



Legal education and training

Submission to the Research Team

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Consumer challenge



About Consumer Challenge

Our Consumer Challenge series is designed to create a space for fresh thinking where the Legal Services Consumer Panel can stimulate debate, question the received wisdom and propose new solutions to old policy issues. These documents do not necessarily represent the Panel's final policy position, but instead allow us to test ideas and spark discussion.

This is the first publication in the series and forms our response to the call for evidence issued by the Research Team leading the Legal Education and Training Review.

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1 Executive summary

- 1.1. Regulation of the education and training system is vital to protect consumers from quality risks and to ensure they can access services from a diverse profession. Individuals, small businesses and some other consumers have limited ability to judge the technical competence of legal work, while the consequences of poor standards can be very serious. Some consumers are very vulnerable indeed. The overriding aim should be to ensure high standards of quality and ethics, with the emphasis on helping to prevent problems before-the-event.
- 1.2. The case for change is two-fold. Firstly, the few studies which have examined the technical quality of work have worrying implications for current quality standards. In some areas of law, such as will-writing, unregulated businesses are demonstrating similar standards of work as solicitors despite not being required to obtain qualifications. Secondly, reform is needed to modernise the education and training system to equip the workforce for the demands of the modern market and to make the system more closely align with the requirements of regulators. At present, the education and training system is inflexible, out-of-step with an increasingly integrated profession and is a poor fit with modern notions of regulation. The mandatory training content can bear little resemblance to the legal work that most lawyers do, or to the reserved activities. Excessive training requirements risk distorting competition in the market.
- 1.3. The system is failing because it tries to train the typical lawyer, when in reality there is no such thing. The legal market is simply too diverse to sustain the general practitioner training model any longer. A future education and training system should be built around an activity-based authorisation regime for individuals and entities. This reflects that different legal activities carry varying levels of quality risks for consumers and so different competency thresholds are needed. We suggest that there are some responsibilities and roles for which no legal training is required, those for which general legal training requirements alone are adequate preparation,

and specialist areas where requirements beyond or instead of this initial training are necessary.

- 1.4. Furthermore, it is no longer enough for someone to demonstrate their competence at Day One and then be left more or less unchecked during the remainder of their careers. The law changes and skills can deteriorate over time. Reform should include a revised model of CPD as the current system is widely discredited, but it must go further. For at least the higher quality-risk areas of law, individuals should be periodically reaccredited. This is needed to meet legitimate public expectations about regulatory controls but the profession should also see it as a career-enhancing measure.
- 1.5. In regulatory terms, consumers obtain legal services from organisations rather than individuals. It makes sense to give employers the freedom to determine the shape of their workforce and demonstrate to their regulator how they are ensuring employees are appropriately trained and supervised. However, although we support the shift to entity-based regulation, the incentives of employers are not always aligned with the needs of consumers and weak competition means that the market alone cannot be expected to regulate entities. Therefore, entities must operate within some authorisation requirements for individuals and there must remain a strong focus on individual accountability.
- 1.6. These three elements – activity-based regulation, reaccreditation, regulation of entities – are already a strong feature in parts of the market, so this sort of change is not as radical as it may sound. However, they should apply fully across the market where the quality risks justify regulation.
- 1.7. The education and training regime should be supported by a more sophisticated approach to quality assurance. In relation to the service and utility dimensions of quality in particular, there is potential to harness consumer power by opening up information about provider performance to inform the shopping around process. Such ‘reputational regulation’ should be powerful in legal services due to the strong influence of recommendation on consumer choice. In addition, the role of peer pressure and sense of profession means that the desire to maintain a good

reputation can be expected to exert a positive influence on lawyers' behaviour.

There is evidence of consumer demand for information, such as complaints data, but other information that would aid choice is either withheld by regulatory agencies or not collected.

1.8. The box below suggests some high-level ingredients for a future regime.

High-level ingredients for a future education and training regime

- Approved regulators would authorise Regulated Legal Entities (RLEs) who wished to provide reserved legal activities to consumers. RLEs would need to demonstrate compliance against the outcome that their workforce is appropriately trained and supervised. RLEs would be required to allocate specific responsibilities to Regulated Legal Advisors (RLAs) as required by the approved regulators, relating either to practise areas or roles within entities;
- RLAs would have to demonstrate competence against Day One Outcomes by meeting authorisation requirements which would be separately granted and vary according to the mix of activities they wished to provide to consumers. These permissions would be identified on practising certificates. Authorisation could involve no legal training requirements, general legal training requirements, or, for higher quality-risk activities, specialist legal training requirements;
- RLAs would be required to undertake CPD within a reformed framework and, at least for higher quality-risk activities, be periodically re-accredited;
- The approved regulators would accredit courses designed to prepare students to meet the RLA authorisation and post-authorisation requirements.
- The content of training courses would reflect a broad notion of competence embracing dealing with consumers in an advice setting, consumer diversity and professional ethics;
- These authorisation requirements would support diverse pathways to legal careers including non-degree routes;
- RLE's would be required to confirm to consumers at the time of engagement that the RLA handling their matter is authorised to provide advice and explain the relevant regulatory protections. Consumers could also recognise that a RLE is regulated when shopping around through a uniform single badge applied by each of the approved regulators; and
- Data about provider performance is made available to consumers to support them in making informed choices as part of a broad quality assurance toolkit.

2 The consumer interest

Who is the consumer of this review?

