ‘to promote full and equal participation in the association, our profession and the justice system by all persons’ (Commission on Racial and Ethnic Diversity in the Profession, 2010: 1) and secondly to: ‘eliminate bias in the legal profession and the justice system’ (Commission on Racial and Ethnic Diversity in the Profession 2010, 1)
97. These goals are advanced through the work of three entities within the ABA, coordinated by the Centre for Racial and Ethnic Diversity (established in 2001): the Commission, whose role is to provide services for racially and ethnically diverse legal professionals, the Presidential Advisory Counsel on Diversity in the Profession - which provides programs and services to improve access and diversity in the education system that prepares individuals for careers in the legal profession and the Council on Racial and Ethnic Justice, which works to address issues related to racial and ethnic bias in the judicial system. (Commission on Racial and Ethnic Diversity in the Profession 2010, 1). The Commission is committed to annual measurement and analysis of progress towards its goal of eliminating bias and enhancing diversity, in addition to its roles in motivating and inspiring ABA leaders to promote the organisation’s equality and diversity objective and inspiring the profession to maintain its commitment to diversity (Commission on Racial and Ethnic Diversity in the Profession, 2010:

1). To this end, the Commission conducts an annual survey of the ABA's members, which is published in its Goal III report, available from the ABA website.

98. The 2010 Goal III report compares the percentage of lawyers and judges from racial and ethnic minority backgrounds with the percentage of individuals from racial and ethnic minority backgrounds within the general population (see Table 7.4 below). It uses these figures as a metric for expressing progress towards its stated ambition to create a more diverse legal profession.

2000	US Census Minority Demographics/Percentages		
	General Population	Lawyers	Lawyers and Judges
African American	12.90%	3.9%	4.20%
Asian American	4.20%	2.3%	2.29%
Hispanic	12.50%	3.3%	3.70%
Native American	1.50%	0.2%	0.24%
Total	31.1%	9.7%	10.43%

Table 7.4: Number of lawyers and judges from racial and ethnic minority backgrounds compared with general population (Commission on Racial and Ethnic Diversity in the Profession, 2010, 3)

99. The significantly higher ethnic population figures and low participation rates appear in stark contrast to the UK experience. The report also analyses data on the ethnic and racial composition of the ABA's membership. ABA members are asked to self report their racial and ethnic background, these indicate that that the proportion of ABA members from African American, Asian American and Hispanic racial and ethnic backgrounds has increased year on year since 2000. The proportion of Asian American members of the ABA is the closest to reflecting the proportion of Asian Americans in the general population (not accounting for increases in percentage members of general population from Asian American backgrounds since the 2000 census). Conversely, the percentage of ABA members from Native American backgrounds has fallen slightly since 2000.
100. Whilst numbers of ABA members who choose not to report their ethnic and racial background has fallen since 2001, the number of ABA members in 2010 who chose not to supply this information constituted 69.2% of the total membership. Again, relative to UK non-response levels, this is striking, and arguably calls into question the validity of the conclusions drawn from the data, whilst exposing a crucial flaw with attempting to measure the success of diversity initiatives in this way. The Commission acknowledges that race is a 'sensitive' issue (Commission on Racial and Ethnic Diversity in the Profession 2010, 2) and cites this as a reason for individuals choosing not to contribute this data.

Affirmative Action

101. No comprehensive study of equality and diversity in the US legal profession can be undertaken without reference to the debates surrounding affirmative action initiatives. However, as many commentators have asserted, 'affirmative action' is a concept that defies rigorous definition (White, 2004:2117). Historically, affirmative action referred to a group of remedies designed and administered informally to combat the structural inequalities created by Jim Crow (White 2004, 2120) before his judicial repudiation in *Brown v. Board of Education* 347 US. 483 (1954). The subsequent anti-discrimination ethic, which has been defined as 'the general principle of disfavouring classifications and other decisions and

practices that depend on the race or ethnic origin of the parties affected' (Brest 1976, 1) dominated civil rights movement generated policies in the US from the 1970s (White 2004, 2121). It has been argued that affirmative action was out of step with these initiatives as it focussed on remedying structural inequality, rather than tackling individual acts of discrimination (White 2004, 2121). The mid 1970s and early 1980s may be characterised as a period of consternation regarding the extent and nature of affirmative action programmes. During the 1990s and early 2000s the debate shifted to a discussion as to whether affirmative action ought to be subsumed by the anti-discrimination ethic, with the decisions in *Grutter v. Bollinger* 123 S Ct. 2325 (2003) and *Gratz v. Bollinger* 123 S Ct. 2411 (2003) seemingly refuting that this should be the case.

