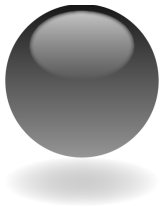

Legal Ethics

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3 The regulation of the legal profession

Key issues

- How do the professions regulate themselves?
- What is the nature of the professional guidance?
- What consequences are there for breach of the guidance?

Introduction

The structure, organisation, and regulation of the legal profession, at first, appear a somewhat boring issue. Yet it tells us much about how the profession understands itself, is understood by society, and is able to exercise power. In this chapter, we will consider who is allowed to become a solicitor or a barrister and what training they must have completed. Further, we will consider the nature of the ethical guidance issued by the profession. Essential to any system of professional ethics is some form of enforcement and sanction. Of course, most lawyers will follow the guidelines using common sense and will not be tempted to act in an unethical way. However, if public confidence is to be maintained and the ethical principles are to be taken seriously, then there must be consequences for those who do breach the ethical codes.

The need for regulation

The regulation of legal services is central to a well-functioning justice system. In his influential review, Sir David Clementi identified six roles for regulation, as follows.[1]

1. *Maintenance of the rule of law* If we wish to have a 'predictable and proportionate legal system with fair, transparent, and effective judicial institutions', then it 'is essential to the protection of both citizens and commerce against any arbitrary use of state authority and unlawful acts of both organisations and individuals'.[2]
2. *Access to justice* Regulation should ensure that everyone has access to good legal advice and services.

[1] D. Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report* (Cabinet Office, 2004). [2] Clementi (n. 1), 3.

3. *Protection and promotion of consumer interests* Many clients are in a vulnerable position when seeking advice. They may be going through a difficult personal time (for example a divorce or an insolvency) or may be making a major decision (for example buying a house). The regulator must ensure that the lawyer does not exploit the vulnerable position of the client.
4. *Promotion of competition* The regulatory framework should promote competition for legal services. This should help to keep standards high and costs low.
5. *Encouragement of a confident, strong, and effective legal profession* The regulation can ensure that new members are appropriately trained and able to supply good-quality services, and that current members are kept up to date.
6. *Promoting public understanding of the citizen's legal rights*

Who can practise law?

In order to practise, a solicitor must:

1. have been admitted as a solicitor;
2. have his or her name on the roll; and
3. have a current practising certificate.[3]

The Legal Services Act 2007 lists reserved legal activities that can be undertaken only by solicitors or other approved persons.[4] 'Other approved persons' includes licensed conveyancers, patent attorneys, and costs lawyers, who can undertake certain activities for which they have received specific training.[5] The reserved activities include the exercise of rights of audience, conducting litigation, and obtaining probate.

Key statute

Legal Services Act 2007, s. 12, offers the following definitions:

Meaning of "reserved legal activity" and "legal activity"

(1) In this Act "reserved legal activity" means—
- (a) the exercise of a right of audience;
- (b) the conduct of litigation;
- (c) reserved instrument activities;
- (d) probate activities;
- (e) notarial activities;
- (f) the administration of oaths.

[3] Solicitors Act 1974, s. 1.
[4] Legal Services Act 2007, ss 12, 13.
[5] Legal Services Act 2007, Sch. 4.

[…]
(3) In this Act "legal activity" means—
  (a) an activity which is a reserved legal activity within the meaning of this Act as originally enacted, and
  (b) any other activity which consists of one or both of the following—
    (i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;
    (ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.
(4) But "legal activity" does not include any activity of a judicial or quasi-judicial nature (including acting as a mediator).
(5) For the purposes of subsection (3) "legal dispute" includes a dispute as to any matter of fact the resolution of which is relevant to determining the nature of any person's legal rights or liabilities.
(6) Section 24 makes provision for adding legal activities to the reserved legal activities.

This list of reserved activities is important because it sets out those activities that only an authorised lawyer can perform. But there are plenty of matters in which lawyers engage that are not regulated. These include many non-litigious commercial matters, claims management, and insolvency. These are often dealt with by lawyers, but need not be.

Regulatory bodies

In this section, we will describe some of the main bodies involved in regulating the legal profession.

The Legal Services Board

Overseeing all of the regulatory bodies is the Legal Services Board (LSB).

Key statute

Under the Legal Services Act 2007, s. 3(2):

The LSB has the job of promoting the regulatory objectives:

(1) In this Act a reference to "the regulatory objectives" is a reference to the objectives of—
  (a) protecting and promoting the public interest;
  (b) supporting the constitutional principle of the rule of law;
  (c) improving access to justice;

(d) protecting and promoting the interests of consumers;
(e) promoting competition in the provision of services within subsection (2);
(f) encouraging an independent, strong, diverse and effective legal profession;
(g) increasing public understanding of the citizen's legal rights and duties;
(h) promoting and maintaining adherence to the professional principles.

(2) The services within this subsection are services such as are provided by authorised persons (including services which do not involve the carrying on of activities which are reserved legal activities).

(3) The "professional principles" are—
(a) that authorised persons should act with independence and integrity,
(b) that authorised persons should maintain proper standards of work,
(c) that authorised persons should act in the best interests of their clients,
(d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
(e) that the affairs of clients should be kept confidential.

The job of the LSB is to oversee the regulation of the legal profession. It does not itself deal directly with complaints about lawyers, but it has the job of ensuring that there are adequate regulations in place. In 2013, the Ministry of Justice announced a review into the regulation of the legal profession.[6] The Bar Standards Board (BSB) and Bar Council suggested that the LSB, which had kick-started reforms to the regulation of the legal services, could now be abolished, because the regulatory systems are working well.

The Solicitors Regulation Authority

There are three main elements to the work of the Solicitors Regulation Authority (SRA). First, it sets the standards for solicitors in order to give the public confidence in the profession. The SRA defines its primary tasks in doing this as follows:

- We set the standards for qualifying as a solicitor.
- We monitor the performance of organisations that provide legal training.
- We draft the rules of professional conduct, particularly to make sure they protect the interests of clients.
- We provide authoritative guidance and rules to solicitors on ethical issues, laws and regulations that affect solicitors' work.
- We administer the roll (register) of solicitors.

[6] Ministry of Justice, *Review of Legal Services Regulation* (Ministry of Justice, 2013).

- We provide information to the public about solicitors, their work and the standards the public is entitled to expect.
- We set requirements for solicitors' continuing professional development.[7]

Its second role is to protect consumers and to protect the public interest by regulating the profession. It lists the features of this role as follows:

- We monitor solicitors and their firms to make sure they are complying with the rules.
- We exchange information with other regulators and law enforcement agencies in order to protect the public.
- We investigate concerns about solicitors' standards of practice and compliance with the rules, where necessary taking regulatory action such as reprimanding the solicitor.
- When necessary, we close down solicitors' firms so as to protect clients and the wider public, and returning papers and monies to their owners.
- We refer solicitors to the independent Solicitors Disciplinary Tribunals and deal with the prosecutions.
- We run a compensation fund to help people who have lost money as a result of a solicitor's dishonesty or failure to account for money they have received.[8]

Its third role involves consulting with the public and legal profession to ensure that the latter provides a good service.

All solicitors who practise law are required to hold a practising certificate issued by the SRA. This must be renewed each year, by means of an application that confirms that there is appropriate insurance in place[9] and that the solicitor has undertaken the necessary continuing professional development (CPD). It is a crime to practise as a solicitor without such a certificate.

The SRA regulates the work that solicitors perform. It has produced the SRA Code of Conduct 2011, which is regarded as subordinate legislation[10] in that its production is required and authorised by an Act of Parliament; although it is not produced by Parliament itself, it is produced with Parliament's authority. Solicitors who carry on investment business are subject not only to the SRA Code of Conduct, but also to the Financial Services and Markets Act 2000.

The Solicitors Disciplinary Tribunal

The Solicitors Disciplinary Tribunal (SDT) deals with allegations of serious breaches of the rules.[11] Appeal from the Tribunal lies to the High Court. The Tribunal comprises

[7] Solicitors Regulation Authority, *What We Do* (Solicitors Regulation Authority, 2013).
[8] SRA (n. 7). [9] SRA, *Indemnity Insurance Rules* (SRA, 2012).
[10] *Westlaw Services Ltd v Boddy* [2011] EWCA Civ 929.
[11] R. Able, *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings* (Oxford University Press, 2009).

50 members, 32 of whom are solicitors and 18, lay members. The Tribunal was created under the Solicitors Act 1974 and is a statutory tribunal. Its primary role is to adjudicate on allegations of breaches of professional rules.[12]

The Bar Standards Board

The Bar Standards Board (BSB) has a similar role to that of the SRA, but in relation to barristers. It describes its primary roles as follows:

- Setting the education and training requirements for becoming a barrister;
- Setting continuing training requirements to ensure that barristers' skills are maintained throughout their careers;
- Setting standards of conduct for barristers;
- Monitoring the service provided by barristers to assure quality;
- Handling complaints against barristers and taking disciplinary or other action where appropriate.[13]

The Bar Tribunals and Adjudication Service

The Bar Tribunals and Adjudication Service (BTAS) organises hearings in instances of complaints against barristers.

Other regulators

Other approved regulators that can be involved in regulating the work of people who perform legal work include:

- the Master of the Faculties;
- the Council for Licensed Conveyancers (CLC);
- the Chartered Institute of Legal Executives (CILEx);
- the Chartered Institute of Patent Agents (CIPA);
- the Institute of Trade Mark Attorneys (ITMA); and
- the Costs Lawyer Standards Board (CLSB).

The Legal Ombudsman

The Legal Ombudsman was established by the Office for Legal Complaints (OLC) under the Legal Services Act 2007 and began accepting complaints on 6 October

[12] The Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011, SI 2011/2346, and the Solicitors Disciplinary Tribunal (Appeals) (Amendment) Rules 2011, SI 2011/3070, govern its procedures.

[13] Bar Standards Board, *What We Do* (BSB, 2013).

2010. The Legal Ombudsman provides a free complaints resolution service to members of the public, very small businesses, charities, and trusts.