- 2.1. There is a risk that a review of education and training of lawyers becomes too inward-looking by focusing on the needs of those being trained instead of those who lawyers seek to serve. This can be an easy trap to fall into given the majority of stakeholders participating in the review process – organisations representing lawyers, educationalists – in their daily roles deal with either current or future lawyers. The call for evidence is guilty of this: in discussing which of the regulatory objectives it sees the review as being linked to, foremost mentioned is that of “encouraging an independent, strong, diverse and effective legal profession”. The regulatory objective of “protecting and promoting the interests of consumers” is not highlighted at all. Furthermore, the focus of a review on the regulation of education and training should not be law students. Instead, it should be centred on the needs of consumers as users of legal services provided by lawyers.
- 2.2. Regulation of the education and training system for lawyers is needed in order to protect consumers from quality risks which they are ill-equipped to manage. We want consumers to make informed choices between providers and to participate fully in decisions about their case, but their ability to do these things is limited. This is due to a range of factors including the technical nature of law, their infrequent use of legal services, these often being purchased at distress moments and the vulnerability of some users. There is always likely to be a substantial imbalance of knowledge between lawyers and consumers, who, sometimes even after the event, will often struggle to tell whether they have received good advice. One statistic which illustrates this point in a nutshell is a survey showing the vast majority of consumers are happy with the quality of their will when provided by a solicitor, but in a mystery shopping exercise one in every five wills prepared by solicitors was failed by a group of expert assessors.

- 2.3. The Panel will continue to call for change which seeks to narrow the imbalance of knowledge and power faced by consumers. For example, we have recently assessed accreditation schemes, examined comparison websites and successfully called for lawyers who are involved in complaints leading to formal ombudsman decisions to be identified. However, these efforts can only achieve so much and thus there remains a need for those who want to provide legal services to demonstrate their competence to regulators whose primary interest is the consumer. This dynamic also means that the emphasis should be on preventing poor quality before-the-event, not leaving consumers to pick up the pieces afterwards.
- 2.4. Employers might also be said to be consumers of the review. They too have a legitimate interest in its outcome, and in a competitive market place – one in which providers deliver services designed around the needs of people buying their services – their interests should reflect those of consumers. However, there are some difficulties with this analysis. As discussed above, legal services consumers are largely unable to assess the technical quality of work and so they are poorly placed to shape what employers demand of the education and training system. Moreover, consumers assume technical quality is good and do little shopping around anyway. Secondly, as employers directly or indirectly pay for the training costs of their employees, there is an incentive to keep these costs low – this may produce quality standards which are lower than acceptable. Thirdly, those employers who are best placed to influence the education and training system through their buying power are City law firms doing commercial work for corporate clients. The competitive drivers should work here, but this will not reflect the needs of consumers in the retail market who most lack buying power.

3 Wider context and the need for change

- 3.1. The wider context for the review is a heady mix of historical legacy, current developments and likely future trends. Together, as identified by the Legal Services Board (LSB), these factors suggest the need for the review to consider radical solutions rather than just tinker at the margins.

There is a need to raise standards

- 3.2. It has been said by some during events organised to support the review that the standard of lawyers is high, so there is no need to fix a system which is not broken. However, this viewpoint smacks of complacency. It is true that surveys show the vast majority of consumers are happy with the outcome of legal work and the service they get, while the Legal Ombudsman's caseload is small when seen in the context of volumes of transactions. However, as identified earlier, consumers lack the expertise to assess quality even after the event, while complaints data is the tip of the iceberg – consumers are reluctant to complain and most complaints should anyway be resolved internally.
- 3.3. Our observation is that there is a massive hole in the evidence base to allow a reasoned assessment about current levels of quality in the sector. This absence of evidence is itself worrying, since it suggests that no-one has been concerned enough to attempt to measure quality. While our research shows that consumers assume lawyers are technically competent, the truth is that regulators make similar assumptions since they are only now beginning to deploy tools, such as mystery shopping, to enable competence assessments in individual practise areas.
- 3.4. In fact, studies which have examined quality in any detail have produced poor findings, for example:

- Criminal advocacy – a study led by Professor Richard Moorhead of a pilot of a quality assurance scheme for criminal advocacy found that while most advocates performed well at the simplest and most serious accreditation levels, the performance of level 2 candidates (lesser Crown court trials) was noticeably lower, with nearly 50% failure rates in the cross examination, examination in chief and multiple choice assessments;
- CPS advocates – two reports in 2012 by the Crown Prosecution Services Inspectorate found the court performance of CPS advocates has shown an overall decline over two years. In the bulk of cases, where defendants pleaded not guilty, CPS advocates were often ill-prepared and failed to challenge prejudicial evidence;
- Will-writing – one in five wills prepared by solicitors in a shadow shopping exercise were failed by an expert panel (the same proportion as for unregulated will-writing companies). Key problems where the will was not legally valid or did not meet the client's stated requirements, were: inadequate treatment of the client's needs; the client's requests not being met; potentially illegal actions; inconsistent or contradictory language; insufficient detail; and poor presentation. Key problems relating to poor advice included: cutting and pasting of precedents; unnecessary complexity; and use of outdated terminology.
- Probate – a Regulatory Impact Assessment prepared in 2004 found that nearly one-third of the applications received by the Probate Service from solicitors were stopped due to errors; recent anecdotal evidence suggests this remains the scale of problem with most applications being rejected due to sloppiness rather than lack of technical knowledge; and
- Legal aid – 12% of peer reviewed case files carried out between April 2009 and January 2011 for the Legal Services Commission were graded 'below competence' or 'failure in performance' rising to 38% of employment providers and 27% of mental health providers.