102. In the context of law school admissions, affirmative action policies may be understood to refer to those policies that use racial preferences in college and graduate school admissions with the aim of: (i) improving diversity within higher education, (ii) widening access to higher education for people from minority ethnic and racial backgrounds, (iii) correcting historic inequalities in the representation of minorities within the legal profession and (iv) 'giving non-whites in America...entrée to the national elite' (Sander 2004, 368). Advocates of these policies assert that they are effective in redressing structural barriers to entry to higher education that disproportionately affect individuals from black and ethnic minority backgrounds. However, critics argue that the impact of these policies can be pernicious, and indeed detrimental to the success of the individuals they are trying to support. Criticisms levelled at affirmative action admissions procedures range from those relating to the less tangible impact such policies have in increasing levels of stigma and stereotyping of individuals from black and racial minority backgrounds in the legal profession (Sander 2004, 368) to concerns that affirmative action in admissions procedures can actually result in lowering the performance of, and higher attrition rates amongst those individuals who benefit from preferential admissions (Sander 2004, 369). Sander, whose systematic analysis of the impact of affirmative action policies in law schools on individuals from black minority backgrounds, points to a 'growing body of evidence... that students who attend schools where they are at a significant academic disadvantage suffer a variety of ill effects, from the erosion of aspirations to a simple failure to learn as much as they do in an environment where their credentials match those of their peers' (373). He goes on to assert that grades, rather than attendance at an elite school are a far better predictor of future performance at the bar exam (373) and argues that:

since racial preferences have the effect of boosting black's school quality but sharply lowering their average grades, blacks have much higher failure rates on the bar than do whites with similar LSAT scores and undergraduate GPA's (Sander 2004, 373).

103. Further criticisms of the affirmative action policies of elite universities focus on their inability to target those most harmed by racism (Nadel 2006, 326) and argue that instead affirmative action should target those communities most affected by racism at an earlier stage in their education. A compromise position, put forward by Nadel argues for a system where 'an individual's race and ethnicity would only be considered for the purposes of providing context to a candidates achievements and experiences, i.e. to confirm the significance of obstacles faced or uncommon backgrounds' (Nadel 2006, 328). It thus argues that using contextual knowledge in this way, rather than simply focusing on race or ethnicity per se, could eliminate some of the more troubling unintended consequences of current affirmative action initiatives.

Admissions tests and equality

104. Much of the literature relating to structural barriers to entry to US law schools now focuses on the role of the Law School Admissions Test ('LSAT') in perpetuating discrimination,

particularly against individuals from black or latino ethnic minority backgrounds. (Jones 2006, 20). According to Kidder (2001), law school applicants with essentially equivalent college grades are apt to receive discrepant LSAT scores depending on their race or ethnicity. Research has demonstrated that the mean LSAT scores of blacks are persistently lower than those of whites (Jones 2006,18). It has been argued that as law schools increasingly set higher minimum LSAT requirements (Jones, 2006:18) than are consistently achieved by the majority black students, then ‘many students who are disqualified in this way actually have significantly higher [college] grades than their white counterparts’ (Jones 2006, 19). This, combined with an overreliance on LSAT scores in the admissions process (an overreliance borne of the need for expedient mechanisms of deciding between applicants, it is argued) not only expressly goes against the LSAT Council’s guidance notes, but actively contributes to the systemic decline in minority enrolment in law schools (Jones 2006, 21). Critics also question the evidence base for the LSAT as a legitimate and reliable indicator of an individual’s likely academic performance (Connor, 1989; Jones, 2006:20). These criticisms are worth bearing in mind in any analysis of the future role of aptitude tests in influencing admissions procedures in UK legal education.