The Legal Ombudsman can deal with complaints about the following types of lawyer (and, generally, those working for them):

- barristers;
- costs lawyers;
- legal executives;
- licensed conveyancers;
- notaries;
- patent attorneys;
- probate practitioners;
- registered European lawyers;
- solicitors; and
- trademark attorneys.

The Legal Ombudsman can hear a case only after complaints have been made to the barristers' chambers. The Ombudsman explains its service in the following way:

> The Legal Ombudsman resolves complaints about legal services. It may be that your lawyer has failed to do what they agreed, has been slow in responding, or increased their charges without explaining why. Perhaps you think you've been unreasonably refused a legal service or have been pressured to accept a service you didn't want.
>
> We will investigate your complaint and look at all the facts to reach a fair outcome. We are independent, impartial and we don't take sides. If we decide the service you received was unreasonable, we can make sure your lawyer or law firm puts it right.[14]

The Ombudsman is primarily focused on poor service rather than misconduct. Professional misconduct should be dealt with by the BSB or the SRA.

Discussion of the complaints procedures

This system of complaints was introduced under the Legal Services Act 2007. Previously, the Law Society itself had handled complaints. The review by Sir David Clementi found that there were concerns about the volume of complaints and the Law Society's handling of them.[15] As already noted, the current system is not fully independent regulation, but something of a 'halfway house'.[16] The Law Society appoints

[14] Legal Ombudsman, *Here to Help* (Legal Ombudsman, 2013).

[15] Clementi (n. 1), ch. 3.

[16] A. Boon, 'Professionalism under the Legal Services Act 2007' (2010) 17 International Journal of the Legal Profession 195.

the SDT, which is predominantly staffed by lawyers, but the independent LSB will oversee the regulation of the profession. This might be seen as 'reinvigorating' the legal profession by providing external focus. Alternatively, it may be seen as the state threatening to control professional work.[17]

There has been some interesting work on the kind of lawyers who have behaved wrongly. Perhaps surprisingly, age is an important factor, with older lawyers more likely to commit wrongdoing. It may be that older lawyers are likely to be in more senior positions and so are less likely to be supervised.[18] Characteristics such as pride and inability to make mistakes are also linked. Commonly, lawyers accused of wrongdoing argue that they were seeking to achieve justice. Whether that is an attempt to justify in retrospect what they did or whether it stems from a genuine belief that they know better than the rules is a matter for debate. Common too is an attitude that clients are lucky to have got such good advice from lawyers and are ungrateful for the work that lawyers do. One can imagine that years of working hard for clients whom the lawyer perceives to be richer, but less talented, than himself or herself might build up an attitude that might make it easier for the lawyer to engage in fraud.

Self-regulation

A notable feature of the regulatory bodies is that the professions are largely self-regulating. The Solicitors Regulation Authority and the Bar Standards Board were set up by the professions to organise regulation. Although they are separate from the professional bodies, they are responsible to them. By contrast, other professions are overseen by bodies selected by the government and over which the professions have no control. It should be noted, however, that the Legal Services Board is an independent body with oversight of the regulation of the profession. It was created under the Legal Services Act 2007. In the run-up to that legislation, there was considerable speculation that the legal profession might lose its ability to self-regulate. The LSB can be seen as a compromise whereby an independent body oversees the regulation, while the professions regulate themselves. Another way of seeing this is as a veiled threat: the professions will regulate themselves, but they will be watched. If they do not do the job adequately, external regulation will take place.

Looking at the issue from the perspective of the Bar, Ruth Deech makes the case for self-regulation, while recognising that it carries dangers:

> Self regulation used to be totally appropriate because of the relatively small size of the Bar, its concentration in London and a few other centres, and the constant surveillance by peers, judges and solicitors. This obviated the need for outside regulation. Now self regulation has a bad name. Self regulation, if left unchecked, can become self interest. That is the risk that must be guarded against. We need appropriate

[17] Boon (n. 16). [18] Able (n. 11).

checks and balances in place to ensure that self regulation does what is necessary to reinforce independence, that is, organise the profession to ensure that its members genuinely support the rule of law and the proper administration of justice.[19]

The division between the SRA/BSB and the LSB has caused concern for some.[20] The exact relationship between these bodies will emerge over time. The more interventionist the LSB, the harder it will be for the profession to claim that it is self-regulating.

A number of reasons are given in favour of self-regulation.[21]

1. A profession can be governed by principles and rules made by people who have technical skill and knowledge of how the profession works in practice.
2. The intimate knowledge of the profession means that changes can be made quickly in response to changes in professional practice.
3. Enforcement and monitoring is easier if undertaken by those who work in the same areas as those being assessed. Less work has to be done to explain to the regulators the reasons why certain actions have been taken and regulators will easily be able to spot inappropriate practices. There will also be greater trust if the regulator is a fellow professional.
4. Changes can take place more easily because there is no need to work with third parties if amendments to regulations are required.

Why does independence matter?[22] It is because it enables clients and organisations to challenge the government of the day; it is because it secures the interpretation and application of legislation by persons who have no conflicting loyalties.[23] Independence is inseparable from the enforcement of human rights.

Another mark of being a professional is self-governance. Most professions—perhaps all—have professional bodies that seek to create rules that govern how its members should act. Of course, not all of these are ethical principles. Rules governing how a person should dress in court are not really an ethical issue. However, while deciding that the professions determine the professional codes and deal with breaches of those codes is part of the autonomy that is seen as a hallmark of professionalism, it may also be seen as an inappropriate lack of control. Allowing lawyers to be the legislators, prosecutors, judges, and juries for any breach of lawyers' professional ethics may lead some to raise an eyebrow. Many workers would like the idea of making

[19] R. Deech, 'How the Legal Services Act 2007 has affected regulation of the Bar' (2011) 11 Legal Information Management 89, 91.

[20] S. Patel, C. Howarth, J. Kwan, and P. McDonald, *Reform of the Legal Profession* (Wilberforce Society, 2012).

[21] C. Decker and G. Yarrow, *Understanding the Economic Rationale for Legal Services Regulation* (Regulatory Policy Institute, 2010).

[22] G. Turriff, 'The consumption of lawyer independence' (2010) 17 International Journal of the Legal Profession 283.

[23] The Law Society of Upper Canada, *Task Force on the Rule of Law and the Independence of the Bar* (The Law Society of Upper Canada, 2006), para. 1.

their own rules, and then deciding how and when to enforce them. This is especially ironic in the case of lawyers, who are involved in a legal system applying to others who have very little control over the promulgation and enforcement of the law.

However, the issue is not straightforward, as we shall see. If it is alleged that a lawyer handled a case badly, does anyone apart from another lawyer have the skill to determine whether the first lawyer gave bad advice? A layperson is simply not in a position to know whether the lawyer's advice on the interpretation of a contract, for example, was negligent or not. Further, if the government takes on the role of investigation, it may pick on lawyers who are effective in bringing litigation against the government itself or who stand up for the rights of unpopular individuals, rather than seek out wrongdoing. While professional regulation brings with it dangers, so too does leaving regulation to the government.

There are two major problems with self-regulation. First, there is an incentive for the regulator to entrench the profession's monopoly: if the regulator of the legal profession *is* the legal profession, it will be in its own interests to restrict who can become a lawyer and who can carry out legal work.[24] Second, there is the problem of perception: self-regulation can create the appearance of lawyers 'looking after their own'.

The traditional model of regulation has required a clear separation between the regulator and the regulated. However, there is some support for 'responsive regulation'. Julian Webb and Donald Nicolson describe this in the following way:

> Responsive regulation is fundamentally concerned with developing . . . a positive conception of trust, drawing on a recursive relationship between the actors. This requires that regulation is grounded in 'reflexive' relationships characterised by integrity, flexibility and participation in decision-making, by diffusion of authority and less top-down administration.[25]

The SRA Code of Conduct

The SRA has produced the SRA Handbook, the latest version of which appeared in April 2013.

Follow the Code

The Handbook explains its aim as follows:

> This Handbook sets out the standards and requirements which we expect our regulated community to achieve and observe, for the benefit of the clients they serve and in the general public interest.

[24] A. Shaked and J. Sutton, 'The self-regulating profession' (1981) 48 The Review of Economic Studies 217.

[25] J. Webb and D. Nicolson, 'Institutionalising trust: Ethics and the responsive regulation of the legal profession' (1999) 2 Legal Ethics 148, 149.

It goes on to set out in more detail:

> We are confident that the contents of this Handbook, coupled with our modern, outcomes-focused, risk-based approach to authorisation, supervision and effective enforcement will
>
> - benefit the public interest;
> - support the rule of law;
> - improve access to justice;
> - benefit consumers' interests;
> - promote competition;
> - encourage an independent, strong, diverse and effective legal profession;
> - increase understanding of legal rights and duties; and
> - promote adherence to the professional principles set out in the Legal Services Act 2007.

This Handbook provides a code of ethical conduct for solicitors. This new code departs from the style of previous codes in a striking way: it seeks to rely on principles-based regulation rather than rules-based regulation.

Principles-based regulation

Principles-based regulation can be contrasted with rules-based regulation, the latter being based on setting down detailed rules with which people are expected to comply carefully. Critics complain that rules-based regulation involves 'nit-picking bureaucracy in which compliance with detailed provisions is more important than…the overall outcome'.[26]

A particular concern is that rules-based regulation leaves professionals making ethical decisions simply to 'follow the rules' rather than actually to try to find out the best solution to the problem at hand. As Nick Smedley argues: '[P]ages and pages of rules can create a passive, dependent culture. The focus shifts to filling in the form correctly, rather than thinking positively and creatively about how to meet the highest standards of conduct and service.'[27]

The SRA Handbook instead prefers principles-based regulation (sometimes known as 'outcomes-based regulation', or OFR). This sets out principles that are to be followed and outcomes to be achieved, but leaves the detail of what the principles

[26] J. Black, *The Rise, Fall and Fate of Principles-Based Regulation*, LSE Law, Society and Economy Working Paper 17/2010 (November 2010), online at http://ssrn.com/abstract=1712862, 3.