There is a need to modernise to reflect the changing market

- 3.5. Obtaining the title of solicitor or barrister takes a considerable period of time, for example nine years to establish a solicitor practice. The reward for this investment is exclusive rights to practice the reserved activities in the Legal Services Act. However, someone could set up in business tomorrow providing legal advice on a wide range of matters, for example about an unfair dismissal or divorce. The list of reserved activities is narrow and increasingly businesses are exploiting this situation. Of course, one answer is to extend the boundaries of regulation to cover more or all legal activities. While this may be justified or not, the LSB has made it clear that the era of giving monopolies to the traditional professions is over.
- 3.6. While a rigorous training regime is welcome, this should be seen in the historical context of a guild system set up to protect the legal qualification from competition. As identified by Decker and Yarrow in their study for the LSB, self-regulation can be seen as a collective attempt among suppliers to maintain certain reputational standards of conduct and performance but problems associated with monopolisation and cartelisation can arise when the remit of self regulation moves beyond what is necessary to certify quality. In short, it is quite possible that the training regime is too burdensome and so the system may need to be loosened rather than further tightened. The review should avoid making recommendations that lead to over-specification of quality as this creates unnecessary entry barriers. Of course, some barriers are legitimately needed to control quality, but taken too far this can unduly limit choice for consumers and can lead to an unlevel playing field for providers. The challenge is to find the right balance which best serves consumers and the public.
- 3.7. Such a stance may initially appear odd when viewed against the quality problems evidenced above. However, this reflects in part that the training regime to acquire the professional qualification often bears little resemblance to the nature of work undertaken by lawyers in practice. Furthermore, it is out of step with the activities

reserved to the profession under the Legal Services Act. Of course, the entry routes to the profession are not entirely to blame for quality problems – quality assurance and other regulatory processes are also important contributory factors. But it underlines the point that reform is needed to remove restrictions which currently make legal services unnecessarily expensive while not providing sufficient quality of service to consumers. Reform is also needed to allow the profession to compete, both with ABS firms that have more diverse workforces, and with unregulated businesses delivering non-reserved activities who face no entry requirements.

- 3.8. Another part of the backdrop to the review is the growing fusion between different branches of the profession. As a result of competitive pressures, Parliament and regulators are gradually removing restrictions that have previously set branches of the profession apart. So, for example, barristers no longer hold a monopoly on rights of audience and face competition from solicitor advocates and others, while consumers now may instruct barristers directly and there are proposals to allow barristers to conduct litigation. And, as a result of market liberalisation, different branches of the profession are working together within new structures. As divisions between branches of the profession fall away, the need to retain different entry routes becomes harder to maintain.

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Education and training needs to be aligned to the requirements of regulators

- 3.9. The preferred style of regulation is also changing. The LSB is encouraging the approved regulators to regulate at entity level. This places greater responsibility on employers to recruit the right workforce and supervise quality. The LSB is also rightly encouraging a shift towards activity-based regulation, which is based on the

principle that the regulatory approach for different areas of law, legal skills and responsibilities within firms should vary depending on the risks. As we argue later, this would entail radical changes to the authorisation regime to which the education and training system would need to respond. Furthermore, the move towards outcomes-focused regulation is seeing the sector increasingly bound by similar high-level principles of behaviour and less by the individual prescriptive rules which have previously differentiated them. Again, these changes are uniting the profession and point in the direction of common training pathways.

- 3.10. The evidence of quality problems suggests that the education and training regime, alongside other failures in regulation, is not producing professionals of the requisite standard. However, whether or not this perspective is shared, the legal services market and its regulation are radically changing. If the education and training regime is to be fit for purpose, it must change along with the market.

4 Competence

- 4.1. What makes an individual competent, and to what extent can the education and training system be expected to equip lawyers with these characteristics?

Quality is multi-dimensional: knowledge, client care, useful advice

- 4.2. The Panel's report, *Quality in legal services*, suggested that quality combines up-to-date legal knowledge and skills with good client care to deliver advice in a way that is useful. This is consistent with the three-part definition of quality used by the Legal Services Institute: knowledge, good client care and utility. It is likely that consumers and legal professionals emphasise different aspects of quality: consumers focus more on service delivery than technical aspects, while professionals emphasise technical ability over client care. However, each dimension of quality is core to the consumer interest. In addition to good quality advice, it is of course important for legal services to be delivered ethically, and we would welcome inclusion of ethics as part of a lawyer's training. Professional ethics should be seen in a broad context, embracing good client care as well as adherence to the professional principles such as independence of advice and confidentiality.
- 4.3. A briefing paper issued by the review team identifies different meanings or levels of competence. For the purposes of regulation, upon authorisation a lawyer should have the minimum acceptable level of knowledge and skills to safely deliver legal services to the public. We embrace the notion of Day One competence to encapsulate the point at which lawyers are prepared to fulfil the roles and responsibilities entrusted to them. This may vary depending on the circumstances and may require a period of supervised work to build necessary experience. Lawyers can be expected to develop their expertise and experience above this minimum level in response to market demand. But the role of regulators should be to assure minimum standards with competition working above this. Regulation

should intervene again to periodically check lawyers maintain the minimum acceptable standards.

Training should go beyond knowledge, including a focus on dealing with diverse consumers

- 4.4. The large part of a lawyer's training will naturally concentrate on the core knowledge needed to provide technically correct advice. But we also consider it should be necessary for lawyers to demonstrate competence in delivering legal services in an advice setting. Preparing a will serves as a useful case study. A good will is not just a legally valid document which reflects the client's stated intentions, but one which is tailored to their personal circumstances following an informed discussion with a lawyer. The provider should build a full knowledge of their client's relevant financial and personal affairs and apply their knowledge to identify solutions that would deliver their wishes effectively. Issues and potential scenarios that clients might not have considered should be highlighted. Providers should help clients to think through their options and make a decision they are comfortable with. These skills reflect the fact that people may know the broad outcome they want from a will, such as to divide various assets fairly between the children, but not know how they can best achieve this. It also reflects that they are sharing sensitive issues and good client care skills are needed to build trust.
- 4.5. Lawyers also need to understand and respond to the diverse needs of their clients. All consumers are different, with a wide range of needs, abilities and personal circumstances. These differences can put some consumers in a position of vulnerability or disadvantage during certain transactions and communications, potentially putting them at risk of detriment. Organisations' policies and processes can contribute to, or increase the risk of, consumer vulnerability. Providers need to adapt services to cater for those with specific cultural needs or who are in vulnerable circumstances, for example due to a physical disability or because English is not their first language. The Panel's recent research with deaf and hard of hearing consumers, commissioned in partnership with Action on Hearing Loss

and the Solicitors Regulation Authority, vividly illustrates what can go wrong. This found that consumers often felt like they were in a battle to be understood by their own legal advisor due to a lack of 'deaf awareness' and, as a result, were being mistreated. Of course, like all businesses, lawyers have obligations under equalities laws, for example to make reasonable adjustments. Therefore, we would welcome the mandatory inclusion of equalities training within recognised qualification routes. This should be the case for all lawyers, not just those specialising in areas of law protecting specific vulnerable groups, e.g. people with mental health needs.