Australia

105. In contrast to the wealth of literature that exists on equality and diversity within the legal profession in the USA, at this stage, there appears to be a limited amount of literature relating to the Australian experience. Much of what is published related to affirmative action in the context of improving the representation of women within the Australian legal profession (Sheridan 1998), and the gender equality debates on the whole tend to mirror many of those in the UK. In a meta-review of the literature of the preceding decade, Hutchinson notes that writers almost universally assert that the rate of change is (barely) incremental and exceedingly slow (Hutchinson 2005).
106. A 2010 report by the Law Admissions Consultative Committee makes no mention of equality and diversity in its review of admission requirements. The Law Council of Australia’s website also makes no mention of diversity or equality within the profession. Whilst the Law Council of Australia has an established Indigenous Legal Issues Committee, the remit of this organisation was, until 2010 restricted to addressing substantive legal and constitutional issues facing indigenous people. It has only recently begun to address the structural issues affecting the participation of indigenous Australians within the legal profession, seeking to overcome these primarily through the provision of financial aid to students from indigenous backgrounds (LCA 2010, 23). It will be interesting to examine the impact of these initiatives as they evolve.

Themes arising from the debate

An overview of themes/conclusions

107. From the literature reviewed here we can draw a number of broad conclusions which provide an important context for the discussion that follows.
108. Undoubted progress has been made over the last twenty to thirty years in increasing equality and diversity in legal education and training. Law may be generally ‘ahead of the curve’ in relation to many professions, but success remains qualified.
109. The complexity of disadvantage is such that, whilst prior educational attainment is perhaps the most significant factor in explaining existing patterns of disadvantage, there is no single or predominant barrier to access, and there are unlikely to be ‘quick fixes’ to a problem that

is, in many respects, shaped by culturally ingrained and intergenerational patterns of disadvantage. As Sullivan (2010:2) concludes:

Research focused on barriers to entry and progression in the legal market tends to be at one stage, for example gaining the training contract. We believe that the lack of diversity in the legal market arises from a combination of factors that make pursuing a career in legal services difficult for those outside of the traditional norm for a lawyer. In the legal market such cumulative problems: failing to gain the right A-levels; not getting work experience in law firms while at school; attending the wrong university; training at the wrong firm all add up to insurmountable barriers that permanently effect the careers of lawyers and segregate the market.

110. Data clearly indicate that, structurally, the key barriers to access remain the training contract and pupillage. Over-provision of capacity at LPC and BPTC stages indicates that these are not significant (numerical) barriers, though they may act as a limited socio-economic filter based on attainment and ascriptive characteristics.
111. Looking at recruitment trends, the traditional legal professions are performing well relative to broad population trends in gender and ethnicity. However, they are still under-recruiting relative to ethnic minority participation in the earlier stages of legal education. There may be a case for taking university participation figures more into account in assessing the performance of the sector.
112. Whilst gender and ethnicity are, of course, significant, we should not overlook social class (Nicolson 2005; Sommerlad 2008). Indeed, further analysis should be undertaken to assess whether progress on gender and ethnicity may both contribute to the narrowing of social mobility, particularly among the professional elite (The Sutton Trust 2009; Milburn 2009). This would be consistent with trends noted in other jurisdictions and settings (Abel 1992), whereby the effects of pressure to introduce 'outsiders' are mediated, at least to a degree, by apparently neutral and meritocratic recruitment and progression criteria that ensure favoured new (minority) entrants share much of the cultural capital of 'insiders' – cultural capital that is largely reflective of a particular socio-economic status.
113. Increasing participation of currently under-represented groups at elite universities would likely be the single most significant way of increasing social mobility in the legal profession in the short term, but such gains are likely to remain limited without greater adjustment of ascriptive criteria at the recruitment stage, and leave underlying structural inequalities relatively untouched.
114. Global trends tend to disguise the extent to which the legal services sector remains segmented in terms of gender and ethnicity. Examples include the tendency for ethnic minority solicitors to work in smaller high street and legal aid firms, or as sole practitioners; the male bias of the commercial Bar, and the feminisation of the legal executives' profession. Such segmentation matters. It may place barriers in the way of workforce development and career progression, on mobility between parts of the sector, and on opportunities to participate in the power and authority networks and structures that shape the future of the sector.
115. There is greater scope to consider ways in which education and training can contribute to the retention and progression of lawyers with protected characteristics. However, there is evidence of a relative lack of leadership and commitment among both service providers and in some representative bodies (cf Duff and Webley 2004) to meeting such training needs.

