

Regulation, Education and Training

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Introduction¹

The Legal Education and Training Review, due to conclude in December 2012, is likely to raise a number of issues of significance to the SRA. This paper sets out some of the key issues arising from the review with respect to the relationship between legal education and training (LET) and regulation. In this context, the LET has identified two questions:

- (i) what is the role of legal education and training as a regulatory tool for assuring competence and driving compliance; and
- (ii) what is the role of regulation in ensuring appropriate LET and what form should such regulation take, in particular what should be the balance between specific training regulation and the use of conduct of business rules and entity-based regulation as drivers of LET compliance.

There is a third, logically prior, question:

- (iii) what are the main purposes of legal education and training: what is it trying to achieve?

The latter is the most important – without a clear understanding of what LET is trying to achieve, and in what contexts, it is difficult to devise a strategy for change. The pressures for change arising from the review may be significant. The existing context is one in which there are many varieties of legal services providers of varying levels of qualification, some with protected titles and some without, and where mobility between different sectors is difficult.² Moreover, evidence suggests that qualification does not necessarily mean competence: the LSB's recent research on will-writers, for example, found there was little difference between solicitors and specialist will-writers in terms of the level of wills that failed; in fact banks and their affiliates produced the highest levels of quality.³ Earlier research has found that in the context of legal aid work, specialist but non-qualified providers (or 'para-professionals') demonstrated higher levels of competence than solicitors.⁴ Other research has found that specialisation, rather than qualification per se, is the best predictor of

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² LETR, Discussion Paper 01/2012. *Key Issues (1) Call for Evidence* – (2012).

³ IIF, *Research Report: Understanding the Consumer Experience of Will-Writing* (London: LSB, 2011).

⁴ R. Moorhead, A. Sherr and A. Patterson, 'Contesting Professionalism' (2003) 37 *Law and Society Review* 765-808.

competence.⁵ Based on those findings, the question has to be asked: is the general licence to practice fit for purpose?

This paper sets out briefly what the role of LET can be in driving professionalism and compliance in general terms (section 1), then turns to consider the question of what LET is trying to achieve (section 2). Section 2 also considers very briefly some of the key issues to be determined in designing and delivering LET, but the main focus of the paper is in Section 3. This considers the role of LET in the context of a wider regulatory issue, which is the different roles of entity, activity and title based regulation. It suggests that re-thinking the relationship between these three groups could help to sharpen the focus on what it is that LETR is trying to achieve, and how it may be re-shaped.

1. Role of LET as a regulatory tool

Role of LET in driving competence, ethics and professionalism

What should be the role of LET in ensuring competence and professionalism? Some definitional clarification is needed first to avoid confusion. Competence defined here as the ability to meet a defined standard or standards of performance both at a particular point in time and on an on-going basis.⁶ It is a composite notion, comprising the ability to employ substantive knowledge and technical skills effectively in given situations.

However, 'competence' can be seen as invoking a baseline level standard; someone is 'competent' if they pass the threshold, but they are less skilled than those classed as 'experts'. The Oxford English Dictionary defines competence as 'having the necessary ability, knowledge, or skill to do something successfully' but to a level which is 'acceptable and satisfactory though not outstanding'. There is a debate to be had as to whether LET should be assuring competence or should be more aspirational and aim to ensure expertise. Whilst I would argue that the longer term goal should be to ensure expertise, for present purposes I will proceed on the basis that the minimum aim of LET should be to ensure a baseline level of competence, at least in the initial stages.

Professionalism, in contrast, invokes a standard above 'competence', and which is comprised not only of substantive knowledge and technical skills but of two other elements: tacit knowledge and 'craft' like skills gained after considerable experience and reflection, and an ethical commitment which sees the upholding of certain norms of conduct as integral to the performance of the role. Although the OED defines 'professional' as someone 'competent or skilled' (and paid), I would argue that it is both the level of expertise together with the ethical dimension which distinguishes 'professionalism' from that of competence.⁷

⁵ Ibid, H. Genn and Y. Genn, *The Effectiveness of Representation at Tribunals, Report to the Lord Chancellor*. (London: Lord Chancellor's Department, 1999); H. Kritzer, 'The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World,' (1998) 33 *Law & Society Rev.* 713–59; R. Moorhead, 'Lawyer Specialization – Managing the Professional Paradox' (2010) 32(2) *Law and Policy* 226-259.