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- 4.6. Consumer detriment can also occur due to mistakes made by individuals running legal businesses, for example poor consumer protection policies or financial mismanagement resulting in insolvency and disruption to clients. The importance of sound business management is recognised by codes of conduct, for example one of the SRA's high-level principles is to 'run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles'. The role of regulators is not to teach businesses how to make profit, but bad business management is a real regulatory risk and is one dimension of competence which is an appropriate focus for the education and training regime.

5 Authorisation

- 5.1. The focus of education and training regulation should be the requirements that someone wishing to provide regulated legal activities needs to demonstrate before obtaining a licence to practise. It is not sufficient to rely on rules in codes of conduct prohibiting lawyers from working in areas where they are not competent. Rather regulators must identify the quality and other risks and specify the competencies that need to be demonstrated before a lawyer is permitted to practise. The education and training system should support the authorisation regime as its core purpose, working closely in tandem with it far more so than is currently the case.

Introduce an activity-based authorisation regime

- 5.2. The justification for reserving a legal activity will differ on a case by case basis depending on the risks to consumers and evidence of detriment. In many cases, entry barriers will be needed to safeguard the quality of advice. This recognises that the law is often technical and some expertise is required before an individual can provide competent advice. It also acknowledges the potentially serious consequences for consumers and others that can result should bad advice be given. However, a decision to reserve a legal activity could be made for reasons other than quality risks. For example, estate administration is a largely administrative process that can be quite easily undertaken by a lay person. Regulation is still justified, however, due to the risk of fraud and the desirability of enabling consumers to seek redress for poor service. For those activities where the quality risks are low, but reservation is needed for other reasons, there would seem no logical reason to require individuals wishing to specialise in this area to be legally trained.
- 5.3. At the other end of the scale, for some legal activities the content of training in the existing general legal qualifications may be insufficient preparation to provide competent advice. For example, one in every five wills prepared by solicitors and

will-writers are substandard. However, the compulsory will-writing elements of a solicitor's training are in fact minimal. It is difficult to sustain the argument that an individual wishing to set up a will-writing business should undergo the full training that a solicitor must go through when that training demonstrably does not equip solicitors to prepare competent wills. Instead, it should be recognised that will-writing is an activity that requires specialist training as a condition of practise. We note that the trade associations in the unregulated sector already require their members to obtain specialist qualifications.

- 5.4. There remains a need for a general legal qualification which trains individuals in the core legal subjects and skills. The Panel appreciates that this training both helps advisors to spot other issues and teaches an approach to interpreting and dealing with legal problems. We are also sensitive to the dangers of over-specialisation when what consumers actually need is holistic advice. The Civil and Social Justice Survey Research shows that problems often occur in clusters, for example someone in rent arrears may need legal advice to fight an eviction order, but the underlying problem also requires legal guidance on managing debt or obtaining their full benefit entitlement. However, we are not convinced that the general legal qualification should be a prerequisite for all areas of law. This should be resisted where it is not necessary to safeguard against quality risks because the costs of this training feed through to the price of legal services and can thus limit access.
- 5.5. The GP-style qualification model fails to respond to a market which is hugely varied in terms of its provider base and range of activities. It is impossible for a single qualification to prepare an individual for the sheer diversity of roles they might, perhaps much later, come to occupy. It is in danger of providing adequate preparation for nothing instead of providing a readiness to tackle anything – the principle to which it aspires. This suggests a modular approach and

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introducing additional, or in some cases, alternative specialist training requirements for activities where the quality risks are highest. The point of authorisation as an approved person would therefore offer a limited permission to provide certain legal services to consumers, but authorisation to provide certain other services would be granted separately. As the Legal Services Institute has recommended, this could take the form of separate endorsements on practising certificates.

Build on existing regulation of activities

- 5.6. This is not as radical as it sounds, as activity-based regulation is already a feature of the market. Specialist professions such as licensed conveyancers, notaries and intellectual property lawyers must obtain specialist qualifications in the relevant area of law. A modular, foundation law training plus activity-based qualification route is a defining feature of entry routes for chartered legal executives who often later specialise among a wide range of legal activities. The Quality Assurance Scheme for Advocates requires advocates to demonstrate specific competencies in the field of criminal advocacy as a post-qualification requirement. Such specialist training requirements are not just restricted to legal knowledge or skills, but may also relate to financial management or other roles within entities, for example sole practitioners must currently be separately authorised by the SRA. And parts of the legal sector are voluntarily committing to additional specialist training, as seen in accreditation schemes.
- 5.7. There could be gradations within an activity-based authorisation system. Lawyers might be separately authorised to conduct work of differing complexity within a single legal area, for example the tiered approach used by the Office of the Immigration Services Commissioner. Similarly, authorisation might be centred on a skill such as advocacy, but advocates might be separately authorised for specific legal areas, such as crime or family. The difficult balance to get right is to tailor the competency requirements to the risks without creating a confusing and bureaucratic mess.

5.8. The Panel considers that such a modular system would allow a far more flexible and risk-based approach, one which offers a surer prospect of competent advice for consumers while removing unnecessary requirements on lawyers of the future. It should raise standards in areas where quality is at higher risk due to more thorough training, yet shorten qualification routes for lawyers who wish to specialise. It is an approach which reflects the increasingly specialised nature of the legal market.