[27] N. Smedley, *Review of the Regulation of Corporate Legal Work* (Law Society, 2009), 3.

mean for a particular situation with a particular client for the lawyer. To quote Nick Smedley again:

> Principles-based regulation, as advocated by the LSB in its draft Business Plan, focuses more on outcomes, allowing the regulated community latitude to achieve stated goals. The idea is to instil a culture of personal and corporate responsibility, maturity and commitment to higher standards.[28]

Charles Plant, chair of the SRA Board, summed up the approach in this way:

> OFR amounts to a shift in emphasis from prescriptive, rigid rules to flexible, outcomes-focused requirements…the way the legal services market is evolving demands that regulation should focus more on the quality of clients' experience—and less on prescribing the approach that firms should take.[29]

Supporters of the new principles-based regulation claim that it allows a solicitor to find the solution to an ethical dilemma that best fits the relationship with a client. For example, what might resolve the dilemma in a case involving an elderly confused client might not be appropriate if the client were an experienced business person. We might be happy to allow the business person to consent to allow a solicitor to act in a case involving a conflict of interest, but not a vulnerable client.

They also acknowledge that there is a danger that a rules-based approach can produce an absurd result if applied without thought to the particular case. Bronwen Still gives the example of a rule saying that solicitors must pay clients any interest earned on money held on their behalf.[30] She argues that if the amount of money were tiny, it might be absurd to require the lawyer to send off a cheque for a few pence. Indeed, in the case of large company, it may cost the company more to deal with the cheque than the value of the cheque itself.

The SRA Code of Conduct is structured by means of certain outcomes that a solicitor should achieve. These outcomes are supported by 'indicative behaviours'. These are seen as examples of ways in which the outcomes might be achieved. A solicitor who follows the indicative behaviour can be safe in the knowledge that he or she is behaving properly, but a solicitor may depart from the indicative behaviours if doing so would better promote the outcomes in the particular case.

A notable feature of the new Code is the lack of detailed guidance. That is deliberate. The aim is for solicitors to think about how the outcomes can be achieved for each client. What might achieve the outcome for one client may not achieve the outcome for another.

[28] Smedley (n. 27), 3.

[29] C. Plant, 'Our proposals for alternative business regulation', Speech delivered at *The Lawyer*'s conference on alternative business structures (8 November 2010), online at www.sra.org.uk/sra/news/plant-abs-proposals-speech.page

[30] B. Still, 'Outcomes-focused regulation: A new approach to the regulation of legal services' (2011) 11 Legal Information Management 85.

It is easy to exaggerate the difference between a rules-based approach and an outcomes-based approach. It might be pointed out that some of the 'outcomes' are very specific and look like rules. For example, under the complaints procedure, one outcome is that clients must be notified of their right to complain to the Legal Ombudsman. That looks very much like a rule. Similarly, the outcomes requiring that there is no conflict of interest, breach of a solicitor's undertaking, or breach of confidentiality look rather like rules, even if expressed as outcomes.

The ten Principles

The Handbook opens with ten Principles that underpin the SRA Code of Conduct.

Follow the Code

You must:

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow your independence to be compromised;
4. act in the best interests of each *client*;
5. provide a proper standard of service to your *clients*;
6. behave in a way that maintains the trust the public places in you and in the provision of legal services;
7. comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner;
8. 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;
9. run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity; and
10. protect *client* money and *assets*.

The SRA explains: 'We expect you to act in accordance with the Principles in everything you do; for example, when dealing with clients, or the SRA.'[31] It also acknowledges that, in some cases, these Principles will conflict. In such a case, the following advice is offered: 'Where two or more Principles come into conflict, the Principle which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice.'[32]

[31] Solicitors Regulation Authority, *Outcomes-Focused Regulation at a Glance* (SRA, 2011).
[32] SRA (n. 31), para. 2.2.

Outcomes and indicative behaviours

Having set out the ten Principles, the Handbook then proceeds to discuss particular issues. In broad terms, these are described as:

- You and your client
- You and your business
- You and your regulator
- You and others[33]

It does so by setting out objectives and indicative behaviours.[34] The guidance sets out the difference between these:

> Outcomes we require which, when achieved, benefit users of legal Services and the public at large. These Outcomes are mandatory and, when achieved, will help ensure compliance with the Principles in the particular contexts covered by the various chapters in the Code. We recognise that these mandatory Outcomes may be achieved in a variety of ways depending on the particular circumstances, and we have supplemented the mandatory Outcomes with non-mandatory 'Indicative Behaviours' to aid compliance. The Indicative Behaviours which we set out are not exhaustive: the Outcomes can be achieved in other ways. We encourage firms to consider how they can best achieve the Outcomes taking into account the nature of the firm, the particular circumstances and, crucially, the needs of their particular clients.[35]

In short, the outcomes must be achieved, the indicative behaviours are good ways, but not the only ways, of achieving these outcomes.

Examples of the outcomes and indicative behaviours will be given throughout this book. But to give an example of why the Code is structured in this way, the following is an example.

Follow the Code

Outcome 1.1 requires:

> you treat your *clients* fairly

Indicative Behaviour 1.3 requires:

> …ensuring that the *client* is told, in writing, the name and status of the person(s) dealing with the matter and the name and status of the person responsible for its overall supervision

[33] SRA (n. 31), 12. [34] SRA (n. 31), 12. [35] SRA (n. 31), 12.

Nearly always, informing the client in writing who is dealing with the matter and who is responsible for overall supervision will be part of treating a client fairly. But you could imagine cases in which that might not be appropriate. If the client has been dealing with the lawyer for years and knows very well who is dealing with the case, he or she may not need to be told. A client who cannot read may not need the advice in writing, preferring it instead in another form. By making this an indicative behaviour, the Code allows solicitors to use common sense to ensure that clients know what they need to know.

What would you do?

An ethical dilemma arises and your partner instructs you to act in a way that clearly breaches one of the indicative behaviours in the Code. You discuss this with the partner; he says that is the way in which the firm has always dealt with this issue and no one has complained. How will you satisfy yourself that you are acting in line with the Code?

What would they do?

This 'What would you do?' scenario is accompanied by a podcast in which current law students debate the issues and articulate their own responses to the ethical questions that it raises. The podcast is available online at www.oxfordtextbooks.co.uk/orc/herringethics/

Issues around codes

There has been quite some debate over what a lawyer's ethics code should try to do.

How detailed the guidance should be

The debate between principles-based regulation and rules-based regulation highlights the central problem. The more detailed the rules are, the greater the risk that lawyers following the 'letter of the rules' will not, in fact, achieve an ethical result.[36] On the other hand, if a code seeks to highlight general principles, it will be vague and some think that it will lose its value.[37] John Flood has expressed the concern that large law firms are manipulating the UK's principles-based regulatory system to promote

[36] A. Crawley and J. Bramall, 'Professional rules, codes, and principles affecting solicitors (or what has professional regulation to do with ethics?)', in R. Cranston (ed.) *Legal Ethics and Professional Responsibility* (Oxford University Press, 2005).

[37] D. Edmonds, 'Training the lawyers of the future: A regulator's view', Lord Upjohn Lecture (19 November 2010), online at www.legalservicesboard.org.uk/news_publications/speeches_presentations/2010/de_lord_upjohn_lec.pdf

their own narrow self-interests.[38] He has suggested that large law firms have sought to 'exploit' the principles-based approach 'to arrogate power to themselves' and to 'escape considerable, though not all, regulatory oversight'.[39]

As Donald Nicolson argues:

> Detailed ethical codes undermine ethical evaluation. They tend to replace ethical decision-making with mindless conformity to rules and inadvertently suggest that compliance with the code is sufficient for moral behaviour because all possible ethical dilemmas have been considered by the experts.[40]

A further problem with detailed ethical codes is that they can quickly become out of date, with new technologies and new practices changing what might be regarded as standard behaviour. Without regular updating, detailed codes can come to be seen as irrelevant.[41] The benefit of more generalised principles is that they will require less updating.[42]

Are codes about enforcement?

The traditional approach to regulation has been to lay out a set of rules and then to provide a system for dealing with complaints made by the public. John Briton and Scott McLean have set out some of the difficulties with such a 'complaints-driven' approach, which can be summarised as follows.[43]

1. The complaints-driven approach focuses on the conduct of individual lawyers. It involves the punishment of individuals who breach the ethical codes. However, this ignores the fact that lawyers are influenced by the culture of the firms in which they work. As Briton and McLean put it, a complaints-driven approach identifies and deals with the '"bad egg" lawyers, but leaves incubator law firms off limits'.[44]
2. Complaints-driven processes are highly selective in their application. Briton and McLean argue that lawyers working in the areas of family law, personal injury, conveyancing, or probate are many times more likely to be the subject of complaints as compared with those who work in commercial litigation, banking, or construction law. Yet there is no reason to believe the latter groups are more ethical than the former.

[38] J. Flood, 'The landscaping of the legal profession: Large law firms and professional re-regulation' (2011) 59 Current Sociology 507.

[39] Flood (n. 38), 508.

[40] D. Nicolson, 'Mapping professional legal ethics: The form and focus of the ethics' (1998) 1 Legal Ethics 51, 64.

[41] D. Morgan, 'Doctoring legal ethics: Studies in irony in legal ethics and professional responsibility', in R. Cranston (ed.) *Legal Ethics and Professional Responsibility* (Oxford University Press, 2005).

[42] Nicolson (n. 40).

[43] J. Briton and S. McLean, 'Incorporated legal practices: Dragging the regulation of the legal profession into the modern era' (2008) 11 Legal Ethics 241.

[44] Briton and McLean (n. 43), 242.

3. Complaints-driven processes focus on minimum standards. They punish conduct that falls well below the line of acceptable standards, but do nothing to promote behaviours of the highest standard.
4. Complaint-driven processes are reactive. They respond to wrongs only once they have happened, but they do not prevent bad conduct from occurring in the first place. It is true that responding to complaints can be seen as providing a deterrent, but that is a narrow focus to prevention.

Another point that could be added to these is that complaints-driven models usually rely on clients bringing complaints. There are two difficulties with this. The first is that it does not deal with cases in which clients do not have the capacity to complain: when the clients are those with mental illness, for example. Second, it does not deal with unethical conduct that does not harm an identified client, but which is more generally contrary to the public good. Then, there may be no individual with sufficient interest to make the complaint.