⁶ See LETR, *Briefing paper 01/2011: Competence* for discussion.

⁷ See eg S. Hilton and H. Slotnick, 'Proto-professionalism: how professionalisation occurs across the continuum of medical education' (2005) 39(1) *Medical Education* 58-65.

In particular, 'professionalism' invokes a sense of public duty and responsibility – marking out 'professionals' from (mere) commercial actors. Herein lies a core tension in the position of lawyers in our society – they operate within markets, but are also meant to stand above them; to act for clients, but also to decline to act for them in ways which would be contrary to broader public values.⁸ Moreover, it is important to stress that professionalization is a process which requires not just formal training, but also learning and adopting the ethical norms of a particular social group. As such, it is learned more through socialisation and modelling the behaviour of other professionals than through the memorising of certain rules of conduct.

The role of education, training and professionalization in driving compliance

Regulators should take a keen interest in the education and training of those they regulate as it can affect the regulatory strategies they can use.⁹ In particular, professionalization can help regulators adopt less prescriptive strategies, such as principles-based or outcomes-focused regulation. This does not necessarily mean that regulators should prescribe or assess the detailed aspects of those standards of education and training, but they should certainly take an active interest in what they are, and there is a strong rationale for arguing that they should set threshold requirements for core standards of competence, as discussed below. Regulation is frequently about acting on behaviours, and the more those behaviours are consistent with producing the social outcomes sought, the easier the regulator's task. Research into what motivates compliance with regulatory norms suggests that there are three separate motivating forces: self-interest, moral agreement, and social pressure. Broadly speaking, people comply with regulatory requirements for one or more of three reasons: because it is profitable for them to do so, or because they agree with the aims of the regulatory project and /or the way it is implemented, and / or because everyone else in their social group or surrounding organisational field is complying. Responses to regulation are often driven by a complex combination of one or more of these different elements.¹⁰

It is worth reflecting on the implications of these insights for the role of professionalization in shaping behaviour. In its ideal (perhaps some would say idealised) form, the fact that regulatees are members of a profession should be a significant asset to regulators. Professional associations create social networks which can exert important motivational forces on how individual members behave; and those individuals can be important carriers of the social and ethical norms of the profession, carrying those norms with them into other contexts, such as healthcare, education or commerce.¹¹ As such, members of a profession can be important shapers of organisational culture and behaviour, even in organisations where they are a numerical minority, as long as they are in

⁸ See eg S.L. Cummings, 'What are Good Lawyers?' in S.L. Cummings (ed), *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Cambridge: CUP, 2011).

⁹ Throughout, 'regulators' is used to refer to regulatory 'arms' of professional bodies; 'professional bodies' to refer to the representative arm.

¹⁰ V. Braithwaite, K. Murphy and M. Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007) 29(1) *Law and Policy* 137; C. Oliver, 'Strategic Responses to Institutional Processes' (1991) 16(1) *Academy of Management Review* 145; S. Winter and P. May (2001), 'Motivation for Compliance with Environmental Regulations' (2001) 20(4) *Jnl of Policy and Management* 675.

¹¹ C. Heimer, 'Competing Institutions: Law, Medicine, and Family in Neonatal Intensive Care' (1999) 33(1) *Law and Society Review* 17-66.

sufficiently senior positions within those organisations. No doubt that this normative power can be used as a double-edged sword. It can have negative effects: if the norms are defective, if they create social, cultural or economic barriers to entry, or if they impede cross-disciplinary working, for example, and there is certainly a wealth of literature on the pathological effects of the legal profession itself.¹² However, conversely, professionalization can have positive effects, improving both expertise and, it is hoped, ethicality. Professionalization can also empower those within organisations to act as internal agents of change. Indeed, for this reason professionalization is often sought by compliance officers and others within organisations who are charged with ensuring firms comply with different sets of internal or external regulatory rules.¹³ So, professionalization may not mean that regulatees know the detailed aspects of the regulatory rules but, ideally, it should mean that they have an ethical awareness and commitment which is in line with the principles underlying those rules.

