

Demonstrating competence, identifying incompetence

Speech by Neil Wightman, University of Westminster, 15 March

Introduction

For those of you who don't know, the Legal Services Consumer Panel's role is to represent the interests of consumers – individuals, small businesses and others who lack buying power – by providing advice to the Legal Services Board on the regulation of legal services. There are three themes which will underpin our work going forward:

- Equality of access – ensuring that all consumers, especially those in a position of vulnerability, have access to affordable and high quality advice;
- Unleashing consumer power – giving them the choice tools to drive greater competition in the market; and
- Enhancing the safety net – through improving quality assurance, better adequate financial protection and redress, and more consumer-focused regulators.

I would suggest that the last two of those themes are particularly relevant to today.

As a Panel, we recognise that the consumer interest is one dimension of the debate on the future of education and training. Other interests, such as those of employers and UK plc, are also relevant and the review must decide what is in the overall public interest. However, I would suggest that consumers should be seen as the ultimate beneficiaries of this review – they drive legal services spending, but also principally require the protection of regulation.

The Panel is in listening mode on this issue, we are not yet at the stage of saying what specific policies we would like to see emerge. At a high level, though, we can start to identify some desirable outcomes for education and training policy:

- Competent lawyers who help consumers achieve good legal outcomes, by providing ethical and high quality advice from Day One and throughout their careers;

- A diverse workforce able to respond to the diverse population it serves;
- Removal of any unnecessary entry barriers to the profession, which ultimately limits consumer choice – although, of course, some barriers are legitimately needed to control quality;
- Prepares lawyers for the demands of the modern market place and is able to adapt to the constantly evolving needs of consumers; and
- Supports the wider regulatory framework – for example, in relation to authorisation, specialisation and expected behaviours.

Demonstrating competence – to whom?

The title of the seminar is about demonstrating competence, but to whom should lawyers have to demonstrate their competence to?

One of the Consumer Panel's aims is to enable consumers to make more informed choices when searching for a lawyer. Our research tells us that quality is the most important thing they are looking for when selecting a provider – in fact, far more so than price. At the moment, however, consumers assume that all legal professionals are technically competent and instead differentiate based on service features. In truth, they have little alternative but to assume this as there is a lack of information about the quality of an individual lawyer's work, whether good or bad.

Much of our work this year has been about trying to change this. For example, we have looked at accreditation schemes, examined comparison websites and successfully called for lawyers who are involved in complaints leading to formal ombudsman decisions to be identified. There is room for more transparency: for example, legal aid lawyers are peer reviewed, but the scores are kept secret; similarly, the Probate Service apparently send back one-third of applications from solicitors, but the public doesn't know who is making these errors.

So one way of raising standards of competence must be to help consumers to identify the best and worst-performing lawyers, but excessive secrecy is frustrating these efforts.

That said there is only so much we should expect consumers to do. There is always likely to be a substantial imbalance of knowledge between lawyers and consumers. Consumers will always struggle to tell whether they have received good advice, sometimes even after the event. It's telling that surveys show 84% of consumers are happy with the quality of their will when provided by a solicitor, but in a mystery shopping exercise one in every five wills prepared by solicitors was failed by an expert panel of independent assessors.

Therefore, while you will hear the Panel calling for more information about quality to be provided to consumers, this does not take away from the need for those who want to provide legal services to demonstrate their competence to their **regulators**. The

emphasis should be on education and training preventing poor quality before-the-event, not leaving consumers to pick up the pieces afterwards.

Revalidation

Why introduce this?

So far most discussions have focused on training lawyers of the future to cope with the demands of the changing legal services market. This is critically important, but I want to use the remainder of my time to focus on lawyers once they are on the professional registers – in particular, the challenge of demonstrating they remain competent through their careers.

This debate usually concentrates on continuing professional development – CPD. There is wide acknowledgment that CPD systems are not fit for purpose and need overhauling. The Panel would add its voice to that analysis, but I want to talk about tools for verifying, on a periodic basis, that a particular individual remains competent within their specific field. These tools are given different labels: ‘revalidation’ or ‘reaccreditation’, ‘re-certification’ or ‘active registration’.

Introducing revalidation would bring the sector in line with what people think is already required of lawyers. This was a key finding of consumer focus groups we commissioned in 2010. Indeed, elsewhere research has shown the public mistakenly believe that health professionals are re-assessed on a regular basis in order to verify their competence.