One view is that codes should set out what behaviour is unacceptable and should lead to sanctions. Another view is that codes should also provide guidance in cases in which there is no clearly wrong answer, but two permissible alternatives. In such cases, the code might offer guidance to indicate what will be the most ethical course of action, even though taking the less desirable action will not be bad enough to warrant censure. In other words, is the code designed simply to stop the worst kind of behaviour or is the code also to promote the ideal behaviour?[45]

One of the problems that can arise with professional codes generally is that part of them gets ignored. Everyone in the profession overlooks the detail of particular provisions and the enforcers overlook the failure to comply.[46] It may be that the requirement has become obsolete or is simply too burdensome to be realistic and may even be widely accepted as an error. This is a very familiar aspect of regulation and occurs in many walks of life. Good practice is for those overseeing codes to check regularly whether there are obsolete provisions of this kind that need to be rejected. However, the existence of these ignored and unenforced provisions is problematic. There may be provisions on which there is no consensus whether the regulation is, in effect, a 'dead one'.[47] This lack of consensus may mislead lawyers to believe that they will not get into trouble for behaving in a particular way when they will. Worse, it might lead to a lessening of respect for the code if 'comply with the parts with which it makes sense to comply' becomes the norm.

[45] N. Moore, 'The complexities of lawyer ethics code drafting: The contributions of Professor Fred Zacharias' (2011) 48 San Diego Law Review 335.

[46] F. Zacharias, 'What lawyers do when nobody's watching: Legal advertising as a case study of the impact of underenforced professional rules' (2002) 87 Iowa Law Review 971.

[47] J. Sahl, 'Behind closed doors: Shedding light on lawyer self-regulation—What lawyers do when nobody's watching' (2011) 48 San Diego Law Review 447.

One code for all lawyers?

There is an issue over the extent to which it is possible to produce one set of guidance that applies to all solicitors. The practices of the lawyer who focuses on domestic violence cases for little or no pay are a world away from those of the lawyer in the city with large businesses as clients, negotiating deals worth millions of pounds. Both will face profound ethical dilemmas in their work, but those dilemmas will be of a very different kind. The kinds of protections that an individual client seeking advice on his or her welfare entitlements needs from the code are utterly different from the protections needed by a client who is an international corporation.[48]

Indeed, in his review, Nick Smedley suggested that the kind of regulation promoted by the SRA was largely irrelevant for large firms.[49] He suggested creating a 'Corporate Regulation Group' within the SRA, which could then produce guidance tailored to the needs of commercial practice.[50] One issue that the specific guidance could address is how ethical principles work in the international arena in which there are competing understandings of ethical principles.[51] Opponents of this suggestion argue that such an approach would lead to the fragmentation of the solicitors' profession. Solicitors should accept one code for all, even if some will find portions of the code more relevant than others. The idea of a separate code for commercial law firms would not be as revolutionary as it sounds, however: large law firms already arrange their own legal practice courses (as we shall see later in this chapter).

The legal status of codes

There has been discussion of the codes in the case law and the following points appear to be well established.

- Simply because conduct is prohibited by the code does not mean that the behaviour is illegal.[52] The codes set out 'professional conduct', not legality.[53]
- A judge can decide that provisions of a code are in error. In *Thai Trading Co. v Taylor*,[54] a provision under the Solicitors Practice Rules was said to be inapplicable after the court decided that the case law underpinning them should be overruled.

[48] C. Sampford and S. Parker, 'Legal regulation, ethical standard-setting and institutional design', in S. Parker and C. Sampford (eds) *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford University Press, 1996).

[49] Smedley (n. 27).

[50] R. Lee, 'Liberalisation of legal services in Europe: Progress and prospects' (2000) 30 Legal Studies 186.

[51] L. Etherington and R. Lee, 'Ethical codes and cultural context: Ensuring legal ethics in the global law firm' (2007) 14 Indiana Journal of Global Legal Studies 6.

[52] *Picton Jones v Arcadia* [1989] 1 EGLR 43.

[53] *Giles v Thompson* [1993] 3 All ER 321.

[54] [1998] 2 WLR 893.

- It seems that a distinction may be drawn between the core codes and supplementary guidance, with the core codes having a stronger status than supplementary guidance.[55]
- Breach of a code could be evidence of negligence. However, it does not follow that because a lawyer has breached a code that therefore he or she was negligent. That said, if conduct did breach the code, a lawyer would face an uphill task claiming that the breach was reasonable.

Digging deeper

A good ethical lawyer will need to:

1. be able to identify that there is an ethical issue that needs addressing;
2. be equipped to determine what is the best response to the ethical issue; and
3. have the character and determination to carry that decision through.

The ethical codes primarily focus on the second of these skills.[56] A person is likely to consult the code only if he or she thinks that there is an issue on which direction is needed.

The first skill, identifying that there is an ethical problem, is one that is difficult to teach. Some believe that everyone has a 'conscience'—that is, a kind of inner voice that will warn them that what they are doing is wrong. But not everyone is convinced by that.

Notably, the third skill is one that is little dealt with in the code. Perhaps most cases of wrongdoing by lawyers have been ones in which lawyers know that they are doing the wrong thing, but do it anyway.[57]

The Bar Council Code of Conduct

The Bar Council Code of Conduct (the Bar Code) is notably shorter than the SRA Code. This is perhaps unsurprising. Barristers do not have to handle clients' money and their contact with clients is less direct. There are therefore fewer issues with which to deal.

Follow the Code

The Bar Code, para 105, explains:

> A barrister must comply with this Code which (save as otherwise provided) applies to all barristers whenever called to the Bar.

[55] *Garbutt v Edwards* [2005] All ER (D) 316.

[56] R. Moorhead, V. Hinchly, C. Parker, D. Kershaw, and S. Holm, *Designing Ethics Indicators for Legal Services Provision* (Legal Services Board, 2012).

[57] L. Levin, 'Misbehaving lawyers: Cross-country comparisons' (2012) 15 Legal Ethics 357.

The general purpose of the Code is said, in para 104, to be the following:

> The general purpose of this Code is to provide the requirements for practice as a barrister and the rules and standards of conduct applicable to barristers which are appropriate in the interests of justice and in particular:
>
> (a) in relation to self-employed barristers to provide common and enforceable rules and standards which require them:
> (i) to be completely independent in conduct and in professional standing as sole practitioners;
> (ii) to act only as consultants instructed by solicitors and other approved persons (save where instructions can be properly dispensed with);
> (iii) to acknowledge a public obligation based on the paramount need for access to justice to act for any client in cases within their field of practice;
> (b) to make appropriate provision for:
> (i) barrister managers, employees and owners of Authorised Bodies; and
> (ii) employed barristers taking into account the fact that such barristers are employed to provide legal services to or on behalf of their employer.

The general principles

Just like the SRA Code, the Bar Code has some key principles.

Follow the Code

The Bar Code, para 301, reads:

> A barrister must have regard to paragraph 104 and must not:
>
> (a) engage in conduct whether in pursuit of his profession or otherwise which is:
> (i) dishonest or otherwise discreditable to a barrister;
> (ii) prejudicial to the administration of justice; or
> (iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;
> (b) engage directly or indirectly in any occupation if his association with that occupation may adversely affect the reputation of the Bar or in the case of a practising barrister prejudice his ability to attend properly to his practice.

The Bar Code then goes on to deal with detailed provisions governing the practice of the Bar. We will examine these at the appropriate points throughout this book. Notably, these do not rely on the same distinction between 'outcomes' and 'indicative behaviours' as the SRA Code of Conduct; rather, they present the more traditional approach of setting out what conduct is or is not permitted.

Alternatives

We have grown accustomed to the idea of professional bodies publishing ethical guidelines, but there are alternatives. We could simply leave ethical matters to the individual autonomy of the lawyer concerned. Should that lawyer behave clearly unethically, he or she would be subject to punishment, but otherwise ethical issues would be matters of individual conscience. In favour of such a view would be the argument that on many matters of ethical behaviour there are a range of acceptable views and that it would be wrong for the profession to presume a single ethical stance.[58] Further, such an approach would recognise that the ethical thing to do will depend so much on the particular circumstances of the case that generalised guidance is not very helpful. Finally, it can be argued that ethical issues need careful thought and balancing of principles. Encouraging lawyers to think that ethical dilemmas are resolved by means of following rules is encouraging lazy thinking.[59]

These are strong points. However, if people are to be punished for acting unethically, they are entitled to know what the profession will regard as 'unethical'. Second, some practitioners may have no clear intuitive sense of what is the right thing to do and believe that, in such a case, guidance should be offered by the professional bodies. This is especially so given the general lack of ethical education provided both generally and especially in law schools. Third, it is important that the public has complete confidence in the legal profession. The existence of a code marks the profession's commitment to ethical practice and gives the public reassurance that lawyers take their ethical obligations seriously.

A rather different approach is to allow clients and lawyers to set out the ethical principles that will govern their relationship. Indeed, there is some evidence that, in commercial practice, some large companies require lawyers acting for them to agree to an ethical code.[60] This may have an attraction for a company that sells itself as being, for example, 'green' or as having an ethical approach. It will want those who act on its behalf to follow the same approach to preserve its reputation. It also has the benefit for international companies of ensuring that, wherever they are in the world, their lawyers are following the same guidance. There is, of course, no problem with a firm agreeing to taken on heightened obligations beyond those set out in the professional codes. The problem will arise where the agreement between the firm and client permits conduct that would otherwise breach the professional code. As we shall see in this book, there are several ethical principles under which the consent of a client means that the code is not breached. An example would be confidentiality: if the client consents to the disclosure of confidential material, there is no breach of ethics. However, breach of other principles cannot be justified by claims that the conduct was required by the client. So, obviously, it is no defence to an allegation that a lawyer lied to the court if the lawyer claims that the client required

[58] W. Simon, 'Ethical discretion in lawyering' (1988) 101 Harvard Law Review 1083.

[59] Nicolson (n. 40).