2. What LET is necessary to ensure appropriate levels of competence and professionalism?

It should be obvious that if well done, LET can play a key role in ensuring both competence and professionalism. Clearly, like anything, not just any form of LET will succeed, for all the various reasons that education and training can fail to either educate or train. However, assuming for the moment that it is well done, the following questions arise, more or less in this order:

- (i) What should be the aims of LET / what competences should LET be aiming to provide?
- (ii) What kind of LET will achieve those ends?
- (iii) Who should provide it?
- (iv) When and how should it be provided?
- (v) Who needs to have these competences, to what level, at what stage in their career, and how can it be verified?

What follows is an attempt to outline very briefly some of the key issues which need to be addressed in answering these questions.

(i) What should be the aims of LET?

The overriding question should be what skills and competences is LET aiming to provide? This in turn requires the answer to two further questions: what do lawyers do, and what makes a good lawyer? There is a wealth of both research and opinions on both these questions.¹⁴ Moreover, the legal profession is highly fragmented, and there are multiple markets for legal services. Skills and knowledge may be required in one area of substantive legal practice which are not necessarily required in another.

¹² See eg R. Abel, *English Lawyers between Market and State; The Politics of Professionalism* (Oxford: OUP, 2003); R. Abel, *American Lawyers* (OUP, 1989).

¹³ C. Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge: CUP, 2002); M. Power, *Organized Uncertainty: Designing a World of Risk Management* (Oxford: OUP, 2007).

¹⁴ On the question of what do lawyers do, see for example, R. Lee and S. Vaughan, 'The contaminated land regime in England and Wales and the corporatisation of environmental lawyers' (2010) 17(1) *Int'l Jnl Legal Profession* 35-57.

However, a distillation of the LETR research to date, together with insights from the Legal Services Board's research (and some glossing), suggests the following:¹⁵

1. *Intellectual skills* - critical reasoning, analytical and communicative skills, the ability to critically analyse a set of facts and arguments, to distinguish the relevant from the irrelevant, the consistent from the inconsistent, to construct a clear and coherent argument and to adjust communication styles to different audiences
2. *Substantive legal knowledge* – including a requirement to keep up to date with legal developments which are relevant to the person's area of practice
3. *Technical legal skills* – the ability to conduct legal research (not just through Google); accurate use and interpretation of legal language including statutory interpretation; technical drafting for contentious and non-contentious work (eg pleadings, contracts, leases); conventions of legal argumentation including analysis of judgements, rules of precedent and so forth; fact management skills
4. *Commercial awareness and client relationships* – commercial awareness relevant to the business model of the firm; sensitivity to the needs of clients, whether commercial or not
5. *Practical 'office', communication and management skills* – from basic skills of note taking, letter writing and file management to project management and leadership skills, ability to supervise junior staff effectively, and the ability to work with non-legal specialists – each skill varying with the role of individuals within organisations and their seniority
6. *Ethical commitment* – knowledge of and commitment to upholding standards of what is 'right' and 'wrong' in the way business is conducted and clients are treated, and of the responsibility of lawyers to uphold the rule of law, even where to do so may conflict with the interests of their clients or their own commercial interests

Other commentators may add other skills, or emphasise some more than others. Nonetheless, most would probably agree that this is a fairly comprehensive set of skills in which one would hope that a person holding themselves out as able to offer legal services would have a baseline competence, even if they were not an expert, which they could improve on throughout their career, and which were relevant to the work they are holding themselves out as able to do.

However it is also important to emphasise that as a person progresses through their career the need for certain skills, particularly those relating to commercial awareness, client relationship and management skills, are likely to change significantly as their role within the organisation changes. This suggests that continuing professional development should not be confined to matters of substantive law but extend to the commercial and managerial skills that lawyers may need to acquire as they taken on greater responsibilities within their firms.

(ii) *What kind of LET will achieve these aims?*

¹⁵ LETR, Briefing Paper 01/2011, *Competence*; LETR Briefing Paper 01/2012, *Knowledge, skills and attitudes required for practice at present*; LETR Literature Review (2012); references cited at notes 3 and 4 above. Also see now LETR, *Key Issues II; Developing the Detail* Discussion Paper 02/2012, para 133, which proposes a very similar skill set.

Assuming we can agree the aims of LET, then the question arises as to what kind of LET will achieve these aims. Here the key issues seem to be twofold: what is the appropriate balance between generalist and specialist training, and when and how are these competences best taught and learned. Importantly, high levels of competence are equally needed at the 'high end' to the 'low end' of legal work; the legal complexity of an issue is not necessarily related to wealth of the client, the value of the transaction, or the size of the fee.