I hope the main arguments to support revalidation are self-evident. A lawyer’s initial education and training does not offer a career-long guarantee of competence. There are substantive changes in legislation, legal processes and consumer expectations. It is only natural that an individual’s skills deteriorate. So there needs to be a way of knowing, at regular intervals, whether a lawyer remains fit to practise. Consumers rightly assume that appearing on the professional register means an individual is competent. If this shown not to be the case, it brings the integrity of the professional register into question.

Some lawyers are proactive in updating their knowledge and skills, but there is currently no requirement, or demonstrable process, which allows consumers to be confident this is true of all lawyers. Regulation instead focuses on entry requirements and disciplinary processes; unless an issue arises, there are few proactive checks that professionals remain competent.

Such a periodic review of competence would have many benefits. It would provide a base level of protection and quality assurance for consumers. It would allow front-line regulators to see ‘warning signs’ at an early stage, enabling action on issues before they become more serious. And, crucially, it should be seen by the profession as a career-enhancing measure not a career-threatening one, supporting learning and offering a demonstration of its commitment to professionalism to the outside world. On this last point, we need to learn the lessons from medicine where the proposals needlessly provoked great divisions between regulators and the regulated.

In fact, the basic principle of revalidation is already in place in parts of the legal sector. For example, the Quality Assurance Scheme for Advocates will require reaccreditation every five years. The Law Society has told us it is introducing reaccreditation across its voluntary quality schemes.

How could revalidation work in practice?

It is far too early to advocate a specific model of revalidation for legal services, our aim now is to put this issue firmly on the agenda. Some key decisions will need to be made around, for example:

- What competencies professionals should be required to demonstrate;
- How the process should be conducted; and
- How often it should occur

However, irrespective of the answers to these questions, we consider that any scheme should include five key features:

- It should link to the authorisation regime – a lawyer's initial training should enable them to provide competent legal service in areas where regulators deem additional specialist training and authorisation is not needed. General revalidation could therefore periodically check that lawyers are competent at this level, whilst a second level of revalidation could then be applied to specialist expertise. The intensity of revalidation should therefore relate to the risks to consumers;
- The standards applied should be high and the revalidation process needs to be objective and based on actual performance. In short, it should comprise a genuine evaluation by an independent third party of a lawyer's continued fitness to practise. This should be an evidence-based positive affirmation of competence, not just the absence of performance/regulatory concerns;
- It should be coupled with the professional register – if lawyers cannot demonstrate they are competent, they should lose their rights to practise, but this should be done in a supportive way and through the usual disciplinary systems. This step is needed to ensure that revalidation has teeth, but for most lawyers it will offer reassurance of their performance and encourage continued improvement;
- It must involve genuine consumer input – consumers need to have a role in the assessment process. Although it is unlikely that consumers will be able to judge the technical quality of advice, their experiences provide an important alternative perspective on the skills and behaviours of professionals. This is of value in its own right, but would also build public trust in the objectivity of the process. In medicine, a clear decision has been made to include patient views; and
- It must complement other regulatory processes – any system of revalidation should complement authorisation, revised CPD and other existing evidence-based processes and data such as appraisals and peer reviews. The consumer interest does not lie in burdensome requirements – after all, consumers ultimately pay the costs of regulation or lose out if good people are deterred from entering the profession.

We hope that the principle of the need for revalidation will be widely accepted, but we recognise that the 'devil will be in the detail'. The question around revalidation should therefore be '**how**' not '**if**'. We have a window of opportunity with the legal education and training review, and there is much that can be learnt from sectors which are ahead of the legal sector on the revalidation path.

Conclusion

Supporting a diverse workforce to deliver high quality advice to consumers should be the overarching aim of the education and training review. Its aim should be high, one built around raising standards so that lawyers get things right first time.

We want to see the regulators helping consumers to drive up quality in the market by giving them the information they need to use their buying power. But we recognise there is only so much that consumers can do given the knowledge gaps.

Therefore, the main responsibility for ensuring high quality advice lies with the regulators. Most of the debate so far has been about who the regulators let in. This is vital, but it's also important that practising lawyers are required to demonstrate they remain up to the task. However, we cannot rely on widely discredited CPD mechanisms to achieve this. The review needs to embrace the idea of introducing of a system of revalidation for lawyers.