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Focus more on entities while retaining strong individual responsibility

- 5.9. In regulatory terms, consumers do not purchase services from individual practitioners, but from law firms and other types of organisation. The focus of regulation is also increasingly shifting towards the entity. In any event, in common legal transactions, such as conveyancing, much of the routine work is actually done by paralegals working under the supervision of someone holding a professional title. On this basis, it makes sense, as the LSB has argued, to give employers the freedom to determine the shape of their workforce and be held accountable for this by their regulator. Moreover, the legal services market is simply too diverse for regulators to dictate to entities how to allocate individual responsibilities within their workforce for dealing with clients.
- 5.10. Entity-based regulation would still need to operate within the authorisation frameworks operated by the approved regulators. In an activity-based framework, entities providing services for which authorised persons are required to obtain a

general or specialist accreditation could only allocate this work to persons who have obtained recognised qualifications in these areas. Beyond this, outcomes-focused regulation might require employers to ensure their workforce is appropriately trained and supervised. Entities seeking a licence would have to demonstrate to their regulator how they plan to ensure this, while there might also be supervision requirements, for example based around information returns and file reviews, whereby entities demonstrate how they are delivering this in practice. Guidance might set out some expectations, but the regulatory framework would be a permissive, enabling innovation alongside appropriate checks and balances.

- 5.11. It remains important for the approved regulators to maintain their grip on individual practitioners through regulation of qualification routes and subsequently, both to ensure quality standards and reinforce the importance of professional ethics in the relationship between practitioner and client. We are mindful here of our earlier comments on which type of employers are best placed to influence the content of training. Therefore, regulation needs to create the right quality incentives for both individuals and entities. These incentives should bite at different levels of seniority within entities. For example, the ABS regime makes named individuals at the top of entities – the Head of Legal Practice (HoLP) and Head of Finance and Administration (HoFA) – ultimately responsible for compliance. At the practitioner level, this is likely to be centred on CPD and sanctions to deal with incompetent or unethical performance, including the ultimate penalty of de-authorisation. Moreover, entities should be prevented from employing individuals who have been de-authorised and legal regulators should establish mechanisms to support due diligence on this by entities.

Put less weight on the professional titles and simplify consumer choice

- 5.12. Regulators should rarely, if ever, limit entry to legal markets to the traditional professions. Instead, anyone who can demonstrate their competence to practise should be permitted to provide legal services to consumers under appropriate

supervision. Regulation should be seen as enabling and supporting consumers to choose between a mix of suitable providers with confidence. In short, the Panel wishes to see competition between diverse providers within a regulated market place.

- 5.13. The professional titles, such as solicitor and barrister, have powerful brand appeal for consumers and strongly influence their choice of legal advisor. One benefit of them is that consumers can tell regulated and unregulated providers apart, but a significant downside is that they create misleading distinctions between regulated providers. For example, a solicitor is likely to be seen by the average consumer wishing to buy a home as being more qualified than a licensed conveyancer for this task, but both have demonstrated they are sufficiently competent to perform the role. This can have negative effects for competition as consumers are not making fully informed choices.
- 5.14. In addition, the logical consequence of our preferred direction of travel for the education and training review is that the professional titles lose meaning. The focus of regulation is on entities and activities, rather than the individual lawyer. Authorisation would no longer be automatically linked to a right to practise each of the reserved activities. A diverse range of providers, not just the traditional branches of the profession, would be authorised for the same work. Indeed, the concept of regulatory competition means that one branch of the profession may be regulated by another, e.g. the SRA regulating barrister-led Legal Disciplinary Practices. The approved regulators cannot discriminate between entities and individuals who meet identical authorisation criteria.
- 5.15. In an activity-based framework, the task of regulators – whether one or many – is to ensure all authorised persons achieve the minimum standards required to demonstrate competence and fitness to practise. Any demarcations above the minimum authorisation standards should be for representative bodies to facilitate in response to market demand. There may be a limited role for regulation of ‘quality marks’ as the Panel discussed in its report on voluntary quality schemes. But the stamp of authorisation should be the only badge consumers need for assurance

that a lawyer has demonstrated their competence to advise them on their particular need. As we discussed in our report, Quality in legal services, it would be preferable to have a single regulatory badge to avoid creating a new regulatory landscape which is just as confusing as the current one. A single regulatory badge should not be read as meaning a single legal regulator; that is for a separate debate. There could still be multiple regulators for individual legal activities, but there is a need for a common easily recognisable and neutral symbol from which the public can derive clear meaning.

6 Diversity

Diversity is important for consumers too

- 6.1. An education and training system which supports diversity is not just important for those individuals who wish to become lawyers. The Panel wishes consumers to deal with providers whose workforce reflects the diverse make up of the general population. This is important for public confidence, but it is more than an issue of perception. The opportunity to train as a lawyer should be open to anyone with the ability to pursue this career and it is important that regulation does not place obstacles in this path to talented people. A diverse workforce is also more likely to understand and respond to the diverse needs of clients, although this does not take away from the need for all lawyers to be able to deal with vulnerable clients. To continue our earlier example, while all lawyers should be deaf aware, it is deeply unsatisfactory that there are just a handful of deaf lawyers and far short of the proportion of deaf and hard of hearing people in the general population.
- 6.2. The Panel's Consumer Impact Report tracks the progress of the profession in improving diversity. Statistics show a good record on entry to the workforce – there are a greater proportion of women and BME new lawyers compared to the overall population – but the senior workforce is dominated by white, male lawyers. Despite this, it is widely recognised that the legal sector needs to do more to open its doors more widely. There are a range of diversity initiatives, but this paper focuses on the contribution of the education and training system.
- 6.3. The change in direction we propose for education and training regulation should facilitate diversity. For example, the current length of qualification before authorisation is one barrier to entry so the shift towards an activity-based system of authorisation should shorten this in many areas. An activity-based approach is likely to support more non-degree entry routes following the example of chartered legal executives. It would also facilitate new qualifications for paralegal workers,

such as through National Occupational Standards and modern apprenticeships. Common training routes to enter different branches of the profession would allow career paths to be decided later and should increase the portability of qualifications. Putting greater emphasis on entity-based regulation should also help as it gives more freedom to employers to recruit from a wider employment market. Furthermore, it is easier to make regulatory initiatives on transparency bite when the focus is on entities rather than individuals.