Some of the skills identified above sufficiently generalisable to cross the boundaries of a number of different professional sectors, though they take on a different hue in each. As such, they can be taught in any appropriate context – critical reasoning, analytical and communication skills are classically seen as 'academic' skills which can be learned through academic study of almost any subject, if well taught. Here it is worth pausing to reflect on the value, or otherwise, of an undergraduate law degree in the practice of law. It is notable that the LETR report one firm stating that after six months they could not tell whether a trainee had done a law degree or not.¹⁶ More research on the relative competence levels on qualification of law and non-law graduates (for those legal professions which are graduate-level entry) could clearly be valuable here.¹⁷ More generally, however, there is clearly a role for both desk-based and practical learning for acquiring both substantive legal knowledge and the relevant legal skills, however; it is a matter for empirical investigation as to which is more successful, and why.

Raising ethical awareness and commitment is far more challenging, however – it can be taught through academic study, but only comes alive in practice.¹⁸ To know the rules about ethics is not the same as being ethical. Moreover, the ability for an individual to behave ethically will be constrained, or facilitated, by the culture of the organisation in which they work. We shall return to this below.

(iii) *Who should provide LET and with respect to which competences?*

The model so far adopted in legal education and training for the majority of those in regulated occupations (barristers and solicitors) is that various skills are learned largely in sequence, and training becomes increasingly specialist as it progresses, and then stops abruptly the moment a person is qualified, save for a minimalist requirement to gain CPD points.

Focusing here on the question of where and when LET is best taught and learned (for it is important to think about the right context for learning as well as teaching). Crudely, there are two main options: 'off the job' learning, which may be delivered face to face¹⁹ and / or virtually; and 'on the job' learning, or learning by doing.

¹⁶ LETR, Discussion Paper 02/2011, *Equality, diversity and social mobility issues affecting education and training in the legal services sector* (2011).

¹⁷ See references above in notes 3 and 4.

¹⁸ As Economides and Rogers note in their paper on the place of legal ethics in training, ethical awareness can be taught on a macro-level, though I would argue in contrast to them that it is perhaps best taught through micro-level examples: K. Economides and J. Rogers, *Preparatory ethics training for future solicitors* (London: Law Society, 2009).

¹⁹ I would include here teaching delivered via a seminar in the workplace.

Rather than talking in general terms as to which is ‘best’, it is worth disaggregating the different skills and competences which LET is aiming to provide, and considering where each may be best taught and learned. Again, the answer to this question is a matter of empirical verification.

We can think of this in terms of a simple 3 x 2 matrix, as in Table 1 below. I have filled in some suggestions for how LET could be arranged as an illustration.

Table 1: LET Matrix

| | Generalist | General legal | Specialist legal |
|----------------------|--|--|---|
| ‘Off the job’ | Intellectual skills Ethics | Substantive legal knowledge – broad base Sub-set of technical legal skills Ethics | Substantive legal knowledge - specialist Specialist set of technical legal skills (eg drafting patent application) Ethics |
| ‘On the job’ | Intellectual skills Commercial & client service skills Office, communication and managerial skills Ethics | Substantive legal knowledge Sub-set of technical legal skills Commercial & client service skills Office and managerial skills Ethics | Substantive legal knowledge Specialist set of technical legal skills Commercial & client service skills Office and managerial skills Ethics |

Clearly the devil is in the detail, as ever, and is likely to be an issue over which reasonable people can disagree. But the LET matrix is proposed as a way of organising both analysis of the current situation and of structuring debates as to what any reforms to this aspect of LET could comprise. Finally, ethics, it will be noted, can and should be taught throughout; though whether or not they will be learned, and if learned whether they will be practised, are entirely separate matters.

(iv) How and when should LET be provided, and by whom? Learn then earn? Or learn and earn?

How LET should be provided is a matter of considerable pedagogical debate. At a practical level, however, the traditional qualification structure for solicitors and barristers, of a university degree – three to four years of continuous study, delivered through face-to-face contact in seminars and / or lectures – is likely to come under increasing pressure. The requirement that students pay for most of the costs of their education themselves, albeit payment is deferred over many years, may reduce the attractiveness of the model of ‘learn then earn’ for an increasing number of students.²⁰

This pressure is likely to have an impact on when training is provided. There will be a role for shorter, more intensive periods of teaching, for wider use of IT-based modes of delivery, and for desk-based learning to be integrated with time spent ‘on the job’.