[60] C. Whelan and N. Niv, 'Privatizing professionalism: Client control of lawyers' ethics' (2012) 80 Fordham Law Review 2577.

him or her to do so. Andrew Boon has raised another concern.[61] He worries that, under principles-based regulation:

> Firms may have a very different practice on a particular ethical issue than that of a neighbouring firm and divergence could magnify over time. The risk here is that the common ground of professional ethics is lost, with each firm becoming an 'ethical silo'.[62]

There has been an interesting shift in the role of regulation. In the past, the primary role of the regulator was to issue guidance and to handle complaints from the public about lawyers who breached the guidance. There have been two tensions here. The first is the extent to which the regulators should deal with cases in which the complaint is not that the behaviour is unethical as such, but rather that the lawyer has simply done a bad job. Traditionally, regulators have seen complaints of negligent work as a matter to be dealt with by suing in the courts. However, the division between conduct that is unethical and that which is negligent is now coming under pressure. Second, there is a tension over the extent to which regulators are meant to ensure compliance with the guidance or whether their role is simply to respond to complaints from the public.[63]

With this in mind, it might be questioned whether it is helpful to have separate codes for barristers and solicitors. Might it be more helpful to have codes based on categories of work?[64]

Complaints about solicitors

A client who is unhappy about the way in which the lawyer has treated him or her is likely to start by making a complaint to the law firm itself. The SRA Code requires that all complaints are dealt with fairly and promptly.

Follow the Code

O 1.9 clients are informed in writing at the outset of their matter of their right to complain and how complaints can be made;

O 1.10 clients are informed in writing, both at the time of engagement and at the conclusion of your complaints procedure, of their right to complain to the Legal Ombudsman, the time frame for doing so and full details of how to contact the Legal Ombudsman;

O 1.11 clients' complaints are dealt with promptly, fairly, openly and effectively;

[61] Boon (n. 16). [62] Boon (n. 16), 213.

[63] L. Haller, 'Professional discipline for incompetent lawyers? Developments in the UK and Australia' (2010) 17 International Journal of the Legal Profession 83.

[64] Patel et al. (n. 20).

When a lawyer faces a disciplinary tribunal, there is considerable discretion as to how the case is dealt with. The case law does provide some limited guidance, which can be helpful. The following are some of the key principles to emerge.

- Where a lawyer makes a genuine and honest mistake on a matter of professional judgement, it is unlikely that this will result in disciplinary proceedings.[65] If the decision that the lawyer made was one that no reasonably competent solicitor could have made, however, it could be inferred that it was not a genuine mistake because the lawyer could not have properly addressed the issue.
- If a finding of misconduct is reached, then adequate reasons must be given for this finding.[66]
- Sometimes, conduct by a lawyer outside his or her professional work was so serious as to undermine the confidence in the profession and so could be subject to professional sanctions.[67]

Able argues that it is not really ignorance of the rules that is the problem.[68] It is also notable that apologies and an assessment of character play relatively little role.[69]

Barristers

Surprisingly, barristers had no effective complaints system until 1997. Since 2006, the Bar Standards Board has dealt with complaints. This now operates under the Legal Services Board.

All chambers now operate an internal complaints procedure. The head of chambers has the responsibility for setting up such a procedure and ensuring that it operates successfully.

Bar Standards Board complaints procedure

A disappointed client now has an alternative remedy to launching proceedings against a barrister. Clients can complain to the BSB about inadequate professional service and may be awarded up to £15,000 in compensation, although compensation is limited to the loss that is recoverable at law. The case is heard by a disciplinary tribunal. If the tribunal dismisses the complaint, then the client can complain to the Legal Ombudsman, who has the power to award compensation.

[65] *Connelly v Law Society* [2007] EWHC 1175.
[66] *Quinn v Bar Standards Board*, 23 February 2013.
[67] *Afolabi v Solicitors Regulation Authority* [2012] EWHC 3502 (Admin).
[68] Able (n. 11).
[69] F. Bartlett, 'The role of apologies in professional discipline' (2011) 14 Legal Ethics 49.

The complaint may be heard by a three- or five-person disciplinary tribunal. This is chaired typically by a Queen's Counsel (QC) or a judge. The panel will also contain a barrister and a layperson. The most serious sentence that a three-person panel can impose is a suspension for up to three months. A five-person tribunal can suspend barristers for any period of time or strike them off (disbar them).

The tribunal will focus on whether or not there has been professional misconduct—defined as the barrister not adhering to the Code. It cannot cover complaints that are not covered by the Code, for example simply that the advice given was wrong.

The BSB gives the following as an example of how it might handle a complaint:

> A litigant in person in a family case complained to the BSB that opposing counsel in the case had lied to the Court. The complainant said that the barrister had deliberately given false information about the history of the case and had not given the Court important financial statements.
>
> Our Assessment Team looked at the complaint first to see if there was evidence of a possible breach of the Code of Conduct. The Assessment Team then passed it to our Investigation and Hearings Team for a formal investigation to be carried out.
>
> Evidence was gathered as part of the investigation, including the comments of all relevant people involved and transcripts of hearings. That evidence showed that the barrister appeared to have breached the Code of Conduct and those breaches were serious. The investigation file was then sent to a barrister member of the Professional Conduct Committee for a report, with recommendations on future action, to be prepared for presentation to the full Committee. At the Committee meeting, the Committee discussed the case and agreed that:
>
> - there was evidence that the barrister had misled the Court;
> - there were reasonable prospects of securing a finding of professional misconduct in front of a Tribunal; and
> - the regulatory objectives would best be served by taking disciplinary action.
>
> The Committee also took the view that the charges were serious, and if proved, the barrister might be suspended from practice for more than three months. The Committee therefore referred the case to a 5 person Disciplinary Tribunal on two charges of misleading the court contrary to paragraph 302 of the Code.
>
> Following the necessary preparation by the BSB and the service of formal charges on the barrister, an independent Disciplinary Tribunal was convened by the Council of the Inns of Court (COIC). The Tribunal considered all the documentary and oral evidence including all information that the barrister put forward. The Tribunal found the charges proved on the basis that it was sure beyond a reasonable doubt that the barrister had misled the court about the history of proceedings and that crucial financial statements had not been presented to the Court. This meant that the complainant's ability to present her case to the Court had been adversely affected. The Tribunal suspended the barrister from practising for 18 months and ordered the barrister to pay the costs of the hearing.

Scandal!

An enquiry was put in place to investigate the way in which the BSB dealt with complaints about the behaviour of barristers. The LSB found, in 2013, that complaints had lain unresolved for years. There were some cases going back a decade. The investigation found that two in three of those who complain to the BSB think that they are treated unfairly.[70]

The structure of the barristers' profession

Chambers

Barristers can practise only as sole practitioners. Traditionally, barristers cannot set up a company and operate through that, at least while purporting to act as barristers. That is still the general rule, but through alternative business structures (considered later in this chapter), they may now be able to do so. Most barristers are self-employed and the significance of that is set out in the Bar Code.

Follow the Code

The Bar Code, para 104(a), requires barristers:

(i) to be completely independent in conduct and in professional standing as sole practitioners;

(ii) to act only as consultants instructed by solicitors and other approved persons (save where instructions can be properly dispensed with).

It is, however, common for barristers to combine in chambers. There is no need for them to do this and they can operate alone, but most choose to join chambers. By combining with other barristers, they can share the costs of rent, training, and marketing. Typically, a QC will head a chambers, but this is not compulsory. Often, a chambers will have several QCs, but most will be junior counsel. The average size of chambers is around 30 barristers. Most will also have pupil barristers, who are training. There are also often door tenants, who can practise from the building, but are not formally members of the chambers. In England and Wales, there are around 300 sets of chambers.

It is common for chambers to employ a chambers clerk. Despite its name, this is a senior and generally well-paid position. The clerk—in bigger chambers, supported by

[70] Legal Services Board, *Developing Regulatory Standards* (Legal Services Board, 2013).

a team of assistants—arranges the day-to-day work of the chambers. Most importantly, the clerk receives briefs and allocates them between barristers. It is a little-known secret that it is very important for barristers to develop a good relationship with the clerks! Some chambers employ a professional chambers manager.

Barristers and briefs

Barristers have traditionally been forbidden from acting directly for clients, but can do so if briefed by a solicitor. Historically, this can be seen as the deal between the professions: only barristers can advocate in court, but they can do so only if briefed by a solicitor. While the attraction of this arrangement is evident from the point of view of the professions, some clients feel that they are being made to pay twice. Further, they find that the person representing their case in court is someone whom they have met only briefly (excuse the pun!) and with whom they have not had the chance to develop a relationship of trust.

There are arguments in favour of this division. It offers the client a second opinion from an expert who is not influenced by knowing the client personally and who will offer a fresh look, of the kind that a court will take.

In recent years, direct access to barristers has gradually increased. Now, it is possible for members of the public to instruct barristers themselves. However, there are important restrictions: this can happen only if the barrister has had more than three years' call and has attended a training course on dealing with the public, keeping records, and money-laundering regulations. The direct-access barristers must be registered with the Bar Council. Further, certain matters cannot be dealt with by direct access—notably, criminal proceedings, family cases, and immigration issues.

Although the ban on public access to barristers has been lifted a little, as will be seen from these exclusions many important issues cannot be dealt with in that way. Further, barristers are not permitted to hold client funds and cannot issue proceedings or serve documents. This limits the kinds of matters that a client might want to instruct a barrister to do. Where direct access is used, it is typically used to obtain advice (counsel's opinion) on a particular matter or to engage in advocacy for a small-scale piece of litigation.[71]

Licensed access to the Bar can be claimed in two ways: first, by members of a professional body who are automatically given access to the Bar, which includes members of the Institute of Chartered Accountants in England and Wales (ICAEW), for example; second, individuals or bodies with specialist knowledge can apply to the BSB and seek a licence to have direct access. Some police forces have done this. Where barristers are doing licensed access work, there is no need for a special training, although there are restrictions on when they can undertake advocacy.

[71] J. Flood and A. Whyte, 'Straight there, no detours: Direct access to barristers' (2009) 16 International Journal of the Legal Profession 131.