116. Most of these observations focus primarily on two equality characteristics: gender, and race/ethnicity. This in itself highlights a very real and significant gap in terms of both baseline information and research on the other protected characteristics. Disability, age, sexual orientation, religion, and pregnancy/maternity status have been far less widely discussed and researched than gender, race and ethnicity, though there is a growing secondary literature in relation to some them.
117. This reflects in part the fact that there has been no historic requirement on HEIs or legal service providers to maintain equality data for factors other than gender, ethnicity and disability, or at all. Under the Equality Act 2010, universities will now be obliged to gather data on all protected characteristics, so as to comply with the public sector equality duty. As noted above, the LSB has also introduced a reporting duty for regulated entities. These changes may make a significant difference to institutions' ability to target resources and interventions in areas of unmet, or possibly previously unidentified, need.³²
118. Beyond this, the relative lack of recent longitudinal, quantitative, research on diversity trends across legal education and training is a more general concern. This is not a gap that LETR itself can close.

Problematizing meritocracy

119. Policies to enhance social mobility are sometimes seen as interfering in the meritocratic basis of selection, and as a threat to standards. Much of the research discussed here has the potential to turn this challenge around and ask whether it is not the perception of 'meritocracy' itself that is the problem? Legal education and training can be said to be only weakly meritocratic because it relies on too narrow and subjective a conception of merit (see, eg, Zimdars, 2010).
120. The case may be stated even more strongly: disadvantage is actually reinforced by institutional and cultural barriers created by a 'meritocratic' system that actually rewards the most socially advantaged. In terms of access to the profession, the effect of successive barriers to entry is significantly to reduce the opportunities for those from disadvantaged backgrounds. Expansion of HE numbers, identified by BIS as a key to increasing social mobility, will not necessarily increase access to the professions, but, as Sullivan (2010), and others note, only increase competition for entry to the professions. Moreover a continuing focus on expanding graduate entry may not in any event best meet the diverse workforce needs of the sector. Might some resources be better spent in re-directing potential students to paralegal careers, higher apprenticeships and other ways of accessing (other) legal careers?
121. Questioning the relationship between diversity and standards is intended to problematize, not devalue debates about quality and standards. Currently, not all pathways to the profession are treated the same: all degrees may be nominally equal, but some are clearly more equal than others. The fact that movement into the legal services market is not closely regulated by undergraduate subjects studied and qualifications obtained at university, when combined with highly socially stratified HEIs, has already given us a system in which the importance of *where* one studies can often outweigh *what* one studies (Brennan 2008). Similar issues arise with later stages of training: not all LPCs or BPTCs may carry the same value in the marketplace, and a work-based learning portfolio completed with a variety of

³² For example the Equality Challenge Unit research has found that one in five LGBT (lesbian, gay, bisexual and trans) students has had to take time out of their studies to deal with issues related to their sexual orientation, including dealing with cases of harassment and discrimination (Valentine, Wood, and Plummer 2009).

training bodies may not carry the same weight as a traditional training contract. This latter point highlights the challenge of one of the main themes of the Review, how do we increase flexibility of training routes, whilst improving or (at the very least) not undermining existing levels of diversity? As we saw in the debates around the Law Society's Training Framework Review, there is a fear that flexibility may also generate new forms of discrimination. At the very least, increasing flexibility in terms of entry routes, admissions criteria, modes of study etc, may also be a double-edged sword. The MMI phenomenon (Raftery and Hout 1993) means that 'middle class' students may initially be better placed to exploit diversity-led changes, with consequently slower or more hidden trickle down effects to the policy's real target audience. The short-term consequences of this need to be borne in mind.

122. Unlike the USA, there has been relatively little enthusiasm for affirmative action approaches in the UK, though arguably this criticism is directed more at 'hard' - such as formal quotas and tie-break preferences in recruitment and progression decisions - rather than 'soft' forms of affirmative action (Nicolson 2005, 221), such as introducing contextual data, or alternative recruitment criteria (Milburn, 2012b). Both hard and soft measures could potentially involve ways of expanding and diversifying the conception of merit in use, and could lawfully facilitate widening participation (Bibbings, 2006).
123. In conclusion, how do we insure that the legal education and training system can discriminate without discriminating? Accommodate and value difference without imposing arbitrary distinctions and hierarchies? How do we address discrimination by the market, within a system that increasingly looks to the market for regulation? These seem to be important challenges for the Review.

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