²⁰ LETR, *Equality, diversity and social mobility*.

It is likely that there will also be pressure for those pursuing the path to qualification to be able to earn some sort of 'badge' at the end of their studies, even if they are not able to gain a training contract. There are more graduates completing the LPC, for example, than there are training contracts available. As a result, graduates are moving into para-legal roles, but without having an accreditation which distinguishes them from those who have had much less legal training. Creating more clearly accredited 'exit' points from training is therefore likely to be demanded.²¹

Furthermore, at present all training requirements are 'front end loaded' – in other words there is little gradation in qualifications, and few incentives for individuals to up-date their skills and knowledge. There is no formal difference in qualification or title between a newly qualified solicitor and one of twenty years' experience. This gives very unclear signals to consumers, and provides those of longer standing with no incentives to ensure that they continue to develop their skills. Continuing professional development is reliant instead on the hope that individuals will have a sufficient degree of professionalism to take responsibility for ensuring that they continue to develop their skills and knowledge. Whilst that hope may be well placed in some instances, research on the competence of solicitors, noted above, together with anecdotal evidence on how CPD training is approached in practice, suggests that this is not always the case.

(v) *What standards of competence and professionalism should be required and from whom, and how and by whom should they be assessed?*

One of the very thorny issues with which the LETR has to consider is what levels of competence should be required, from whom, and indeed by whom.²² The question is rendered particularly complex by two factors.

First, there is no overlap between the title-based regulation run by the professional bodies or their associated regulators (and remembering that these are not limited to the Law Society and the Bar Association but include the professional bodies attached to other approved regulators) and the list of reserved activities in the Legal Services Act. The vast majority of the work done by those qualified as solicitors, for example, is not work which is required to be regulated by the Act.

Second, conversely, roughly half of those providing legal services at the moment have no formal certification or accreditation at all, and far more of whom have no need for one. This is a significant issue, for there is a risk that a 'Rolls Royce' system of LET will be created which applies only to a fraction of those providing legal services. One of the issues will therefore be how to continue to incentivise people to gain legal qualifications when there is no statutory requirement for them to do so.

Even if we leave on one side for the moment the thorny question of the scope of the LSA, three initial questions relating to the standards of LET arise (though not all fall within the SRA's scope to answer):

²¹ See LETR, *Key Issues: Developing the Detail* Discussion Paper 02/2012.

²² LETR, *Competence*.

- First, should every provider of legal services (and not just those engaging in reserved activities) have to have a minimum threshold level of qualification, and if so, should that qualification be generalist or specialist?
- Second, should it be possible for providers of legal services to form professional associations which require, or at the least are able to impose, a higher threshold on their members than may be imposed by others – in other words should a hierarchy of qualifications be possible?
- Third, should regulators require that their members have different levels of qualification if they are performing certain roles within the organisation or operating within particular legal specialisms?

The answers to these questions are complicated, and probably politically the most contested.

At present, qualification requirements are divided broadly between those which require a broad based legal knowledge to graduate standard (barristers and solicitors) and those which require specialist legal knowledge to a lower educational standard (immigration, conveyancing, and probably will-writing in the future).

The question which is likely to become more pressing is whether those seeking to perform a specialist activity, unsupervised, should also be required to have a generalist qualification. Threshold levels of qualification will have impacts on access to and diversity within the legal profession, but there are trade-offs to be made. There is little justification for lowering standards in order to enable more people to provide legal services if the quality of services provided will be below the level necessary to maintain the public's confidence in the legal profession as a whole.

However, as Moorhead has argued, current evidence does not suggest that the generalist qualification necessarily provides the skills necessary to work in different specialist areas of law.²³ Nonetheless, it may be argued that there is a core of generalist non-legal and legal skills which are relevant to any area and which should be common across specialist qualifications. Identifying just which that core of knowledge should consist of is one of the most difficult problems, but one which the LSB may well require the SRA and Bar Standards Board to address.