Unlicensed access is permitted for any person. However, the barrister must be satisfied that it is not in the client's best interests to use a solicitor, and that the barrister and client can complete any necessary court work themselves.

The guidance from the Bar Council includes the following list of factors to consider when determining whether a client would be better off using a solicitor:

- Complexity of the case
- Nature of the lay client (some lay clients may be better suited to dealing with a barrister directly than others)
- Capacity of the lay client to carry out the facets of the case that the barrister cannot (correspondence with the Court, filing of documents etc)
- Availability of the barrister related to the probable length of the case
- Whether the administration of justice requires a solicitor
- Whether the client, for whatever reason, is unable to communicate easily with the barrister and therefore, for example, requires an interpreter. The need for an interpreter to be instructed in the case would greatly increase the likelihood that the case would not be suited to the public access scheme.
- However, each case should be considered individually.[72]

Crime, family, and immigration work cannot be done on this basis. To do unlicensed work, barristers must have practised for three years since finishing pupillage and completed a training course. Although quite a number of barristers have completed the course, for complex cases and those involving non-professional clients, most barristers prefer a client to be represented by a solicitor.

It would certainly be wrong to say that the barristers' and solicitors' professions have now fused. The gates have been opened, however, and with alternative business structures becoming popular, the professions are likely to grow ever closer in the future.

Becoming a Queen's Counsel

As a barrister gains experience and reputation, he or she may seek to become a QC. This is sometimes known as 'taking silk'. This is usually after at least ten years' practice. QCs can typically ask for higher rates of pay and take on only more complex cases. In particularly complex cases, a QC may be assisted by a junior barrister. Originally, QCs were appointed in an informal process, involving discussions with the judiciary. Now, there is a more open applications process. Applicants must apply anonymously, and include references from judges and clients. Applications for silk are then considered by a panel. There is a hefty fee for the application. Notably, since the process has become more open, a larger number of women and black and minority ethnic (BME)

[72] Bar Council, *Public Access Work: Guidance for Barristers* (Bar Council, 2010), para. 44.

applicants have been appointed, although they are still underrepresented. That issue will be discussed further in Chapter 14.

McKenzie friend

If someone is not entitled to legal aid and cannot afford a lawyer, one option is to use a 'McKenzie friend', who can act as an advocate on the person's behalf. Usually, this will be someone with some legal knowledge, but who is not a trained lawyer. Before someone can act as a McKenzie friend, he or she needs the leave of the court. The Court of Appeal has confirmed that there is a presumption in favour of allowing a McKenzie friend, but if it is an unsuitable person, leave may be refused.[73] In *Re F*,[74] leave to appoint a McKenzie friend was refused because the person wishing to act was a campaigner against the whole family justice system, who had breached confidentiality in other cases and who failed to understand the role of a McKenzie friend. Where a McKenzie friend cannot be found, a person can act alone.

Alternative business structures

Solicitors typically operate through a partnership or a company. These firms often employ not only solicitors, but also support staff, paralegals, and trainee solicitors. Traditionally, a solicitors' firm has not been permitted to offer services other than legal services. For example, a firm could not set itself up as both a firm of solicitors and an estate agent. If a firm had been keen to do this, it would have needed to create two separate businesses that could be closely connected, but which would officially have had to be kept separate. Where there are close links, there are concerns that conflicts of interests can arise, and lawyers need to act carefully. For example, the close links between solicitors and claims firms have been said by some to create ambiguities for clients. In the Legal Services Act 2007, however, the law was changed to provide much more flexibility and to permit the creation of 'alternative business structures' (ABSs). These now mean that a single body can provide legal, accountancy, and other services.[75] Under ABSs, lawyers can now work alongside other professionals, and, indeed, even non-lawyers can own and manage firms. This means that not only might a firm of solicitors now employ an accountant and offer 'one-stop shop' legal and accountancy services, but also that non-legal groups, such as supermarkets, could employ lawyers and offer legal services—hence the nickname 'Tesco law'.

[73] *Mackenzie friend, Re O (Children) (Hearing in Private: Assistance)* [2005] EWCA Civ 759, [2006] Fam 1.
[74] 14 May 2013.
[75] Boon (n. 16).

As will have been clear from that brief introduction, the ABS can cover a wide range of bodies. At the one extreme, they can be sophisticated services for commercial clients, combining a range of specialist professional services;[76] at the other end, they can be high-street names offering basic legal services to individuals—perhaps particularly aimed at people who would not be familiar with legal services.

The idea of non-lawyers owning legal services has not been welcomed by everyone.[77] It will pose a challenge to the attorney–client privilege (see Chapter 5) because the information given will not be restricted to a lawyer and a client. Prima facie, a lawyer is not permitted to disclose information given by a client; if the lawyer is under a manager who is a non-lawyer, then he or she may be expected to disclose the paperwork. In an ABS, the best course of action is to request the client's permission to share the information with other staff in the firm as necessary. However, a client may well be reluctant to consent to that. Further difficulties can arise with regards to conflicts of interest. The basic rule is that a firm cannot work for two clients who have conflicting interests. However, with ABSs involving a range of different professionals and particularly being owned by a range of bodies, it will become very hard for them to ensure that there are no conflict difficulties.

Lawyers may, however, welcome a new source of investment and may be able to open up new markets by providing a range of services. It is even possible that ABSs could be listed on the stock exchange and a market open up in ownership of them.

All ABSs must be approved by the Legal Services Board, although the LSB has authorised the Law Society to give approval on its behalf.[78] Once approved, non-lawyers can be involved in a professional, managerial, or ownership activity, including as partners. They cannot, of course, practise as lawyers. The ABS has proved popular, with 65 applications being made within the first two weeks of applicants being accepted. External investors may be attracted by the opportunity to invest in commercial firms, especially given their record of reliable and high profitability.

A smaller law firm may be attracted by the benefit of being linked to a well-known household brand name or simply a national group.[79] National chains, such as Face2Face Solicitors[80] and High Street Lawyer,[81] have been launched.

The client may gain from this too: greater competition may increase investment in law firms, resulting in improvement to the range of services offered. It is, however, likely that there will be a decline in the number of independent high-street firms. Reardon draws

[76] A. Perlman, 'Toward a unified theory of professional regulation' (2003) 55 Florida Law Review 97.

[77] K. Reardon, 'It's not your business! A critique of the UK Legal Services Act of 2007 and why nonlawyers should not own or manage law firms in the United States' (2012) 40 Syracuse Journal of International Law and Commerce 155.

[78] Legal Services Act 1997, s. 27 and Sch. 10.

[79] N. Jarrett Kerr, 'Alternative business structures: The long pregnancy' (2011) 11 Legal Information Management 82.

[80] www.face2facesolicitors.net/ [81] www.highstreetlawyer.com/

attention to the opticians market, in which, despite some big-name players, small independent opticians seem to have managed to survive.[82] There is, however, a real fear that the marketing, brand, and economic power of the large firms will offer a challenge with which small firms will not, in the long term, be able to compete.

Legal education

At the heart of professionalism is the claim that there are special skills and knowledge. It is therefore essential that all those who practise professionally as lawyers have been educated and trained to the appropriate level.

There are currently four educational elements required of all practising lawyers:

1. the qualifying law degree (QLD) or a one-year conversion course (the Graduate Diploma in Law, or GDL);
2. the vocational training year (the Legal Practice Course, or LPC, or the Bar Professional Training Course, or BPTC);
3. working as a trainee solicitor for two years or as a pupil barrister for one year (pupillage); and
4. continuing professional development (CPD) post-qualification.

We will consider each of these in turn.

The qualifying law degree

A solicitor or barrister must complete a full-time law degree, or a degree in another subject and then the graduate diploma course (commonly known as the 'conversion course'). There is another route and that is to qualify as a member of the Chartered Institute of Legal Executives (CILEx) and then to take the solicitors' vocational course.

The law degree, if it is to count for the professional bodies, has to be a qualifying law degree (QLD). It requires coverage of the six pillars:

- tort;
- crime;
- land;
- equity and trusts;
- public law; and
- European law.

This is controversial for several reasons, as we shall now see.

[82] Reardon (n. 77).

Which subjects are on the list?

First, there is disagreement about which subjects are or are not on the list.[83] For example, why is personal property not included, or the law of property or family law? Why is commercial law, which is important for many practising lawyers, not required? The great Peter Birks was highly critical of insistence on the foundational subjects:

> The greatest absurdity which will now be continued for the best part of a decade is the combination of a list of compulsory subjects and the impossibility of substitution. It means in effect that nearly half the time available must be clogged up with courses pitched at the most superficial level. There is so much that has to be done in each compulsory module that superficiality is inevitable. Look for example at Public Law, and calculate the time available for administrative law or human rights. A law school which wants to give depth a priority over breadth is crippled by these prescriptions, for no reason at all beyond a bureaucratic refusal to contemplate a more flexible system. If, for example, someone has done company law, commercial law, family law and labour law, no case whatever can be made for worrying about the omission of some part of the so-called foundations.[84]

For the purposes of this book, a key question is whether legal ethics should be a compulsory subject on the law degree.

Recent history on legal education has been heavily influenced by the Ormrod Report of 1971,[85] the Benson Report of 1979,[86] and the Marre Committee Report in 1989.[87] One debate that runs through these reports is the division between the academic year and the vocational year. Interestingly, the reports acknowledged that ethical issues were important for lawyers. The Benson Report states:

> It is essential that throughout their training students should be impressed with the importance of maintaining ethical standards, rendering a high quality of personal service, maintaining a good relationship with clients, providing information about work in hand for clients, avoiding unnecessary delays, maintaining a high standard in briefs and preparation for trial, promptly rendering accounts with clear explanations and attending to other matters mentioned elsewhere in this report.[88]

The Marre Report specifically acknowledged the need for 'an adequate knowledge of professional and ethical standards'[89] but it was unclear at what stage of the legal education this was to be imparted.

[83] R. Huxley-Binns, 'What is the "Q" for?' (2011) 45 The Law Teacher 294.