Facilitate greater mobility between career paths

- 6.4. The call for evidence highlights that the criteria for mobility between occupations ‘appears to have evolved rather than be developed in ways that are wholly rational’. It gives examples, such as chartered legal executives who may re-qualify as solicitors, but, because they are not graduates, cannot become barristers, despite the fact they may acquire advocacy rights and become judges. An activity-based approach to regulation would help to resolve this since the focus is on competence to perform the function, not the title – the route to achieving this level of competence is irrelevant to consumers. Regardless of this, we hope that one outcome of the review will be rationalisation of mobility between branches of the profession.
- 6.5. It is important that education and training initiatives do not have unintended consequences for diversity. For example, a key issue for the profession is that there are too many law graduates in relation to vacancies in the job market, but there is a risk that methods used to identify the best new lawyers could undermine diversity efforts. For example, the Law Society commissioned a report which highlighted the advantages of aptitude tests to manage entry to the profession, while the Bar Standards Board is also pressing ahead with plans to introduce an aptitude test in autumn 2012 for September 2013 starts. However, research commissioned by the LSB has found the tests could favour those from privileged and certain class and ethnic backgrounds.

7 Post-authorisation

7.1. This section is concerned with the challenge of ensuring that lawyers remain competent throughout their careers. For the most part, the education and training review has focused on preparing lawyers of the future to cope with the demands of the changing legal services market. Of course, this is critically important, but the quality risks to consumers do not disappear upon authorisation. Someone might tick all the right boxes to qualify, but prove not to be, or remain, up to standard in practice. Consumers assume that appearing on the professional register means an individual is competent. If this is shown not to be the case, it brings the integrity of the professional register into question. A successful post-authorisation regime is thus of critical importance to fostering public confidence in the competence of the legal profession.

Continuing Professional Development regimes need to be transformed

7.2. The general basis of CPD regimes in the sector is a requirement to complete a minimum number of CPD hours. This system has been widely criticised for many reasons. It is inputs rather than outcomes-focused and is too rigid to take account of the differing experience and needs of lawyers. The minimum hour thresholds vary between the approved regulators, but they are low when compared to other professions. There is often no requirement for CPD to be related to areas of practice or identified knowledge or skill gaps. There are weak controls on the content of accredited CPD content with hours amassed by attending events which should not be allowed to count, such as conferences on how to maximise profit or skiing holidays. Even though CPD tends to be self-certified, a significant minority of lawyers do not manage to complete their required hours. Yet the typical sanctions for this – usually a slap on the wrist or a small fine – are not an effective deterrent.

7.3. These failings are disappointing and may point to underlying cultural problems. It is possible that the mechanistic approach of minimum CPD hours leads to the wrong behaviours, although we would stress that primary responsibility always lies with individuals despite any systemic issues. Alternative models of CPD, such as ‘benefits models’, attempt to create a culture of individuals leading their own development programmes instead of being told what to do by their employer or regulator. The onus is placed on lawyers to identify personal objectives and provide hard evidence to demonstrate delivery against these objectives on an annual cycle. The corollary is that these increased freedoms are matched with tougher sanctions in the event of non-compliance, with code of conduct obligations providing a hook. Regulators too should be held to account for the success of their CPD regimes by a requirement to publish a report showing progress against performance indicators.

“These failings are disappointing and may point to underlying cultural problems.”

7.4. Certainly, the current mechanisms are widely discredited. The review will need to come up with the evidence to suggest which approach to CPD will work best in the legal sector. Key is likely to be creating the right culture – away from anti-avoidance towards pride in performance – and ensuring the right accountability backstops are in place to support this.

Introduce reaccreditation, at least in higher quality risk areas of law

7.5. A key theme of our consumer research is that people’s expectations about the quality safeguards that regulation provides do not exist in reality. The public expect lawyers to be re-assessed on a regular basis to verify their competence, but of course there is no regulatory requirement relating to ongoing competence beyond the completion of a minimum number of CPD hours. Now doctors and some other

medical professionals must undergo periodic revalidation, surely the time is right for the legal sector to give serious consideration to introducing something similar.

- 7.6. The basic arguments to support revalidation should be self-evident. A lawyer's initial education and training does not offer a career-long guarantee of competence. There are substantive changes in legislation, legal processes and consumer and regulatory expectations. Furthermore, it is only natural that an individual's skills will deteriorate. In

“A lawyer’s initial education and training does not offer a career-long guarantee of competence.”

order to assure consumers that a lawyer remains fit to practise, regulators need a reliable way of checking this at regular intervals.

- 7.7. This principle has already been acknowledged by the sector's largest representative body. John Wotton, President of the Law Society, has said: “We do not consider that a scheme that is meant to be an indicator of quality can be credible in the modern world if those who are accredited are not re-assessed regulatory to ensure that they remain competent and up to date”. The Law Society is in fact currently finalising a uniform re-accreditation structure across all its accreditation schemes.
- 7.8. This is already reflected in parts of the sector, for instance the Quality Assurance Scheme for Advocates will require reaccreditation every five years. However, quality schemes are currently a weak influence on consumer choice so this cannot be left to the market to resolve by itself. While some lawyers are proactive in updating their knowledge and skills, there needs to be a demonstrable process which allows consumers to be confident this is true of all lawyers. CPD does not offer sufficient protection on its own since it does not include an objective assessment of competence based on a wide portfolio of evidence.
- 7.9. Such a periodic review of competence would bring benefits for consumers, lawyers and regulators. In addition to providing a base level of protection and quality assurance for consumers, it would allow regulators to spot ‘warning signs’ at an

early stage, enabling action on issues before they become more serious. And, crucially, it should be seen by the profession as a career-enhancing measure, not a career-threatening one. It would support further learning and enable lawyers to demonstrate their commitment to professionalism. On this point, the introduction of revalidation in the medical field was a drawn out and fraught affair due to a defensive mindset on the part of some professional bodies. It is important that the legal sector learns the lessons of this episode. Although competence failings must carry consequences, the purpose of revalidation is not to weed out the weak – incompetence should anyway be spotted sooner than this – but to enhance the profession's strength in a positive way which fosters public confidence.