As for assessment processes, there is an argument for following the example of accountancy and stipulating that any formal assessments should be free-standing and not be tied to a requirement to complete a specific course of training in order to be able to enter for the assessment. In addition, for competition reasons, the ability to provide training should not be limited by regulation to a restricted set of education and training providers. There are indications in the LETRs most recent discussion paper that they are thinking on these lines.²⁴

The central issue, however, is whether certain activities associated with the provision of legal services should be reserved to those of a certain level of qualification, or a qualification in certain specialisms? In other words, should the ability of anyone to provide 'front line' legal services unsupervised be restricted to those who can demonstrate they have met a prescribed set of threshold standards of competence and professionalism? This in turn has implications for the role of regulation in promoting or requiring particular standards of LET, and for the scope of the LSA.

²³ Moorhead, 'Professional Specialization'.

²⁴ DP 02/2012, para 136 and Question 17.

3. Regulation and LET

It could be argued that there is no need for the regulator to become involved in LET, because the market will sort it out (ie consumers will know what the different titles and levels of qualification mean, will know what type of service they need, and will seek legal services accordingly).

This option makes a number of heroic assumptions as to the knowledge and rationality of consumers and as to the clarity and transparency both of legal services and of legal qualifications. It also assumes that the 'consumption' of legal services is always voluntary, when it may not be: for those accused of criminal behaviour, for example, their encounter with the legal profession is far from that of a person deliberately seeking out legal services. It may be countered that in this case the state will in fact be purchasing the services on their behalf through legal aid, and so will be exercising a degree of quality control. However, continued restrictions in the legal aid budget mean that this will not always be the case. These factors thus make this option a fairly risky strategy to adopt, at least on its own.

So assuming that there is a role for regulation in requiring a certain level of competence and professionalism, the question is how should regulation be used to achieve this. Having initially framed the issue in terms of a choice between LET regulation and conduct of business (COB) regulation,²⁵ in its second discussion paper LETR recognises that these are simply tools that a regulator can use in a range of ways to achieve its ends. Indeed it recognises that training in ethics in particular can play a considerable role in providing the tacit understandings which are so vital in interpreting and applying rules, particularly those which are framed in general terms.²⁶ It can thus play a significant role in supporting the principles-based or outcomes-focused regulatory strategies to which the regulators are now turning. A principle which requires lawyers to act 'fairly and in the best interests of their clients' relies on tacit understandings of what conduct is expected in any situation without this needing to be spelled out in reams of detailed guidance. It takes more than COB regulation to instil these understandings, however. It requires at the least a minimum level of education, but to a much greater extent it requires the modelling of ethical behaviour by those in practice from which newer entrants can learn, and an organisational and professional context which supports a culture of ethical behaviour.

The significance of the organisational culture in promoting both ethics and competence leads us to the second area where discussion of LET is becoming bogged down: should regulation attach to title, to activity, or to entities? This is a much broader question than that of the nature and scope of LET regulation, extending right to the heart of the current regulatory structures.

Regulation – Moving beyond entities vs individuals, to individuals within entities

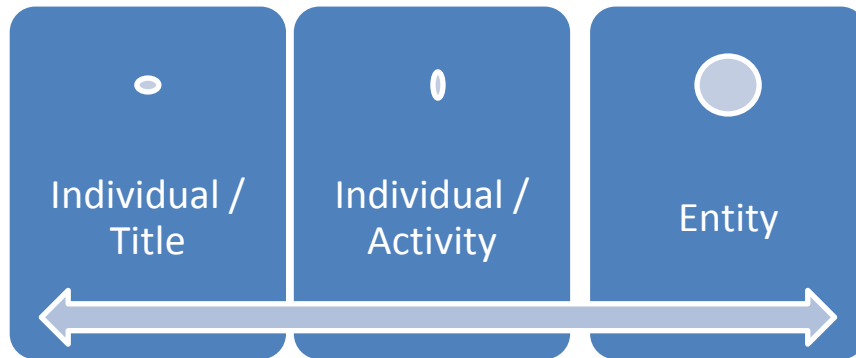
In framing the question in terms of alternatives between regulation of activities, titles or entities, there is a risk of creating false dichotomies. At the moment, regulation in fact attaches to all three. The LSA is based on activities; licences to practice issued by the professional bodies are based on

²⁵ LETR, *Discussion Paper 1*.

²⁶ LETR, *Discussion Paper 2*, para 92.

title; and the SRA imposes duties both on individuals who hold titles, and the entities in which they operate.²⁷

Diagram 1: Regulation – crossing activities, titles and entities



However, even if we recognise that regulation crosses all three categories, there are still risks in seeing the issue in terms of this ‘siloed’ model.