[84] P. Birks, 'Compulsory subjects: Will the seven foundations ever crumble?' (1995) 1 Web Journal of Current Legal Issues 1, 7.

[85] Justice Ormrod, *Report of the Committee on Legal Education* (Lord Chancellor's Department, 1971).

[86] R. Benson, *The Royal Commission on Legal Services* (Lord Chancellor's Department, 1979).

[87] The Committee on the Future of the Legal Profession, *A Time for Change* (General Council of the Bar and the Law Society, 1988).

[88] Benson (n. 86), para 39.47.

[89] Committee on the Future of the Legal Profession (n. 87), para. 12.21.

How law is to be taught

Another issue of controversy surrounds whether law degrees should be taught using the positivist approach towards the law—that is, the view that law can be learned by looking at the legislation and cases alone. Critics argue that we must understand the social, political, and moral context within which the law operates in order to come to a full comprehension of the law.

There is a tension among universities and even among academics over the extent to which legal study at degree level at university should be designed to prepare someone to be a lawyer. Clearly, the profession's main aim is that law degrees produce competent lawyers. However, academics seek academic respectability: wanting to engage in theoretical, interdisciplinary, and critical work. If academic lawyers are seen simply as people who teach rules to students, they will not be held in high esteem in the wider academic community. Anthony Bradney rejects the view that the law degree is about preparing people to be professional lawyers.[90] He has a grander aim: the fulfilment of human flourishing. Contrast that with the view of Stephen Mayson:

> [T]he starting point for considering changes to professional legal education must be the needs of the employment market for qualified lawyers and, in particular, those parts of the market that offer employment to the greatest number of trainees and newly qualified lawyers.[91]

Clearly, students must be part of the discussion. Their payment of fees arguably gives them a greater stake in the content of the course. Those seeking 'value for money' will seek a degree that best places them in the market to get the career that they want. 'Commercial awareness' came top in a study of what solicitors are looking for in graduates, yet few university courses teach that, at least in their compulsory courses.[92] Others emphasise the importance of the use of information technology in the modern commercial world, yet that is rarely a major part of a law degree.[93] However, it should be noted that only 60 per cent of law graduates go into legal practice, so ensuring that the degree provides a broad range of skills that might be used in a range of occupations seems sensible. Only just over half of qualified lawyers have a law degree.

[90] A. Bradney, 'English university law schools, the age of austerity and human flourishing' (2011) 18 International Journal of the Legal Profession 59.

[91] S. Mayson, *The Education and Training of Solicitors: Time for Change* (Legal Services Institute, 2010), 4.

[92] C. Strevens, C. Welch, and R. Welch, 'On-line legal services and the changing legal market: Preparing law undergraduates for the future' (2010) 45 The Law Teacher 328.

[93] C. Strevens, 'The changing nature of the legal services market and the implications for the qualifying law degree' (2011) 1 Web Journal of Current Legal Issues 1.

The vocational year

The vocational year comprises a one-year course: the Bar Professional Training Course (BPTC) for barristers and the Legal Practice Course (LPC) for solicitors.[94] These are designed to improve the quality of knowledge and skills needed for a practical lawyer. Their development might be seen as acknowledgement that the academic law degree was not providing the complete skill set required to practise.

The aim of vocational training has been said by the Solicitors Regulation Authority to be to:[95]

1. research and apply knowledge of the law and legal practice accurately and effectively
2. identify the client's objectives and different means of achieving those objectives and be aware of
   - the financial, commercial and personal priorities and constraints to be taken into account
   - the costs, benefits and risks involved in transactions or courses of action
3. perform the tasks required to advance transactions or matters
4. understand where the rules of professional conduct may impact and be able to apply them in context
5. demonstrate their knowledge, understanding and skills in the areas of:
   - Professional Conduct and Regulation
   - the core practice areas of Business Law and Practice, Property Law and Practice, Litigation and the areas of wills and administration of estates and taxation
   - the core skills of Practical Legal Research, Writing, Drafting, Interviewing and Advising, and Advocacy

   Students should also be able to transfer skills learnt in one context to another;
6. demonstrate their knowledge, understanding and skills in the three areas covered by their choice of electives, and
7. reflect on their learning and identify their learning needs.

The overarching aims of the BPTC are to:

- prepare students of the Inns of Court for practice at the Bar of England and Wales;
- prepare students for pupillage; and
- enable students of the Inns from overseas jurisdictions to acquire the skills required for practice at the Bar of England and Wales, thereby assisting them to undertake further training or practice in their home jurisdictions.

[94] P. Knott, 'Becoming a lawyer: Entry level training for the legal profession' (2010) 19 Nottingham Law Journal 42.

[95] SRA and BSB, *Legal Practice Course Outcomes* (SRA and BSB, 2011), 2.

Specific objectives of the course are to:

- bridge the gap between the academic study of law and the practice of law;
- provide the foundation for the development of excellence in advocacy;
- inculcate a professional and ethical approach to practice as a barrister;
- prepare students for practice in a culturally diverse society;
- prepare students for the further training to be given in pupillage;
- equip students to perform competently in matters in which they are likely to be briefed during pupillage;
- lay the foundation for future practice, whether in chambers or as an employed barrister; and
- encourage students to take responsibility for their own professional development.

In recent years, a group of major commercial firms has created a City LPC that focuses on preparing graduates to work in a commercial setting. This has proved somewhat controversial. The setting up of different training for different kinds of legal practice may be seen as a challenge to the unity of the legal profession.

Training and pupillage

The training stage involves a period of training working with a professional. For a barrister, this is a one-year pupillage; for solicitors, a two-year traineeship.[96]

Continuous professional development

Much CPD within the legal profession takes the form of lawyers remaining up to date with the latest developments in the law and procedure.[97] Although lawyers must attend CPD sessions, there is little attempt to ensure that they have understood what they have heard.

The place of ethics in legal education

As already indicated, teaching ethical principles has traditionally played a lowly part in legal education. The kindest way of putting it might be that it has been seen as a consistent theme in all topics and so as not requiring explicit articulation.

There are a number of reasons why ethics have played a relatively small part in legal education.[98] First, there is general feeling that ethics cannot be taught. If a person

[96] J. Ching, 'The significance of work allocation in the professional apprenticeship of solicitors' (2012) 34 Studies in Continuing Education 57.

[97] J. Ching, 'Solicitors' CPD: Time to change from regulatory stick to regulatory carrot?' (2011) 3 Web Journal of Current Legal Issues 3.

[98] J. Hodgson and N. Peck, 'How "vocational" do law schools want to be? A brief comparison of England and the USA' (2010) 19 Nottingham Law Journal 45.

is of a dishonest disposition, then there is no point teaching him or her about honesty. For many ethical issues, our consciences or instincts will tell us what to do and encouraging people to follow that is more reliable than setting down rules. Teaching ethics is therefore in danger of teaching the obvious.

Second, for some, lawyers' ethics are a matter of practice. They elide into issues such as speaking nicely to clients and negotiating well, and so are better matters for the professional training period than a law degree.

Third, there is, as will be apparent in this book, a danger of reducing ethical analysis to a set of rules. Ethical responses must be sensitive to the particular contexts and individuals involved. It may be more ethical to encourage lawyers to seek a solution to dilemmas that works for the good of the particular client in the particular context than to require them to follow abstract rules.

Fourth, there may be a question whether ethics is even appropriate to the profession. Lawyers are meant to be competitive, individualistic, ruthless, legalistic, authoritative; asking them to be moral might, in fact, be dangerous. It invites controversy: whose ethics and whose morals are we going to teach? It is interesting that writing on legal ethics, such as this book, generally avoids the controversial and focuses on the 'legal' issues, such as duties of confidentiality. What of love? Fear? Altruism? Joy? Where do these fit in with legal ethics?[99]

Support for the importance of ethics in legal education may come from a range of points of view. Brownsword suggests the following groups of supporters.[100]

1. The *legal idealist* sees law as inevitably and unavoidably moral. Legal argument must, in its nature, involve moral argument, because law grows from and is shaped by moral principles. It is simply impossible to teach or to understand law in an amoral context.
2. The *intersectionist* sees that there are some cases in which law and moral issues intersect, and that an understanding of ethics is necessary for those cases. This, if you like, is a more moderate version of the legal idealist.
3. The *contextualist* believes that the law can be understood only in its broad context. This includes the economic, political, and social realities within which the law operates; it also operates with the ethical principles prevalent in society.
4. The *liberal* argues that law degrees should give lawyers a broad education, with an understanding of the law, but also an ability to critique it—and that this requires an understanding of moral principles.

[99] A. Boon and J. Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart, 2008), 166.

[100] A. Brownsword, 'Ethics in legal education: Ticks, crosses and question marks' (1987) 50 Modern Law Review 529.

Alternative view

Is it really possible to teach ethics 'in the classroom'? The world of a practising solicitor or barrister is a mystery to many students, and indeed many lecturers. It is one thing to decide what is the right thing to do within a classroom, when we have plenty of time to think, but in a high-pressure, fast-moving environment, it is far from straightforward. Further, the cultural pressures generated by the expectations of those senior to us and of the firm in general can have a powerful effect. Might it not therefore be better to delay ethics training until someone has worked for, say, a year with a firm? Or is that an argument for training both during a degree and beyond?

The delivery of ethics

If we accept that ethics should be included in a law degree, in what way should it be taught?