7.10. It is too early in this paper to suggest a specific model of revalidation for legal services, but we suggest five features or issues to consider:

- It should link to the authorisation regime – revalidation should be prioritised in areas where lawyers are separately authorised for higher quality-risk activities;
- The standards applied should be high and the revalidation process needs to be objective and based on actual performance. It should comprise an independent evaluation by a third party of a lawyer's continued fitness to practise. This should be an evidence-based positive affirmation of competence, not just the absence of performance/regulatory concerns;
- Revalidation should be coupled with the professional register – if lawyers repeatedly cannot demonstrate they are competent, they should lose their rights to practise, but this should be done in a supportive way and through the usual disciplinary systems. This step is needed to ensure that revalidation has teeth, but for all but a tiny minority of lawyers the process will offer reassurance of their performance and encourage continued improvement;
- The evidence base must include consumer input – although consumers will not always be able to judge the technical quality of advice, their

experiences provide an important alternative perspective on the skills and behaviours of professionals. This is of value in its own right, but consumer involvement would also build public trust in the objectivity of the process. In medicine, a clear decision has been made to include patient views; and

- It must complement and build on other processes – revalidation is not an isolated one-off pass/fail mechanism, but should take account of a portfolio of evidence such as CPD, appraisals, peer reviews, voluntary accreditations and complaints and regulatory history.

8 Broader quality assurance processes

- 8.1. Tools used by regulators to assure quality are beyond the remit of the LETR. However, education and training mechanisms, authorisation regimes and quality assurance tools should be seen as a package of measures which together contribute to the same aim: ensuring high quality advice is provided to consumers who depend on legal services at critical life moments. They are also linked in the sense that a reduction in entry requirements might be balanced by stronger quality assurance tools or vice versa. Evidence gained through use of quality assurance tools might also be used to inform decisions about the continued authorisation of lawyers.

Harness consumer power through publishing data on regulatory performance

- 8.2. The LSB is consulting on regulatory tools to address quality risks. This document sets out a menu of interventions that might be suitable in different circumstances. In selecting from such a menu, the Panel would draw a clear distinction between the different dimensions of quality. We see the technical aspects of quality as being best safeguarded through the authorisation regime and other regulatory tools reflecting the limited ability of consumers to assess this. However, there is scope to make greater use of market mechanisms on the service and utility dimensions of quality, by making more information about provider performance available to inform consumer choice.
- 8.3. Such 'reputational regulation' should be powerful in legal services due to the strong influence of recommendation on consumer choice. In addition, the role of peer pressure and sense of profession means that the desire to maintain a good reputation can be expected to exert a positive influence on lawyers' behaviour.

There is evidence of consumer demand for information, such as complaints data that would help to build a picture of provider performance, although it only needs some consumers (or indeed their advisors, be they the voluntary sector or the press) to use the information for it to have an impact as it forces firms to make service improvements that benefit all users.

“Such ‘reputational regulation’ should be powerful in legal services due to the strong influence of recommendation on consumer choice.”

- 8.4. However, there are currently low levels of consumer empowerment and a lack of performance information. The Legal Ombudsman’s decision to publish complaints data is a positive step, but some data remains withheld (such as peer review scores for legal aid providers) while in other areas there is an absence of data recorded (for example the identities of the one-third of lawyers who are responsible for rejected probate forms). Nevertheless, opening up provider performance data is at the heart of the Government’s consumer empowerment strategy and we would argue that the legal sector should embrace this agenda to maximise its competitiveness.

Regulators can facilitate choice tools and create better incentives for entities

- 8.5. As part of this approach, regulators can also facilitate ‘choice tools’ developed by the market to help consumers identify good quality lawyers. In 2011-12, the Panel looked in detail at accreditation schemes and comparison websites. These tools have the potential to help people make more informed choices, but both must resolve credibility issues before they can expect to become stronger influences on purchasing behaviour. Our reports on these tools suggested ways in which regulators could assist in facilitating self-regulatory solutions.

- 8.6. On the regulatory side of the equation, there is an opportunity to create incentives for entities to demonstrate how they are managing quality risks. Since these will vary depending on the nature of legal activities and the type of consumer, regulators should not be overly prescriptive but place the onus on entities to demonstrate compliance against quality outcomes. The evidence used might be systemic measures, such as file reviews or membership of accreditation schemes. This evidence might in turn justify use of tools, such as earned recognition policies, in relation to lower risk entities. Earned recognition policies involve a lighter touch inspection regime for entities which have good internal quality controls. This supports risk-based regulation and has the potential to free up limited regulatory resources to focus on the highest risk areas.
- 8.7. Finally, enforcement should be a last resort but regulators must demonstrate they are willing to take action against incompetent individuals and the entities they work for. Regulators must use tools, such as mystery shopping, to help them build a reliable evidence base of poor performance. Moreover, in a world of outcomes-focused regulation, in which lawyers must demonstrate compliance with a quality related outcome, sanctions need to be applied in cases of non-compliance. In the absence of this, the right incentives to promote high standards will not be present: it creates a disincentive for those inclined to improve as well as to encourage infractions.