First, as the most recent LETR discussion paper notes, in practice the legal services that a client receives are delivered by a firm, not an individual.

‘The growth of multi-disciplinary practices and project teams, increased specialisation, the use of new technologies, and the competitive drive to decompose services will mean that clients and consumers are likely increasingly to experience their engagement with a ‘lawyer’ as engagement with the entity rather than a constant individual.’²⁸

Second, as noted above, organisational structures, processes and cultures can be highly significant in shaping or deterring competent or ethical behaviour by those individuals who work in them.²⁹ It can also be very difficult for any one individual to act contrary to the systems, practices or cultures of the firms in which they operate. There is therefore an argument for requiring, as the SRA does, that any entity in which legal services providers are employed to have in place the requisite systems to ensure that those individuals employed by them should be able to meet any regulatory obligations which are imposed on them as individuals (whether because they have a particular title or are performing a particular role), and that the organisation as a whole can meet its regulatory obligations.³⁰

Recognising the organisational context in which individuals operate could in turn have implications for understanding what skills and competences they need at different stages and thus for what qualifications they need, and when. Thus regulation could stipulate that individuals working within

²⁷ There may also be instances where provisions which need some adjustment as they apply to legal entities in a way in which they do not apply in practice to individuals because of attribution of knowledge rules, for example, such as those relating to conflicts of interest

²⁸ LETR, Discussion Paper 2, para 113.

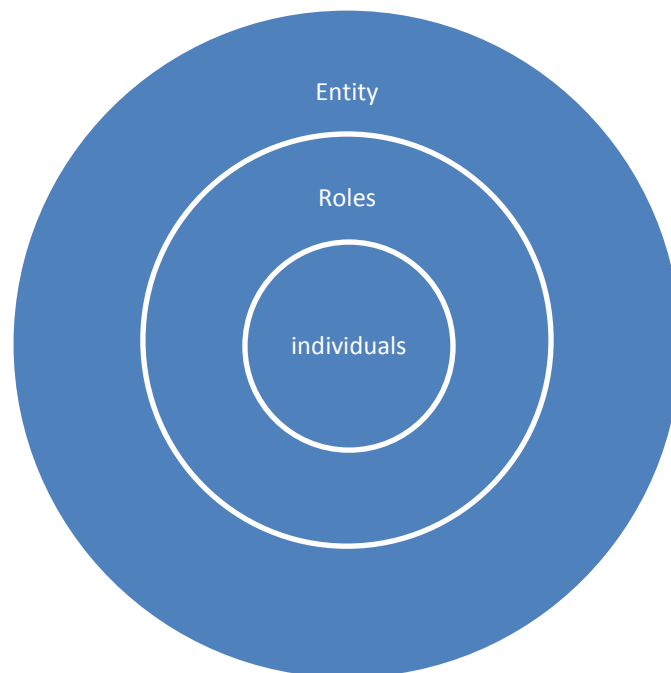
²⁹ W.R. Scott, *Institutions and Organisations* (2nd edition) (Thousand Oaks: Sage Publications, 2001).

³⁰ SRA Handbook, Chapter 7.

authorised entities may themselves not need separate qualifications themselves unless they are performing specified functions, such as giving (unsupervised) legal advice or representing individuals in adjudication proceedings. For example, in financial services, entity-based authorisation is combined with direct regulation of individuals performing certain functions. Indeed, in most other areas of regulation, regulation of the entity is the norm, and regulation of individuals within those entities is confined to those performing specified roles.

It is suggested that we could reconceive the relationship between individuals and entities, and move away from the 'siloed' model to one of concentric circles, in which individuals operate within entities. Within an entity, not all individuals are operating on the 'front line': they are not all delivering legal services directly to clients, rather there is a plethora of others who are performing support or back office roles, such as document processing. Furthermore, certain individuals play particular roles with respect to the management of that entity itself, including compliance with regulatory requirements, which are likely to require different skills. These skills will also vary with the size and complexity of the firm: the competences required to manage a large global law firm are likely to differ from those required to manage a small high street firm.

Diagram 2 – Individuals within entities



Re-thinking the relationship between individuals and entities could have several implications for the debate on education and training, and on how competence is assessed and when. Some of the key issues include (but are not limited to) the following.