1. Should ethics be a stand-alone subject or included in every topic? The argument for keeping it separate is twofold. First, some topics, such as confidentiality, apply across the board, whether we are talking about family law, land law, or contract law. Unless it is given its own designated place, it may slip between the cracks and no subject will cover it, or it will become highly repetitive. Second, there is a danger that some of the broader tensions between lawyers' ethics may not be articulated. For example, the distinction between the family lawyers and commercial lawyers may never be explored if they are treated separately. On the other hand, there are dangers that if legal ethics are taught as a stand-alone topic, they will not be treated as seriously as a 'hardcore legal subject', such as contract law. They may even be 'relegated' to a sideline or as part of the general introduction to a law degree. This need not happen. More significantly, legal ethics may be seen as isolated from real practice. The solution is obvious: we need *both* approaches. Legal ethics should both be studied as a subject in its own right *and* integrated into the syllabus generally.
2. It is easy to reduce lawyer's ethics to a set of rules—'Thou shalt not'—and weaken the significance of a truly ethical approach. Deborah Rhode has warned against ethics courses becoming 'unethics… the careful delineation of precisely how far the lawyer can go without disbarment, with copious suggestions on how to do things lawyers ought not to be doing'.[101]

   There is a particular danger of this given the emphasis on commercialisation. If firms want to do everything that they can to make money and make themselves as attractive as they can to clients, there is a danger that legal ethics will be perceived

[101] D. Rhode, *Access to Justice* (Oxford University Press, 2004), 34.

as a barrier to those goals. The temptation is therefore to restrict ethical limitations to as narrow a band of cases as possible, so 'liberating' the lawyer to increase profit and do what the client wants.

3. There is also a danger that, by reducing ethics to rules, we rob people of ethical judgements. Some of the most unethical conduct that we have seen lawyers commit has been technically within the rules, but should have been clearly immoral. The issue here is to ensure that students realise that the rules on 'lawyers' ethics' are not meant to supplant the basic principles of behaving properly. A study of ethics should not rob someone of ethical common sense.
4. One of the difficulties is how to deal with morally controversial topics. It is understandable that universities and professions do not want to be seen clearly to take sides on a controversial issue. You do not see, for good reason, a law faculty proclaiming that it opposes the right to die and supports the right to life of a foetus—in part, no doubt, because there would be no agreement among the faculty members on such a matter. However, there is no real problem here: not many lecturers seek to turn students into clones of themselves![102] Lecturers are more likely to want to encourage students to think about and articulate the different views that can be taken. So too with ethics.

Some of these issues feed through into the style of teaching legal ethics. This tends not to be the old-fashioned way in which core subjects are often taught: setting out key definitions and central legal principles, and key cases and statutes. Rather, hypothetical scenarios are given, and students are often encouraged to discuss and explore these.

This practice has several benefits. First, students need to think through their ethical analyses and not assume that 'Everyone would agree…'. For example, I remember giving a group of students a scenario in which a professional, after a busy day at work, went home and discussed her clients with her husband. Interestingly, there was one group of students who were shocked and thought that there could be no question but that this was completely wrong. Another group were astonished that anyone would think there was anything wrong with this scenario. (This latter group contained many students who experienced this as normal home life!) At least one benefit of the exercise was that the two groups came to realise that we cannot always assume '*Everyone* thinks…' on an issue.

Second, that same scenario revealed another issue. As the discussion developed, it became clear that more information was required to determine the answer. If all that the lawyer was telling her husband was that a client came in wearing a wild orange suit, no one thought that there was anything wrong with this. Similarly, if the lawyer was telling her husband information that would help the husband's business, all agreed that this would be wrong. So it became clear that much would depend on the precise circumstances.

[102] What an awful thought!

A third benefit of this approach is that it can bring home to students the strength of feelings. Some might see some of the rules of ethics as technical, but hearing from others the impact of a breach is powerful. I remember hearing a student describe her experience of a doctor telling her mother what the student had disclosed and discussing the impact on her life. Suddenly, the rules on protection of confidentiality did not seem so dry after all!

Another approach is using role play. There is some evidence that persuading people to act out ethical behaviour encourages people to act in that way. It also helps them to appreciate and discuss how behaving in the ethically appropriate way can be challenging. This can take place in the classroom, but more significantly as part of the traineeship that the professions offer. One of the roles of the close supervision in the first year or two of practice is to ensure that ethical standards are kept up.

Role play also encourages 'self-reflection'. Why did people act as they did? What were their true motivations? Was there a more ethical alternative? Encouraging lawyers to ask themselves these questions is good practice. Where universities offer clinical practice or pro bono work, this can perform this role too.[103]

Perhaps it is worth ending this debate over reform of legal education with a reference to the views of Lord Neuberger of Abbotsbury:

> There is real reason for doubting whether there is that much wrong. UK lawyers enjoy a high worldwide reputation. Places on our university law degrees, at both undergraduate and postgraduate levels, are highly sought after. Research and publications of academics in our universities are of high value and enjoy international recognition. Our courts and our substantive law are prized throughout the world—not only by those who seek to litigate in our courts, but also by those who seek our judges and lawyers out to assist them in the development of their laws and justice systems.[104]

The Legal Education and Training Review

In 2013, a major review of legal education and training was produced.[105] The Legal Education and Training Review (LETR) summarised its main findings as follows:

Quality

- strengthen requirements for education and training in legal ethics, values and professionalism, the development of management skills, communication skills, and equality and diversity;
- enhance consistency of education and training through a more robust system of learning outcomes and standards, and increased standardisation of assessment;

[103] D. Nicolson, '"Education, education, education": Legal, moral and clinical' (2008) 42 The Law Teacher 145.

[104] Lord Neuberger of Abbotsbury, 'Lord Upjohn Lecture 2012: Reforming legal education' (2013) 47 The Law Teacher 4, 6.

[105] Legal Education and Training Review, *Setting Standards* (LETR, 2013).

- place greater emphasis on assuring the continuing competence of legal service providers through a system of continuing professional development that will require practitioners more actively to plan and demonstrate the value of continuing learning;
- require regulators to gather and make available key data and information that will reduce information gaps, support decision-making by prospective entrants, consumers and employers, and increase the effective market regulation of LSET.

Access and mobility

- establish professional standards for internships and work experience;
- enhance quality and increase opportunities for career progression and mobility within paralegal work, by encouraging regulatory and representative bodies to collaborate in the development of a single voluntary system of certification/licensing for paralegal staff, based on a common set of paralegal outcomes and standards;
- provide higher quality and more accessible information on the range of legal careers and the realities of the legal services job market;
- support and monitor the development of higher apprenticeships at levels 6–7 as a non-graduate pathway into the regulated sector.

Flexibility

- expect regulators to co-operate in setting outcomes for LSET to ensure equivalence of baseline standards;
- clarify systems for accreditation of prior learning and transfer between professional routes, and ensure that these do not create unnecessary barriers to progression;
- remove requirements in training regulations that unduly restrict the development of innovative and flexible pathways to qualification, including the more effective integration of classroom- and workplace-learning.[106]

The Legal Services Board has announced that a period of consultation will take place on how to implement these reforms. It is seeking responses particularly on five principles:

i. Education and training requirements focus on what an individual must know, understand and be able to do at the point of authorisation
ii. Providers of education and training have the flexibility to determine how best to deliver the outcomes required
iii. Standards are set that find the right balance between what is required at entry and what can be fulfilled through ongoing competency requirements
iv. Obligations in respect of education and training are balanced appropriately between the individual and entity, both at the point of entry and ongoing

[106] LETR (n. 105), 121.

v. Education and training regulations place no direct or indirect restrictions on the numbers entering the profession[107]

It is too early to know quite what reforms will emerge from the LETR and the further consultations, but the following points seem to be clearly emerging.

1. There is a need to provide better training on some of the practical skills that people need in the profession, such as communication skills.
2. It is important that lawyers are trained in ethics.
3. There needs to be flexibility so that training can match the kind of work that a lawyer might undertake. So someone seeking a career in commercial law does not necessarily need the same training as a person intending to work in criminal law.
4. Ensuring the education and training process produces a diverse profession.

Conclusion

It is essential that the legal profession is well regulated. The public must have confidence that lawyers will treat them well and that the clients will be compensated if the lawyers do not. Lawyers need to have clear guidance regarding what is or is not expected of them. Lawyers play a central role in the legal system, and if that is to flourish, it is important that lawyers perform the role that they should.

However, the regulation of the legal profession is difficult. It can be used by government to control lawyers and to make sure that they do not cause the authorities too much trouble. On the other hand, there are complaints that the codes are more concerned with maintaining the reputation of the legal profession than promoting the interests of clients.[108]

Further reading

The nature of regulation is discussed in the following works:

R. Able, *Lawyers in the Dock: Learning From Attorney Disciplinary Proceedings* (Oxford University Press, 2009).

A. Boon, 'Professionalism under the Legal Services Act 2007' (2010) 17 International Journal of the Legal Profession 195.

S. Patel, C. Howarth, J. Kwan, and P. McDonald, *Reform of the Legal Profession* (Wilberforce Society, 2012).

[107] LSB, *Proposals on Draft Guidance on Education and Training* (LSB, 2013), 12.

[108] D. Rhode and A. Woolley, 'Comparative perspectives on lawyer regulation: An agenda for reform in the United States and Canada' (2012) 80 Fordham Law Review 2761.

R. Pearce and E. Wald, 'Rethinking lawyer regulation: How a relational approach would improve professional rules and roles' [2012] Michigan State Law Review 513.

D. Rhode and A. Woolley, 'Comparative perspectives on lawyer regulation: An agenda for reform in the United States and Canada' (2012) 80 Fordham Law Review 2761.

N. Smedley, *Review of the Regulation of Corporate Legal Work* (Law Society, 2009).

B. Still, 'Outcomes focused regulation: A new approach to the regulation of legal services' (2011) 11 Legal Information Management 85.

C. Strevens, 'The changing nature of the legal services market and the implications for the qualifying law degree' (2011) 1 Web Journal of Current Legal Issues 1.

C. Whelan and N. Niv, 'Privatizing professionalism: Client control of lawyers' ethics' (2012) 80 Fordham Law Review 2577.

Legal education is considered in these works:

A. Brownsword, 'Ethics in legal education: Ticks, crosses and question marks' (1987) 50 Modern Law Review 529.

J. Hodgson and N. Peck, 'How "vocational" do law schools want to be? A brief comparison of England and the USA' (2010) 19 Nottingham Law Journal 45.

Lord Neuberger of Abbotsbury, 'Lord Upjohn Lecture 2012: Reforming legal education' (2013) 47 The Law Teacher 4.

D. Nicolson, '"Education, education, education": Legal, moral and clinical' (2008) 42 The Law Teacher 145.

M. Robertson, L. Corbin, and K. Tranter, *The Ethics Project in Legal Education* (Routledge, 2010).