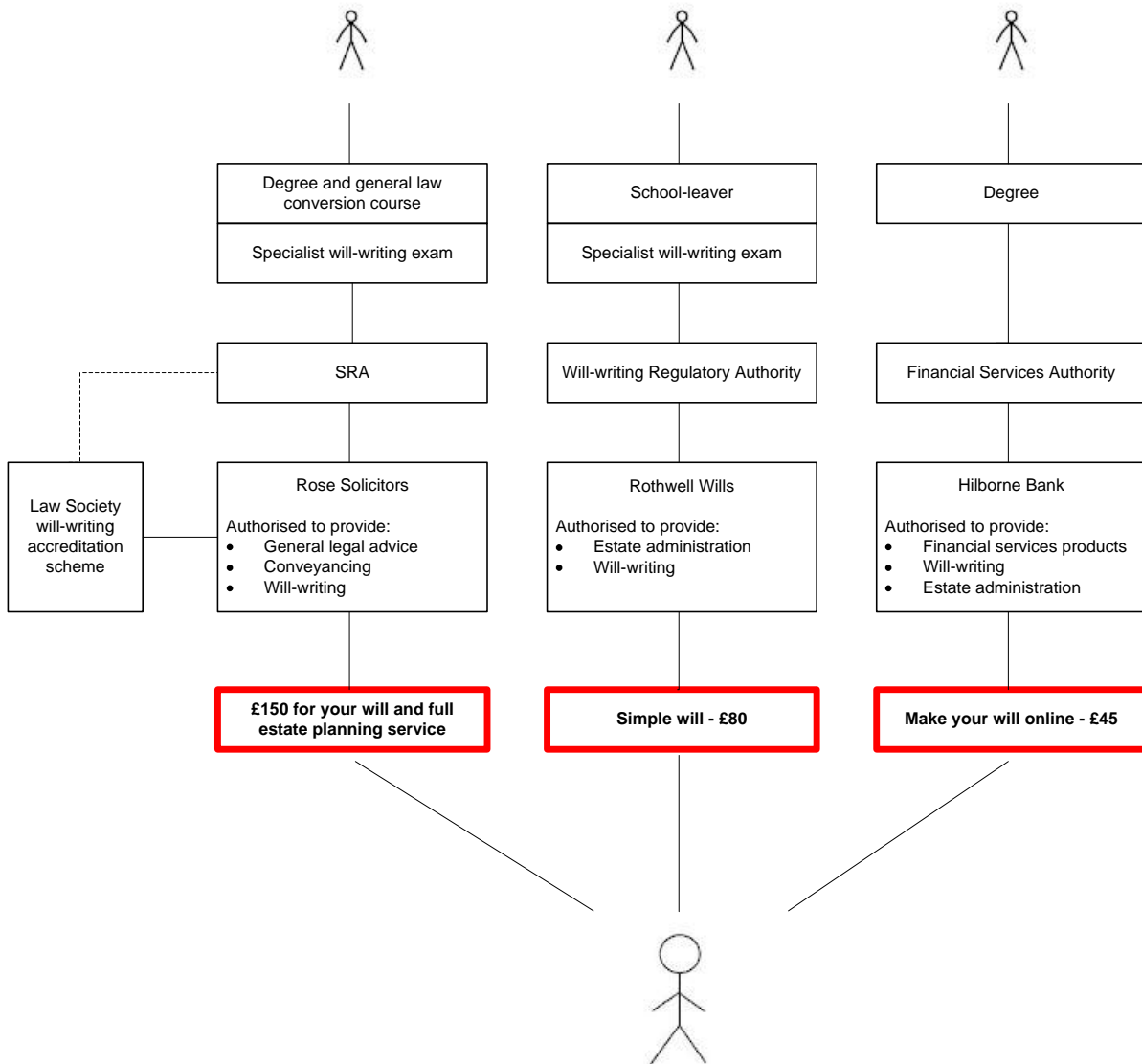
9 Towards a new model of education and training

9.1. We now bring together the various strands of thinking in this document to set out some high-level ingredients for a future legal education and training regime. This is written at the level of principles; it is for later stages of the review to consider more detailed implementation issues.

- The hub of our vision is for individuals and entities to be authorised within an activity-based system of regulation;
- Approved regulators would authorise Regulated Legal Entities (RLEs) who wished to provide reserved legal activities to consumers. RLEs would need to demonstrate compliance against the outcome that their workforce is appropriately trained and supervised. RLEs would be required to allocate specific responsibilities to Regulated Legal Advisors (RLAs) as required by the approved regulators relating to practise areas or roles within entities;
- RLAs would have to demonstrate competence against Day One Outcomes by meeting authorisation requirements which would be separately granted and vary according to the mix of activities they wished to provide to consumers. These permissions would be identified on practising certificates. Authorisation could involve no legal training requirements, general legal training requirements, or, for higher quality-risk activities, specialist legal training requirements;
- RLAs would be required to undertake CPD within a reformed framework and, at least for higher quality-risk activities, be periodically re-accredited;
- The approved regulators would accredit courses designed to prepare students to meet the RLA authorisation and post-authorisation requirements.

- The content of training courses would reflect a broad notion of competence embracing dealing with consumers in an advice setting, consumer diversity and professional ethics;
- These authorisation requirements would support diverse pathways to legal careers including non-degree routes;
- RLE's would be required to confirm to consumers at the time of engagement that the RLA handling their matter is authorised to provide advice and explain the relevant regulatory protections. Consumers could also recognise that a RLE is regulated when shopping around through a uniform single badge applied by each of the approved regulators; and
- Data about provider performance is made available to consumers to support them in making informed choices as part of a broad quality assurance toolkit.

Wills – a case study



The Legal Services Consumer Panel was established under the Legal Services Act 2007 to provide independent advice to the Legal Services Board about the interests of consumers of legal services in England and Wales. We investigate issues that affect consumers and use this information to influence decisions about the regulation of legal services.

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