First, the general licence to practice that a person receives initially could be confined to a licence to practice in a supervised context. Additional requirements to enable them to operate unsupervised could then be tailored to the area of legal specialism in which they operate and / or the role they have within the firm. In other words, the general licence to practice (GLP) need not require knowledge of solicitors' accounts rules, but anyone operating unsupervised or having responsibility for managing the firms' accounts should need to demonstrate that they have the specialist knowledge and skills required for that role. This could relieve the syllabus for LET for that initial licence, creating space for a greater focus on issues such as ethics, which are probably necessary in any role.

Second, that focusing on roles could enable the SRA to identify areas of highest risk (such as client money, or disorderly wind-downs) and to require firms to have designated individuals responsible for those areas on whom specific regulatory obligations could be imposed. This would mean extending regulation into the entity by expanding COLP, for example, but it would enable regulation of individuals within firms to attach to those performing certain roles irrespective of their title. Research has consistently found that individuals are more likely to take their regulatory responsibilities seriously if they are personally liable for any failings.³¹

Third, and this is much more tentative, the regulation of individuals within firms could also attach to the particular legal service they were providing and / or legal specialism they were operating in. Thus those providing services to clients who are particularly vulnerable, and / or who are providing legal advice in areas which are highly complex, could be required to demonstrate higher levels of competence than that required for the GLP (whether or not they hold that GLP).

Fourth, and perhaps most importantly, it enables us to see LET as much more of a continual process, rather than aimed at crossing a particular hurdle at the start of one's career with only minimal needs to demonstrate progression thereafter. It could also enable a greater focus on just what a person does need to know at different stages, given the legal specialisms they operate in, the clients they deal with, and the roles they play within firms. There are indications that the LETR is also moving in this direction, with a focus on ensuring that individuals can demonstrate 'active competence' rather than 'passive competence' derived from a qualification received some time ago.³²

This in turn suggests that the SRA could reconsider the 'day one' outcomes which it currently requires newly qualified solicitors to possess. Qualitative research could be conducted, for example, which asks solicitors with 1, 3 and 5 years post-qualification experience (PQE) to ask them which of these 'outcomes' they have ever needed in their work to date, asking them to assess these on a multi-point scale from 'not at all' to 'very important', and correlate those assessments with the size of the firm they are working in, their area of legal practice, and the types of clients they are dealing with. Asking newly qualified lawyers themselves what skills and knowledge they have in fact needed could provide valuable evidence for understanding what LET they do need, and when.

There are still a number of difficult issues to resolve. Not least of these are the role of the general licence to operate; identifying the roles for which additional competences would need to be

³¹ An analogy could be drawn with the liabilities imposed on money laundering reporting officers under the money laundering regulations.

³² LETR, *Discussion Paper 2*, para 115.

demonstrated; the issue of whether there should be a need to acquire accreditation to perform certain specialisms; whether there is a role for compulsory re-accreditation every 5, 7, 10 years – the list goes on.³³

However, as noted above, thinking about individuals as operating within entities does enable us to start to think of LET in terms of what skills and competences individuals need at any particular stage of their career, given the nature of the organisation in which they operate, the role which they play within it, their area of legal specialism, and perhaps the types of clients they are dealing with. It may also help us to think whether and how we may need to move away from the current structure of LET, in which LET is an initial hurdle to be jumped, to seeing LET as a continuing road to be travelled.

Conclusion

The LETR provides an opportunity for the SRA to address fundamental issues relating to the purposes of legal education and training in the context of its wider shift in regulatory strategy to outcomes-focused and risk-based regulation, and to a greater focus on regulation of entities as a complement to the regulation of individuals.

It may therefore facilitate thinking on the specific skill set that any one person may need given their role within the firm or the nature of legal services they are providing at different stages of their career. However, in recognising that individuals operate within entities, it is important that the core of what it means to the individual to be a member of a profession should remain. That is only partly to do with skills, however; much more important is the sense of ethical obligation that it entails, including the obligation not to act outside the scope of one's own competence. Furthermore, by demanding high qualities of professionalism from those it regulates the SRA could hope to ensure that the badge 'regulated by the SRA' provides a valued kite-mark of quality assurance in a complex and rapidly changing market for legal services.

³³ The responses of the LSB and the LSCP to the review both proposed a greater role for activity-based authorisation (DP 2 para 119).